

Who really owns your clients?

April 07, 2015

Inside Counsel

April 7, 2015

by Lawrence F. Carnevale

Analyzing what *Marsh USA Inc. v. Robert Doerfler, et al.* means for employers.

Fifteen years after *BDO Seidman v. Hirshberg*, the watershed New York Court of Appeals decision on the enforcement of restrictive covenants in employment agreements, courts and practitioners still wrestle with the issue of whether and under what circumstances employees or their employers possess superior rights in client goodwill. A recent case in point is *Marsh USA Inc. v. Robert Doerfler, et al.*

In *Marsh*, Doerfler, an experienced insurance broker, left Marsh to join competitor Aon. Doerfler's agreement with Marsh prohibited him from soliciting or servicing Marsh clients for one year after leaving Marsh. Whether Doerfler could continue at Aon to do business with two key clients with whom Doerfler had a relationship predating Marsh was at the heart of Marsh's application for an injunction to enforce the agreement. *BDO Seidman* endorsed a three part test for enforcement of restrictive covenants: A restrictive covenant must be no greater in scope than required for protection of the legitimate interest of the employer, not impose undue hardship on the employee, and not be injurious to the public.

BDO Seidman recognized that an employer has a legitimate interest in preventing employees from appropriating the goodwill of clients which "had been created and maintained at the employer's expense, to the employer's competitive detriment."

Applying *BDO Seidman*, Justice Bransten found that Marsh acquired a legitimate interest in clients known to Doerfler before his employment with Marsh because there was evidence Marsh had maintained or enhanced goodwill with those clients by incurring client entertainment expenses. The court however, declined to enforce the agreement to preclude Doerfler from servicing those clients because it observed Doerfler also had acquired goodwill in those client relationships before joining Marsh and the injunction sought would completely deprive him of his legitimate interest in that goodwill. In a novel analysis, the court reasoned that to determine whether the restrictive covenant was reasonable it must somehow distinguish between, and perhaps compare, goodwill independently created by Doerfler and goodwill created by Marsh. The court observed that the evidence before it was not sufficiently developed to properly assess how best to protect the separate interests of Doerfler and Marsh in the client goodwill, and, therefore, the court could not conclude the covenant was reasonable under *BDO Seidman*. For the same reason, the court could perceive no way to judicially modify the agreement to limit the scope of the contractual restraint to make it no greater than necessary to protect Marsh's legitimate interests.

About the Author

Lawrence F. Carnevale

Larry Carnevale is a partner at Carter Ledyard & Milburn LLP. Mr. Carnevale is the chair of the firm's Litigation Department and Trade Secrets, Business Torts and Restrictive Covenants Practice Group.

Reprinted with permission from the April 7, 2015 edition of Inside Counsel © 2015 A Summit Professionals Networks Publication. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-221-9595 or visit <http://sbmediareprints.com/>.