

Legal Update

Bessemer Trust Company, N.A. v. Branin

It has long been established that when a sale of a business includes the business's goodwill, the sale includes an implied covenant permanently prohibiting the seller from subsequently soliciting its former customers. The seller's solicitation of its former customers is viewed as improperly recapturing that which the seller has sold. The question remained, however, as to exactly what type of conduct would constitute prohibited solicitation under the implied covenant.

Although it did not completely answer the question, New York State's highest court did recently provide some guidance on the issue in the case of Bessemer Trust Company, N.A. v. Branin, 16 N.Y.3d 549 (2011). While the parties are of course free to include in their agreement an express covenant that details the specific type of activity that is prohibited (and temporal, geographic, or other limitations on those prohibitions), the implied covenant that applies in the absence of an express covenant had previously been recognized as allowing the seller to subsequently compete with the purchaser and even accept business from the seller's former customers provided the seller does not actively solicit the former customers.

The Court in Bessemer Trust Company declined to adopt a "hard and fast rule" as to what constitutes improper solicitation and stated that it must be assessed on a case-by-case basis. The Court, however, did set out some general guidelines. While the seller cannot affirmatively initiate contact with former customers, through, for example, direct mailings, the seller can advertise to the public, provided the advertisement is general in nature and not specifically aimed at the seller's former customers. A seller also cannot "tout his new business venture" if a former customer fortuitously contacts him or her. However, at least in the financial services industry

that was the subject of the Bessemer Trust Company case, the seller can answer factual inquiries from a former customer, provided that the seller's answers do not go beyond the scope of the information sought by the customer and the seller does not disparage the purchaser of the business, or even explain why the seller believes his or her products or services are superior than the purchaser's.

The guidelines established by the Court apply whether the seller is working on his or her own or with a firm. The Court also provided some guidance as to how much assistance a seller may provide to a new employer if the seller's former customer contacts the firm. The seller may assist his new employer in developing a plan to respond to the customer's inquiries, provided the seller does not provide the employer with any proprietary information that has been sold as part of the sale of good will. The seller may even attend a meeting between representatives of his employer and the former customer, provided that the seller's role is "largely passive."

In the absence of an applicable express covenant, a seller must be certain to follow the guideposts set out by the Court of Appeals in Bessemer Trust Company and apply those rules,

For more information on this topic or if you have a need for legal services in this area, please contact J. Michael Wood at (585) 295-4009 or by email at mwood@cdog.com.