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Not All Actions Taken by Seller of "Good Will" Constitute Improper Solicitation

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Bessemer Trust Co., N.A. v. Branin, 16 N.Y.3d 549, 949 N.E.2d 462 (April 28, 2011)

In New York there is an "implied covenant" or "duty to refrain from soliciting former customers" when a transaction involves the sale "good will" of an established business. However, on April 28, 2011, the Second Circuit ruled that this duty does not mean all actions subsequent to the transaction constitute improper solicitation, especially in the absence of a non-compete agreement.

In 2000, the defendant sold his independent investment firm to the plaintiff, which included the sale of the firm's "good will." The sales agreement, however, did not include a covenant restricting the defendant from competing against the plaintiff if he left the firm. After working at the plaintiff's firm for a year, the defendant sought new employment. Before departing the firm, the defendant provided his previous firm with notice of his intention to leave, helped the firm transition his clients to new investment managers, and did not inform any of the clients about leaving the firm. Once he was hired by a competitor, his previous clients contacted him to set up meetings and investigate the possibility of transferring their accounts to the new firm.

The Second Circuit declined to create a bright-line rule when determining whether a seller of "good will" has improperly solicited his former clients. Rather, the Court wrote that the determination must be made on a case-by-case basis and include the factors involved within the "relevant industry that may impair the 'good will' conveyed by the original seller."

When analyzing the case at hand, the Court concluded that,

> *"While [the defendant] may not contact his former clients directly, he may, 'in response to inquiries' made on a former client's own initiative, answer factual questions. Furthermore, under the circumstances where a client exercising due diligence requests further information, a seller may assist his new employer in the 'active development . . . [of] a plan' to respond to that client's inquiries. Should that plan result in a meeting with a client, a seller's 'largely passive' role at such meeting does not constitute improper solicitation in violation of the implied covenant."*

At the meeting with his previous clients, the defendant did not disparage his former firm nor did he communicate to the clients that his new firms products or services are superior. Therefore, the Court reversed the trial court's

decision awarding damages to the plaintiff.

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