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New York Supreme Court Denies "Employee Raid" Injunction

In a recent unpublished opinion, *GFI Securities LLC v. Tradition Asiel Securities Inc., et al.*, New York State Supreme Court Justice Richard B. Lowe denied the request of an inter-dealer brokerage firm for a preliminary injunction that would have prevented a competitor from hiring eighteen former employees and forbidden the employees from violating the restrictive covenants in their employment agreements. While the case does not break new legal ground, it is a good reminder of how these cases turn on their specific facts.

GFI Securities LLC ("GFI") and Tradition Asiel Securities Inc. ("Tradition") are competing inter-dealer brokerage firms that "function primarily as intermediaries, matching bids and offers for financial products and their derivatives presented to them by large banks, investment banks, and other financial institutions." According to the Court, the two firms have been engaging in a series of "self-serving" litigations in which, with "alarming frequency," they are asserting contrary positions against each other depending on what side of the issues they are on. The case offers a valuable perspective on employee departure disputes and how best to position a firm to deal with an employee raid.

Injunction Not Granted Because Damages Sufficient. The Court found that an injunction was not needed because damages would be a sufficient remedy for any wrong proved. The Court reasoned that brokerage commissions for any customers who moved with the employees could be easily calculated and awarded as damages. In addition, the Court focused on the fact that the employment contracts at issue contained liquidated damages clauses, and found that damages that can be satisfied with money are not "irreparable."

Similarly, GFI had disclosed in a Form 10-K that disputes with competitors regarding employee hires and departures are common and that the company incurs "significant expense and management time dealing with these claims." Based on this disclosure, the Court concluded that these employment disputes are "an anticipated and presumably quantifiable, cost of doing business," and thus unsuited to equitable relief.

Merits. The Court also found that the merits of the claim were weak. To be enforceable, covenants that restrict employees' mobility must protect an employer's "legitimate interests," which New York law defines

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as trade secrets, customer lists, and protection from competition by a former employee whose services are unique or extraordinary. GFI sought the injunction to protect the goodwill in its client relationships, but the Court found that the departing employees were largely responsible in the first place for having brought the clients to GFI from their prior employers, such as major financial institutions and GFI competitors. The Court therefore concluded that GFI had only a weak interest in the goodwill that had been created with these customers.

The Court also concluded that the departing employees were not "unique" or "extraordinary." Once again, the Court used the former employer's own prior statements against it, focusing on an earnings call in which an executive discussed the availability of replacements for the departing brokers.

Lessons To Be Learned. Among the lessons to be learned from this decision are:

First, companies should have reasonable expectations regarding their ability to prevent departures. Courts generally do not like restrictions on employees' ability to change jobs.

Second, consider whether to include a liquidated damages provision in employment contracts. The presence of such a clause will severely reduce the former employer's ability to obtain injunctive relief, and there is only a limited potential benefit from such clauses, as they are unenforceable if deemed to be a penalty.

Third, although it is useful to include contractual language making clear that monetary damages are insufficient, that the company will be irreparably harmed if the restrictive covenants are not specifically enforced, and that the employee agrees that the company is entitled to an injunction in the event of breach or threatened breach, this language was in the contracts involved in the *GFI v. Tradition* case. Thus, there is no guarantee that a court will actually issue an injunction even when the parties' contract provides for it; such language is useful, but not bulletproof.

Fourth, when hiring employees, it may be beneficial to state specifically in the contract that the firm owns the client relationships, including any being brought to the firm by the employee. A typical non-solicitation or non-interference clause, such as one that prohibits an employee from interfering or attempting to interfere with, or soliciting business from, the company's clients or investors for a certain period of time will usually protect the company's interest in its client relationships, including, if the agreement is drafted properly, those clients that the departing employees may have brought to the firm from a prior employer.

Fifth, when taking a position in a litigation, consider whether you will be comfortable with that position in other cases. Are you always on the same side of the issue?

And finally, because public statements such as SEC filings, earnings calls, and litigation filings often find their way into later litigated matters, they should be drafted with those audiences in mind as well. As the adage goes, "if you don't want to see it on the front page, don't say it."

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