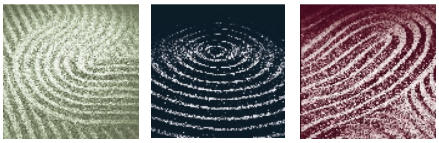

MILLER THOMSON LEGAL

Stop! In the Name of the Law!

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Companies that want to protect their "mobile assets", namely clients, try to do so by having their employees sign agreements containing "restrictive covenants". This practice is common wherever products and services are provided in a competitive market. The insurance industry is no exception. Non-competition and non-solicitation agreements are two main categories of restrictive covenants.

With a non-competition agreement, an employee agrees not to pursue a job in competition against a former employer. This kind of clause protects a company from a former employee who begins working for a competitor or starts a business, and uses knowledge of the former employer's business. Non-competition agreements are usually unenforceable by courts because they go against the employee's right to work to earn money.

With a non-solicitation agreement, a former employee cannot contact clients to sell products or services which are the same or similar to those sold by the former employer. A non-solicitation agreement can also prohibit an employee from contacting or enticing other employees from leaving the employer. This clause is generally preferred by courts because it is seen as less restrictive. It still allows someone to work to earn money in the same industry.

For restrictive covenant agreements to be enforced, the former employer has to prove, among other things, that the restrictions are "reasonable" in terms of their duration and geographic area. For example, an employer with operations exclusively in Waterloo Region cannot "reasonably" prohibit a former employee from working anywhere in Ontario.

A recent Court of Appeal decision about competition in the insurance industry originating from Kitchener has garnered a lot of attention. In *H.L. Staebler Company Limited v. Allan et al.,* a Kitchener judge awarded almost $2 million against former sales representatives of Staebler for breach of restrictive covenants.

Staebler employed two successful commercial producers, Tim Allan and Jeff Kienapple. Allan had been employed with Staebler for about 21 years, and Kienapple for about 8 years. In October 2003, Allan, Kienapple and their respective assistants all submitted letters of resignation to Staebler effective immediately. They moved to competitor broker Stevenson & Hunt (S & H) and began contacting their former clients. That day, Staebler received letters of authority from clients to transfer their business to S & H. Two weeks later, Staebler obtained an injunction against Allan, Kienapple, their assistants and S & H preventing them from approaching any Staebler customer for the purpose of soliciting business. By that time, 118 clients had moved their business to S & H.

Staebler then started a lawsuit for damages for breach of fiduciary duty, breach of contract, conspiracy and inducing breach of contract, and punitive damages. Staebler relied on the terms of a restrictive covenant contained in the employment contracts signed by Allan and Kienapple which stated that clients belonged to the company and in the event of termination of employment they would not, for two years afterwards, conduct business with any of the clients they serviced while at Staebler. The trial judge sided with Staebler. He referenced that commercial insurance producers have a close and personal relationship with their clients, common industry practice, and the fact that Staebler's book of business (clients) is an asset owned by Staebler, which it is entitled to protect. The scope of the restrictive covenant was reasonably necessary to protect Staebler's legitimate business interests.

The trial judge noted that Staebler's restrictive covenant did not prevent Allan and Kienapple from earning a living in their chosen field as insurance brokers, from accepting employment with a competing brokerage, or from contacting other Staebler clients not serviced by them. He did not have any difficulty with the two year duration of the restriction.

The trial judge also found S & H liable for "inducing breach of contract". S & H had copies of Allan's and Kienapple's employment contracts before offering employment to them. Still, it expected them to solicit their Staebler clients to transfer their business. The court did not award punitive damages against them.

Staebler was unable to enjoy its victory for long. In August 2008, the Ontario Court of Appeal reversed the trial decision. The restriction was a non-competition clause that was too broad in scope and was therefore unenforceable. The law of restrictive covenants is elaborate. Employers and employees are wise to consult legal counsel before entering into restrictive agreements.

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