Court Rules in Staebler Appeal

By Steven Borlak

The industry has been nervously following Staebler v. Stevenson & Hunt for the past few years. The case involves two producers who left the employ of Staebler Insurance Brokers in 2003 to join Stevenson & Hunt Insurance Brokers Ltd. An injunction was obtained shortly after their departure. In the meantime, these employees allegedly caused many of 'their' customers to migrate to Stevenson & Hunt. Both had signed employment agreements containing identical restrictive covenants.

"In the event of termination of your employment with the Company, you undertake that you will not, for a period of two consecutive years following said termination, conduct business with any clients/customers of H.L. Staebler Company Limited that were handled or serviced by you at the date of your termination."

In 2007, the Ontario Superior Court of Justice determined that the restrictive covenant was valid and enforceable, and awarded damages to Staebler. This finding was appealed and on Aug. 6, 2008 a ruling was released. In a stunning reversal, the Court of Appeal held that the restrictive covenant in the employment agreements was unenforceable.

Unlike the Trial Court, which supported the restriction as a 'hybrid clause' (combination of non-solicitation and non-competition), the Court of Appeal classified the covenant as a non-competition clause because, as stated in the decision, "it does not purport to merely restrain the employees from soliciting the clients and customers they had serviced when they worked for Staebler, it prohibits the Employees from 'conduct[ing) business with any such clients or customers'."

As a result, the Court had to apply a more stringent test to determine the enforceability of the covenant. It held that the 'exceptional circumstance' that would warrant a 'noncompetition covenant' did not exist in this case.

Where does this leave us? Mostly dazed and confused!

For many years, I have been preaching the importance of binding producers to something more than mere non-solicitation covenants. The conventional non-solicitation covenant leaves an obvious gap. A producer leaves, business migrates, and the producer explains that "the customers were not solicited by me - I was solicited by the customers."

The basic non-solicitation covenant will not provide protection from this. This is why most creative restrictions include covenants to not solicit customers, and to not accept p&c business from such customers. Until the Court of Appeal weighed in, the judicial acceptance of a 'hybrid clause' seemed to support this reality. Now I am not so sure.

The Court of Appeal seemed to affirm the notion of a hybrid clause but, as indicated,

concluded that the Staebler restriction was not a hybrid clause. Based on the Court's rationalization of the Staebler restrictive covenant, it raises questions about what will be acceptable as a hybrid clause.

The industry would have been assisted by some further guidance from the Court of Appeal. Would the activities have been prohibited through a basic non-solicit? If the restriction referred to 'conducting p&c business' with customers instead of just 'conducting business', would that have been enforceable?

Regrettably, in our common law legal system courts are generally unwilling to express views beyond that which is essential to support their decision. And so we are left wondering.

In the wake of this decision, brokers should set aside some time to review their existing employee restrictive covenants. Again, it is important to note that courts will look to the specific circumstances of each case to determine enforceability, so it may be useful to have a discussion with your professional advisors to determine what type of restrictive covenant is most suited to your situation.