"UNFAIR COMPETITION: THE MIGRATING INSURANCE AGENT"

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UNFAIR COMPETITION:
THE MIGRATING INSURANCE AGENT

The scenario repeats itself regularly in the insurance industry: a field agent, or a whole group of field agents, leave one company and affiliate with another. These agents then contact their former customers to sell them their new company's products. Their new company's products are generally similar to their old company's products. Sometimes these agents take written materials with them from their former company. They always take with them the sales skills, product knowledge, and customer knowledge they developed at their former companies. They often have non-compete contracts, which generally contain "forfeiture" clauses. They may try and recruit productive agents they knew at their old companies, to join them at their new companies. This scenario inevitably appears to pose an immediate and dire threat to the company whose customers are being switched or whose field force is migrating, and field managers often demand that the home office act forcefully in response.

Traditionally, companies have responded by bringing actions against individual agents, seeking to enforce individual non-compete contracts and to recover damages for violations of the non-competes. The jurisprudence in this area is well established, with most contests turning on the enforceability of the particular non-compete clause at issue. This outline does not intend to retrace the law in this well-travelled area. Instead, this outline discusses the main legal theory traditionally employed in direct actions against the competitor - tortious interference with contractual relations - and a perhaps more flexible emerging theory

- unfair competition - as well as some of the practical considerations in this type of litigation.

Litigating directly against the competitor company involves different legal theories than suing individual agents, and modifying or recasting other existing legal theories. It also raises different strategic considerations, problems of proof, and damages issues. In contrast to the largely established principles that apply in suits against individual agents for breaching their non-compete contracts, there is not much settled law in direct suits against competitors. This absence of clear rules poses hazards for both plaintiffs and defendants and calls for "creative lawyering" on both sides of the case. It is my intention here to discuss some aspects of the "tortious interference with contractual relations" and "unfair competition" causes of action that may be asserted in these situations, defenses, the strategic battlegrounds in this type of litigation, and damages issues. Both plaintiffs and defendants, as well as in-house insurance counsel, may find the ideas presented here useful when faced with groups of agents leaving one company and soliciting their former customers on behalf of a new company. (Various other theories such as conspiracy, interference with prospective business relations, conversion, misappropriation of trade secrets, and the remedy of injunction, are not addressed here).

I. THE POLICY ISSUE: FREE COMPETITION vs. UNFAIR COMPETITION

These cases involve a tension between the fundamental, yet competing, interests of free competition and mobility, versus protection from unfair competition. The law recognizes and

endeavors to serve both interests, with the result that it is often hard to discern clear, bright lines in the cases, and similar factual scenarios can produce quite different results.

As a very general proposition, the reasoning often employed runs as follows:

A. In the absence of an employment contract binding the employee to his employer for a set term (as distinct from a non-compete contract) there is nothing wrong with one company merely recruiting from a competitor, and nothing wrong with people switching jobs to join a competitor. Phrased another way, merely inducing at-will employees to switch jobs is generally not actionable. Orkin Exterminating Co. v. Martin Co., 242 S.E.2d 135 (Ga. 1978) (competitor not liable for inducing competitor's employees to switch jobs, where employee contracts were terminable at-will and no other contractual provisions were violated); Motorola, Inc. v. Fairchild Camera and Instrument Corp., 366 F.Supp. 1173 (D. AZ. 1973) (A competitor is privileged to hire away an employee whose employment is terminable at will.)

In addition, it is recognized that some degree of economic harm from competition (including, implicitly, recruitment) is built into our free enterprise system. For example, the recently-completed Restatement of the Law of Unfair Competition states, in the Comments to Chapter One, § 1, as follows:

> "The right to engage in business and to compete for the patronage of prospective customers is a fundamental premise of the free enterprise system. Competition among those who market goods or services creates and fosters the general welfare by efficiently allocating our economic resources. The right to compete in the marketplace necessarily contemplates the probability of harm to the

> commercial relations of other actors in the market. The fundamental rule stated in the introductory clause of this Section promotes competitive activity by insuring that neither new entrants nor existing competitors are subject to liability for harm resulting solely from the fact of their participation in the market."

Similar views are expressed in the general authorities. "Competition in business, even when carried to the extent of ruining a rival, constitutes justifiable interference in another's business relations, and is not actionable, so long as it is carried on in furtherance of one's own interests and by means that are lawful, even if of questionable morality and ethicality. 45 Am. Jur.2d Interference §31. In short, there is a general rule of non-liability for inducing a competitor's employees to switch jobs, and this general rules stems from the public interest in free competition and free job mobility. 45 Am.Jur.2d Interference §46.

B. The general rule of non-liability is subject to several exceptions, however. "Mere inducement" of at-will employees to switch jobs can become actionable when, for example:

- ♦ The switching of jobs involves the violation, or expected violation, of a contractual obligation, such a [illegible] te contract;
- ♦ The re [illegible] part of a larger plan or conspir [illegible] ly compete, or to harm the target c [illegible]
- ♦ The recru [illegible] -switching is accompanied by ancillary [illegible] ts, such as misuse of confidenti [illegible], misrepresentation, or breach of f [illegible]

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Most of the cases in this area fall into one of these broad categories. Thus, while public policy requires that the law protect successful economic actors from liability for the harm that their success inevitably causes to their competitors, (in other words, mere competition, mere recruitment, etc. should not be actionable), mere competition coupled with a broad array of other factors can create liability. Some illustrative cases in these categories, which show the types of circumstances that can turn recruitment into something actionable, are discussed below:

II. TORTIOUS INTERFERENCE: THE SWITCHING INVOLVES VIOLATION OF A CONTRACTUAL OBLIGATION, SUCH AS A NON-COMPETE.

Because practically all insurance agents are under some form of contract with their companies, and these contracts almost always contain some sort of non-compete provision, this fact pattern is often encountered. In fact, it is usually the very fact that the ex-agent is so successfully raiding his former accounts, that agitates his former company. In this scenario, where a competitor is luring away numbers of agents and these agents are then violating their non-compete contracts, an action will often lie for tortious interference with contractual relations. Generally, the elements of this claim are:

1. The existence of a valid contract;
2. The defendant's knowledge of the contract;
3. Defendant's intentional interference with the contract;
4. Breach of the contract;
5. Resulting harm to the plaintiff.

K&K Management v. Lee, 557 A.2d 965 (Md. 1989). (Obviously, the precise elements will vary slightly between jurisdictions).

Many of the cases cite to the Restatement (2d) of Torts §§ 766(b) and 767. Section 766(b) provides as follows:

> One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Section 767 lists seven (7) factors relevant to determining whether the "interference" is "improper." These include such factors as the "nature" of the conduct, motive, social interests, and the relation between the parties. Section 768 addresses competition as "proper" or "improper" interference.

Some examples of cases in which the injured company has proceeded against its competitor on a tortious interference theory are:

- Ecolab, Inc. v. Paolo, 753 F.Supp. 1100 (E.D.N.Y. 1991). In this case, the plaintiff brought an action against its competitor for, among other things, tortious interference, and sought a preliminary injunction. Granting the injunction, the Court found that the following circumstances created a "likelihood of success" in favor of the plaintiff:

1. The defendant knew that the salesmen it had hired from the plaintiff were under non-compete contracts;

2. The non-competes were valid;

3. The defendant knew that non-competes were common in the industry;

4. The defendant knowingly sought to induce the salesmen to engage in acts that would violate the non-competes (the defendant

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asked the salesmen what accounts they could switch, set financial goals that could only be met if they switched accounts, and the defendant's President was told that the salesmen were soliciting their old accounts but took no steps to object to or prevent such conduct);

5. The plaintiff's lawyer sent the defendant a letter requesting that the contract violations cease, and no action was taken.

- Roane-Barker v. Southeastern Hospital Supply, 392 S.E.2d 663 (N.C. App. 1990). Here the plaintiff sold medical supplies in the Carolinas and the defendant, a direct competitor, hired three of the plaintiff's salesmen and placed them in the same sales territory they had serviced for the plaintiff. The salesmen had employment contracts that contained non-compete clauses. The defendant took the position that merely hiring the salesmen and placing them in their former territories was not actionable. The Court agreed, stating that a competitor has a "limited privilege" to interfere with the business of its competitor through hiring its personnel; however, this limited privilege is lost if the interference occurs through improper means or with an improper purpose. (Though using different terminology, this reasoning tracks the reasoning in the Restatement sections cited above. That is, mere competition is not actionable, but accompanying improper acts can render the competitor actionable.) Under the facts of this case, in which the salesmen violated their contracts, the limited competitive privilege was exceeded, and the defendant became liable. The case of United Laboratories, Inc. v. Kuykendall, 378 S.E.2d 375 (N.C. 1988) also provides a good discussion of the legal

principles applicable in this area. Also see Surgider Corp. v. Eye Technology, Inc., 648 F.Supp. 661 (D.Minn. 1986) (the defendant's attempts to hire the plaintiff's President were an attempt to disrupt and interfere with his contractual relations with his employer, and the defendant would be enjoined from hiring the individual).

There are numerous defenses to an action based upon tortious interference. These include:

1. **The underlying contract is not valid:** an essential element of a tortious interference claim is that the contract interfered with must have been valid. In the context of a non-compete contract, the defendant usually raises this defense by asserting that the non-competes with which it is alleged to have interfered are invalid for overbreadth. Most states require a non-compete to be reasonable in both time and geographic scope in order to be valid. If the non-competes allegedly interfered with do not meet these "reasonableness" requirements under the applicable law, then they are not valid, and a basic element of a tortious interference claim is therefore missing. See, Howard Systems Int. Inc., v. IMI Systems, Inc., 596 N.Y.S.2d 48 (1993); Juliette Fowler Homes, Inc. v. Welch Assoc. Inc., 793 S.W.2d 660 (Tex. 1990); Manpower of Guilford City v. Hedgecock, 257 S.E.2d 109 (N.C. App. 1974).

Of course, this requires a determination of what state's law applies to the issue of the validity of the non-compete. Assume, for example that an Ohio insurer sues a New York competitor in Ohio, alleging interference with ex-agent's non-compete contracts in Florida, Georgia, and South Carolina. What state's law controls

the question of whether the non-competes are valid? Is there a choice of law provision in the non-compete? Perhaps Ohio law is deemed to control in the contract. But, if the non-compete would clearly be invalid under Florida law, will an Ohio Court enforce a contract that offends the law of the place where it is to be carried out? In Barnes Group, Inc. v. C&C Products, Inc., 716 F.2d 1023 (4th Cir. 1983), the plaintiff alleged that the defendant-competitor employed several of its former salesmen and induced them to breach their non-competes. The contracts contained an Ohio choice-of-law provision; the salesmen resided in Alabama, Maryland, Louisiana, and South Carolina. The Fourth Circuit held that the validity of the non-competes had to be determined under the law of each state in which the salesmen lived and worked. The Court found that non-competes were unenforceable in Alabama, and therefore no tortious interference claim could be based upon the alleged contract violations of the Alabama salesman.

There is also no reason that the validity of the contract could not be attacked on any other legal basis; such as lack of mutuality, duress, lack or failure of consideration, unconscionability, etc. If the contract is not valid, it cannot be interferred with.

2. **Prior breach by the plaintiff:** a party who has itself breached a contract may not bring an action on that contract. In Associates Spring Corp. v. Wilson, 410 F.Supp. 967 (D.S.C. 1976), the Court held that the employer had violated an employment contract by changing its employees sales territories. After this employee left to join a competitor, the former employer brought an action on the non-compete portions of the employment contract, and

the Court held that the plaintiff's prior breach invalidated the contract.

3. **Competitive "justification" or "privilege":** As discussed in Roane-Barker, supra, a competitor has a "limited privilege" to interfere with the business of its competitor. This is the "limited privilege" visible in the Restatement of the Law of Unfair Competition § 1, and in the Restatement (2d) of Torts §§ 767, 768, under different formulations. It will be recalled that the Restatement of Torts speaks in terms of whether the interference is "proper" or "improper." The concept of "impropriety" is narrowed when the interference comes from an economic competitor. If the competitor does not employ wrongful means, or harbor an improper purpose, the general weight of authority is that interference is justified so long as its purpose, at least in significant part, is to advance the interferor's economic interests. Some illustrative cases are:

People's Security Life Insurance Company v Hooks, 367 S.E.2d 647 (N.C. 1988). In this case, a former employee of the plaintiff insurance company induced other employees to join a competitor, for the purpose of developing the sales territory assigned to him by the competitor. Public policy and the free enterprise system demanded that competitors be allowed to vie for the services of "the best and the brightest" without fear of liability for tortious interference.

Salomon v. Crown Life Ins. Co., 536 F.2d 1233 (8th Cir. 1976). Here, the plaintiff insurance agency sued an insurance company and three of its ex-employees, alleging tortious interference. The Court reversed a damages award, finding that the plaintiff had

failed to prove its claim of tortious interference. The opinion rested heavily on the issue of competitive justification. "Justification for intentional interference ... can be provided through proof that the efforts were undertaken to protect a valid economic interest." Id., at 1242. The Court cited to Comment a, Restatement of Torts §767, as follows:

> The issue in each case is whether the actor's conduct is justifiable under the circumstances; whether, upon a consideration of the relative significance of the factors involved, his conduct should be permitted despite its expected effect of harm to another.

See also, H.S. Inc. v. Int. Tel. & Tel. Corp., 867 F.2d 1531 (8th Cir. 1989); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988).

III. THE RECRUITMENT OR MIGRATION AMOUNTS TO, OR WAS PART OF, UNFAIR COMPETITION

As can be seen above, there are a number of technical hurdles in a tortious interference action. While more traditionally accepted by the Courts, a claim based upon tortious interference may be somewhat cumbersome. The same is not true in an action styled as one for unfair competition. As will be discussed below, the tort of unfair competition is attractive because it has no well-defined parameters, and no well-defined elements. As a result, a creative plaintiff can take a wide range of circumstances which may "look bad" and construct a claim for unfair competition which has a reasonable prospect of surviving a summary judgment motion. The unfair competition tort is thus an attractive concept for plaintiffs to use in these "migrating agent" cases.

This tort had its origin in the realm of "passing off" goods, but has expanded into the full range of commercial activities. The following is a lengthy excerpt from The Restatement of the Law of Unfair Competition § 1, Comment g (note the portions in bold, which show how broad the scope of the "unfair competition" tort may be):

> **"Unfair methods of competition: A primary function of the law of unfair competition is the identification and redress of business practices that hinder rather than promote the efficient operation of the market.** Certain recurring patterns of objectionable practices form the basis of the traditional categories of liability specifically enumerated in Subsection (a). These specific forms of unfair competition, however, do not fully exhaust the scope of statutory or common law liability for unfair methods of competition, and Subsection (a) therefore includes a residual category encompassing other business practices determine to be unfair.
>
> It is impossible to state a definitive test for determining which methods of competition will be deemed unfair in addition to those included in the specific categories of conduct described in the preceding Comments. **Courts continue to evaluate competitive practices against generalized standards of fairness and social utility.** Judicial formulations have variously appealed to principles of honesty and fair dealing, rules of fair play and good conscience, and the morality of the marketplace. The case law, however, is more circumscribed than such rhetoric might indicate, and courts generally have been reluctant to interfere in the competitive process. An act or practice is likely to be judged unfair only if it substantially interferes with the ability of others to compete on the merits of their products in the marketplace or otherwise conflicts with accepted principles of public policy as established by statute or common law.
>
> As a general matter, if the means of competition are otherwise tortious with respect to the injured party, they will also constitute an unfair method of competition. A

competitor who interferes with the business of another by acts or threats of violence directed at the other, for example, is subject to liability for unfair competition. So also is one who interferes by instituting or threatening to institute groundless litigation against a competitor. Similarly, if a competitor interferes with the commercial relations of another by engaging in defamation or disparagement, or by establishing or maintaining an unlawful restraint of trade, the conduct also constitutes unfair competition. Liability for unfair competition under the residual rule stated in Subsection (a), however, is not limited to conduct that is otherwise tortious with respect to the party seeking relief. Thus, interference in the commercial relations of the competitor resulting from unlawful threats directed at customers of the competitor will also constitute unfair competition.

In assessing the propriety of the actor's conduct a primary consideration is the social utility of the conduct as a means of competition. If the conduct is likely to interfere in a significant manner with the ability of prospective purchasers to choose on the merits of the competing products, it will ordinarily be considered unfair. A court may conclude, for example, that a competitor has competed unfairly by failing to disclose to prospective consumers particular information crucial to an informed purchasing decision.

Many applications of the residual rule of liability specified in Subsection (a) may be seen as extensions of the established categories of unfair competition. A competitor who diverts business from another by means of fraudulent misrepresentations or through the wrongful use of confidential information, for example, may sometimes be subject to liability for unfair competition even if its conduct is not specifically actionable under the rules relating to deceptive marketing or the appropriation of trade secrets. **In determining whether it is appropriate to conclude that an act or practice is unfair despite the fact that a restrictive element of traditional doctrine precludes the imposition of liability under an established category, careful consideration must be given to the nature of the restriction. If the restriction expresses an**

> **important policy of the law against the imposition of liability in such circumstances, the conduct will not be actionable as unfair competition.**
>
> A party seeking relief under the residual rule stated in Subsection (a) bears the burden of establishing that the method of competition employed by the actor is unfair. The use of equitable remedies has contributed to the development of the law by facilitating the condemnation of practices not previously determined to be unlawful. A party likely to be damaged by the unfair competition of another may obtain an injunction against the continuation of the conduct. Upon proof of actual damages the court may also award appropriate monetary relief.

A plaintiff can argue that the purpose of the tort of unfair competition is to fill in the gaps left by more traditional causes of action (such as tortious interference) and provide a remedy for the multitude of unpleasant and undesirable competitive methods one may encounter in the marketplace. There appear to be no fixed elements of this tort, and no fixed limits to the type of conduct it may apply to. Along the same lines as the language cited above, is the leading torts hornbook. "Unfair competition does not describe a single course of conduct or a tort with a specific number of elements. Instead, it describes an open-ended, general category into which nameless forms of unfair competition may be placed when recognized as torts by the courts for the protection of commercial values." Prosser & Keeton on Torts, § 130 at 1015 (5th edition 1984.)

The unfair competition tort is obviously extremely useful to a plaintiff that believes it has been subjected to unfair competitive practices, but is concerned about fitting these practices into an established tort, or concerned about the

difficulties of proving its case (cr surviving a summary judgment motion) under a more traditional tort theory like tortious interference.

In the context of the insurance business, the following are some cases that illustrate the "unfair competition" tort:

1. American Republic Ins. Co. v. Union Fidelity Life Ins. Co., 470 F.2d 820 (D. Or. 1972): This is a similar case that is frequently cited. The plaintiff in this case sold accident and health insurance, through a network of captive state and area managers. The home office regularly sent leads to these managers. The defendant was a competitor in the same business. The defendant approached the plaintiff's state manager in Oregon and western Washington, saying that they wanted to build a sales force of "career" agents. The defendant and the state manager discussed how many sub-agents the state manager could bring with him. The state manager resigned from the plaintiff and eventually brought 15 sub-agents with him to the defendant. Many of these agents were recruited before the state manager formally resigned. These agents retained customer information after they left the plaintiff, and a high percentage of the policies this group of agents sold on behalf of the defendant were to former policyholders of the plaintiff. The court held that, "because we find that Union was a party to the illegal actions of [the state managers] it is unnecessary to consider Union's competitive privilege."

2. United Insurance Company of America v. Dienno, Pilgrim Insurance Company, et. al., 248 F.Supp. 553 (1965); In this case, the defendant hired a group of agents from the plaintiff, who proceeded to solicit sales in the same area they had serviced for

the plaintiff. The agents also made various false statements regarding the plaintiff, representing that the plaintiff dragged their feet on claims, and had poor products. The Court found that the defendant-competitor "knew, or should have known" at the time it licensed the new agents that they had just previously been agents for the plaintiff. The agents had developed a familiarity and friendship with many of the plaintiff's policyholders, and carried in their minds the names and addresses of many of these policyholders. The Court found that the agents capitalized upon this information (note that the court apparently considered mere mental knowledge of customer identities to be a trade secret in this case). The Court granted an injunction barring the agents from using this knowledge to compete, though not barring them from competing altogether.

3. Atlantic and Pacific Insurance Company v. Combined Insurance Company of America, 312 F.2d 513 (10th cir. 1962). In this case, the defendant induced several salesmen to switch jobs. The agents used confidential information (written and unwritten) to make sales for their new company. The Court considered the defendants inducing the salesmen to quit and come to work for it for the purpose of securing this confidential information, then using the information to sell comparable insurance to the plaintiff's policyholders, to be unfair competition.

4. Combined Insurance Company of America v. Investors Consolidated Insurance Co., 499 F.Supp. 484 (E.D.N.C. 1980). The plaintiff health and accident insurer sued a competitor and its majority stockholder. The plaintiff obtained an injunction when the Court found that Combined had made a prima facia showing that

the defendants had misappropriated a substantial proportion of its Combined business through hiring a number of Combined agents, who misused confidential information.

This is not an exhaustive review of the cases, but merely an illustrative sampling. A few points are noteworthy, though. First, the Courts appear to treat employees and independent contractors alike. While many insurance companies treat their agents as independent contractors, and therefore may wish to take the position that they do not have the right or ability to control their agents' actions, there is no indication that Court consider this is a significant distinction. Second, a common theme appears to be entanglement by the competitor in the agent's underlying wrongdoing. This entanglement can consist of as little as prior knowledge that the agents had previously worked for a competitor, knowledge that they are under a non-compete, all the way to direct encouragement of violations of non-competes. Third, misuse of confidential information to make sales for the competitor seems to be a certain way to involve the competitor in the wrongdoing. Finally, merely reaping the economic benefit of the wrongdoing also appears to be sufficient to take the case out of the realm of mere inducement (for which there is no liability) and into the realm of actionable conduct. (It is not clear whether realizing an economic benefit alone, without any additional entanglement, would be sufficient as a basis for imposing liability.) This would seem to pose a major potential problem for insurers, who generally do not monitor whether an agents' new business is coming from accounts he should not be soliciting, or through the misuse of information. Finally, the main defense to an unfair competition claim -

competitive justification/privilege - is a question of fact. United Laboratories, Inc. v. KuyKendall, et. al., 370 S.E.2d 375 (N.C. 1988).

KEY STRATEGIC BATTLEFIELDS:

1. **Causation (Why did the agents really leave?)** A tort action, whether couched as one for tortious interference or unfair competition, must meet the causation requirement. This affords the defendant an opportunity to conduct a battle on the question of exactly why the agents who moved from the plaintiff to the defendant-competitor really left. Were they improperly "lured" away, or did they merely exercise their right to change jobs? The defendant should conduct intensive discovery into anything that might bear upon agent morale: compensation, benefits, agent opinion surveys, treatment of the departed agents. The cases do not contain a very thorough discussion of the causation requirement in these types of cases, most courts seemingly being swayed by the nature of the conduct involved. For example, in Bancroft-Whitey Company v. Glen, 411 P.2d 921 (Ca. 1966), the Court refused to permit damages for the resignation of any employee whose departure was "unrelated" to the unfair competition. The defense argued that there was insufficient proof of proximate cause, in that the employees testified that they had left the plaintiff for a higher salary. The Court dealt with this argument by stating that there was a "proximate link" between the competitor's "persuasive inducement" and the departures. In American Republic Ins. Co. v. Union Fidelity Life Ins. Co., 470 F.2d 820 (9th Cir. 1972), the defense argued that the plaintiff had experienced high agent turnover and that the agents who left were dissatisfied with their

employment with the plaintiff. The Court stated that the recruitment of so many agents (15) is "sufficient to show the requisite causality." The evidence of high turnover and agent dissatisfaction would only go to the extent of the plaintiff's loss that was attributable to the defendant.

2. **What is "Improper" in the Insurance Business?** An interesting question, given that a tortious interference claim relies in part on whether the interference is "proper" or "improper," and an unfair competition claim is concerned with practice that violate standards of good behavior in the market, is what exactly are proper (accepted) competitive standards in the insurance business? This may be a proper subject for expert testimony.

3. **What can the Agent take with him?** One of the recurring circumstances in many of these cases is some misuse of confidential information on behalf of the new company. This raises the question of what, exactly, constitutes confidential information. Most broadly, the distinction is between mental information and written information. Some states do not consider mere mental information to be proprietary and confidential, although others do. Written information concerning customer identities is almost universally viewed as confidential. Other types of written information may not be so clear. Consider the fact that most insurance companies publish and distribute a virtual avalanche of materials. Interestingly, see Murrow Agency, Inc. v. Ryan, et. al., 800 S.W.2d 600 (Tx. 1990), holding expert testimony admissible on what constitutes confidential information in the insurance business.

4. **What is the status of the departing agent?** Some of the cases stress the status of the departing agent; that is, soliciting and luring away a person who occupies a fiduciary position may be more significant, in terms of liability, than recruiting a non-fiduciary. The Courts have taken an expansive view of the "fiduciary" concept, for example finding stockbrokers who occupy a managerial role to be fiduciaries Financial Programs, Inc. v. Falcon Financial Services, Inc., 371 F.Supp. 770 (D. Or. 1974). Also, some Courts apply a "duty of loyalty" analysis, even after the employee has left. Sheryln Hill & Greenfield Direct Response, Inc. v. Names & Addresses, Inc., 571 N.E.2d 1085 (Ill. App. 1991).

COMMON THEMES ON LIABILITY: SOME THINGS INSURANCE COMPANIES DO THAT CAN CREATE LIABILITY PROBLEMS

1. Focusing (targeting) recruitment efforts at agents from one or two specific companies.

2. Specifically seeking agents that have experience with competitors.

3. Requiring potential recruits to submit copies of their non-compete contracts.

4. Reviewing or offering opinions on the potential recruit's contract with his old company.

5. Discussing with the potential recruit the idea of bringing other agents with him.

6. Estimating with the potential recruit the volume of business that can be switched; projecting the recruit's income

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based on the assumption that certain amounts of business will be switched.

7. Having the potential recruit submit information regarding the competitor's business; such as commission statements, internal newsletters, internal product information, leads, customer lists, manuals, etc.

8. Paying recruiters based on how much their new recruits sell.

9. Placing agents in the same sales territory they worked for their former companies.

10. Doing nothing when becoming aware that the agent is calling on former customers.

11. Doing nothing when becoming aware that the agent is making false or misleading statements about his former company.

12. Paying the agent's legal fees if he is sued by his old company.

SOME PREVENTIVE MEASURES

1. Recruit from a broad base of people. Have a recruit profile that does not depend upon experience with competitors.

2. Be sure someone is flagged if a large group of agents is coming, en masse, from another company.

3. Require new recruits to acknowledge in writing that they understand your company's policy is for all agents to honor whatever contractual arrangements they have with their former companies. Include a policy statement to this effect in your new agent orientation materials, and make sure your recruiters are aware of this policy.

4. Do not give prospective agents opinions regarding the scope or enforceability of their non-compete contracts, or become entangled with their cases if they are sued by their old companies.

5. Have a policy/procedure for investigating and responding when a competitor brings a potentially improper situation to your attention.

SOME THOUGHTS ON A PLAINTIFF'S APPROACH TO DAMAGES

As has been noted earlier, the plaintiff in one of these kinds of cases will probably want to try the case on the "macro" level. We have already discussed what this means from the standpoint of liability. Now consider what this might mean in terms of damages.

1. Lost Profits: If the plaintiff can point to specific accounts that their ex-agents wrongly switched to the defendant, the plaintiff will seek to recover profits lost from these accounts. This is standard in "former company vs. ex-agent" cases, and has also been approved in those "former company vs. new company" cases. Fowler v. Printers II, 598 A.2d 794 (Md. App. 1991); James S. Kemper & Co. v. Cox & Assoc., 434 So.2d 1380 (Ala. 1983). A plaintiff taking a "global" approach to damages, though, might also try to do the following: attribute a certain quantum of net profits on a "per agent" basis, then simply assert that the number of agents lost should be multiplied by this "per agent" net profit figure. The logic would run as follows:

- We made a net profit of $100.00 in 1994.
- We had 50 agents in 1994.
- Each agent therefore represents $2.00 in profits.
- You "stole" 10 agents.

♦ You therefore owe us $2.00 x 10 agents = $20.00.

This is obviously extremely simplistic, and ignores the fact that some agents are more profitable than others, and also ignores the question of whether the specific agents who left actually caused any harm.

The plaintiff will also try to extend the time period for which these damages may be claimed. Under a standard lost profits analysis, lost profits may be projected for a "reasonable time period." The insurance company plaintiff may be expected to assert that its "average" agent stays for "X" years, and therefore lost profits should be projected for this length of time. This ignores the question of how long the specific agents in dispute were likely to stay, and also ignores the fact that the agents would have been completely free to compete after the term of their non-compete expired. For example, in Fowler Supra, the court calculated lost profits "during the one-year period covered by the restrictive covenant..." Id., at 806.

2. **The lost cost of training the "stolen" agents**: all companies devote some resources to training their agents via seminars, written materials, videotapes, etc. The plaintiff may assert that its investment in the wrongly diverted agents has been destroyed, and seek to recover the money it spent to train them. From the plaintiff's perspective, this can generally be shown fairly simply. Some companies maintain detailed records on the seminars, etc. their agents attend, and can isolate the cost of these seminars in their budgets. Companies that have less budget detail can, nevertheless, generally segregate their training costs on an annual basis and, when divided by the total number of agents

in their force over the same time period, arrive at some figure for training per agent that would pass the "reasonable certainty" requirement in most courts.

A corollary of losing the training investment in the departed agents is the fact that costs will be incurred to train replacement agents. This may be viewed as a recoverable "cost of mitigation." Also, the company's expenditures to try and convince the agents to stay may be recoverable. Bancroft-Whitney Co. v. Glen, 411 P.2d 921 (Ca. 1966); A&P Ins. Co. v. Combined Ins. Co. of America, 312 F.2d 513 (10th Cir. 1962).

3. **Unjust Enrichment:** In Hayes Albion Corp. v. Kuberski, et al., 364 N.W.2d 609 (Mich. 1984), the plaintiff manufactured silicone rubber products under various proprietary processes. The plaintiff's chief engineer left and went into competition, with a competitor. Among other claims, the plaintiff contended that the defendants had been unjustly enriched as a result of the former chief engineer's conduct. The Court held that the plaintiff could recover unjust enrichment damages in addition to lost profits, on the theory another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary. If the third person makes a profit through such participation, he is chargeable as constructive trustee of the profits so made." In that the chief engineer violated his fiduciary duty to the plaintiff, and the defendants "knowingly participated" in that violation, the plaintiff would be "entitled to unjust enrichment damages in addition to actual damages." The Court did not spell out how these differed from lost profits, but presumably it involved disgorgement of wrongful profits.

4. **Punitive Damages:** Punitive damages are recoverable in actions for tortious interference and unfair competition on the same basis as in other tort actions, under the applicable law.

5. **Statutory Damages:** Although not specifically discussed in this outline, another basis of liability for third parties who induce the breach or receive benefits from another's breach of a non-compete, or who engages in unfair competition, may lie under state Unfair Trade Practices Acts. An examination of each state's unfair trade laws should give guidance as to whether or not an action will lie under the local statute. Some Courts have held, however, that their unfair trade acts are aimed at conduct affecting the public at large, or "consumers," thus perhaps making them inapplicable to claims by one competitor against another for purely competitive conduct. For example, see Florence Paper Co. v. Orphan, 379 S.E.2d 289 (S.C. 1989). A further consideration under an unfair trade practices statute is that recovery will be limited to the damages permitted by the statute. These may be more or less than the damages recoverable in a common law tort action. Many of these statutes provide for enhanced (double or triple) damages, and have the added attraction of providing for recovery of attorney's fees and costs.

SOME THOUGHTS ON A DEFENDANT'S APPROACH TO DAMAGES

While the plaintiff will attempt to take a global approach to damages, the defendant should try to wage the damages battle on the "micro" level; agent by agent, account by account. For example:

1. If the agents who left and allegedly breached their non-competes are in different states, evaluate whether their non-compete contracts are valid under the law of each state in

which the agents reside. A motion for partial summary judgment may be appropriate if the contract is not valid under one state's law, even if it probably is valid under some other agents' state law.

2. Examine the question of a prior breach with respect to each contested agent, as well as other factors relevant to the validity of the contract. Make the plaintiff prove all the elements of a contract with regard to each agent.

3. Most companies monitor agents with respect to their longevity (also called retention) and loss-ratio. Most measure accounts in terms of persistency and penetration. Companies usually have their own internal goals with respect to these factors. These can be very important to the defense effort to ascertain the true economic value of the specific lost agents involved and the specific lost accounts. The defense should do the following:

- obtain data showing the average length of an agent's stay with the plaintiff. This data may enable you to argue that, based on these figures, the departed agents were "due" to leave anyway, that the company plans for turnover, prices its products to account for such turnover, and so really lost nothing when these agents left. At the least, this average tenure should limit the length of time over which lost profits should be projected.
- obtain data showing the loss-ratio for each departed agent. Companies have target loss-ratios and it may be that some of the agents fell short of

these loss-ratio targets. If so, you may argue that the departed agents were not profitable, or were just marginally so.

- obtain data showing how long the average account stays with the plaintiff. This may show that the lost accounts were likely to "drop off" soon anyway, or at least limit the time period over which the plaintiff may project lost profits from that account.

4. Make sure the plaintiff's damages model is consistent with NAIC (National Association of Insurance Commissioners) loss-ratio guidelines, and contains assumptions that are sound from an actuarial standpoint. Some states have adopted NAIC loss ratio guidelines by regulation. The plaintiff's damages model may assume profits (and, therefore, assume a loss ratio) in excess of what would be permissible in a given state under the NAIC guidelines. In layman's terms, a plaintiff's damages model may project more profits than the plaintiff would legally be allowed to realize in a given state. This would obviously present a problem for the plaintiff, and is another mechanism for limiting the profit projections.

5. Argue that lost profit projections should be limited to the time period of the non-compete.

6. Argue that the contractual forfeiture provision provides the exclusive remedy. Many agent contracts provide that a violation of the non-compete will result in forfeiture of renewals which the agent has accumulated. While no direct authority has been found on this point, a defendant could contend that this

forfeiture provides the exclusive remedy in the event an agent violates his non-complete.

7. Obtain the plaintiff's filings with state insurance authorities. Most states require insurance companies doing business in that state to file annual statements that contain a wealth of financial data. If the plaintiff is a public company, it will produce a glossy annual report in which it will generally tout how well it did the previous year, and will also make informative filings with the SEC in Washington.

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