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Real Estate; Civil Litigation; Bankruptcy & Insolvency; Corporate & Partnership; Commercial Matters; Personal Injury; Construction; Business & Estate Planning; Divorce; Hotel & Restaurants; Patent & Intellectual Property

RF Wins Jury Victory After 3 Week Trial

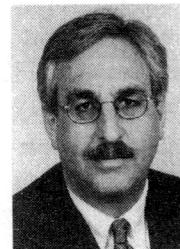
Rudolph Friedmann recently received a very favorable jury verdict after a three (3) week trial in a very difficult and complicated construction dispute heard in Suffolk Superior Court.

Jim Singer of our litigation department represented a general contractor who claimed it was owed almost a quarter of million dollars for renovations to a five (5) story building in Boston's South End. The owner raised various common defenses of defective workmanship, incomplete work and overcharging. What made this case so difficult, however, is that many other significant issues were also in dispute, including: what were the parties contractual arrangements (there were

no signed written contracts, although two completely different versions of unsigned contracts); a disagreement as to the scope of work; claims by the owner of a significant verbal credit; dispute as to the billing methods (time and materials vs. stipulated sum); different phases of job (with different billing methods) and many more.

The jury decided unanimously in favor of our client, awarding him virtually all of his damages,

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Jim Singer

Non-Competition Agreement Held Not Enforceable Due to Changes in Employee's Compensation


Bob Shea

When the terms of an employee's compensation are unilaterally changed by the employer, the employee may thereby be released of his or her obligations under a previously-signed non-competition agreement. By invoking this often overlooked doctrine, Jim Rudolph and Bob Shea were able to defeat a former employer's motion for preliminary injunction. As a result, two salespersons were held to be free to

work for the firm's client, a defendant in this case, without any court-imposed restraint. The name of the case, pending in Suffolk superior court, was *Executive Glass Co., Inc. v. Brian J. McMahon, Rosemary Driscoll, and New Angle Glass Co., Inc.*

The salespersons, both of whom were also named as defendants, had each worked for the plaintiff company from the early 1990s until late in 2003. During their employment, they had each signed a non-competition agreement. The two agreements each provided that for a period of

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Non-Competition Agreement

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one year after termination, the employee could not be employed by any business in New England that competed with their former employer.

Several years after the non-competition agreements were signed, the plaintiff company unilaterally changed the terms of compensation. Both of the defendant employees had always been compensated by a salary plus percentage commissions paid on their sales. In the fall of 2003, however, the plaintiff company cut their salaries in half, and a portion of each employee's health insurance premium was deducted from the reduced salary. Furthermore, both employees were told that their salaries would be eliminated in January of 2004. The commission structure was changed so that, in theory, the loss of salary could be replaced by increased commission payments. The defendant salespeople, however, felt that this "commission increase" was largely an illusion, and that they would not be able to replace their lost salary. Consequently, the two salespeople resigned their positions with the plaintiff employer and immediately went to work for a direct competitor; the defendant corporation, which was client of the firm.

The plaintiff employer sued both former employees and the new employer, our client. The complaint alleged that the former employees were liable for breach of the non-competition agreement, and that the new employer was liable for interference with contractual relations. Pursuant to the terms of the non-competition agreement, the plaintiff sought a preliminary injunction forbidding the salespersons from continuing their employment with the new employer, and forbidding the new employer from continuing to employ the salespeople. The case was filed in the Business Litigation Session in Suffolk County, the specialized court designed for the resolution of complex business disputes. Jim Rudolph and Bob Shea represented both the new employer and the defendant employees.

The Court found against the plaintiff, and refused to issue a preliminary injunction. Consequently, the employees were free to continue working for the firm's client, in direct competition with their former employer.

The Court accepted the argument that substantial changes in the employees' compensation arrangements indicate that the employer and employee have entered into a new employment agreement. Consequently, the old employment agreement has been terminated. In this case, the non-competition agreement had been signed during the period of the former employment agreement: *i.e.*, when the salespeople were paid on a salary-plus-commissions basis. The Court held that the ending of the salary-plus-commissions compensation, and its replacement by a commissions-only compensation arrangement created a new employment contract, and that the non-competition agreement in the former employment contract did not survive. In effect, by changing the terms of the employees' compensation, the former employer had unwittingly released the former employees from their non-competition obligations.

There are lessons in this case for both employers and employees. When an employee's compensation is changed, it is wise for the employer to obtain, in writing, a statement that the employee agrees to be bound by all previously-signed non-competition and non-disclosure agreements. As to employees, they should not assume that a previously-signed non-competition agreement either will or will not be enforced if they leave their employment. The law in this area is very fact-specific. While there are general guidelines regarding enforceability, the Court has a great deal of discretion in applying those guidelines to any particular case.

Medicaid

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ations among the states) for the resident's personal needs; a deduction for any uncovered medical costs, including premiums for medical insurance; for married applicants, an allowance for the spouse at home if he or she needs income support; and a deduction for any dependent children living at home. Income attributable solely to the community spouse is off-limits. It is not taken into account in determining eligibility and the community spouse will not have to use his or her income to support the spouse receiving Medicaid benefits in a nursing home.