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## Client Newsletter

A newsletter  
for clients  
and friends  
of the firm

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### New York Court Expands Recognition of Foreign Country Judgments Against New York Businesses Even Where New York Business Is Not Present In Foreign Jurisdiction

#### *Ruling Expands Reach of Uniform Foreign Country Money-Judgments Recognition Act*

In a potentially far reaching decision, New York's Appellate Division for the Third Department adopted an expansive reading of New York's Uniform Foreign Country Money-Judgments Recognition Act and enforced a foreign judgment, holding that a foreign court may assert personal jurisdiction over a New York business, even where the company does not maintain any offices or assets in the foreign country, and is not otherwise present in the foreign jurisdiction. The decision may now subject New York companies that transact business in foreign countries to lawsuits there, and any judgments rendered in such countries will be enforceable in New York courts.

In *Wimmer Canada, Inc. v. Abele Tractor & Equipment Co.*, 299 A.D.2d 47, 750 N.Y.S.2d 331

(3d Dep't 2002), the Appellate Division held that a Canadian court had a valid basis for exercising personal jurisdiction over a New York company that had purchased construction equipment from a Canadian manufacturer and had defaulted on two lines of credit extended to it, even though the defendant had no assets or presence in Canada and the business was transacted by mail, telephone and fax. The New York court agreed that the New York company's purposeful transaction of business in Canada was sufficient to give Canadian courts personal jurisdiction, and consequently, the Canadian judgment was fully enforceable in New York.

#### *The Uniform Foreign Country Money- Judgments Recognition Act*

CPLR Article 53 is New York's version of the Uniform Foreign Country Money-Judgments Recognition Act. The Act provides that the courts of New York will recognize and enforce a final foreign country judgment which grants or denies the payment of a sum of money provided (i) the foreign court had personal jurisdiction over the judgment debtor, and (ii) the judgment was rendered by a system that provides an impartial tribunal or procedures compatible with due process.

CPLR 5305(a) sets forth a nonexclusive list of factors which are deemed adequate for the foreign

court's exercise of personal jurisdiction over the judgment debtor. These factors include personal service upon defendant in the foreign state, defendant's appearance in the foreign proceeding, voluntarily submitting to jurisdiction before suit, being domiciled in or maintaining an office in the foreign state.

In *Wimmer*, none of these enumerated factors were present. Instead, the court relied on the broad catch-all provision contained in CPLR 5305(b), which provides that the "courts of this state may recognize other bases of jurisdiction." While acknowledging that the court had not previously applied this provision, the court stated as a general rule that it will be "appropriate for New York to recognize a foreign judgment under CPLR 5305 under any jurisdictional basis it recognizes in its internal law."

#### *The Court's Analysis in Wimmer*

Applying the above rule to the situation in *Wimmer*, the court found the Canadian court had a valid basis for exercising personal jurisdiction over the defendant, given the defendant's purposeful transaction of business in Canada, and the direct nexus between the business transacted in Canada and the claim asserted in the court there, which was based on defendant's failure to pay on two lines of credit that the plaintiff extended to defendant.

The court found that over a period of nine months, the parties had maintained an ongoing business relationship by means of international communication systems involving numerous transactions in which defendant ordered equipment by telephone calls, mailing and faxes. The court found this sufficient to confer personal jurisdiction, noting that courts have long rejected the need for a defendant's actual physical presence to establish personal jurisdiction.

#### *Conclusion*

New York courts are now more likely to enforce

foreign judgments based on a foreign court's finding of jurisdiction, notwithstanding the lack of a defendant's physical presence in the foreign jurisdiction. A New York business may not ignore a lawsuit in a foreign country simply because it does not maintain offices or have assets there if it regularly places orders or transacts business there, even if it never enters the country. Such business dealings will permit a foreign court to assert jurisdiction and enter a judgment which will then be fully enforceable in New York.

## Employer's Damages Against Employees Who Defect To Start Their Own Businesses Enlarged

### *Court Holds Laying the Groundwork While On The Job Breaches Employee's Duty of Loyalty and Subjects Employee to Disgorgement of Profits*

A recent ruling by an appellate court clarified the damages available to an employer where an employee defects and forms his own business with a potential client of the employer. The case is significant for its comparison of the damages available to an employer against an employee who breaches his duty of loyalty versus those who violate a non-compete agreement. The case potentially gives employers a substantial advantage over employees who leave to start their own businesses with clients of the firm.

In *Gomez v. Bicknell*, 2002 WL 31890825 (2d Dep't Dec. 23, 2002), the employer, Bicknell Advisory Services hired Christian Gomez in 1995 to work in its merger and acquisition advisory firm. At the time of Gomez's hiring, he signed a non-compete agreement covering a period of two years after his termination.

Thereafter, Gomez and his employer became engaged in a dispute arising out of Gomez's claim

that in January 1998, Bicknell had promised him a 50% equity split in the firm and a 50% split of profits on a per transaction basis, and Gomez threatened to resign.

In 1998, while working on a deal for Bicknell, a Bicknell client offered to reveal the name of another merger prospect to Gomez once that client's deal closed. Gomez related this development to Bicknell. However, when Gomez later learned the identity of the prospect from the client, Gomez contacted the prospect directly from his home, without disclosing the prospect's name to his employer. Shortly thereafter, Gomez resigned and subsequently secured a contract with the prospect several weeks later, generating a gross fee of \$353,000 and a net profit of \$260,000. Gomez then sued Bicknell on his claim for 50% of Bicknell's profits and Bicknell counterclaimed alleging a violation of the non-compete agreement and breach of the duty of loyalty.

At the trial of the action, the court dismissed Bicknell's counterclaim for breach of the non-compete agreement, finding that Bicknell failed to produce evidence of lost profits, a necessary element of the claim. However, the jury awarded Bicknell \$5000 on its claim for breach of the duty of loyalty.

### *Damages for Breach of Duty of Loyalty vs. Breach of Non-Compete Agreement*

On appeal, the Second Department affirmed the lower court's dismissal of Bicknell's non-compete claim, noting its failure to put forth any evidence of its lost profits. However, it agreed with Bicknell that the court had erred in instructing the jury regarding the damages available for a breach of the duty of loyalty. The court noted that while contractual damages for a breach of a non-compete agreement consist of the employer's lost profits, for a breach of the duty of loyalty, the employer may elect between its lost profits resulting from the disloyal employee's theft of a corporate opportunity, *or the employee's gain or profits* resulting from the employee's diversion of the corporate opportunity. Since Gomez had

obtained a net profit of \$260,000 from the transaction with the prospect, disgorgement of this sum was the proper measure of damages.

The court also rejected Gomez's argument that he did not breach his duty of loyalty while he was employed because he did not formalize his relationship with the client until several weeks after he resigned, at which time no duty was owed. The court held that an employee would not be relieved of liability for advantages secured after the termination of his employment if the opportunities arise by virtue of his employment.

### *Conclusion*

The Second Department has made it clear that an employee may not avail himself of an opportunity belonging to his employer, even if the employee does not finalize his plans until after his employment is terminated. An employee who does so may be forced to disgorge any profits resulting from opportunities that arose during the employment relationship. Moreover, employers may enforce this duty against all employees who take preparatory steps to securing potential clients of the employer during the employment relationship, regardless of whether the employer has obtained non-compete agreements with the employee.

This newsletter is a service to the clients and friends of the firm. It is intended to give general information on the matters actually covered. It is not intended to be a comprehensive summary of recent developments in the law, to treat exhaustively the subjects covered, to provide legal advice, or to render a legal opinion.

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