

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK RUSSELL COMPANY, et al. : CIVIL ACTION
v. :
WELLINGTON MANAGEMENT COMPANY, LLP : NO. 98-1703

MEMORANDUM AND ORDER

Fullam, Sr. J. April , 1998

The defendant has filed a Motion for Stay of this Court's Order of April 13, 1998, which granted a preliminary injunction precluding the defendant from disrupting the ongoing business relationship between plaintiffs and their investment advisor, Arnold C. Schneider and his firm.

If the stay now sought by the defendant is granted, the funds of which plaintiff is an ERISA fiduciary, and of which the defendant also was an ERISA fiduciary until fairly recently, would be irreparably damaged to the extent of at least \$13,000,000, and perhaps as much as \$25,000,000 or \$30,000,000, in the transaction costs which would be necessitated by a transfer to another investment advisor. Granting a stay would also prevent the plaintiffs from fulfilling their fiduciary obligation to carry out their best business judgment concerning investment of the funds entrusted to their care, including the selection and utilization of the best portfolio management.

In contrast, continuing the injunction in effect until final hearing in this case would impose no financial burden upon the defendant, and would, so far as the record shows, entail no significant prejudice whatever.

The application for a stay includes what are, in my view, misstatements of fact. The evidence before me established, and I expressly found, that Mr. Schneider did not solicit plaintiffs as clients, or lure them away from Wellington. The decision to follow Mr. Schneider to his new firm when he left Wellington was initially that of the plaintiffs - for understandable reasons - given the fact that neither Mr. Schneider nor any of his co-workers familiar with plaintiffs' portfolio and its management would be available at Wellington, and the fact that no one else at Wellington used the same management style as Mr. Schneider.

The only significant justification for defendant's application for a stay is the perceived conflict between this Court's injunction and the decision of the Massachusetts state courts. This would indeed be a matter of regret, if the decisions were actually in conflict. But the fact remains that (1) the plaintiffs were not parties to the Massachusetts litigation; indeed, contrary to defendant's assertion, they were not in privity with the defendant in the Massachusetts litigation, nor were they in control of the litigation. (2) the

Massachusetts courts decided only state-law contract issues; they had no jurisdiction to consider, and did not purport to consider, the federal claims involved in the present case. (3) a reasonable interpretation of the decision of the Massachusetts trial court (the record does not include the recent decision of the appellate court) is that it did not purport to preclude Wellington customers, such as the plaintiffs, from pursuing their own remedies in protecting their own interests. Indeed, were it otherwise, fundamental concepts of due process of law would have been disregarded. A court simply cannot, constitutionally, enjoin a party from fulfilling its contract obligations unless the other contracting party is named in the lawsuit and afforded an opportunity to defend.

I note, also, that the application for a stay, and the brief in support of that application, make no mention of the undisputed fact that the defendant intentionally concealed from plaintiffs the existence of the non-competition clause in the partnership agreement until long after Mr. Schneider had been selected and functioning as the portfolio manager of plaintiffs' accounts.

Finally, although the non-competition clause in defendant's partnership agreement, to the extent it concerns "accepting" business from defendant's customers, has been upheld as reasonable under Massachusetts law, the restrictions in the

partnership agreement have been declared unreasonable in other respects (the three-year ban on working in the investment advisory industry), and, were it not for the language which suggests that the defendant would not enforce the restrictions in the absence of harm to the defendant partnership, would have questionable in terrorem implications: it purports to impose severe restrictions, some of which are facially unreasonable, unless the affected individual successfully challenges the restrictions through litigation.

For present purposes, however, it suffices to reiterate my conclusion that the plaintiffs have a strong case on the merits, and to note the overwhelming disparity of harm between the harm which would ensue from a grant of the stay, and the virtual absence of harm from denial of a stay pending final hearing. The application for stay will be denied.

An Order follows.

