Massachusetts Supreme Court Awards Treble Damages to Unregistered M&A Broker

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NOTE: *I am not an attorney, and this is not intended to be legal advice, nor is it the official position of any group or professional association. It is merely my personal interpretation of a recent court ruling.*

On March 20, 2020, the Massachusetts Supreme Court awarded treble damages totaling more than $990,000 to an unregistered M&A intermediary who had been engaged to raise capital for his client's planned acquisition.

Background: Consultant brought action against customer, alleging breach of contract to source capital and structure financing transactions from agreed-upon target investors or lenders, breach of implied covenant of good faith and fair dealing, and violations of unfair or deceptive trade practices act. Jury rendered verdict for consultant.

Upon appeal the Superior Court judge set aside the jury verdict and vacated the jury award in its entirety, concluding that consultant had been required to register as a broker-dealer, and its failure to do so rendered the contract invalid and unenforceable.

Upon appeal to the Massachusetts Supreme Court, the judge concluded that consultant's contract did NOT trigger an obligation to register as a broker-dealer. Ergo, the jury award for breach of the enforceable contract, breach of the implied contract of good faith and fair dealing, and treble damages must be reinstated.

The judge noted that under its contract, consultant was to "serve as a consultant and advisor" to client in the acquisition of target, and the "financing transactions" necessary to "facilitate" the acquisition. Consultant was to "source capital" from "agreed-upon target investors and/or lenders" and assist client in 'structuring, financing transactions" and "facilitating and participating in meetings and due diligence with capital sources." If consultant succeeded in finding sources of capital that ultimately were accepted by client and provided capital for the final acquisition, consultant would earn a commission commensurate with that amount of capital. If consultant did not introduce any sources of capital that were ultimately used, but introduced at least 10 "qualified sources of capital," it would earn an "advisory fee" of $330,000.

Client ultimately completed acquisition of target with a financial partner NOT introduced by consultant, and took the position that consultant earned neither a commission nor an advisory fee.

The judge ultimately concludes that "the contract by its terms does not require a transaction in securities." The judge goes on to observe that in recent years "there has been considerable evolution at the Federal level regarding bespoke investment transactions similar to the ones at issue in this case." He specifically cites the [M&A Broker] No Action letter issued by the Securities and Exchange Commission (SEC) stated that the SEC would not require broker-dealer registration where a person facilitates the sale of a privately held business, provided the circumstances of the transaction mitigated the risks inherent in a typical transaction in securities. The no-action letter recognizes that financing transactions resembling those at issue in the present case may not implicate the concerns that motivate broker-dealer registration requirements."

The judge concludes "that the contract, on its face, does not require [consultant] to 'effect' transactions in 'securities'. As the purported obligation to register as a broker-dealer was the sole basis for the judge's decision that [consultant] could not maintain its breach of contract and [other] claims, the judge's decision to vacate and set aside the jury verdict was erroneous."

This decision by the Massachusetts Supreme Court is clearly another milestone in our long journey to clarify - and hopefully, simplify - when does an M&A intermediary legally need to be securities licensed. But our journey won't be complete unless and until we can codify this regulatory relief in federal securities law.

HR 609, The Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act of 2019, currently before the Congress will do just that.

Click here

To read the complete text of:

Massachusetts Supreme Court Ruling in NTV Management v. Lightship Global Ventures

To read the complete text of:

HR 609, The Small Business Mergers, Acquisitions, Sales and Brokerage Simplification Act of 2019

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With over 30 years of experience in corporate management with companies such as 3M, Bemis Packaging, GE Major Appliance, Hillenbrand Industries, Batesville Casket, and Premier Bedding, and 20+ years in marketing and strategic planning, Mike Ertel brings the expertise to confidentially market businesses to serious and well-qualified prospects, and to work closely with other trusted advisers to maximize the net proceeds from the largest and most significant transactions in many business owners' careers. Mike Ertel holds several certifications including Certified Business Intermediary (CBI), M&A Master Intermediary (M&AMI) and Certified M&A Advisor (CM&AA). Mike can be reached at ***mertel@transworldma.com***