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5th Circ. Revives Insurance Adjuster's Suit Over Soured Deal

By **Jeff Sistrunk**

Law360 (August 20, 2018, 11:07 PM EDT) -- A split Fifth Circuit on Friday revived insurance adjuster IAS Services Group LLC's claim that the owner of another adjuster fraudulently misrepresented his firm's future prospects to induce IAS to buy the business for \$3.6 million, but affirmed the dismissal of IAS' breach-of-contract claim.

In a 2-1 opinion, a panel of the appellate court found that a Texas federal judge had erroneously dismissed IAS' fraudulent inducement claim against Jim Buckley & Associates Inc. and its eponymous owner. IAS has alleged that Buckley exaggerated expectations for his firm's future growth to convince IAS to go through with its acquisition of JBA in 2011.

While the trial court found that IAS failed to provide sufficient facts and context to support its allegations regarding Buckley's purported misrepresentations — such as his remark that JBA was the "number one" adjusting firm for insurer QBE, when that allegedly had not been the case for years — the Fifth Circuit panel held otherwise.

"Under the circumstances, the allegations are sufficiently particular to 'state a claim to relief that is plausible on its face,' and to satisfy Rule 9(b)'s purpose of weeding out strike suits and fishing expeditions," Circuit Judge Stephen A. Higginson wrote for the majority, referring to the pleading requirements under Rule 9(b) of the Federal Rules of Civil Procedure.

The majority said the lower court was right, however, to rule in Buckley's favor on IAS' breach-of-contract claim, given that IAS hadn't provided evidence showing that it suffered damages due to any breach of the purchase agreement by Buckley.

The seeds of the dispute were sown in 2010, when Texas-based IAS identified California-based JBA as a potential acquisition target. Court papers indicate that the two firms signed a letter of intent in June 2011. While performing due diligence, IAS discovered that about 45 percent of JBA's revenues were attributable to the firm's work on behalf of QBE, according to court documents.

Buckley told IAS that his business was QBE's "number one" adjustment firm, outperforming the insurer's eight other vendors, and further represented that the firm's revenues were likely to grow in the future, court papers state. But IAS later alleged that Buckley's statements were false, because in mid-2011 JBA was in fact ranked eighth out of QBE's vendors, as reflected in an internal memo circulated at the firm.

IAS acquired JBA in October 2011, agreeing to pay \$2.4 million at closing plus \$1.2 million through a note payable in five equal annual installments, according to court documents. In addition, IAS brought Buckley onboard to work for five years at \$250,000 per year, court

papers say.

Problems began to arise almost immediately after the acquisition, according to IAS. One week after the deal closed, QBE terminated its contract with JBA, and by 2014, IAS had suffered \$950,000 in losses from the acquired firm's division, court documents say.

IAS terminated Buckley for cause — and without severance pay — in 2014 based on his failure to get consent from QBE to assign the insurer's contract with JBA to IAS, according to court papers. Shortly thereafter, IAS filed suit against Buckley and his firm in Texas federal court, asserting several claims for fraud and breach of contract.

The trial court dismissed the fraud-based claims, and the case proceeded to a bench trial on IAS' breach-of-contract claim. At trial, the court ruled in Buckley's favor and awarded him about \$296,000 in severance pay, prompting IAS to appeal to the Fifth Circuit.

Contrary to the lower court's holding, the appellate majority found that IAS included enough facts in its suit to indicate when and where Buckley made the alleged misrepresentations, and to support the position that IAS had relied upon those misrepresentations when deciding to acquire JBA. For instance, IAS claimed that Buckley said his firm was QBE's "number one" vendor during the 60-day period following the signing of the letter of intent in June 2011, according to the opinion.

"Here, the timing and content of the alleged misrepresentation support an inference of reliance; the complaint alleges that the 'number one' vendor statement was made during the time in which the purchase agreement was being finalized and just months before it was executed," Judge Higginson wrote.

With respect to IAS' breach-of-contract claim, though, the panel said the lower court made the right call. IAS claimed that Buckley had breached the terms of the asset purchase agreement by executing the deal without obtaining QBE's consent to assign JBA's contract with the insurer to IAS.

But the appellate panel said IAS had failed to set forth any evidence indicating it suffered damages due to Buckley's alleged breach, because QBE had apparently been planning on severing ties with some of its vendors before IAS acquired JBA.

"There was evidence presented at trial that QBE's decision to terminate its relationship with Buckley & Associates — and, by extension, IAS — was primarily the result of QBE's internal restructuring rather than Buckley's failure to obtain its consent prior to the assignment," Judge Higginson wrote.

Finally, the panel reversed the lower court's award of severance pay to Buckley, saying the award was improper because Buckley was required to execute a release and waiver of claims against IAS to obtain severance pay but did not do so.

In a partial dissent, Circuit Judge James C. Ho said he would have upheld the trial court's dismissal of IAS' fraudulent inducement claims.

"In my view, IAS has not pled its allegations with sufficient particularity," Judge Ho wrote.

Sidney Katherine Powell of Sidney Powell PC, who represents IAS, told Law360, "IAS is pleased with the court's recognition of its serious fraud claim against JBA and its reversal of the award of severance pay to which Mr. Buckley was not entitled."

"We look forward to taking the fraud claim to trial to demonstrate what really happened in this case and recover our substantial damages from Mr. Buckley's misrepresentations," Powell said in an emailed statement.

Counsel for Buckley declined comment.

Senior Circuit Judge Edith Brown Clement and Circuit Judges Stephen A. Higginson and James C. Ho sat on the appellate panel.

IAS is represented by Sidney Katherine Powell and Torrence Evans Lewis of Sidney Powell PC.

The Buckley parties are represented by David E. Keltner and Leslie Ritchie Robnett of Kelly Hart & Hallman LLP, Kendall M. Gray of Hunton Andrews Kurth LLP and Anthony Lawrence Cannon & Nelms PC.

The case is IAS Services Group LLC v. Jim Buckley & Associates Inc. et al., case number 17-50105, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Joe Phalon.

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