

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2001-019633

05/10/2004

HON. FRANK T. GALATI

CLERK OF THE COURT  
L. Muhammad  
Deputy

FILED: 05/11/2004

COMRISK INSURANCE INC

JAY A ZWEIG

v.

RICHARD WHISTON

JESS A LORONA

**MINUTE ENTRY**

On April 13 and 14, 2004, a bench trial was conducted. Each party submitted its proposed findings of fact and conclusions of law. The court has now read the exhibits and the applicable case law.

**FINDINGS OF FACT**

Although there was a dispute at trial over the exact meaning of the parties' "uncontested facts deemed material" portion of the joint pretrial statement, the court regards the following to be stipulated facts:

1. Richard Whiston was hired to do insurance carrier development, key customer contacts, and large case insurance sales in April 2000 by Comrisk Insurance, Inc. ("Comrisk"), an insurance intermediary and wholesaler.
2. Whiston worked for Comrisk from April 2000 through October 1, 2001, when he was terminated.
3. In June 2001, and thereafter, Whiston was instructed by Comrisk's President John Mathews and Vice President Sue Carroll to actively seek to place insurance business through managing general underwriters or directly with carriers who were not affiliated with TRU Services, Inc. Comrisk's management also instructed Whiston not to discuss Comrisk's business

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with TRU, to discontinue telephone contacts with TRU, and to conduct business with TRU in written form only.

4. Whiston disregarded these instructions and discussed Comrisk's confidential business plans and other proprietary information with Virginia Haines and other employees of TRU. Whiston also engaged in other inappropriate conduct, such as viewing pornographic material on the computer that he was assigned at Comrisk during and after work hours.

5. On October 1, 2001, when confronted with his inappropriate conversations with TRU and other unsatisfactory behavior, Whiston told Comrisk's management if it did not like the way that he had been acting, then Comrisk should fire him. He was discharged that day.

6. On the very next day after Whiston was terminated from Comrisk, he traveled to Chicago to attend the Self-Insured Institute of America ("SIIA") convention. There, Whiston was hired by a competitor of Comrisk (Thomas Duhr of) Commercial Group Insurance ("CGI").

7. Whiston then used his employment with CGI and his contacts with TRU to solicit and take customers and business from Comrisk. Whiston contacted Comrisk's brokers and insureds and worked in conjunction with CGI, TRU and others to move insurance business that had been written through Comrisk elsewhere. Whiston was compensated for this conduct.

8. Comrisk was damaged by this loss of business and loss of business goodwill.

The following are the court's findings from contested evidence:

9. Whiston worked for Comrisk in a key employment position and had responsibility for reinsurance sales, business development, and maintaining relationships with brokers, insurers, and managing general underwriters ("MGU").

10. Through his employment, Whiston had direct access to Comrisk's confidential and trade secret information regarding Comrisk's list of insurance brokers who did business with Comrisk; the list of insureds who worked with these brokers; the rates and pricing for insurance sold by Comrisk; information regarding the incumbent insurance carrier; information regarding effective and renewal dates of insurance policies; and claims and rate history (hereafter referred to as "Comrisk's trade secrets").

11. Comrisk's Trade Secrets to which Whiston had access through his employment with Comrisk have independent economic value and are not generally known to or readily ascertainable by proper means. Comrisk makes reasonable efforts to maintain the secrecy and confidentiality of Comrisk's Trade Secrets and does not share Trade Secrets with competitors, nor do competitors share such confidential information with Comrisk.

12. On October 2, 2001, Whiston was met at the Chicago airport by Thomas Duhr ("Duhr"), the President of CGI, a competitor of Comrisk. Over the next several days, Whiston

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and Duhr had conversations about Whiston coming to work for CGI, to be based in Arizona. Whiston represented to Duhr that Whiston could move a “block of business” from Comrisk to CGI.

13. After accepting employment with CGI, Whiston contacted brokers who had been working with Comrisk and stated that if those brokers wanted to renew their customers’ insurance policies with the incumbent, in-force insurance carrier, that those brokers would be required to place their business through Whiston and not through Comrisk.

14. In late October 2001, TRU terminated its business agreements with Comrisk and, with Whiston’s assistance, compelled brokers and insured, who wished to renew, to renew insurance policies originally placed through Comrisk only through Whiston, CGI and TRU, and not through Comrisk.

15. Comrisk sued TRU and its related entities for breach of contract on November 6, 2001.

16. Whiston contacted brokers, such as Robin Sylvia and Mark Matsock to tell them that Whiston had all of their insurance policy renewal information and that he, not Comrisk, was the source that these brokers must work with to renew insurance policies.

17. The timing of Whiston’s activities in October, November, and December 2001 was particularly destructive to Comrisk’s ability to renew its business, because a significant portion of the block of business insurance policies that Whiston was seeking to take from Comrisk to move to CGI or TRU was due to renew effective January 1, 2002.

18. In many instances, Comrisk did not have a reasonable opportunity to find alternative insurance carriers who could match the pricing that had previously been by the incumbent insurance carriers provided through Comrisk and, as a result, brokers such as Robin Sylvia moved significant accounts, such as the Venetian Casino Resort, L.L.C., from Comrisk to Whiston, CGI and TRU.

19. Other insureds whose reinsurance policies Whiston transferred from Comrisk to CGI and TRU included: City of Henderson, Nevada; Imperial Palace Hotel & Casino; Spectrum Restaurant Group; American Restaurant Group (ARG); Bianchi International; LabCorp; and Omaha Tribe of Nebraska.

20. Whiston earned at least \$117,674.95 as a result of substituting himself for Comrisk or these insurance renewal transactions, which Comrisk would have otherwise reasonably expected to keep.

21. Whiston’s use of Comrisk’s trade secrets involving broker contacts, insurance policy effective and renewal dates, claims and rate history, pricing and rates, and the relationship

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with the incumbent insurance carriers through TRU was the means that Whiston used to move the Comrisk "block of business" from Comrisk to CGI and TRU.

22. At the time of his departure from Comrisk, Whiston deleted information from his office computer relating to insurance policy renewals and improperly took from Comrisk the confidential contents from a rolodex containing a list of compilation of Comrisk's brokers, insureds, and insurance carriers.

23. Whiston also obtained insurance policy renewal information and had Comrisk renewal rates and documents sent directly to Whiston and not provided to Comrisk, which put Comrisk at a significant and unfair business disadvantage in Comrisk's efforts to renew business that Comrisk had developed through years of time and investment.

24. Whiston's acts in misappropriating Comrisk's business and trade secrets were done willfully and maliciously with a conscious disregard of the substantial harm that Whiston's conduct would do to Comrisk's business.

25. Comrisk's damages include Comrisk's loss of profits on business that Whiston misappropriated, the loss of broker relationship, and the diminution in value of Comrisk's business.

CONCLUSIONS OF LAW

1. Comrisk's clientele of brokers and ongoing business contract was a valuable asset which was developed and acquired by Comrisk over a period of time and protectable as a property interest.

2. Whiston's conduct in using Comrisk's confidential and proprietary business information and trade secrets to solicit and take customers and business from Comrisk constituted unlawful and unfair competition.

3. By: (1) using Comrisk's trade secrets for his benefit and to Comrisk's detriment, and (2) communicating to brokers that renewals of incumbent insurance policies must come through Whiston instead of Comrisk, which resulted in Comrisk losing insurance renewal business, Whiston interfered with Comrisk's contracts and prospective business advantage with brokers and their insureds.

4. Through his employment at Comrisk, Whiston knew about the insurance contracts in which Comrisk had participated and the prospective business expectancies and advantages that Comrisk anticipated in renewing these contracts.

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5. Whiston intentionally interfered with Comrisk's contractual relationships with Robin Sylvia and other insurance brokers, which caused a termination of those contractual relationships.

6. Whiston's conduct was improper and Comrisk was damaged as a result.

7. Comrisk is entitled to recover the net benefit that Comrisk would have received had Comrisk's insurance contracts been renewed.

8. Comrisk is entitled to recover damages for Whiston's misappropriation of Comrisk's trade secrets. A.R.S. §44-403.

9. Whiston's willful and malicious misappropriation of Comrisk's trade secrets allows Comrisk to recover exemplary damages in an amount up to double its compensatory damages, in addition to its actual damages. A.R.S. §44-403(B).

10. An award of punitive damages is a matter of discretion for the trier of fact. Nelson v. Flashberg, 101 Ariz. 355, 419 P.2d 514 (1966). Punitive damages punish wrongdoers and deter others from engaging in similar conduct. Medasys Acquisition Corp. v. SDMS, 203 Ariz. 420, 55 P.3d 763 (2002).

11. Based upon the evidence presented at trial, the court FINDS that Comrisk is entitled to compensatory damages in the amount of \$150,810.00. The court limits compensatory damages to the year 2002. Evidence of subsequent years' damages is too speculative in this competitive industry.

12. Plaintiff has proved by clear and convincing evidence that Whiston's conduct was undertaken to unfairly compete and to interfere with Comrisk's business for Whiston's benefit and with a conscious or reckless disregard of the substantial harm that Whiston's conduct would do to Comrisk. Whiston's conduct was willful and malicious and Comrisk is entitled to punitive damages from Whiston to punish him and to set a deterrent example for others in the amount of \$117,000.00.

13. Based upon Whiston's willful and malicious misappropriation of Comrisk's trade secrets, the court FINDS that Comrisk is also eligible for an award of statutory exemplary damages; however, in light of the court's award of punitive damages, the court declines to award statutory exemplary damages.