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The *WRNewswire* is created exclusively for AALU Members by insurance experts led by Steve Leimberg, Lawrence Brody and Linas Sudzius. The *WRNewswire* provides timely reports and commentary on tax and legal developments important to AALU members, clients and advisors, delivered to your inbox as they happen.

TOPIC: Lack of Valid Buy-Sell Agreement Leaves Decedent's Family Frustrated

CITE: *Selzer v. Dunn*, 2014 WL 356992, No. 12–12–00150–CV (Ct. App. Tex. Jan. 31, 2014).

SUMMARY: Co-shareholders in a closely held business purchased insurance on each other's lives, arguably for the purpose of funding a death-time buyout of shares. However, no binding buy-sell agreement was ever signed. When one of the owners of the business died, the proceeds were paid to the surviving shareholder. The trial court and appeals court both concluded that the surviving owner was not required to use the life insurance proceeds for the purpose of purchasing the decedent's stock.

BACKGROUND: Robby Dunn and Michael Varner were each fifty percent shareholders in Cleanline Products, Inc.

In 2008, Lincoln Financial Life Insurance Company issued a two million dollar life insurance policy on Varner, naming Dunn as the sole beneficiary. It also issued a two million dollar life insurance policy on Dunn, naming Varner as the sole beneficiary.

Cleanline paid the premiums on both policies. Varner died in 2010.

Tracey Selzer, as administrator of Varner's estate, asserted a claim to the insurance policy proceeds.

Dunn filed a petition for declaratory judgment requesting the court declare him the sole beneficiary of the policy. Selzer filed counterclaims for breach of contract and breach of fiduciary duty, requesting the court render judgment declaring either that Varner's estate was the exclusive beneficiary of the policy or, if Dunn was the exclusive beneficiary, that he held the insurance proceeds in constructive trust for the estate.

The trial court granted Dunn's motion for summary judgment. It declared that Dunn was the sole and exclusive beneficiary of the policy and entitled to all proceeds of the policy. Further, the court ordered that Selzer take nothing on her counterclaims.

Selzer appealed the decision.

FACTS: Dunn and Varner purchased insurance on each other's lives with the intent of protecting each other from the financial and related impacts of the death of a co-owner. Their advisors brought up the idea of a cross-purchase buy-sell agreement. While the co-shareholders discussed the fact that they *needed* a buy-sell agreement, and the attorney for the business originally created three versions of a proposed cross-purchase agreement, *none* of these were ever *executed* by the parties.

Selzer argued that the decedent-insured's estate rather than Dunn was entitled to all of the insurance policy proceeds, in exchange for Varner's stock in the company. Dunn asserted that there was no breach of contract – because there never *was* a (buy-sell) contract.. Specifically, he contended that the requisite elements of a binding contract were absent, i.e. there was no evidence of (1) an offer, (2) an acceptance, (3) a meeting of the minds, (4) execution, or (5) delivery. He argued that, although a buy-sell agreement was discussed, the specific terms of the buyout were never agreed upon, especially the price to be paid for the shares.

The court stated that the four essential elements of any breach of contract claim are (1) the existence of a valid contract, (2) performance or tendered performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages sustained by the plaintiff as a result of the breach.

The evidence upon which the trial court rendered summary judgment showed that Dunn and Varner never agreed to the number of shares the surviving partner would purchase nor to the price he would pay for those shares. Further, there was no

agreement that any portion of the proceeds would be given to the family of the deceased beyond what was required to purchase the deceased's shares.

Selzer, on behalf of Varner's estate, asserted that an *oral* contract existed and that a buy-sell agreement of some sort was a part of that agreement. Further, she argued, Dunn breached the contract when he refused to pay the life insurance proceeds to the estate in return for the stock the estate owned.

RESULT: The appeals court decided that the evidence did not show that Dunn and Varner had a meeting of the minds regarding the price to be paid for the deceased shareholder's shares or how many shares the survivor would purchase. Accordingly, it affirmed the decision of the trial court, and left the insurance proceeds in the hands of Dunn, the surviving shareholder.

RELEVANCE: The use of life insurance to help fund a business buyout is often an essential part of overall estate planning for the owners of a closely-held business.

Selzer v. Dunn is a reminder that the purchase of life insurance is only one part of the whole buy-sell picture. Agents need to follow through and be sure that their business owner clients actually enter into a valid and binding buy-sell agreement (and update them as needed) so that any life insurance death benefits *are* used for the intended purpose—i.e. to protect the family of the decedent, and to allow for as seamless as possible transition to successor ownership.

***WRNewswire* #14.02.12 was written by Linas Sudzius of Advanced Underwriting Consultants.**

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