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Home Health Care Companies Protected by Noncompete Pacts

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The referral sources for home health care companies can be protected by noncompete agreements because they qualify as a legitimate business interests under the state law on restrictive covenants in contracts, the Florida Supreme Court ruled.

In a decision that resolved a split between District Courts of Appeal on whether referral sources meet the definition of a "legitimate business interest" under a 2016 law, the high court ruled they can qualify "depending upon the context and proof adduced."

> "There is an indispensable relationship between referral sources and their undisputed legitimate business interests in relationships with patients" protected by Section 542.335(1)(b)3, Justice R. Fred Lewis wrote for the unanimous court. "Likewise, it may be noted that referral sources are somewhat analogous to customer goodwill, which is expressly protected."

The opinion is expected to resonate both inside Florida's large home health care industry, which provides skilled nursing, physical therapy and other health services to homebound patients, and outside of it, because the decision makes clear that courts must assess proffered business interests under noncompetes — from any industry — on their own merits and not be limited by the examples of business interests named in the statute.

"Certain industries, such as home health services, present special facts where protecting referral sources may be necessary to prevent unfair competition," Lewis wrote in the Sept. 14 decision. "Because the statute protects more business interests

than those specifically listed, courts must necessarily engage in fact- and industry-specific determinations when construing non- enumerated interests."

Miami attorney Eric Ostroff, writing on his blog "Protecting Trade Secrets," said, "The opinion has far-reaching implications beyond cases involving referral sources. It makes clear that courts should engage in industry-specific, context-based analysis" in every instance.

Ostroff of Meland Budwick, P.A. noted Lewis's point that the law uses the language "includes but not limited to" atop its list if legitimate business interests.

Attorney Margaret Cooper, who represented Elizabeth White in one of the cases, said, "The problem is there is not a clean answer for anybody." The partner at Jones, Foster, Johnston & Stubbs in West Palm Beach added, "The court came up with an intellectual resolution and not a practical resolution for the industry."

The opinion resolved a split issue between the Fourth and Fifth DCAs. In a 2015 decision in Mederi Caretenders Visiting Services of Southeast Florida v. White, the Fourth District ruled home health service referral sources counted as legitimate business interests, while the Fifth District said in its 2015 Hiles v. Americare Home Therapy decision rejected protection.

In facts underlying both lawsuits, it was undisputed that both people involved in the two cases "engaged in conduct in violation of their noncompete employment contracts by working for direct competitors of their prior employers within the noncompete territories during the relevant periods," Lewis wrote.

"In Florida, a contract providing restrictions on competition must involve a legitimate business interest" as defined by the law to be enforceable, he added.

Cultivating Referrals

Lewis also made it clear in a 25-page decision that, in the case of home health care companies, referral sources are a lifeblood of the business.

"To attract and develop their businesses, HHCs seek referrals from multiple patients' health care providers," he wrote. "HHCs employ marketing representatives whose primary roles are to cultivate relationships with referral sources."

He continued, “The importance of referrals to HHCs cannot be overstated. One HHC representative testified that without marketing representatives, ‘his company would no longer be viable.’ To facilitate their business, HHCs compile internal databases of referral source preferences, strategies and procedures, which the representatives utilize.”

In analyzing whether referral sources — and other industries’ business components — should be considered a legitimate business interest, Lewis repeatedly an individual analysis required at the trial court level.

“Sitting in a Tallahassee courthouse with a frozen record before us, we cannot precisely define the exact parameters of what constitutes a ‘legitimate business interest’ in the myriad of commercial disputes that may arise across this diverse state,” he wrote. “Instead, trial courts are well-positioned to construe the phrase to determine the legitimacy of a particular business interest — in conjunction with the industry context and evidence adduced. What is clear, however, is that the statute is not an exhaustive list of protected business interests. A plain reading of the statute mandates our holding.”

Ostroff noted in his blog article, “The opinion repeatedly references industry- specific determinations. Lawyers attempting to enforce a restrictive covenant should consider what types of industry-specific evidence is necessary to justify the restrictive covenant.”

The panel affirmed the Fourth District’s decision in Mederi Caretenders and quashed the Fifth District’s decision in Hiles.

Lawyers for the parties included Jane Kreusler-Walsh, a partner at the Law Office of Kreusler-Walsh, Compiani & Vargas in West Palm Beach, for White; Braxton Gillam IV, a partner at Milam Howard Nicandri Gillam & Renner in Jacksonville, for petitioner Americare Home Therapy Inc.; Patrick Muldowney, an Orlando partner at Baker & Hostetler for respondents Mederi Caretenders Visiting Services of Southeast Florida and Almost Family Inc.; and Keith Hesse, an Orlando partner at Shuffield, Lowman & Wilson, for respondent Carla Hiles.

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