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Florida Court Likens State's New Non-Compete Restriction to Swamp Monster

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Years ago, I clerked for an appellate judge who had a penchant for narrative writing. When given the right opportunity (i.e., a case involving a nighttime collision at sea), he couldn't help but lead off his opinion with, "It was a dark and stormy night." My former boss and mentor would love the recent non-compete opinion authored by the Northern District of Florida in the matter of 21st Century Oncology, Inc. v. Ashley Moody.

The tale begins with a recital of the horror classic The Creature from the Black Lagoon, in which a "prehistoric monster emerges from the fetid depths of a jungle swamp to terrorize a scientific expedition, kidnaps the girlfriend of one of the scientists, and is killed only after bringing the majority of the cast to various grisly ends." This description is not without purpose: the court observed that the movie was filmed only a few miles from the courthouse steps. More to the point, it carries the analogy by noting that "Plaintiff contends another monster has emerged," with the "primordial pool" played by the Florida Capitol and the "hadean hominid" played by Florida Statutes § 542.336.

Those familiar with nationwide non-compete law may recognize that, for good or ill, Florida has some of the most permissive laws in the country on the subject. Under Florida Statutes § 542.335, non-compete restrictions between employers and employees generally are enforceable, provided certain conditions are satisfied:

- The restrictions are reasonable in time, area, and line of business
- The restrictions are set forth in writing and signed by the person against whom enforcement is sought
- The party trying to enforce the covenants must demonstrate that the restraints are reasonably necessary to protect one or more legitimate business interests (with such interests including trade secrets, valuable confidential business information, substantial relationships with customers, customer goodwill and extraordinary training)

In 2019, the legislature narrowed the application of restrictive covenants for

certain physicians, adopting the following language in Florida Statutes § 542.336:

A restrictive covenant entered into with a physician who is licensed under chapter 458 or chapter 459 and who practices a medical specialty in a county wherein one entity employs or contracts with, either directly or through related or affiliated entities, all physicians who practice such specialty in that county is not supported by a legitimate business interest. The Legislature finds that such covenants restrict patient access to physicians, increase costs, and are void and unenforceable under current law. Such restrictive covenants shall remain void and unenforceable for 3 years after the date on which a second entity that employs or contracts with, either directly or through related or affiliated entities, one or more physicians who practice such specialty begins offering such specialty services in that county.

Essentially, the statute provides that there is no “legitimate business interest” to support a restrictive covenant for a physician specialist in any Florida county where one entity employs all of them.

The case at issue presented a textbook example of the purpose behind the new statute and illustrated its effect on non-competes. An oncology practice employed all nine radiation oncologists in Lee County, Florida. The practice was the only provider of radiation oncology services in Lee County and all of its physicians had non-competes. When five of the oncologists severed their relationship and started to practice radiation oncology in Lee County on their own, the practice sued and sought injunctive relief.

The court denied the injunction because of the statute, finding the practice could not show that it had a substantial likelihood of success on the merits. Among other things, the court shot down a constitutional challenge to the statute. While it conceded that the statute had an impact on the parties’ ability to contract (voiding the non-competes was a significant impairment on their employment agreements), it did not render the entirety of the employment agreements valueless – just the non-competes or restrictive covenants. Nor was the court swayed by the policy arguments against the statute – it found that the statute served a legitimate public purpose.

Both this case and Florida’s new statute serve as an important reminder that companies which use restrictive covenants must keep abreast of the ever-changing legal landscape in this area. Otherwise their restrictive covenants are liable to be devoured by the swamp monster.

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