

Nova Law Review

Volume 35, Issue 1

2010

Article 3

A Survey of Physician Non-Compete Agreements in Employment Under Florida Law

John Sanchez*

*

Copyright ©2010 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

A SURVEY OF PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT UNDER FLORIDA LAW

JOHN SANCHEZ*

| | | |
|------|--|----|
| I. | INTRODUCTION | 64 |
| II. | A BRIEF HISTORY OF FLORIDA NON-COMPETE LAW | 65 |
| III. | PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT | 70 |
| IV. | SECTION 542.335..... | 74 |
| A. | <i>Non-Compete Agreements Must Be in Writing</i> | 74 |
| B. | <i>What Constitutes a “Legitimate Business Interest?”</i> | 74 |
| 1. | Valuable Confidential or Professional Information That Otherwise Is Not a Trade Secret..... | 74 |
| 2. | Substantial Relationships with Specific Prospective or Existing Customers, Patients, or Clients..... | 75 |
| 3. | Customer, Patient, or Client Goodwill..... | 78 |
| 4. | Extraordinary or Specialized Training..... | 79 |
| C. | <i>Employer’s Prima Facie Case</i> | 79 |
| 1. | Rebuttable Presumptions | 79 |
| 2. | Rules of Construction | 80 |
| D. | <i>Employee’s Burden of Proof</i> | 80 |
| E. | <i>Employee Defenses</i> | 80 |
| 1. | Employer’s Breach of Contract..... | 81 |
| 2. | Employer’s Unclean Hands | 82 |
| 3. | Intervening Changes in the Employee’s Job Duties | 82 |
| 4. | Waiver..... | 82 |
| 5. | Lack of Consideration..... | 82 |
| F. | <i>Remedies</i> | 83 |
| 1. | Injunction | 83 |
| a. | <i>Irreparable Injury and Inadequate Legal Remedy</i> ... | 84 |
| b. | <i>No Balancing of the Hardships</i> | 84 |
| c. | <i>Substantial Likelihood of Success on the Merits</i> | 85 |
| d. | <i>The Public Interest</i> | 86 |
| e. | <i>Injunction Bond</i> | 89 |
| 2. | Modifying Overbroad, Overlong, or Unreasonable Terms in the Non-Compete Agreement: Section 542.335(1)(c) | 89 |
| 3. | Damages..... | 91 |

* B.A. Pomona College (1974) cum laude; JD, University of California (Berkeley) (1977); LLM, Georgetown Law School (1984). Professor of Law at NSU since 1988.

| | | |
|----|---------------------------------|----|
| a. | <i>Liquidated Damages</i> | 91 |
| b. | <i>Actual Damages</i> | 92 |
| c. | <i>Attorney's Fees</i> | 93 |
| 4. | Other Remedies..... | 94 |
| V. | CONCLUSION | 94 |

I. INTRODUCTION

“Under early English common law, noncompetition clauses . . . were considered per se invalid on the ground that they caused undue personal hardship and public injury.”¹ While several states continue to ban such restrictive covenants,² most states, Florida included,³ generally enforce non-compete agreements in employment.⁴

This survey aims at assessing section 542.335 of the *Florida Statutes* through the lens of a physician non-compete agreement. While some states have invalidated such agreements on public policy grounds either by statute⁵ or by common law,⁶ Florida usually upholds such agreements and has always assessed their validity under the same statute governing all employment non-compete agreements, section 542.335.⁷

Part II provides a brief history of Florida non-compete law, during which time the law has seesawed between favoring and disfavoring such restrictive covenants. Part III gives an overview of physician non-compete agreements generally and offers reasons for either invalidating such covenants altogether or narrowly restricting their impact on public policy grounds. Part IV assesses how physician non-compete agreements have been

1. Derek W. Loeser, *The Legal, Ethical, and Practical Implications of Noncompetition Clauses: What Physicians Should Know Before They Sign*, 31 J.L. MED. & ETHICS 283, 285 (2003).

2. See, e.g., CAL. BUS. & PROF. CODE § 16600 (West 2009); MONT. CODE ANN. § 28-2-703 (2009); N.D. CENT. CODE § 9-08-06 (2009); OKLA. STAT. tit. 15, § 217 (2010).

3. FLA. STAT. § 542.335(1) (2010).

4. William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 194 (2002).

5. See, e.g., COLO. REV. STAT. § 8-2-113(3) (2009); DEL. CODE ANN. tit. 6, § 2707 (2010); MASS. GEN. LAWS ch. 112, § 12X (2009).

6. E.g., *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 683 (Tenn. 2005) (relying on public policy, the Supreme Court of Tennessee banned non-compete agreements between physicians and their private employers), *superseded by statute*, Act of June 21, 2007, 2007 Tenn. Pub. Acts 487 (codified at TENN. CODE ANN. § 63-1-148).

7. See, e.g., *4UOrtho, L.L.C. v. Practice Partners, Inc.*, 18 So. 3d 41, 43-44 (Fla. 4th Dist. Ct. App. 2009); *Alvarez v. Rendon*, 953 So. 2d 702, 712-13 (Fla. 5th Dist. Ct. App. 2007); *Univ. of Fla., Bd. of Trs. v. Sanal*, 837 So. 2d 512, 515-16 (Fla. 1st Dist. Ct. App. 2003).

analyzed under Florida's current non-compete statute, section 542.335, and explores how they unduly favor employers and unfairly treat physician-employees bound by restrictive covenants. This article concludes that physician non-compete agreements should be construed as narrowly as lawyer non-compete agreements are construed in Florida and for analogous public policy reasons: The physician-patient relationship is entitled to the same respect that the lawyer-client relationship is owed under Florida law.

II. A BRIEF HISTORY OF FLORIDA NON-COMPETE LAW

A Florida Bar Journal article, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*,⁸ co-authored by the Florida Senate, sponsor of the 1996 non-compete statute section 542.335 of the *Florida Statutes*⁹ governing restrictive covenants in employment to the present day, and by the Florida Bar's principal drafter of the statute, (hereafter referred to as Grant and Steele), traced the history of non-compete agreements under Florida law.¹⁰ The history can be divided into the following time periods: pre-1953, when restrictive covenants were interpreted under the common law doctrine known as the "rule of reason," which generally disfavored non-compete agreements in employment;¹¹ 1953–1990, when such covenants were governed by section 542.12, "the first Florida statute to explicitly authorize contractual restrictions upon competition;"¹² 1990–1996, when restrictive covenants were governed by section 542.33 and were strictly construed;¹³ and finally, 1996 to the present, during which time restrictive covenants have been governed by section 542.335.¹⁴

8. John A. Grant, Jr. & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition" Approach for the 21st Century*, 70 FLA. B.J. 53 (1996).

9. FLA. STAT. § 542.335 (2010).

10. See generally Grant & Steele, *supra* note 8.

11. See, e.g., *Love v. Miami Laundry Co.*, 160 So. 32, 34 (Fla. 1935) (holding the enforcement of the non-compete agreement may "mean that the . . . employee cannot procure other employment" from a competitor covering the territory and serving the customers which were covered and served by the employer, "and that he, together with his family, will become a charge on the public" and "[t]hat courts are reluctant to uphold contracts whereby an individual restricts his right to earn a living at his chosen calling is well established.") (internal quotations omitted).

12. Grant & Steele, *supra* note 8, at 53.

13. See, e.g., *Hapney v. Cent. Garage, Inc.*, 579 So. 2d 127, 131 (Fla. 2d Dist. Ct. App. 1991) (finding that section 542.33 of the *Florida Statutes*, allowing for noncompetition agreements, is "in derogation of the common law and must be strictly construed"), *disapproved on other grounds by Gupton v. Vill. Key & Saw Shop, Inc.*, 656 So. 2d 475 (Fla. 1995).

14. See FLA. STAT. § 542.335.

Non-compete agreements are governed by the law “in effect at the time the agreement was entered into.”¹⁵

The attitude of Florida courts toward non-compete agreements pre-1953 is illustrated in *Love v. Miami Laundry Co.*,¹⁶ where the Supreme Court of Florida refused, on public policy grounds, to enjoin former employees from engaging in the service of driving laundry trucks belonging to competitors of their former employer over certain routes in Dade County, Florida.¹⁷ As *Love* demonstrates, “Florida courts displayed an extreme distaste for agreements that restricted competition, especially agreements between employers and employees.”¹⁸

From 1953 to 1990, restrictive covenants in Florida were governed by section 542.12.¹⁹ According to the Supreme Court of Florida, the goal of section 542.12 was to “protect the legitimate interests of the employer.”²⁰ In addition, “[t]he statute is designed to allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them.”²¹ Twice, the Supreme Court of Florida upheld the constitutionality of section 542.12 against equal protection and due process challenges.²²

Grant and Steele claim, “In the late 1970s and throughout the 1980s, the Florida courts lost sight of the original purpose of the statute and increasingly employed a judicial approach to such agreements that emphasized a ‘contract-oriented’ methodology and that abandoned the original ‘unfair competition’ theory of analysis and enforcement.”²³ Grant and Steele criticize the pre-1990 period on the ground that “the ‘contract-oriented’ approach . . . led to a hodge-podge of conflicting and unprincipled decisions.”²⁴ By way of contrast, however, in *King v. Jessup*,²⁵ the Fifth District Court of Appeal made clear that pre-1990, “a judicially-created presumption of irreparable [harm] upon breach [of non-compete agreements] evolved.”²⁶ In *First Miami*

15. See *Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 331 (Fla. 3d Dist. Ct. App. 1997), *superseded by statute*, Act Effective July 1, 1996, ch. 96-257, §§ 1.3, 1996 Fla. Laws 983, 987.

16. 160 So. 32 (Fla. 1935).

17. *Id.* at 33–34.

18. Grant & Steele, *supra* note 8, at 53.

19. *Id.*

20. *Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So. 2d 532, 534 (Fla. 1966).

21. *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11, 12 (Fla. 1974).

22. *Capelouto*, 183 So. 2d at 534; see *Standard Newspapers, Inc. v. Woods*, 110 So. 2d 397, 399–400 (Fla. 1959).

23. Grant & Steele, *supra* note 8, at 53.

24. *Id.*

25. 698 So. 2d 339 (Fla. 5th Dist. Ct. App. 1997) (per curiam).

26. *Id.* at 340.

Securities, Inc. v. Bell,²⁷ the Fourth District Court of Appeal noted that before 1990, “an employee’s only challenge, based on unreasonableness, had to focus on the time and geographic area, and a presumption of irreparable harm flowed from any violation of the agreement.”²⁸

In 1990, the Florida Legislature amended section 542.33 of the *Florida Statutes*.²⁹ Grant and Steele criticize section 542.33 because

[it] created a standardless “unreasonableness” defense; it created a standardless “contrary to the public health, safety or welfare” defense; it shifted the focus of enforcement to “irreparable injury;” it erroneously suggested that a “customer list” need not be a trade secret to be granted a measure of protection by contract; and it specified narrow instances of presumptive “irreparable injury.”³⁰

In short, Grant and Steele insist that section 542.33 “nowhere specifies any objective standard for the courts to use in determining the ‘reasonableness’ of a restriction upon competition.”³¹ In other words, Grant and Steele reject the common law rule of reason that many states rely upon in assessing the validity of restrictive covenants in employment agreements.³²

In support of Grant and Steele’s assessment of the 1990 non-compete statute, the Fifth District noted that section 542.33 “eliminated the judicial presumption by requiring a showing of irreparable injury before an injunction could be entered.”³³

King illustrates how, during the period between 1990 and 1996, it was harder for employers to enforce non-compete agreements by injunction.³⁴ In *King*, the Fifth District Court of Appeal upheld the trial court’s finding that the employer failed to show that he suffered irreparable injury stemming from the physician-employee’s breach of a covenant not to compete.³⁵

27. 758 So. 2d 1229 (Fla. 4th Dist. Ct. App. 2000) (per curiam).

28. *Id.* at 1229 (citing *Gupton v. Vill. Key & Saw Shop, Inc.*, 656 So. 2d 475, 478 (Fla. 1995)).

29. Act effective June 28, 1990, ch. 90-216, 1990 Fla. Laws 1607 (amending FLA. STAT. § 542.33 (1989)).

30. Grant & Steele, *supra* note 8, at 53 (quoting Act effective June 28, 1990, ch. 90-216, 1990 Fla. Laws 1607, 1607).

31. *Id.* at 54.

32. *See id.* at 55.

33. *King v. Jessup*, 698 So. 2d 339, 341 (Fla. 5th Dist. Ct. App. 1997) (per curiam).

34. *See id.* at 341.

35. *Id.* at 341.

In *Hapney v. Central Garage, Inc.*,³⁶ the Second District Court of Appeal noted how the 1990 non-compete statute, section 542.33 changed the 1953 non-compete statute, section 542.12:

We view the sweeping impact of this amendment to be threefold. First, the presumption of irreparable injury . . . is strictly curtailed. Second, a test of reasonableness is injected into the enforcement process because the amendment prohibits the enforcement of an unreasonable covenant. . . . “In determining the reasonableness of such an agreement, the courts employ a balancing test to weigh the employer’s interest in preventing the competition against the oppressive effect on the employee.” . . . [But] this balancing test [is] limited . . . to duration and geographic area. . . . Third, the legislature has specifically identified and segregated for special treatment covenants which protect trade secrets and customer lists and prohibit solicitation of existing customers³⁷

Finally, since July 1, 1996, restrictive covenants in Florida have been governed by section 542.335.³⁸ Unsurprisingly, as the sponsors and drafters of the statute, Grant and Steele think it strikes the proper balance between protecting employers’ “legitimate business interests” and any infringement upon employees’ rights to make a living.³⁹ According to the Fifth District, “[s]ection 542.335 contains a comprehensive framework for analyzing, evaluating and enforcing restrictive covenants” contained in employment contracts.⁴⁰

The thesis of this article is that while section 542.335 of the *Florida Statutes* may well have reduced uncertainty when it comes to interpreting restrictive covenants in employment, it unduly understates the interests of employees in the following four ways:

36. 579 So. 2d 127 (Fla. 2d Dist. Ct. App. 1991), *disapproved on other grounds by* *Gupton v. Vill. Key & Saw Shop Inc.*, 656 So. 2d 475, (Fla. 1995).

37. *Id.* at 133–34 (quotations omitted). Compare FLA. STAT. § 542.33 (1989 & Supp. 1990), with FLA. STAT. § 542.12 (1953) (renumbered 1980).

38. See FLA. STAT. § 542.335 (2010).

39. Grant & Steele, *supra* note 8, at 55. The term “legitimate business interest” seems to have originated in Florida from a Second District Court of Appeal decision. *Hapney*, 579 So. 2d at 134 (holding that a former employee should be barred from competing only if the employer had a “legitimate business interest” in avoiding such competition); see also Stanley H. Eleff, *Covenants Not to Compete Can Have Their Limitations*, TAMPA BAY BUS. J. (Mar. 29, 2004, 12:00 AM), <http://tampabay.bizjournals.com/tampabay/stories/2004/03/29/focus4.html?t=printable>.

40. *Henao v. Prof'l Shoe Repair, Inc.*, 929 So. 2d 723, 726 (Fla. 5th Dist. Ct. App. 2006).

1) It shifts the usual burden of proving irreparable injury from the employer to the employee in assessing whether an injunction should be granted;⁴¹

2) “In determining the enforce[ment] of a restrictive covenant, a court [s]hall not consider any individualized economic or other hardship that might be caused to the [employee];”⁴² in other words, the usual balancing of hardships prong⁴³—assessing whether an injunction should be issued—has been altogether abandoned;⁴⁴

3) “A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter . . .;”⁴⁵ and

4) While paying lip service to the “public interest” prong for assessing the validity of non-compete agreements, in fact, the public interest rarely, if ever, has been relied upon to invalidate such restrictive covenants.⁴⁶ Specifically, section 542.335 “gives absolutely no weight to how physician non-compete agreements cause potential harm to patient choice and to the professional and ethical obligations of physicians to their patients.”⁴⁷

Which party bears the burden of proof on an issue is often outcome determinative: Under section 542.33, the employer bore the burden of proving irreparable injury, a critical element in an effort to obtain an injunction.⁴⁸ By contrast, under section 542.335, the former employee bears the burden of proving that a violation of a non-compete agreement *does not* cause irreparable injury.⁴⁹ As the Second District Court of Appeal put it:

[an employer] seeking to enforce a restrictive covenant by injunction need not directly prove that the [former employee’s] specific activities will cause irreparable injury if not enjoined. Rather, the statute provides that “[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant.”⁵⁰

41. See FLA. STAT. § 542.335(1)(j).

42. *Id.* § 542.335(1)(g)1.

43. *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11, 12 (Fla. 1974).

44. See FLA. STAT. § 542.335(1)(g)1, (1)(i)–(j).

45. *Id.* § 542.335(1)(h).

46. See S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 194 n.23 (2006).

47. See *id.*; see generally FLA. STAT. § 542.335.

48. See FLA. STAT. § 542.33(2)(a) (1989 & Supp. 1990).

49. *Id.* § 542.335(j) (2010).

50. *Am. II Elecs., Inc. v. Smith*, 830 So. 2d 906, 908 (Fla. 2d Dist. Ct. App. 2002) (quoting FLA. STAT. § 542.335(1)(j) (2001)).

This key difference between the 1990 and 1996 statutes turns the common law of equity on its head. It is black letter law that the party seeking an injunction bears the burden of proving, among other things, that it will suffer irreparable injury if the injunction is denied.⁵¹

Even though no drafter of legislation can foresee all potential ambiguities in proposed bills, the current controversies over 1) whether referral doctors constitute a “legitimate business interest” under section 542.335;⁵² 2) whether attorney’s fees are recoverable from or by a prevailing non-party such as a rival employer;⁵³ and 3) when access to confidential information will support a broad restriction on former employees,⁵⁴ illustrates that uncertainty and ambiguity continues to plague even the best efforts of lawmakers to learn from the past.

III. PHYSICIAN NON-COMPETE AGREEMENTS IN EMPLOYMENT

The relative merits of physician non-compete agreements in employment may be summarized by comparing and contrasting the Supreme Court of New Jersey case of *Karlin v. Weinberg*,⁵⁵ and the Supreme Court of Arizona case of *Valley Medical Specialists v. Farber*.⁵⁶

Karlin involved “medical doctors engaged in the practice of dermatology.”⁵⁷ Dr. Weinberg’s employment contract contained clauses barring him, post-termination, from engaging in the practice of dermatology for five years within a ten-mile radius of the site of his previous employer.⁵⁸ Post-termination, Dr. Weinberg opened a competing dermatology practice “just a few doors” from his former employer where he treated sixty patients he had

51. *Hiles v. Auto Bahn Fed’n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1986) (per curiam).

52. *Fla. Hematology & Oncology Specialists v. Tummala (Tummala II)*, 969 So. 2d 316, 316–17 (Fla. 2007) (per curiam) (Lewis, C.J., dissenting) (quoting FLA. STAT. § 542.335(1)(b) (2004)).

53. *Compare Sun Grp. Enters., Inc. v. DeWitte*, 890 So. 2d 410, 412 (Fla. 5th Dist. Ct. App. 2004) (holding appellees were entitled to attorney’s fees), *with Bauer v. DILIB, Inc.*, 16 So. 3d 318, 320 (Fla. 4th Dist. Ct. App. 2009) (holding the plaintiff was not entitled to attorney’s fees).

54. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1235 n.12 (11th Cir. 2009).

55. 390 A.2d 1161 (N.J. 1978).

56. 982 P.2d 1277 (Ariz. 1999) (en banc).

57. *Karlin*, 390 A.2d at 1163.

58. *Id.* at 1164 (reviewing the merits of the case, despite the restrictive covenant being oral). Unlike Florida, which requires that non-compete agreements be in writing under section 542.335(1)(a) of the *Florida Statutes*, New Jersey recognizes and enforces oral restrictive covenants. *See id.*

previously treated while employed by Dr. Karlin.⁵⁹ Dr. Karlin sued, seeking both an injunction and damages.⁶⁰

The Supreme Court of New Jersey began its analysis by stating that:

[A]n employee's post-employment restrictive covenant is enforceable to the extent that it is reasonable under all the circumstances of the case. A post-employment restrictive covenant will be found to be reasonable when it protects the "legitimate" interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public⁶¹

The court proceeded to say that Dr. Karlin had:

[A legitimate] interest in protecting his ongoing relationship with his patients. Dr. Karlin, by virtue of his efforts, expenditures and reputation, has developed a significant practice, and only if the restrictive covenant is given effect can he hope to protect in some measure his legitimate interest in preserving his ongoing relationship with his patients.⁶²

The court noted that "a mere showing of personal hardship does not amount to an 'undue hardship' that would prevent enforcement of the covenant."⁶³

Next, the court compared and contrasted lawyer non-compete agreements with physician non-compete agreements.⁶⁴ While emphasizing "the unique relationship between attorney and client," the court minimized the physician-patient relationship: "While . . . some patients may have to travel a greater distance to Dr. Weinberg's new office . . . than they travelled to his former office, no patient will, by force of law, automatically be deprived of continuing his ongoing relationship with his physician."⁶⁵ While recognizing that the Supreme Court of New Jersey had adopted the American Bar Association rule prohibiting lawyer non-compete agreements in employment, it noted, "The regulations governing physicians within this State, however, do not contain any restriction similar to [the ABA prohibition on lawyer non-compete agreements]."⁶⁶ The court refused to give weight to various prin-

59. *Id.*

60. *Id.*

61. *Karlin*, 390 A.2d at 1166 (citations omitted).

62. *Id.*

63. *Id.* at 1166 n.3 (citing *Marvel v. Jonah*, 90 A. 1004, 1005 (N.J. 1914)).

64. *See id.* at 1166-67.

65. *Id.* at 1167.

66. *Karlin*, 390 A.2d at 1167-68.

ciples of medical ethics that had not been adopted by any governmental body or court.⁶⁷ Ironically, the *Karlin* court invoked public policy in support of enforcing physician non-compete agreements in employment: Without such restrictive covenants,

established physicians [would be] hesitant to employ younger associates and in turn deprive the younger physician of the opportunity to gain experience and to husband the necessary resources needed to establish a practice of his own. [Invalidating such covenants] might discourage physicians from establishing partnerships, thereby depriving the public of the potentially lower fees which ordinarily flow from the economies of scale attendant upon a partnership operation.⁶⁸

In rejecting a per se rule in favor of a case-by-case determination of the validity of physician non-compete agreements, the *Karlin* court did note that a shortage of physicians within a restricted area should be taken into account in assessing the reasonableness of such agreements.⁶⁹

In *Valley Medical Specialists*, a medical practice hired Dr. Farber, an internist and pulmonologist.⁷⁰ “Dr. Farber became a shareholder and subsequently a minority officer and director” of the practice.⁷¹ Dr. Farber’s employment contract contained a non-compete agreement, which he violated when he left the practice and opened a new office within the restricted area.⁷²

Noting the law’s traditional disfavor towards non-compete agreements, the *Valley Medical Specialists* court said:

This disfavor is particularly strong concerning such covenants among physicians because the practice of medicine affects the public to a much greater extent. In fact, “[f]or the past [sixty] years, the American Medical Association (AMA) has consistently taken the position that noncompetition agreements between physicians impact negatively on patient care.”⁷³

67. *See id.* at 1168.

68. *Id.* at 1169.

69. *Id.* at 1170.

70. *Valley Med. Specialists*, 982 P.2d at 1278

71. *Id.* at 1279.

72. *Id.*

73. *Id.* at 1281 (quoting Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors’ Interests at Patients’ Expense*, 45 RUTGERS L. REV. 1, 6 (1992)).

Even though the agreement in *Valley Medical Specialists* was between partners, the court said it was closer “to an employer-employee agreement than a sale of a business.”⁷⁴ The court went on to note that “[u]nequal bargaining power may be a factor to consider when [assessing] the hardship on the departing employee.”⁷⁵ Most important to the court in *Valley Medical Specialists*, however, was that “in cases involving the professions, public policy concerns may outweigh any protectable interest the remaining firm members may have.”⁷⁶ Analogizing to lawyer non-compete agreements, the *Valley Medical Specialists* court concluded that the physician-patient relationship was entitled to the same protection the law gives to the lawyer-client relationship.⁷⁷ Relying on public policy, the *Valley Medical Specialists* court concluded:

that the doctor-patient relationship is special and entitled to unique protection. It cannot be easily or accurately compared to relationships in the commercial context. In light of the great public policy interest involved in covenants not to compete between physicians, each agreement will be strictly construed for reasonableness.⁷⁸

In assessing the validity of physician non-compete agreements in employment contracts, commentators, and courts have listed factors the law should consider:

- 1) whether the covenant goes beyond preventing a doctor from practicing the specialty performed by the employer;
- 2) whether the duration of the restriction is longer than the typical treatment interval of patients in the specialty;
- 3) whether the restriction unduly interferes with patients’ right to continue seeing the doctor of their choice by requiring patients to travel an unreasonable distance to see the doctor;
- 4) whether enforcement of the covenant would result in a shortage of doctors practicing the particular specialty in the area;
- 5) whether enforcement of the covenant would grant a monopoly over a specialty in an area to the employer for the duration of the restriction; and
- 6) whether enforcement of the covenant would bar doctors from engaging in activities not in competition with their former employers.⁷⁹

74. *Id.* at 1282.

75. *Valley Med. Specialists*, 982 P.2d at 1282.

76. *Id.*

77. *Id.* at 1283.

78. *Id.*

79. See Elizabeth Williams, *Cause of Action to Enforce Anticompetition Covenant in Employment Contract*, in 11 CAUSES OF ACTION 375, 398–401 (2009).

IV. SECTION 542.335

A. *Non-Compete Agreements Must Be in Writing*

Under section 542.335(1)(a) of the *Florida Statutes*, a non-compete agreement must be in writing and signed by the former employee.⁸⁰ Several Florida cases address this issue. In *Sanz v. R.T. Aerospace Corp.*,⁸¹ the Third District Court of Appeal concluded that an employee was not bound by his non-compete agreement after the three-year term of his written contract expired, and he continued working under an oral agreement.⁸² Similarly, in *Gray v. Prime Management Group, Inc.*,⁸³ the Fourth District Court of Appeal concluded that an oral extension of the company's president's written employment contract did not apply to his non-compete agreement.⁸⁴ In *Zupnik v. All Florida Paper, Inc.*,⁸⁵ the Third District Court of Appeal ruled that "post-termination restrictions expire upon the termination of [a contract] for a specific term, even if [the] employee remains an at-will employee after the [contract term ends]."⁸⁶

B. *What Constitutes a "Legitimate Business Interest?"*

Even today, under Florida's current "pro-employer" non-compete statute, an employer may not enforce a noncompetition agreement restriction on a former employee simply to eliminate competition per se, but rather an employer must establish a legitimate business interest to be protected.⁸⁷

1. Valuable Confidential or Professional Information That Otherwise Is Not a Trade Secret

As the Eleventh Circuit Court of Appeals pointed out in *Proudfoot Consulting Co. v. Gordon*,⁸⁸ there is a split of authority in Florida on when confidential information accessible by employees will support a broad restriction barring former employees from working for a rival.⁸⁹ *AutoNation, Inc. v.*

80. FLA. STAT. § 542.335(1)(a) (2010).

81. 650 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1995).

82. *Id.* at 1059–60.

83. 912 So. 2d 711 (Fla. 4th Dist. Ct. App. 2005) (per curiam).

84. *Id.* at 713–14.

85. 997 So. 2d 1234 (Fla. 3d Dist. Ct. App. 2008).

86. *Id.* at 1238.

87. See FLA. STAT. § 542.335(1)(b) (2010).

88. 576 F.3d 1223 (11th Cir. 2009).

89. *Id.* at 1235 n.12.

*O'Brien*⁹⁰ held “that the employee’s access to confidential information . . . justified a restriction against work for a competitor where the employee was in a position at his new employer to use that information to unfairly compete against his former employer.”⁹¹

By contrast, Grant and Steele “suggest that in determining whether an employee’s knowledge of confidential information justifies a restriction against work for a competitor, courts should look to the definition of threatened misappropriation used in trade secrets law.”⁹²

While acknowledging that the “principle of inevitable disclosure would appear to impose a higher standard than the approach set out in *O'Brien*,” the Eleventh Circuit concluded that “it is unclear if, in practice, the application of [these] two standards would produce different results.”⁹³

In *AutoNation, Inc. v. Maki*,⁹⁴ the Florida Circuit Court noted that an analysis of whether an employee has the ability to use confidential information to compete unfairly against a former employer is “an objective one.”⁹⁵

2. Substantial Relationships with Specific Prospective or Existing Customers, Patients, or Clients

As the Third District Court of Appeal put it in *Bradley v. Health Coalition, Inc.*,⁹⁶ “[t]he purpose of the [1990 non-compete statute] is to prevent an employee from taking advantage of a customer relationship which was developed during the term of the employee’s employment.”⁹⁷

There is a consensus in Florida on the question of whether a former physician violates a non-compete agreement when she places an advertisement announcing her new business address.⁹⁸ While such ads are a form of solicitation, they are not *direct* solicitation and therefore not in violation of a non-compete agreement.⁹⁹

90. 347 F. Supp. 2d 1299 (S.D. Fla. 2004).

91. *Proudfoot Consulting Co.*, 576 F.3d at 1235 n.12 (discussing *O'Brien*, 347 F. Supp. 2d at 1305–08).

92. *Id.* (citing Grant & Steele, *supra* note 8, at 54–55).

93. *Id.* at 1236 n.12 (discussing *O'Brien*, 347 F. Supp. 2d at 1305–08).

94. No. 03-18896 CACE(03), 2004 WL 1925479 (Fla. Cir. Ct. Aug. 25, 2004), *aff’d per curiam*, *Maki v. AutoNation, Inc.*, 895 So. 2d 453 (Fla. 4th Dist. Ct. App. 2005).

95. *Id.* at *5.

96. 687 So. 2d 329 (Fla. 3d Dist. Ct. App. 1997), *superseded by statute*, Act effective July 1, 1996, ch. 96-257, §§ 1, 3, 1996 Fla. Laws 983, 987.

97. *Id.* at 334–35.

98. *See, e.g.*, *Lotenfoe v. Pahk*, 747 So. 2d 422, 424 (Fla. 2d Dist. Ct. App. 1999); *King v. Jessup*, 698 So. 2d 339, 341 (Fla. 5th Dist. Ct. App. 1997) (*per curiam*).

99. *See, e.g.*, *Lotenfoe*, 747 So. 2d at 424 (finding that an ad by former physician-employee was not a direct solicitation of former employer-physician’s patients); *King*, 698 So.

Currently, there is a district court of appeal split over whether “referring physicians” are a legitimate business interest in the hematology and oncology context.¹⁰⁰ Supreme Court of Florida Justice Lewis succinctly summed up this controversy when he dissented from the majority’s decision not to resolve this issue.¹⁰¹ In *Florida Hematology & Oncology v. Tummala (Tummala I)*,¹⁰² the Fifth District Court of Appeal ruled that “referral physicians” are not a legitimate business interest.¹⁰³ That court made clear that referring physicians secure a “stream of unidentified prospective patients.”¹⁰⁴ In doing so, the Fifth District acknowledged “that this holding . . . appear[s] to conflict with [*Torregrosa*],”¹⁰⁵ where the Third District Court of Appeal concluded that “referral physicians” do constitute legitimate business interest worthy of protection under section 542.335.¹⁰⁶ While Supreme Court of Florida Justice Lewis left no doubt that he believed “referral physicians” are a legitimate business interest under section 542.335(1)(b), a majority of the Supreme Court of Florida dismissed the appeal in *Tummala I* as improvidently granted.¹⁰⁷

In *Tummala I*, an oncologist’s employment contract included a restrictive covenant barring him from competing for two years after he left the practice, within a radius of fifteen miles of his former employment.¹⁰⁸ After resigning, Tummala opened a competing oncology practice within the restricted geographic area, and his former employer sued to enforce the non-compete agreement.¹⁰⁹ While Tummala scrupulously avoided providing medical services directly to any of his former employer’s existing patients, he did accept patient referrals from family physicians, internists, and general practitioners, who refer their patients to specialists.¹¹⁰ Tummala’s former

2d at 341 (finding that an ad placed by former employee in local newspaper announcing his new business address is not direct solicitation in violation of non-compete agreement).

100. Compare Fla. Hematology & Oncology v. Tummala (*Tummala I*), 927 So. 2d 135, 137–38 (Fla. 5th Dist. Ct. App. 2006), review dismissed by Tummala II, 969 So. 2d 316, 316–17 (Fla. 2007) (per curiam), with Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa, 891 So. 2d 591, 594 (Fla. 3d Dist. Ct. App. 2004).

101. See *Tummala II*, 969 So. 2d at 316–18 (Lewis, C.J., dissenting).

102. 927 So. 2d 135 (Fla. 5th Dist. Ct. App. 2006), review dismissed by Tummala II, 969 So. 2d 316 (Fla. 2007) (per curiam).

103. *Id.* at 139.

104. *Id.*

105. *Id.* at 139 n.4.

106. Southernmost Foot & Ankle Specialists, P.A. v. Torregrosa, 891 So. 2d 591, 594 (Fla. 3d Dist. Ct. App. 2004).

107. See *Tummala II*, 969 So. 2d 316, 316 (Fla. 2007).

108. *Tummala I*, 927 So. 2d at 137.

109. See *id.*

110. See *id.* at 137 n.1.

firm proved that its volume of referrals from existing referral physicians plunged seventy percent since Tummala opened his competing practice.¹¹¹

Relying upon the First District Court of Appeal's decision in *University of Florida Board of Trustees v. Sanal*,¹¹² which held that before a relationship with a prospective patient could constitute a legitimate business interest, that relationship must be specific and identifiable,¹¹³ the trial court in *Tummala I* declined to enjoin the defendant from competing with his former practice or from securing referral patients from the same referral physicians.¹¹⁴ Despite acknowledging that such referral physicians were a vital source of patients, the trial court argued that since Tummala was not directly providing services to any existing patients, he was not infringing upon any "specific prospective and existing" patients.¹¹⁵ If unknown prospective patients cannot constitute legitimate business interests, the *Tummala I* court reasoned, then neither can the doctors who refer them to specialists: "[T]he lack of [a specific and identifiable] relationship with a patient does not become a legitimate business interest simply by virtue of being referred by a physician."¹¹⁶

As one critic of the *Tummala I* ruling put it:

[*Tummala I*] is a stunning curtailment of the scope of *Florida Statute* [section] 542.335. Worse, the rationale for refusing to protect an employer's interest in its referral relationships is not limited to the medical profession. Any business or profession which receives clients, customers or patients from referral relationships developed, nurtured and maintained by the business will, at least in the Fifth District, be unable to protect those relationships by use of restrictive covenant.¹¹⁷

In *Southernmost Foot & Ankle Specialists v. Torregrosa, P.A.*,¹¹⁸ the Third District Court of Appeal concluded, "The trial court properly found . . . that the restrictive covenant was reasonably necessary to protect Southern-

111. Initial Brief of Appellants at 9, *Fla. Hematology & Oncology v. Tummala*, 927 So. 2d 135 (Fla. 5th Dist. Ct. App. 2006) (No. 5D05-1950).

112. 837 So. 2d 512 (Fla. 1st Dist. Ct. App. 2003).

113. *Tummala I*, 927 So. 2d at 139 (citing *Sanal*, 837 So. 2d at 515-16).

114. *Id.*

115. *See id.* at 138-39.

116. *Id.* at 139 (citing *Sanal*, 837 So. 2d at 515-16).

117. H. Gregory McNeill, *Restrictive Covenants: The New Loophole*, THE BRIEFS, Nov. 2007, at 16.

118. 891 So. 2d 591 (Fla. 3d Dist. Ct. App. 2004).

most's legitimate business interests in its patient base, referral doctors, specific prospective and existing patients, and patient goodwill."¹¹⁹

In the absence of resolution of this conflict by the Supreme Court of Florida, Justice Lewis urged the Florida Legislature to clarify the law on this issue.¹²⁰

3. Customer, Patient, or Client Goodwill

As case law makes clear, a former employer has a legitimate business interest in its patients which it can protect against a physician who violates an enforceable non-compete agreement.¹²¹

In *Medtronic, Inc. v. Janss*,¹²² the Eleventh Circuit affirmed the district court's injunction against a pacemaker salesman who by "his contacts with former customers [prescribing physicians]," he "plainly tried to trade on Medtronic's—[his former employer]—goodwill."¹²³

In *Kephart v. Hair Returns, Inc.*,¹²⁴ the Fourth District Court of Appeal ruled that a non-compete agreement cannot bar a former employee from servicing "customers who *voluntarily* follow an employee to her new place of employment."¹²⁵

In *Austin v. Mid State Fire Equipment of Central Florida, Inc.*,¹²⁶ the Fifth District Court of Appeal barred the former employee from soliciting customers of his former employer but did not bar the employee from working for a competitor.¹²⁷

119. *Id.* at 594. In *Open Magnetic Imaging, Inc. v. Nieves-Garcia*, the Third District Court of Appeal again upheld the trial court's finding that the employer had a legitimate business interest in its referral doctors. 826 So. 2d 415, 419 (Fla. 3d Dist. Ct. App. 2002) (*per curiam*).

120. *Tummala II*, 969 So. 2d 316, 318 (Fla. 2007) (*per curiam*) (Lewis, C.J., dissenting).

121. *E.g.*, *Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 531 (Fla. 5th Dist. Ct. App. 2003).

122. 729 F.2d 1395 (11th Cir. 1984).

123. *Id.* at 1401.

124. 685 So. 2d 959 (Fla. 4th Dist. Ct. App. 1996).

125. *Id.* at 960 (emphasis added).

126. 727 So. 2d 1097 (Fla. 5th Dist. Ct. App. 1999).

127. *Id.* at 1098.

4. Extraordinary or Specialized Training

An employer's right to protect his investment in an employee's training was addressed by the Second District Court of Appeal under the 1990 non-compete statute in *Hapney v. Central Garage, Inc.*:¹²⁸

To constitute a protectable interest, however, the providing of training or education must be extraordinary. . . . The third category is difficult to define with any degree of precision. . . . [I]t is generally required that the employer provide more in training than that acquired by simply performing the tasks associated with a job. . . . The precise degree of training or education which rises to the level of a protectible [sic] interest will vary from industry to industry and is a factual determination to be made by the trial court.¹²⁹

C. Employer's Prima Facie Case

1. Rebuttable Presumptions

“The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant.”¹³⁰ Although “[t]his presumption is rebuttable, not conclusive,” it is rare indeed for a former employee to successfully rebut this presumption.¹³¹ A common way to rebut this presumption, however, is for the employee to prove that damages are readily calculable.¹³² What is clear is that Florida law does not require the employer to prove that the former employee *intentionally* breached a restrictive covenant in order for the employer to obtain an injunction.¹³³

128. 579 So. 2d 127 (Fla. 2d Dist. Ct. App. 1991), *disapproved on other grounds* by *Gupton v. Vill. Key & Saw Shop Inc.*, 656 So. 2d 475 (Fla. 1995).

129. *Id.* at 132.

130. *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*, 939 So. 2d 268, 271 (Fla. 4th Dist. Ct. App. 2006) (quoting FLA. STAT. § 542.335(1)(j) (2006)). Whether a restrictive covenant has been violated is a question of fact. *See id.*

131. *Id.*; *see also* *Passalacqua v. Naviant, Inc.*, 844 So. 2d 792, 796 (Fla. 4th Dist. Ct. App. 2003).

132. *See, e.g.*, *First Miami Sec., Inc. v. Bell*, 758 So. 2d 1229, 1230 (Fla. 4th Dist. Ct. App. 2000) (*per curiam*).

133. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1239 (11th Cir. 2009).

According to section 542.335(1)(d)1 of the *Florida Statutes*, “In the case of a restrictive covenant sought to be enforced against a former employee . . . a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than 2 years in duration.”¹³⁴

2. Rules of Construction

Under section 542.335(1)(h) of the *Florida Statutes*:

A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.¹³⁵

D. *Employee’s Burden of Proof*

Once the employer establishes a prima facie case that a restrictive covenant is reasonably necessary, the employee “has the burden of establishing that the [restriction] is overbroad, overlong, or otherwise not reasonably necessary.”¹³⁶ *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*¹³⁷ illustrates just how hard it is for a physician-employee to overcome the presumption of irreparable harm once the former employer proves the existence of one or more “legitimate business interests.”¹³⁸

E. *Employee Defenses*

In a 2004 Florida Bar Journal article, N. James Turner offered employees advice and strategies for defending against non-compete agreements.¹³⁹ Turner suggests that the restricted employee try a preemptive strike—file a declaratory judgment action—“which should seek a determination of the enforceability of the noncompete agreement and a declaration of

134. FLA. STAT. § 542.335(1)(d)(1) (2010).

135. *Id.* § 542.335(1)(h).

136. *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770 n.2 (Fla. 5th Dist. Ct. App. 2000); FLA. STAT. § 542.335(1)(c).

137. 939 So. 2d 268 (Fla. 4th Dist. Ct. App. 2006).

138. *See id.* at 271–72.

139. *See* N. James Turner, *Successfully Defending Employees in Noncompete and Trade Secret Litigation*, 78 FLA. B.J. 43, 44–46 (2004).

its invalidity.”¹⁴⁰ But, as the Eleventh Circuit made clear in *Proudfoot*, it is no defense that “an employee reasonably believed that his conduct did not violate the restrictive covenants at issue.”¹⁴¹

1. Employer’s Breach of Contract

Turner notes:

[I]t is generally easier to convince a court of a prior material breach if the noncompete covenant is part of an overall employment contract which contains compensation and other provisions which were arguably breached, than if the covenant is a stand-alone agreement. It is generally easier to prove the breach of an explicit term of the contract than an implied term, such as a requirement of existing law.¹⁴²

Turner notes “[t]he employer’s failure to pay compensation under a contract of employment is the most common material breach available as a defense to employees who have previously signed noncompete agreements. Florida courts have regularly denied injunctive relief in these situations.”¹⁴³ If an employer breaches the employment contract first, “the general rule is that a material breach . . . allows the non-breaching party to treat the breach as a discharge of [her] contract liability.”¹⁴⁴ Florida courts have accepted the following kinds of employer breaches that will serve to release the former employee from obligations contained in the non-compete agreement: 1) “refusing to credit [a physician] with all . . . services performed in calculating her bonus;”¹⁴⁵ 2) evidence that the former employer sexually harassed the former employee;¹⁴⁶ Turner notes that an employer’s “[f]ail[ure] to pay an

140. *Id.* at 46.

141. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1239 (11th Cir. 2009). The Eleventh Circuit noted that all Florida court cases “referring to an ‘intent’ element” were decided under an earlier version of the state’s non-compete statute. *Id.* at 1239–40.

142. Turner, *supra* note 139, at 46.

143. *Id.* at 45.

144. *Benemerito & Flores, M.D.’s, P.A. v. Roche*, 751 So. 2d 91, 93 (Fla. 4th Dist. Ct. App. 1999) (quoting *Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 333 (Fla. 3d Dist. Ct. App. 1997), *superseded by statute*, Act effective July 1, 1996, ch. 96-257, §§ 1,3 1996 Fla. Laws 983,987).

145. *Id.* at 94.

146. *Harrison v. Palm Harbor MRI, Inc.*, 703 So. 2d 1117, 1119 (Fla. 2d Dist. Ct. App. 1997).

employee in accordance with the [Fair Labor Standards Act]” is an often-neglected source of an employer’s prior breach of contract.¹⁴⁷

2. Employer’s Unclean Hands

Since an injunction is an equitable remedy, equitable defenses such as unclean hands and laches may be raised to successfully defeat an employer’s efforts to obtain a temporary injunction.¹⁴⁸ *Bradley* provides an example of how a physician was released from his promise not to compete by showing unclean hands on the part of the employer.¹⁴⁹

3. Intervening Changes in the Employee’s Job Duties

Intervening changes in an employee’s job duties and/or compensation have served, in other jurisdictions, to terminate the employment agreement that includes the non-compete clause when it is replaced with an agreement lacking one.¹⁵⁰ There is no reason such an employee defense would not work in Florida as well.

4. Waiver

If the restricted employee can demonstrate that “the former employer [never] enforced the non-compete agreement in the past against other employees,” she may argue that the employer has waived the right to enforce it against her.¹⁵¹

5. Lack of Consideration

“Courts will not enforce a non-compete [agreement if] there is no consideration.”¹⁵² States vary, however, “on whether the continuation of at-will employment of a physician is sufficient consideration for a non-compete

147. Turner, *supra* note 139, at 45–46.

148. See *id.* at 46.

149. *Bradley v. Health Coal., Inc.*, 687 So. 2d 329, 334 (Fla. 3d Dist. Ct. App. 1997), *superseded by statute*, Act effective July 1, 1996, ch. 96-257, §§ 1, 3 1996 Fla. Laws 983, 987.

150. See, e.g., *Lycos, Inc. v. Jackson*, 18 Mass. L. Rptr. 256 (Super. Ct. 2004); *AFC Cable Sys., Inc. v. Clisham*, 62 F. Supp. 2d 167 (D. Mass. 1999).

151. Katherine Benesch, *Update on Covenants Not to Compete: Will They Survive in the Healthcare Industry?*, DUANE MORRIS (Feb. 9, 2006), <http://www.duanemorris.com/articles/article2115.html>.

152. *Id.*

agreement.”¹⁵³ Some states require that “additional consideration, not the mere continuation of employment, must be given to support a restrictive covenant once employment has begun.”¹⁵⁴ Other states have “recognized continued employment as [sufficient] consideration to support a covenant not to compete.”¹⁵⁵

F. Remedies

1. Injunction

Even under Florida’s original non-compete statute, section 542.12 of the *Florida Statutes*, it was recognized that the normal remedy for breach of a non-compete agreement was an injunction.¹⁵⁶ This is so “because of the inherently difficult, although not impossible, task of determining just what damage actually is caused by the employee’s breach of the agreement.”¹⁵⁷

Florida courts have not been consistent in identifying the elements necessary to be proven before an injunction will be issued.¹⁵⁸ For example, in *Environmental Services, Inc. v. Carter*,¹⁵⁹ the Fifth District Court of Appeal of Florida lists four requirements for a temporary injunction.¹⁶⁰ By contrast, in *Litwinczuk*, the court listed five requirements for a temporary injunction.¹⁶¹ *In re Estate of Barsanti*,¹⁶² the Third District Court of Appeal of Florida noted that the party seeking a temporary injunction must demonstrate that: “1) immediate and irreparable harm will otherwise result, 2) the moving party [has] a clear legal right thereto, 3) [the moving party has] no adequate remedy at law and 4) the public interest will not be disserved.”¹⁶³ Of the four elements, it is typically irreparable injury and substantial likelihood of success on the merits “that drive the outcome of most noncompete cases. The

153. *Id.*

154. *Id.*

155. *Id.*

156. *See, e.g.,* Capelouto v. Orkin Exterminating Co. of Fla., 183 So. 2d 532, 535 (Fla. 1966).

157. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1241 n.21 (11th Cir. 2009) (quoting Miller Mech., Inc. v. Ruth, 300 So. 2d 11, 12 (Fla. 1974)).

158. *Compare* Envtl. Servs., Inc. v. Carter, 9 So. 3d 1258, 1261 (Fla. 5th Dist. Ct. App. 2009), with *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*, 939 So. 2d 268, 271 (Fla. 4th Dist. Ct. App. 2006), and *In re Estate of Barsanti*, 773 So. 2d 1206, 1208 (Fla. 3d Dist. Ct. App. 2000) (per curiam).

159. 9 So. 3d 1258 (Fla. 5th Dist. Ct. App. 2009).

160. *Id.* at 1261.

161. *Litwinczuk*, 939 So. 2d at 271.

162. 773 So. 2d 1206 (Fla. 3d Dist. Ct. App. 2000) (per curiam).

163. *Id.* at 1208.

fourth factor, the public interest, rarely has much impact, since most cases involve purely commercial issues between private parties.”¹⁶⁴

a. *Irreparable Injury and Inadequate Legal Remedy*

Under the common law of equity, the equitable remedy of an injunction is not available if the legal remedy is adequate.¹⁶⁵ The usual way of proving the inadequacy of the legal remedy, when it comes to injunctions, is to prove irreparable injury.¹⁶⁶ As one Florida court put it, an injunction is the usual remedy for breach of non-compete agreements because “it is extremely difficult for a court to determine what damages are caused by breach of the covenant.”¹⁶⁷ In *Masters Freight, Inc. v. Servco, Inc.*,¹⁶⁸ the Second District Court of Appeal of Florida discussed the necessity of weighing *all* the factors for the granting of a temporary injunction, including irreparable injury, in the context of non-compete agreements.¹⁶⁹

b. *No Balancing of the Hardships*

Under Florida’s original non-compete statute, section 542.12, courts of equity retained the power to “employ a balancing test to weigh the employer’s interest in preventing the competition against the oppressive effect on the employee.”¹⁷⁰

In sharp contrast, sections 542.335(1)(g) and (1)(g)(1) state: “In determining the enforceability of a restrictive covenant, a court: Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.”¹⁷¹ In utter disregard of the common law elements that must be proved to obtain a temporary injunction, Florida’s non-compete statute leaves no doubt that whatever hardship a restrictive covenant has on the former employee, such hardship is irrelevant. So, if obeying the injunction means the former employee must relocate out-

164. Alan B. Rosenthal, *Enforcement of Noncompete Agreements*, PHYSICIAN’S NEWS DIG., Nov. 13, 2006, <http://www.physiciansnews.com/2006/11/13/enforcement-of-noncompete-agreements/>.

165. *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. 5th Dist. Ct. App. 2009).

166. *See id.* at 1261–62.

167. *Id.* at 1261 (citing *Sentry Ins. V. Dunn*, 411 So. 2d 336, 336 (Fla. 5th Dist. Ct. App. 1982)).

168. 915 So. 2d 666 (Fla. 2d Dist. Ct. App. 2005).

169. *Id.* at 666–67.

170. *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11, 12 (Fla. 1974) (citing *Capelouto v. Orkin Exterminating Co. of Fla.*, 183 So. 2d 532, 534 (Fla. 1966)).

171. FLA. STAT. § 542.335 (1)(g)(1) (2010).

side the restricted area, these costs are not to be taken into account.¹⁷² By contrast, the Supreme Court of Pennsylvania, in *New Castle Orthopedic Associates v. Burns*,¹⁷³ invalidated a physician non-compete agreement in part because, in balancing the hardships, the court concluded that greater harm would result from issuing the injunction than from its denial.¹⁷⁴

c. *Substantial Likelihood of Success on the Merits*

A temporary injunction is issued pre-trial by a court of equity sitting without a jury.¹⁷⁵ Solely on the basis of affidavits, the judge must guess which party is likely to prevail on the merits of the case in the event it proceeds to trial.¹⁷⁶ Usually, the party seeking the injunction bears the burden of proving this element by a preponderance of the evidence.¹⁷⁷

Certainly under earlier versions of Florida's non-compete statute, it was generally accepted that before a temporary injunction would be issued, the employer must prove a substantial likelihood of success on the merits in the event the case goes to trial.¹⁷⁸

As the Fifth District Court of Appeal makes clear, when an employer cannot prove a legitimate business interest, it cannot satisfy the substantial likelihood of success element for obtaining a preliminary injunction.¹⁷⁹ As the Fourth District Court of Appeal put it, whether the employer breached the employment contract first also relates to whether the employer has a substantial likelihood of success on the merits.¹⁸⁰ In *JonJuan Salon, Inc. v. Acosta*,¹⁸¹ the Fourth District discussed the substantial "likelihood of success on

172. *See id.*

173. 392 A.2d 1383 (Pa. 1978).

174. *Id.* at 1385–86.

175. *See* FLA. R. CIV. P. 1.610(a).

176. *See id.*

177. *See id.*

178. *See, e.g.,* *Sarasota Beverage Co. v. Johnson*, 551 So. 2d 503, 508 (Fla. 2d Dist. Ct. App. 1989), *superseded by statute*, FLA. STAT. § 542.335 (2009) (rejecting the notion that success on the merits, a traditional requirement for injunction, need not be considered in an employment non-compete case and noting that under the 1989 non-compete statute, section 542.33 of the *Florida Statutes*, it is proper to consider the likelihood that the movant will succeed on the merits).

179. *Anich Indus., Inc. v. Raney*, 751 So. 2d 767, 770 (Fla. 5th Dist. Ct. App. 2000).

180. *Benemerito & Flores, M.D.'s, P.A. v. Roche*, 751 So. 2d 91, 93 (Fla. 4th Dist. Ct. App. 1999) (citing *Cordis Corp. v. Prooslin*, 482 So. 2d 486, 489 (Fla. 3d Dist. Ct. App. 1986)).

181. 922 So. 2d 1081 (Fla. 4th Dist. Ct. App. 2006).

the merits” element in assessing an employer’s right to a temporary injunction.¹⁸²

d. *The Public Interest*

As one critic of physician non-compete agreements put it:

[C]ourts must modify the traditional rule of reason test in future evaluation of physician restrictive covenants. Courts must consider the impact that enforcement of restrictive covenants will have on the relationships between physicians and their patients within the public-interest prong of the rule of reason analysis. . . . [C]ourts must weigh the potential harm to patient choice and to the professional and ethical obligations of physicians to their patients.¹⁸³

While section 542.335(1)(g)4 states that a court “[s]hall consider the effect of enforcement upon the public health, safety, and welfare,”¹⁸⁴ section 542.335(1)(i) states:

No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.¹⁸⁵

Though section 458.301 expressly recognizes the importance of patients “mak[ing] an informed choice when selecting a physician,”¹⁸⁶ I have found only one case citing this source of public policy in a physician non-compete case, and it was decided under the 1991 version of the *Florida Statutes*.¹⁸⁷

As H. Gregory McNeill put it in *Restrictive Covenants: The New Loophole*, while asserting that an injunction will “adversely affect the public health, safety and welfare” is a valid defense under Florida law, it almost

182. *Id.* at 1083.

183. S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 194 (2006).

184. FLA. STAT. § 542.335(1)(g)4 (2010).

185. *Id.* § 542.335(1)(i).

186. *Id.* § 458.301.

187. *See Humana Med. Plan, Inc. v. Jacobson*, 614 So. 2d 520, 522 (Fla. 3d Dist. Ct. App. 1992).

never works.¹⁸⁸ In fact, “[o]ver the last 30 years, doctors have been enjoined as often as former employees in any other business or profession. It is a rare circumstance that doctors are able to avoid enforcement of a restrictive covenant based upon the public interest argument.”¹⁸⁹

By contrast, courts in other states have considered whether the enforcement of a restrictive covenant would cause a shortage of specialists in the restricted area in invalidating non-compete agreements on public policy grounds.¹⁹⁰

When it comes to lawyer non-compete agreements in Florida, however, an Ethics Opinion makes clear that under Rules 4-1.4, 4-1.5(g), and 4-5.6(a) of the Rules of Professional Conduct of the Florida Bar, such restrictive covenants should be narrowly construed on grounds of protecting the lawyer-client relationship.¹⁹¹ “The ‘special trust and confidence’ inherent in an attorney-client relationship dictates ‘that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships.’”¹⁹² Moreover, “prohibiting a departing attorney from attempting to hire other lawyers from the firm, [such a covenant] restricts the right of association between attorneys and, indirectly, the right to practice.”¹⁹³ The same solicitude Florida law bestows on the lawyer-client relationship should apply with equal force to the physician-patient relationship especially in light of section 458.301 which evidences Florida’s public policy recognizing the special status of the physician-patient relationship.

188. McNeill *supra* note 117, at 15 n.1 (quoting FLA. STAT. § 542.335(1)(g)(4)).

189. *Id.* (citing *Jewett Orthopaedic Clinic, P.A. v. White*, 629 So. 2d 922, 925 (Fla. 5th Dist. Ct. App. 1993)).

190. *See, e.g., Idbeis v. Wichita Surgical Specialists, P.A.*, 112 P.3d 81, 92 (Kan. 2005) (discussing that while the Supreme Court of Kansas upheld a physician non-compete agreement, the Court also suggested that restrictive covenants in medically necessary specialties might be unenforceable if the community would be left with a shortage in that specialty); *New Castle Orthopedic Assocs. v. Burns*, 392 A.2d 1383, 1388 (Pa. 1978) (explaining how the Supreme Court of Pennsylvania held that a non-compete agreement between an orthopedic practice and its former physician employee would not be enforced, mainly on the grounds that there was a shortage of orthopedic specialists in the geographic areas encompassed by the non-compete agreement).

191. Fla. Bar Prof'l Ethics Comm., Op. 93-4 (1995).

192. *Id.* (quoting *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982)).

193. *Id.* (citing ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1417 (1978)). While no Florida case expressly addresses lawyer non-compete agreements in employment, cases from other jurisdictions provide the typical public policy justifications for rendering such restrictive covenants among lawyers per se unreasonable and therefore void as contrary to public policy. *See, e.g., Dwyer v. Jung (Dwyer I)*, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975) (per curiam); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989).

Public policy also comes into play when assessing non-compete agreements entered into in other states, but effective in Florida, or when such agreements are executed in Florida but take effect in other states. Several Florida cases have addressed these issues.¹⁹⁴ In *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*,¹⁹⁵ a panel of the Eleventh Circuit, strictly construing non-compete agreements, ruled Georgia's public policy strictly construing non-compete agreements superseded the public policy of other states with more substantial contacts.¹⁹⁶ Authors of a Florida Bar Journal article make the case that:

Under the apparently sweeping holding of *Palmer & Cay*, a Florida employer who entered into a non-compete, valid under [Florida Statutes] section 542.335, with an employee living and working in Florida, could potentially be precluded from enforcing that contract in Florida, by the decision of a Georgia state or federal court having no prior connection to the employer, the employee, or the contract.¹⁹⁷

What should Florida courts do when faced with enforcing a non-compete agreement executed in another state that contains provisions that violate Florida's public policy? In *Cerniglia v. C. & D. Farms, Inc.*,¹⁹⁸ the Supreme Court of Florida directly confronted the question of whether a non-compete agreement, contrary to Florida public policy, is unenforceable only in Florida or in its entirety.¹⁹⁹ The Court concluded that "Florida's public policy and statutes cannot be applied to a foreign contract to void its operation elsewhere. If performance, in Florida, of a foreign made contract is repugnant to our public policy it is unenforceable here, but not necessarily void or unenforceable in other jurisdictions."²⁰⁰ Finally, in *Harris v. Gonzalez*,²⁰¹ the Fourth District Court of Appeal ruled, "Although . . . Florida cannot apply its public policy and statutes to a foreign contract to void its operation

194. See e.g. *Cerniglia v. C. & D. Farms, Inc.*, 203 So. 2d 1, 2 (Fla. 1967) (per curiam); *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th Dist. Ct. App. 2001).

195. 404 F.3d 1297 (11th Cir. 2005).

196. See *id.* at 1309.

197. Courtney B. Wilson & Donald W. Benson, *Outrunning Contractual Noncompete Undertakings: Does the 11th Circuit's Palmer & Cay Decision Offer "Earlybird Specials" for Florida Forum Shoppers?*, 79 FLA. B.J. 55, 55 (2005).

198. 203 So. 2d 1 (Fla. 1967) (per curiam).

199. *Id.* at 2.

200. *Id.*

201. 789 So. 2d 405 (Fla. 4th Dist. Ct. App. 2001).

elsewhere, it can hold such a contract void or unenforceable here if said contract is repugnant to the public policy of this state.”²⁰²

e. *Injunction Bond*

Section 542.335(1)(j) of the *Florida Statutes* makes clear that no temporary injunction shall be entered unless the employer posts a bond and the court will not enforce “any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.”²⁰³ In *Supinski v. Omni Healthcare, P.A.*,²⁰⁴ the Fifth District Court of Appeal remanded the case to the trial court, ordering it to conduct an evidentiary hearing regarding the amount of the injunction bond.²⁰⁵ Similarly, in *Lotenfoe v. Pahlk*,²⁰⁶ the Second District Court of Appeal ruled that the lower court erred in issuing a temporary injunction without conducting an evidentiary hearing to determine the amount of the bond.²⁰⁷ When no evidentiary hearing is held, the defendant’s damages for being wrongfully enjoined are not limited to the amount of the posted bond.²⁰⁸

2. Modifying Overbroad, Overlong, or Unreasonable Terms in the Non-Compete Agreement: Section 542.335(1)(c)

Some critics urge courts not to modify unreasonable restrictive covenants and to refuse to enforce them.²⁰⁹ For example, in *Valley Medical Specialists*, the Supreme Court of Arizona noted, “Although we will tolerate ignoring severable portions of a covenant to make it more reasonable, we will not permit courts to add terms or rewrite provisions.”²¹⁰ A court cannot “rewrite and create a restrictive covenant significantly different from that created by the parties.”²¹¹

By contrast, section 542.335(1)(c) of the *Florida Statutes*, expressly authorizes courts to modify overbroad, overlong, and unreasonable terms in a

202. *Id.* at 409; see also FLA. STAT. § 542.335(1)(i) (2010).

203. FLA. STAT. § 542.335(1)(j).

204. 853 So. 2d 526 (Fla. 5th Dist. Ct. App. 2003).

205. *Id.* at 532.

206. 747 So. 2d 422 (Fla. 2d Dist. Ct. App. 1999).

207. See *id.* at 426.

208. *Id.*

209. See, e.g., Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 674 (2008) (urging courts not to blue pencil unreasonable restrictive covenants).

210. *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (en banc).

211. *Id.*

non-compete agreement.²¹² Common sense dictates that if an employer provides a particular product or service that is commonly available, a statewide restriction is likely unreasonable. But, if a product or service is unique, arguably a statewide, even a multi-state regional restriction, may be enforceable. But the most commonly enforced geographic restriction would be barring an employee from competing within the same county where her former employer is located.²¹³ In one case, *Proudfoot Consulting Co.*, the Eleventh Circuit upheld a geographic restriction that extended beyond the United States to include Canada and even Europe.²¹⁴

Litwinczuk illustrates the typical way a court may modify an overbroad restrictive covenant in a non-compete agreement.²¹⁵ In this case, the Fourth District Court of Appeal noted that the trial court properly reduced the geographic area subject to the restrictive covenant from the entire Palm Beach County to an area “from the southernmost boundaries of the City of West Palm Beach north to the Martin County line.”²¹⁶ Similarly, in *Open Magnetic Imaging, Inc. v. Nieves-Garcia*,²¹⁷ even though the non-compete agreement barred the former employee from competing in three counties, the court narrowed the geographic limitation to the only county the former employee ever worked in.²¹⁸

While Florida’s non-compete statute makes it clear that a court has the power to modify overbroad, overlong or unreasonable terms in a non-compete agreement, courts have interpreted this language to include the court’s power to add terms.²¹⁹ For example, even if a non-compete agreement omits altogether the geographic area subject to the restrictive covenant, a court can insert what it regards as a reasonable geographic limitation.²²⁰ “Whether a non-compete covenant is reasonable or overly broad is a question of fact for the trial court.”²²¹

212. FLA. STAT. § 542.335(1)(c) (2010).

213. See *Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 531 (Fla. 5th Dist. Ct. App. 2003). But see *Availability, Inc. v. Riley*, 336 So. 2d 668, 670 (Fla. 2d Dist. Ct. App. 1976).

214. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1237 n.15, 1238 (11th Cir. 2009).

215. See *Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C.*, 939 So. 2d 268, 270 (Fla. 4th Dist. Ct. App. 2006).

216. *Id.*

217. 826 So. 2d 415 (Fla. 3d Dist. Ct. App. 2002) (per curiam).

218. See *id.* at 418.

219. See *generally Health Care Fin. Enters., Inc. v. Levy*, 715 So. 2d 341 (Fla. 4th Dist. Ct. App. 1998).

220. See *id.* at 343 (discussing that a restrictive covenant is not invalid because it fails to contain a geographic limitation).

221. *Whitby v. Infinity Radio, Inc.*, 951 So. 2d 890, 897 (Fla. 4th Dist. Ct. App. 2007).

3. Damages

a. *Liquidated Damages*

Liquidated damages represent the best efforts of the parties to a contract to agree upon a fixed amount of money recoverable by the non-breaching party in the event of breach of contract.²²² In assessing the validity of liquidated damages clauses, courts ask two questions: (1) whether at contract formation it was all but impossible to estimate what damages would be in the event of breach, and (2) despite this uncertainty, the amount in the clause reflects the best estimate of what those damages would be in the event of breach.²²³ Any liquidated damages clause deemed a penalty is unenforceable.²²⁴ While liquidated damages clauses are generally disfavored in the law, on the ground that often they result in forfeiture, those passing the two-part test are enforceable, rendering unnecessary plaintiff's usual burden of proving actual damages.²²⁵ While some courts apply the single-look doctrine, under which the reasonableness of the amount contained in the liquidated damages clause is measured only at the time of contract formation; other courts apply the second look doctrine, in which reasonableness is measured both at contract formation and at breach, thus, invalidating more liquidated damages clauses than the single-look doctrine.²²⁶

Humana Medical Plan, Inc. v. Jacobson,²²⁷ though decided under the 1990 non-compete statute, illustrates how Florida courts handle liquidated damages clauses in non-compete agreements and how courts applying the 1990 statute were far more wary of enforcing such restrictive covenants.²²⁸ Ultimately, the Third District Court of Appeal, applying the single-look doctrine, threw out the liquidated damages clause on the ground that actual damages were readily ascertainable at contract formation.²²⁹ Invoking the Florida Statutes recognizing the importance of patients making an informed choice when selecting a physician, the Third District Court concluded, "Liquidated

222. *Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991).

223. *Id.*

224. *See id.*

225. *Id.*; 25 C.J.S. *Damages* § 262 (2002).

226. *Kelly v. Marx*, 694 N.E.2d 869, 873–74 app. 1–2 (Mass. App. Ct. 1998) (illustrating how twenty-two courts across the country favor the "single look" approach, whereas twenty courts favor the "second look" approach), *rev'd*, 705 N.E.2d 1114, 1115–16 n.5 (Mass. 1999) (rejecting the "second look" approach as the standard in Massachusetts while acknowledging the "divided [courts] between the single and second look approach" across the country).

227. 614 So. 2d 520 (Fla. 3d Dist. Ct. App. 1992).

228. *Id.* at 522.

229. *See id.*

damages clauses . . . seriously impair patients' choice of a physician, by discouraging doctors from continuing existing doctor/patient relationships."²³⁰ Moreover, "public policy . . . is violated when the business relationship an HMO has with its affiliated doctors interferes with . . . the doctor/patient relationship."²³¹

b. *Actual Damages*

Under section 542.12, Florida's original non-compete statute, courts issued injunctions if the alternative was only nominal damages because the employer was unable to prove actual damages.²³²

In *Proudfoot Consulting Co.*, the Eleventh Circuit addressed the question of damages under Florida's non-compete statute.²³³ The Eleventh Circuit began its discussion of damages by saying, "An award of damages for breach of contract is intended to place the injured party in the position he or she would have been in had the breach not occurred."²³⁴ The employer "bears the burden to prove both that it sustained a loss and that 'its lost profits were a direct result of'" the employee's breaches of the non-compete agreement.²³⁵ While "'uncertainty as to the precise amount of the lost profits will not defeat recovery, so long as there is a reasonable yardstick by which to estimate the damages,' causation must be 'proved with reasonable certainty.'"²³⁶ "Damages for breach of a non-compete [agreement] are intended to make the prior employer whole, not to punish employees."²³⁷ "[U]nder Florida law, disgorgement of profits earned is not a remedy for breach of contract."²³⁸ The Eleventh Circuit did suggest, however, that lost profits might be recoverable in an action for unjust enrichment.²³⁹

230. *Id.*; FLA. STAT. § 458.301 (2010).

231. *Humana Med. Plan, Inc.*, 614 So. 2d at 522.

232. *Miller Mech., Inc. v. Ruth*, 300 So. 2d 11, 12–13 (Fla. 1974); FLA. STAT. § 542.12 (1979 & Supp. 1980) (renumbered 1980).

233. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1241 (11th Cir. 2009) (reversing a \$1.66 million damages award to a former employer); *see generally* FLA. STAT. § 542.33 (2010).

234. *Proudfoot Consulting Co.*, 576 F.3d at 1242 (alteration in original) (quoting *Mne-monics, Inc. v. Max Davis Assocs., Inc.*, 808 So. 2d 1278, 1280 (Fla. 5th Dist. Ct. App. 2002)).

235. *Id.* at 1243 (quoting *Whitby v. Infinity Radio, Inc.*, 951 So. 2d 890, 898 (Fla. 4th Dist. Ct. App. 2007)).

236. *Id.* (quoting *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1217 (11th Cir. 2006)).

237. *Id.*

238. *Id.* at 1245.

239. *Proudfoot Consulting Co.*, 576 F.3d at 1245–46 n.27.

c. *Attorney's Fees*

Grant and Steele point out, as yet another defect of Florida's 1990 non-compete statute, that section 542.33 contained no provision authorizing attorney's fees to prevailing parties.²⁴⁰ In support of adding section 542.335(1)(k) in 1996, authorizing the awarding of such fees, Grant and Steele claim, "Unless the contract itself had such a provision, the parties [bore] their own litigation expenses. . . . [T]his deficiency encouraged abusive litigation strategies and tactics."²⁴¹

Now, however, that Florida's non-compete statute so soundly stacks the deck in favor of enforcing such restrictive covenants, the possibility that insult will add to injury in the form of attorney's fees, if a former employee challenges enforcement of such non-compete agreements further chills such individuals' efforts to maintain their livelihoods.²⁴²

There is a district court split over whether section 542.335(1)(k) applies to a non-party to a written restrictive covenant.²⁴³ For example, when a rival employer is a named defendant in an action to enforce a non-compete agreement, but is a non-party to the restrictive covenant, can attorney's fees be assessed against him as well if the former employer prevails in its action? In *Sun Group Enterprises, Inc. v. DeWitte*,²⁴⁴ the trial court awarded attorney's fees to the defendants—including the subsequent employer, a non-party to the restrictive covenant between the former employer and the former employees—because they had "successfully challenged the enforceability of a restrictive covenant."²⁴⁵ By contrast, the Fourth District Court of Appeal in *Bauer v. DILIB, Inc.*,²⁴⁶ concluded that the attorney's fee provision in the current non-compete statute did not authorize the former employer to recover its attorney's fees from the non-party, the former employees' subsequent employer.²⁴⁷

240. Grant & Steele, *supra* note 8, at 54.

241. *Id.*

242. See FLA. STAT. § 542.335(1)(k) (2010).

243. Compare *Sun Grp. Enters., Inc., v. DeWitte*, 890 So. 2d 410, 412 (Fla. 5th Dist. Ct. App. 2004), with *Bauer v. DILIB, Inc.*, 16 So. 3d 318, 322 (Fla. 4th Dist. Ct. App. 2009).

244. 890 So. 2d 410 (Fla. 5th Dist. Ct. App. 2004).

245. *Id.* at 412.

246. 16 So. 3d 318 (Fla. 4th Dist. Ct. App. 2009).

247. *Id.* at 319.

4. Other Remedies

In *Making Noncompete Agreements Work for Employers*,²⁴⁸ Robert B. Gordon suggests:

[U]nilateral employer action (such as . . . cancellation of stock options or restricted equity, termination of severance payments, and the like) . . . are remedies that employers can implement on their own initiative, at no cost, and with only a modest risk that an employee might elect to initiate a lawsuit to challenge the claw-back.²⁴⁹

V. CONCLUSION

Like most states, Florida enforces physician non-compete agreements in employment.²⁵⁰ Also, like most states, Florida strictly construes non-compete agreements among lawyers, in law firms, on grounds of public policy.²⁵¹ Logically, there is no basis for treating the physician-patient relationship any less sympathetically than the lawyer-client relationship. For this reason, physician non-compete agreements should be as narrowly construed, as lawyer non-compete agreements are, under Florida law and for analogous public policy reasons.

248. Robert B. Gordon, *Making Noncompete Agreements Work for Employers*, CORP. COUNS. WKLY. (Bureau of Nat'l Affairs, Inc., Arlington, Va.), Oct. 14, 2009, at 1.

249. *Id.* at 2.

250. *See, e.g.*, *Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 529–30 (Fla. 5th Dist. Ct. App. 2003).

251. Fla. Bar Prof'l Ethics Comm., Op. 93–4 (1995).