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Troubled Waters?
Navigating Florida's Non-Compete Statute in the Wake of *TransUnion*

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An employer who seeks to enforce a non-compete clause against a former employee in Florida may seek injunctive relief and, depending on whether diversity jurisdiction exists, must decide whether to file in federal or state court. Florida's non-compete statute provides strong protection for an employer's legitimate business interests and applies whichever venue is selected. But, following a 2015 unpublished Eleventh Circuit case, the outcome at the injunctive stage may be different in federal court.

Florida's Non-Compete Statute

In Florida, an employer who secures an employee's agreement not to work for a competing business or to solicit the employer's customers can seek to enforce that agreement under Florida's non-compete statute, section 542.335, Florida Statutes. Adopted in 1996, section 542.335 states that non-compete agreements are not prohibited "so long as such contracts are reasonable in time, area, and line of business."[1] Florida courts routinely enforce non-compete agreements against a breaching party if an employer establishes the existence of one or more legitimate business interests and establishes that the "contractually specified restraint is reasonably necessary to protect the legitimate business interest."[2] Legitimate interests include trade secrets; valuable confidential information; substantial relationships with customers, patients, and clients; goodwill; and extraordinary or specialized training.[3]

Once an employer establishes a legitimate business interest, the party resisting enforcement must establish that the restriction is overbroad and not reasonably necessary to protect that interest.[4] If that effort fails, the statute provides that a court "shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions."[5]

Since its passage in 1996, section 542.335 has been applied in harmony with the familiar four-step analysis for determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the moving party unless the injunction issues; (2) the unavailability of an adequate remedy; (3) the substantial likelihood of success on the merits; and (4) the furtherance of the public interest.[6]

Two significant features of section 542.335 affect the injunctive relief analysis. First, section 542.335(4)(j) provides a presumption of irreparable harm due to the breach of an enforceable non-compete agreement. When seeking injunctive relief, as the statute contemplates, a party's ability to establish irreparable harm satisfies the likelihood-of-success prong of the test for establishing one's entitlement to injunctive relief.[7]

Second, section 542.335(1)(g)(1) prohibits a court from considering "any individualized economic or other hardship that might be caused to the person against whom enforcement is sought," which would typically be part of the analysis of whether the public interest would be served by the entry of the injunction.[8]

When deciding whether to enforce a restrictive covenant with injunctive relief, Florida courts have taken this plain language to mean what it says and have granted the presumption of irreparable harm and refused to weigh the potential hardship an injunction might impose on the transgressor.[9]

Federal courts applying the 1996 statute generally followed suit, although inconsistently.[10] In *Talk Fusion v. Ulrich*,[11] however, the court employed a hybrid approach; it analyzed the likelihood of success prong in reference to the irreparable harm presumption of section 542.335 but proceeded to balance hardships without mentioning the statute.[12]

Enter *TransUnion*

In 2015, in *TransUnion v. Maclachan*,[13] the Eleventh Circuit held in an unpublished opinion that a federal court sitting in diversity was required to apply Florida substantive law, i.e., section 542.335, which prescribes "the elements necessary to state a prima facie claim to enforce a restrictive covenant and issues instructions to the courts when ruling on such claims,"[14] but must follow Federal Rule of Civil Procedure 65 to determine whether to issue an injunction to enforce a non-compete agreement that was otherwise enforceable under section 542.335.[15] The court noted that under federal procedure codified in Rule 65, a party seeking injunctive relief must show: "'(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.'"[16]

In *TransUnion*, the former CEO of the company seeking injunctive relief argued that the district court "erred when it applied Florida Statutes sections 542.335(1)(g)(1) and 542.335(1)(j) to two of the four elements necessary for a preliminary injunction under Federal Rule of Civil Procedure 65," contending

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that "these sections are in conflict with federal procedure codified in Rule 65."[17]

In addressing the perceived conflict, the *TransUnion* court reasoned that section 542.355(1)(g) "governs the *enforceability* of restrictive covenants, not the *enforcement* of an already enforceable restrictive covenant."[18] The court also stated that "Florida courts have seamlessly applied section 542.335(1)(j) alongside Florida's state procedure for preliminary injunctions, which mirrors Rule 65 federal procedure almost exactly."[19] But, the Eleventh Circuit noted that section 542.335(1)(g)(3) instructs that the court "[s]hall consider all other pertinent legal and equitable defenses."[20] From that, the Eleventh Circuit concluded that in determining the remedy, federal courts must follow Rule 65, including consideration of irreparable harm and the balance of harms to the parties.[21]

In analyzing the availability of injunctive relief, the Eleventh Circuit rejected the statute's presumption of irreparable harm. The court reasoned that "section 542.335(1)(j) does not relieve [a defendant] of its procedural burden of establishing that irreparable injury will be suffered unless the injunction issues; rather, it prescribes how irreparable injury is established in the restrictive covenant context."[22]

Second, the *TransUnion* court held that the district court had erred by refusing to consider the potential hardship to the defendant when balancing the harms under Rule 65. The Eleventh Circuit expressly rejected the clear language of section 542.335 and reasoned that that consideration "[is] directed towards the determination of whether a restrictive covenant is enforceable" and "should not be applied when determining the appropriate remedy."[23]

Section 542.335 clearly addresses both the enforceability and the enforcement of restrictive covenants. By applying Rule 65 to the analysis, however, *TransUnion* effectively eliminates two of the significant elements of Florida's substantive non-compete law—the presumption of irreparable harm and the bar on considering economic hardship to a transgressing employee as a result of the breach.

Post-*TransUnion*

Since 2015, Florida courts have continued to analyze the grant of injunctive relief in enforcement of non-compete agreements as they had before.[24] Federal cases since *TransUnion* have been inconsistent in their approach to section 542.335. In *Hayes Healthcare Servs., LLC v. Meacham*,[25] the court noted that *TransUnion* requires courts to follow Rule 65, without regard to section 542.335, and proceeded to apply the traditional irreparable harm analysis.[26] But, in *Pirtek USA v. Twillman*,[27] the district court without comment noted that section 542.335 presumes irreparable harm where there is an adequately pled violation of an enforceable non-compete agreement and precludes consideration of individualized economic or other hardship, dismissing the defendant's contentions in affidavits regarding potential hardship.

The Bottom Line

Whether or not the presumptions of section 542.335 apply has a significant impact on the enforcement of an otherwise enforceable non-compete agreement. In Florida state courts, the question whether to grant an injunction to enforce a non-compete agreement is answered once the employer establishes a legitimate business interest and the reasonableness of the restrictive covenant to protect that interest. Absent a showing by the party resisting enforcement that the covenant is unreasonably overbroad, irreparable harm resulting from its breach is presumed. And, a party who violates a valid restrictive covenant cannot escape the transgression by arguing that an injunction will impose an economic hardship.

On the other hand, an employer who seeks a preliminary injunction in federal court risks that court following *TransUnion*, thereby eliminating the Florida statute's intended benefits. Instead, the employer seeking enforcement of a valid non-compete agreement that a former employee has unquestionably violated will have to provide evidence that it has, in fact, sustained irreparable harm. Moreover, an employee who has violated a restrictive covenant can defend against injunctive relief by arguing that it will impose an undue hardship, even though the employee has no right to engage in the conduct that an employer seeks to stop.

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Endnotes

1 FLA. STAT. § 542.335(1) (2020).

2 *Id.* at § 542.335(1)(c).

3 *Id.* at § 542.335(1)(b)(1–5).

4 *Id.* at § 542.335(1)(c).

5 *Id.* at § 542.335(4)(j); *see Supkinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 529–30 (5th DCA 2003) ("So long as the covenant not to compete fits within the parameters of section 542.335, it may be enforced by the injunctive power of the courts.").

6 *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. 5th DCA 2009).

7 *See Atomic Tattoos, LLC v. Morgan*, 45 So. 3d 63, 66 (2d DCA 2010) ("Evidence that an enforceable covenant not to compete was breached will support a trial court's finding of the likelihood of success on the merits." (internal quotation marks and citation omitted)); *Variable Annuity Life Ins. Co. v. Hausinger*, 927 So. 2d 243, 245 (Fla. 2d DCA 2006) ("[A] party seeking to enforce a restrictive covenant by injunction need not directly prove that the defendant's specific activities will cause irreparable injury if not enjoined." (internal quotations marks omitted)).

8 *See DePuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 940 (1st DCA 2012) (rejecting appellees' argument that an injunction disserves the public interest because the balance of harm favors them and noting that argument conflicted with the statute's prohibition on considering individualized hardship).

9 *See Atomic Tattoos, LLC*, 45 So. 3d at 66 (refusing to consider argument that former employee's injury would outweigh "speculative" damages suffered by Atomic Tattoo, because of § 542.335(1)(g)(1)'s prohibition on considering individualized economic or other hardship).

10 *See 7-Eleven, Inc. v. Kapoor Bros., Inc.*, 977 F. Supp. 2d 1211, 1229–30 (M.D. Fla. 2013) (applying presumption of irreparable harm, noting that injunction is the "common and preferred remedy" and citing Florida statute's prohibition on

considering economic hardship to person against whom enforcement sought).

[11] No. 8:11-CV-1134-T-33AEP, 2011 U.S. Dist. LEXIS 74549 (M.D. Fla. June 21, 2011).

[12] *See id*. at *14, 16; *see also United Subcontractors, Inc. v. Godwin*, No. 11-81329-Civ-Hurley/Hopkins, 2012 U.S. Dist. LEXIS 67061, *36–38 (S.D. Fla. Feb. 3, 2012) (applying irreparable harm presumption but not mentioning prohibition on considering undue hardship).

[13] *TransUnion Risk & Alternative Data Solutions, Inc. v. MacLachlan*, 625 F. App'x 403 (11th Cir. 2015).

[14] *Id.* at 405.

[15] *Id.* at 406.

[16] *Id.* at 405 (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per curiam)).

[17] *Id.* at 404.

[18] *Id.* at 407.

[19] *Id.* at 406 (citing *Supinski v. Omni Healthcare, P.A.*, 853 So. 2d 526, 530 (Fla. 5th DCA 2003)).

[20] *Id.* at 407.

[21] *Id.*

[22] *Id.* at 406 (internal quotation marks and citation omitted).

[23] *Id.* at 407.

[24] *See, e.g.*, *Fla. Digestive Health Specialists*, 192 So. 3d 491, 494 (Fla. 2d DCA 2015) (whether party against whom injunction sought will suffer greater injury "is not a part of the court's consideration"); *Freightcenter, Inc. v. Gregory D. Edbaugh*, 2018 Fla. Cir. LEXIS 9223, *9 (Fla. 6th Cir. July 30, 2018) (valid noncompete satisfies the "irreparable harm" and "likelihood of success" elements of injunction analysis; court may not consider hardship to defendant).

[25] No. 19-60113-CIV-COHN/SELTZER, 2019 U.S. Dist. LEXIS 113890 (S.D. Fla. Feb. 1, 2019).

[26] *Id.* at *10–12.

[27] No. 6:16-cv-01302-Orl-37TBS, 2016 U.S. Dist. LEXIS 138811, *22–25 (M.D. Fla. Oct. 6, 2016).