

# Client Alert

Business Information for  
Clients and Friends of  
Shumaker, Loop & Kendrick, LLP

September 18, 2017



Connolly



Wood

## Supreme Court Settles Debate in Florida in Favor of Protection of Referral Sources Under Non-Compete Statute at Least in Some Circumstances

Mark Alan Connolly, Partner | [mconnolly@slk-law.com](mailto:mconnolly@slk-law.com) | 813.227.2347

Thomas M. Wood, Partner | [twood@slk-law.com](mailto:twood@slk-law.com) | 813.227.2271

On September 14, 2017, the Florida Supreme Court issued a unanimous opinion in consolidated cases *White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC*, SC Appeal No. SC 16-28 and *Americare Home Therapy, Inc., v. Hiles*, SC Appeal No. 16-400, and at least partially settled a long-standing debate as to whether “referral sources” qualify as legitimate business interests worthy of protection under Florida’s Non-Compete Statute. In its lengthy opinion, the Court concluded that “section 542.335, Florida Statutes, is non-exhaustive and does not preclude the protection of referral sources; hence, home health service referrals may be a protected legitimate business interests depending on the context and proof adduced.” Employers now potentially have an additional weapon to protect their businesses from departing employees looking to compete unfairly, and should review their non-compete agreements to ensure that they are maximizing available protections under Florida law.

Under 542.335 and prevailing case law, to enforce a contract providing restrictive covenants limiting competition, a plaintiff must plead and prove the existence of one or more “legitimate business interests” of the person or business seeking enforcement. The conflicting cases which formed the basis of the Court’s decision involved the issues of (i) whether the list of “legitimate business interest” in 542.335(1)(b) was an exhaustive list precluding the assertion of other business interests worthy of protection, and (ii) whether home health service referral sources could be protected legitimate business interests under 542.335 sufficient to support enforcing a restriction on competition in a contract.

In analyzing the first issue, the Court noted the list of “legitimate business interests” in the statute was prefaced with the language “includes, but is not limited to” and the conventional rule in Florida is that when the Legislature uses the word “including” in a statute, it is used as a word of expansion, not one of limitation. Ultimately, the Court concluded that section 542.335(1)(b)3 does not preclude recognizing referral sources as protected legitimate business interests, meaning employers can use many different legitimate business interests not listed in the statute to support non-compete agreements.

In determining whether home health service referral sources can be a protected legitimate business interest under section 542.335, the Court again looked to the Legislature’s intent by reviewing the plain language of the statute. Recognizing that the statutory list found its roots in the seminal case of *Hapney vs. Cent. Garage, Inc.*, 579 So. 2d 127 (Fla. 2d DCA 1991), the Court also noted that *Hapney* itself clarified that, other than the three listed categories, “other business interests . . . may constitute protectable interests depending upon the proof adduced.” 579 So. 2d at 134. According to the Court, “other than their connection to *Hapney*, consideration of the interests in the statutory list reveals only one discernable similarity: preventing unfair competition by protecting crucial business interests...” and “because the statute protects more business interests than those specifically listed, courts must necessarily engage in fact- and industry-specific determinations when construing non-enumerated interests.”

Home Health Companies (HHCs) provide skilled nursing, physical therapy, and other home health services to homebound patients. In finding that referral sources can be protectable legitimate business interests for HHCs, the Court noted that the importance of referrals to HHCs “cannot be overstated.” The Court explained that to attract and develop their businesses, HHCs seek referrals from multiple patients’ health care providers, and that generally patients seek an HHC after a referral from a physician, hospital, or skilled nursing facility. HHCs compile internal databases of referral source preferences, strategies, and procedures, which their representatives utilize for marketing the HHC business.

After considering the history of the statute, cases interpreting it, and the significance of referral sources to the success of HHCs, the Court concluded that home health service referral sources may be a protected legitimate business interest within the meaning of section 542.335, depending upon the context and evidence introduced by the party seeking to enforce an agreement. The Court found that certain industries and businesses, such as HHCs, present special facts where protecting referral sources may be necessary to prevent unfair competition.

Critically, the facts of each case will be dispositive in determining whether an activity qualifies as a protected legitimate business interest. Though the controlling statute includes a limited list of protected legitimate business interests, the Court found there could be a “plethora” of interests far beyond those listed that could be protected. Home health service referral sources can now be counted among those protectable legitimate business interests depending on the facts and circumstances of the individual case presented.

While it is clear that non-compete agreements can no longer be ignored or thrown out simply because they include or are based upon referral sources, the decision leaves open the question of its applicability in industries other than the home health services industry, such as for specialist physicians or non-healthcare based industries.

For more information on the White decision and enforcement of restrictive covenant agreements, as well as advice on updating current non-compete agreements under Fla. Stat. Sec. 542.335, please contact Mark A. Connolly at [mconnolly@slk-law.com](mailto:mconnolly@slk-law.com) or Thomas M. Wood at [twood@slk-law.com](mailto:twood@slk-law.com).

[www.slk-law.com](http://www.slk-law.com)

