

Say It with Specificity (Extending Enforceability of the Non-Compete Agreement)

It could be argued that one of the most valuable contractual tools available to a company in negotiating with executives or management personnel is an agreement not to compete with the company in the future. After all, how terrible a fall-out for a top executive or employee to leave with a wealth of knowledge, and possibly the company's business or client information, only to set up shop right down the street doing the same thing as his/her prior company. This circumstance happens often in business, and when it happened to one Florida company, that company did what businesses in that situation often do – file suit seeking to enjoin (stop) the “improper” competition. However, as gleaned from the Court's ruling discussed below, specificity in your contract can be key.

Factual Background of the Case:

Upon hiring a particular individual to be its president back in May of 1997, the company and that individual entered into an employment agreement which provided: (a) that the contract was to commence on May 1, 1997, and end five years from that date, “unless terminated pursuant to section 6 of the Agreement, or unless extended by the mutual agreement of the parties,” and (b) the president (employee) would not compete with the company in the business of property management and maintenance services, or solicit the business of the company's clients, for a period of eighteen months “following termination” of the Agreement. In July of 2003 (over 6 years after the agreement was signed) the company president resigned and proceeded to open a new, competing business, which the company was now looking to shut down.

Legal Discussion/Conclusion:

In reaching its conclusion that the competing business could not be shut down, the court began by recognizing 2 clear statutory rules of law:

- (1) Florida statutes § 542.335(1) provides that restrictive covenants (or non-compete agreements) are valid if they are (a) reasonable in time, area and line of business, (b) set forth in a writing signed by the party against whom enforcement is sought, (c) supported by at least one legitimate business interest justifying the restraint, and (d) reasonably necessary to protect that interest;
- (2) Florida Statutes § 725.01 (commonly known as the Statute of Frauds) provides, among other things, that any agreement that is not to be performed within the space of one year from its making must be reduced to writing in order to be enforceable; and

In this case, it was undisputed that the parties had signed the agreement and that the ex-employee was in fact competing. However, it was also undisputed that the agreement's initial term had expired more than one year after the ex-employee quit, and that no new agreement had been signed. Accordingly, the statute of frauds would bar enforcement of the non-compete agreement absent some other exception or rule.

Confronted with that reality, the company argued that the language providing for a five year term "unless terminated pursuant to section 6 of this Agreement, or unless extended by the mutual agreement of the parties hereto," effectively extended the contract. The court, however, didn't buy it.

Specifically, because (a) agreements not to compete are generally not looked upon favorably under the law since they impose on one's right to work freely and (b) the contract language did not directly address the agreement not to compete provision of the contract, but merely the contract itself, the court concluded that the non-compete agreement had not been extended and was therefore unenforceable.

Unfortunately, in this instance the lack of specificity in properly extending the non-compete clause left this company not as protected from a competing ex-executive as hoped – a difficult lesson indeed.

By: Andrew M. Feldman, Esq.

E-mail: AFeldman@AMFLegal.com

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