Employer’s Desk Reference:

Florida Non-Compete Agreements

March 2013

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EMPLOYER’S DESK REFERENCE: FLORIDA NON-COMPETE AGREEMENTS

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A Brief History

Under common law, covenants not to compete were generally held as void and therefore unenforceable, because they were viewed by courts as a restraint on trade and contrary to public policy. Auto Club Affiliates, Inc., v. Donahey, 281 So.2d 239 (Fla. 2d DCA 1973). In 1953, however, the Florida legislature passed Florida Statute § 542.12 which recognized that although there are legitimate public policy reasons against agreements restricting competition, there should nevertheless be exceptions where covenants not to compete may be deemed reasonable. Miller Mechanical, Inc., v. Ruth, 300 So.2d 11 (Fla. 1974).

Florida law governing non-compete agreements continues to evolve. Fla. Stat. § 542.12, the statute passed in 1953, was eventually replaced with Fla. Stat. § 542.33. Section 542.33, in turn, was replaced by Florida’s current non-compete statute - Fla. Stat. § 542.335. Parties using restrictive covenants, whether as an employer or employee, should be familiar with both § 542.33 and § 542.335, as the first governs non-compete agreements entered into before July 1, 1996, and the latter (Fla. Stat. § 542.335) applies to non-competes entered into on or after July 1, 1996. DePuy Orthopaedics, Inc., v. Peter Waxman, et al., Case No. 1D12-897 at *5 (Fla. 1st DCA Aug. 3, 2012), citing Corporate Express Office Products, Inc., v. Phillips, 847 So. 2d 406 (Fla. 2003).

Purpose of Non-Compete Statutes

Florida Statutes §§ 542.33 and 542.335 were both drafted with the same purpose in mind - allow employers to prevent their employees or agents from learning the employer’s trade secrets, establishing relationships with the employer’s customers and then leaving the employer and taking its trade secrets to a competitor. See generally, Miller Mechanical, Inc., v. Ruth, 300 So.2d 11 at 12.

Florida Statute § 542.33

Florida Statute § 542.33 governs non-compete agreements executed prior to July 1, 1996. Section 542.33 provides as follows:

(1) Notwithstanding other provisions of this chapter to the contrary, each contract by which any person is restrained from exercising a lawful profession, trade, or business of any kind, as provided by subsections (2) and (3) hereof, is to that extent valid, and all other contracts in restraint of trade are void.

(2) One who sells the goodwill of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer,
and on who is employed as an agent, independent contractor, or employee may agree
with his employer, to refrain from carrying on or engaging in a similar business and from
soliciting old customers of such employers within a reasonably limited time and area, so
long as the buyer or any person deriving title to the goodwill from him, and so long as
such employer, continues to carry on a like business therein. Said agreements may, in the
discretion of a court of competent jurisdiction, be enforced by injunction. However, the
court shall not issue an injunction contrary to the public health, safety or welfare or in
any case where the injunction enforces an unreasonable covenant not to compete or
where there is no showing of irreparable injury. However, use of specific trade secrets,
customer lists, or direct solicitation of existing customers shall be presumed to be an
irreparable injury and may be specifically enjoined. In the event the seller of the
goodwill of a business, or a shareholder selling or otherwise disposing of all his shares in
a corporation breaches an agreement to refrain from carrying on or engaging in a similar
business, irreparable injury shall be presumed.

Fla. Stat. § 542.33.

Courts interpreting Fla. Stat. § 542.33 have found that the “statute expresses the legislature’s
intent that covenants not compete, although validated by the statute, are not enforceable by
injunction if the covenant is unreasonable, if enforcement would be contrary to public health,
safety or welfare, or if the proponent is unable to show irreparable harm if the covenant were not
enforced according to its terms.” Jewett Orthopaedic Clinic, P.A., v. M. White, M.D., 629 So.2d
922, 925 (Fla. 5th DCA 1993).

Covenants not to compete must also be reasonable as to geographic scope and duration. Miller
Mechanical, Inc., v. Ruth, 300 So.2d at 12, citing Capelouto v. Orkin Exterminating Co., 183
So.2d 532 (Fla. 1966). In deciding whether a covenant is reasonable, courts apply a “balancing
test” that weighs the employer’s interest in preventing competition against the oppressive effect
of the covenant on the employee. Capelouto v. Orkin Exterminating Co., supra. Courts have
found that a covenant prohibiting competition for one year was reasonable, whereas the same
contract’s geographic scope of two counties was not. Silvers v. Dis-Com Securities, Inc., 403
So.2d 1133 (Fla. 4th DCA 1981).

Florida Statute § 542.335

Florida Statute § 542.335 governs non-compete agreements executed on or after July 1, 1996.
Section 542.335 provides as follows:

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or
prohibit competition during or after the term of restrictive covenants, so long as such
contracts are reasonable in time, area, and line of business, is not prohibited. In any
action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant unless it is set forth in a writing signed
by the person against whom enforcement is sought.
(b) The person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term “legitimate business interest” includes, but is not limited to:

1. Trade secrets, as defined in s. 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

4. Customer, patient, or client goodwill associated with:
   a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”;
   b. A specific geographic location; or
   c. A specific marketing or trade area.

5. Extraordinary or specialized training.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

(d) In determining the reasonableness in time of a post-term restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:
   a. The assets of a business or professional practice, or
b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice, 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.

2. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice, a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice, a court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(e) In determining the reasonableness in time of a post-term restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.
(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party's assignee or successor.

(g) In determining the enforceability of a restrictive covenant, a court:

1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

2. May consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.

3. Shall consider all other pertinent legal and equitable defenses.

4. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(h) 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.

(i) 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.

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(k) In the absence of a contractual provision authorizing an award of attorney's fees and
costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant. A court shall not enforce any contractual provision limiting the court's authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) This act shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.

LEGAL STANDARD FOR ENFORCEMENT OF NON-COMPETE AGREEMENTS

Legitimate Business Interests

As Florida’s most current statute governing non-compete agreements, section 542.335 provides “a comprehensive framework for analyzing, evaluating and enforcing restrictive covenants contained in employment contracts.” Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1230-31 (11th Cir. 2009), citing Envt'l Servs., Inc., v. Carter, 9 So.3d 1258, 1262 (Fla. 5th DCA 2009). In order for a restrictive covenant to be valid, the party seeking to enforce the covenant “shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant.” Proudfoot, 576 F.3d at 1231, citing Fla. Stat. § 542.335(1)(b). Section (1)(b) of the statute provides a non-exhaustive list of legitimate business interests. Id. Included among this list of legitimate business interests are (1) trade secrets; (2) confidential business or professional information; (3) substantial relationships with prospective or existing customers; (4) customer goodwill; and (5) extraordinary or specialized training.

Reasonably Necessary to Protect Legitimate Interests

In addition to establishing a legitimate business interest, a party seeking to enforce a restrictive covenant must also prove that the covenant is reasonable with regard to time, area and line of business. Proudfoot, 576 F.3d at 1231, citing Fla. Stat. § 542.335(1). Once the party seeking enforcement of the restrictive covenant establishes that the restraint “is reasonably necessary to protect the legitimate business interest[s] … justifying the restriction,” the burden shifts to the party opposing the restraint to show that “the contractually specified restraint is overbroad, overlong or otherwise not reasonably necessary to protect the established legitimate business interests.” Id., citing Fla. Stat. § 542.335(1)(c). Should the court find that the “contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest[s],” the statute requires the court to “modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.” Id.
PRESUMPTIONS OF IRREPARABLE INJURY

Presumption of Injury For Non-Competes Executed Prior to July 1, 1996

Florida Statute § 542.33 spells out the legal principles which govern covenants not to compete for contracts entered into prior to July 1, 1996. Prior to the Florida legislature amending § 542.33 in 1990, the statute provided that a covenant not to compete could be enforced through injunction at the discretion of the court. King M.D., P.A. v. Jessup, M.D., 698 So.2d 339, 340 (5th DCA 1997). Typically, before a party can receive an injunction, it must establish that there has been an irreparable injury. Langford v. Rotech Oxygen & Medical Equipment, Inc., 541 So.2d 1267 (Fla. 5th DCA 1989). Before the 1990 amendments to § 542.33, however, courts could grant an injunction for a breach of a covenant not to compete provided the moving party established a valid covenant and a breach thereof – irreparable harm was presumed by establishing the breach. King M.D., P.A. v. Jessup, M.D., supra., citing Capraro v. Lanier Business Products, Inc., 466 So.2d 212 (Fla. 1985).

In 1990, the legislature amended § 542.33 to provide that “the court shall not enter an injunction contrary to the public health, safety, or welfare or in any case where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury.” (Emphasis added). Under the amended version of § 542.33, a party seeking to enforce a covenant not to compete was required to prove irreparable injury in addition to the existence of a valid covenant and a breach. See King M.D., P.A. v. Jessup, M.D., 698 So.2d at 341, citing AGS Computer Services, Inc. v. Rodriguez, 592 So.2d 801 (Fla. 4th DCA 1992). Through the amendment, a presumption of irreparable injury exists provided the moving party establishes that the breaching party either used specific trade secrets, customer lists, or directly solicited existing customers.

In King M.D., P.A. v. Jessup, M.D., the Fifth District Court of Appeal had to consider whether a doctor who left a practice to start his own was in breach of a covenant not to compete. One of the issues before the court was whether the doctor seeking to enforce the covenant was entitled to the presumption of irreparable injury due to the breaching doctor’s alleged direct solicitation of patients. See King M.D., P.A. v. Jessup, M.D., 698 So.2d at 341. The alleged “direct solicitation” consisted of the departing doctor placing an advertisement in a local newspaper announcing his new address. Id.

The Fifth District found that the doctor who started his new practice (an purportedly breached the non-compete agreement), did not engage in direct solicitation of past patients by putting an advertisement in the local newspaper. Id. Although placing an ad in a newspaper was a form of solicitation, it was not direct solicitation as provided for in Fla. Stat. § 542.33. Id. Likewise, the court found that even though past patients of the departing doctor sought him out at his new practice, this too was not evidence of “direct solicitation” that entitles a moving party to the presumption of irreparable injury. Id., citing Kephart v. Hair Returns, Inc., 685 So.2d 959 (Fla. 4th DCA 1996), rev. denied, 695 So.2d 699 (Fla. 1997)(holding that non-compete agreement did not prohibit former employee from servicing customers who voluntarily followed employee to her new place of employment).
The court in *King v. Jessup* found that a former employee placing an ad in a newspaper that provides his new address is not the form of direct solicitation that would entitle a party to a presumption of irreparable injury. There are other ways, however, that a party can breach a covenant not to compete which will trigger a presumption of irreparable injury – use of trade secrets, confidential business information or utilizing an employer’s information regarding existing or potential customers. These issues are addressed in greater detail in the following pages.

**Presumption of Injury For Non-Competes Executed After July 1, 1996**

Florida Statute § 542.335 is the most recent statute governing non-compete agreements. The current statute contains several express provisions governing presumptions. For example, under § 542.335(1)(j), the statute provides that “the violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant.” Courts interpreting the statute therefore have found that an employee’s violation of a restrictive covenant in an employment agreement creates a presumption of irreparable injury for purposes of enforcement under either a temporary or permanent injunctions. *Environmental Services, Inc., v. Carter*, 9 So.3d 1258, 1262 (Fla. 5th DCA 2009), citing *Henao v. Prof'l Shoe Repair, Inc.*, 929 So.2d 723, 726 (Fla. 5th DCA 2006).

An enforceable restrictive covenant is one in which “the contractually specified restraint is reasonably necessary to protect [a] legitimate business interest.” Fla. Stat. § 542.335(1)(c); see also, *Walsh v. Paw Trucking, Inc.*, 942 So.2d 446, 447-48 (Fla. 2d DCA 2006). In order for a party to receive the presumption of irreparable injury, the party seeking to enforce the covenant must show that the restrictive covenant protects a legitimate business interest under § 542.335(1)(b) and that the covenant was violated. *Id.* at 449, citing *Colucci v. Kar Kare Auto Group*, 918 So.2d 431, 438 (Fla. 4th DCA 2006); see also, *Hapney v. Cent. Garage, Inc.*, 579 So.2d 127, 134 (Fla. 2d. DCA 1991)(holding that the “proof of a legitimate business interest is the threshold for a presumption of irreparable harm on breach of the contract.”)

It is important to remember that the presumption of irreparable injury under § 542.335(1)(k) is rebuttable, not conclusive. *See Passalacqua v. Naviant, Inc.*, 844 So.2d 792, 796 (Fla. 4th DCA 2003), citing *Don King Prods., Inc., v. Chavez*, 717 So.2d 1094, 1095 (Fla. 4th DCA 1998). In *Passalacqua*, the trial court granted a former employer’s request for temporary injunction enforcing a non-compete agreement. On appeal, the Fourth District reversed, finding that the employer failed to demonstrate a legitimate business interest. Recognizing that the presumption of irreparable harm was rebuttable, the court in *Passalacqua* found that the former employee “presented detailed and uncontroverted testimony and other evidence showing that there was nothing unique about [the employer’s] operations, sales methods or other aspects of its business …” *Id.* at 796. *Passalacqua* illustrates how a party opposing enforcement of a non-compete can effectively rebut the presumption of irreparable injury.
LEGITIMATE BUSINESS INTERESTS

Fla. Stat. § 542.335(1)(b)(1) – (5) provides a non-exclusive list of an employer’s “legitimate business interests” which are subject to protection. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1231 (11th Cir. 2009). Included among legitimate business interests are the following:

(1) trade secrets;
(2) confidential business information;
(3) substantial relationships with specific, prospective or existing customers;
(4) customer goodwill; or,
(5) extraordinary or specialized training.

TRADE SECRETS

Fla. Stat. § 542.335(1)(b) provides in part that “[t]he term ‘legitimate business interest’ includes, but is not limited to: (1) [t]rade secrets, as defined in [Fla. Stat. §] 688.002(4).” A “trade secret” under Fla. Stat. § 688.002(4) is defined as:

(4) … information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Florida courts interpreting Fla. Stat. 688.002(4) often summarize trade secrets as information that (i) derives economic value from not being readily ascertainable by others and (ii) is the subject of reasonable efforts to maintain its secrecy. American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998); see Fla. Stat. 688.002(4).

Economic Value

In East v. Aqua Gaming, 805 So.2d 932 (2d DCA 2001), the Second District considered whether customer lists provide economic value and therefore are trade secrets which are subject to protection. The employer in Aqua Gaming operated a casino gaming renovation and resale business and had a customer base spanning the U.S., the Caribbean and South America. Id. at 933. An employee who had worked for the company for several years left and started his own casino equipment refurbishing business. Id. Before leaving, however, the employee took a list that included casino names, vendor names, telephone numbers, addresses and contact information which he acquired while working for the employer. Id. The trial court entered an injunction prohibiting the employee from using any confidential information obtained from the
employer and further ordered the employee to return such information. The employee appealed the trial court's decision. *Id.*

In reviewing the evidentiary record, the Second District found that although there was conflicting evidence at trial, there was sufficient evidence to support the trial court's finding that the employer's customer lists were the product of great expense and effort and therefore qualified as trade secrets under Fla. Stat. 688.002(4). *Id.* at 934. At trial, the employer had established that the customer lists taken by the former employee "included information that was confidential and not available from public sources, and that it was distilled from larger lists of potential customers into a list of viable customers for its unique business." *Id.* In reaching its decision, the Second District cited other opinions that were in agreement with the court's finding. *Id.* citing *Templeton v. Creative Loafing Tampa, Inc.*, 552 So.2d 288 (Fla. 2d DCA 1989)(in deciding whether a customer list was a trade secret, the court considers whether the list is a product of great expense and effort and is confidential); see also, *Dicks v. Jensen*, 768 A.2d 1279 (Vt. 2001)(stating that a list of potential or existing customers which is not readily ascertainable has value and can be a trade secret).

In *Sethscot Collection, Inc.* v. *Drbul*, 669 So.2d 1076, 1078 (3rd DCA 1996), the Third District considered whether a former employee of a company that embroidered logos on clothing used trade secrets in the form of customer lists. The employer in *Sethscot* sought an injunction prohibiting the employee from using the employer's prospective customer list. *Id.* The list contained over 9,000 names of fraternities and sororities - keys customers for an embroidery company. *Id.* On appeal, the Third District found that the customer list did not qualify as a trade secret entitled to injunctive relief. In doing so, the court noted that the information on the list "was obtained from commercially available materials" and that the "list is compiled from information that is readily ascertainable to the public." *Id.* Such information, the Third District reasoned, did not rise to the level of a "product of any great expense or effort." *Id.* citing *Templeton v. Creative Loafing Tampa, Inc.*, 552 So.2d 288, 289 (Fla. 2d DCA 1989); see also, *Mittenzwei v. Industrial Waste Serv., Inc.*, 618 So.2d 328 (Fla. 3d DCA 1993).

The court in *Sethscot* also found that a separate customer list of the employer, consisting of over 6,000 sororities and fraternities that had previously ordered from the employer, constituted trade secrets that were subject to protection under an injunction. *Id.* Unlike the first list, the second list was an active customer list that represented a "distillation" of the prospective customer list. The second list contained detailed information regarding the purchasing history of the employer's customers. Such information was not readily ascertainable to the public and therefore entitled to protection as a trade secret. *Id.*

**Reasonable Efforts to Maintain Secrecy**

Florida Statute § 688.002(4) provides a two part test for trade secrets: the information sought to be protected must gain economic value from not being known by the public; and, reasonable efforts must be made to maintain its secrecy. It sounds simple enough, but in Florida a trade secret must in fact be a secret, meaning the information sought to be protected is not known by the public or not readily "discernible" by the public. *Potucek v. Taylor*, 738 F.Supp. 466, 470 (M.D.Fla. 1990). Second, the party who owns the trade secret must take precautions to prevent
the disclosure of the secret to the public. *Id.* These precautions usually require that the trade secret owner only divulge the secret under conditions of confidentiality. *Id.* citing *Smith Snap-On Tools Corp.*, 833 F.2d 578 (5th Cir. 1987); *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195 (5th Cir. 1986).

Trade secret litigation often involves an employer seeking to protect a customer list or other proprietary data. In *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F.Supp.2d 1064 (S.D.Fla. 2003), the United States District Court for the Southern District of Florida considered whether to dismiss a complaint that alleged, *inter alia*, misappropriation of trade secrets. The court in *Greenberg* found that the complaint alleged that the plaintiffs used time, money and other efforts to create a registry of patients. *Id.* at 1077. The court also found, however, that the plaintiffs in *Greenberg* did not allege in their complaint that they took measures to keep the patient lists confidential. Instead, the plaintiffs only alleged that there was an "expectation" that the patient list would remain confidential. *Id.* To have a trade secret which a court will protect, you must take steps to prevent disclosure of the information. A mere expectation of confidentiality is not enough.

If a party seeks to protect a trade secret such as a customer list, it should be prepared to demonstrate to the court that it has taken reasonable steps to protect the information from the general public. In *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410-11, (11th Cir. 1998), the Eleventh Circuit found that the party seeking to protect a trade secret "had not been particularly careful to protect the secrecy of its list of names." *Id.* at 1410. It making this finding, the court noted that the customer lists had been posted on a computer bulletin board that was readily available to competitors and the public. *Id.* In *American Red Cross*, the Eleventh Circuit vacated a district court injunction because the donor lists at issue were "not in fact secret but have instead entered the public domain." *Id.*

**Other Considerations**

In trade secret litigation, the party seeking to protect the trade secret bears the burden of demonstrating that the information it seeks to protect is secret and that it has taken reasonable steps to protect this secrecy. *American Red Cross, supra.*, at 1410, citing *Lee v. Cercoa, Inc.*, 433 So.2d 1, 2 (Fla.Dist.Ct.App. 1983). Whether a customer list or other form of data constitutes a trade secret is a question of fact that must be determined by the trier of fact. 1 R. Milgram, Milgram on Trade Secrets, sec. 2.23 at 2-32-33 (1984).

Generally speaking, trade secret laws do not prohibit copying or using information that has been gained by proper means, such as through reverse engineering, independent invention, or copying or using information that is available in the public domain. *Potucek v. Taylor*, 738 F.Supp. 466, 470 (M.D.Fla. 1990). If the information is commonly known in a particular industry and not unique to the party seeking to protect the information, such information is not "confidential" and therefore not entitled to protection. *Keel v. Quality Medical Systems, Inc.*, 515 So.2d 337 (Fla. 3d DCA 1987).
CONFIDENTIAL BUSINESS INFORMATION

Section 542.335(1)(b)(2) includes in its list of legitimate business interests “valuable confidential business or professional information that otherwise does not qualify as trade secrets.” Although the statute provides several definitions of legitimate business interests, a party seeking to enforce a non-compete agreement is required to establish only one interest to justify enforcement. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1233 (11th Cir. 2009). In Proudfoot, the district court found that an employee breached several provisions of a non-compete agreement and that the employee had access to information about the employer’s clients and business operations, “including training materials, pricing information, information about [the employer’s] methodology for providing operational management consulting services and information about [the employer’s] products, offerings and tools. Id. at 1228.

The non-compete agreement in Proudfoot restricted the employee from engaging in certain types of conduct after leaving the employer. Id. at 1229. Regarding confidential business information, the agreement required the employee to return all of the employer’s documents and materials upon termination. Id. at 1230. The non-compete further provided that the employee could not disclose or use the confidential information “at all times after the termination of [his] employment.” Id.

The district court found that the employee received “valuable confidential business information” under section 542.335(1)(b), including information about the employer’s clients and business operations, training materials, pricing information, information about the employer’s methodology for providing management consulting services and information about the employer’s products, offerings and tools. Id. at 1233-34. In finding that the employer’s information was confidential and subject to protection, the district court reasoned as follows: “when an employee has access to confidential business information crucial to the success of an employer’s business, that employer has a strong interest in enforcing a covenant not to compete.” Id. at 1234, citing Autonation v. O’Brien, 347 F.Supp.2d 1299 (S.D.Fla. 2004)(Emphasis added).

Future Breach by Employee

On appeal to the Eleventh Circuit, the employee in Proudfoot argued that he did not intentionally take the employer’s confidential information and that he never used or disclosed such information at his new employment. Proudfoot Consulting Co. v. Gordon, 576 F.3d at 1234. The Eleventh Circuit, however, found that the employer’s interest in the confidential information justified enforcement of the non-compete agreement regardless of whether the employee improperly retained the information or whether the employee actually used the information. Id. Further, the employee testified that he could potentially use the employer’s confidential information at his new employment. Id. Proudfoot illustrates how courts will enforce a non-compete agreement not just to remedy an actual breach, but to prevent a future breach of “endangered [] information.” Id. This potential endangerment constitutes a legitimate business interest that warrants enforcement of non-compete agreement. Id.

The reasoning of the Eleventh Circuit in Proudfoot is beneficial to a party seeking to enforce a non-compete to protect confidential business information. The court agreed with the district
court that information concerning items such as the employer’s business operations, training materials and methodology of conducting business all constituted confidential business information. Citing *Autenation v. O’Brien*, the Eleventh Circuit also agreed that when the confidential information is “crucial to the success of an employer’s business”, the employer has a strong interest in enforcing the covenant not to compete. Such information should be protected, pursuant to the terms and limitations of the non-compete, so long as the employee is employed by the employer’s competitor. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d at 1234.

**SUBSTANTIAL RELATIONSHIPS WITH CUSTOMERS**


**Initiation of Contact by Customer**

An employer can have a legitimate business interest in customer relationships even if the employer’s customers elect on their own to end their relationship with the employer and start a business relationship with the departing employee. *Hilb Rogal & Hobbs of Florida, Inc., v. Grimmel*, 48 So.3d at 961, citing *Scarborough v. Liberty National Life Insurance Co.*, 872 So.2d 283, 285 (Fla. 1st DCA 2004). Likewise, in *Envtl. Servs., Inc. v. Carter*, 9 So.3d 1258 (Fla. 5th DCA 2009), the Fifth District recognized that a solicitation by an employee can exist in violation of a non-compete agreement “regardless of whether the customer or employee initiated the transaction.” *Envtl. Servs.*, 9 So. 3d at 1266.

**Public Interest**

In *Hilb Rogal & Hobbs of Fl. v. Grimmel*, the Fourth District reversed a trial court finding that the public interest would not be served by enforcing an injunction against a former employee who contacted the employer’s customers. *Hilb Rogal & Hobbs 48 So.3d* 961-962 (reversing the trial court’s findings that “[t]he public interest will not be served if a temporary injunction is issued. The [employer’s] former customers are not owned by the [employer].”). In reversing the trial court, the Fourth District cited *Pitney Bowes Inc. v Acevedo*, 2008 WL 2940667 (S.D.Fla. 2008) which enjoined a former employee from, among other things, soliciting prospective and current customers of the employer. *Hilb Rogal & Hobbs 48 So.3d* 962. The *Pitney Bowes* court found that an injunction barring solicitation by a former employee would not harm the public interest, but would instead serve the public through the protection and enforcement of contractual rights. *Pitney Bowes Inc. v Acevedo*, 2008 WL 2940667 at *6 (further citations omitted).
Establishing a Substantial Relationship

The Fourth District in *Hilb Rogal & Hobbs* found that the trial court abused its discretion by applying an “erroneous view of the law and an erroneous assessment of the evidence.” *Hilb Rogal & Hobbs* 48 So.3d 962. Reviewing the record before it, the Fourth District found that the employer seeking to enforce the non-compete agreement had a legitimate business interest in its substantial relationships with specific existing customers. Further, the employer established that the non-compete agreement it sought to enforce “prohibit[ed] the piracy of those customers [and] was no broader than necessary to protect that interest.” *Id.* Finally, the Fourth District found that the former employee had solicited and serviced the employer’s customers, which violated the terms of the non-compete agreement and irreparably harmed the employer. *Id.*

It is important to point out that the Fourth District in *Hilb Rogal & Hobbs* found that the employer had a legitimate interest in substantial business relationships with its customers. In *GPS Indus., LLC, v. Lewis*, the United States District Court for the Middle District of Florida found that GPSI, as the former employer seeking to enforce a non-compete, “failed [] to show that it had a substantial relationship with any existing or prospective customers.” *GPS Indus., LLC, v. Lewis*, 691 F.Supp.2d 1327, 1334 (M.D.Fla. 2010).

The employer in *GPS Industries* offered an affidavit of its president stating that the former employee had contacted several of the employer’s clients, including two golf courses (the employer sold golf cart mounted gps systems). *Id.* The district court, however, was unconvinced, finding that nothing in the record proved that the employer had a substantial, let alone a remote, relationship with any existing or prospective clients which were contacted by the employee. *Id.* The *GPS Industries* court acknowledged that the employer alleged its former employee solicited a former client of the company. *Id.* However, the employer failed to offer evidence showing that the company contacted by the employee was either (i) an existing client at the time of the employee’s termination; or (ii) that the employee solicited the client into becoming a client after the employee left the employer. *Id.*

Definition of Solicitation of Customers

As discussed above, a solicitation of an employer’s customers can occur even if the customer initiated the contact with the former employee. *Scarborough v. Liberty National Life Ins. Co.*, 872 So.2d 283, 285 (Fla. 1st DCA 2004). In *Scarborough*, the Fourth District found that a solicitation could occur even if the employee (who sold insurance) made a comparison for the employer’s clients of two insurers. *Id.* The *Scarborough* court noted that neither the parties non-compete agreement, nor the relevant statute, defined the term “solicit.” *Id.* The court then turned to Black’s Law Dictionary which defines “solicitation” as “the act or an instance of requesting or seeking to obtain something; a request or petition.” *Id.* citing Black’s Law Dictionary 1398 (7th ed. 1999); see also, *FCE Benefit Adm’rs Inc. v. George Washington Univ.*, 209 F.Supp.2d 232, 239 (D.D.C. 2002)(holding that an insurance agent breached an agreement not to “call upon, solicit, or take away” her former employer’s customers, because “[e]ven though she was initially contacted by [a former customer] … she assumed an active role in [the customer’s] decision-making process.”) *Scarborough v. Liberty National Life Ins. Co.*, 872 So.2d at 285.
CUSTOMER GOODWILL

“Customer, patient or client goodwill” are yet another form of business interest protected under Florida law. In order to understand how courts protect this type of business interest, it helps to understand how courts define goodwill.

Definitions of Goodwill

There are multiple ways to define goodwill. From an accounting perspective, goodwill may include the value of a company’s intangible assets such as its reputation among clients. Another definition of goodwill is “[t]hat part of business value over and above the value of identifiable business assets.” See http://www.valuadder.com/glossary/business-goodwill.html. Using this definition, factors that contribute to a company’s goodwill include its going concern value, excess business income and expectation of future economic benefits. Id. Under this definition, companies have an interest in protecting goodwill because it represents earnings that are in addition to the ordinary return on business assets. Id.

The legal definition of goodwill differs considerably from the definition used in the accounting profession. In California, for example, goodwill has been defined as the expectation of continued public patronage. Cal. Bus. & Prof. Code Sec. 14100. Other courts have defined goodwill as a preexisting relationship arising from a continuing course of business. Wellspan Health v. Bayliss, 2005 PA Super 76 (Pa.Super.Ct. 2005) (recognizing that “the interest protected under the umbrella of goodwill is a business's positive reputation.”) Goodwill includes such things as customer names, addresses and the requirements or needs of the customer. Donahue v. Permacel Tape Corp., 234 Ind. 398, 127 N.E. 2d 235, 240 (1955).

Damages for Harm to Goodwill

In Insurance Field Services, Inc., v. White & White Inspection, 384 So.2d 303 (Fla. 5th DCA 1980), the Fifth District examined how a company lost goodwill due to a former employee breaching a non-compete agreement. Insurance Field Services provided underwriting and auditing services for the insurance industry. The employer’s branch manager, while still working for the employer, started a competing business even though the employee had signed a two year non-compete agreement. Id. at 305. Evidence at trial demonstrated that the employee-manager solicited longstanding clients of the employer and told customers that the employer was going out of business (which was not true). Id. Over the course of a couple of months, the employee was able to establish business relationships with many of the employer’s former customers. Id.

On appeal, the Fifth District in Insurance Field Services found that the employee’s interference with the employer’s customers caused the employer to lose profits. Id. at 308. The court affirmed the trial court’s award of damages, in part, because of the harm caused to the employer’s goodwill from the actions of the former employee. According to the Fifth District, “goodwill [is] accomplished when a client becomes accustomed to dealing with someone who is
regularly performing a service.” *Id.* at 308. The damages awarded by the trial court, and upheld by the Fifth District, were due to the loss of goodwill caused by the employee’s conduct. *Id.*

**Protecting Goodwill Through Injunctive Relief**

A company seeking to protect its customer goodwill is not limited to damages. Courts will also grant injunctive relief in order to protect goodwill as a legitimate business interest. In *NAPCO v. Moore, et al.*, 196 F.Supp. 1217, 1230-31 (M.D.Fl. 2002), the United States District Court for the Middle District of Florida granted injunctive relief to “maintain[] long standing relationships and preserv[e] the goodwill of a company built up over the course of years of doing business.” In granting the injunction, the district court in *NAPCO* found that the former employee of the company had solicited customer’s of the employer, in violation of a non-compete agreement, and that the “net effect of this solicitation has a high possibility of permanently damaging the reputation and goodwill of [the employer].” *Id.* at 1231.

**SPECIALIZED TRAINING**

Included among section 542.335(b)’s definition of legitimate business interests is “extraordinary or specialized training.” In *Milner Voice and Data, Inc., v. Tassy*, 377 F.Supp.2d 1209, 1218 (S.D.Fla. 2005), the United States District Court for the Southern District of Florida found that an employer had plead and proven a legitimate business interest in extraordinary or specialized training provided to a former employee. In *Milner*, the employee received specialized training on products marketed by the employer. *Id.* Prior to working for the employer, the employee had neither training or experience selling the items sold by the employer (telephone and voice recording systems). *Id.* In addition to receiving training, the employee also became a certified technician in the equipment sold by the employer. The employer also sent the employee for three weeks of offsite training at different locations throughout the United States. *Id.* All total, the employer spent over $18,000 in tuition, expenses, salary and benefits for the employee’s training. *Id.* In light of these facts, the court in *Milner* found that the employer made a “substantial investment” in the employee’s training and the restrictive covenant the employer sought to enforce protected the employer’s interest in the employee training. *Id.* at 1219.

**Employer Interest in Training**

In contrast to *Milner, Autonation v. O’Brien* 347 F.Supp.2d 1299 (S.D.Fla. 2004), illustrates circumstances where an employer has not provided an employee with the specialized training necessary to demonstrate a legitimate business interest. In *Autonation*, the employer auto dealership sought damages and injunctive relief against a former employee who the employer claimed breached a non-compete agreement. *Id.* at 1303. The employer raised several arguments in support of its claims, one being that the employee received specialized training which represented an ongoing investment by the employer. *Id.* at 1306. The employer further argued that Autonation’s training gave it an advantage over its competitors that was subject to protection. *Id.*
During the evidentiary hearing in *Autonation*, the employer offered evidence that the employee’s training consisted primarily of working as the “right-hand person” of the employer’s Vice President of Used Vehicles. *Id.* The employee testified that he was not required to attend training seminars, but instead “popped in and out” of training meetings. *Id.* After considering the evidence, the district court found that the employer “had not demonstrated any specialized training exceeding what would be common or typical in the industry.” *Id.*

The training provided to the employee in *Milner* was in stark contrast to that provided in *Autonation*. In *Milner*, the employer was able to show that the employee received extensive, formal training that resulted in the employee becoming certified in the employer’s line of work. In *Autonation*, however, the employee received no formal training, but instead shadowed the employer’s vice president and attended a few meetings. The employer in *Milner*, however, was able to use its training provided to the employee to establish a business interest in the non-compete agreement for which the district court was willing to protect.

**Prior Training**

When deciding whether to enforce a non-compete agreement, courts often give consideration to the level of training the employee received *prior* to working for the employer. For example, in *Balasco v. Gulf Auto Holding, Inc.*, 707 So.2d 858, 860 (2d DCA 1998), the Second District affirmed the trial court’s finding that the non-compete agreement was enforceable, in part, because the employer demonstrated that the non-compete “was necessary to protect the substantial investment [the employer] makes in specialized training for its sales staff.” At trial, one of the employer’s managers testified that rather than “recycling sales personnel” for other auto dealerships, the employer hires personnel with little or no sales experience and makes substantial investment in training the employees. *Id.* Based on this evidence, the *Balasco* court found that the non-compete agreement promoted the employer’s legitimate business interest in encouraging productivity and maintaining competent and specialized sales employees. *Id.*

**Certification Relevant**

Employee certification is yet another factor courts consider in deciding whether to enforce a non-compete agreement. Like *Milner* and *Balasco*, the employer in *Aero Kool Corporation v. Oosthuizen*, 736 So.2d 25 (3rd DCA 1999), was also able to demonstrate a legitimate business interest in its specialized training of an employee which was subject to protection under a non-compete agreement. In *Aero Kool*, the employer offered evidence showing that it provided its employee with over 195 hours of specialized training which allowed the employee to receive FAA certification. *Id.* On appeal, the Third District found that the employer had clearly demonstrated that it had a “legitimate business interest in the extensive, specialized training in aircraft component repair” provided to the employee. *Id.* In making its finding, the *Aero Kool* court noted that the employee had no prior training (prior to working for the employer) and that the employer offered specialized training in a highly regulated industry – overhauling commercial aircraft. *Id.*
REASONABLE GEOGRAPHIC SCOPE

In order to enforce a non-compete agreement, a party must plead and prove the existence of one or more legitimate business interests. GPS Indus. LLC v. Lewis, 691 F.Supp.2d 1327, 1333 (2010), citing Fla. Stat. § 542.335(1)(b) and (c). The enforcing party must also show that the non-compete is reasonably necessary to protect the business interests. Id. Aside from proving a legitimate business interest, section 542.335(1) requires non-compete agreements to be reasonable in time, area and line of business.

Question of Fact

Whether a non-compete is reasonable or overbroad is a question of fact, not law. Partylite Gifts, Inc., v. MacMillan, C.A. No. 810-CV-1490-T-27EAJ at *9 (M.D. Fla. Sept. 10, 2012), citing Orkin Exterminating Co. v. Girardeau, 301 So.2d 38, 40 (Fla. 1st DCA 1974), cert. denied, 317 So.2d 75 (Fla. 1975)(recognizing that "[w]hat is a reasonable area is a factual matter to be determined in each [non-compete] case."); see also, Dorminy v. Frank B. Hall Co., Inc., 464 So.2d 154 (Fla. 5th DCA 1985)(finding that "[t]he facts of each [non-compete] case determine whether the area and time restrictions are reasonable.").

Courts considering the reasonableness of a geographic scope provision recognize that "the area in which competition is to be restricted must not be broader than is necessary to protect the employer's interests." Partylite Gifts, Inc., supra., at *fn. 16. A non-compete provision that is indefinite in scope is presumptively unreasonable. Id. at 9, citing Speechworks Intern., Inc., v. Cote, No. 024411BLS, 2002 WL 31480290, *4 (Mass. Super. Ct. Oct. 11, 2002)(holding that a restrictive covenant with no geographic limitation is unacceptable).

Modification

Even when a court finds a provision in a non-compete agreement to be unreasonable (such as an unlimited geographic scope provision), the agreement should not be struck down entirely, but instead should be enforced to the extent it is reasonable and necessary to protect one or more legitimate business interests. Partylite Gifts, Inc., supra., at *9. Florida Statute 542.335(c) provides that "[i]f a contractually specified restraint is overbroad, overlong or otherwise not necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief necessary to protect such interest or interests." (Emphasis added). If a geographic scope provision is too broad, the court must modify or "blue pencil" the agreement to the extent necessary to protect the employer's legitimate business interest. Id. at *9.

What constitutes a reasonable geographic scope provision can vary significantly depending on the facts of each case. A non-compete provision extending throughout all of the United States and Canada was found reasonable where such area fell within the employee's "territory" and the employee attended weekly sales meetings with the employer that discussed projects throughout North America. Proudfoot Consulting Co. v. Gordon, 576 F.3d 1223, 1237 (11th Cir. 2009). In Autonation v. Maki, a court enjoined a former auto dealership employee from competing within 50 miles of the employee's former dealership and 10 miles from any other dealership owned by the employer within the United States. Id. at 1238. Similarly, in Autonation, Inc. v. O'Brien, the
court found reasonable a geographic scope provision which restricted the employee from "working in any geographic space in which [the employer] operates" where the employer had an interest in confidential information. *Proudfoot, supra.*, at 1238-39, citing *Autonation, Inc.*, 347 F.Supp.2d 1299, 1307-08 (S.D.Fla. 2004); *see also, Intermedtro Indus. Corp. v. Kent*, No. 07-cv-0075, 2007 WL 1140637, at *7 (M.D.Pa. Apr. 17, 2007)(recognizing that "[w]hen the employer's protected interests include information that may be competitively harmful to the employer in any area it competes, it is reasonable for a non-compete to extend to all areas the employer competes."). *Proudfoot, supra.*, at 1239.

In *Medi-Weightloss Franchising USA v. Medi-Weightloss Clinic of Boca Raton*, C.A. No. 8:11-cv-2437-T-30MAP (M.D.Fla. Jan. 3, 2012), the United States District Court for the Middle District of Florida found a restrictive covenant reasonable as to geographic scope which prohibited operation of a competitive business within 25 miles of any of the Medi-Weightloss clinics. Citing *Graphic Business Systems, Inc., v. Rogge*, 418 So.2d 1084, 1087 (Fla. 2d DCA 1982), the court in *Medi-Weightloss* noted that Florida courts have upheld geographic restrictions covering a 75 mile radius from the city where the former employee worked. *Medi, supra.*, at *5, citing *Graphic Business Systems* at 1087 (finding that a non-compete agreement lasting for two years after termination of employment within 75 miles of the employer's city was reasonable in both time and geographic area).

There are limits, however, to the extent an employer can restrict competition in a geographic area. In *GPS Indus. v. Lewis*, for example, the United States District Court for the Middle District of Florida found a restrictive covenant reasonable (and therefore unenforceable) a geographic limitation prohibiting competition globally. *GPS Indus. v. Lewis*, 691 F.Supp.2d 1327 (M.D.Fla. 2010). In support of the global restrictions, the employer in *GPS* argued that the restriction operated worldwide due to the global nature of its business (selling gps equipment for golf carts). The court, after considering the evidence, was unconvinced, finding that a global restraint on competition was "patently unreasonable." *Id.* at 1336.

The non-compete provision in *GPS* which the court found unenforceable stated that "[g]iven the global nature of [GPS's] business, there is no geographic limitation [to] the non-competition provision, and such provision shall be presumed effective world-wide." *Id.* at fn. 11. It is significant that the employer in *GPS* provided the court with no reasonable alternative to the global covenant which the court found unreasonable. *Id.* at 1336. Because of the limited evidentiary record, the court was unable to modify or "blue pencil" the non-compete agreement to make it reasonable and necessary to protect the employer's business interests. *Id.* The opinion suggests that if a court is not inclined to enforce a noncompete agreement, it helps if the employer (or whichever party seeks to enforce the agreement) offer a proposed modification that would allow the court to enforce the agreement on more reasonable terms. In *GPS*, the court found that the employer had not provided a reasonable geographic modification and was therefore not entitled to injunctive relief to enforce the non-compete agreement. *Id.* at 1337.
REASONABLE TIME LIMITATIONS

Section 542.335(1)(d)(1) through (3) lays out rebuttable presumptions for reasonable time limitations contained in non-compete agreements. Where a party seeks to enforce a non-compete agreement against a former employee, agent or independent contractor, the court “shall presume reasonable” any time period of six months or less. Likewise, non-competes in this category containing a time duration greater than two years shall be presumed unreasonable. Fla. Stat. § 542.335(1)(d)(1).

For a party seeking to enforce a non-compete against a former distributor, dealer, franchisee or licensee of a trademark or service mark, section 542.335(1)(d)(2) creates a presumption that non-competes for a duration of one year or less are reasonable, whereas agreements restraining competition for three years or more are unreasonable. Under section 542.335(1)(d)(3), non-competes enforced against the seller of a business are presumed reasonable if the restraint on competition is for three years or less. Non-competes restraining competition by the seller of a business which are more than seven years in duration are presumed unreasonable.

Modification

Like with geographic scope provisions that are overly broad, non-compete agreements containing unreasonable durations should be modified by the court so as to make the agreement reasonably necessary to protect business interests. See Fla. Stat. § 542.335(1)(c)(providing in part that “[i]f a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.”)

In Henao v, Professional Shoe Repair, Inc., 929 So.2d 723 (Fla. 5th DCA 2006), the Fifth District had to consider whether a non-compete agreement applied to the seller of a business complied with section 542.335. In addressing the time period contained within the non-compete agreement, the Fifth District found as follows:

The ten year duration of the non-compete provision seems problematic given that subsection 542.335(1)(d)(3) provides that where a restrictive covenant is sought to be enforced against the seller of a business or the shares of a corporation, a restraint of more than seven years duration is presumed unreasonable. … Given an otherwise valid and enforceable covenant not to compete, the trial court could reduce the ten year time period.

Id. at 728. Henao illustrates how courts handle non-compete agreements which, although are overly broad or “overlong”, are otherwise enforceable. The Fifth District in Henao found that the non-compete agreement was not an illegal restraint of trade, even though the duration of the agreement (ten years) exceeded the seven year presumption of reasonableness provided under the statute. Id. at 729. Instead of rejecting the non-compete agreement, the Henao court remanded the proceeding back to the trial court so that the term of the agreement would comply with the statute. See also, Balasco v. Gulf Auto Holding, Inc., 707 So.2d 858, 860 (Fla. 2d DCA 1998(holding that the three year restriction in an employee non-compete agreement was
presumptively unreasonable. Further holding that “[b]ecause we find no evidence in the record to rebut this presumption, the agreement shall not be enforceable for more than two years following [the employee’s] separation from the [employer]. … On remand, the order granting relief should be amended to reduce the period of restraint to two years.”

DEFENSES TO ENFORCEMENT

There are many defenses to the enforcement of a non-compete agreement. Parties seeking to enforce the terms of a non-compete agreement usually seek injunctive relief from the court. Generally speaking, courts view injunctions as “an extraordinary and drastic remedy which should be sparingly granted.” Cordis Corp. v. Prooslin, 482 So.2d 486 (Fla. 3rd DCA 1986). The extraordinary nature of injunctive relief can work to the advantage of a party who is defending against enforcement of a non-compete. A person or party opposing the enforcement of a non-compete agreement should always consider whether the party seeking the injunctive relief has satisfied the burdensome requirements for an injunction.

Injunctive Relief

Before a court will grant a temporary injunction, the party seeking the injunction (often the employer) must plead and prove the following:

(i) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (ii) a substantial likelihood of success on the merits; (iii) that the threatened injury to the party seeking injunctive relief outweighs any harm to the respondent; and (iv) that the granting of a temporary injunction will not diserve the public interest. Cordis, 482 So.2d at 489-90.

Any of the above prerequisites for injunctive relief may provide a party defending against a non-compete agreement with a valid defense. For example, if an employee can convince a court that an employer will not suffer, or cannot establish a likelihood of irreparable harm, the court may refuse to enforce the non-compete agreement. Similarly, if a court is not convinced that the employer is likely to succeed on the merits at a final hearing, the court is not likely to grant a temporary injunction. See Lotenfoe v. Pahk, 747 So.2d 422, 425 (Fla. 2d DCA 1999)(dissolving a temporary injunction, due in part, to the court’s finding that during the evidentiary hearing there was insufficient evidence to find that the former employer was likely to succeed “in the face of the [employee’s] proffered defenses.”)

Employer’s Breach as a Defense

Florida courts generally recognize that in order for a party to receive injunctive relief to protect against the breach of another party, the party seeking the injunction must have performed its obligations under the contract. Bradley v. Health Coalition, Inc., 687 So.2d 329, 333 (Fla. 3rd DCA), citing Seaboard Oil Co. v. Donovan, 99 Fla. 1296, 1305 (recognizing that “[a] party is not entitled to enjoin the breach of a contract by another, unless he himself has performed what the contract requires of him so far as possible; if he himself is in default or has given cause for
nonperformance by defendant, he has no standing in equity.”) In the context of non-compete litigation, courts consider an employer’s breach of an employment agreement when deciding whether the employer is entitled to an injunction to enforce a non-compete provision. *Cordis Corp. v. Prooslin*, 482 So.2d 486, 490 (Fla. 3rd DCA 1986), citing *Channell v. Applied Research, Inc.*, 472 So.2d 1260, 1262 (Fla. 4th DCA 1985).

Section 542.335(1)(g)(3) requires a trial court to consider all “pertinent legal and equitable defenses” available to a party defending against a non-compete agreement. See e.g., *Leighton v. First Universal Lending, LLC*, 925 So.2d 462, 464 (Fla. 4th DCA 2006), citing *Benemerito & Flores, M.D.'s, P.A. v. Roche*, 751 So.2d 91, 93 (Fla. 4th DCA 1999). In order for an employee to prevail using the employer’s breach as a defense to a non-compete agreement, the employee must offer evidence of the employer’s breach. *Id.* at 464.

If the employee can establish that the employer breached the agreement, the employee may convince the court that the employer has not established a likelihood of success on the merits and therefore a temporary injunction is not warranted. See *Lotenfoe v. Pahk, M.D.*, 747 So.2d 422, 425 (Fla. 2d DCA 1999)(finding employer was unlikely to succeed on the merits as evidence suggested the employer may have failed to negotiate in good faith). In *Bradley v. Health Coalition*, 687 So.2d 329, 333 (Fla. 3rd DCA 1997), the Third District reversed a temporary injunction granted to the employer and ordered the trial court to consider whether the employer (who sought the injunction) breached the employment contract by failing to adequately compensate the employee. According to the court in *Bradley*, “[i]f the employer wrongfully refuses to pay the employee his compensation, the employee is relieved of any further obligation under the contract and the employer cannot obtain an injunction.” *Id.* at 333. (Emphasis added).

**Limitations on the Breach Defense**

An employer’s breach is not an automatic defense to enforcement of a non-compete agreement. Some courts have limited the defense to “dependant covenants,” versus independent covenants. See *Reliance Wholesale v. Godfrey*, 51 So.3d 561, 565 (Fla. 3rd DCA 2010). In *Reliance Wholesale*, the Third District reversed a trial court finding that the employer had breached the employment agreement. *Id.* According to the Third District, covenants within the employment agreement were independent, not dependent covenants, and therefore the employer’s prior breach of the agreement was not a viable defense to the issuance of an injunction. *Id.*

In order to understand the distinction between dependent and independent covenants, it helps to look at the language of the employment agreement at the center of the dispute in *Reliance Wholesale*. The agreement in *Reliance* contained the following provision:

The covenants set forth herein shall be construed as agreements independent of any other provision in any other agreement by, between, among, or affecting Reliance Medical Wholesale, Inc., and Employee, and the existence of any claim or cause of action by Employee against Reliance Medical Wholesale, Inc., whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement of this Agreement.
Id. The non-compete agreement in *Reliance Wholesale* specifically provided that the covenants “shall be construed as agreements independent of any other provision in any other agreement.” The language in the agreement clearly makes each provision independent of the other. Under such language, if an employer breaches one covenant, that breach is independent of other provisions and therefore not a defense to enforcement.

**“Like Business” Defense**

Section 542.335(g)(2) provides that in determining the enforceability of a restrictive covenant, a court “[m]ay consider as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of a violation of the restriction.” This section illustrates the “substantially smaller burden” placed on parties seeking to enforce non-compete agreements. *USI Ins. Services of Florida, Inc., v. Pettineo*, 987 So.2d 763, 766 (Fla. 4th DCA 2008).

Under section 542.33, the predecessor version to section 542.335, courts required the party seeking to enforce the non-compete agreement to establish that it remained in a “like business” in order to carry its initial burden of proving the existence of a legitimate business interest. *Id.*, citing *Wolf v. James G. Barrie, P.A.*, 858 So.2d 1083, 1085 (Fla. 2d DCA 2003). The current statute – section 542.335 – allows the enforcing party to establish *prima facie* the enforceability of the agreement, after which the opposing party can raise as a defense the fact that the person seeking enforcement no longer continues in the line of business that is the subject of the action to enforce the non-compete agreement. *Id.* citing Fla. Stat. § 542.335(g)(2).

**Economic Hardship**

Section 542.335(g)(1) provides that in considering the enforceability of a non-compete agreement, the court “shall not consider any individualized economic harm or other hardship that might be caused to the person against whom enforcement is sought.” When considering whether to grant an injunction, a court must examine the balance of harms between the parties. Under section 542.335(g)(1), however, the court is precluded from considering the individual economic hardship that a breaching party would suffer if the covenant is enforced. *North American Prods. Corp. v. Moore*, 196 F.Supp.2d 1217, 1231 (M.D. Fla. 2002).

**BURDEN OF PROOF**

The party who seeks to enforce a non-compete agreement must prove to the court that the agreement is lawful and enforceable. To do so, the enforcing party must “plead and prove the existence of one or more legitimate business interest justifying the restrictive covenant.” Fla. Stat. § 542.335(1)(b); see also, *USI Ins. Services of Florida, Inc., v. Pettineo*, 987 So.2d 763, 766 (Fla. 4th DCA 2008). Once the enforcing party establishes that the non-compete agreement is reasonably necessary to protect a legitimate business interest, the burden shifts to the party opposing enforcement of the non-compete agreement to prove that the agreement is overbroad or not otherwise reasonably necessary. Fla. Stat. § 542.335(c); *USI Ins. Services of Florida, Inc.,*

Pleading and Proving Legitimate Interests

In DePuy Orthopaedics, Inc., v. Waxman, 95 So.3d 928 (Fla. 1st DCA 2012), the First District considered whether a former employer had pled and proved the existence of one or more legitimate business interests as required under § 542.335(1)(b). After considering the record before it, the court in DePuy found that the employer “presented unrebutted evidence that it had legitimate business interests justifying the non-compete covenants.” Id. at 938. The unrebutted evidence the employer presented included proof (1) that it had sold its products in Florida since the 1970s; (2) that its substantial relationships with its customers (including hospitals, surgeons and patients) were damaged by the acts of its former employee; and (3) establishing evidence of a legitimate interest in the specialized training, advertising and professional support it provided to its former employee. Id. at 939.

Employer’s “General Concerns” Not Sufficient

DePuy provides a good example of how an enforcing party can satisfy its burden of proof under section 542.335(1)(b). In contrast, Gould & Lamb v. D’Alusio, 949 So.2d 1212 (Fla. 2d DCA 2007), illustrates how a party can fail to meet its evidentiary burden under the statute. In Gould, the employer sought enforcement of a non-compete agreement arguing it had demonstrated one or more legitimate business interests, including trade secrets as defined under Fla. Stat. § 688.002(4). In seeking an injunction, the employer relied on the testimony of its president. Id. at 1214. The company’s president testified that the company utilized internal processes that allowed it to work faster than its competitors. Id. The president further testified that, through the injunction, the employer wished to protect “marketing plans, product plans, business strategies, financial information, forecasts and the like.” Id.

After considering the evidence, the trial court in Gould found that the employer did not “prove the existence of trade secrets or that restraint was reasonably necessary to protect legitimate business interests of [the employer].” Id. The Second District agreed, holding that “[g]eneralized statements of concern cannot substitute for proof.” Id.

Shifting Burden for Breached Non-Compete Agreements

Section 542.335(1)(j) provides in pertinent part that “[t]he violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant …” Once a party establishes by prima facie evidence that the non-compete agreement has been violated, § 542.335(1)(j) shifts the burden to the party opposing enforcement to establish the absence of injury. See DePuy Orthopaedics, Inc., v. Waxman, 95 So.3d at 939; see also, Variable Annuity Life Ins. Co. v. Hausinger, 927 So.2d 243, 245 (Fla. 2d DCA 2006), quoting Am. II Elecs., Inc. v. Smith, 830 So.2d 906, 908 (Fla. 2d DCA 2002).

In DePuy, the First District found that the employer presented a prima facie case that the employee violated the non-compete agreement and failed to rebut the presumption of irreparable
injury created by section 542.335(1)(j). *DePuy Orthopaedics, Inc., v. Waxman*, 95 So.3d at 939. The employer in *DePuy* presented evidence that the employee breached the non-compete agreement by calling on hospitals and surgeons located in counties covered by the non-compete agreement. *Id.* Further, the employer presented un rebutted evidence that it was significantly harmed by the employee’s breach in that it experienced a drop in sales with those accounts that were contacted by the employee. *Id.*

**Easier Burden for Enforcing Party**

The shifting burdens of proof under § 542.335 reflects a more employer-friendly environment for the enforcement of non-compete agreements. By that, under Fla. Stat. § 542.33 (applying to non-competes executed before July 1, 1996), the party enforcing the non-compete agreement was required to establish that it remained in a “like business” in order to carry its initial burden of providing the existence of a legitimate business interest. *USI Insurance Services of Florida, Inc., v. Pettineo*, 987 So.2d 763, 766 (Fla. 4th DCA 2008), citing *Wolf v. James G. Barrie, P.A.*, 858 So.2d 1083, 1085 (Fla. 2d DCA 2003).

Unlike section 542.33, “[s]ection 542.335 allows an enforcing party to establish *prima facie* the enforceability of the agreement itself, after which the party opposing enforcement can raise *as a defense the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant.*” *USI Insurance Services, supra.*, 987 So.2d at 766, quoting Fla. Stat. § 542.335(g)(2). Section 542.335, as Florida’s newest version of a non-compete statute, now places a substantially smaller burden on the enforcing party and shifts some of that burden to the defending party. *Id.* at 766. Whereas in the prior statute the enforcing party was required to show that it continued to operate in a like business, the newer statute no longer requires such proof but instead allows the opposing party to use the “like business” defense.

**ENFORCEMENT AGAINST THIRD PARTIES**

Non-compete agreements may be enforced against third parties who never signed or agreed to a covenant not to compete. *Leighton v. First Universal Lending, LLC*, 925 So. 2d 462, 465 (Fla. 4th DCA 2006). However before a court can enjoin a third party under a non-compete agreement, the third party must receive notice and have an opportunity to be heard. *Id.*, citing *Sheoah Highlands, Inc. v. Daugherty*, 837 So.2d 579, 583 (Fla. 5th DCA 2003).

In *Leighton*, an employer/lending company sought an injunction enforcing a non-compete agreement against its former employee and a competing company the employee went to work for. *Id.* at 463. The trial court held an evidentiary hearing on the injunctive relief and enjoined the employee and the competitor from competing with the employer within a fifty mile radius. *Id.* at 464. On appeal, the competitor argued the trial court committed reversible error by enjoining the competitor when it was neither named as a party to the action, nor served with the claim for injunctive relief. *Id.*
On appeal, the Fourth District agreed with the competitor and reversed the injunction to the extent it applied to the competitor. *Id.* at 465. In *Leighton*, the employee, not the competitor, was a party to the non-compete agreement. Whether the competitor was a party to the non-compete agreement was not determinative however. As the Fourth District recognized, “[t]here is no doubt that a court can enjoin others who were not parties to the non-compete agreement.” *Id.* Before a party can be enjoined, however, it “must receive notice and have an opportunity to be heard.” *Id.*

**Writing Required**

Section 542.335(1)(a) prohibits a court from enforcing a non-compete agreement “unless it is set forth in a writing signed by the person against whom enforcement is sought.” On its face, the statute suggests that a third party cannot be enjoined unless it signed the non-compete agreement. Courts interpreting this section, however, have found that notwithstanding section 542.335(1)(a), a court may enjoin a third party who aids and abets the violation of a non-compete agreement. *Bauer v. Dilib, Inc.*, 16 So.3d 318, 320-21 (Fla. 4th DCA 2009)(citing a string of decisions holding that a court can enjoin third parties under a non-compete agreement provided the third parties receive notice and have an opportunity to be heard). The power of a court to enjoin a third party does not derive from section 542.335. *Id.* at 321. Instead, such authority derives from the common law. *Id.*, citing *W. Shore Rest. Corp. v. Turk*, 101 So.2d 123, 129 (Fla. 1958)(holding that “the rule that a stranger to a covenant may be enjoined from aiding and assisting the covenanter in violating his covenant is supported by an overwhelming weight of authority.”)(Further citations omitted).

**ASSIGNMENT ON NON-COMPETE AGREEMENTS**

Section 542.335(1)(f) prohibits a court from refusing to enforce a non-compete agreement on the grounds that the party seeking enforcement is a third-party beneficiary or assignee. The statute provides:

(1)(f) The court shall not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract, provided:

(2) In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party’s assignee or successor.

Court’s have liberally construed section 542.335(1)(f)(2)’s requirement that the restrictive covenant expressly authorize enforcement by an assignee or successor. For example, in *Patel v. Boers*, 68 So.3d 380 (Fla. 5th DCA 2011), the Fifth District reversed a trial court that held, in essence, that restrictive covenants can only be enforced by an assignee or beneficiary “if the requisite statutory language is included in the covenants.” *Id.* at 381. In *Patel*, an employment agreement between dentists contained an assignment clause whereby the parties “specifically agreed that the mutual and reciprocal covenants and agreements, rights and obligations contained
in [the agreement] are assignable …” The same agreement also contained a non-compete clause. Id. at 381.

The owner of the dental practice sold the practice to a third party who later sought to enforce the non-compete clause against a former employee of the practice. The trial court agreed with the employee’s argument that the non-compete agreement was not properly assigned to the party purchasing the practice and the enforcing party appealed. Id. at 380. On appeal, however, the Fifth District reversed, holding that the assignment language contained within the employment agreement was sufficient to constitute an express authorization of enforcement by an assignee or successor as required under the statute. Id. at 381, citing Price v. RLI Ins., Co., 914 So.2d 1010, 1013-14 (Fla. 5th DCA 2005)(explaining that an assignment is a transfer of all the interests and rights to the thing assigned and that the assignee stands in the shoes of the assignor and may enforce the contract against the original obligor).

It is important to note the difference in the ability to assign non-compete agreements under the current statute, 542.335, and its predecessor 542.33. Under the prior statute, a non-compete agreement could be assigned, but only if the employee consented to the assignment. DePuy Orthopaedics, Inc., v. Waxman, 95 So.3d 928, 935 (Fla. 1st DCA 2012), citing Corporate Express Office Products, Inc. v. Phillips, 847 So.2d 406, 413 (Fla. 2003). Section 542.335 replaces section 542.33 and applies to non-compete agreements entered into on or after July 1, 1996. The newer statute expressly provides for the assignment of non-compete agreements and it is reversible error for courts to rely on case law applying the predecessor statute to contracts entered after the July 1, 1996 effective date. DePuy Orthopaedics, Inc., v. Waxman, 95 So.3d at 936.

INJUNCTIVE BONDS

Pursuant to Fla. Stat. § 542.335(1)(j), no preliminary injunction should issue without the enforcing party posting a bond sufficient to pay for costs and damages suffered by any party that may be wrongfully enjoined. North American Products Corp. v. Moore, 196 F.Supp.2d 1217, 1233 (M.D. Fla. 2002). Section 542.335(1)(j) provides in relevant part:

No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

Hearing Required

When setting an injunction bond, the trial court should conduct an evidentiary hearing as to the amount of the bond. See, e.g., Flickinger v. R.J. Fitzgerald & Company, Inc., 732 So.2d 33 (Fla. 2d DCA 1999)(finding that “the appellants argue correctly that the trial court erred in setting the amount of the injunction bond [for enforcement of a non-compete agreement] without an evidentiary hearing.”). The evidentiary hearing requirement before setting bond allows both parties to present evidence as to the amount of damages recoverable for a wrongfully obtained
injunction.  *Id.* at 35, citing *Longshore Lakes Joint Venture v. Mundy*, 616 So.2d 1047, 1047-48 (Fla. 2d DCA 1993).  Failure to hear evidence before setting bond is grounds for reversal and remand.  *Id.* at 35.

**Foreseeable Damages**

When the court sets an injunction bond, in the context of a non-compete agreement or otherwise, the amount of the bond should reflect the court’s determination of foreseeable damages for a wrongful injunction.  *Advantage Digital Systems, Inc., v. Digital Imaging Services, Inc.*, 870 So.2d 111, 116 (Fla. 2d DCA 2003), citing *Parker Tampa Two, Inc., v. Somerset Dev. Corp.*, 544 So.2d 1018, 1021 (Fla. 1989).  Failure by the court to determine foreseeable damages generally results in a remand for a new bond hearing.  *Advantage Digital*, 870 So.2d at 117, citing *Lotenfoe v. Pahk*, 747 So.2d 422, 425 (Fla. 2d DCA 1999).

**CONCLUSION**

Florida Statute § 542.335 provides employers with a broad range of protections for “legitimate business interests.” Through the statute, Florida protects an employer’s interest in such items as trade secrets, confidential business information, customer relationships and employee training. By allowing for an enforcing party to receive certain presumptions, section 542.335 reduces the burden placed on an employer to show it sustained an irreparable injury. The statute makes it easier for employers (or any party enforcing a non-compete agreement) to receive injunctive enforcing the terms of a non-compete agreement.

Although section 542.335 may be more employer-friendly when compared to prior statutes, employees still benefit from several protections both under the statute and case law. For example, materials that are otherwise commercially available to the public are generally not found to constitute a trade secret which is subject to protection. Further, the statute still requires that non-compete agreements be in writing and reasonable in time, area and line of business. Rebuttable presumptions contained within the statute provide a framework for reasonable time periods for the enforcement of non-competes. From the perspective or employer or employee, section 542.335 provides a comprehensive set of parameters to consider when drafting or litigating covenants not to compete.