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Covenants Not to Compete: Current Conflicts and Emerging Issues Affecting Enforcement

The Florida Legislature's 1990 amendment to F.S. §542.33 has dramatically changed the landscape of litigation involving covenants not to compete. However, the statutory amendment has been inconsistently interpreted by the district courts. The decisions of some courts have reflected a marked weakening of the employers' ability to enforce noncompetition agreements in the 1990's, while other courts have been unwilling to alter the almost unbridled power to restrict competition given to employers prior to the statutory amendment. This article will address the issues affecting enforcement of noncompete agreements as they apply to employees, independent contractors, and agents, and the current conflicts existing between the district courts of appeal.

The thorniest problem facing a trial court hearing a dispute over a noncompete agreement is deciding wether the employer has established irreperable harm

by Gary C. Rosen and David H. Reimer

New Environment Surrounding Enforcement

As the 1980's came to a close, Florida courts had become some of the most rigorous guardians of an employer's rights to enforce a covenant not to compete. In Capraro v. Lanier Business Products, Inc., 466 So.2d 212 (Fla. 1985), the Florida Supreme Court held that where a covenant not to compete is violated, irreparable harm will be presumed. Furthermore, many appellate decisions had construed the pre-1990 version of §542.33 to limit a court's discretion in deciding whether to enforce a noncompete solely to an assessment of the reasonableness of the covenant's duration and geographic limitations.

Justice Ben Overton, perceiving an unjustified tile of the scales of justice toward employers and away from employees' right to pursue a chosen trade or profession, in a dissenting opinion in Capraro, issues a call to the legislature to amend §542.33 governing non-competition agreements, and restore equitable powers traditionally available to trial courts. Reemphasizing his prior dissent in Keller v. Twenty-Four Collection, 419 So.2d 1048 (Fla. 1982), he reasoned that the majority's holding would allow employers to enforce unreasonable covenants against employees, and would allow "unjust results." The justice stated:

> [W]e should never , by our laws or court determination, totally restrict an individual from earning a living in his or her chosen calling, particularly when the individual is an employee not used in a management capacity, except when absolutely necessary to prevent irreparable damage.

Justice Overton's dissents, and later appellate court decisions rigidly enforcing covenants not to compete, precipitated the Florida Legislature's 1990 amendment to §542.33. The

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This column is submitted on behalf of the Business Law Section, Robert H. Duckworth, chair and Diane Noller Wells, editor.