



Are Referral Sources Protectable Under Florida Law?

Insights

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The question of whether referral sources constitute legitimate, protectable business interests under Florida's Covenants Against Unfair Competition statute, Fla. Stat. § 542.335 (2014), is likely heading to the Florida Supreme Court to be decided, following two conflicting decisions by separate appellate courts as 2015 came to a close.

In a decision released December 31, 2015, Florida's Fifth District Court of Appeal ruled that referral sources are not legitimate, protectable business interests in the case of *Carla Hiles v. Americare Home Therapy, Inc., Etc.*, Case No. 5D15-9, overturning the trial court's entry of a temporary injunction in favor of American Home Therapy, Inc., d/b/a Americare Home Health ("Americare"). The decision cited as precedent the 5th District's own identical decision a decade earlier, in *Florida Hematology & Oncology v. Tummala*, 927 So.2d 135 (Fla. 5th DCA 2006). However, the 5th District's decision in December directly conflicts with a decision rendered a month earlier, on November 18, 2015, by the Florida 4th District Court of Appeal in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC.*, 40 Fla. L. Weekly D2589b (November 18, 2015). In *Infinity Home Care*, the 4th DCA held that referral sources may be a legitimate business interested under Fla. Stat. §542.335, and certified conflict with *Tummala*.

In *Americare*, the facts were largely not in dispute. Hiles worked as a home health liason for Americare in Volusia County, Florida. In that role, Hiles was responsible for soliciting referrals of patients to Americare from their treating physicians, in order that Americare could provide in-home patient care services for various medical needs, including nursing, physical therapy, occupational therapy, speech therapy, medical social work and home health aids. On November 7, 2011, as part of her acceptance of employment with Americare, Hiles executed and entered into a Non-Compete, Non-Solicitation and Nondisclosure Agreement (the "Non-Compete"), which asserted that Americare's business "depends on referral sources," including health facilities and physicians, and described Hiles' role as a "liason" was one forging relationships with such referral sources. The Agreement further asserted that Hiles would be privy to confidential information relating to Americare's business and would develop relationships with existing and potential referral sources. Under the relevant terms of the "Non-Solicitation" provisions of the Agreement, Hiles agreed that during her employment with Americare and for 12 months thereafter she would not "market or promote home health services to any health facility, physician, or referral source to whom any Employee of the Company marketed or promoted Americare's home health services during the final 12 months of (Hiles') employment with Americare Home Health."

In 2014, Hiles was approached by a competitor of Americare, Halifax Health Services, Inc., d/b/a Doctor's Choice ("Doctor's Choice") regarding employment. On October 2, 2014 Hiles transferred documents from her work email at Americare to her personal e-mail account. The next day, on October 3, 2014, Hiles tendered a resignation letter to Americare. However, throughout that day, Hiles continued sending Americare data in emails to her personal email account. On October 6, 2014, Americare advised Hiles her employment would end that day. And, on that same date, Hiles began employment with Doctor's Choice. Both before and after her employment ended at Americare, Hiles continued to send email data from Americare's business computers to her personal email account. Americare filed a multi-count complaint against Hiles, including a count for temporary injunctive relief to stop her from violating the restrictive covenants of her Non-Competition Agreement.

After a two-day evidentiary hearing, the trial court pronounced that it would grant the motion for injunctive relief, finding the *Tummala* case was factually distinguishable. The trial court had found, in relevant part, that Hiles had access to and obtained Americare's confidential information and trade secrets, that she learned the identify of Americare patients as well as the business partners/referral sources with whom Americare worked, that the non-competition covenants were supported by legitimate business interests, including referral sources, that the restrictive covenants were necessary to protect the legitimate business interests, and were reasonable in scope. Of particular concern to the trial court was that even after leaving Americare's employment, Hiles continued to access and utilize Americare's confidential business information to compete against Americare, on behalf of her new employer. In that respect, the trial court found Hiles actions distinguishable from those of the defendant in *Tummala*.

The 5th District Court of Appeals, however, found that the facts in *Americare* were not distinguishable from *Tummala* and that the plaintiffs in each case attempted to protect the same "business interests," namely referring physicians. In *Tummala*, the court ruled that:

"To accept referring physicians as a statutory 'legitimate business interest' would completely circumvent the clear statutory directive that 'prospective patients' are not to be recognized as such. . . . To qualify as a 'legitimate business interest' a 'relationship' with a 'prospective patient' must be substantial, and one with a specific, identifiable individual, and the lack of such a relationship with a patient does not become a legitimate business interest simply by virtue of being referred by a physician."

Following *Tummala*, the 5th DCA held again that unidentified prospective patients, and correspondingly referred physicians, do not qualify as legitimate business interest for the purpose of enforcing restrictive covenants.

By contrast, the 4th DCA, in *Infinity Home Care, L.L.C. v. Amedisys Holding, LLC*, found that referral sources may be a legitimate business interest under § 542.335, and certified conflict with *Tummala*. The 4th DCA ruled that because the statute did not identify the list of legitimate business interests as an "exclusive list," it would be improper to construe narrowly § 542.335 to exclude referral sources

simply because they were not specifically included in the five interests listed. The contract at issue in *Infinity Home Care* (as did the one in *Americare*) specifically included referral sources as a protectable business interest, and therefore the court ruled they could be construed and protected as one.

The 5th DCA's decision in *Americare* will not be final until the time expires for either party to file a motion for rehearing and disposition thereof. Once final, it is possible that *Americare* will appeal, thus placing the issue before the Florida Supreme Court to resolve the conflict between the district courts. The final decision will have significant implications to the future enforcement of restrictive covenants under Florida law, and could conceivably lead to a revision of Florida's restrictive covenant statute to identify and include "referral sources" as legitimate, protectable business interests.

[Carla Hiles v. Americare Home Therapy.pdf \(109.18 kb\)](#)

[INFINITY HOME CARE, LLC v. AMEDISYS HOLDING, LLC.pdf \(200.99 kb\)](#)

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