The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL:	CS/SB 458
INTRODUCER:	Health Policy Committee and Senator Brodeur
SUBJECT:	Invalid Restrictive Covenants in Health Care
DATE:	February 5, 2024 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Brown	HP	**Fav/CS**
2.	McMillan	McKay	CM	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 458 amends s. 542.336, F.S., to prohibit any restrictive covenant entered into with an allopathic or osteopathic physician which restricts the physician from practicing medicine in any geographic area for any period of time after the termination of his or her contract or other employment relationship. The bill provides exceptions from the prohibition for restrictive covenants related to research, related to physicians whose individual compensation is $250,000 per year or more, or related to physicians who have an ownership interest in a medical business, practice, or entity and who sells a specified type of related asset. The bill specifies that its provisions apply to restrictive covenants entered into on or after July 1, 2024.

The bill provides an effective date of July 1, 2024.

II. Present Situation:

Federal Antitrust Laws

In 1890, Congress passed the first antitrust law, the Sherman Act, as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. Congress subsequently passed two additional antitrust laws in 1914: the Federal Trade

Commission Act, which created the Federal Trade Commission (FTC), and the Clayton Act. Currently, these are the three core federal antitrust laws.[1]

The Sherman Act

The Sherman Act outlaws every contract, combination, or conspiracy in restraint of trade, and any monopolization, attempted monopolization, or conspiracy or combination to monopolize. The Sherman Act does not prohibit every restraint of trade – only those that are unreasonable. For example, an agreement between two individuals to form a partnership may restrain trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. In contrast, certain acts are considered "per se" violations of the Sherman Act because they are harmful to competition. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids.[2]

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the U.S. Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations. The Sherman Act imposes criminal penalties of up to $10 million for a corporation and $1 million for an individual, along with up to 10 years in prison.[3] Under some circumstances, the maximum fines can reach twice the gain or loss involved.[4]

The Federal Trade Commission Act

The Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices. The U.S. Supreme Court has ruled that all violations of the Sherman Act also violate the FTC Act. Therefore, the FTC can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition but may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC may bring cases under the FTC Act.[5]

The Clayton Act

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates.[6] It also bans mergers and acquisitions where the effect may substantially lessen competition or create a monopoly. As amended by the Robinson-Patman Act of 1936, the Clayton Act also prohibits certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. Additionally, private parties are

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[1] *See The Antitrust Laws*, Federal Trade Commission, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 5, 2024).
[2] *Id.*
[3] *Antitrust Enforcement and the Consumer*, U.S. Department of Justice, *available at* https://www.govinfo.gov/content/pkg/GOVPUB-J-PURL-LPS16084/pdf/GOVPUB-J-PURL-LPS16084.pdf (last visited Feb. 5, 2024). *See also* 15 U.S.C.A. § 2
[4] *Id.*
[5] *The Antitrust Laws*, Federal Trade Commission, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 5, 2024).
[6] "Interlocking directorates" means the same person making business decisions for competing companies. *See also Id.*

authorized to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice prospectively.[7]

Florida Antitrust Laws

Florida law also provides protections against anticompetitive practices. Chapter 542, F.S., the Florida Antitrust Act of 1980, has a stated purpose to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.[8] It outlaws every contract, combination, or conspiracy in restraint of trade or commerce in Florida[9] and any person from monopolizing or attempting or conspiring to monopolize any part of trade.[10]

Contracts in Restraint of Trade or Commerce

Generally, a contract in restraint of trade or commerce in Florida is unlawful.[11] However, non-competition restrictive covenants[12] contained in employment agreements that are reasonable in time, area, and line of business, are not prohibited.[13] In any action concerning enforcement of a restrictive covenant, a court may not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought, and the person seeking enforcement of a restrictive covenant must prove the existence of one or more legitimate business interests justifying the restrictive covenant.[14] The term "legitimate business interest" includes, but is not limited to:

- Trade secrets;[15]
- Valuable confidential business or professional information that does not otherwise qualify as trade secrets;
- Substantial relationships with specific prospective or existing customers, patients, or clients;
- Customer, patient, or client goodwill associated with:
  - An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress;"
  - A specific geographic location; or
  - A specific marketing or trade area; or
- Extraordinary or specialized training.[16]

[7] *Id.*
[8] Section 542.16, F.S.
[9] Section 542.18, F.S.
[10] Section 542.19, F.S.
[11] Section 542.18, F.S.
[12] Section 542.335, F.S. employs the term "restrictive covenants" and includes all contractual restrictions such as noncompetition/nonsolicitation agreements, confidentiality agreements, exclusive dealing agreements, and all other contractual restraints of trade. *See Henao v. Prof'l Shoe Repair, Inc.*, 929 So.2d 723, 726 (Fla. 5th DCA 2006).
[13] Section 542.335(1), F.S.
[14] *Id*.
[15] Section 688.002(4), F.S., defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
[16] Section 542.335(1)(b), F.S.

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.[17] A person seeking enforcement of a restrictive covenant must prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction.[18]

Restrictive Covenants in Florida Health Care

Under s. 542.336, F.S., a restrictive covenant entered into with a physician who practices a medical specialty in a county where one entity employs or contracts with all physicians who practice that specialty in that county, is not supported by a legitimate business interest and is void and unenforceable.[19] The restrictive covenant remains void and unenforceable until three years after the date on which a second entity that employs or contracts with one or more physicians who practice that specialty begins serving patients in that county.[20]

In *21st Century Oncology, Inc*., the plaintiff sought a preliminary injunction to enjoin the application and enforcement of s. 542.336, F.S. In August of 2019, the U.S. District Court for the Northern District of Florida denied the injunction. While s. 542.336, F.S., was found to impair the plaintiff's employment contracts within the meaning of the Contracts Clause, the court held that the degree of impairment did not outweigh the statute's significant, legitimate public purpose.[21]

III. Effect of Proposed Changes:

CS/SB 458 amends s. 542.336, F.S., to declare that any restrictive covenant entered into with an allopathic or osteopathic physician[22] which restricts the physician from practicing medicine in any geographic area for any period of time after the termination of his or her contract, partnership, employment, independent contractor arrangement, or professional relationship or other employment relationship is not supported by a legitimate business interest and is void and unenforceable.

The bill provides exceptions from the provisions of the bill described above for restrictive covenants that are:

- Related to any research conducted by the physician under the terms of a contract or in furtherance of a partnership, employment, or professional relationship, if the covenant does

[17] *Id*.
[18] Section 542.335(1)(c), F.S.
[19] Section 542.336, F.S.
[20] *Id*.
[21] "The ostensible public purpose of section 542.336 is to reduce healthcare costs and improve patients' access to physicians. See § 542.336, Fla. Stat. (2019); ECF No. 64 at 8 (Attorney General's post-hearing brief, stating "section 542.336 explicitly sets forth its own rational basis in declaring that the restrictive covenants addressed by it are not supported by a legitimate business interest, restrict patient access to physicians, and increase costs"). It is well settled that access to affordable healthcare is a legitimate state interest." *21st Century Oncology, Inc. v. Moody*, 402 F. Supp. 3d 1351, 1359 (N.D. Fla. 2019).
[22] "Allopathy" is a system of medical practice that emphasizes diagnosing and treating disease and the use of conventional, evidence-based therapeutic measures (such as drugs or surgery). *See* Merriam-Webster Dictionary, "allopathy," *available at* https://www.merriam-webster.com/dictionary/allopathy (last visited Feb. 5, 2024). "Osteopathy" is a system of medical practice that emphasizes a holistic and comprehensive approach to patient care and utilizes the manipulation of musculoskeletal tissues along with therapeutic measures to prevent or treat disease. *See* Merriam-Webster Dictionary, *"osteopathy," available at* https://www.merriam-webster.com/dictionary/osteopathy (last visited Feb. 5, 2024).

not impair the continuing care and treatment of a specific patient or patients whose care and treatment were part of the research;

- Related to physicians whose individual compensation is $250,000 per year or more. The bill defines individual compensation to mean:
  - For an employed physician, the amount of wages, bonuses, benefits, and salary paid to the physician for the previous tax year or expected to be paid for the current tax year; or
  - For a physician with a partnership or similar ownership interest in the profits of a practice, the amount of business income attributed to the physician for the previous tax year or expected to be attributed to the physician for the current tax year; or
- Related to physicians who have an ownership interest in a medical business, practice, or entity of any kind and who sells:
  - The goodwill of such business, practice, or entity;
  - Any or all of his or her ownership interest in such business, practice, or entity; or
  - Any or all portions of the assets of such business, practice, or entity together with its goodwill and who contractually agrees with a buyer of such business, practice, or entity, or portion thereof, to refrain from carrying on a competing business practice, or entity within a specified geographic are reasonably necessary to protect the legitimate business interest of the acquiring party or the acquired business, practice, or entity.

The bill specifies that its provisions apply to restrictive covenants entered into on or after July 1, 2024.

The bill provides an effective date of July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None Identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Prohibiting restrictive covenants as provided in the bill may provide patients with more access to physicians and decrease health care costs.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 542.336 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Policy on January 30, 2024:
The committee substitute amends two exceptions allowing restrictive covenants that would have been prohibited by the underlying bill to:

- Increase the minimum salary, from $160,000 per year to $250,000 per year, that a physician must make in order for an otherwise prohibited restrictive covenant to be valid; and
- Rework the exception for a physician who sells a business interest in a medical practice to apply the exception to all medical entities and to add additional detail as to the types of sales of such an entity that would validate a restrictive covenant.

B. Amendments:

None.