DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CAPITAL WEALTH ADVISORS, LLC, a Florida limited liability company,

Appellant,

v.

CAPITAL WEALTH ADVISORS, INC., a Florida corporation; WILLIAM N. BEYNON; and BLAINE M. FERGUSON,

Appellees.

No. 2D20-2446

October 21, 2021

Appeal from the Circuit Court for Collier County; Elizabeth V. Krier and Hugh D. Hayes, Judges.

Craig A. Rubinstein and Steven M. Katzman of Katzman Wasserman Bennardini & Rubinstein, P.A, Boca Raton; Jeffrey D. Fridkin of Grant Fridkin Pearson, P.A., Naples, for Appellant.

Seth M. Horras and Edmond E. Koester of Coleman, Yovanovich & Koester, P.A., Naples; Bruce S. Rogow of Bruce S. Rogow, P.A., Naples, for Appellee Capital Wealth Advisors, Inc.

Rachel Kerlek and Casey K. Weidenmiller of Woods, Weidenmiller, Michetti & Rudnick, LLP, Naples, for Appellees William N. Beynon and Blaine M. Ferguson.

ATKINSON, Judge.

Capital Wealth Advisors, LLC (the Agent), appeals from the final judgment entered in favor of William N. Beynon and Blaine M. Ferguson (the Individuals) and Capital Wealth Advisors, Inc. (the Company) (collectively, the Appellees). Because the trial court erroneously concluded that the commission agreement was an unlawful restraint on trade, we reverse.

In February 2011, the Agent and the Company entered into a commission agreement (the Agreement). Under the Agreement, the Company would pay the Agent a percentage of insurance commissions when the Company sold insurance products through a network of referral sources cultivated by the Agent. The Agent received one hundred percent of the commission for the sale of any products that were originated and sold by the Agent. It received seventy-five percent of the commission for the sale of products that were originated by the Company but sold by the Agent, and between fifty-five percent and seventy-five percent for the sale of products (depending on the total amount of the commission) that the Agent originated but the Company sold. The Agreement provided that this

commission sharing arrangement would survive termination and continue in perpetuity:

> 7. COMMISSION:
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> A: INSURANCE AND ANNUITY SALES: . . .
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> vi. PERPETUITY: The Company will pay all compensation associated with any case subject to this Agreement owed to the Agent according to the terms of this Agreement indefinitely after the Agreement is terminated, unless the Agreement is terminated due to the Agent's failure to comply with the terms of the Agreement. This perpetuity clause also considers all network referral sources listed on Exhibit B. If for one reason or another we cease to work together the company and agent, the Agent would like to continue to be paid off introductions that we made in the past and referrals to new lawyers at those firms and any other clients that may be introduced as a result of an introduction the agent made. These introductions will be listed in Exhibit B.
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> . . . .
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> 10. TERM: . . . If termination occurs for whatever reason the Agent will continue to be compensated for those introduction[s] listed in Exhibit B for perpetuity.

Exhibit B, the list of referral sources, contained a list of twenty-five individuals and law firms. Among the list of names was Michael Ben-Jacob. He referred business to the Company which resulted in the payment of commissions in 2017. At the time of the Ben-Jacob

referral, the Agent was administratively dissolved. On December 27, 2017, three months before filing suit against the Company seeking its share of the Ben-Jacob commissions, the Agent was retroactively reinstated.

The Appellees moved for summary judgment based on their affirmative defense alleging that the Agreement constituted an unlawful restraint on trade pursuant to sections 542.18 and 542.335, Florida Statutes (2011). We review de novo the trial court's determination that the Agreement constitutes a restraint on trade such that it is subject to the strictures of section 542.335. *See White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 779 (Fla. 2017).

Section 542.335 provides that restrictive covenants do not run afoul of the prohibition on restraints of trade or commerce, even if they restrict or prohibit competition, so long as they protect one or more legitimate business interests and are reasonable in geographic and temporal scope. *See* § 542.335. However, we need not reach the reasonableness of the scope of the Agreement or whether it is necessary to protect a legitimate business interest under section 542.335 unless and until we determine that the commission

sharing arrangement is, in fact, a restraint on trade or commerce under section 542.18.

Section 542.18 provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." The Company argues that, because the Agreement imposes a "substantial financial disincentive" on the Company, it constitutes a "restraint of trade or commerce" as that phrase is used in the statute. However, by the Appellees' rationale, every referral arrangement, fee-splitting deal, or commission structure would constitute a restraint of trade governed by the statute—because each of these creates a disincentive, substantial or otherwise, to the individual or entity that enters into them. For example, a real estate agent might be less motivated to get up off the couch on a Saturday afternoon to show a home to a potential buyer if that buyer was referred pursuant to an agreement under which the agent must pay the referrer a percentage of whatever fee she might be paid upon a sale. But that alone does not transform the referral arrangement into a restraint on trade.

The restraint prohibited by section 542.18 is on *trade* or *commerce* in general—not on the competitiveness or incentives of

individual actors. *See, e.g.*, *United Am. Corp. v. Bitmain, Inc.*, No. 18-CV-25106, 2021 WL 1807782, at *17 (S.D. Fla. Mar. 31, 2021) ("An unreasonable restraint of trade is one that harms competition in general, rather than the plaintiff, or any other competitor." (citing *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1069 (11th Cir. 2004))).[1] Section 542.335 does govern the enforceability of "contracts that restrict or prohibit competition," but that language must be understood in relation to the prohibition in section 542.18 to which section 542.335 serves as an exception. *See* § 542.335(1) ("*Notwithstanding s. 542.18* and subsection (2), enforcement of contracts that restrict or prohibit

[1] Florida courts routinely rely upon federal courts' interpretations of the Sherman Act, 15 U.S.C. § 1 (2011), when applying sections 542.18 and 542.335. *See, e.g.*, *Oce Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So. 2d 1037, 1041 (Fla. 2d DCA 2000) (citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993), for the proposition that "the Sherman Act applies to foreign conduct that produces some substantial effect in the United States"); *MYD Marine Distrib., Inc. v. Int'l Paint Ltd.*, 76 So. 3d 42, 46 (Fla. 4th DCA 2011) ("[W]e 'look to federal cases to elucidate what is an agreement in restraint of trade and what proof constitutes a conspiracy.' " (quoting *Parts Depot Co. v. Fla. Auto Supply, Inc.*, 669 So. 2d 321, 324 (Fla. 4th DCA 1996))); *see also* § 542.32 ("It is the intent of the Legislature that, in construing this chapter, due consideration and great weight be given to the interpretations of the federal courts relating to comparable federal antitrust statutes.").

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." (emphasis added)). Section 542.18 does not prohibit every agreement that might reduce—or even *substantially* reduce—the competitiveness or profit motives of an individual, a business, or even a group of individuals or businesses who enter into the agreement. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."). Rather, section 542.18 governs restraints on "trade" or "commerce" itself—not the discreet effects that agreements have on the parties that enter into them. *See Spectrum*, 506 U.S. at 458 (noting that antitrust statutes do not "protect businesses from the working of the market" but rather "protect the public from the failure of the market").

The Company describes how good a deal this is for the Agent, and how correspondingly severe the effects of the deal have been to the Appellees. The Agreement might very well have been—or became, in light of circumstances developed after its execution—

quite advantageous to the Agent and disadvantageous to the Company and Individuals. This does not make it a restraint of trade or commerce.

And just as the focus on the lopsidedness or open-endedness of the particular deal into which the Appellees entered gets the cart before the horse, so does a premature examination of the geographical or durational scope of the Agreement elide the threshold determination of whether it is a restraint on trade to begin with. While the Agreement might now be financially unfavorable to the Appellees due to the size of the list of referral sources and the enduring obligation to share commissions earned from prior introductions, that is the deal that was struck and under which the Appellees operated for some time. And it does not restrain trade or commerce in the insurance sales market. The Agreement merely requires the Company to split commissions; it does not even operate as a barrier to the Agent's ability to sell its own insurance products to potential buyers, including to clients of the referral sources listed on Exhibit B. The Agreement does not negatively affect consumers' ability to procure insurance products

since both the Company and Agent can freely compete for the same business.

The Florida Supreme Court has considered whether agreements governing the use of referral sources may under some circumstances constitute a restraint on trade. *See White*, 226 So. 3d at 777 (identifying the question presented as "whether home health service referral sources can be a protected legitimate business interest under section 542.335"). That case, however, involved provisions in two employment contracts that prohibited former employees from working for or soliciting referrals for competing home health care businesses. *Id.* at 778. Here, there is nothing keeping the Agent from competing against the Company, or vice versa, by utilizing the very same referral sources that it provided to the Company.

Because the commission sharing arrangement set forth in the Agreement does not constitute an invalid restraint on trade or commerce, the trial court erred by granting judgment in the Appellees' favor.

Reversed and remanded.

MORRIS, C.J., and LUCAS, J., Concur.

Opinion subject to revision prior to official publication.