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Firm News

Employment Practice Overview

Non-Compete Provisions: Do they Survive Upon Expiration of an Employment Contract ?

On November 2, 2005 the Fourth District Court of Appeals in *Gray v. Pinnacle Management*, No. 4D04-1940 (Fla. 4th DCA November 2, 2005) held that a non-compete clause could not be enforced upon expiration of the employment agreement because it violated the Statute of Frauds.

Background

Prime Management is a property maintenance and services organization. Douglas Gray was employed as Prime's president. Gray resigned and started a competitor called

Pinnacle. Prime sued, among others, Gray and Pinnacle for breach of contract, tortious interference and misappropriation of trade secrets. It also filed for an injunction.

Gray was hired by Prime pursuant to a written employment agreement. The **Term** of employment was for five years from the effective date "unless terminated pursuant to ... the Agreement, or unless extended by mutual agreement of the parties hereto." The agreement contained a restrictive covenant which prohibited Gray from competing against Prime for a

period of eighteen months "following termination of this agreement". Gray resigned after expiration of the agreement and started Pinnacle.

Court's Decision

The trial court had issued a temporary injunction enjoining Gray and Pinnacle from soliciting existing clients of Prime. On appeal the District Court of Appeals reversed.

At the outset the appeals court noted that restrictive covenants are valid restraints of trade or business if they

Guarantor Beware: Release of the Debtor After Judgment May Not Extinguish Your Liability

In a case that shows that guarantor's need to be extremely careful in understanding the extent and duration of a guaranty, the District Court of Appeals in *BankAtlantic v. Berliner*, No.4D04-1106 (Fla. 4th DCA Nov. 2, 2005) held that the general rule that the release of the primary obligor did not apply to release the guarantor where the release occurred after judgment.

Background

Berliner, Anthony Fareri, President of 24 Hour Protective Corp. ("24 Hour") signed

separate commercial guaranties which guaranteed the indebtedness of 24 Hours to BankAtlantic with respect to two promissory notes totaling \$60,000. The guaranty was absolute and unconditional. It also indicated that the guarantor was liable even if the debtor is discharged from liability.

24 Hour defaulted on the notes and BankAtlantic sued 24 Hour, Fareri and Berliner in the same action. A settlement was reached where judgment was entered against 24 Hour and Fareri, jointly and severally, but dismissed Berliner without prejudice. The judgment did not

indicate that Fareri was secondarily liable. Fareri and 24 Hour breached the settlement. BankAtlantic sued Berliner and obtained a judgment against him for \$79,521.65 and did not indicate that he was secondarily liable.

BankAtlantic then entered into a joint stipulation with 24 Hour and Fareri and recorded a satisfaction of judgment indicating that the judgment had been satisfied in full. Berliner was not a party to the settlement. BankAtlantic continued its collection efforts against

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The Firm practices throughout the State of Florida with particular emphasis in the areas of

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Non-Compete Agreements (cont'd)

are:

1. reasonable in time, area and line of business;
 2. set out in writing and signed by the party against whom enforcement is sought;
 3. supported by at least one legitimate business interest justifying the restraint; and
 4. reasonably necessary to protect the identified legitimate business interest(s).
- The Court further stated that any agreement that is not to be performed in one year from its making was

required to be in writing to be enforceable.

The District Court rejected the trial court's finding that because Gray continued to work for Prime after expiration of the employment agreement that the parties had acted as if the Agreement and restrictive covenant had not expired. It also rejected the trial courts conclusion that an implication arose that the parties had mutually assented to a new contract containing the same provisions as the old. The District Court held that

the Statute of Frauds required a written renewal of Gray's fully performed contract. In reaching this conclusion, it found that the Term provision of the agreement was insufficient to satisfy the Statute of Frauds because the terms did not expressly provide that its terms would continue if the employee continued to work after expiration without renewing the contract.

Guaranty (cont'd)

Berliner who challenged the enforceability of the judgment in response to a writ of garnishment. The trial court ordered BankAtlantic to enter a satisfaction of judgment. BankAtlantic appealed that order.

Court's Decision

The issue the Court addressed on appeal was whether a guarantor against whom a final judgment was obtained remains liable on the debt guaranteed, once a satisfaction of judgment has been filed in favor of the

obligor and another guarantor.

At the outset the Court reiterated the general principles of guaranty law—namely, release of the debtor constitutes a release of the guarantor and once a primary debt is fulfilled by payment of the judgment, the guarantor's obligations ceases to exist.

However, the Court found that the general rules were not applicable because the release occurred **after** judgment. The Court said that since the release of the

obligor occurred post-judgment the debt merged into the final judgment which did not indicate that he was secondarily liable and thus lost its prejudgment identity and Berliner was no longer a guarantor of the debt. Moreover, the language of the guaranty specifically stated that the guarantor would be liable even if the debtor was discharged indicating that the parties contemplated BankAtlantic might settle with one guarantor, with the guaranty remaining in force against another guarantor.

Executive Employment Litigation Practice

The firm's attorneys have litigated a wide range of employment and compensation related disputes for executives and managers of public and privately held U.S. and foreign corporation and partnerships in state and federal throughout

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- Contract Issues**
- Fraud in the Inducement**
- Defamation**
- Non-Compete Agreements**
- Trade Secrets**

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