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Inside

Features

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Non-Compete Agreements – What Physicians Need to Know

In Missouri, there are more reported non-compete cases involving the medical profession than any other single profession

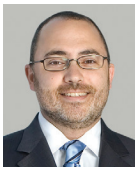
By Bill Corrigan, JD, and Michael Kass, JD

Physicians are very often required to sign non-compete agreements and other restrictions as a condition of employment with a medical practice or hospital. Both physicians and their employers should be aware of the basic legal concepts surrounding this area of law, and in particular the fact that courts often do enforce such agreements. Indeed, in Missouri, there are more reported non-compete cases involving the medical profession than any other single profession. Of course, there are many more cases that are not reported because they are resolved at the trial court level and not appealed. The purpose of this article is to provide a brief overview of this important area of the law.

Purpose of Covenants

The Supreme Court of Missouri has stated that "agreements of this kind restrain commerce and limit the employee's freedom to pursue his or her trade." Therefore, "enforcement of such ... agreements is carefully restricted." The purpose of enforcing a non-compete agreement is to protect the employer from unfair competition by a former employee without imposing unreasonable restraints on the latter. "Protection of the employer, not punishment of the employee, is the essence of the law."

Bill Corrigan, JD



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An employer may only seek to protect certain narrowly defined and well-recognized interests—its trade secrets and its stock in customers (i.e., in the case of medical practices, the patients). The enforcing party must also show that the agreement is reasonable in scope, both as to time and place. The burden of demonstrating the covenant's validity is on the party seeking to enforce it.

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Cases Enforcing Covenants

Most reported Missouri cases involve the successful enforcement of restrictive covenants against physicians, usually prohibiting them from practicing within a certain geographic area for a limited time period. The duration of restrictions enforced by the courts have been as long as five years and as short as one year. The geographic restriction is commonly anywhere from several miles to even a 75-mile radius from the offices of the employer. In order to provide physicians a better understanding of the factors that the courts consider, a more detailed discussion of those cases is set forth below.

In the last Missouri Supreme Court case concerning a physician, the court enforced a covenant preventing a surgeon from practicing medicine for a period of five years within a 20-mile radius of St. Joseph, Mo. The defendant/physician completed his residency and then worked with the employer/physician for three years, when the partnership was terminated. The defendant argued that there was a need in northwest Missouri for the services of a skilled surgeon, and that in determining whether to enforce this restrictive covenant, the court should weigh the benefit to the people of this part of Missouri which would result from not enforcing the covenant, compared with the benefit to the employer seeking to enforce it. Simply stated,

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the community could not afford the loss of this surgeon. The Supreme Court rejected this public policy argument for the reason that many communities are short of physicians and their services are as valuable and necessary in one community as in another. A more fundamental public policy is served, said the court, by the preservation of the obligations of contracts. More recent Missouri cases have also rejected this physician's public policy argument.

In another case, a physician (the court did not indicate the specialty) was enjoined from the practice of medicine within a 60-mile radius of the City of Butler for five years after termination of his employment. The defendant/physician worked with the plaintiff during his internship. After completing a few years of employment, the defendant left to begin his own practice. He admitted that during the first month of his own practice he sent requests for medical records to the plaintiff's clinic, and about 80% were concerning patients of his former employer. In this case, the court stated that contracts of non-competition between physicians will often be enforced through injunctive relief (i.e., a court order specifically prohibiting violation of the restrictions). The court further stated that the established public policy of Missouri does not prohibit enforcement of an otherwise valid non-competition employment contract between medical practitioners. Furthermore, "the competition which marks the medical practice and the time required to gain the confidence of a [patient] makes the insistence on such protection not only reasonable but a practical necessity."

The court held that the covenant was necessary to protect the employer's legitimate business interest in his practice at that hospital and enforced the agreement.

In a case involving a cardiologist who worked with the corporate cardiology practice for 15 months, the court issued an order prohibiting him from providing any services to any patients of the cardiology practice or engaging in general cardiology at certain hospitals in the St. Louis area for one year. The physician who was the sole owner had established the practice initially and developed his practice for several years before he hired the defendant cardiologist as an employee (the latter had never been in private practice). In this case, the cardiologist/employee was hired to expand his new employer's existing practice at a particular hospital. The court held that the covenant was necessary to protect the employer's legitimate business interest in his practice at that hospital and enforced the agreement. The court rejected defenses that the non-compete was procured by fraud and duress, that there was a prior material breach of the agreement or that the cardiology practice was barred from seeking a court order because of "unclean hands."

In another case, a neurologist was enjoined from practicing neurology for two years within a 75-mile radius of the employer's office. Interestingly, the neurologist only worked for the neurology group in Columbia, Mo., for six months. Moreover, he was an experienced neurologist, having practiced for six years before accepting employment with the neurology group, including practicing in the Columbia area. However, what influenced the court was the neurologist's conduct of becoming a shareholder in a competing neurology group in Rolla shortly after signing his employment agreement with the Columbia neurology group. The employment agreement with the Columbia neurology group required that he devote substantially all of his time and attention to that corporation. After the neurology group in Columbia raised this issue to him, he informed them that he would no longer be involved in the group in Rolla; however, he continued seeing patients there, and discharged some of these patients in Columbia to the clinic in Rolla.

The neurologist argued that the court should not enjoin him because his exposure to the Columbia neurology group's patients was limited. However, the court stated that he saw over 500 patients while there and that 80-90% of the patients he treated were first-time patients.

The neurologist also argued that given his short tenure with the clinic in Columbia, it did not have a protectable interest in its patient base. The court disagreed. The court concluded that he had significant influence over the patients he saw while employed by the Columbia clinic. This was demonstrated by the fact that he was able to direct former Columbia patients to see him in his Rolla clinic for follow up. Finally, in addition to the injunction, the court also entered a money judgment against the neurologist for $40,000.

Finally, in another case, a pediatrician filed a declaratory judgment suit seeking a declaration from the court that his non-compete agreement was overly broad and thus, unenforceable. The pediatrician filed a motion with the trial court requesting that the trial court rule, as a matter of law (without hearing any evidence), that the non-compete agreement was overly broad and unenforceable. Surprisingly, the trial court granted the motion. However, the court of appeals, after discussing a number of the Missouri non-compete cases involving medical professionals, reversed and concluded that the pediatrician's 60-mile, three-year restriction was not overly broad as a matter of law.

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Defenses

The most common defenses in attacking the enforceability of a non-compete agreement are the following: (1) the employer did not have a protectable interest in the physician's patients; (2) a prior material breach of the agreement; and (3) "unclean hands." Two reported cases that have upheld at least one of these defenses are discussed below.

In the first case, the court refused to enforce a three-year, non-compete agreement involving an ophthalmologist. During the course of the contract negotiations between the ophthalmologist and the eye clinic, it became apparent that a new agreement was not likely to be agreed to before the existing one expired. The eye clinic notified all hospitals and patients which the physician served that he would be leaving the Kansas City area at the expiration of his contract, terminated all his on-call duties, prohibited him from treating patients, cancelled surgeries he was scheduled to perform and locked his office. In effect, the clinic relegated him to a compulsory vacation for the remainder of the contract term.

It is important to be aware that Missouri courts may, in their discretion, modify (instead of not enforcing) a restrictive covenant if the court believes it is too restrictive.

The trial court refused to enforce the covenant not to compete based on the material breaches of the employment agreement by the clinic. The Court of Appeals agreed, holding that the actions of the clinic in informing hospitals and other physicians that the ophthalmologist was no longer practicing in the area and prohibiting his access to patients for treatment or surgery—all before the termination of the existing contract term—prevented him from the exercise of his profession when he was entitled to practice and constituted a material breach of the agreement. Moreover, by not allowing him to work for a month, he was deprived of an additional $25,000 of compensation under his agreement, and this also constituted a material breach by the eye clinic.

In the second case, the court refused to enforce a non-competition agreement with respect to a nephrologist who served as a medical director and independent contractor of the plaintiff's dialysis treatment centers. The reason was the employer did not have a protectable interest in its patient contacts related to to the nephrologist. The threshold issue was whether a non-compete applies to an independent contractor. The court, in a case of first impression, held that non-compete covenants are applicable to an independent contractor relationship. However, the court refused to enforce the covenant in this case, because the nephrologist was only prohibited from serving as a medical director and not as a private physician. Because he had no patient contacts as medical director, the employer did not prove a protectable interest in its patient relationships.

Finally, it is important to be aware that Missouri courts may, in their discretion, modify (instead of not enforcing) a restrictive covenant if the court believes it is too restrictive. For instance, a restriction covering a 100-mile radius may be deemed overbroad depending on the circumstances, but then the court may nevertheless enforce it for a much narrower geographic area. Both sides to a non-compete case should consider this principle in determining how to proceed.

In summary, covenants not to compete are enforceable if they serve to protect a legitimate business interest of the former employer, usually patient relationships, and are narrowly tailored to protect that interest in terms of the duration and geographic scope of the restrictions.