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## PHYSICIAN RESTRICTIVE COVENANTS ENFORCED SOMEWHAT RELUCTANTLY

Ability to restrain competition from departing physicians increasingly the subject of litigation

By **PATRICK J. MONAHAN II**  
and **ROY W. BREITENBACH**

The disposition of legal issues involving the enforceability of restrictive covenants restraining a departing physician's ability to practice after leaving a group practice or other company have become increasingly significant over the last 20 years.

That is largely due to the increased mobility of physicians. Before 1990, fewer than 2 percent of physicians changed jobs during their career. Physicians entering the profession after 1990, however, switched employers on average about three times before 2000. More recent studies indicate that approximately 10 percent of physicians change jobs annually.

As the opportunity for mobility has increased, physicians have become justifiably concerned with preserving their ability to change practices when it suits their professional and personal interests. Medical practices, too, have become increasingly concerned with protecting their good will and business when physicians leave. Thus, disputes over the enforceability of physician restrictive covenants have often been litig-



Roy W. Breitenbach is a partner at Garfunkel, Wild & Travis, P.C. He is a member of the firm's Litigation and Arbitration Practice Group. Patrick J. Monahan II joined the firm's Stamford office after serving as General Counsel and Vice President of the Connecticut Hospital Association.

gated over the last 20 years, both nationally and in Connecticut.

Connecticut, like the majority of states, generally, but somewhat reluctantly, permits the enforcement of physician restrictive covenants. As the Connecticut Supreme Court stated last year in *Deming v. Nationwide Insurance Co.*: "By definition, covenants by employees not to compete with their employers restrain trade in a free market. Consequently these covenants may be against public policy, and, thus, are enforceable only if the imposed restraint is reasonable, an assessment that

depends upon the competing needs of the parties as well as the needs of the public."

Under Connecticut law, the party challenging the enforceability of a non-compete has the burden of proving that it is not enforceable. The state Supreme Court has held that a court should consider the following five factors in evaluating the reasonableness of a restrictive covenant ancillary to an employment agreement: 1.) The length of time the restriction operates; 2.)

The geographical area covered; 3.) The fairness of the protection accorded to the

employer; 4.) The extent of the restraint on the employee's opportunity to pursue his or her occupation; and 5.) The extent of interference with the public's interests.

The first two factors in determining reasonableness are the length of time the restriction operates and the geographical area covered. These factors are derived from the principle that a restrictive covenant, as a restriction or limitation on competition, must be narrowly tailored to protect the practice's legitimate competitive interest in preventing unfair competition.

With regard to duration, the restrictive covenant can last only as long as it needs to ensure that the physician is competing on the basis of his or her own skill and efforts, and not on the basis of material to which he or she had access at a former practice. That requirement recognizes that, even if a physician's initial practice is

entirely dependent on the good will, access and materials obtained while employed at a former practice, over time the physician's ability to retain and enhance a patient base is dependent on his or her own skill and efforts.

Court decisions regarding the reasonableness of the duration requirement in and outside Connecticut suggest a general rule of thumb for

maximizing the prospect of enforceability: the covenant should last either the same



amount of time as the term of the contract containing the restrictive covenant, or two years, whichever is shorter.

With regard to reasonableness of geographic scope, the covenant should only prohibit a physician from practicing in the same geographic area from which the practice draws a majority of its patients. That means a practice that provides a unique or advanced specialty—or a practice in a rural area—may generally impose a broader geographic area restriction than an internal medicine practice or a practice in a large metropolitan area.

Finally, to the extent that a court finds that a restrictive covenant is reasonable under all the factors except duration or geographic area, it may apply the “blue pencil rule,” which allows a court to redraw the duration or geographic area restrictions to make them reasonable and, therefore, enforceable. Under Connecticut law, however, courts likely will apply the blue pencil rule only if there is a specific provision in the operative agreement authorizing the courts do so.

### **Fairness To The Employer**

A non-competition covenant is fair to the employer to the extent it is designed to protect a legitimate competitive interest. That requirement is important because federal law, in our free-market economic system, generally does not tolerate attempts by entities to restrain or limit competition among providers of goods or services.

Accordingly, a court in general will permit a restraint or limitation on competition only if it serves some important purpose. Over the years, courts have recognized that a limitation on competition is acceptable if it protects a party from unfair competition.

A physician engages in unfair competition when he or she obtains confidential or competitively sensitive information about a practice or its patients, when working for the practice, and then uses that information to compete against the practice.

To prevent unfair competition, courts have allowed parties to enforce restrictive covenants provided that the covenants are narrowly tailored to protect a party’s legitimate interest in preventing unfair competition. That means, to satisfy the legitimate competitive interest requirement, a practice must show that the departing physician had access to competitively sensitive information or such close contact with patients that there is a risk the physician could use the information or access to compete with the practice.

For most medical practices, the legitimate competitive interest requirement should be relatively easy to meet. It is hard to imagine a physician who does not have access to competitively sensitive information or such close contact with patients that there is a risk the physician could use the information after departure to compete against his or her former practice.

### **Burden On The Physician**

The next major requirement that must be met before a restrictive covenant will be deemed enforceable is that the covenant cannot unduly harm or burden the physician against whom it is sought to be enforced. Of course, any restrictive covenant burdens the physician against whom it is enforced. The question really is whether circumstances changed since the physician signed the restrictive covenant

such that enforcing it would place a significant and extraordinary burden on him or her. As the Connecticut Supreme Court has stated: “[A] restrictive covenant is unenforceable, if by its terms, the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family.” Reasonableness of the limitation depends on the nature of the restriction, the length of the limitation and the geographic scope of the limitation.

The final requirement for enforcement of the restrictive covenant is that it does not unduly harm the public. In *New Haven Tobacco Co. v. Perrelli*, the Connecticut Appellate Court articulated the standard for determining whether a covenant not to compete violates the public’s interests. The three factors are: (a) “the interest sought to be protected by the employer”; (b) “the scope and severity of the covenant’s effect on the public interest”; and (c) “the probability of the restriction creating or maintaining an unfair monopoly in the area of trade.”

Applying these factors, a court is more likely to find a restrictive covenant covering a physician harmful to the public if there is a shortage of the physician’s specialty in the area where the physician practices. For example, if the physician is an interventional radiologist and there is no other interventional radiologist in or even near the restricted area covered by the restrictive covenant, then enforcing the restrictive covenant most likely would be deemed to harm the general public because there would be no interventional radiologists to provide services to those in the affected area. ■