



**Are covenants not to compete becoming unenforceable?: A growing trend explored**

PETER M. SFIKAS

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# Are covenants not to compete becoming unenforceable?

## A growing trend explored

**T**he plaintiff, Murfreesboro Medical Clinic (MMC) is a private medical practice in Murfreesboro, Tenn., employing more than 50 physicians.<sup>1</sup> In early 2000, MMC made an offer of employment to the defendant, Dr. David Udom, to practice internal medicine at the clinic. Dr. Udom accepted the offer orally. Thereafter, MMC provided Dr. Udom with a written employment agreement for his review and signature.

The agreement was for an initial two-year term of employment at MMC and included a noncompete provision that stated, “[u]pon any termination of this Agreement ..., the Employee agrees not to engage in the practice of medicine within a twenty-five (25) mile radius of the public square of Murfreesboro, Tennessee, for a period of eighteen (18) months following such termination.”

Dr. Udom reviewed the proposed agreement, signed it and returned it to MMC on or about April 4, 2000. He began work on Sept. 1, 2000, and practiced in the internal medicine department until August 2002.

On Aug. 13, 2002, before his initial two-year term of employment was about to expire, MMC advised Dr. Udom that it would not renew his agreement and set Aug. 31 as his last day of

employment. MMC also stated that it would enforce the terms of the covenant not to compete.

Dr. Udom stated in an affidavit that the covenant not to compete would preclude him from practicing medicine at all hospitals in the

Murfreesboro area. It also appeared that the covenant would restrict him from practicing in several communities surrounding Murfreesboro, including La Vergne, Antioch, Brentwood, Shelbyville, Woodbury, Lascassas and Lebanon.

On Oct. 10, 2002, Dr. Udom sent a letter to MMC, informing the clinic of his intention to open a medical practice in Smyrna, Tenn.

Shortly after receiving the letter, MMC filed a complaint against Dr. Udom seeking to enjoin him from violating the noncompete provision of his employment agree-

ment. The trial court granted a temporary injunction to MMC, stopping Dr. Udom from practicing medicine in Smyrna, Tenn. In the court of appeals, Dr. Udom argued that the trial court erred in granting MMC the temporary injunction and that the covenant not to compete was unenforceable because it was “unreasonable in the circumstance,” did not secure a protectable interest, was overbroad and was against public policy.

The court of appeals reversed the temporary injunction against Dr. Udom but affirmed the trial court ruling that the covenant not to compete was enforceable. The Tennessee Supreme Court allowed an interlocutory appeal because it

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BY PETER M. SFIKAS, J.D.

found that the issue of whether a covenant not to compete was enforceable against a physician was “a case of first impression” for the court, meaning that it involved issues on which the court had never ruled before.

### THE COURT’S ANALYSIS

The court noted that, historically, these covenants are viewed as restraint of trade in any context and, as such, are construed strictly in favor of the employee. However, it also noted that if there is a legitimate business interest to be protected and if the time and territorial limitations are reasonable, then noncompete agreements are enforceable. The court found that the following factors were relevant to determine reasonableness:

- the consideration supporting the covenant;
- the threatened danger to the employer in the absence of the covenant;
- the economic hardship imposed on the employee by the covenant;
- whether the covenant is inimical to the public interest.

In *Spiegel v. Thomas, Mann & Smith*,<sup>2</sup> a law firm attempted to enforce the terms of a “deferred compensation agreement,” which was in essence a noncompete agreement, against an attorney formerly employed by the firm. This court analyzed the validity of the agreement to determine whether the covenant was in conflict with the public interest.

The court first examined the position of the American Bar Association (ABA), which viewed restrictive covenants as unethical. The ABA’s ethics committee declared the practice of law different from a common business or trade because

lawyers deal with clients, not merchandise, and lawyers have a duty to make legal counsel available to the public. As a result, this court concluded that enforcing the clause in question would violate these ethical standards. Thus, the court found the covenant unenforceable because it was in conflict with the public good.

The court observed that the medical profession also has raised the issue of public good. It found that having a greater number of physicians practicing

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in a community benefits the public by providing greater access to health care. Increased competition for patients tends to improve quality of care and keep costs affordable. Furthermore, a person has a right to choose his or her physician and to continue an ongoing professional relationship with that physician.

The court then examined the policies of the American Medical Association (AMA), which has taken the position that physicians’ noncompete agreements have a negative effect on health care and are not in the public interest. The AMA has held the view for many years that noncompete agreements restrict competition, disrupt continuity of care and potentially deprive the public of medical services.

The court also found it curious that, despite the AMA’s stated position, a majority of courts continue to apply a “reasonableness” standard in evaluating noncompete agreements among physicians, similar to the evaluation of such covenants in commercial contexts. Nevertheless, several states, emphasizing public policy concerns, have applied closer scrutiny to noncompete agreements involving physicians (for an example, see *Valley Med. Specialists v. Farber*<sup>4</sup>). Also, three states in recent years have enacted statutes totally prohibiting noncompete clauses in physicians’ contracts. In other states, antitrust statutes have been interpreted as prohibiting noncompete clauses among physicians.

The court found that both the medical profession and the legal profession were similar with reference to public policy. They both have a duty to make their services available. Their relationships with patients or clients are professional and go well beyond simply providing goods or services. The medical profession, as with the legal profession, must have the confidence of its patients (clients), and the relationship involves a fidelity not found in a commercial context (for an example, see *Weber v. Tillman*<sup>5</sup>).

These professions must have the faith and confidence of their patients (clients) in order to provide services effectively. When a patient (client) has entrusted confidential information to the doctor (lawyer), this creates a relationship of confidence, and the patient (client) does not wish to have that relationship involuntarily terminated. Patients who entrusted confidential infor-

mation to Dr. Udom, by virtue of their highly fiduciary relationship with him, should not have that relationship involuntarily terminated.

The court concluded its analysis by holding that public policy considerations such as the right to freedom of choice in physicians, the right to continue an ongoing relationship with a physician and the benefits derived from having an increased number of physicians practicing in a given community all outweigh the business interests of an employer. As a consequence, the covenant not to

compete was declared void.

Although most courts continue to enforce physicians' non-compete agreements, more and more courts today are holding these covenants unenforceable for public policy reasons. In some instances, this has spread to other health care providers.<sup>6</sup> At present, however, we are not aware of any cases involving dentists whose agreements have been held void because they were judged to be in conflict with public policy. ■

Mr. Sfikas is ADA chief counsel and an adjunct professor of law at Loyola University of Chicago School of Law. He has lectured and

written on legal issues and is a fellow of the American College of Trial Lawyers. Address reprint requests to Mr. Sfikas at the ADA, 211 E. Chicago Ave., Chicago, Ill. 60611.

This article is informational only and does not constitute legal advice. Dentists must consult with their private attorneys for such advice.

1. Murfreesboro Medical Clinic, P.A. v. David Udom, Tenn. (Tenn. June 29, 2005).
2. Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W. 2d 528, 529-30 (Tenn. 1991).
3. American Medical Association. Code of medical ethics: Current opinions with annotations, 1998-1999. Chicago: American Medical Association; 1998:Section E 9.02.
4. Valley Med. Specialists v. Farber, 982 P.2d 1277 (Ariz. 1999).
5. Weber v. Tillman, 913 P.2d 84 (Kan. 1996).
6. Sfikas PM. Non-compete agreements: a new trend? ADA Legal Adviser; October 2003. Available to ADA members at: "www.ada.org/members/resources/pubs/adviser/0310/index.asp". Accessed July 29, 2005.