SA-CME

Noncompete Clauses: A Contract Provision That Has Exhausted Its Usefulness?

Jonathan L. Mezrich, MD, JD, MBA, LLM, Eliot L. Siegel, MD

Purpose: Noncompete clauses (NCs) are common in many physician employment agreements, including those of radiologists. NCs restrict radiologists' ability to perform services for anyone other than their employers, not only during the term of employment but also for a period of time after employment ends. Although courts frown on the post-termination portion as a restraint of trade, in most states, NCs will be enforced if they are deemed reasonable in duration and geography. However the practice of radiology has changed. Teleradiology is common, and improvements in telecommunications and portable devices allow radiologists to perform their services virtually anywhere. In light of these changes, are NCs still necessary for radiologists?

Methods: Eighty-six University of Maryland radiology residency alumni for whom e-mail information was available were asked to complete an online survey regarding whether they are subject to NCs, the key terms of their NCs, and their views on the continuing usefulness of NCs. A review of all state and federal cases published in the Westlaw law database in which radiologists' NCs were adjudicated was also performed.

Results: Twenty-one alumni from our residency program completed the survey, representing a 24.4% response rate; 57.1% of respondents are subject to NCs. Of that group, post-termination restrictions ranged from 1 to 2 years in duration, and geographic limitations ranged from 7 to >50 miles from the employer's practice. Respondents were split as to the impact of teleradiology, with 36.8% feeling that NCs are now more necessary and 26.3% feeling that NCs are less necessary. Searches of Westlaw revealed 7 cases on point, which upheld as reasonable NCs ranging from 1 to 5 years in duration and imposing geographic limitations of 15 to 40 miles from the employer's practice.

Conclusions: Although the practice of radiology has undergone significant changes, this survey shows that NCs are still widely used and are still being enforced in many courts. It is unclear whether NCs still make sense in today's practice, but it may be important to modify them to explicitly address the practice of teleradiology. NCs are common and have been upheld in court, although radiologists are split on their usefulness in this era of teleradiology. Contracts should specifically address teleradiology in NC provisions.

Key Words: Noncompete, noncompetition, covenant not to compete, restrictive covenant, radiologist, employment agreement, teleradiology

J Am Coll Radiol 2014;11:145-152.

INTRODUCTION

Jim Smith had had it with his job. A board-certified radiologist with strong academic credentials and experience, he was constantly frustrated by the inflexibility and lack of business savvy of his bosses and all too frequently hearing about more lucrative local positions. He was at a point in his career when he felt comfortable functioning independently, and he simply did not feel that his current

Credits awarded for this enduring activity are designated "SA-CME" by the American Board of Radiology (ABR) and qualify toward fulfilling requirements for Maintenance of Certification (MOC) Part II: Lifelong Learning and Self-assessment.

Department of Diagnostic Radiology and Nuclear Medicine, University of Maryland Medical Center, Baltimore, Maryland.

Corresponding author and reprints: Jonathan L. Mezrich, MD, JD, MBA, LLM, University of Maryland Medical Center, Department of Diagnostic Radiology and Nuclear Medicine, 22 South Greene Street, 2nd Floor, Baltimore, MD 21201; e-mail: jmezrich@umm.edu.

This paper was presented at the 98th Scientific Assembly and Annual Meeting of the RSNA, November 2012, Chicago, Illinois. Dr Siegel has relationships with the ACR, Amalga, Anatomic Travelogue, Anthro, Applied Radiology, ATL, Barco, Bracco, Carestream, Dejarnette, Dell, Diagnostic Imaging, Digital Art Forms, Dynamic Imaging, Eizo, Fovia, Fuji, Herman Miller, IBM, Intel, Kodak, the National Institute of Biomedical Imaging and Bioengineering, the National Institute of Standards and Technology, the National Library of Medicine, the National Cancer Institute, Life Images, McKesson, Medrad, Merge, Microsoft, GE, Philips, Redrick, the RSNA, Siemens, the Society for Imaging Informatics in Medicine, Sonare, Steelcase, Stentor, TeraRecon, Virtual Radiology, Virtual Images, and Xybix.

1546-1440/14/$36.00 • http://dx.doi.org/10.1016/j.jacr.2013.03.014

job represented the best use of all of his many years of school, residency, and fellowship. So one day, Jim decided he could not take it anymore and gave notice to his employer. He would just go across town to work at a different radiology group. He would find a job in which his skills would be financially appreciated, with employers that would allow him to work the schedule he desired. Everything would be great. "Not so fast," warned his employer, waving Jim's employment agreement in front of his eyes. "Read your noncompete agreement. This town is not big enough for the both of us."

Noncompete clauses, also known as covenants not to compete, are common in many physician employment agreements and partnership agreements [1], including those of radiologists [2]. "Typically, these provisions bar a departing physician, whose employment or partnership relationship is terminated, from practicing medicine within a certain geographic region for a specified period of time" [1]. Covenants not to compete date back to early 15th century English law, with the first court adjudication of such an agreement in 1414 [3].

Generally, courts frown on noncompete provisions as restraints of trade, and a number of courts and legislatures refuse to enforce them either generally or in the context of physicians. However, to date, the majority of state courts do enforce them if they are signed in exchange for some amount of financial consideration and if they meet a "rule of reason" test:

> Under the rule of reason test, a restrictive covenant is reasonable, and therefore enforceable if it 1) is no broader than is necessary to protect a legitimate interest of the employer, 2) does not unduly burden the employee, and 3) does not harm the public. [4]

Agreements are typically enforced in such jurisdictions if they are reasonable in both post-termination duration and geographic scope, taking into account the nature of the business. "The restraint may not cover a greater geographical area or a longer time than is necessary to protect the [employer's] legitimate interests" [5]. In some states, an agreement that was partially reasonable and partially unreasonable could be partially enforced by what is referred to in legal parlance as the "blue pencil" doctrine, whereby, if grammatically feasible, a court would sever a contract, enforce that part that was enforceable, and void the remainder; the court was thought to mark up the contract like an editor with a blue pencil to render it maximally enforceable [6]. Today's contracts often simply provide "savings clauses" to authorize courts to save and enforce provisions to the extent permitted.

Enforcement of noncompete agreements in the setting of physicians has long been debated. Given a patient's right to choose a physician, the need for continuity of care, as well as the present situation of physician shortages, strong arguments can be made that a physician's noncompete clause will cause public harm. The AMA Code of Medical Ethics, Opinion 9.02, generally reflects the medical profession's dislike for noncompete clauses, indicating that they "restrict competition, disrupt continuity of care and potentially deprive the public of medical services" [7]. However, the AMA ultimately seems to take a watered-down approach, rather than prohibiting these agreements outright, stating that "restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or they fail to make reasonable accommodation for patients' choice of physician" [7]. So apparently, they are not "unethical" if they are legally reasonable [8]. Interestingly, the legal profession has taken a much stronger position for its own profession, and noncompete clauses have been deemed unenforceable and void in the setting of lawyer employment agreements, because of concerns of deprivation of a legal client's freedom of choice; similar application has not been extended to other professions in most states [6].

Although virtually all courts frown on noncompete agreements as restraints of trade, very few jurisdictions prohibit them outright. One legal commentator noted that only 19 states even have statutes that address noncompete agreements [9].[1] Only 7 states prohibit noncompete agreements generally, while an additional 2 prohibit noncompete agreements in the context of physician employment [10].[2] Thus, it is clear that, despite court posturing to the contrary, in most states, noncompete agreements still represent a viable part of the arsenal of lawyers drafting radiology employment contracts.

Noncompete clauses for radiologists present a unique set of issues. Unlike the typical internist, who sees patients regularly and repeatedly, the majority of radiology practice patients are onetime referrals. A clinician sends a patient to a radiologist for a study, and the radiologist performs and interprets the study and provides a report to the referring clinician. This does not create the kind of ongoing physician-patient relationship that creates the risk for an employee's "stealing" patients, the kind of employer protection that noncompete clauses were originally designed to facilitate. The patient does not represent repeat business opportunities. A terminated radiologist potentially could entice referring clinicians to send business his way. However, it is difficult to prevent this in any event with a reasonable geographic restriction because radiology by its nature can be performed remotely. A radiologist who interprets a patient's imaging study need not be in the same hospital as the patient, or even the same city. If appropriately licensed, the radiologist need not even be in the same state,

[1] The author lists the 19 states with statutes that govern noncompete agreements: Alabama, California, Colorado, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Missouri, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Wisconsin.

[2] The author lists the following states as prohibiting all noncompete agreements: Alabama, California, Colorado, Louisiana, Montana, North Dakota, and South Dakota. The following states are listed as prohibiting noncompete agreements in which physicians are involved: Massachusetts and Delaware.