Recent Wisconsin Supreme Court decision impacts noncompetition agreements

Thomas P. Godar, JD; Paul D. Cranley, JD

Physician employment is often subject to a noncompetition agreement that restricts the physician from competing with his employer for a certain time and/or in a certain area after he or she leaves the practice. Employers who hire physicians have often been frustrated that even their well-drafted noncompetition agreements are held to be unenforceable. A recent decision by the Wisconsin Supreme Court, *Star Direct, Inc versus Dal Pra,*[1] may make noncompetition agreements easier to enforce, and their restrictions more meaningful.

Background

Wisconsin law has long recognized that agreements restricting post-employment physician competition may be enforceable. Wisconsin law also teaches us that if any part of an agreement restricting competition is found to be unenforceable, the courts will not simply ignore or rewrite the offending language; they will instead throw out the entire agreement. This sets Wisconsin apart from many other states. Elsewhere, the courts may instead enforce whatever portion of an agreement it finds reasonable. Wisconsin's "all or nothing" approach arguably benefits employees by allowing freedom from overly restrictive agreements. However, Wisconsin employers have been forced to be extremely cautious in creating noncompetition agreements for fear that 1 portion might be found overly broad, causing the entire agreement to be invalidated. This has made drafting not only difficult, but unpredictable, since a court's decision to invalidate an agreement may be based on the very specific language used in the agreement, or the very specific facts underlying the employment relationship.

The *Wisconsin Medical Journal*[2] recently highlighted a Wisconsin Court of Appeals case, *Robert Davison, MD versus Bay Area Nuclear Medicine*, to illustrate how a seemingly reasonable restrictive covenant may be struck down. Doctor Davidson practiced at St. Vincent's Hospital pursuant to an agreement with his employer, Bay Area Nuclear Medicine (BANM) that included a noncompetition agreement restricting Dr Davidson from practicing nuclear medicine within 35 miles and requiring him to relinquish his clinical privileges at St. Vincent's Hospital for 1 year. When St. Vincent's replaced BANM with another radiology group, Dr Davison left BANM and joined the new group. BANM's attempt to prevent Dr Davidson from accepting that competitive employment was unsuccessful. The Court of Appeals concluded that BANM could not prevent Dr Davison from practicing at St. Vincent's since it had already lost the contract. The Court of Appeals also noted that the 35 mile restriction and the requirement that Dr Davidson quit practicing at St. Vincent's were overly broad as applied to Dr Davidson.

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Recent Change

The Wisconsin Supreme Court's recent decision in the *Star Direct* case suggests that noncompetition agreements may become easier to enforce in Wisconsin. In this case, Eugene Dal Pra accepted employment with Star Direct upon its acquisition of a competi-

Mr Godar and Mr Cranley are both attorneys with the law firm Whyte Hirschboeck Dudek SC in Madison.

tor for whom Dal Pra worked. He accepted this offer and in connection with the new employment, signed a noncompetition agreement that contained 3 distinct restrictions: (1) the "customer clause," restricted Dal Pra for 2 years after termination from soliciting the customers with whom he dealt on behalf of his employer; (2) the "business clause," precluded him from "becoming engaged" by a competitor within a 50 mile radius of his employer's headquarters; and (3) the "confidentiality clause," prevented him from disclosing confidential and proprietary information related to his employer and employment.

After working for Star Direct for approximately 4 years, Dal Pra left to start his own company to compete with Star Direct, which then sued to enforce the noncompetition agreement. While Star Direct was unsuccessful at the trial court and the Court of Appeals, the Wisconsin Supreme Court (Court) found in favor of Star Direct. While the Court reiterated and clarified some basic principles governing noncompetition agreements, it also offered a novel approach that may change the way such agreements are viewed by Wisconsin courts in future cases.

The Court clarified that even though restrictive covenants are to be construed in favor of the employee, courts must give contract language a reasonable and plain language interpretation, without imposing an interpretation that renders a noncompetition provision unreasonable. The Court reiterated that an employer has a protectable interest in shielding its former employees from soliciting its customers or former customers. This restriction applies not only to those customers with whom the former employee had a recent relationship, it also extends to customers who are not as recent, since the employee's significant knowledge about the business and those customers could potentially lead to unfair competition. The Court also found that the failure of the business to have similar noncompetition agreements for all employees in a similar capacity is not necessarily fatal to the enforcement of such an agreement for one employee.

Most importantly, the Court held that the existence of certain unenforceable restrictions on post-employment activity would not necessarily invalidate the entire noncompetition agreement. A noncompetition agreement may be "divisible" if, after striking the unreasonable portion, the remaining provisions "may be understood and independently enforced." Applying this contract principle for the first time in the context of a noncompetition agreement, the Court found that the "business clause" in Dal Pra's contract was unenforceable, but that the "customer clause" and the "confidentiality clause" were reasonable restrictions. The Court enforced the latter 2 clauses, finding those provisions "divisible" from the unenforceable provision.

In reaching its conclusion, the Court observed that each of the 3 clauses dealt with a different interest of the employer, the clauses did not reference each other, and none of the clauses was dependent on the others. In other words, by drafting the agreement in a way that kept the separate interests independent of each other, Star Direct was able to enforce an intended restriction, even though 1 of the provisions of the noncompetition agreement was unenforceable. In this respect, the *Star Direct* decision broke important new ground for Wisconsin law.

Application

Employers should draft their new noncompetition agreements so they are "divisible." Various features of noncompetition should be included in separate paragraphs, not cross-referenced or dependent on earlier paragraphs. Non-solicitation of provisions, prohibitions on practicing for a particular time period or in a particular geographic area, and confidentiality agreements should each be stated separately. Current agreements between physicians and clinics should be reviewed and amended to make sure that they take into consideration the *Star Direct* decision.

References

1. *Star Direct v Dal Pra,* WI 76, 7678 N.W.2d 898 (2009)
2. Zabawa BJ. Wisconsin courts weaken physician non-compete agreements. *WMJ.* 2007;107(5):263-264

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