Physician Non-Compete Agreements in Illinois: Diagnosis – Critical Condition; Prognosis – Uncertain

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Illinois appellate courts hand down dozens of opinions each year on the enforceability of employee restrictive covenants. For some industries, such as printing, the majority of opinions suggest the lack of protectible business interest in the company's customers, and thus, the unenforceability of the covenant not to compete.1 For some professions, such as the practice of law, the courts have held that public policy concerns dictate that no restrictive covenant be enforceable.2

Many physicians in Illinois have, for years, agreed to non-competition agreements in their employment contracts. These non-compete agreements generally require that for a certain period of time after a physician leaves a practice, he or she will not compete by practicing within a certain geographic distance from the previous practice. Until recently, doctors were on the other end of the scale from lawyers and such restrictions in the medical profession were routinely enforced if properly drafted.3 However, the enforceability of non-compete agreements for members of the medical profession is now uncertain, and doctors, medical practices, and the lawyers advising them must wait for the Illinois Supreme Court to tell us where on the spectrum they now lie.

Carter-Shields v. Alton Health Institute and its progeny

Pending before the Illinois Supreme Court and awaiting a decision is *Carter-Shields v. Alton Health Institute.*4 The plaintiff, Carter-Shields, is a physician who entered into an employment contract with Alton Health Institute ("AHI"). The employment contract contained a non-competition agreement requiring that for a period of two years from the date the contract was terminated, the plaintiff physician would not compete within a twenty-mile radius. The plaintiff physician subsequently terminated her relationship with AHI and initiated litigation by filing a declaratory judgment action against AHI seeking to have her employment contract declared invalid. AHI counterclaimed for injunctive relief, seeking to enforce the restrictive covenant. The trial court found the non-compete provision enforceable and enjoined Carter-Shields from violating it.5

The Illinois Appellate Court for the Fifth District reversed the trial court. First, the Appellate Court found that the corporate practice of medicine doctrine barred AHI from entering into an employment agreement with Carter-Shields. The court then stated that covenants not to compete are disfavored by the law because they are restraints of trade. The court refused to enforce the non-competition clause because it found that Carter-Shields essentially started a new business for AHI and that AHI did not have a near-permanent relationship with the patients. Accordingly, the court found that "the covenant in question restricts competition rather than protects any legitimate business interest of AHI…."6

However, the *Carter-Shields* court then took the analysis one step further. It cited the ethical rules of the American Medical Association's Council on Ethical and Judicial Affairs, which disfavor agreements between physicians that restrict the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement, because such restrictive agreements are not in the public interest. Relying by analogy on *Dowd & Dowd, Ltd. v. Gleason,*7 a case where the Illinois Supreme Court refused to enforce a non-competition clause for attorneys on the basis that Illinois Rule of Professional Conduct 5.6 prohibits

partnership or employment agreements restricting a lawyer's right to practice law, the *Carter-Shields* court refused to enforce the non-compete on behalf of a physician. The court commented:

The same public-policy arguments that prohibit lawyers from making such contracts are applicable to physicians. An agreement restricting the right of partners or associates to practice after leaving a firm limits not only their professional autonomy but also the freedom of clients to choose a lawyer. Similarly, an agreement restricting the right of a physician to practice medicine after leaving a health care provider such as AHI limits not only the physician's professional autonomy but also the patients' freedom to choose a doctor. The 20-mile restriction, even with the modification added by the trial court, would deprive at least some patients of an ongoing relationship with the physician of their choice.8

In making this statement, the Appellate Court did not follow the body of Illinois precedent enforcing physician non-compete agreements. Instead, it relied heavily on the AMA's rules. Interestingly, in 2000 the AMA published an Annotated Model Physician Employment Agreement that summarized, in chart form, several states' laws relating to covenants not to compete among physicians and practices. For Illinois, the AMA Annotated Agreement identified and summarized two Illinois cases upholding non-compete agreements. This suggests that at about the same time that the AMA interpreted Illinois law as allowing non-competition agreements among doctors, an Illinois court interpreted AMA guidelines as restricting them.

In *Prairie Eye Center, Ltd. v. Butler*,9 the Illinois Appellate Court for the Fourth District disagreed with *Carter-Shields*. The court distinguished the Illinois Supreme Court Rule prohibiting lawyer non-competition agreements from the AMA rule relating to physician competition, pointing out that the AMA's rule was merely advisory. On the other hand, the Illinois Supreme Court's rule is mandatory, has the force of law, and is indicative of public policy in the area of attorney conduct. The Fourth District noted that the AMA's rules are not codified and therefore do not establish public policy. While the court stated that there may be "no real difference in the concerns of clients in keeping or choosing lawyers of their own choice and patients in keeping or choosing doctors of their own choice," it felt constrained to follow the precedent prior to *Carter-Shields* that enforced non-compete clauses among physicians.

At least some trial courts around the state have chosen to follow the reasoning of *Carter-Shields*. For instance, Judge Duncan of the Circuit Court of DuPage County recently followed *Carter-Shields* in *Marwaha v. Woodridge Clinic, S.C.*, a case involving a non-compete agreement among physicians. Judge Duncan recognized that "[t]he same public policy arguments that prohibit lawyers from making [covenants not to compete], are applicable to physicians."10 Accordingly, based partially on the reasoning of *Carter-Shields*, he refused to enforce a doctor's covenant not to compete in granting a motion for summary judgment.

These conflicting decisions of the Illinois Appellate Court place doctors in a time of uncertainty in the law. Until the Illinois Supreme Court resolves this conflict, lawyers in Illinois will have to advise their clients that they cannot predict what will happen to their cases if they seek to enforce or defeat a doctor's non-competition agreement.

It is anticipated that the Illinois Supreme Court will provide guidance for physicians and courts to follow in this important area of the law. In the meantime, lawyers are advised to temper their advice to clients with great caution.

1 *See, e.g., Reinhardt Printing Co. v. Feld*, 142 Ill. App. 3d 9, 490 N.E.2d 1302 (1st Dist. 1986).

2 *See, e.g., Down & Dowd v. Gleason*, 181 Ill.2d 460, 693 N.E.2d 358 (1998).

3 *See, e.g., Canfield v. Spear,* 44 Ill. 2d 49, 254 N.E.2d 433 (1969) (enjoining a former associate physician from competing); *Cockerill v. Wilson*, 51 Ill. 2d 179, 281 N.E.2d 648 (1972) (upholding non-compete restriction for veterinarians); *Gillespie v. Carbondale & Marion Eye Centers, Ltd.*, 251 Ill.App.3d 625, 622 N.E.2d 1267 (5th Dist. 1993) ("Restrictive covenants between medical doctors are not detrimental to the public interest because the restricted doctor can be just as useful to the public in another location outside the restricted area; and the physician can always resume his practice in the restricted zone once the time duration of the covenant not to compete has expired…").

4 317 Ill. App. 3d 260, 739 N.E.2d 569 (5th Dist. 2000).

5 *Id.* at 264.

6 *Id*. at 269.

7 181 Ill. 2d 460, 693 N.E.2d 358 (1998).

8 *Carter-Shields*, 317 Ill. App. 3d at 270.

9 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002).

10 Report of Proceedings, July 2, 2002, J. Duncan, p.17 (01 MR 1020).