



The rebirth of the non-competition clause – health professionals beware



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In an article two years ago, I wrote that non-competition clauses, no matter how clear or reasonable, appeared to be entirely unenforceable. Now, it appears that the non-competition clauses are – legally speaking – alive and well. In the 2000 Ontario Court of Appeal case of *Lyons v. Multari*, the Court considered a non-competition clause contained in an agreement between two oral surgeons who were discontinuing their association of their practices. Non-competition clauses were found to be incompatible with public policy and thus non-binding. This case appeared to sound the death knell for the non-competition clause. But in the years since *Lyons v. Multari*, it appears that the courts have begun to retreat from this hard line and, indeed, in some cases, have attempted to breathe new life into the ability of contracting parties to prevent one from competing with the other in certain circumstances.

In one group of cases, the courts have considered the validity of a non-competition clause in the context of the sale of a health-professional practice. The circumstances are really no different than that of the vendor of a business promising not to compete with the business he has just sold, for a particular period of time within a specific geographic location.

In such circumstances, the courts have said the vendors of health practices, particularly those who have been paid significant sums of money for their businesses, should be bound by the agreements they have signed.

The non-competition covenant given at the time of the sale must, however, be reasonable both in terms of duration and geographic application. Indeed, the courts have gone to great lengths to distinguish a non-competition clause entered into in a sale context, from that of one given by a departing associate or employee.

Consistent with the notion that promises not to compete that are voluntarily entered into and appear reasonable on their face ought to be enforced, some courts have upheld non-competition clauses in the context of the break-up of a professional association.

The courts have retreated from their previous focus on the issue of restraint of trade, i.e. whether non-competition clauses, as a matter of policy, are something that we as a society wish to enforce. Now, the courts appear more inclined to look at the particular wording of the agreement.

In one recent Ontario case, the Court has expressly held that despite *Lyons v. Multari*, in certain circumstances, "an employer may...justify a non-competition clause." There clearly appears to be a judicial trend to uphold seemingly plain and clear contracts, regardless of their overall impact upon public policy.

What is the effect of this apparent back-and-forth movement by the courts in their consideration of the validity of non-competition clauses in various contexts? Simply put, it appears that reasonable non-competition clauses given in the context of the sale of a professional practice or business are *likely* to be enforceable.

Conversely, non-competition clauses entered into between a principal and an associate of a health-professional practice *may* be enforceable, depending on the facts and circumstances of the case and the particular wording of the clause at issue.

It still may be difficult to stop a departing associate from opening an office "across the street." Suffice it to say, however, that businesses and health professionals should review existing agreements and consider having them redrafted. Otherwise, trying to enforce such agreements' provisions in an attempt to protect the goodwill in a business or health-professional practice may be futile.

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