Latest Change in Non-Compete Law Leaves Unanswered Questions

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Posted: Monday, March 5, 2012 10:16 am

To Which Contracts Does the Change Apply?

If there’s one thing businesses don’t like, it’s uncertainty. Yet uncertainty is what medical group practices and other entities that contract with physicians are faced with these days, thanks to seven years of legal pendulum swings regarding physician non-compete agreements.

“Certain attempts for certainty continued with uncertainty,” Miller & Martin attorney Christie Burbank stated.

“I don’t think there is any certainty, which creates a lot of uncertainty in the industry. That’s a problem,” echoed Josh McCreary, attorney with Murfreesboro-based Cope Hudson Reed & McCreary.

Both health law experts agreed the twists and turns of non-compete law in Tennessee have left attorneys scratching their heads and admittedly unsure about the status of non-compete provisions in employment agreements they orchestrated between physicians and employers or contracting groups.

“There are all kinds of potential problems,” McCreary said.

The History

Before 2005, non-compete clauses were expected to be included in physician employment agreements and contracts. Traditionally, to protect the practice’s business interests, those clauses prohibited a physician who left the practice from seeing patients within a certain geographic area and for a certain amount of time.

The wheels of change began to turn in 2002, when Murfreesboro Medical Clinic decided not to renew its contract with David Udom, MD, an internist who had been employed by the large physician group for two years. Udom’s employment agreement, which was typical at the time, included a non-compete clause that upon termination prohibited him from practicing within 25 miles of the Murfreesboro Public Square for 18 months. In 2003, Udom opened a solo practice in Smyrna, 10 miles closer than the 25-mile restriction. Murfreesboro Medical Clinic sued, and both the Chancery Court and the Court of Appeals ruled in favor of MMC. Yet, the Tennessee Supreme Court reversed the matter in 2005, essentially ruling that physician non-competes were unenforceable.

“The Tennessee Supreme Court was clearly interested in the broader questions of public policy,” explained McCreary, who was MMC’s attorney. “The Supreme Court really made that declaration not so much based on existing case law, but based on the unique relationship between physicians and patients, the sanctity of that relationship and an interpretation that non-competes in that context were not appropriate.”

Enter the Tennessee General Assembly, which essentially reversed the Supreme Court’s decision with the enactment of Tennessee Code Annotated §63-1-148. Effective July 1, 2008, the statute said non-competes with healthcare providers (defined as physicians, dentists, psychologists, podiatrists, chiropractors and optometrists) are “presumed reasonable” as long as they are:
1. Written and signed agreements;

2. The restriction is two years or less; and

3. The geographic restriction is limited to whichever is greater: a 10-mile radius from the primary practice site or the county where the practice is located.

There also was a provision in the statute that said if the physician has been employed or contracted for more than six years, then the non-compete was unenforceable.

That last measure met with “enough pushback,” Burbank said, that the General Assembly entered the fray again, amending the statute effective April 30, 2010. The amendment allowed employing or contracting groups to restrict senior physicians who had been with them for more than six years as long as the agreement was mutual and negotiated. There could be an unlimited number of extensions, but only for six years at a time. “It was impractical because it required a new, separate negotiation when that healthcare provider reached that six-year mark,” Burbank explained.

The Latest Turn

Still, the General Assembly wasn’t done. Another statutory amendment, effective Jan. 1, 2012, throws the six-year provision out the window altogether, leaving in legal limbo contracts forged in recent years with six-year provisions included.

“To be frank with you, the April 30, 2010, amendment that allowed groups to restrict senior physicians didn’t give enough guidance. I had to work through a myriad of issues to get to a system of six-year non-compete renewals with which I was comfortable,” Burbank said. In fact, she worked through the renewal process with several clients, including a large physician group, individually negotiating non-competes at the appropriate time and including restrictions of no more than six years. “We’re in a predicament now,” she acknowledged.

While the statute was effective Jan. 1, 2012, to which contracts does this new statute apply? All contracts entered into before Jan. 1, 2012 … or those enacted on that date and/or going forward? In essence, can the Legislature make a contract null and void?

“There have been a lot of changes to the law in a relatively short period of time — at least as far as the law goes, it’s a relatively short period of time,” McCreary said. “The challenge becomes how do you apply the statutes, based on their date of enactment as compared to when the particular physician at issue signed the contract. So the applications are still very much up in the air. … To be honest with you, I don’t think there’s a lot of case law right now that tells us exactly how it will apply in all of these hypotheticals.”

As for the newest amendment lifting the six-year window, Burbank said it’s a positive for the business of healthcare. “At this point, I have to agree that from the perspective of the physician groups and the healthcare-provider employers, this is a really good thing, even though it’s uncertain as to what to do with those agreements that were entered into between April 30, 2010 and Jan. 1, 2012,” she said. “I think the safest, most conservative way would be to stick to whatever agreements you entered into between those times, let them run out and then enter into a new agreement that then would fall under the Jan. 1, 2012, amendment.”

Meanwhile, expect court-related interpretations in the future, McCreary predicted. As for the Tennessee General Assembly’s next move, that’s anybody’s guess.