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Commentary

Doctors' Restrictive Covenants: Weighing the Harm Factor

With *More* Ruling, Uncertainty of *Karlin* Comes to an End

By Thomas A. Muccifori

Twenty-six years ago, the New Jersey Supreme Court decided 4 to 3 that noncompete agreements between doctors were enforceable as long as the pacts complied with the reasonableness test in *Karlin v. Weinberg*, 77 N.J. 408 (1978). There, the Court enforced a five-year, 10-mile restrictive covenant between dermatologists.

Managed care has led to a recent debate about the continued viability of *Karlin*. For example, the American Medical Association initially voiced no opposition to such covenants. But on July 15, 2002, it adopted policy E-9.02, which opposed restrictive covenants because they "disrupt continuity of care and potentially deprive the public of medical services."

Then last June 16, an Atlantic County judge openly questioned *Karlin* when ruling in *Sunder v. Mandalapu*, ATL-C-171-00, that a restrictive covenant barring a physician from practicing within 15 miles of her former employer's office was an undue hardship and refused to enforce the agreement.

Adding to this uncertainty is the Appellate Division's unsettling opinion last April 16 in *Maw v. Advanced Clinical Communications Inc*., A-3606-01. There, the court imposed potentially sweeping consequences on employers under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, for firing an employee who refused to sign a noncompete agreement if he or she reasonably believed it was overbroad. *Maw* sent attorneys for employers into a tizzy.

While *Maw*'s uncertainty won't end until the state Supreme Court issues its ruling this spring, the uncertainty about *Karlin* is surely over as a result of the Appellate Division's Dec. 29 decision in *The Community Hospital Group Inc. t/a JFK Medical Center v. Jay More*, A-3861-02T3. The court enforced a 30-mile, two-year post-employment restrictive covenant.

The 30-mile restriction is the broadest covenant enforced between physicians in a reported decision in New Jersey, and the appeals court properly used *More* to reaffirm principles enunciated in *Karlin*.

There are a number of reasons why the *More* decision is correct and can restore some certainty to employers who seek to use restrictive covenants to protect their legitimate interests.

First, the hospital had sought to develop an extensive clinical neurological program, devoting about $14 million to its development since 1992, including $200,000 annually on advertising and promotion. *More* rightly determined that this investment inures to the benefit of the hospital, as employer, and is legitimately protectable.

Second, JFK Medical Center hired More as a neurosurgeon immediately upon completion of his residency at Mt. Sinai Hospital in New York. More did not have any prior practice; he built his substantial patient base during his eight years at JFK. When More decided to venture out on his own and compete with JFK, despite having agreed not to compete in three restrictive covenants he signed during his eight-year tenure, the *More* court properly concluded that there was something unfair about his decision.

Third, the public interest remains unaffected, since More was employed as a neurosurgeon and patients were shown to routinely travel more than 30 miles to seek specialized care such as neurosurgery. Seventeen percent of JFK's patients live outside its 30-mile radius.

The *More* decision should end for now the debate about the enforceability of noncompete agreements between physicians. Other New Jersey employers, however, will have to wait until the Supreme Court issues its opinion in *Maw*, to clear up uncertainty they face with an employee who refuses to sign a covenant the employee considers overbroad. ■

Muccifori is founder of the Employment Competition and Information Protection Group at Archer & Greiner in Haddonfield and chairs the General Equity Section of the Burlington County Bar Association and the Commercial Litigation Committee of the Camden County Bar Association.