Legal Brief

Restrictive covenants: recent cases, court modification, and statutory provisions

The subject of restrictive covenants has been addressed several times in *JAVMA* Legal Briefs, and it continues to be a subject of recurring litigation resulting in various court opinions, as the judges look at established principles, public policy issues, and new arguments made by imaginative lawyers. This brief will review some recent cases, comment on the willingness of some courts to modify an agreement so it can be enforced, and discuss the effects that some statutory provisions may have on the enforcement of restrictive covenants.

In *Gillespie v Marion-Carbondale Eye Center Ltd*, 622 NE2d 1267 (1993), the plaintiff, an employee of the eye clinic, filed for a declaratory judgment to determine whether a restrictive covenant was enforceable. The defendant, the clinic, filed a counterclaim and asked for injunctive relief under the covenant. The court held that the covenant, which prohibited practice for 2 years within a 50-mile radius, was enforceable. Particularly, the court found that the defendant had a "protectable interest" and that the public would not be injured by enforcement of the covenant. With respect to injury to the public, the court found that there was adequate eye service in the proscribed area, and it remarked that if the plaintiff practiced outside the 50-mile radius, the public (though a different segment of it) would still be served.

The court went on to say, "In Illinois the trial court has discretion in determining whether to grant an injunction to enforce a restrictive covenant." It also said that the trial court can modify the covenant to make it "reasonable," then grant injunctive relief—so long as the modification is not against the manifest weight of the evidence and does not amount to an abuse of discretion.

This means to the writer that an employee who does not give up easily will appeal a trial court's adverse decision, claiming that its holding was against the manifest weight of the evidence and that it abused its discretion. These are not mathematical considerations; therefore, the result of an appeal will always be unpredictable. In *Danville Polytechnic Ltd v Defthmers*, 631 NE2d 842 (1994), the clinic asked for injunctive relief against a physician who, after the termination of his contract with the clinic, set up a practice within the proscribed 50-mile limit. There was an added feature in the covenant that provided that if the physician did practice within the 50-mile area during the ensuing 5 years, he would pay $50,000/y to the clinic. The provision in the contract that caused the Illinois Appellate Court to deny relief to the clinic was one that required all contracting physicians to contribute to the construction of a new clinic, the alternative being termination of the contract. The court found that the purpose of the covenant was not to protect the interest of the clinic, but to provide financing for new construction—and without proof of a protectable interest, the covenant was unenforceable.

In *Shelbina Veterinary Clinic v Holthaus*, 892 SW2d 803 (1995), the veterinary clinic (a professional corporation) and an employed veterinarian entered into a 1-year contract containing an agreement that if the veterinarian left the clinic she would not practice veterinary medicine within a 35-mile radius for 4 years. Prior to a second year of employment, some modifications were made in the contract. The employee defended an injunctive action by the clinic by claiming that the covenant against competition was no longer included in the modified contract. The trial court did not agree and held for the clinic. This was affirmed on appeal, the court finding that the contract containing the restrictive covenant was effective when the employee left the clinic's employment and that whether the noncompetition agreement was severable from the main contract, was not an issue.

Should courts modify what is deemed to be an unreasonable restriction so it becomes enforceable? The trend is to allow courts this latitude, despite the theory that courts do not "make contracts," they only interpret them. If a restrictive covenant is not unconscionable, is capable of modification without doing violence to the intent of the parties,

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and, in fact, preserves a protectable interest of the employer (or the purchaser of a professional practice), most courts will now modify the agreement—either by eliminating language that imposes restrictions on the employee ("blue-penciling") or by actually changing provisions it regards as unreasonable (ie, reducing the proscribed area from 50 miles to 25 miles or from 2 cities to 1 city). It is obvious that to do so the court would need to be well informed about the number and nature of the professional practices within the proscribed area, the number and geographic spread of clients of the covenantee, and other factors that would bear on a determination of protectable interest.

Most states have adopted antitrust or other legislation that could affect in greater or lesser degree, depending on the legislation, the validity of covenants restricting a person from practicing a profession. In a few states, there is legislation that purports to make setting restriction on a professional employee unenforceable. In others, the language may state that restrictive covenants are unenforceable and then list a number of exceptions that may include not only the sale of a business or practice but also employment contracts.

The best advice to a veterinarian involved in a controversy over the enforcement of a restrictive covenant, whether as employer, employee, seller, purchaser, or partner, is to find an attorney conversant with the court holdings in his or her own state and with any statutory provisions that could affect the agreement. An excellent and exhaustive treatment of the legal implications of covenants not to compete in veterinary contracts, authored by professor Margaret Grossman and Greg Scoggins, DVM, JD, appears in an issue of the *Nebraska Law Review* (1992;71:826).