From the desk of Jeanne M. Kerkstra, Esq., CPA

Viewpoint
All Non-Competes Are Not Born Equal

As an attorney, I thought that at first blush there are a lot of similarities between the idea behind a non-compete for physicians as in *Mohanty v. St. John Heart Clinic.*[1] However, it is not as straightforward as it may initially appear.

In *Mohanty*, the Illinois Supreme Court let stand a covenant not to compete which undoubtedly had major ramifications as to how the two physicians who had entered into these non-competes could practice medicine following their parting with St. John Heart Clinic. The Plaintiffs in the *Mohanty* case cited *Dowd* as precedence for why all physician non-competes should be not allowed to stand because they were against public policy. It is interesting to note that in the *Mohanty* case, the trial court granted the Defendants a TRO, which was later amended to permit the Plaintiffs, for a limited time, to provide critical care to their hospitalized patients.

Contrast this with *Dowd.*[2] In *Dowd*, only attorneys were involved and consequently only the financial health, as opposed to the physical health, of the clients would appear to be at stake. In *Dowd*, attorneys left the firm and subsequently formed another law firm. At the end of the day, their non-compete was held to be unenforceable due to the fact that it violated a specific Rule of Professional Conduct. Rule 5.6 of the Rules of Professional Conduct provides: "A lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. . ." 134 I11.2d R. 5.6(a). [Emphasis added.] In *Mohanty*, the Court looked to whether the legislature had enacted prohibition against non-competes for physicians. The Illinois legislature to date has not. It is important to note, as the Court did, that even the AMA's Council on Ethical and Judicial Affairs merely discourages non-competes and does not prohibit them, hi relevant part it states:

> "Covenants-not-to-compete restrict competition, disrupt continuation of care, and potentially deprive the public of medical services. The Council of Ethical and Judicial Affairs *discourages* any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment partnership, or corporate agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician." (Emphasis Added.) AMA Council on Ethical and Judicial Affairs, Op. E-9.02 (1998).

The *Mohanty* Court also looked at whether there was an objective standard of reasonableness for both the temporal and geographical limitations. The two Plaintiffs had different restrictions placed on them. Dr. Rajhu Ramadurai's non-compete restricted his practice of medicine within a 2-mile radius of any Clinic office or any of the four hospitals where the Clinic operated for a period of three years. Dr. Jyoti Mohanty's non-compete restricted his practice of medicine within a 5-mile radius of any Clinic office or at any of the four restricted hospitals for a period of five years. At trial, the Defendant, Dr. John Monteverdi, founder of the St. John Heart Clinic, testified that it took three

to five years to develop a referral base. Furthermore, the 3-year restriction imposed on Dr. Ramadurai "just came into his mind" and the 5-year restriction on Dr. Mohanty was due to the fact that Dr. Monteverdi "did not trust him". Consequently, it would appear that there were subjective, as opposed to objective, standards used in determining the temporal and geographical restrictions of the non-compete. However, the Court noted that although there were subjective standards, there were also objective standards that could be used to determine the reasonableness. Also interesting is that the Court held "[c]ardiology, like other specialties, is inextricably intertwined with the practice of medicine. For this reason, restrictive covenants precluding the practice of medicine against physicians who practice a specialty has been upheld as reasonable. . . . Thus, we find that the restraint on the practice of medicine, here, was not greater than necessary to protect Defendants' interest."

As is often the lesson, it is necessary, in very realistic terms, to review the terms and conditions of any agreement prior to entering into it. Ask yourself whether you would be able to live with those terms and conditions if indeed they are imposed on you.

[1] *Mohanty* v. *St. John Heart Clinic*, —N.E.2d—.

[2] *Dowd & Dowd, Ltd. v. Nancy J. Gleason, et al*, 181 I11.2d 460, 693 N.E.2d 358.

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