

Q: I've heard that covenants not to compete are difficult to enforce. Does it make any difference whether the covenant involves a primary care physician or a specialist?

A: In light of the recent decision in Oakwood Orchard Community Health Ctr. v. Blasco, a case decided by the Supreme Court in Rochester, the answer is probably yes.

Dr. Blasco, a pediatrician, went to work for Oakwood Orchard Community Health Center in 2000 under an employment agreement that included a covenant not to compete for a period of 2 years after termination within a radius of 10 miles of the center. She left the health center in 2004 to work for Strong Memorial Hospital. About a year later, she asked the Board of Directors of the center to waive the covenant not to compete so that she could establish a pediatrics practice in Spencerport. Dr. Blasco claimed that the new office would be 9.76 miles from the center; the center said it was more like 8 miles.

When the Board of Directors refused to bend, Dr. Blasco asked the court to strike down the restrictive covenant.

The Supreme Court first noted the general rule that restrictive covenants will be enforced only if they are reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee. The "legitimate interests" of the employer include protection against misappropriation of the employer's trade secrets or confidential customer lists, or protection against competition by a former employee whose services are unique or extraordinary. Since there was no allegation of misappropriation, the issue came down to whether Dr. Blasco's services were unique or extraordinary and, if so, whether enforcement of the covenant would serve a legitimate interest of the center based on the particular facts of the case.

The court looked carefully at more than just whether Dr. Blasco would be competing against the center -- it examined whether she would be in a position to compete *unfairly*. On that score, the court found in favor of Dr. Blasco. During her years with the center, she did not acquire information or develop particular relationships which she appropriated and could exploit to unfair advantage in her proposed pediatric practice. Most significantly, as a general pediatrician, Dr. Blasco was not reliant on a referral network from primary health providers, a factor which motivated the court rulings in many restrictive covenant cases against specialists. Therefore, in the eyes of this court, the element of unfair competition was not present.

The lack of a network of referring practitioners might have been sufficient to strike down the covenant in this case, but the court definitely expressed a bias against covenants in general. The judge quoted the AMA opinion that discourages covenants not to compete between physicians and former employers, noting that this was just one step away from the *per se* prohibition that applies to restrictive covenants involving the legal profession.

In one last parting shot at covenants, the court stated that the health center, from a superior bargaining position, required Dr. Blasco to sign the employment agreement upon hiring her and thereafter as a condition of continued employment. It went on to say that there had been no showing that, in exchange for her signing the agreement, Dr. Blasco enjoyed a fiduciary relationship, a position of increased responsibility within the firm or any other significant benefit beyond continued employment. The result may have been different if the covenant had been required as a condition to becoming a partner or shareholder in the center rather than merely an employed physician.

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