HEALTH CARE TRIFECTA: NON-COMPETE, NON-SOLICITATION, AND CONFIDENTIALITY AGREEMENTS IN MICHIGAN—WHAT WORKS AND WHAT DOESN'T[1]

By: Michelle D. Bayer, Esq., Vezina Law, PLC
Michael H. Rhodes, Esq., Loomis, Ewert, Parsley, Davis & Gotting, PC
Warren H. Krueger, Esq., Loomis, Ewert, Parsley, Davis & Gotting, PC

Edited by: Sheerin Siddique, Esq., Employee Health Insurance Management, Inc.

I. INTRODUCTION

Generally, restrictive covenants are agreements between two or more parties in which one party agrees to abide to certain specified limitations on their professional or business activities to the advantage or protection of the other party. Restrictive covenants are utilized in many contexts and can take a variety of forms. With regard to health care, restrictive covenants may apply to traditional employer-employee relationships, independent contractor relationships, purchases and sales of businesses, franchise relationships, operating agreements, partnership agreements, joint ventures, and other associations where one or more parties could gain a competitive advantage over the other party should their relationship terminate. Employment-related restrictive covenants are meant to protect the business assets, confidential or trade secret information, good will and/or competitive advantage of an employer. In the employment environment, non-competition agreements, non-solicitation agreements and confidentiality agreements are the most common types of restrictive covenants. These restrictions may be in effect during and throughout employment and continue post-employment for an agreed upon length of time and under various circumstances as will be described herein.

a. What are non-compete, non-solicitation, and confidentiality agreements?

"Covenants not to compete" or "non-competition" restrictions limit the ability of a person or entity to engage in competitive activities against the other party. In the typical employment context, a non-compete restriction prohibits an employee upon termination of the employment relationship from competing with the employer or going to work for a competitor of an employer for a specific period of time and geographic limitations.

A "non-solicitation" agreement limits an employee or former employee's ability to contact employees or clients of the employer to solicit or induce those parties to terminate their relationship with the employer, or in any manner establishing a similar relationship with the former employee or any other entity. Non-solicitation agreements can be limited to prohibiting

[1] This article is not intended to provide legal advice or address any particular legal situation. Instead, it is merely a summary of Michigan law as of the date it was written on the enforcement of restrictive covenants and should not be used as a substitute for independent legal research and specific legal advice.

solicitation of all or just particular customers, relate to all or only a class or group of particular employees and may be limited to particular circumstances and time frames.

Confidentiality agreements limit the use of trade secret or other confidential business or client information which is relevant to the parties' business and may require the return or destruction of such information outside of the employment relationship.

b. When are these agreements appropriate?

The nature of the parties' relationship and the type of business involved determines the type of restrictive covenants that offer the best protection for the situation. It is important to keep in mind the goal of a restrictive covenant, which is to protect business assets, trade secret/confidential information, and/or competitive advantage. Thus, employers should consider these types of restrictions when, due to the nature of their relationships with others, their business, business assets, customers and/or goodwill could be harmed should the information be disclosed or the employee engages in competitive behavior.

c. History of Non-Compete Agreements in Michigan

Restrictive covenants, and their enforcement, have a long history in Michigan jurisprudence. Under common law, restrictive covenant agreements were enforced if they qualified as reasonable.[2] In 1905, Michigan's legislature enacted the state's first anti-trust statute, the former MCL 445.761, which generally prohibited restrictive covenants, subject to limited exceptions. These restrictions remained in place from 1905 until 1985 when the legislature enacted the Michigan Antitrust Reform Act (known commonly as "MARA"), MCL 445.774a. Through the repeal of the former antitrust statute, Michigan courts concluded that the Michigan Legislature intended to revive the common law standards for enforceability of restrictive covenants, including reasonableness.[3] The Michigan Court of Appeals ruled that MARA only specifically addressed employer-employee relationships. MARA also applied to other relationships.[4] As recognized by the Court of Appeals, restrictive covenants have long been used in a variety of settings in Michigan outside of the employer-employee relationship.[5]

---

[2] *Hubbard v. Miller*, 27 Mich 15; 15 Am Rep 153 (1873).

[3] *Cardiology Associates of Southwestern Michigan, PC v. Zencka*, 155 Mich App 632, 636; 400 NW2d 606 (1985); *Bristol Window & Door, Inc. v. Hoogenstyn*, 250 Mich App 478, 495; 650 NW2d 670 (2002) (applying MARA to independent contractors).

[4] *Bristol Window*, 250 Mich App at 495.

[5] *See, Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F3d 535, 549 (6th Cir 2007) (finding a reasonable competitive interest in preventing Defendants from using the confidential information they learned as Plaintiff's franchisee to gain a competitive advantage in the provision of restoration dry cleaning services); *Loutts v. Loutts*, 298 Mich App 21, 34-35; 826 NW2d 152, 161 (2012) appeal denied, 493 Mich 968, 829 NW2d 600 (2013)(a divorce case where a restrictive covenant for non-competition and non-solicitation as part of the equitable division of marital assets which included a business which employed both spouses); *Capaldi v. LiftAid Transp, LLC*, 267981, 2006 WL 3019799 (Mich App 2006) (a non-compete was part of the sale of a business and the attendant employment of the former owner by the new owner).

II. AUTHORITIES AND GENERAL PRINCIPLES

a. Permissibility of Non-Competition Agreements

As mentioned above, there is a recognized need to protect competitive interests and foster business growth. In this regard, most jurisdictions in the United States allow parties to enter into restrictive covenants. Some states, however, still place severe restrictions on this practice. Indeed, California, Colorado, Hawaii, North Dakota, and Oklahoma all prohibit non-competition agreements, subject to limited exceptions.[6] Other states generally allow non-competition agreements but carve out exceptions such as barring or limiting their applicability to certain professions. Delaware, for instance, specifically limits the application of non-competition agreements with respect to physicians.[7] Thus, the treatment of non-competition agreements varies throughout the country.

Given the varying positions on restrictive covenants, the evolving nature and growth of the health care industry, as well as many states' propensity to take "creative" steps to spur economic growth, preparation of a non-competition agreement requires careful research and study as to how the particular jurisdiction treats such agreements, and whether there are any trends toward limiting or expanding their applicability.

Michigan's MARA statute generally permits non-competition agreements, even in the health care context, subject to the reasonableness limitations described below. Under MARA, a non-competition agreement is enforceable if it protects an employer's reasonable competitive business interest, and is reasonable as to its duration, geographic area, and type of employment or the type of business involved. Courts interpreting and enforcing MARA have created a four-factor test for determining the reasonability of a non-compete that analyzes whether the agreement:

1. Protects the employer's reasonable competitive business interest;
2. Is reasonable as to its duration;
3. Is reasonable as to its geographic area; and
4. Is reasonable as to the type of employment or line of business covered by the prohibition.[8]

It is not uncommon for courts to combine and discuss factors one and four contemporaneously; as such, those factors will be discussed together below.

The application of those factors varies depending on the circumstances and considerations for each factor are discussed in detail below. Generally, courts analyzing each factor weigh the interests of the employee, employer, and the public.[9] If a court finds that the provisions of a non-competition agreement are unreasonable as to any of these factors, the court

---

[6] *See,* Cal Business and Professions Code §§ 16600-16602.5; Colo Rev Stat §8-2-113; Haw Rev Stat §480-4; ND Cent Code §9-08-06; Okla Stat Tit 15 §§217-219.
[7] Del Code Tit 6 §2707.
[8] *St. Clair Medical, PC v. Borgiel*, 270 Mich App 260; 266 NW2d (2006).
[9] *See, e.g., Id.*

has the authority to amend or reform the agreement in order to render it reasonable in light of the circumstances in which it was made. This is often referred to as the "blue pencil" doctrine. However, the court has the discretion to decide whether or not to exercise that authority.[10] Attorneys should also be aware that unique issues are presented when utilizing non-competition agreements in the health care context due to privacy, payment issues, along with public policy concerns regarding the provision of health care.

When evaluating reasonability, the context or the circumstances giving rise to the non-competition agreement, play a big part in the evaluation of reasonableness (*e.g.,* employment, sale of a business, termination of a business relationship). Courts tend to be less strict when considering agreements not related to employment.[11]

Although MARA provides authority for non-competition agreements between employer and employees and was extended to agreements between businesses to not hire one-another's employees, such agreements may create liability under antitrust laws, as was recently observed in the U.S. Department of Justice lawsuit against eBay and Intuit.[12]

b. General Principles of Interpretation

Analysis of the reasonableness of restrictive covenants, particularly non-competition agreements, under MARA involves the application of general principles of contract interpretation.[13] Those principles require courts to give words used in the agreement their plain and ordinary meaning. Unambiguous provisions are construed and enforced as written, and courts may not impose ambiguity on clear contractual language.[14] Ambiguity exists where two provisions irreconcilably conflict with one another, or when a term is equally susceptible to more than a single meaning.[15] While ambiguity is a question of law, the meaning of ambiguous language is a question of fact.[16] The court's goal in interpreting a non-competition agreement is to determine and enforce the parties' intent based on the contract's plain language. Thus, a well-drafted non-competition agreement can prevent costly, protracted and unpredictable litigation.

Employers should also be aware that because non-competition agreements are restraints on commerce, they are disfavored by courts and construed narrowly.[17] Moreover, the party seeking enforcement of the agreement has the burden to demonstrate validity of the agreement.[18] As a result, an employer may likely face a costly uphill battle when trying to enforce a poorly drafted non-competition agreement.

---

[10] *A Complete Home Care Agency, Inc. v. Gutierrez*, 246280, 2004 WL 1459450 at 2 (Mich App 2004).
[11] *See, Id.*
[12] *See*, DOJ Press Release, dated Nov. 16, 2012, available at: http://www.justice.gov/opa/pr/2012/November/12-at-1376.html (April 14, 2014).
[13] *See, e.g., St. Clair Medical, supra*, n 7 at 264; *Coates v. Bastian Bros, Inc.*, 276 Mich App 498; 741 NW2d 539 (2007).
[14] *Coates*, 276 Mich App at 503 (2007).
[15] *Id.*
[16] *Id.*
[17] *Id.* at 507.
[18] *Id.*

III. RESTRICTIVE COVENANT REQUIREMENTS

The reasonableness of a non-competition agreement is not analyzed in the abstract, but is an "inherently fact specific" inquiry, made in the context of the employer's particular business, business interest and the function and knowledge of the particular employee.[19] However, "[t]he reasonableness of a non-competition provision is a question of law where relevant facts are undisputed."[20]

"Under MARA, the reasonableness of an agreement is decided by examining several factors, including consideration supporting the agreement, economic hardship imposed on the employee, public interest, and whether the employer has reasonable competitive business interest for protection of which a restriction is reasonable."[21]

a. Interest Being Protected: A Reasonable Competitive Business Interest

By their nature, restrictive covenants prohibit competitive behavior in some respect. However, in order to be enforceable, the restriction cannot merely be a tool to restrain trade or prevent competition.[22] Moreover, general knowledge, skill or facility that is acquired or developed through experience or training during employment does not, by itself, give an employer an interest sufficient to support a restraining covenant.[23] Nonetheless, the Michigan Supreme Court has recognized the "perceived unfairness" that an employee who possesses confidential information regarding a client is "in a position to exploit that information for the purpose of obtaining the patronage of the client after leaving his employer's service."[24]

However, courts have not enforced covenants that have prevented a former employee from engaging in competition with the employer when the employee had no confidential information that would have given him/her an unfair competitive advantage.[25]

---

[19] *Whirlpool Corp. v. Burns*, 457 FSupp 2d 806, 812 (WD MI 2006); *Capaldi v. LiftAid Transp, LLC*, 267981, 2006 WL 3019799 at *5 (Mich App 2006).

[20] *Certified Restoration, supra*, n 4 at 546-47 (citing *Coates*).

[21] *Lawley v. A & M Logistix, Inc.*, 97-CV-74582, 1998 WL 34182467 (ED Mich 1998).

[22] *Coates v. Bastian Brothers, Inc.*, 276 Mich App 498; 741 NW2d 539 (2007) ("To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill.")

[23] *St. Clair Medical, PC v. Borgiel*, 270 Mich App 260; 715 NW2d 914 (2006).

[24] *Follmer, Rudzewicz & Co., P.C. v. Kosco*, 420 Mich 394, 402-04 (1984) (approving non-competition agreements covering an accountant and insurance agent holding that "confidential information, including information regarding customers, constitutes property of the employer and may be protected by contract based on the close relationship developed between these professionals and clients and their knowledge of the clients special needs and desires.")

[25] *See, Northern Mich Title Co of Antrim-Charlevoix v. Bartlett*, 248751, 2005 WL 599867, at 5 (finding unreasonable a non-compete clause which completely prohibited former employees of title insurance company from engaging in the title insurance business for five years based on conclusion that nothing about employees' former employment would give them unfair advantage in competing for clients who had never given business to the employer in the first place); *Whirlpool Corp. v. Burns*, 457 FSupp 2d 806 (WD Mich 2006) (restriction unenforceable where most of the evidence presented as "confidential" was information that was generally known in the trade or readily ascertainable, and there was no evidence that the information obtained by Burns at his job for Whirlpool in Michigan, even if confidential, would be useful to him in his retail sales position for Electrolux in

The Federal Court for the Eastern District of Michigan has also refused to enforce a restriction when it was only threatened, but not an inevitable, misappropriation of the former employer's trade secrets and confidential information.[26]

b. Protectable Interest: Specialized Knowledge

Specialized knowledge and training can be a protectable interest. However, in *Teachout Sec. Services, Inc. v. Thomas*,[27] the training provided to security officers was found to be only general, not specialized knowledge, and not a protectable interest. In reaching this conclusion, the Court of Appeals noted that "[t]he knowledge they acquired about the personnel of the Mass Transit Authority ("MTA"), the people who frequented it, and the criminal elements present was merely general knowledge acquired through their experience of working at the MTA. There is no evidence that the defendants' positions allowed them access to confidential information or put them in a position to appropriate any goodwill associated with plaintiff's business."

The Teachout case also raised the novel legal argument that its position as a "middle man" should be a protectable interest and employees should not be permitted to leave its employ and then cut it out of the process. The Court of Appeals disagreed recognizing that "no Michigan court has cited "disintermediation" as a reasonable competitive business interest for limiting competition of former employees." While the plaintiff was able to cite other jurisdictions where disintermediation was found to be a protectable interest, the Court "conclude[d] that, under the circumstances of this case, where the knowledge acquired by defendants in providing security at the MTA is merely general knowledge accumulated in their day to day positions, recognizing plaintiff's claim of disintermediation as a reasonable interest would come into conflict with the binding Michigan common law precedent articulated in Follmer."

c. Protectable Interest: Goodwill

Michigan Courts have recognized that an employer has a reasonable business interest in protecting its goodwill because an employee who establishes client contacts and relationships as the result of the goodwill of his employer's business is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure.[28]

Virginia or West Virginia); *see also, Lawley v. A & M Logistix, Inc.*, 97-CV-74582, 1998 WL 34182467 (ED Mich 1998) ("AML has no reasonable competitive business interest because the identity of customers, suppliers and vendors is readily available in the public domain and is, therefore, not proprietary or secret to AML. Even if AML possessed protectable business information, by its failure to take reasonable steps to assure its secrecy, AML lost the right to claim such information as a reasonable competitive business interest. Therefore, the Agreement is not enforceable against the Plaintiff.")

[26] *Superior Consultant Co, Inc. v. Bailey*, 00-CV-73439, 2000 WL 1279161 (ED Mich 2000); *Ram Products Co, Inc. v. Chauncey*, 967 FSupp 1071, 1091 (ND Ind 1997) (applying MCL § 445.774a).

[27] *Teachout Sec Services, Inc. v. Thomas*, 293009, 2010 WL 4104685 (Mich App 2010).

[28] *Edwards Publications, Inc. v. Kasdorf*, 2009 WL 131636 (Mich App 2009) (the close and personal relationships with customers and the information learned about the customers' operations, tendencies and leanings "could result in a 'comfort level' that might not be reached or will take a while to be reached by another sales representative and result in an unfair competitive advantage").

The Sixth Circuit has also recognized that the goodwill generated from relationships developed through employment can be a protectable business interest.[29]

d. Protectable Interest: Customer Lists

Customer lists can also be protectable business interest. In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*,[30] the Michigan Eastern District Court enforced a restrictive covenant which prohibited the broker-defendants from using client lists and information, despite the fact that the defendants had brought many of their own clients with them when they became employed at Merrill Lynch. The Eastern District Court found that Merrill Lynch still had a protectable reasonable business interest in the client information, even though some of the information came with the employees at the time of hire. The District Court noted that there was no provision in the contracts that treated clients developed after broker-defendant began employment with Merrill Lynch differently than those brought to the firm at the time of hire. The Court reasoned that the defendants were compensated by Merrill Lynch for all of the clients they serviced, including those clients they already had a relationship with before joining the firm and these long-standing client relationships was the very reason some of the defendants were recruited to join Merrill Lynch in the first place. Looking at the restriction in light of the line of business, and recognizing the "reality that the securities brokerage industry is a highly competitive market in which firms vigorously compete for successful brokers, primarily because of the clients they will bring with them or can be expected to develop at a firm," the Court found the restriction reasonable. The district court explained what the defendants should have done to protect their interests: "had defendants wished to maintain information regarding their pre-existing clients as their own personal property, defendants should have negotiated for this right when they began employment with Merrill Lynch or gone into business for themselves."

It is common for restrictive covenants to contain "carve outs" which identify or list individuals, entities, activities, etc. which will be outside of the restrictive covenant. This is particularly important for employees who are coming to an employment or business relationship with their own book of business, knowledge base or personal competitive advantage.

Michigan courts have similarly found restrictions reasonable when the restriction was limited to prohibiting the provision of the exact same services as was provided during employment. For example, in *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC,*[31] the Michigan Court of Appeals upheld a restrictive covenant which only prohibited the plaintiffs from providing the same type of accounting services they had provided as Plante Moran employees to Plante Moran's clients. The two-year restriction did not prohibit the plaintiffs from providing accounting services in general. In contrast, in *A Complete Home Care Agency, Inc. v. Gutierrez,*[32] the restriction was found to be unreasonable and unenforceable, because it broadly

[29] *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F3d 535, 549 (6th Cir 2007) (restriction enforced that protected plaintiffs new restoration dry cleaning franchisee from competition with defendants who were armed with the knowledge they gained as plaintiff's former franchisee of Plaintiff's Restoration DC System and the relationships they established with the franchise's customers).
[30] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F Supp 2d 764, 775 (ED Mich 1999).
[31] *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007).
[32] *A Complete Home Care Agency, Inc. v. Gutierrez*, 246280, 2004 WL 1459450 (Mich App 2004).

attempted to restrict the provision of "any service" to the plaintiff home care agency's clients. The home care patient, Mr. Boyagian required twenty-four hour nursing care, and his care was split between plaintiff, A Complete Home Care Agency, and another competitor, Atrium. Defendant Ms. Gutierrez provided part-time nursing services on behalf of plaintiff, A Complete Home Care Agency. In January of 2002, Ms. Gutierrez left the employ of plaintiff to work for Atrium on a full-time basis providing nursing services, which allowed her to secure health insurance.

As an A Complete Home Care Agency employee, Ms. Gutierrez had signed a six month non-competition restriction which prohibited her from performing "any services for the client." In evaluating the reasonableness of the restriction, the Court noted deposition testimony by plaintiff's representative that the purpose of the restriction was to prevent former employees from performing any service for a client for six months after the termination of employment, not just nursing services as was provided by plaintiff's business, including such services as haircutting, dog walking or grocery shopping. This overbroad restriction was the key factor in the trial court and the Court of Appeals finding the restriction was unreasonably broad, and therefore, invalid as a matter of law.[33]

Michigan Courts have also opined on what is a reasonable competitive business interest in a health care/medical setting. In the seminal case of *St. Clair Medical, P.C. v. Borgiel*,[34] the Michigan Court of Appeals has held that "a restrictive covenant can protect against unfair competition by preventing the loss of patients to departing physicians."

> We conclude, nevertheless, that the restrictive covenant was protecting plaintiff's competitive business interest in retaining patients, that it provided plaintiff with time to regain goodwill with its patients, and that it prevented defendant from using patient contacts gained during the course of his employment to unfair advantage in competition with plaintiff. A physician who establishes patient contacts and relationships as the result of the goodwill of his employer's medical practice is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure.

The restrictive covenant at issue was contained in defendant Dr. Borgiel's 2001 employment contract and provided in relevant part:

---

[33] See also *Frontier Corp. v. Telco Communications Group, Inc.*, 965 FSupp 1200, 1209 (SD Ind 1997) (applying MCL § 445.774a) (finding unreasonable a non-compete clause prohibiting the solicitation of any of former employer's customers because it would prohibit solicitation of customers with whom employee had no contact, and therefore no competitive advantage); *Robert Half Int'l v. Van Steenis*, 784 FSupp 1263, 1273–74 (ED Mich 1991) (finding unreasonable the portion of a non-compete clause prohibiting former employee from competing within fifty miles of employer's Ann Arbor office because employee was never involved in the line of business engaged in by that office and thus did not gain any information from his employment that would facilitate his competing with employer in that line of business).

[34] *St. Clair Medical, PC v. Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).

> 7. Restricted Covenant. The employee shall agree not to embark on medical practice within 7 (seven) miles of either office for at least one (1) year after this Employer-Employee relationship has ended. The employee shall reimburse the corporation $40,000 if these terms are breached.

Prior to his resignation, Dr. Borgiel worked almost exclusively for the Greater Yale Medical Clinic in Yale, Michigan; but he also worked approximately six hours during the 20-month employment period at the Mitchell Medical Center in Port Huron, Michigan. When Dr. Borgiel resigned he gave notice of his intent to work for Physician's Health Care Network in Fort Gratiot, which was located within seven miles of the Mitchell Medical Center and part of the restricted area.

The employer, St. Clair Medical, P.C., filed suit to enforce the restrictive covenant and sought payment of the $40,000 liquidated damage amount. Dr. Borgiel counter-claimed that the restriction was not enforceable. The trial court enforced the restrictive covenant and awarded his former employer the $40,000 in liquidated damages.

On appeal, the Michigan Court of Appeals rejected St. Clair Medical's argument that its expenditure of substantial resources in training Dr. Borgiel to be a successful practitioner was a protected business interest. Citing the Michigan Supreme Court *Follmer* decision, the Court felt that there were disputed issues of fact that this was merely general knowledge, skill, or facility acquired through training or experience, which St. Clair Medical needed to prove that Dr. Borgiel benefited from and which he could then use to unfairly compete with the practice. Nonetheless, the Court of Appeals ruled that the seven mile restriction reasonably protected the practice's competitive business interest in retaining patients, in that it provided plaintiff with time to regain goodwill with its patients, and that it prevented the defendant physician from using patient contacts gained during the course of his employment to unfair advantage in competition—a protectable business interest.

The Court of Appeals also addressed Dr. Borgiel's argument that the restrictive covenant was unreasonable in light of the Principles of Medical Ethics issued by the American Medical Association, which provide:

> Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on 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. [AMA, E-9.02: Restrictive Covenants and the Practice of Medicine.] (Bracketed information supplied in original)

The Court of Appeals ruled that that the medical ethic standard merely reflected the

common-law rule of reasonableness, that restrictive covenants are unethical only if they are excessive in geographical scope or duration. The Court also recognized that restrictive covenants may not be enforceable where to do so would be injurious to the public. With regard to Dr. Borgiel's restriction, the Court found that the patients' choice of physician was a public interest to be protected, but nonetheless found the public interest protected by the modest and reasonable geographical scope of the covenant and the liquidated damages clause. The St. Clair Court did cite to another case, *Community Hosp*, supra at 61-62, 869 A.2d 884 where a restriction with a 30-mile radius was found to be injurious to the public where it would prohibit a neurosurgeon from practicing in an area where there was a shortage of neurosurgeons.

e. Reasonable in Duration

In order to be protectable, the restriction must be "reasonable in duration." MCL 445.774a(1). "With respect to duration, Michigan courts have not provided any bright line rules. Most courts simply cite the lack of a bright line rule and they 'have upheld non-compete agreements covering time periods of six months to three years.'"[35]

However, *Lawley v. A & M Logistix, Inc.*, is an example where the restriction was found to be unreasonable and the Court provided justification for its decision.[36] The district court found that the two-year restrictive covenant was unreasonable for being vague and overbroad in scope of prohibited activities, having no geographical limitation, and for being too long in duration. As to duration, the district court found the restrictive covenant was too long because the information sought to be protected was available in the public domain (AML's alleged proprietary information (e.g. race tracks, fairgrounds, tent manufacturers, caterers, and vendors, etc.) could be found in everyday sources such as the yellow pages). In the case of the customers, Plaintiff knew the manufacturers and their representatives prior to joining AML. That information was never sold or transferred to AML, and was is not the proper subject matter for a restrictive covenant."

f. Reasonable in Geographic Limitation

Geographic limitations must be tailored so that the scope of the agreement is no greater than is reasonably necessary to protect the employer's legitimate business interests.[37] There is no bright-line rule as to what geographic scope is permissible. Instead, the determination of whether a given geographic boundary passes muster evaluates how far the employer's legitimate business

[35] *Superior Consulting Co v. Walling*, 851 FSupp 839, 847 (ED Mich, 1994) (six-months); *Kelly Servs, Inc. v. Noretto*, 495 FSupp 2d 645, 657 (ED Mich 2007) (citing *Coates*, 276 Mich App 498 (one year)); *Rooyakker & Sitz PLLC v. Plante & Moran PLLC*, 276 Mich App 146, 742 NW2d 409, (two years); *St. Clair Med*, 715 NW2d at 917 (one year); *Bristol Window & Door, Inc. v. Hoogenstyn*, 250 Mich App 478 (enforcing a three-year, statewide non-competition agreement); *In re Spradlin*, 284 BR 830 (ED Mich 2002) (five years); *see also, Follmer, Rudzewicz & Co, PC v. Kosko*, 420 Mich 394; 362 NW2d 676 (1984) (one year); *Whirlpool Corp. v. Burns*, 457 FSupp 2d 806, 813 (WD Mich 2006) (one year).

[36] *Lawley v. A & M Logistix, Inc.*, 97-CV-74582, 1998 WL 34182467 (ED Mich 1998).

[37] *Whirlpool Corp. v. Burns*, 457 FSupp 2d 806, 813 (2006); *Superior Consulting Co, Inc. v. Walling*, 851 FSupp 839, 847 (ED Mich 1994).

interests expand.[38] Indeed, if an employer operates on a worldwide basis, then the geographic scope could possibly be the entire world.[39] However, if an employer does business in only one Michigan county, an agreement restricting competition outside of that county is likely to be found unreasonable. Moreover, the geographic scope that a court is willing to enforce tends to be inversely proportional to the level of activity prohibited by the agreement.[40] In other words, as more restrictions are placed on the ability of the employee to compete, the reasonable geographic scope of the agreement and duration generally shrinks.

In the health care arena, attorneys more commonly deal with employers operating in a much smaller area than the entire world, or even the entire state. But the employer may have multiple offices, or own multiple office facilities, and it is not uncommon for an employee to be hired to work at only one of the employer's many locations. This creates a question of whether the employer may tailor the non-competition agreement to bar the employee from competing within a specific areas surrounding all of the employer's facilities, or only around the facility where the employee works. One factor in this analysis is how the other facilities are used.

For example, courts have prevented employers from restraining competition around satellite offices that are not used on a regular basis by the employee, and that are used for a line of business different than that in which the employee operates.[41] However, courts have upheld restrictions on a former employee from operating within a radius surrounding the employer's multiple service locations where there was a threat that the former employee would cause the transfer of the employer's customer base.[42] Another factor in the health care context is whether the employee in question has or will provide services in only one or multiple facilities of the employer. For instance, courts have found a restriction prohibiting an employee from operating within a radius of the employer's multiple offices reasonable where the employer drew patients from all around the county in which the offices were located, and there was a common practice of patients going to either office.[43]

---

[38] *See*, *Whirlpool Corp.*, *supra*, (restriction prohibiting an appliance salesman from selling home appliances anywhere in the world for one year, even to customers not contacted while with former employer, or without the use of confidential information, was found unreasonable); *see also*, *ACS Consultant Co, Inc. v. Williams*, 06-11301, 2006 WL 897559 (ED Mich 2006) (finding an agreement prohibiting competition throughout the United States reasonable where plaintiff, a health care information systems consultant, had clients in 48 states and serviced clients in all 50 states); *Lockworks, Ltd v. Keegan*, 279894, 2009 WL 187419 (Mich App 2009) (non-competition agreement barring former stylist from working within 5 miles of employer's salon found reasonable).

[39] *Superior Consulting Co, Inc. v. Walling*, 851 FSupp 839, 847 (ED Mich 1994), citing *Sigma Chemical Co v. Harris*, 586 FSupp 704, 710 (ED Mo, 1984).

[40] *See*, *ACS Consultant Co, Inc. v. Williams*, 06-11301, 2006 WL 897559 (ED Mich 2006) (upholding a nationwide limitation where the plaintiff had serviced clients in all 50 states, the court explained broader scopes are more acceptable where "the scope of the restriction is limited to the type of work the employees provided for the former employer.")

[41] *See*, *Robert Half Intern, Inc. v. Van Steenis*, 784 FSupp 1263 (ED Mich 1991).

[42] *See*, *Radio One, Inc. v. Wooten*, 452 FSupp 2d 754, 759 (ED Mich 2006) (concluding that a non-competition agreement prohibiting a former employee DJ from appearing on a radio station within 75 miles of the former employer's three transmitters for 6 months was reasonable because the former employee was not prohibited from using his talents, but rather was prohibited from transferring the former employer's audience.)

[43] *St. Clair Medical, PC v. Borgiel*, 270 Mich App 260, 269; 715 NW2d 914 (2006).

Provisions of the federal Stark[44] law present an added wrinkle in the health care arena with regard to permissible geographic scope. Stark prohibits physicians from referring a Medicare patient for certain designated health services ("DHS") to an entity with which the physician has a financial relationship, unless an exception applies. Since Stark is a strict liability statute, its violation carries penalties which can range from monetary fines to disqualification from participation in federal health care reimbursement programs.

Stark may be implicated when a physician recruitment agreement contains a non-competition restriction. The Centers for Medicare & Medicaid Services' ("CMS") final rule, issued in 2004, specifically stated that non-competition agreements could not be included in a recruitment agreement without violating Stark. However, in 2007, after public outcry and commentary that non-compete agreements are a standard business practice in physician recruitment, CMS broadened its position. Now, the final rule to the physician recruitment exception allows hospitals and physician practices to enter into physician recruitment agreements to attract physicians to the areas served by those providers. However, "the physician practice may not impose on the recruited physician practice restrictions that unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital."[45]

CMS has issued an advisory opinion on the recruitment exception to Stark involving a non-competition agreement.[46] The CMS opinion analyzed a recruitment agreement for a pediatric orthopedic surgeon that restricted the physician from "establishing, operating, or providing professional medical services at any office, clinic, or other health care facility at any location with a 25-mile radius" of the hospital that was providing financial recruitment assistance (the "Recruiting Hospital") for one year. That restriction had the effect of prohibiting the physician from practicing at five hospitals located within the 25-mile radius. However, the physician could still practice at one other hospital that was within the Recruiting Hospital's geographic service area, but outside of the 25-mile radius. The physician could also work at three other hospitals located about 35 to 60 miles from the Recruiting Hospital that took approximately an hour of travel time via automobile.

CMS discussed that non-competition covenants should not be categorically prohibited from recruitment agreements, but that such restrictions must be in compliance with state law:

> [P]hysicians and physician practices, may not impose on the recruited physician any practice restrictions that unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital. Although we are not *per se* conditioning payment for DHS on compliance with State and local laws regarding non-compete agreements, we believe that any practice restrictions or conditions that do not comply with

[44] 42 USC § 1395nn.
[45] 42 CFR § 411.357(e)(4)(vi).
[46] CMS-AO-2011-01.

> applicable State and local law run a significant risk of being considered unreasonable.[47]

CMS concluded that the non-competition agreement at issue in its opinion was reasonable, and therefore not in violation of Stark, because, under the circumstances, the physician was not unreasonably restricted from practicing in the hospital's service area. Specifically, CMS found that the one-year time restriction was not unreasonable; the 25-mile radius was reasonable based on the geographic area served by the hospital; that even with the time and distance restrictions, the physician could still practice at hospitals within and around the Recruiting Hospital's geographic service area while the restriction was in effect; and CMS accepted as true the opinion requestor's certification that the non-competition agreement complied with applicable State and local laws.

Unfortunately, the opinion does not explain how CMS came to its "reasonability determinations." While CMS stated that payment for DHS was not conditioned on compliance with State and local laws, it did little to alleviate concern about whether a finding of non-compliance with State law would result in a very high likelihood of a Stark violation. Finally, these CMS opinion letters are expressly limited to their facts and to the parties involved. But, they provide guidance as to how CMS will analyze a non-competition restriction in the future.

Accordingly, attorneys drafting non-competition agreements in the health care setting should analyze the employee's duties, compare those duties against the employer's legitimate business interests, consider whether Stark applies and, if so, whether it alters the analysis.

IV. DRAFTING CONSIDERATIONS

a. Consideration (Pre and Post Employment Provisions)

Michigan courts have long enforced restrictive covenants that were entered into as a condition of employment. Michigan courts have also affirmed that in an at-will employment relationship, continued employment after execution of the agreement, even if employment has already commenced, constitutes sufficient consideration for restrictive covenants.[48] However, the Eastern District Court of Michigan explained that there would be no consideration for a restrictive covenant if the employee already had a contractual right to employment.[49] Furthermore, "the law is well established in Michigan that an employee's continued employment by a successor employer after a corporate buy-out is sufficient consideration for a non-compete agreement."[50] The Michigan Eastern District Court also held that the significant signing bonus paid to the employee was sufficient additional consideration for entering into the employment agreement that contained the non-compete clause.

---

[47] CMS-AO-2011-01, p 5.
[48] *Robert Half Int'l, Inc. v. Van Steenis*, 784 FSupp 1263, 1273 (ED Mich 1991).
[49] *Id*, citing *Insurance Agents, Inc. v. Abel*, 338 NW2d 531 (Iowa App 1983).
[50] *Valley Nat Gas, Inc. v. Marihugh*, 07-11675, 2007 WL 2852338 (ED Mich 2007) (citing, *Lowry Computer Prods Inc. v. Head*, 984 FSupp 1111, 1115 (ED Mich1997)).

b. Severability/Reformation

Severability clauses are used to preserve the remaining sections of an agreement if one or more parts are found to be unenforceable. It is best for a severability clause to be expressly stated in the agreement, however, if it is not clear in the agreement, the court may review the parties' intent, and apply an involved multifaceted analysis to determine severability.[51] The severability clause can simply state:

> In the event one or more of the provisions contained in this Agreement shall, for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement and the invalid, illegal or unenforceable provisions shall be restricted to the maximum extent provided by law to effect the original intent of the parties.

A properly drafted severability clause authorizes a court to exercise its discretion to revise the contract to fall within the requirements of MARA.[52] In fact, both the Michigan Court of Appeals and Supreme Court have pointed out that through MARA, the legislature explicitly assigned the responsibility of assessing the reasonableness of non-competition agreements to the judiciary.[53]

c. Choice of Law

Because there is inconsistency across the country as to how various states treat non-competition provisions, choice of law provisions can be very important, particularly, for those jurisdictions, such as California, Colorado, Hawaii, North Dakota, and Oklahoma where non-competition restrictions are prohibited or very narrowly permitted. Accordingly, and as a general practice principle, if a drafter is not familiar with the law of jurisdiction that is being inserted into the agreement, at the very minimum, research should be conducted to determine whether any nuances in that jurisdiction's treatment exist that could affect the parties' decision to apply that law.

Generally, Michigan courts honor the parties' choice-of-law provisions, but Courts have moved toward a more policy-centered approach that balances the expectations of the parties to a contract with the interests of the states involved to determine what law to apply.[54]

---

[51] *See, Dumas v. Auto Club Ins Ass'n*, 437 Mich 521, n 87; 473 NW2d 652 (1991).
[52] MCL 445.774a.
[53] *Grigg Box Co v. Michigan Box Co*, 285862, 2009 WL 3401111 (Mich App 2009); *Rory v. Continental Ins Co*, 473 Mich 457, n 32; 703 NW2d 23 (2005).
[54] *Uhl v. Komatsu Forklift Co, Ltd*, 512 F3d 294, 302 (6th Cir 2008) citing *Chrysler Corp. v. Skyline Indus Servs, Inc.*, 448 Mich 113; 528 NW2d 702 (1995).

d. Assignability

Assignability should be expressly dealt with by including an assignability clause in the non-competition agreement. If assignability is not addressed, then assignability of the agreement depends on whether or not the court views the agreement as a personal services contract.[55] A simple provision (example below) will prevent that headache:

> This Agreement shall not be assignable by Employee without the written consent of Employer. Employer, however, may assign its interest in this Agreement without the consent of Employee.

e. Arbitration Clauses

Non-competition agreements are subject to valid arbitration clauses.[56] In 2012, effective July 1, 2013, Michigan enacted a Revised Uniform Arbitration Act ("RUAA").[57] Notably, the RUAA no longer requires the specific term of art language[58] to create an irrevocable arbitration agreement.[59] Before enactment of the RUAA, if that specific term of art language was not included in the arbitration clause, the clause was considered a common-law agreement that either party could revoke at any time prior to the arbitrator's award. If that special language was included, then the agreement was considered statutory and the parties could not revoke their agreement to arbitrate. The RUAA removes the language requirement by stating:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.[60]

Despite the enactment of the RUAA, a contract drafter may be wise to include the language required prior to the enactment of the RUAA, at least until case law has confirmed that the RUAA repealed the language requirement.

f. Remedies

Since restrictive covenants are contractual in nature, parties can generally contract to provide remedies in the event of a breach. In addition, §445.778 of MARA provides:

> (2) Any other person [the state, a political subdivision, or any public agency can file suit for violation under subsection 1]

[55] *See, Virchow Krause & Co v. Schmidt*, 266271, 2006 WL 1751835 (Mich App 2006).
[56] *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich App 146, 155-56; 742 NW2d 409 (2007).
[57] MCL 691.1681, et seq.
[58] Under MCL 600.5001(2) (repealed), to be irrevocable the language of an arbitration agreement was required to state: "a judgment of any circuit court may be rendered upon the award."
[59] *See, Wold Architects and Engineers v. Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006).
[60] MCL 691.1681(1).

> threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of 3 times the actual damages sustained by reason of a violation of this act.

The MARA statute does not define flagrant and there are no known Michigan cases which have defined the term. The Merriam Webster Dictionary defines flagrant as "conspicuously offensive <*flagrant* errors>; *especially* **:** so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality <*flagrant* violations of human rights>."

i. Judicial Enforcement

Under MCL 445.775, the circuit has exclusive jurisdiction over MARA violations: "[a]n action for violation of this act shall be brought in a circuit court where venue is proper without regard to the amount in controversy." Despite this granting of exclusive jurisdiction to the circuit court, mandatory arbitration provisions in restrictive covenants have been found to be enforceable by Michigan courts.[61]

ii. Injunctive Relief

MCL 445.778(2) specifically provides for an injured person or a person threatened with injury to seek injunctive relief:

> (2) Any other person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of 3 times the actual damages sustained by reason of a violation of this act.

[61] *Valley Nat. Gas, Inc. v. Marihugh*, 07-11675, 2007 WL 2852338 (ED Mich 2007) (citing *Lowry Computer Prods. Inc. v. Head*, 984 FSupp 1111, 1115 (EDMich1997)); *See also, Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007).

The decision of whether or not to issue a preliminary injunction lies within the sound discretion of the court.[62] In determining whether to grant or deny an injunction, the court is required to consider four factors:

1. Whether the movant is likely to prevail on the merits;
2. Whether the movant would suffer an irreparable injury if the court does not grant a preliminary injunction;
3. Whether a preliminary injunction would cause substantial harm to others; and
4. Whether a preliminary injunction would be in the public interest.[63]

"None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." (citations omitted).[64] A district court is required to make specific findings concerning each of the four factors unless fewer are dispositive of the issue.[65]

iii. Liquidated Damages

A liquidated damages provision is an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive.[66] Such a provision is particularly appropriate "where actual damages are uncertain and difficult to ascertain or are of a purely speculative nature...."[67] Assigning a specific dollar amount for damages in the event of a breach, may undercut an irreparable injury claim necessary for injunctive relief. Therefore, it is important to advise clients of this possibility and the importance of assigning an appropriate monetary amount as a liquidated damage.

In *St. Clair Medical, P.C. v. Borgiel*, the $40,000 liquidated damages provision in the physician's employment contract was affirmed as appropriate and reasonable in relation to the possible injury suffered by the practice in the event of breach of the restrictive covenants. There was credible testimony by the practice that the liquidated damages provision was included in the contract because damages associated with a physician's departure was difficult to calculate.

In *Great Lakes Eye Institute, P.C. v. Krebs*,[68] the liquidated damages provision in the employment agreement provided that, if Krebs, an ophthalmologist, breached the restrictive covenant, plaintiff's damages would be an amount equal to 40 percent of the gross receipts attributable to Krebs's professional services for the twelve-month period ending as of the month preceding Krebs's termination or $200,000, whichever was greater. The Michigan Court of

---

[62] *Golden v. Kelsey–Hayes*, 73 F3d 648, 653 (6th Cir 1996), cert denied, 519 US 807, 117 SCt 49, 136 LEd2d 13 (1996).
[63] *Id.*
[64] *Id.*
[65] *Performance Unlimited v. Questar Publishers, Inc.*, 52 F3d 1373, 1381 (6th Cir 1995) (citations omitted).
[66] *St. Clair Medical, PC v. Borgiel*, 270 Mich App 260; 715 NW2d 914 (2006), citing, *UAW-GM Human Resource Ctr v. KSL Rec Corp.*, 228 Mich App 486, 508; 579 NW2d 411 (1998).
[67] *St. Clair Medical, supra*, n 62, citing, *Papo v. Aglo Restaurants of San Jose, Inc.*, 149 Mich App 285, 294; 386 NW2d 177 (1986) (liquidated damages provisions are permitted under MARA); *Follmer, Rudzewicz & Co., PC v. Kosco*, 420 Mich 394, 408-09; 362 NW2d 676 (1984).
[68] *Great Lakes Eye Institute, P.C. v. Krebs*, 294627, 2011 WL 321636 (Mich App 2011).

Appeals enforced the provision holding that "because plaintiff was receiving between 70 and 100 percent of the fees brought in by Krebs before he resigned, the liquidated damages provision appeared to be a reasonable approximation of the damages suffered by plaintiff."

Federal courts have also upheld the use of liquidated damages clauses for breach of restrictive covenants as well.[69]

iv. Attorney Fees, Costs, and Expenses

Michigan follows the American rule with respect to the payment of attorney fees.[70] Consequently, a prevailing party cannot generally recover attorney fees from the losing party "in the absence of an exception set forth in a statute or court rule expressly authorizing such an award."[71] Nevertheless, the parties to a contract may include a provision requiring a breaching party "to pay the other side's attorney fees and such provisions are judicially enforceable."[72]

MARA, MCL § 445.778(2) provides for an award of costs and reasonable attorney fees as determined by the court.

V. CONCERNS FOR NONPARTIES

While nonparties to a non-competition agreement cannot generally be held to the non-competition agreement's terms, a nonparty may be subject to certain types of liability resulting from the violation of that agreement. For instance, if an employer becomes aware of a non-compete applicable to its medical professional employee but chooses to nevertheless employ that person, it may be liable for tortious interference with contract. Proving tortious interference with a contractual relationship requires a showing of: (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant.[73] However, careful consideration by a plaintiff/former-employer should be made in deciding whether to name the new employer as a defendant in a lawsuit. Since the new employer may have greater financial resources than the former employee, including the new employer in a suit may invite a more complicated defense (and accompanying costs) to the agreement. On the other hand, the new employer's actions may have exponentially increased the harm to the plaintiff/former employer and may have the financial capability.

New employers may also face liability for trade secret misappropriation. Indeed, liability under the Michigan Uniform Trade Secrets Act[74] could fall on the employer if it used or disclosed trade secrets, and at the time of the use or disclosure knew "that his or her knowledge

---

[69] *Kelly Servs, Inc. v. Noretto*, 495 FSupp 2d 645, 659-60 (ED Mich 2007) (citing *Michigan Bell Tel Co v. Engler*, 257 F3d 587, 599 (6th Cir 2001) (the loss of goodwill from existing and prospective customers has been held to be irreparable by the Sixth Circuit); *Basicomputer Corp. v. Scott*, 973 F2d 507, 512 (6th Cir 1992) ("Similarly, the loss of fair competition that results from the breach of a non-competition covenant is likely to irreparably harm an employer").

[70] *Haliw v. Sterling Heights*, 471 Mich 700, 706-707; 691 NW2d 753 (2005).

[71] *Id.* at 707; MCL 600.2405(6).

[72] *Zeeland Farm Services, Inc. v. JBL Enterprises, Inc.*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

[73] *Health Call of Detroit v. Atrium Home & Health Care Services, Inc.*, 268 Mich App 83; 706 NW2d 843 (2005).

[74] MCL 445.1901 *et seq*.

of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use."[75]

VI. DEFENSES

As with all contracts, claims to enforce restrictive covenants should be defended with not only a denial of the wrongdoing, but such claims are also subject to legal defenses, including affirmative defenses, which while unrelated to the merits of the underlying claim, nonetheless, establish mitigating or exculpatory facts which limit or preclude liability. The following are just a few of such defenses.

a. The "First Breach" Doctrine

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform."[76] "Substantial breach" means a breach which "has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." (citations omitted).[77]

In *Great Lakes Eye Institute,* the Michigan Court of Appeals ruled that there was no first breach of the employment agreement by plaintiff because under a plain reading of the agreement, plaintiff, after it had employed Krebs for 24 months, was only required to offer Krebs the option to purchase stock in the company. There was no claim that Krebs was not given the option to purchase stock after 24 months of employment. The agreement did not require plaintiff to maintain its stock at a certain value. In addition, no section of the employment agreement prohibited the physicians from engaging in a sexual relationship with members of plaintiff's staff, nor did any section require that the plaintiff-company be run in any particular manner.

It is important to recognize that language in restrictive covenant agreements themselves may vitiate any first breach defense. For example, language in the restriction such as "[e]mployee will not for a period of one (1) year after termination of employment with the Company, regardless of the reason for termination of employment, participate ... in any enterprise in competition with the Company" (Emphasis added).[78]

---

[75] *See, Hudson & Muma, Inc. v. Wolf-Hubert Co, LLC*, 288346, 2010 WL 1330342 (Mich App 2010), citing MCL 445.1901, *et seq*.

[76] *Michaels v. Amway Corp.*, 206 Mich App 644, 650 (1994) (quotation omitted); *Great Lakes Eye Institute, PC v. Krebs*, 294627, 2011 WL 321636 (Mich App 2011) ("The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform"); *Michaels v. Amway Corp.*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (quotation omitted).

[77] *Baith v. Knapp–Stiles, Inc.*, 380 Mich 119, 126, 156 NW2d 575, 578 (1968).

[78] *Coates v. Bastian Brothers, Inc.*, 276 Mich App 498; 741 NW2d 539 (2007).

b. Duress

"[A]llegations of coercion, like other contract defenses of mistake, duress, and fraud, must be proven by the party seeking to avoid the contract on such grounds."[79] The contract defense of duress exists when a party, by the unlawful act of another party, is induced to enter into a contract under circumstances that deprived him or her of the exercise of free will.[80] In *Edwards Publications, Inc.*, there was evidence showing that Kasdorf signed the 2002 employment agreement under economic duress, where the office manager threatened the withholding of her paycheck if the agreement was not executed.

c. Fraud in the Execution

In *Rood v. Midwest Matrix Mart, Inc.*, 350 Mich.559, 87 N.W.2d 186 (1957) the Michigan Supreme Court held that the plaintiff in that case could avoid the terms of his written contract based upon the theory of fraud in the execution because the defendant misrepresented to him that the proposed written agreement actually incorporated the terms of their agreed oral agreement when, in fact, the written agreement materially varied the terms.

VII. OTHER PRACTICAL CONSIDERATIONS

a. Discovery issues in litigating physician non-competition agreements

Michigan's physician-patient privilege law restricts a health care provider's ability and legal duty to disclose patient information for purposes of litigation.[81] Interestingly, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") provides an exception allowing the disclosure of patient information for litigation purposes.[82] But the absence of a corollary exception under Michigan's privilege statute nevertheless prohibits disclosure of that information – at least that was the Michigan Court of Appeals' conclusion in *Isidore Steiner, DPM, PC v. Bonanni*.[83] The Michigan Court of Appeals has recognized and commented on how its ruling could cripple efforts by a plaintiff to prove money damages in a breach of non-competition suit, saying:

> To support its request for defendant's patient list, plaintiff says it cannot press its claim that defendant stole its patients without knowing the identity of defendant's patients and that, unless the courts grant such discovery, it cannot enforce its contractual right to protect its valuable patient list from poaching by any unscrupulous ex-employee, such as plaintiff regards defendant. To this, we say that it is not our role to address either the wisdom of a

[79] *Edwards Publications, Inc. v. Kasdorf* , 281499, 2009 WL 131636 (Mich App 2009); *Morris v. Metriyakool*, 418 Mich 423, 440; 344 NW2d 736 (1984) (KAVANAGH, J).
[80] *Apter v. Joffo*, 32 Mich App 411, 416; 189 NW2d 7 (1971), quoting, *Knight v. Brown*, 137 Mich 396, 398; 100 NW 602 (1904); *Hungerman v. McCord Gasket Corp.*, 189 Mich App 675, 677, 473 NW2d 720 (1991).
[81] MCL 600.2157.
[82] 45 CFR § 164.512(e).
[83] 292 Mich App 265, 277; 807 NW2d 902 (2011).

> physician's efforts to restrict with whom a patient may consult or the appropriate business or legal means by which a corporation can effectively protect its practice. Instead, our limited role is to decide whether the names, addresses, and telephone numbers of nonparty patients are protected from disclosure by law.[84]

Subsequent to the *Bonanni* decision, the Federal District Court for the Eastern District of Michigan weighed in on the matter. [85] The court created an opening to challenge *Bonanni* based on the preemption doctrine. Specifically, the *Bonanni* court reasoned that the Michigan privilege law was not preempted by HIPAA because it provides more protection for patient information than HIPAA.[86] The federal court found that reasoning "plainly incorrect" explaining that the Michigan privilege law permitted unfettered access to patient records in certain circumstances, while HIPAA did not.[87] As a result, the federal court concluded that HIPAA was more stringent than, and therefore superseded, the Michigan privilege law.

At the time of writing this article, no authority existed reconciling these two cases. Accordingly, the concerns raised by *Bonanni* remain present for an employer entering a non-compete with a physician. A careful risk analysis should be undertaken to determine whether insertion of a liquidated damages clause to avoid the damages issue is warranted, or whether the client would prefer to avoid the consequences attendant with a liquidated damages clause and assume the risk of being the first to argue the matter all the way to the Michigan Court of Appeals.

VIII. CONCLUSION

A restrictive covenant's enforceability is a fact-specific inquiry. While restrictive covenants are enforceable in Michigan, they are disfavored, narrowly construed, and subject to limitations that vary depending on the circumstances presented. Although this summary is a guide to how these covenants, particularly non-compete agreements, have been treated by Michigan courts, it does not substitute for specific legal advice from informed counsel.

---

[84] *Isidore Steiner, DPM, PC v. Bonanni*, 292 Mich App 265, n 3; 807 NW2d 902 (2011).
[85] *Thomas v. 1156729 Ontartio, Inc.*, 979 FSupp 2d 780 (ED Mich 2013).
[86] *Id.* at 2.
[87] *Id.*