

KANSAS COURT OF APPEALS ENFORCES COVENANT NOT TO COMPETE AGAINST PHYSICIAN

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After 13 years of practice with Wichita Clinic, Dr. Michelle Louis resigned and went into practice with a family physician group. Her employment agreement with Wichita Clinic contained a restrictive covenant that prevented her from practicing medicine in Sedgwick County for a period of three years after she left Wichita Clinic. The contract also had a liquidated damages provision requiring her to pay 25% of her earnings during the three-year restricted period if she did practice in the county.

On June 13, 2008 the Kansas Court of Appeals reversed the decision of the trial court in *Wichita Clinic v. Louis* and held that the three year restrictive covenant was enforceable and that the clinic could collect the 25% of earnings as liquidated damages. Louis had argued that the restrictive covenant should not be enforced because the clinic had breached the compensation provision in the contract by unilaterally modifying to charge certain overhead costs to her. The court rejected this argument, holding that it was not a pre-condition to enforcement. The court also noted her acceptance of a number of compensation changes over the years.

The court of appeals focused on public policy favoring freedom to contract and enforcement of the intent of the parties. In holding the restrictive covenant enforceable, the court answered these four questions:

- 1) Does the covenant protect a legitimate business interest? Yes, the clinic has an interest in its referral system, patient base and good will.
- 2) Does it create an undue burden on the employee? No, because the employee can still practice medicine and pay the liquidated damages or go outside the county and return after three years.
- 3) Is it injurious to the public? No, there was no indication Louis' patients would not continue to receive quality medical care.
- 4) Are the time and territory restrictions reasonable? Yes, the limit to Sedgwick County was appropriate and three years reasonable due to time necessary to recruit a new physician and achieve a level of productivity.

Louis also claimed that the liquidated damages clause was an unenforceable penalty. The court held that the amount the parties had agreed to was reasonable in view of the value of the subject matter and probable or presumable loss, although actual damages would be difficult to determine.

This case is good news for Kansas employers who wish to protect their trade secrets, business relationships and other confidential information. The company should, however, carefully draft any restrictive covenants to improve the likelihood they will be enforced. This includes making sure it is defining the legitimate business interests to be protected to avoid a defense that it is simply trying to avoid competition. Additionally, geographic restrictions should be limited to areas in which the company does business. Although the *Wichita Clinic v. Louis* court upheld a three year restriction, other courts have held that two years is the maximum time under different circumstances. Consider the impact on the employee's ability to make a living and on the public. Finally, avoid over-reaching on any liquidated damages.