

# Non-Compete Clauses in HealthCare Litigation

Dallas Bar Association CLE



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## Health Law and Healthcare Litigation



**Martin Merritt** is a founder and Executive Director of the Texas Health Lawyers Association where he has served from 2013 to the present. He has been repeatedly voted by D Magazine Best Lawyers in Dallas List. He has been elected by his peers to serve as Chairman of the Dallas Bar Association Health Law Section for 2021. He has served as special disciplinary counsel for the Texas Commission for Lawyer Discipline and serves outside litigation counsel and as outside general counsel to healthcare clients.

# Part I: History of Non-Competes

Where we are and how  
we got here

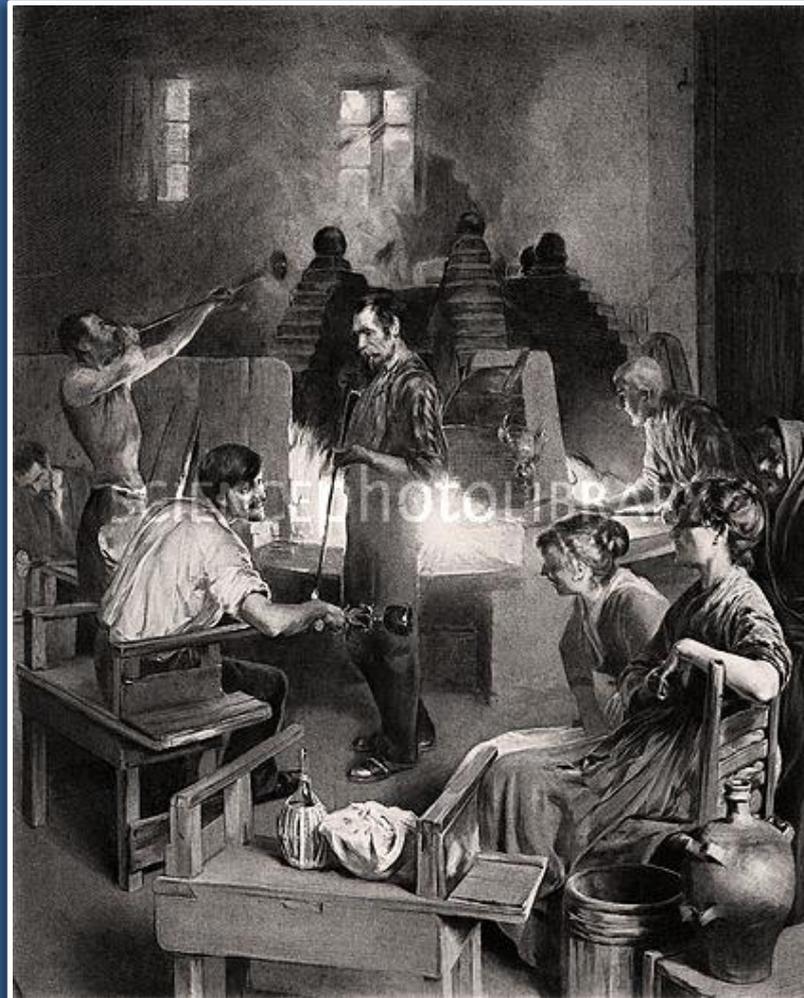
# A Good Place to Start Venice (Circa 1200's)



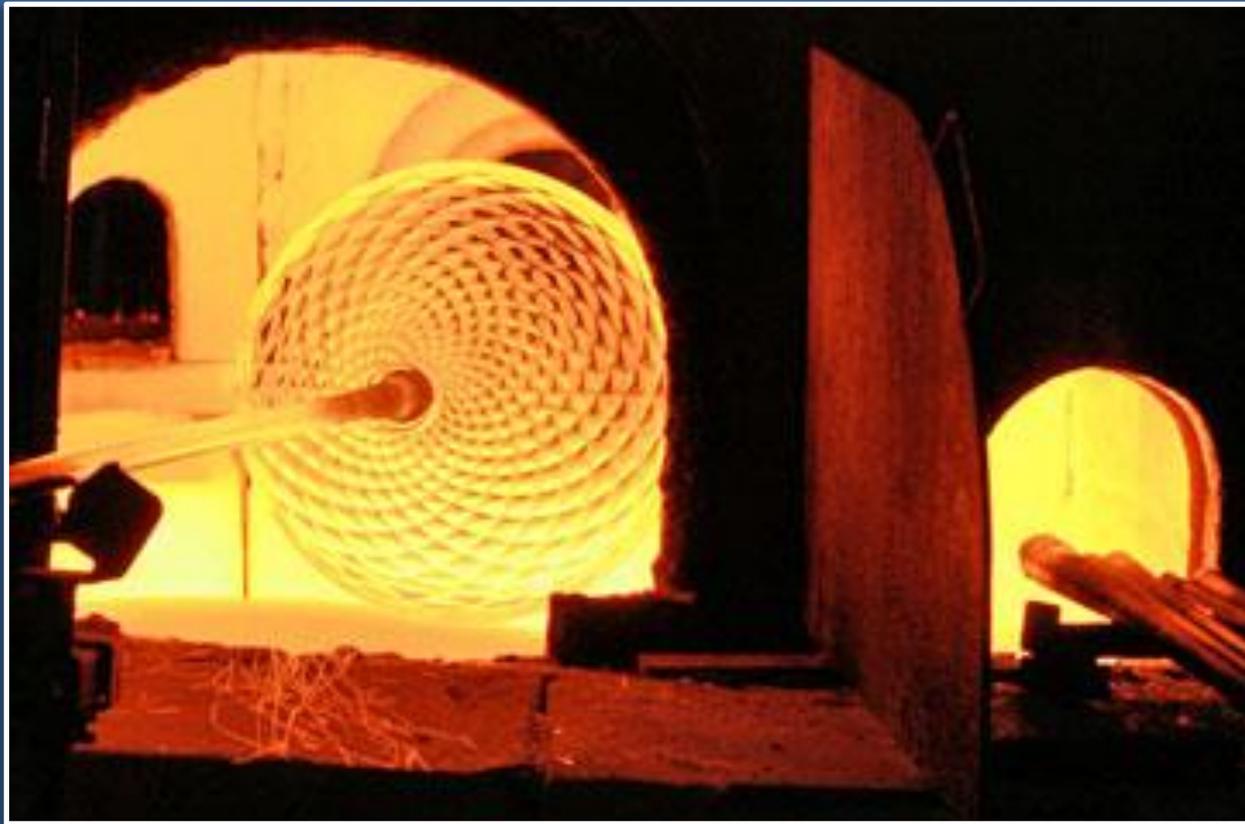
# Meanwhile the Other Good Place to Work: 4<sup>th</sup> Crusade Sack of Constantinople (1204)



Some employees had a skill  
... and No Jobs.



They needed somebody to provide the  
Capital and physical plant



And they could make this stuff . . .



Because Venice had  
the Capital and entrepreneurs



The Employees  
decided to motor West . . .



Employers created a dedicated workplace. . . Murano Isle.



200 years of collaboration later . . .



# Which was kind of a “trade secret”



# 1500's version of a Non-Compete : Employees Could Never leave the island. Ever.



# This illustrates a timeless struggle

## Employer :

- has the leverage (power)
- has all the business connections
- has all the customers
- Assembled a valuable team of coworkers
- Has confidential information and trade Secrets
- Would actually prefer a naked restraint on Employees

## Employee:

- has very little leverage
- Just needs a paycheck/Will sign anything
- Oftentimes naïve and no connections
- Doesn't know what a non-compete actually means
- Thinks nothing of taking customer list, fellow workers, trade secrets , usurping opportunities

# Texas' Historical View:

“Texas Courts historically held that noncompetition covenants limit competition and are restraints of trade. Therefore, they are presumed to be invalid unless specifically authorized by a statute.”—

--Mark Shank ,*Texas Litigators Guide to Departing Employee Litigation, Ch. 3., P. 41.*

Codified at Texas Bus. & Com §15.05

- (a) Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.
- (b) It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce.

On the Other Hand  
Freedom to Contract :

“Parties are free to contract in any manner which does not violate a statute or public policy.”

RESTATEMENT (SECOND) OF CONTRACTS § 178(1)

# Texas Covenant Not to Compete Act

## Bus. & Com §15.50 (1989-93)

“A covenant not to compete is enforceable if it is (1) ancillary to or part of an otherwise enforceable agreement at the time the agreement is made (2) to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and (3) do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.”

# What this means in English:

- A covenant not to compete is a contract in which the employee is giving up a valuable right . The rules are:
- First: Must have “consideration.” “At will” contracts can’t be enforced (“illusory”).
- Second: Must be some “Justifiable business purpose.”
- Third: Must be reasonable in time, scope, and place.

## “Justification” for the Non-Compete Clause:

Historically, courts were reluctant to accept this contractual waiver of rights. Courts tied the Consideration to the the Non-Compete (had to bear some relation to the promise not to compete), such as disclosure of confidential information in exchange for the promise not to compete.

# Texas Supreme Court Lessens the Burden on Business.

- *Light v. Centel Cellular Co. of Tex.* 883 S.W.2d, 647 (Tex. 1994)
- *Alex Sheshunoff Mgmt. Serv's, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006)
- *Mann Frankfort Stein & Lipp Advisors v. Fielding*, 289 S.W.3d 844 (Tex. 2009).
- *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011).

There is a reason for that.. .



Pointer: Be sure to check ,  
the state chosen in the contract



# The trial courts: contracts must appear to protect some legitimate business interest

Something other than  
“I don’t want employees as competitors”

- Preserve business goodwill/connections
- Particularly in Sale of Business
- Protect customer lists
- Preserve valuable team of coworkers
- Protect confidential information and trade Secrets



# Some of the more clever provisions.

- *“I agree that there is no adequate remedy at law for my breach.”*
- *“I agree that the noncompete will not harm my ability to earn a living.”*
- *“I agree that an ordinary medical procedure is a trade secret”*



# The Special Nature of Healthcare Contracts

Of Course §15.50  
In Physician Non-competes.

- 1) The contract must provide for a buyout of the non-compete
- 2) Other Statutory Language must be included
- 3) Contract cannot be reformed by the court to add a buyout. (Unlike geography, time and Scope.)

§ Sec. 15.52.

PREEMPTION OF OTHER LAW.

“The criteria under 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete under common law or otherwise.”

# *Nacogdoches Heart Clinic vs. Vijay Poloka, MD*

No. 12-11-00133-CV. (Tyler)

Physician argued that even if the non-compete contract fits squarely within the statute, it is unenforceable if Public interest would be adversely affected.

*Citing Marsh USA, Inc., 354 S.W.3d at 772-73; DeSantis, 793 S.W.2d at 681; Matlock v. Data Processing Sec., Inc., 618 S.W.2d 327, 329 (Tex. 1981).*

# *Nacogdoches Heart Clinic vs. Vijay Poloka, MD*

No. 12-11-00133-CV. (Tyler)

Held: Even if a physician non-compete contract fits squarely within the statute, it may be unenforceable if Public interest would be adversely affected

*Citing Marsh USA, Inc., 354 S.W.3d at 772-73; DeSantis, 793 S.W.2d at 681; Matlock v. Data Processing Sec., Inc., 618 S.W.2d 327, 329 (Tex. 1981).*

# *Nacogdoches Heart Clinic vs. Vijay Poloka, MD*

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In other words “Public Policy”  
Arguments are not preempted

*Citing Marsh USA, Inc., 354 S.W.3d at 772-73; DeSantis, 793 S.W.2d at 681; Matlock v. Data Processing Sec., Inc., 618 S.W.2d 327, 329 (Tex. 1981).*

*There are many Patient Safety and Health law reasons the contract might not be “otherwise enforceable”*

- “Offensive use” of Stark law and the AKS: “The contract is illegal”
- Similar to “Offensive use” of Stark Law:
  - Can’t delegate because “I don’t trust you with patient safety”
  - HIPAA “I don’t trust you with PHI”
- Corporate practice of Medicine
- Fee Splitting

# Sec. 15.51.PROCEDURES AND REMEDIES.

15.51(b) Personal services contracts, Employer  
(promisee) has the burden of proof of the  
§15.50 elements (Scope, Time, Place)

# Sec. 15.51.PROCEDURES AND REMEDIES.

## 15.51(c) Excessive time, geographical area, or scope

- (1) must be reformed by court
- (2) Penalty: Court may not award damages pre-reformation .
- (3) Penalty: Personal Services Contracts– If Employer knew time, geography and scope were excessive—attorneys fees are awarded employee.

Part II:  
Non-Compete  
Enforcement and  
Remedies

# Injunctive Relief

- Temporary Restraining Order (TRO)
- Temporary Injunction
- Permanent Injunction

# Temporary Restraining Order (TRO)

- TRCP 680 Ex Parte (Without Notice )
- But Dallas Local Rule 2.02
  - Certificate of Conf. must state whether opponent has counsel
  - If counsel is available or can be reached
  - Provide O/C a copy of TRO applic. 2 hours before hearing
  - Unless irreparable harm makes impossible to notify counsel, or
  - Notification would impair relief
- Must Preserve *Status Quo*
- Supported by affidavit
- Expires at Midnight on the 14<sup>th</sup> days unless extended to 28 days

# Temporary Restraining Order (TRO)

- TRO Must be served.
- Must provide Bond.
- Arbitration Clauses may nullify TRO which was not obtained through Arbitration

# Temporary Injunction

- Requires notice and Evidentiary Hearing (even if Defendant does not attend)
- Can be expensive in the first month than many cases
- More likely to lead to a quick end to the dispute
- Remains in effect until Permanent Injunction

# Rule 202 Deposition

- To perpetuate testimony by deposition ONLY
- To investigate a potential suit
- Warning Shot across the bow with less chance of prolonged litigation and counterclaims

# Investigation: Get all the Contacts and Documents.

- (1) Gather employment applications;
- (2) Gather offers of employment in letters;
- (3) Gather all employment contracts;
- (4) Any stock option agreements;
- (5) Any non-competition agreements;
- (6) Any non-solicitation agreements;
- (7) Any separation or severance agreements;
- (8) Any releases of claims executed as part of any settlement agreements;
- (9) All documents that an employee might have executed as part of the merger and acquisition; and
- (10) Any other agreements signed by the employee that might contain any post-employment restrictions.
- (12) Prophylactic Agreements

# Employee “Black Hat” behavior



- Taking customer lists
- Taking employer's business forms
- Self-dealing before quitting (usurping)
- Poaching coworkers
- Misappropriating trade secrets
- Disparagement

# Employer

## “Black Hat” behavior



- Excessive time, scope or geographical restrictions,
- Fraud in the inducement
- Unclean hands
- Contract is an illegal subject

# Investigate Behavior by the Employee

- USB Drive Download Detector (Unplug the employee's computer and don't try forensic analysis without a professional.)
- Install a Keystroke Monitor
- Monitor business related emails
- Listen to business related voice mail messages
- Listen to business related phone calls
- Record business related phone calls

# Gather Witness Statements and Affidavits for TRO

- Interview Co workers
- Interview Customers
- Interview Suppliers
- Social Media: Facebook, LinkedIn, etc.

# Advise the Client with Candor

- Non-compete lawsuits are very expensive (even a simple TRO and temporary Injunction can cost \$50,000.00)
- Equitable actions often hinge on “Black Hat/White Hat” analysis
- Which means it gets ugly.
- These cases are hard on the parties (and lawyers)
- Delay in bringing an action can harm “irreparable harm/No adequate remedy at law

# Advise the Client with Candor

- A reformed non-compete usually cannot form the basis of a damages award from date of breach until it is reformed by the court.
- Employer may be required to sue the new employer as well as the employee (Bad for business).
- There must be a legitimate business interest, other than a desire to keep employees from competing (Justification)
- There will be a counterclaim

# Advise the Client with Candor

## “Justification” for the Non-Compete Clause:

Although the Texas Supreme Court has weakened the requirement of consideration in an at will contract, some judges don't like lengthy noncompete clauses in “at will” contracts. Especially if there is no good justification.

# Demand Letter/Litigation Hold

- Consider a demand letter to both employee and new employer
- Causes of action: Civil conspiracy, Breach of Contract, Breach of fiduciary duty/loyalty, business disparagement, Computer Fraud and Abuse Act, Conversion, Defamation, Fraud, Privacy, Texas Trade Secrets Act, Tortious interference, Theft

# Demand Letter/Litigation Hold

The legal hold is initiated by a notice or communication from legal counsel to an organization that suspends the normal disposition or processing of records, such as backup tape recycling, archived media and other storage and management of documents and information.

# ANTI-SLAPP Suit Caution!

- Filing a Defamation Actions may trigger an Anti-SLAPP suit under CPRC 27.001
- Almost anything could violate the statute, if enforced as written
- Court must award attorneys fees.