WHAT ARE THE BOUNDARIES OF MY KINGDOM?
Geographical Limits in Michigan
Covenants Not to Compete

Introduction

When considering the enforceability of a covenant not to compete, Michigan Courts typically cite four decisive factors: (1) the covenant's duration; (2) the geographical scope; (3) the restricted activities; and (4) whether the employer presents legitimate "competitive business interests" in need of protection.

The general rule followed by the courts is that geographic limitations in non-competition agreements must be tailored so that the scope of the agreement is no greater than is reasonably necessary to protect the protected party's legitimate business interests. This Article explores how that rule plays out in practice.

No Territory

Oddly enough, this particular factor allows for the total absence of specific territorial restrictions. At first glance, this practice seems at odds with the statute and the courts' stated purpose of reviewing the reasonableness of the geographical territory, but in reality that law does not require that any geographical limit be imposed. Covenants lacking a territorial foundation usually present one or more of the following features.

Customer/Client Based Covenants. Covenants which prohibit a former employee from soliciting a client or customer of the former employer are customarily upheld, even when no geographical restriction is imposed. In Michigan, this style of covenant has proven to be popular in the accounting field, where they have been upheld in at least three appellate decisions. In *Rooyakker & Sitz, PLLC v. Plante & Moran, PLLC*, 276 Mich. App. 146, 158 (2006), the Court expressly declared that the lack of a geographical limit in such clauses was no bar to their enforceability.

These clauses essentially replace geographical scope with the client/customer-based restriction. In practice, the most critical "other" interacting element in these cases has been the scope of the restricted activities. A carefully drawn and narrowly tailored clause which does not take the employee out of his or her chosen field altogether will enable a customer-based covenant to impose a longer period of time for the restriction. For example, in one case an extraordinary five year covenant was upheld when the covenant was limited to the employee's prior activities and the employer's patients. *Neocare Health Sys. v. Teodoro*, 2006 Mich. App. LEXIS 240

World Wide Covenants. An unlimited geographical scope may be reasonable if the employer's business is sufficiently national and international in scope. Such a covenant was upheld in one case after the court narrowed the clause to make sure it was carefully tailored to reflect the former employer's actual competitive interests. *Superior Consulting Co. v. Walling*, 851 F. Supp. 839, 847 (ED MI 1994).

The employer in *Whirlpool Corp. v Burns*, 457 F. Supp. 2d 806 (WD MI 2006) relied upon the international scope of its business to impose an unlimited geographical covenant upon its former employee. The Court would not enforce this covenant because it barred the employee from selling appliances anywhere in the world even when he was selling to customers whom he did not previously call upon while at Whirlpool.

In yet another case, the world wide covenant failed because the employer could not demonstrate it had world-wide operations. *Capaldi v Liftaid Transportation,* 2006 Mich App Lexis 3199.

Specific Territorial Limits

Limited Mileage Radius. In the health care industry, it is common practice for a covenant not to compete to impose a restrictive radius of 5-10 miles from the office or offices of the medical practice, health care facility or nursing services company. The seven mile radius imposed and upheld in one reported case against a previously employed medical doctor is fairly typical. *St. Clair Med., P.C. v. Borgiel*, 270 Mich. App. 260, 262 (2006). These limited range radii should prove effective for most professions, provided the other factors are met.

One of the most extensive restrictive mileage based areas is the 100 mile radius enforced in *Coates v. Bastian Bros., Inc.*, 276 Mich. App. 498 (2007). The employee's 22 year length of service may have influenced this decision; the court mentioned that feature, but did not expressly link it to this decision.

Sales Territory Restrictions. Covenants not to compete which span one or two states, or even the entire United States, are fairly common in cases involving sales people or similar representatives who had a specific territory for the employer. Covenants not to compete spanning an entire state have been upheld in at least two Michigan appellate cases. *Bristol Window & Door v. Hoogenstyn*, 250 Mich. App. 478, 481 (2001) (entire state of Michigan). *Kelly Services, Inc. v. Marzullo,* 591 F. Supp. 2d 924 (ED MI 2008) (State of Texas, applying Michigan law). In both cases, the person restricted had previously serviced the statewide territory.

Non-Employment Contracts

Our review of Michigan case law does not reveal any extensive discussion regarding the permissible geographic scope of restrictive covenants imposed upon shareholders or sellers of a business or professional practice. For the most part, general practice follows the guidance stated in the employment based cases.

Conclusion

The permissible range of a geographical covenant restriction depends largely upon (1) how closely it mirrors the restricted party's prior duties, and (2) whether the other terms of the covenant properly compensate for the absence or breadth of the geographical restriction. The enforcing employer or party is tasked with showing a close symbiotic relationship between these factors. The employee or person subject to the covenant, on the other hand, is burdened with the task of

demonstrating that the geographical scope bears an insufficient relationship to the truly protectable competitive interests.

For more information about restrictive covenants, see our lead article on the subject, COVENANTS NOT TO COMPETE IN MICHIGAN. That article also references our companion writings on this subject.

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