Covenants not to Compete in the Employment Context

Elizabeth Lamb Kearney P.C.
Elizabeth Lamb Kearney
P.O. Box K
Berthoud, CO 80513
Phone: 960-532-3594

Historically disfavored as restraints of trade.

Covenants not to compete or non-compete agreements ("CNC") are the red-headed stepchildren of contract law in that they are generally disfavored as restraints of trade and in the medical and legal professions are sometimes viewed as barriers to the public having choice in their providers. The statutorily approved exceptions to that disfavor accommodate business owners when they sell businesses, and protect their business trade secrets or investments in training costs or highly compensated employees, see C.R.S. §8-2-113. The focus of this discussion will be the impact of covenants not to compete on the employment relationship. In 1973 Colorado first statutorily delineated the exceptions to invalidation of CNC found in the common law up to that point. An example of the common law analysis appears in a Colorado Supreme Court opinion from 1913, *Barrows v. McMurtry Mfg. Co*. 54 Colo. 432, 131 P. 430 (1913). The current version of the statute is as follows:

Colorado Statute on Exceptions to Invalidation of CNC

§ 8-2-113. Unlawful to intimidate worker--agreement not to compete

(1) It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit.

(2) Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:

(a) Any contract for the purchase and sale of a business or the assets of a business;

(b) Any contract for the protection of trade secrets;

(c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;

(d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

CNC reviewed for reasonableness on case by case basis.

(3) Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void; except that all other provisions of such an

Business sale exception

Harrison v. Albright, 40 Colo. App. 227, 577 P.2d 302 (1977)

Feudenthal v. Espey, 45 Colo. 488, 102 P. 280 (1909)

Reasonable scope often one year, and smallest geographic area that will protect interest of employer.

agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition. Colo. Rev. Stat. Ann. § 8-2-113 (West)

The gap between the language of the statute and what the Courts deem acceptable has been pretty competently bridged by decisions during the past forty years. The guidance provided in pre-1973 cases is still instructional, as those were set on a sturdy foundation of contract law principles. It is comforting to read the early cases discussing the court's distaste for agreements that interfere with the right of people to work, which are in accord with the recent interpretations of the Colorado statute applying the same rationales. Due to the specific exceptions to invalidation of CNC, many of the cases do not appear at first glance to involve employees but are instead discussion of the details of a business sale. Indeed the oft cited case of *Harrison v. Albright*, 40 Colo. App. 227 (1977) which is referenced to support the validity of CNC that are five years in length and 50 miles in area related not to an employment relationship alone but to the formation of a partnership in which the CNC was a substantial part of the benefit gained by the partner providing the funds to form the company and was voluntarily offered by the other partner (employee) to encourage the formation— the enforcement of which he later tried to avoid. So, the *Harrison* case is technically flawed as a guide for the appropriate length of a CNC related to an employee if that employee was not also an owner of the company. This is mentioned only because the *Harrison* case is listed in the statutory annotations for the approval of 5 year, 50 miles CNC and is most likely incorrectly cited in the event the CNC at issue does not apply to a company owner.

In the 1909 Colorado CNC case of *Freudenthal v. Espey*, 45 Colo. 488, 102 P. 280 (1909) dicta in that case noted the qualitative difference between CNC that hinder the "practice of a learned profession" and those incident to protecting goodwill after the sale of a business. While the former should be limited in time, CNC in the sale of a business could include an "indefinite" restraint. *Fruedenthal* at 503-504, 102 P. at 285. This is undoubtedly due to the assumption that the parties to an agreement for the sale of a business will have arguably equal bargaining power and will only allow restrictions which they feel they are fairly compensated for in the agreement. Not so, with employment- only CNC.

The majority of cases which assess the reasonableness of an employment CNC for individuals who are not owners but act strictly as employees, as to duration and scope (geographic area) seem to hover around an enforceable time frame of about 1 year and scope of from 5 to 50 miles if the product is local and up to entire regions of the United States if the product is international. See

National Graphics v. Dilley, 681 P.2d 546 (Colo. App. 1984)

Pepsico v. Redmond, 54 F.3d 1262 (7th Cir. 1995)

Trade secret definitions C.R.S. §7-74-101

Harvey Barnett, Inc. v. Shidler, 143 F.Supp.2d 1247 (D. Colo. 2001)

Hertz v. Luzenac Group, , 576 F.3d 1103, 91 U.S.P.Q.2d 1801, 2009

Ovation Plumbing, Inc. v. Furton, , 33 P.3d 1221, (Colo.App.2001)

National Graphics v. Dilley, 681 P.2d 546 (Colo. App. 1984) As the world of commerce becomes more global, CNC are sometimes structured around barring provision of particular duties for a competitor as in *Pepsico v. Redmond*, 54 F.3d 1262 (7th Cir. 1995); customers or products. All the parameters of a CNC must still meet the reasonableness test that is done on a case by case basis when analyzed by the courts.

The definition of trade secrets that qualify as an exception to CNC is an area that will continue to develop as the technology related to trade secrets changes and the doctrine of inevitable disclosure develops Generally the accepted definition of trade secrets applied in the CNC cases mirrors that found in the Colorado Uniform trade Secrets Act, C.R.S. §7-74-101. Essentially, trade secrets must have inherent value and the company must have exhibited reasonable steps to protect their secrecy.

The definition specifically states: (4) "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. Colo. Rev. Stat. Ann. § 7-74-102

Factors considered in determining whether a trade secret exists under Colorado law include: (1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information. *Hertz v. Luzenac Group*, 2009, 576 F.3d 1103, 91 U.S.P.Q.2d 1801, on remand 2010 WL 3777222. Novelty and invention are not required for a trade secret; rather, the protection of a trade secret is merely against breach of faith and reprehensible means of learning another's secret. *Ovation Plumbing, Inc. v. Furton*, , 33 P.3d 1221, (Colo.App.2001) modified on denial of rehearing.

The issue with many cases involving CNC wherein the trade secret exception to invalidity is claimed, is an inappropriately broad application of the term to information and processes that are not actually trade secrets. As Judge Babcock ruled in *Harvey Barnett, Inc. v. Shidler*, 143 F.Supp.2d 1247, (Dist. Colo. 2001) that a covenant not to compete, contained in a license agreement for infant swimming program instructors, was facially invalid under Colorado law, where allegedly protected trade secrets were not secret. The factors relied upon

Atmel Corp. v. Vitesse Semiconductor Corp., 30 P.3d 789 (Colo. App. 2001)

Colorado Supply Co. v. Stewart, 797 P.2d 1303 (Colo.App.1990)

Porter Indus., Inc. v. Higgins, 680 P.2d 1339, 1342 (Colo. Ct. App. 1984)

Rivendell Forest Products, Ltd. v. Georgia-Pacific Corp., 824 F.Supp. 961 (1993)

Suburban Gas of Grand Junction, Inc. v. Bockelman, 157 Colo. 78, 401 P.2d 268 (1965).

Training and education expenses C.R.S. §8-2-113(2)(c)

Dresser Indus., Inc. v. Sandvick, 732 F.2d 783, (10th Cir. 1984)

for the finding of invalidity were a failure to protect the information from general knowledge by training scores of instructors without informing them of the need for confidentiality, allowing parents to videotape lessons, and the lack of special procedures or characteristics for the program that made it materially different than other programs. In a case in which the employer claimed an employee ranking system was a trade secret, *Atmel Corp. v. Vitesse Semiconductor Corp*., 30 P.3d 789 (Colo. App. 2001), certiorari denied, on remand 2004 WL 5656293, the Colorado Court of Appeals found that the trial court's only finding to support an injunction to protect trade secrets was that the employee ranking information was "confidential information." However, because information subject to arguably normal business precautions does not necessarily constitute a trade secret, see *Colorado Supply Co. v. Stewart*, 797 P.2d 1303 (Colo.App.1990), this finding was insufficient to invoke application of the trade secret exception. Likewise in *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo. Ct. App. 1984) the court found that the only "trade secret" to which that employer laid claim was its own pricing and bidding structure which failed to qualify as a legitimate trade secret. The same result was reached in *Rivendell Forest Products, Ltd. v. Georgia-Pacific Corp*., 824 F.Supp. 961 (1993) when Judge Finesilver determined that a computerized cost analysis system was not a protectable trade secret as similar programs were in use in the industry before the employee left and went to another company.

More importantly the *Atmel* opinion found, an employee's skills, aptitude, and experiences belong to the employee and not to the employer, relying on *Mulei v. Jet Courier Service, Inc*., 739 P.2d 889 (Colo.App.1987), rev'd on other grounds, 771 P.2d 486 (Colo.1989); see *also Suburban Gas of Grand Junction, Inc. v. Bockelman,* 157 Colo. 78, 401 P.2d 268 (1965). The opinion commented that an employee's subjective opinions about his or her co-workers are not trade secrets belonging to the employer. In that case the appellate panel deemed it clear that the individual defendants had neither misappropriated nor disclosed any of the employee ranking information.

The subsection of the statute that allows for recovery of training or education expenses for employees who serve less than two years has drawn little analysis since the 1984 case of *Dresser Indus., Inc. v. Sandvick*, 732 F.2d 783, (10th Cir. 1984). That opinion refused to apply the exception to employees who left after a year and one-half based on the lack of any such specific clause in the employment agreements between the company and the employees. The opinion commented at page 788 that although it was true that Dresser incurred expenses in training employees Petty, Sandvick, and Eide, who left after about 1½ years of employment, § 8–2–113(2)(c) was inapplicable because their employment agreements contained no provision requiring reimbursement of training expenses. The *Dresser* opinion is interesting because it analyzes a complicated choice of laws question caused by the different domiciliary of the company and each of the employees. The Dresser result was distinguished in a later federal district court opinion that also dealt with a forum selection clause in an employment agreement. Judge Babcock applied the contractually agreed upon law of Minnesota in *Am. Exp. Fin. Advisors, Inc. v. Topel*, 38 F. Supp. 2d 1233, 1239 (D. Colo. 1999). The opinion points out that the American Express contract clause was not contrary to a fundamental Colorado policy in that it provided for the protection of trade secrets which is a sanctioned exception to CNC under Colorado statute.

Am. Exp. Fin. Advisors, Inc. v. Topel, 38 F. Supp. 2d 1233, 1239 (D. Colo. 1999).

The other factual difference between the *Topel* and *Dresser* cases was that in *Dresser*, there was no contractual choice of law provision; accordingly, the court applied Colorado law as the result of a balancing of the interests of the interested states. Id. at 785–88. In addition there was no indication in *Dresser* that the restrictive covenant at issue protected any trade secrets—the employees were "mud engineers" with limited technical training who employed standard tests and calculations to determine the additives necessary to maintain the consistency of the drilling mud formulated for oil and gas wells. Id. at 784. The *Dresser* restrictive covenant prohibited all competition with the company in the territories where the employees worked during the previous two years of employment. Id. Accordingly, unlike the post-termination covenants at issue in the *American Express v. Topel* case, the purpose of the *Dresser* restrictive covenants appeared to prevent all competition by former employees, not to prevent the former employee from using trade secrets obtained during the course of performing his or her duties. Because the covenant not to compete did not fall within an exception to the Colorado statute invalidating covenants not to compete, the *Dresser* court found that it was invalid.

Choice of laws issues.

King v. PA Consulting Group, Inc., 485 F.3d 577 (10th Cir. 2007),

The choice of laws conundrum is one that will be at issue more in the future as employees change locations and companies become more national in scope. Classic contract interpretation principles such as where the contract was performed and adherence to the stated purpose of the contract interact with choice of laws analysis which balance the interests of the involved states and their public policy considerations. An updated analysis of the choice of laws question for CNC appears in *King v. PA Consulting Group, Inc.*, 485 F.3d 577 (10th Cir. 2007), in which the Court analyzed both New Jersey and Colorado law on CNC and found that the CNC in question would be enforced under either state's policy and therefore upheld the enforcement. It seems that specifically drafting the CNC to comport with statutory exceptions which match the state with the predominate interest in the contract will result in more certain outcomes should the CNC be reviewed by a court. Be aware that California law prohibits all CNC, so if the need arises for one for a company/employee in California don't use California as your forum. This prohibition in California applies to all employees except equity partners in the business, (Cal. Bus. & Prof. Code §§ 16600, 16601) which operates much the same as the Colorado exception for sale of a business.

Executive and management personnel exception*.*
C.R.S. §8-2-113(2)(d)

Phoenix Capital, Inc. v. Dowell, 176 P.3d 835, (Colo. Ct. App. 2007)

Mgmt. Recruiters, Inc. v. Miller, 762 P.2d 763 (Colo.App.1988)

Several recent decisions analyze the statutory language setting out the exceptions to invalidation for executive and management personnel found at C.R.S. 8-2-113(2)(d). One of those, *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, (Colo. Ct. App. 2007) deals with an employee who signed a CNC upon his arrival at the company and then progressed to a much higher management level position from which he departed to work for a competitor. The factual analysis by the court indicated that when he was hired the employee clearly was outside the exception for management and executive positions, to which the company responded by attempting to have the CNC applied to the position the employee held upon his departure, which more clearly met the exception. The court was not persuaded by that argument as the statutory interpretation of the exceptions has consistently held that CNC that do not meet the exceptions are *void ab initio*, which meant the defective CNC did not exist at the time of the employee's departure, even though his position at the time would have met the exception.

The *Phoenix Capital* opinion looks at not only the parameters for executive and management positions but also the secondary clause of " professional staff to executive and management personnel". At page 842 the panel summarized their findings,

> After assessing the text and legislative history of the statute, one set of Colorado commentators has concluded that the purpose underlying the exception contained in § 8–2–113(2)(d) is "to protect employers from the disruption of operations which occur upon the loss of a key executive or member of his staff." James H. Krendl & Cathy S. Krendl, Noncompetition Covenants in Colorado: A Statutory Solution?, 52 Den. L.J. 499, 532 (1975). In this regard, another commentator has noted, "By allowing employers to require executive and management personnel and their professional staff to sign noncompetition agreements, the statute assures employers that the very heart of their enterprise—business plans and high-level strategies—will not be subject to accidental (or intentional) disclosure to a competitor." Christine M. O'Malley, Covenants Not to Compete in the Massachusetts Hi–Tech Industry: Assessing the Need for a Legislative Solution, 79 B.U. L.Rev. 1215, 1236 (Dec.1999)(footnote omitted).20 In accord with this purpose, we conclude that the phrase "professional staff to executive and management personnel" is limited to those persons who, while qualifying as "professionals" and reporting to managers or executives, primarily serve as key members of the manager's or executive's staff in the implementation of management or executive functions.

DISH Network Corp. v. Altomari, 224 P.3d 362, 366 (Colo. Ct. App. 2009)

Porter Indus., Inc. v. Higgins, 680 P.2d 1339, 1342 (Colo. Ct. App. 1984)

As one would expect for exceptions that are to be narrowly drawn, the *Phoenix Capital* and *Atmel* cases interpreting CNC found them unenforceable. The next case gives specific examples of what conforms to the management exception contained in the statute. The finding in *DISH Network Corp. v. Altomari*, 224 P.3d 362, 366 (Colo. Ct. App. 2009) relied on the following facts to discern that the employee was in fact "management personnel": 1) Altomari was the only director, out of nine directors employed by DISH to perform installation and service work, who worked on the commercial side of DISH's business, which was approximately five percent of the business and was a "growth area." 2) He directly supervised fifty out of DISH's 22,000 employees. 3) Although he was several layers under the CEO, he was at the top level of compensation "and at least at the start of the decision-making level." 4) Altomari "had to go through a lot of hoops to get authority to do many, many things, but there was a certain amount of autonomy that [he] was allowed." Inexplicably, due to its ultimate determination that the CNC was void, the trial court determined that Altomari "was a mid-level manager at best," but he "definitely had management responsibilities." Despite that conclusion, the trial court found that Altomari was not the type of manager who triggered the statutory exception.

In a 1984 case which voided the CNC under the management exception in favor of the employee, the specific factual basis was that employee's job title was that of a company representative and salesperson salaried at $1,400 per month. His duties were to negotiate and sell contracts, make sales calls, keep updated contracts filed, and to promote the employer's business. The employee was not "in charge" of the business' existing contracts and did not act in an unsupervised capacity. *Porter Indus., Inc. v. Higgins*, 680 P.2d 1339, 1342 (Colo. Ct. App. 1984)

Blue Pencil Doctrine

Whittenberg v. Williams, 110 Colo. 418135 P.2d 228, (1943).

National Graphics Company v. Dilley, 681 P.2d 546, 547 (Colo. App. 1984).

Blue penciling or judicial reformation, refers to the decision of court to strike sections of a CNC it finds unenforceable and only enforce the acceptable provisions instead of either striking the entire CNC or rewriting the offending portions. Although blue penciling as a phrase has not appeared in any Colorado cases known to this writer, the concept of judicial reformation of a flawed CNC has been accepted. See *Whittenberg v. Williams*, 110 Colo. 418, 135 P.2d 228, (1943). Severability clauses are often used in CNC for this reason, so that the court is aware the parties have agreed to a revision of the contract if certain provisions are found unconscionable. Judge Babcock saved the day once again when he was on the Colorado Court of Appeals, in the case of *National Graphics Company v. Dilley*, 681 P.2d 546, 547 (Colo. App. 1984). In that case he just said no, he refused to reform a CNC that contained no limitation on either duration or geographic scope.

Step-Down Provisions

Step-Down provisions are terms that provide alternative time and area restrictions that allow a court to use the blue-pencil rule to strike overly broad restrictions and have ready alternatives built into the agreement. These work in tandem with severability clauses to allow clean revisions of the agreement that have the parties' approval. The argument against using them is that if the initial terms are too restrictive and need the protection of a step-down provision they should be omitted from the contract. This mechanism has not been specifically tested in Colorado

Thirty-one State Survey Re: Treatment of Physician Non-Compete Provisions

Colorado Physician CNC C.R.S. § 8-2-113(3)

Because CNC applied to physicians create a public policy issue of access to a chosen provider, and can create problems with continuity of care they have been strictly construed and prohibited in many states. The American Medical Association in its Code of Medical Ethics §9.02 discourages CNC for physicians. This position is a long held one, "[f]or the past 60 years, the American Medical Association (AMA) has consistently taken the position that noncompetition agreements between physicians impact negatively on patient care." Paula Berg, Judicial Enforcement of Covenants not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense, 45 RUTGERS L. REV. 1, 6 (1992). An Ohio appellate opinion determined that the AMA Opinions Section 9.2 merely discourages physician CNC and overturned a lower court ruling that relied on the AMA opinion to invalidate a physican CNC, restating the classic contract analysis necessary for CNC as being the appropriate review, *Ohio Urology Inc. v Poll*, 72 Ohio App.3d 446, 451, 594 N.E.2d 1027, 1032 (1991).

Idbeis v. Wichita Surgical Specialists, 112 P.3d 81 (Kan. 2005)

Kansas has also declined to make the AMA opinion determinative on the question of CNC for physicians, in its opinion in *Idbeis v. Wichita Surgical Specialists*, 112 P.3d 81 (Kan. 2005) In its analysis of the issue raised by the doctors on appeal who asked the court to deem the AMA opinion determinative because another clause of their employment agreements required the AMA standards of practice to be adhered to, the Court responded that the AMA provisions do not state that all restrictive covenants are unethical; rather, such covenants are only unethical "if they are excessive in geographic scope and duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of, physician." These requirements were found to be no different than the common-law requirement in Kansas that restrictive covenants be reasonable and not adverse to the public welfare. See *Weber v. Tillman*, 259 Kan. 457 at 462, 913 P.2d 84 (1996); see also *Community Hosp.*

Valley Medical Specialists v. Farber, 194 Ariz. 363, 982 P.2d 1277 (1999)

Medical Clinic v. Udom, 166 S.W.3d 674, 678 (Tenn. 2005)

Group v. More, 183 N.J. 36, 56, 869 A.2d 884 (2005) (AMA standards do not make restrictive covenants per se unethical but adopt a reasonableness standard similar to that applied by courts);

The State of Arizona invalidated a 5-mile, 3 year CNC for a pulmonologist in the 1999 opinion of *Valley Medical Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (1999). In coming to that conclusion the Supreme Court of Arizona relied heavily on the public policy of affording choice to patients. That opinion states at page 1285 that "A court must evaluate the extent to which enforcing the covenant would foreclose patients from seeing the departing physician if they desire to do so. See Karlin, 390 A.2d at 1170; see also AMA Opinions, Section 9.06. ….Concluding that patients' right to see the doctor of their choice is entitled to substantial protection, VMS's protectable interests here are comparatively minimal. …. The geographic scope of this covenant encompasses approximately 235 square miles, making it very difficult for Dr. Farber's existing patients to continue treatment with him if they so desire. After six days of testimony, the trial judge concluded that this restrictive covenant was unreasonably broad and against public policy."

Tennessee also came down on the side of the greater public good for physician choice as opposed to the need to protect the business interest of medical corporations in *Medical Clinic v. Udom*, 166 S.W.3d 674, 678 (Tenn. 2005). That opinion does a lovely job of summarizing the rulings of other states and includes an interesting note about Colorado's statute §8-2-113(3) which the Tennessee Supreme Court read to mean that physician CNC are barred by Colorado law. The opinion at page 680 begins the summary:

> Despite the AMA's stated position that non-compete agreements among physicians are not in the public interest, we find it curious that a majority of states continue to apply a reasonableness standard in evaluating non-compete agreements between physicians, similar to the evaluation of covenants in commercial contexts. See, e.g., *Canfield v. Spear*, 44 Ill.2d 49, 254 N.E.2d 433 (1969) **(Illinois)** (enforcing a covenant which prohibited a dermatologist from practicing within twenty-five miles of former employer); *Duneland Emergency Physician's Med. Group, P.C. v. Brunk*, 723 N.E.2d 963 (Ind.Ct.App.2000) (**Indiana**) (holding a covenant unenforceable upon concluding that employer had failed to show a protectable business interest); *Weber v. Tillman* 259 Kan. 457, 913 P.2d 84 (1996) (**Kansas)** (enforcing a covenant not to compete upon concluding its restrictions were reasonable); *Cmty. Hosp. Group, Inc. v. More*, 183 N.J. 36, 869 A.2d 884 (2005) **(New Jersey)** (enforcing with modifications a non-compete agreement upon determining that employer had a protectable business interest and restrictions were reasonable); *Karlin v. Weinberg*, 77 N.J. 480, 390 A.2d 1161 (1978) (enforcing a covenant not to

Alabama
Arizona
California
Colorado
Delaware
Florida
Georgia
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Missouri
Montana
Nevada
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oregon
Pennsylvania
Tennessee
West Virginia
Wisconsin
Virginia

compete against a physician upon finding that the employer had a legitimate business interest in protecting patient relationships). We note that the largest number of cases dealing with physician's covenants not to compete were decided prior to the AMA's adoption of its current ethical guidelines in 1980. See, e.g., *Odess v. Taylor*, 282 Ala. 389, 211 So.2d 805 (1968) (**Alabama)**; *Canfield v. Spear*, 44 Ill.2d 49, 254 N.E.2d 433 (1969); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (Iowa 1962) (**Iowa**); *Lareau v. O'Nan*, 355 S.W.2d 679 (Ky.1962)(**Kentucky)**; *Willman v. Beheler*, 499 S.W.2d 770 (Mo.1973)(**Missouri)**; *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222 (1979)(**Nevada**); *Karlin v. Weinberg,* 77 N.J. 408, 390 A.2d 1161 (1978) (**New Jersey**); *Lovelace Clinic v. Murphy*, 76 N.M. 645, 417 P.2d 450 (1966)(**New Mexico**); *Gelder Med. Group v. Webber*, 41 N.Y.2d 680, 394 N.Y.S.2d 867, 363 N.E.2d 573 (1977)(**New York**); *New Castle Orthopedic Assoc. v. Burns*, 481 Pa. 460, 392 A.2d 1383, (1978) (**Pennsylvania**); *Oudenhoven v. Nishioka*, 52 Wis.2d 503, 190 N.W.2d 920 (1971)(**Wisconsin**).

We further find it most surprising that several of the jurisdictions to have addressed this issue since 1980 have placed little emphasis on the general ethical concerns cited by the AMA in discouraging physicians' non-compete agreements. See *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 280-81 (Ind.1983) (**Indiana**)(dismissing as merely "self-serving" the argument that ethical considerations should prohibit enforcement of such covenants and offering no discussion of the AMA's stance on the issue.); see also *Rash v. Toccoa Clinic Med. Assocs*., 253 Ga. 322, 320 S.E.2d 170 (1984) (**Georgia**); *Duneland Emergency Physician's Med. Group, P.C. v. Brunk*, 723 N.E.2d 963 (Ind.Ct.App.2000); *Weber v. Tillman* 259 Kan. 457, 913 P.2d 84 (1996) (**Kansas**); *Gant v. Hygeia Facilities Found. Inc*., 181 W.Va. 805, 384 S.E.2d 842 (1989) (**West Virginia**).

Nevertheless, several states, emphasizing public policy concerns, have subjected these covenants to closer scrutiny than non-compete agreements in other contexts. See *Valley Med. Specialists v. Farber,* 194 Ariz. 363, 982 P.2d 1277 (1999) (**Arizona**) (stating that the physician/patient relationship is "special and entitled to unique protection"); *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C.App. 21, 373 S.E.2d 449, 455 (1988) (**North Carolina**) (stating that with respect to the doctor/patient relationship, the court was "extremely hesitant to deny the patient-consumer any choice whatsoever"); *Ohio Urology, Inc. v. Poll,* 72 Ohio App.3d 446, 594 N.E.2d 1027 (1991) (**Ohio)** (stating that the physician/patient relationship is entitled to unique protection, therefore physician's non-compete agreements will be "strictly construed" for reasonableness); see also 681*681 *Ellis v.*

McDaniel, 95 Nev. 455, 596 P.2d 222 (1979) (**Nevada**); *Statesville Med. Group, P.A. v. Dickey,* 106 N.C.App. 669, 418 S.E.2d 256 (1992) (**North Carolina**) .

> Also, three states have in recent years enacted statutes totally prohibiting non-compete clauses in physicians contracts. See Colo.Rev.Stat. Ann. § 8-2-113(3) (2003) (**Colorado**); Del.Code Ann. tit. 6, § 2707 (1993)(**Delaware**); Mass. Gen. Laws Ann. ch. 112, § 12X (1991)(**Massachusetts**). Additionally, antitrust statutes in several states, although not enacted specifically for this purpose, have been interpreted as prohibiting non-compete clauses between physicians. See *Odess v. Taylor*, 282 Ala. 389, 211 So.2d 805 (1968) (**Alabama)**; *Bosley Med. Group v. Abramson*, 161 Cal.App.3d 284, 207 Cal.Rptr. 477 (1984) (**California**); *Bergh v. Stephens*, 175 So.2d 787 (Fla.Dist.Ct.App.1965) (**Florida)**; *Gauthier v. Magee*, 141 So.2d 837 (La.Ct.App.1962) (**Louisiana)**; *W. Montana Clinic v. Jacobson*, 169 Mont. 44, 544 P.2d 807 (1976) (**Montana**); *Spectrum Emergency Care, Inc. v. St. Joseph's Hosp. & Health Ctr.*, 479 N.W.2d 848 (N.D.1992) (**North Dakota**)."

Emphasis for state names added.

As noted in the Tennessee summary, in contrast to the Arizona and Tennessee approaches is the one taken in Georgia, which appears to analyze CNC for physicians using the same contract driven, fact based review that all CNC are scrutinized under, as in *Rash v. Toccora Clinic Medical Assoc.*, 253 Ga. 322, 320 S.E.2d 170(1984)(**Georgia**). In that case the physician was a partner in the practice, and the *Rash* decision discusses the difference between CNC for a partner and for a doctor who is only an employee. That factor was of importance to the analysis, and cites to an Oregon case that ruled similarly calling attention to the mutual benefits and burdens involved in partnership agreements. *McCallum v. Asbury*, 393 P2d 774, 776-7 (Ore. 1964)(**Oregon**). The mutual benefits and burdens for partners as well as the disparity in bargaining power for employees who are not equity holders was noted by the Georgia court as well. Even though Louisiana is mentioned in the Tennessee summary as having antitrust provisions prohibiting CNC for physicians, an appellate decision found otherwise in *Regional Urology L.L.C. v. Price*, 966 So.2d 1087 (La. App. 2nd Cir. 2007). In that case the court rejected the arguments of the doctor regarding the negative affect of physician CNC on the ability of patients to choose their doctor and enforced the CNC, commenting that the legislature could take care of the public policy issues by passing a law that prohibited physician CNC.

Rash v. Toccora Clinic Medical Assoc., 253 Ga. 322, 320 S.E.2d 170(1984)

McCallum v. Asbury, 393 P2d 774, 776-7 (Ore. 1964)

Regional Urology L.L.C. v. Price, 966 So.2d 1087 (La. App. 2nd Cir. 2007)

The state of **Virginia** reviews physician CNC on a case by case basis and enforces only those that are narrowly written and not related to the sale of a business, see Greenbrier Obstetrics and Gynecology v. Zenette Moore Leao, MD (Va. 2009). In a ruling that sent the case back to the trial court for further factual findings, the **Idaho** Supreme Court set out the state's policy on physician CNC in *Intermountain Eye and Laser Centers v Miller*, 2005 WL 23498313 (Idaho 2005) "We adopt the view expressed by the supreme courts of Arizona and New Jersey. The extent of Intermountain Eye's interest in those patients Dr. Miller inherited when he joined the firm and those patients it provided him thereafter is limited by those patients' interests in continuity of care and access to the health care provider of their choice. *Valley Med. Specialists*, 982 P.2d 1277 at 1284 (1999); *Karlin v. Weinberg*, 390 A.2d 1161,at 1171 (1978). The reasonableness of the non-compete provision and practice fee was not evaluated against these interests and, therefore, a trial is necessary to determine whether the prohibition and practice fee are no more restrictive than necessary to protect these interests.",

Intermountain Eye and Laser Centers v Miller, 2005 WL 23498313 (Idaho 2005)

Since the *Medical Center v. Udom, supra,* case in 2005 which cites Iowa as one of the many states which relied on opinions upholding physician CNC issued prior to the AMA guidelines, the Iowa Court of Appeals has issued an opinion that refused to enforce CNC in a physician employment agreement. The opinion in *Board of Regents v. Warren*, 2008 WL 5003750 (Iowa Ct. App. 2008)(final publication decision pending) held that a CNC prohibiting an oncologist from practicing in Cedar Rapids, which as been designated by the federal government as underserved by oncologists, was prejudicial to the public interest. The Court also noted that UIHC failed to present any evidence that it had promoted Dr. Warren's services, expended money to obtain patients for him, or provided him with any unique training.

Board of Regents v. Warren, 2008 WL 5003750 (Iowa Ct. App. 2008)

Even though other sources indicate that Colorado has definitively prohibited physician CNC, the only post C.R.S. 8-2-113(3) case on the books is *Wojtowicz v. Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (1997). The analysis in that case found the CNC defective because the liquidated damages definition was too speculative and could not be enforced—thereby taking it out from under the allowed exception. In addition, upon information and belief, several large health care organizations in Colorado routinely place their employee physicians under CNC, perhaps they are relying on the language of the exception that CNC for doctors are only prohibited "between physicians". The limitations of those CNC may well be tested in the next few years as they become more prevalent for non-equity physicians.

Wojtowicz v. Greeley Anesthesia Services, P.C., 961 P.2d 520 (1997