Upholding the Traditional Test of Reason in Analyzing the Enforceability of Covenants Not to Compete in Physicians' Contracts:

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

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I. PRIOR LAW

The majority of American jurisdictions apply state contract law in analyzing the validity and enforceability of covenants not to compete in physician employment contracts.[1] Under contract law, these jurisdictions have adopted a "reasonableness test."[2] The determination of reasonableness is a question of law.[3] A minority of jurisdictions does not apply a test of reason, but instead have enacted statutes prohibiting noncompetition covenants, with limited exceptions,[4] or have interpreted state antitrust statutes as prohibiting such covenants, with limited exceptions.[5]

In 1960, the American Medical Association (AMA)[6] published an opinion stating that there is no ethical ban against "reasonable agreement[s] not to practice within a certain area."[7] In 1971 and again in 1972, the AMA refused to declare a complete ban of all such restrictive covenants.[8] In 1980, the AMA adopted the position, still effectual today, that covenants not to compete are not in the public interest since they "restrict competition, disrupt continuity of care, and potentially deprive the public of medical services."[9] The AMA provided such covenants are only unethical if they are "excessive in geographic scope and duration" or if they do not support a patient's right of free choice of a physician.[10] The Tennessee Board of Medical Examiners,[11] the statutory agency responsible for supervising physicians in Tennessee, has adopted the AMA Code of Medical Ethics as a "regulatory policy."[12] Thus, a violation of the AMA Code amounts to a violation of Tennessee's public policy.[13]

One of the first cases to address contracts with a covenant not to compete by Tennessee courts was *Turner v. Abbott*,[14] in which the defendant dentist entered into an employment contract with a covenant not to open an office or practice dentistry in the same town and immediate vicinity as the plaintiff's office after ceasing to work for plaintiff.[15] To determine the enforceability of such noncompetition covenants, the *Turner* court developed the following rule:

A covenant not to pursue one's trade or profession, with reasonable limits on time and place, is enforceable as not contrary to public policy.[16] The court found that the covenant in this case did not impose a great burden on the defendant and was in no way harmful to the public interest, and was, thus, reasonable and enforceable.[17]

In *Allright Auto Parks v. Berry*,[18] the Tennessee Supreme Court set forth four factors to be considered in the determination of whether a noncompetition covenant is valid and enforceable: 1) consideration supporting agreement, 2) threatened danger to employer in the absence of such an agreement, 3) economic hardship imposed on employee by such a covenant, and 4) whether or not such a covenant is inimical to public interest.[19] Covenants not to compete are not favored by law because they are restraints of trade, but are not considered to be per se invalid, and will be enforced if found to be reasonable.[20] The modern trend of courts is to construe covenants not to compete favorably to the employee.[21]

Additionally, for a noncompetition covenant to be enforceable, there must be time and territorial limits, which are sufficiently narrow to protect the employer's business interests.[22] In *Allright*, the noncompetition covenant prohibited the defendant from working in any of the 46 cities in which his former employer operates for a period of five years.[23] However, during his employment, the defendant had only worked in three of these cities.[24] The court found that this covenant restricted the defendant employee from territory in which he/she never worked for the former employer and was, thus, unreasonable and unenforceable because the limitation was overly broad and unnecessary to protect the employer's business interests.[25]

These factors were reiterated in *Hasty v. Rent-A-Driver*[26], in which the Tennessee Supreme Court found that the prevention of ordinary competition cannot be a "threatened danger," or a legitimate protectable business interest.[27] Rather, the employer must have required

the covenant in order to prevent future unfair competition as a result of advantages the employee may gain throughout his employment.[28] Other legitimate interests recognized by the *Hasty* court, as well as by many other courts,[29] include trade secrets and other confidential information.[30] Customer contacts,[31] specialized training,[32] referral sources,[33] and good will[34] are additional interests that have been distinguished as protectable by noncompetition covenants.

Other jurisdictions have adopted essentially the same reasonableness test, requiring consideration of four different factors: 1) does the covenantee (employer) have a legitimate protectable business interest, 2) is the covenant reasonably narrow in scope and time to protect that interest, 3) will enforcement of the covenant unduly burden the covenantor (employee), and 4) will enforcement of the covenant be adverse to the public interest.[35] Some jurisdictions have ruled that contracts must be supported by consideration[36], while others have found no such requirement,[37] in order for the covenant to be enforceable. Though there may be minute differences among factors considered by jurisdictions, the ultimate purpose of the test remains the same: "to balance the opposing objective of promoting free economic competition and protecting employers from unfair competition and upholding freedom of contract."[38]

In *Iredell Digestive Disease Clinic v. Petrozza*,[39] if the covenant not to compete was enforced, the defendant physician would be unable to practice, creating a monopoly for the former employer, which may lead to increased costs, a shortage of adequate health care, and a denial of patient choice.[40] The court determined since this would constitute substantial harm, not mere inconvenience, to the public, the public's interest in adequate health care outweighs the parties' freedom of contract.[41] The burden to prove substantial public harm is on the party seeking relief.[42] The dissent asserted that the availability of other doctors should be considered

in conjunction with the importance of protecting an establishment which one has built up and the desire not to allow one to benefit from another's labor.[43]

In a minority of jurisdictions, some courts have enacted state statutes banning such covenants, with limited exceptions,[44] while other courts have interpreted state antitrust statutes as providing a blanket prohibition of covenants not to compete, unless specifically statutorily authorized.[45] In *Bosley Med. Group*,[46] the court found that the State of California had abandoned a reasonableness test to determine the validity of covenants not to compete in 1872, when the legislature enacted Civil Code sections addressing such.[47] Since that time, any covenant not to compete has been found to be void unless specifically authorized by the relevant sections.[48] In *Bosley*, there was a covenant not to compete and a stock purchase agreement.[49] The court agreed with the defendant that the stock purchase plan was just an attempt to circumvent the State's established policy and found the covenant to be unenforceable.[50]

In *Bergh*,[51] the court found that the State of Florida had enacted statutes, declaring that contracts by which one is restrained from exercising lawful profession, trade, or business are void unless falling within one of two subsections.[52] The plaintiff contended the covenant in this case fell within one of these subsections exemptions, but the court found the subsection did not address exercise of profession or trade, only business.[53] Thus, the court found the covenant was unenforceable as being violative of the State antitrust statute.[54]

II. THE COURT'S ANALYSIS

In *Murfreesboro Medical Clinic v. Udom*,[55] the Tennessee Supreme Court held that all covenants not to compete in physicians' employment contracts are void and unenforceable, unless specifically provided for by statute.[56] First, the court identified the test of reason enumerated by the court in *Allright Auto Parks*[57] and *Hasty*,[58] which reflects that a covenant will

be enforced if there is a legitimate business interest and the covenant reasonably protects that interest.[59] The court found that noncompetition covenants in the medical profession, similar to the legal profession, generate many concerns about the public good.[60] The concerns identified are that such covenants may lead to less physicians practicing in a particular community, resulting in decreased health care access and competition, and, thus, higher costs and reduced quality of care.[61] The court also highlights the AMA's position, since 1980, that covenants not to compete are not in the public interest.[62]

Next, the court expresses its surprise that courts continue to apply the established reasonableness test to determine the validity of noncompetition covenants on a case by case basis, with little or no reliance on the AMA's ethical concerns.[63] The court goes on to find support for its position in cases in which the courts found the relationship between a doctor and patient to be entitled to "unique protection" and, thus, physicians' noncompetition agreements should be "strictly construed."[64] The court also emphasizes the fact that Colorado, Delaware, and Massachusetts have enacted statutes[65] providing for a blanket prohibition of covenants not to compete in physicians' employment contracts, as well as the fact that courts in other jurisdictions have construed state antitrust statutes as applicable to and prohibitive of such covenants between physicians.[66]

The court uses these decisions to transition into a discussion of Tennessee Code Annotated section 63-2-204,[67] which validates noncompetition covenants in physicians' employment contracts in two limited circumstances, subject to several conditions: 1) when the employer is a hospital or an affiliate of such,[68] or 2) when the employer is a "faculty practice plan."[69] The court found that allowing for only two exceptions to the prohibitive statute, considering it was well known that such noncompetition covenants were disfavored by state law

and completely prohibited in the legal profession, reflects the legislature's hesitation to find such covenants as valid and enforceable.[70]

Finally, the court related the medical profession to the legal profession, as both generate relationships and dealings that are "consensual, highly fiduciary, and peculiarly dependent on the patient's or client's trust and confidence in the physician consulted or attorney retained."[71] The court reasoned that consequently, there were important public policy implications in enforcing covenants not to compete, since a patient's or client's right to choose and right to continue established relationships in such professions are "fundamental" and cannot be restricted.[72] These public policy concerns, in conjunction with reliance on the AMA's ethical standards[73] and on the state's prohibitive statute,[74] led the court to conclude that covenants not to compete in physician employment contracts are unenforceable, absent statutory authorization.[75]

The dissent does not believe that Tennessee statute,[76] by specifically validating noncompetition covenants in two circumstances, thereby prohibits enforcement of such covenants in all other circumstances in physician employment contracts.[77] The dissent analyzes the legislative history behind the addition of subsections (d) and (e), which describe the two circumstances in which restrictive covenants are allowed in physicians contracts, and concludes that the addition of the subsections did not substantively change the law, merely clarified pre-existing law, which permitted covenants not to compete in some physician employment contracts.[78] This reflects the legislature's intent to regulate only some covenants, as opposed to providing for an outright ban of all such covenants.[79]

The dissent further asserts that the court does not establish the ethical standards for physicians, as it does for attorneys, but rather, the state Board of Medical Examiners does so.[80] The dissent also believes that noncompetition covenants that are not addressed statutorily

addressed may be deemed enforceable if they are found to be reasonable and not adverse to the public interest, in accordance with the traditional test of reason.[81] The dissent agrees with the jurisdictions that scrutinize restrictive covenants in physicians' employment contracts more closely than covenants not to compete in commercial contexts.[82]

The dissent finds that in applying this test, discussed above in Section I, the time and territorial limitations of Tennessee Code Annotated section 63-2-204[83] may be "instructive in determining the reasonableness of the restriction at issue."[84] The dissent finds the territorial limitation of 25 miles is overly broad to protect MMC's interest in protecting its patient base, the restriction imposes an undue hardship on Dr. Udom, and there is no harm to the public.[85] Thus, the dissent concludes that in weighing all of these considerations, this particular covenant is unreasonable and unenforceable.[86]

III. PERSONAL ANALYSIS

The majority in *Murfreesboro Medical Clinic v. Udom*[87] departs from the common law analysis of reasonableness and instead relies on an improper interpretation of both the AMA's Code of Medical Ethics[88] and Tennessee Code Annotated § 63-6-204,[89] placing Tennessee in the minority of jurisdictions.[90] By abandoning the traditional reasonableness test, which guides courts through a comprehensive, factual analysis of a covenant not to compete on a case-by-case basis, the court fails to adequately consider the possible repercussions of allowing Dr. Udom to practice in the restricted area. In its broad adoption of essentially a complete ban on such covenants, the court also fails to address the impact of its decision on the medical community, in regards to both covenants already in place in contracts and those that may no longer be formed and enforced.[91]

As discussed in the dissent, the legislative history of Tennessee Code Annotated § 63-6-204[92] does not support the majority's construction, since it was not the legislature's intent for the statute to provide for a complete ban of covenants not to compete in physicians' employment contracts.[93] The court properly discusses the AMA's position on such covenants, as not in the public interest, but construes it in an improper manner. Its curiosity as to why other courts have not relied heavily on it may have been alleviated by conducting a thorough analysis of the AMA's position.

Though the court makes a compelling argument describing the similarities in lawyer/client and doctor/patient relationships, covenants not to compete are distinctive among the professions in that the American Bar Association (ABA) has expressly prohibiting almost all of them in DR 2-108(A) of the ABA Model Code of Professional Responsibility[94], while the AMA has only discouraged such covenants.[95] When Section 9.02 is read in context, it is improper to conclude that the AMA intended to ban all noncompetition covenants.[96] If this was the AMA'a actual intent, it would have simply expressly stated as such.[97] If the court had properly construed the AMA's position, that "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,"[98] it would have been evident that it essentially mirrors the common law test that such covenants be reasonable and not adverse to the public interest to be enforceable.[99]

A proper comprehensive analysis per the state's common law reasonableness test would have required the court to consider whether there was consideration, whether Murfreesboro Medical Clinic (MMC) had a legitimate business interest protectable by this covenant, was the covenant reasonable in time and geographic scope, would enforcement of the covenant result in

economic hardship on Dr. Udom, and would enforcement of the covenant cause public harm, supporting enforceability of the covenant.[100] This approach would also have allowed for consideration of further information, such as the fact that Dr. Udom did not terminate the contract, but rather MMC did so for no stated reason, and that Dr. Udom attempted to obtain employment as a hospitalist,[101] believing since he would not be in competition with MMC for patients, it would not be violative of the covenant.[102] Consideration of all of these factors could possibly have resulted in the court finding the covenant not to compete was unenforceable,[103] if not outweighed by the public's interest in a patient's right to free choice of a physician.[104]

Instead, the *Udom* court took an approach which ignored decades of precedent and resulted in an unnecessarily broad and questionable ban on covenants not to compete. By completely banning any such covenants not specifically statutorily authorized, the court abandons any consideration of reasonableness and the impact on the public, which may have rendered the covenant as enforceable under common law. Additionally, the court does not define the scope of its decisions. Two of the three state statutes cited by the court in support of its decision to ban such covenants actually validate them when there is a provision allowing for recovery of compensation.[105] However, the *Udom* court does not address the "buy-out" clause at all and provides no guidelines on whether the inclusion of such a clause would enable employers to create enforceable covenants not to compete in physicians' employment contracts in the state of Tennessee.[106]

In allowing such an exception, the *Udom* court's decision would have provided private medical practice groups with a means of protecting current investments they have made in recruiting and hiring physicians, as well as how they may protect such investments in the future.[107] However, by failing to provide any such guidelines, or even any consideration on the

relatively important issue, the court's decision fails to provide such groups any such protection. Private medical practice groups can invest up to $100,000 in recruiting, hiring, and providing specialized training to new physicians and use noncompetition covenants not as a means to prevent free competition or to limit free choice, but to protect such large investments.[108] The *Udom* court's complete ban leaves such groups with little recourse for protecting these investments through contracts and enables physicians to obtain specialized training from one employer, terminate this employment, and then use that training to immediately and unfairly compete with the former employer. Thus, such a ban could have a significant impact on how medical practice groups conduct their day to day business and how physicians go about obtaining medical training. Such an open-ended opinion leaves many questions that may only be addressed by the Tennessee Board of Medical Examiners.[109]

IV. CONCLUSION

In *Murfreesboro Medical Clinic v. Udom*,[110] the Supreme Court of Tennessee held that covenants not to compete in physicians' employment contracts are void and unenforceable, unless specifically authorized by statute. In doing so, the court relied on an improper interpretation of the AMA Code of Medical Ethics[111] and the Tennessee statute,[112] and abandoned the traditional, comprehensive test that such covenants will be enforced if found to be reasonable and not adverse to the public interest.[113] The decision will have a significant impact on the medical community by creating uncertainty in how private medical practice groups may conduct their daily business and protect their investments from now on. Such a broad decision, providing physician employers little guidance as to alternative means of protecting legitimate business interests and leaving many questions unanswered as to its scope, awaits either affirmation, rejection, or clarification by the state Board of Medical Examiners.

[1] Arthur S. Di Dio, *The Legal Implications of Noncompetition Agreements in Physician Contracts*, 20 J. Leg. Med. 457, 458 (1999).

[2] *Id.* at 458.

[3] *Duneland Emergency Physician's Medical Group v. Brunk*, 723 N.E.2d 963, 966 (Ind. Ct. App. 2000) (citing *Raymundo v. Hammond Clinic Ass'n.*, 449 N.E.2d 276, 280 (Ind. 1983).

[4] Colo. Rev. Stat. Ann. § 8-2-113 (2005); Del. Code Ann. tit. 6, § 2707 (2005); Mass. Gen. Laws Ann. ch. 112, § 12X (2006).

[5] *See Bosley Med. Group v. Abramson*, 207 Cal. Rptr. 477, 480 (Cal. App. 2nd Dist. 1984); *Bergh v. Stephens*, 175 So. 2d 787, 788-789 (Fla. 1st Dist. App. 1965); *Gauthier v. Magee*, 141 So. 2d 837, 841 (La. App. 4th Cir. 1962); *W. Montana Clinic v. Jacobson*, 544 P.2d 807, 811-812 (Mont. 1976); *Spectrum Emergency Care, Inc. v. St. Joseph's Hosp. & Health Center*, 479 N.W.2d 848, 851-852 (N.D. 1992); *Odess v. Taylor*, 211 So. 2d 805, 810-812 (Ala. 1968).

[6] The AMA was founded on May 7, 1847 and has become the nation's largest medical association, serving as an advocate of the profession itself, as well as of physicians and patients. *See Founding of the American Medical Association*, http://www.ama-assn.org/ama/pub/category/print /12982.html (last updated Mar. 10, 2005).

[7] Paula Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 Rutgers L. Rev. 1, 7 (1992).

[8] *Id.* at 7-8.

[9] *See* AMA Code of Medical Ethics § E-9.02 (1998).

[10] *Id. See also id.* at § E-9.06 (emphasizes importance of free choice of a physician and free competition among physicians).

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[11] *See* Tenn. Code Ann. § 63-6-101 (2005).

[12] *Swafford v. Harris*, 976 S.W.2d 319, 321 (Tenn. 1998).

[13] *Id.*

[14] 94 S.W. 64 (Tenn. 1906).

[15] *Id.*

[16] *Id.* at 66.

[17] *Id.* at 69.

[18] 409 S.W.2d 361 (Tenn. 1966).

[19] *Id.* at 363.

[20] *Id. But see Shankman v. Coastal Psychiatric Assoc.*, 368 S.E.2d 753, 753-754 (Ga. 1988) (Smith, J., dissenting) (similar strong public policy contracts in physicians and lawyers contracts, so restrictive covenants in a medical contract should be held invalid per se); *Karlin v. Weinberg*, 390 A.2d 1161, (1978) (Sullivan, J., dissenting) (restrictive covenants should be held as invalid per se in light of the strong, personal and sensitive relationship between a physician and patient).

[21] *Allright*, 409 S.W.2d at 365.

[22] *Id.* at 363.

[23] *Id.* at 364.

[24] *Id.*

[25] *Id.* at 363. *See also Intermountain Eye and Laser Centers v. Miller*, 127 P.3d 121, 128 (Idaho 2005) (citing *Insurance Center v. Taylor*, 499 P.2d 1252, 1255 (Idaho 1972) (blue pencil rule enables courts to modify covenants overly broad in some terms, rendering covenants enforceable); *but see The Community Hospital Group v. More*, 869 A.2d 884, 901 (N.J. 2005) (Rivera-Soto, J., concurring in part and dissent in part) (court's blue-penciling of geographic

limits of restrictive covenant, which permitted conduct otherwise restricted by the original covenant, render it meaningless).

[26] 671 S.W.2d 471, 472-473 (Tenn. 1984).

[27] *Id.* at 473.

[28] *Id. See also Weber v. Tillman*, 913 P.2d 84, 89 (Kan. 1996) (finding that a noncompetition covenant seeking to avoid ordinary competition is unreasonable and unenforceable).

[29] *E.g. Gant v. Hygeia Facilities Found*, 384 S.E.2d 842, 845 (W.Va. 1989).

[30] *Hasty*, 671 S.W.2d at 473.

[31] *Compare e.g. Weber*, 259 Kan. at 91 (recognizing customer contacts as legitimate protectable interest) *with e.g. Valley Medical Specialists v. Farber*, 982 P.2d 1277, 1284 (Ariz. 1999) (personal relationship between patient and physician limits an employer's interest in customer contacts in the health care field).

[32] *See e.g. Hasty*, 671 S.W.2d at 473; *The Community Hospital Group, Inc.* 869 A.2d at 897 (finding a protectable interest in the investment in training of a physician).

[33] *See e.g. Valley Medical Specialists*, 982 P.2d at 1284.

[34] S*ee e.g. Gant*, 181 S.E.2d at 846 (recognizing customer goodwill and special information and training provided to the employee as protectable business interests).

[35] Berg, *supra* n. 7, at 15-30.

[36] *See e.g. Allright Auto Parks*, 409 S.W.2d at 363 (requiring the agreement be supported by consideration).

[37] *See e.g. Lareau v. O'Nan*, 355 S.W. 2d 679, 680-681 (1962) (finding no consideration requirement for a noncompetition covenant to be enforceable in equity, based on precedents).

[38] Berg, *supra* n. 7, at 15.

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[39] 373 S.E. 2d 449 (N.C. App. 1988).

[40] *Iredell*, 373 S.E. 2d at 455. *See Statesville Medical Group v. Dickey*, 418 S.E.2d 256, 259 (N.C. App. 1992) (factors to consider in determining harm to public include the shortage of specialists in field in restricted area, the impact of the plaintiff establishing a monopoly in the area, including impact on fees in future and availability of a doctor at all times for emergencies, and public interest in having choice in selection of a doctor); *New Castle Orthopedic Associates v. Burns*, 392 A. 2d 1383, 1387-1388 (Pa. 1978) (refused to enforce a noncompetition covenant where there was a shortage of such specialists in the area and patients had been delayed in obtaining appointments); *Odess*, 211 So. 2d at 809-810 (finding a shortage of specialists and that public interest was a priority consideration); *Ellis v. McDaniel*, 596 P. 2d 222, 225 (Nev. 1979) (refusing to enforce a noncompetition covenant against specialists who developed and maintained a neonatal unit that would suffer without their services); *but see e.g. Lareau*, 355 S.W. 2d at 681 (despite shortage of doctors, enforcement of the covenant will not deprive the community of any medical services it had before the contract was made).

[41] *Iredell*, 373 S.E.2d at 455.

[42] *E.g. Cogley Clinic v. Martini*, 112 N.W.2d 678, 682 (Iowa 1962).

[43] *Iredell*, 373 S.E.2d at 457 (citing *Scott v. Gillis*, 148 S.E. 315, 317-318 (N.C. 1929)). *See also Canflied v. Spears*, 254 N.E.2d 433, 435 (Ill. 1969) (a young doctor accepted benefits of gaining experience from older doctor, so must accept burdens as well); *Willman v. Beheler*, 499 S.W.2d 770, 777 (Mo. 1973) (enforced restrictive covenant despite evidence of shortage of physicians because of counterbalancing public policy that there was shortage of medical professionals in most communities, so would result in increase in providers in another area).

[44] Colo. Rev. Stat. Ann. § 8-2-113; Del. Code Ann. tit. 6, § 2707; Mass. Gen. Laws Ann. ch. 112, § 12X.

[45] *See Bosley Med. Group*, 207 Cal. Rptr. at 480; *Bergh*, 175 So. 2d at 788-789; *Gauthie*, 141 So. 2d at 841; *W. Montana Clinic*, 544 P.2d at 811-812; *Spectrum Emergency Care, Inc.*, 479 N.W.2d at 851-852; *Odess*, 211 So. 2d at 810-812.

[46] 207 Cal. Rptr. at 480.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 479.

[50] *Id.* at 482.

[51] 175 So. 2d 787 (Fla. 1st Dist. App. 1965).

[52] *Id.* at 788-789.

[53] *Id.* at 790.

[54] *Id.* at 791.

[55] 166 S.W.3d 674 (Tenn. 2005).

[56] *Id.* at 676.

[57] *Allright*, 409 S.W.2d at 363.

[58] *Hasty*, 671 S.W.2d at 472-473.

[59] *Allright*, 409 S.W.2d at 363.

[60] *Murfreesboro Medical Clinic*, 166 S.W.3d at 679 (citing *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 529-530 (Tenn. 1991)) (covenants in attorney employment contract are void and unenforceable in light of the American Bar Association (ABA) ethics rules); s*ee also*

ABA Model Code of Professional Responsibility § DR 2-108 (prohibits restraint of trade in the legal profession).

[61] *Murfreesboro Medical Clinic*, 166 S.W.3d at 679.

[62] *See* AMA Code of Medical Ethics § E-9.02.

[63] *Murfreesboro Medical Clinic*, 166 S.W.3d at 680 (citing *Raymundo*, 449 N.E.2d at 280-281; *Rash v. Toccoa Clinic Med. Assocs.*, 320 S.E.2d 170 (Ga. 1984); *Duneland Emergency Physician's Med. Group, P.C.*, 723 N.E.2d 963; *Weber*, 913 P.2d 84; *Gant*, 384 S.E.2d 842).

[64] *Murfreesboro Medical Clinic*, 166 S.W.3d at 680-681 (citing *Valley Medical Specialists*, 982 P.2d at 1277; *Iredell Digestive Disease Clinic*, 373 S.E.2d at 455; *Ohio Urology, Inc. v. Poll*, 594 N.E.2d 1027, 1031 (Ohio App. 10th Dist. 1991); *Ellis*, 596 P.2d at 224-225; *Statesville Med. Group, P.A.*, 418 S.E.2d at 258).

[65] Colo. Rev. Stat. Ann. § 8-2-113; Del. Code Ann. tit. 6, § 2707; Mass. Gen. Laws Ann. ch. 112, § 12X.

[66] *Murfreesboro Medical Clinic*, 166 S.W.3d at 681 (citing *Bosley Med. Group*, 207 Cal. Rptr. at 480; *Bergh*, 175 So. 2d at 788-789; *Gauthie*, 141 So. 2d at 841; *W. Montana Clinic*, 544 P.2d at 811-812; *Spectrum Emergency Care, Inc.*, 479 N.W.2d at 851-852; *Odess*, 211 So. 2d at 810-812).

[67] Tenn. Code Ann. §63-6-204 (2005).

[68] Tenn. Code Ann. §63-6-204 (d).

[69] Tenn. Code Ann. §63-6-204 (e).

[70] *Murfreesboro Medical Clinic*, 166 S.W.3d at 683.

[71] *Id.* at 683 (citing *Karlin*, 390 A.2d at 1171) (Smith, J., dissenting). *See also Shankman.*, 368 S.E.2d at 753-754 (Smith, J., dissenting).

[72] *Murfreesboro Medical Clinic*, 166 S.W.3d at 683.

[73] AMA Code of Medical Ethics § E-9.02, 9.06.

[74] Tenn. Code Ann. §63-6-204.

[75] *Murfreesboro Medical Clinic*, 166 S.W.3d at 684.

[76] Tenn. Code Ann. §63-6-204.

[77] *Murfreesboro Medical Clinic*, 166 S.W.3d at 684 (Holder, J., dissenting).

[78] *Id.* (citing *Med. Educ. Assistance Corp. v. Mehta*, 19 S.W.3d 803, 813 n. 2 (Tenn. Ct. App. 1999)) (quoting Sen. Crowe's testimony at the Senate General Welfare Committee on May 21, 1997).

[79] *Murfreesboro Medical Clinic*, 166 S.W.3d at 684 (Holder, J., dissenting).

[80] *Id.* at 685.

[81] *Id.*

[82] *Id.* (citing *Valley Med. Specialists*, 982 P.2d 1277, 1282-1283; *Iredell Digestive Disease Clinic*, 373 S.E.2d 449, 455; *Ohio Urology, Inc.*, 594 N.E.2d 1027, 1032).

[83] Tenn. Code Ann. §63-6-204.

[84] *Murfreesboro Medical Clinic*, 166 S.W.3d at 686 (Holder, J., dissenting).

[85] *Id. at 685-686.*

[86] *Id.* at 686.

[87] 166 S.W. 3d 674 (Tenn. 2005).

[88] AMA Code of Medical Ethics § E-9.02, 9.06.

[89] Tenn. Code Ann. §63-6-204.

[90] *See* Walter E. Schuler, *Knock Out? Supreme Court deals a blow to non-compete for docs, but this fight is not over*, 41 Tenn. B.J. 16, 26 (2005).

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[91] *See* Karen Ott Mayer, *Tennessee Supreme Court Strikes Down Physician Non-Competition Agreements*, Nashville Medical News 3 (Aug. 2005).

[92] Tenn. Code Ann. §63-6-204.

[93] *Murfreesboro Medical Clinic*, 166 S.W.3d at 684 (Holder, J., dissenting).

[94] ABA Model Code of Professional Responsibility § DR 2-108. *See Dwyer v. Jung*, 137 N.J. Super. 135 (1975) (finding restrictive covenants in attorney employment contract are per se invalid).

[95] *See Ohio Urology, Inc.*, 594 N.E.2d at 1030-1031.

[96] *Id.*

[97] *Id.*

[98] AMA Code of Medical Ethics, § E-9.02.

[99] *See Ibdeis v. Wichita Surgical Specialists*, 112 P.3d 81, 88 (Kan. 2005) (even if the AMA provisions were incorporated into the physician's employment contract, the contract was not automatically invalidated and the Court must still conduct the common law test of reason to determine enforceability).

[100] *See Allright*, 409 S.W.2d at 363.

[101] A hospitalist is a physician, usually an internist, who specializes in the care of hospitalized patients. *The American Heritage Dictionary* (4th ed., 2000). Thus, hospitalists treat patients that are already hospitalized, and are not in competition for patients who seek physicians.

[102] *Murfreesboro Medical Clinic*, 166 S.W.3d at 677.

[103] Covenant could be found to be too broad since MMC prevented Udom from working as a hospitalist, which is distinctive from the employment he performed for MMC and would not constitute Udom competing with MMC for patients. *See Ellis*, 596 P.2d at 224-225 (Covenant

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not to compete was overly broad and unenforceable because it prevented physician from practicing specialty which employer Clinic was not engaged).

[104] *Murfreesboro Medical Clinic v. Udom*, 2004 Tenn. App. Lexis 77, (Tenn. Ct. App. 2004) (citing *Beam v. Ruthledge*, 9 S.E.2d 476, 478 (N.C. 1940).

[105] *See* Colo. Rev. Stat. Ann. § 8-2-113 (3) ("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" are enforceable, though noncompetition covenants among physicians are otherwise void); Del. Code Ann. tit. 6, § 2707 ("provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the principal agreement" are enforceable, though noncompetition covenants among physicians are otherwise void).

[106] *See* Schuler, *supra* n. 90, at 23-24.

[107] *See* Mayer, *supra* n. 91, at 3.

[108] *See* Mayer, *supra* n. 91, at 3.

[109] *See* Schuler, *supra* n. 90, at 25-26.

[110] 166 S.W.3d 674 (Tenn. 2005).

[111] AMA Code of Medical Ethics § E-9.02, 9.06.

[112] Tenn. Code Ann. §63-6-204.

[113] *Allright*, 409 S.W.2d at 363.