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NON-COMPETES AND THE URGENT CARE ACQUISITION

Written by Richard Romero | Jun 11, 2015 | 0 Comments

When a buyer acquires a business from a seller, there is potential for the worry of whether or not the seller will turn around, open up a similar business and take back all of their former clients. In the case of urgent care, the value of patient loyalty is paramount to the success of a location or brand. Therefore, an acquirer of a new business may want to put a non-compete agreement clause in the contract in order to keep the seller from competing in the same marketplace with a similar business.

Rodney Adams, leader of the Professional Liability Defense Team at LeClairRyan says that in the healthcare field, non-compete clauses may be applicable to individual physicians or to an owner of a group of facilities.

Alan Ayers, vice president of Corporate Development at Concentra says that typically, any time assets (i.e. money) are exchanged for other assets (i.e. medical practice), the buyer will want some assurances that the seller will not resume operations and compete within the trade area.

“A non-compete is somewhat of an insurance policy for the buyer. In urgent care, specifically, a physician or operations executive may have relationships with patients, payers and employers as well as knowledge of systems, processes, marketing/sales channels, and data that have value to a prospective buyer. If the seller can take relationships and information and directly compete with the buyer, it diminishes the value of what the buyer has purchased,” Ayers says.

Ayers says a non-compete clause is considered a contract and subject to enforcement like any other contract.

“Without a non-compete, the seller would have a competitive advantage over the buyer by exploiting confidential information about their former employer or businesses’ operations or trade secrets and sensitive information including patient and client lists, development and marketing plans. So long as a non-compete is not unreasonable as to geographic area and time period, courts have generally allowed buyers to enforce non-competes against sellers,” he says.

Adams says in these agreements there should be a time frame and it usually is at least six months, a year, or two or three years. Usually anything longer than that is not enforceable.

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Jonathan Pollard, principle, Jonathan Pollard LLC is a strong advocate for non-compete agreements and he explains why he believes they are so important to the protection of assets on the buyer side.

“Anybody who buys a business needs to have the seller sign a non-compete agreement. This is of paramount importance and in any significant transaction that takes place in today’s marketplace, there will be a sale of a business non-compete agreement,” Pollard says.

“If you acquire a business and you do not require the seller to enter a non-compete agreement, the seller can immediately get back into the marketplace, compete against you and take back all of its old customers.”

Adams explains that in these agreements sometimes when a practice is purchased the goal is to keep the selling physician as a key employee in the practice. Other times it’s an effort to continue employment of the sellers as part of the deal.

“This could be either because it is important to keep a key physician or administrator, or because of intentionally wanting to take them out of the market,” Adams says.

Enforceability does vary by jurisdiction, with some states like California limiting enforceability to the sellers of entire businesses rather the individual employees. According to Ayers, what would be considered “unreasonable” is a non-compete that limits the seller to hold any employment at all.

“This is particularly significant when dealing with physician non-competes. Due to the need for physicians in many communities and in consideration of the investment made in a physician’s medical education, residency, and other training that would limit the physician’s ability to find gainful employment in another field, courts have been hesitant to uphold non-competes that limit a physician’s ability to practice medicine. Generally the remedies for violating a non-compete, that is competing against the former practice, is a cease and desist or restraint of the competitive activity. Monetary damages can also be sought if it can be proven the competitive activity hurt the former employer. The practical consideration in attempting for enforce a non-compete are the attorneys fees and time and attention required relative the true threat or business impact of the competitive activity,” Ayers says.

Ayers goes on to add that even though the seller could be intentionally taken out of the market for a set timeframe, most buyers will refuse to do business without the agreement in place.

“A valuation consists of tangible assets such as furnishings, fixtures and equipment as well as intangible assets such as customer lists, physician contracts, and goodwill. The benefit to the seller of including a non-compete is a higher purchase price. Additionally, a non-compete serves as a good faith gesture, and buyers are typically reluctant to engage in a transaction with a seller if the seller is unwilling to sign a non-compete,” Ayers says.

Adams says that the development of an agreement needs to be crafted very specifically to the jurisdiction that you are in to make sure it is complying with the nuances of that state’s interpretation of non-competes.

“If you are the buyer you want to make sure they are enforceable. If you’re the seller, the broader or more overreaching the better, because then it’s not enforceable. However, if the goal for the buyer is to force a non-compete, then you need to be very careful in crafting those,” Adams says.

“I’ve seen physicians who have sold their practices and sold their clinic and within six months or less, they have gotten the itch or the need to go back to work and they open another office. That’s when you get into the fight over whether or not the non-compete is enforceable or not.”

Pollard says when crafting a non-compete there are a litany of considerations.

“You have to consider choice of law which means you have to consider which state law you will have govern the sale of a business non-compete agreement. Certain states are more favorable than other states. To my knowledge, every state in the union will enforce a non-compete to a certain extent, that is very different than in the employment context. There are certain states that the employment context will not force non-compete agreements, but when it comes to the sale of a business, I believe every one of the 50 states will enforce it to some extent,” Pollard says.

Pollard says a non-compete agreement is above all, solid protection for your business and the good will gained in the acquisition.

“You need to have something in the sales agreement that specifically indicates that you are paying for the company’s good will. You are acquiring their good will and the non-compete agreements are necessary to protect the good will of the acquiring company,” Pollard says.

Blayne Rush

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