

Montana Supreme Court Upholds \$2.3 Million Judgment Against Former Employees Subject to Restrictive Covenant

by Steve Bell, Gabrielle Wirth, Ben Kappelman, and Briana Al Taqatqa

Montana is often perceived as unfriendly to restrictive covenants in employment agreements. But in a decision last week, the Montana Supreme Court showed its willingness to enforce those covenants, when they contain reasonable terms and do not pose a complete bar to departing employees' ability to practice their professions.

On July 14, in *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn*, 2020 MT 179, the court affirmed a judgment in excess of \$2.3 million against former employees of an accounting firm who left the firm and took clients with them. Those employees had agreed to pay their former firm a fee if they serviced the firm's clients within one year of departing:

POST-EMPLOYMENT REPRESENTATION OF CLIENTS. If this Agreement is terminated for any reason and [the employee] provides professional services . . . in competition with [the accounting firm] the [employee] agrees as follows:

a. To pay to [the firm] an amount equal to one hundred percent (100%) of the gross fees billed by [the firm] to a particular client over the twelve month period immediately preceding such termination, if the client was a client of [the firm] within the twelve month period prior to [the employee]'s leaving [the firm's] employment (hereinafter "particular client"), and the particular client is thereafter within one year of date of termination served by [the employee], [the employee]'s partners, or any professional services organization employing the [employee].

....

f. For purposes of this Section, [an employee] shall be considered to be in competition with [the firm], by providing professional services within the county of the [employee]'s primary office (the office through which the [employee] provides the majority of his professional services [while working for the firm]), or any county contiguous thereto.

Put differently, for a year after leaving the firm, if the former employees (1) competed

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with the firm in the counties around their former primary office, and (2) serviced clients the firm had serviced in the twelve-month period before the employees left, then they would owe the firm a fee equal to the gross fees the firm billed those clients in the year before the employees left.

The court recognized this term as a covenant restricting competition, but affirmed the District Court's conclusion that it was enforceable under the three-part test set forth in *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 708 P.2d 577 (1985).

In so holding, the court acknowledged that under Montana law “[c]ontracts that restrain trade are strongly disfavor[ed], and therefore, covenants that act as an absolute prohibition on trade—absent an express statutory exception—are void.” However it went on to state: “when a contract contains a restraint on a person’s ability to practice their profession, but such restraint is not an absolute prohibition,” Montana courts will enforce the covenant if it is reasonable based on three factors announced in *Dobbins*:

1. The covenant should be limited in operation either as to time or place;
2. The covenant should be based on some good consideration; and
3. The covenant should afford reasonable protection for and not impose an unreasonable burden upon the employer, the employee or the public.

The Supreme Court carefully reviewed the District Court's findings with respect to each of the three factors: the covenant was limited in both time and place—it lasted one year and applied to counties around where the former employees practiced for the firm. The court had found there was sufficient consideration for the agreement in a 2016 appeal involving the same parties.

The court thus focused on reasonableness as to the three parties listed in the *Dobbins* test—the employer, the employee, and the public. The court explained that the firm had a legitimate business interest in protecting its client base. The court cited expert testimony that restrictive covenants have been common in the accounting industry for decades and that 100% of gross fees over the preceding twelve months was a common covenant term. The Court noted the District Court's finding that “The reality in this case is the [former employees] had the financial benefit of the [firm’s] client base for over five and a half (5 1/2) years without having paid anything for the income stream generated to them during that time frame. While the [former employees] take the position that the clients they left with are really ‘their’ clients and not ‘[firm]’ clients, this position ignores the reality of the business relationship they entered into.”

Regarding burden on the former employees, expert testimony established that their new business had the financial wherewithal to pay the contractually agreed amount and that they had paid similar fees to purchase client relationships from a different firm. Because the expert had testified that the employees would have been able to service the debt associated with paying their former firm, it did not appear that the burden on them was unreasonable. This also led the court to conclude the covenant did not unreasonably burden the public—the former employees were still able to service any customer, the

former employees just had to pay the firm as they had agreed.

This decision confirms that post-employment covenants limiting a former employee's access to customer-clients are alive and well in Montana. The trifecta of (1) limitations in time or place, (2) supported by some good consideration, and (3) affording reasonable protection to the employer while not imposing an unreasonable burden on the employee or public will result in an enforceable post-employment covenant.