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Examining Restrictive Covenants In Physicians' Contracts

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Contractual covenants restricting employees' post-employment activity are generally disfavored by courts and are only enforced in New York if they are found to be "reasonable." These covenants not only limit competition, to the detriment of customers, but they inhibit the employee's ability to engage in his or her chosen trade or profession. Where restrictive covenants are contained in physicians' employment or partnership agreements, however, additional policy considerations are implicated, potentially subjecting such covenants to even higher judicial scrutiny. Attorneys drafting or reviewing restrictive covenants involving the practice of medicine should be aware of the unique issues at play where those restrictive covenants become subject to court review.

No Per Se Rule for Physicians

In New York, as well as elsewhere, there is a largely unjustified disparity between how courts treat covenants restricting practice among attorneys as compared to covenants restricting physician practices. Covenants restricting an attorney's practice are deemed by New York courts to be per se invalid and unenforceable.[1] Several states have statutorily prohibited covenants restricting a physician's ability to practice, or provide that only monetary but not injunctive relief is available for breach of such covenants.[2] New York, however, has historically enforced these covenants.[3] Examination of the policies behind the rule applied to attorneys reveals that such policies arguably apply equally, if not with greater force, to restrictive covenants involving physicians.

In the absence of legislative action, courts have been hesitant to apply the per se invalidity rule to restrictive covenants involving physicians.

The reasoning behind the rule prohibiting covenants restricting attorney practice is that clients should have the freedom to engage the attorney of their choice, and that an attorney's continuous representation of his or her client should not be disrupted by enforcement of such a covenant. It would seem beyond any doubt that choice and continuity are at least as important when it comes to one's selection of a treating physician as they are when it comes to one's selection of legal counsel.

While a client's selection of counsel is no doubt important, can it really be more important than a patient's selection of the physician who will perform open heart surgery on him or her? Similarly, while there would no doubt be great burden, inconvenience and expense in forcing a client to switch counsel in the middle of a matter because of a change in the attorney's employment situation, is it really greater than the burden on a cancer patient being told that the physician who has been administering chemotherapy to him or her can no longer continue the treatment, or can only do so from a remote location, because of a restrictive covenant?

To be sure, these are extreme examples, but they demonstrate the importance of the physician/patient relationship. In fact, medical research demonstrates that continuity in the physician/patient relationship fosters good health care, whereas the involuntary termination of that relationship can be detrimental to patients' treatment.[4]

In other situations, the law in New York recognizes the importance of the physician/patient relationship and treats the relationship much more akin to the attorney/client relationship. For example, the physician testimonial privilege is quite similar to the attorney/client testimonial privilege. Similarly, the "continuous treatment" doctrine, which affords patients in the midst of receiving medical treatment a toll of the statute of

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limitations applicable to claims against their physicians, largely mirrors the "continuous representation" doctrine applicable to legal malpractice claims. In both instances the law recognizes the importance of the relationship at issue and is designed to ensure the quality and uninterrupted nature of the relationship between the professional and his or her client or patient.

When addressing the disparity between the per se invalidity of attorney restrictive covenants and the reasonableness test applied to physician restrictive covenants, courts usually rely on the New York Rules of Professional Conduct, which deem attorney restrictive covenants to be unethical.[5] In contrast, the American Medical Association, while discouraging physician restrictive covenants and declaring them to be not "in the public interest," stops short of deeming such covenants to be outright "unethical."[6]

Reasonableness Test

Whereas, in the absence of legislative action, courts have been hesitant to apply the per se invalidity rule to restrictive covenants involving physicians, courts have recognized the unique concerns that those restrictive covenants present, and have strictly scrutinized the "reasonableness" of such covenants.[7]

A restrictive covenant will be considered reasonable in New York only if it: (1) is no more restrictive than is required for the protection of the legitimate interest of the employer; (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.[8] While all three of these factors are considered whenever any restrictive covenant is challenged or enforced, physician restrictive covenant cases often emphasize the third factor, in that there are unique public policy considerations at issue in restricting a physician's practice.

One public interest that is often considered in physician restrictive covenant cases is whether there are a sufficient number of other physicians practicing in the particular medical field and geographic area at issue.[9] Courts have considered patient demand and ensuring sufficient medical coverage a significant factor in the reasonableness analysis, and have made clear that they will not enforce a restrictive covenant if as a result, patients would suffer long delays in obtaining medical appointments or would have to travel great distances for medical treatments.

For one extreme example, in *Oak Orchard Community Hospital Center v. Blasco,*[10] the Supreme Court, Monroe County, refused to enforce a restrictive covenant preventing a physician from opening up a medical office where the evidence established that, notwithstanding "the availability of a great many 'family practices'" in the area, defendant's proposed office would be the only "pediatrician" in the Village of Spencerport, N.Y. The court there wrote that "[i]n such circumstances, the third prong of the common-law test, injury to the public is implicated" and that "the proof presented on this motion concerning the shortage of pediatricians in Spencerport on the public interest issue militates strongly in favor of denying the requested preliminary injunction." To place this ruling in perspective, it is worth noting that the Village of Spencerport encompasses a land area of just 1.36 miles.[11]

Additionally, while courts have not adopted a per se invalidity rule for physician restrictive covenants as they have for attorney covenants, judges appear to be mindful of, and receptive to arguments regarding the underlying policy that a patient ought to have the ability to select his or her physician of choice and not to have ongoing medical treatment disrupted as a result of enforcement of a restrictive covenant.[12] In this context, it is a relevant consideration that the party seeking to enforce a restrictive covenant bears the burden of proof with respect to reasonableness, as well as all other elements of his or her claim, and that to obtain a preliminary injunction, this burden must be satisfied by clear and convincing evidence.[13]

Conclusion

While restrictive covenants in physicians' employment and partnership agreements are not subject to the per se invalidity rule that attorneys' covenants are governed by, they do implicate the same public policy concerns as attorneys' restrictive covenants. As a result, counsel drafting such agreements and advising clients about their enforceability should be cognizant of the unique arguments that will likely be made against the enforceability of such an agreement, should the covenant ever be the subject of litigation.

1. See *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, n. 1 (1999).
2. See Mike Kreager, "The Physician's Right in §15.50(B) to Buy Out a Covenant Not to Compete in Texas," 61 *Baylor Law Review* 357, 370-71 (2009)
3. See *Gelder Medical Group v. Webber,* 41 N.Y. 680, 683 (1997).
4. See Paula Berg, "Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense," 45 *Rutgers Law Review* 1, 31-36 (1992) and the authorities cited therein.
5. New York Rule of Professional Conduct 5.6
6. See American Medical Association Opinion 9.02; Paula Berg, "Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense," 45 *Rutgers Law Review* 1, 9 (1992) (quoting letter from Betty Anderson, Special Counsel to AMA (Oct. 1, 1991)).
7. See *Oak Orchard Community Health Center v. Blasco*, 8 Misc.3d 927, n. 3 (Sup. Ct. Monroe Co. 2005).
8. *BDO Seidman v. Hirshberg*, 93 N.Y. 382, 388-89 (1999).
9. See e.g. *Bollengier v. Gulati*, 233 A.D.2d 721, 722 (3rd Dept. 1996); *Horn v. Radiological Health Services*, 83 Misc.2d 446, 453 (Sup. Ct. Suffolk Co. 1975); *Coppa v. Josiane Lederman, M.D.*, 2004 U.S.Dist.LEXIS 6608, *6 (E.D.N.Y. March 11, 2004); *Wellspan Health York Hosp. v. Wellspan Med. Group*, 869 A.2d 990, 999-1000 (Pa. Super Ct. 2005); *The Community Hospital Group v. Jay More, M.D.*, 183 N.J. 36, 61-63 (N.J. Sup. Ct. 2005).
10. 8 Misc.3d 927 (Sup. Ct. Monroe Co. 2005).
11. http:/www.city-data.com/city/Spencerport-New York.html.
12. See *Lowe v. Reynolds*, 75 A.D.2d 967 (3rd Dept. 1980).
13. See e.g. *The Flood Group of L.I. v. Henry J. Bosio & Assocs.*, 2010 N.Y.Misc.LEXIS 1329, **5-6 (Sup. Ct. Nassau Co. Jan. 5, 2010).