Twenty-First Annual ALI CLE (formerly ALI-ABA) Course of Study and Video Webcast

Current Developments in Employment Law

July 24-26, 2014
Santa Fe, New Mexico
La Fonda Hotel

The Enforceability of Physician Non-Competes

by

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BIOGRAPHY

Robert ("Bob") Brian Fitzpatrick is the principal in the law firm of Robert B. Fitzpatrick PLLC in Washington, D.C. where represents clients in employment law matters. Mr. Fitzpatrick has concentrated his practice in employment law disputes for more than fifty years. He has represented clients in individual and class actions. He has represented clients in employment discrimination, workplace harassment, retaliation, age discrimination, FMLA, ADA, whistleblower, wrongful termination, non-compete, trade secrets, Computer Fraud and Abuse Act, and wage and hour claims, among others. He counsels numerous executive clients regarding employment agreements and compensation issues. He has negotiated literally thousands of severance agreements. He is also a frequent speaker on employment law topics, and has written countless articles on employment law, a few of which can be found on his website and his blog, Fitzpatrick on Employment Law.

Prior to entering private practice, Mr. Fitzpatrick served as a staff attorney in the Jackson, Mississippi office of the Lawyers' Committee for Civil Rights Under Law in the late 1960's; as a staff attorney in the Office of General Counsel of the Equal Employment Opportunity Commission in the early 1970's; and with the Washington Research Project (now the Children's Defense Fund) training minority attorneys in the Deep South to litigate employment discrimination cases. He has been in private practice in Washington, D.C. since 1970. He is an avid hiker and kayaker. He is a Fellow of the College of Labor & Employment Lawyers, having been inducted as a Fellow at the first annual induction ceremony in 1996. He has been listed as one of The Best Lawyers in America® for at least 25 continuous years.

He is admitted to practice in all courts of the District of Columbia (Superior Court, D.C. Court of Appeals, and the Federal District Court of the District of Columbia), the Federal District Court for Maryland, the Federal District Court for the Northern District of Mississippi, the Supreme Court of the United States, the Federal Circuit, the Court of Federal Claims, and the United States Courts of Appeals for the District of Columbia as well as the Fourth and Sixth Circuits.

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by Robert B. Fitzpatrick

It is worth noting, as an initial matter, that the American Medical Association has stated that "covenants not to compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services." AMA Opinion 9.02, "Restrictive Covenants and the Practice of Medicine", AMA Code of Medical Ethics (Updated June 1998) (available at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion902.page). The opinion goes on to note 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." *Id.*

There is little precedent regarding the treatment of physician non-competes (or of non-competes in general) in the District of Columbia. In *Deutsch v. Barsky*, the D.C. Court of Appeals was called upon to review a trial court's determination that a non-compete between a dentist and his former employer was void as against public policy. 795 A.2d 669 (D.C. 2002). After finding that there was no *per se* bar to medical (or at least, dental) non-competes, the Court went on to set forth the proper inquiry, and held that, assuming the contract not to compete was otherwise valid, "it must plainly appear that it contravenes public policy before the courts will declare it void upon that ground." *Id.* at 674 (quoting *Godfrey v. Roessle*, 5 App. D.C. 299, 303-04 (D.C. 1895). While the Court did not further address the special circumstances of non-competes in the medical field, its reliance on case law from other professions in reaching its decision that summary judgment in favor of the defendant-dentist was inappropriate reveals that such concerns are muted, at best. *E.g. Erikson v. Hawley*, 12 F.2d 491 (D.C. 1926) (Court enforced ten year non-compete agreement enjoining defendant from practicing orthodontia within D.C.).

That said, there is little precedent in the District of Columbia on this point, and - especially given the lack of specific attention to this issue in *Deutsch*, the enforceability of physician non-competes can fairly be considered an open question. *See* Zulima Farber, *et al.*, "Are Physician Post-Employment Noncompete Agreements Enforceable?", Metropolitan Corporate Counsel (March 1, 2004) (available at: http://www.metrocorpcounsel.com/articles/3746/are-physician-post-employment-noncompete-agreements-enforceable) ("jurisdictions such as the District of Columbia…have no definitive case law regarding physician-noncompete agreements."). This is particularly true when the physician practices in a highly specialized field of medicine if it may be difficult for patients to find an alternate healthcare provider. D.C. is somewhat unique in that many otherwise reasonable geographic restrictions (e.g. restrictions of a 10, 25, or 50 mile radius) would include the entirety of the District of Columbia, and, in many cases, the vast majority of the D.C. metropolitan area. To the extent that the physician at issue practices in a sub-specialty with few other practitioners, the difficulty in obtaining alternative treatment may weigh in favor of blue penciling – or voiding – the non-compete provisions on

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public policy grounds. *See Wheeler v. Fredericksburg Orthopaedic Assocs.*, 44 Va. Cir. 399 (Va. Cir. Ct. 1998) (finding non-compete unenforceable based, in part, on fact that no other surgeons in plaintiff's sub-specialty practiced in the area and patients would need to travel 50 miles for next nearest doctor). Of course, some courts have found that "unique" or "extraordinary" skills possessed by a doctor may, on a case-by-case basis, actually support the enforcement of a reasonable restrictive covenant. *See BDO Seidman v. Hirshberg*, 12 N.E.2d 1220 (N.Y. 1999).

In the absence of D.C. law on point, a D.C. court may turn to Maryland law. Under Maryland law, covenants not to compete may be enforced "only against those employees who provide unique services, or to prevent the future misuse of trade secrets, routes or lists of clients, or solicitation of customers." *Becker v. Bailey*, 268 Md. 93, 97, 299 A.2d 835 (1973). Unfortunately, much like in D.C. – though to a slightly lesser extent – there is "a general paucity of Maryland case law regarding covenants not to compete specifically in the healthcare industry, and no Maryland court has conducted a thorough analysis of such covenants or explicitly defined their scope." Robert Niccolini, Esq., "Covenants Not To Compete in Healthcare: A Maryland Primer", Maryland State Bar Association (2007) (available at: http://www.msba.org/sec_comm/sections/health/docs/homepage/noncompetes/CovNottoCompeteRobN.pdf). Despite this, the Maryland Court of Special Appeals, in *Holloway v. Faw, Casson & Co.*, strongly implied that some level of special protection was appropriate for physicians. 572 A.2d 510 (Md. Ct. Spec. App. 1989). In *Holloway*, the Court addressed whether accountants deserved special protection from restrictive covenants as a matter of public policy. In reaching its conclusion that they did, the Court noted that accountants, like lawyers and physicians, had a special relationship with their clients deserving of protection. *Id.* at 517; *See also* Niccolini, "Covenants Not to Compete in Healthcare: A Maryland Primar" at p.9.

Nationally, there is great deal of disagreement among courts as to whether, and how, physicians should receive special protection from non-competes. *E.g.* S. Elizabeth Wilborn Malloy, "Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests", 41 Wake Forest L. Rev. 189 (Spring 2006); Robert W. Horton, "Restrictive Covenants in Physician Employment Relationships", American Health Lawyers Assoc. Member Briefing (April 2013) (available at: http://www.bassberry.com/files/upload/AHLA_Article_Horton_and_Padgett_April_2013.pdf). By way of example, Illinois has repeatedly upheld physician non-competes. In a typical case, *Canfield v. Spear*, the Illinois Supreme Court reasoned that: "[i]t cannot be said that the public interest is adversely affected if a physician decides to move from one community to another, nor does it become so if the move results from some agreement made in advance. If a severe shortage exists in any particular place young doctors will tend to move there, thus alleviating the shortage." 44 Ill. 2d 49, 52 (1969). Wyoming appears to follow a similar approach. *See Oliver v. Quynn*, 2013 WY 70 (2013) (quoting *Canfield*).

The majority rule, however, seems to afford at least some protection to physicians. In *Cmty. Hosp. Group, Inc. v. More*, 869 A.2d 884 (N.J. 2005), the New Jersey Supreme Court reversed the decision of a lower court to enforce just such an agreement because the lower court

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had "failed to focus on the adverse impact the geographic restriction [in the non-compete agreement] would have on neurological patients seeking treatment at [defendant's employer's] emergency room. Without [defendant]…necessary neurological treatment to an emergency room patient could be compromised." *Id.* at 899. Accordingly, the Court found that there was "overwhelming" evidence that prohibiting Defendant from attending neurological patients in the geographical area specified would injure the public interest. The Court, while prepared to accept a non-compete covering a limited geographical distance "less than thirteen miles", specifically instructed the lower court, on remand, that any geographical restriction should exclude defendant's current employer. *Id.* at 900. *See also Duneland Emergency Physicians Med. Group v. Brunk*, 723 N.E.2d 963 (Ind. Ct. App. 2000) (restrictive covenant unenforceable when it would compromise emergency room care); *Premier Health Care Servs., Inc. v. Schneiderman*, 2001 Ohio 7087 (Ohio Ct. App. Dec. 28, 2001) (public interest weighed against granting injunction against physician-defendant); *Emergicare Sys. Corp. v. Bourdon*, 942 S.W.2d 201 (Tex. Ct. App. 1997) (refusing to enforce covenant that would have prevented doctor from serving public as emergency doctor);

Non-competes with regard to physicians also face regulatory hurdles. For example, the Federal Trade Commission recently relieved a group of cardiologists from a non-compete agreement which it determined implicated antitrust concerns. *See* Karen Cheung-Larivee, "FTC Antitrust Agreement Frees Cardiologists From Non-Compete Contract", FierceHealthcare (Dec. 6, 2012) (available at: http://www.fiercehealthcare.com/story/ftc-antitrust-agreement-frees-cardiologists-non-compete-contract/2012-12-06). Furthermore non-compete agreements in the context of physician recruitment can implicate, and be barred by, the Stark Laws. In particular under 42 C.F.R. 411.357(e)(4)(vi), physicians and physician practices are prohibited from placing restrictions on the practice of physicians which they recruit that would "unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital." Between 2004 and 2007 the Centers for Medicare & Medicaid Services ("CMS") took the position that imposing a non-compete agreement on a recruited physician would violate the Stark Law. *See* I. Paul Mandelkern & Jason S. Rimes, "CMS Rules That Non-Compete Provision Complies With Stark Laws Physician Recruitment Exception", National Law Review (Nov. 3, 2011) (available at: http://www.lowndes-law.com/publications-presentations-blogs/1085-cms-rules-that-non-compete-provision-complies-stark-laws-physician-recruitment). However, in 2007 CMS issued an advisory opinion which found that a proposed physician recruitment arrangement, which included a non-competition provision, met the requirements of the Stark Law. *See* CMS Advisory Opinion AO-2011-01 (available at: http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/downloads/CMS-AO-2011-01.pdf). Although properly drafted non-compete agreements can comport with the Stark Law, it does present another avenue of attack, even to otherwise reasonable non-compete agreements, which would prohibit a physician from practicing within the geographic area covered by a hospital.

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