

Wisconsin courts weaken physician non-compete agreements

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Many people learn best through example. Two recent cases in the Wisconsin Court of Appeals provide great examples of whether a physician's covenant not to compete might be enforceable.

In recent years, more and more physicians face the prospect of accepting employment tied to their willingness to sign a written employment contract containing restrictive covenants upon termination of the relationship. Wisconsin courts generally look with disfavor on unjustified or overly broad restrictions. The key term in determining whether a covenant not to compete is legally enforceable is whether the restriction is "reasonable."¹ A physician who is subject to a non-compete agreement with multiple restrictions, such as a geographic and time restriction, may find his or her entire agreement unenforceable if a court finds just 1 of those restrictions unreasonable. Two recent decisions from the Wisconsin Court of Appeals issued on the same day illustrate the uphill battle that employers of physicians have in enforcing their restrictive covenants.

Can a group practice restrict where a physician practices after the group loses an exclusive service contract?

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That was the question addressed recently in *Robert Davison, MD v Bay Area Nuclear Medicine* ("BANM"). The Court found the restrictive covenant unenforceable in Dr Davison's employment agreement with the BANM group practice. BANM's restrictive contract provision prohibited Dr Davison from practicing nuclear medicine at any entity within 35 miles of BANM's location and further required him to relinquish his clinical privileges at St Vincent's Hospital in Green Bay for 1 year after his termination from BANM. BANM lost its contract with St Vincent's Hospital, when St Vincent replaced BANM with Green Bay Radiology, SC. In response to the loss of the service contract, BANM terminated Dr Davison.

Green Bay Radiology hired Dr Davison with the condition that he free himself of any restrictive contract provisions. After BANM refused to release him from the restrictions, Dr Davison sued. The Court concluded that BANM did not have a protectable interest because it lost its contract with St Vincent's and therefore the covenant was not reasonably necessary to protect BANM. In a footnote, the Court also noted that both the 35 mile restriction and the provision requiring Davison's relinquishment of privileges at St Vincent's were overly broad. Therefore, Davison was free to take the offer with Green Bay Radiology.

Can employers limit a physician's practice in other specialties, con-

sider a physician's duty of loyalty to his or her former group practice, or consider how his or her new practice will effect the marketplace?

In the case of *Fox Valley Thoracic Surgical Associates, SC v Robert J. Ferrante, MD*, the Court of Appeals examined the enforceability of another restrictive covenant. Dr Ferrante is a heart surgeon who left his group practice, Heart Surgeons, and became a competitor in the cardiac surgery market. Like Dr Davison, Dr Ferrante was subject to a covenant that prohibited him from engaging in heart surgery or thoracic medicine within the city limits of Appleton, Neenah, or Menasha—and also within a 30 mile radius of those cities—for 1 year after his termination with Heart Surgeons. After working with Heart Surgeons for 1 year, Dr Ferrante declined Heart Surgeon's offer to become a partner in the company and instead opened his own surgical practice. One cardiology group, Cardiology Associates, provided Dr Ferrante most of his referrals. Following Dr Ferrante's departure from Heart Surgeons, Cardiology Associates' referrals to Heart Surgeons slowed significantly. Heart Surgeons closed its practice and sued Dr Ferrante and others.

In this case, the Court of Appeals made several findings involving the conditions of the restrictive covenant, Dr Ferrante's duty of loyalty to Heart Surgeons, and anti-competitive issues. First, the Court concluded that Dr Ferrante's

restrictive covenant was unenforceable because it was overbroad. The Court determined that the covenant effectively prevented Dr Ferrante from practicing thoracic medicine and not just heart surgery. Further, the Court concluded that the geographic restraint was greater than reasonably necessary to protect the legitimate business interests of Heart Surgeons.

Second, the Court found that Dr Ferrante did not breach any duty of loyalty to Heart Surgeons by opening his own practice and receiving referrals from Cardiology Associates. The Court concluded that Dr Ferrante was not an "officer" of Heart Surgeons who owed the practice the fiduciary duty of loyalty, good faith and fair dealing, even though he was in control of his own surgical methods, had

nurses working for him, maintained patient medical records and other documentation, and was privy to some of Heart Surgeons' financial information. Rather, the Court held that these are typical physician activities and therefore Dr Ferrante owed no special duty of loyalty to Heart Surgeons.

Finally, the Court did not find any evidence of a conspiracy between Dr Ferrante and Cardiology Associates to deny referrals to Heart Surgeons referrals. Heart Surgeons' case failed because it only offered evidence of the impact of the alleged conspiracy on the marketplace in general without offering sufficient proof of an illegal agreement.

Lessons learned

In the past decade, numerous

Wisconsin Appeals Court decisions address the permissibility of restrictive covenants in employment and business relationships. These cases set forth fairly specific limitations on the enforceability of such provisions. Many agreements involving physicians in both clinic and hospital settings are now out of date and may not take into consideration recent case law decisions. The *Davison* and *Fox Valley* cases should encourage physicians, as well as their employers who are parties to employment or partnership agreements, to review those agreements for overly broad or unenforceable restrictions with a view towards crafting restrictions as narrowly as possible.

References

1. Wis. Stat. § 103.465.



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