Court Broadly Interprets Ban on Physician Noncompetition Restrictions

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In a recent decision, a Massachusetts trial court judge decided that a medical practice could not enforce noncompetition and patient nonsolicitation provisions contained in both an employment agreement and an asset purchase agreement against a physician. This case is noteworthy because it is the first reported instance where a Massachusetts court has voided such restrictions in an asset purchase agreement.

Background

Over the past several years, many bills have been introduced in the Massachusetts Senate and House of Representatives to ban or limit employee noncompetition agreements. But none have been enacted and noncompetes remain enforceable against employees generally. Physicians are one exception (nurses, social workers, lawyers and broadcasters are the others). In 1977, Massachusetts General Law Chapter 112, § 12X was enacted, which banned restrictions on a physician's right to practice medicine in employment or partnership agreements. That law provides:

> Any contract or agreement **which creates or establishes the terms of a partnership, employment, or any other form of professional relationship** with a physician registered to practice medicine pursuant to section two, which includes any restriction of the right of such physician to practice medicine in any geographic area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction; provided, however, that nothing herein shall render void or unenforceable the remaining provisions of any such contract or agreement. (Emphasis supplied.)

Chapter 112, § 12X has been applied by an appeals court only once. In that decision, *Falmouth Ob-Gyn Associates v. Abisla*, 417 Mass. 176, 178 (1994), the Supreme Judicial Court ruled that a "compensation for competition" provision in a physician's employment agreement, which required him to pay his employer a substantial sum if he left to work for a competing practice, was banned by Chapter 112, § 12X. In *Falmouth Ob-Gyn*, the Court ruled that the language "any restriction" in Chapter 112, § 12X was very broad and was intended to encompass any agreement having a significant "inhibitory effect" on a physician's ability to practice medicine. The strong public policy behind Chapter 112, § 12X and *Falmouth Ob-Gyn Associates* is a patient's need to receive treatment from a physician he or she chooses.

Note, however, that Chapter 112, § 12X's language describes contracts or agreements that **"create or establish the terms of a partnership, employment, or any other form of professional relationship."** This language suggests that restrictions are prohibited only if they are contained in contracts dealing with a physician's services to a hospital or medical practice as an employee, independent contractor, or partner. What about restrictions contained in a purchase/sale agreement when a physician-owner sells his practice to others? Historically, courts have enforced much longer restrictions against competition in the "sale of business" context.

Dr. Velazquez v. Eye Health Assoc.

Leonardo Velazquez, M.D. is a board certified ophthalmologist. In 2005, he began working for Eye Health Associates, LLC and became a minority owner in 2010. In 2012, Dr. Velazquez and the other owners of Eye Health entered into an asset purchase agreement ("APA") whereby substantially all of the assets of Eye Health were sold to Candescent Eye Health Surgicenter, LLC. Candescent paid $14 Million for the assets of Eye Health, of which approximately $2 Million went to Dr. Velazquez. After the purchase, Dr. Velazquez entered into an employment agreement ("EA") with, and began working for, Candescent as a physician.

Both the APA and EA contained noncompetition and patient nonsolicitation restrictions that provided:

> [N]either the Sellers, nor any of the Owners [Dr. Velazquez], will, directly or indirectly, or as a stockholder, partner, member, manager, employee, consultant or other owner or participant in any Person other than the Purchasers, engage in or assist any other Person to engage in a "Prohibited Management Activity" anywhere in the Covered Area, provided, that each Owner may (a) deliver inpatient or outpatient professional health care services to patients, and (b) maintain medical staff membership or clinical privileges at any hospital, health care system, or other similar entity that offers or provides, or whose owner, parent, subsidiary or other affiliate offers or provides, acute care hospital services or facilities for inpatient care….

"Covered Area" was defined as anywhere in the United States. The "noncompetition period" was five years from the date of the closing of the transaction and, for an owner like Dr. Velazquez, two years from the termination of the provision of his services, but in no event to exceed seven years following the closing. "Prohibited Management Activity" was defined as, "directly or indirectly, alone or with others, develop, own, manage, operate or control; or participate in the management or control of; **or be employed by, consult with or provide services for;** or maintain or continue any interest whatsoever (including without limitation as a direct or indirect owner), in a Covered Business." "Covered Business" was defined as any business that provides services of a kind provided by Candescent during Dr. Velazquez's employment.

The APA and EA also contained restrictions against contacting patients of Candescent and assisting or requesting such patients to become patients of Dr. Velazquez after his departure from Candescent. The APA prohibited Dr. Velazquez from "directly or indirectly, soliciting or endeavoring to entice away from the Purchasers any patients of the Business, [and from] affirmatively suggesting, requesting or directing that any such patients request that their medical records be copied or otherwise removed or transferred from Candescent's offices." Finally, the APA and EA prohibit Dr. Velazquez's from enticing away from Candescent employees or otherwise interfering with the business relationship of any person with Candescent or interfering with the business relationship of Candescent with any customer or client supplier, vendor, or service provider to Candescent.

In 2014, Dr. Velazquez decided to leave Candescent to work as a physician for Rhode Island Eye Institute ("RIEI"). Candescent agreed to delete the language **"or be employed by, consult with or provide services for"** from the definition of Prohibited Management Activity in the APA to permit Dr. Velazquez to work as an employee of RIEI. Nevertheless, Dr. Velazquez was concerned that Candescent would sue him to enforce the other restrictions in the APA and EA and involve RIEI and patients. So he sued Candescent preemptively in Superior Court asking for an order that the noncompetition and nonsolicitation restrictions in the APA and EA were unenforceable and void under Chapter 112, § 12X.

Judge Edward P. Leibensperger granted Dr. Velazquez's request, ruling that the noncompetition and nonsolicitation provisions in the APA and EA imposed restrictive effects upon Dr.

Velazquez's right to practice that are prohibited by Chapter 112, § 12X. Dr. Velazquez, the Court held, could not be prevented from setting up his own competing practice as a physician. Restricting the form of his practice would be a "significant" restriction on his right to practice. Further, the Court found that the patient nonsolicitation restrictions would impose a "significant inhibitory effect" on Dr. Velazquez's practice and were barred on public policy grounds. The Court declined to address whether Dr. Velazquez could be restricted by the APA and EA from engaging in practice management activities (as opposed to the actual practice of medicine).

Interestingly, the Court's written decision did not discuss whether the "sale of business" context had any relevance to the enforceability of the restrictions or whether Chapter 112, § 12X's language describing contracts or agreements that **"create or establish the terms of a partnership, employment, or any other form of professional relationship"** properly encompassed the APA. Nor did Dr. Velazquez's receipt of $2 Million from Candescent's purchase of Eye Health factor into the Court's reasoning. Relying on the strong public policy favoring patient choice, as applied in *Falmouth Ob-Gyn*, the Court stated that Candescent had "no legitimate claim to harm as a result of application of the statute making the restrictive provisions unenforceable."

For physicians, *Velazquez v. Eye Health Associates*, is instructive regarding the broad scope of Chapter 112, § 12X's prohibition against "any restriction" on a physician's right to practice medicine in Massachusetts and the importance judges place on patient choice. Potential buyers of medical practices, on the other hand, must carefully evaluate and value their targets due to the uncertainty that physicians and their patients can be retained using noncompetition and nonsolicitation contract provisions.

For more information on this topic, please contact **Matthew Mitchell**.