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A New Precedent For Physician Restrictive Covenants In NY

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The Commercial Division of the New York Supreme Court in Suffolk County refused to enforce a restrictive covenant against a physician which sought to prohibit him from, inter alia, providing "physician ... services in any manner ... within 20 miles from" the hospital at which he used to practice. This decision will have a significant impact in the area of restrictive covenants for physicians in New York.

In October 2015, Rajmani Krishnan, M.D., a physician currently practicing in the field of pain management, filed a lawsuit seeking to limit the scope of the restrictive covenant in his employment agreement with his former employer Suffolk Anesthesiology Associates (SAA), the exclusive anesthesia provider at St. Catherine's of Siena Medical Center in Smithtown, New York. As written, the restrictive covenant covered all physician services within a 20-mile radius of St. Catherine's for a period of three years.

In his lawsuit, Dr. Krishnan seeks to limit the restrictive covenant to anesthesia services only, as he claims that is the sole practice of SAA. In response to Krishnan's lawsuit, SAA answered and immediately moved for summary judgment seeking a permanent injunction to enforce the restrictive covenant as written or, alternatively, a preliminary injunction during the pendency of the litigation which would have prevented Krishnan from providing pain management services in the restricted area.

On June 6, 2016, the Honorable Jerry Garguilo issued a decision that denied SAA's summary judgment motion for a permanent injunction and that denied in part and granted in part SAA's alternative motion for a preliminary injunction. The court has only preliminary enjoined Krishnan from practicing anesthesiology within the restricted area. Kirshnan is not enjoined from continuing his pain management practice in close proximity to St. Catherine's while the case proceeds to trial.

While employed by SAA, Krishnan largely provided anesthesia services at St. Catherine's. He also practiced in the field of pain management. While both anesthesiology and pain management refers to the treatment of pain, they are distinct fields of medicine. Anesthesiology generally refers to the administration of anesthetics for surgical procedures — the treatment of acute pain. Pain management or pain medicine, on the other hand, refers to the treatment of chronic pain arising outside the surgical context from disorders or illnesses, such as cancer, fibromyalgia, rheumatoid arthritis, lupus, spinal stenosis, reflex sympathetic dystrophy, and prosthetic pain from amputations, to name a few. The practice of pain medicine requires a specialized fellowship which may or may not be associated with an anesthesiology training program.

In his decision, Justice Garguilo initially noted that SAA had successfully litigated the reasonableness and enforceability of essentially the same restrictive covenant against a former shareholder, Mathew J. Verdone, D.O.[1] In the Verdone case, the Appellate Division, Second Department affirmed on appeal the decision of the trial court by the Honorable Ralph Gazzillo. Justice Gazzillo preliminarily enjoined Dr. Verdone from practicing anesthesiology or pain management within 20 miles of St. Catherine's and from his efforts to replace SAA as the exclusive anesthesia provider at St. Catherine's.[2]

Justice Garguilo's decision quoted at length the prior decision of Justice Gazzillo, which cited some leading restrictive covenant cases involving physicians in New York.[3] According to Justice Gazzillo, in those cases, the test to enforce a restrictive covenant was met: It was reasonable as to time and area, necessary to protect a legitimate interest, not harmful to the public, and not unduly burdensome.

Justice Garguilo adopted Justice Gazzillo's test for enforcement. However, Justice Garguilo first distinguished Justice Gazzillo's Verdone decision by noting that Verdone was a shareholder as opposed to an employee. Although not discussed in Justice Garguilo's decision, Verdone had indicated his desire to oust SAA as the sole anesthesia provider at St. Catherine's and threatened to use his position on St. Catherine's Board of Trustees to force SAA out. Justice Garguilo also referenced another litigation involving SAA and a former shareholder Philip Kurlander. Both Dr. Kurlander and Krishnan made allegations that the restrictive covenant is being used vindictively in order to impair the doctors' ability to practice in their profession.

Justice Garguilo then addressed SAA's alternative request for a preliminary injunction before ruling on SAA's summary judgment motion. He found that a question of fact existed concerning the unduly burdensome element of the enforcement test based on Krishnan's claim that his current practice is limited entirely to pain management and that SAA only practices in the field of anesthesiology. As a result, Justice Garguilo held that SAA demonstrated a likelihood of success on the merits only insofar as the restrictive covenant applied to anesthesiology. He declined to preliminarily enjoin Kirshnan from practicing pain management.

Justice Garguilo went on to hold that summary judgment for a permanent injunction in favor of SAA was not warranted at this time because a clear factual dispute existed concerning the nature of Kirshnan's services while employed by SAA. The court's decision was without prejudice to renew upon completion and/or during discovery.

Justice Garguilo's decision reflects the continued changes taking place in the health care field. As physicians specialize or even subspecialize, courts must be sensitive to these changes and not enforce overly broad restrictive covenants, especially at the preliminary injunction stage. The litany of cases in New York where courts have protected former employers who could be harmed by former employees competing against them in the same field of medicine should be distinguished. Some of those cases were relied upon by Justice Gazzillo in the earlier Verdone case when Verdone sought to directly compete with SAA.[4] SAA continued to rely on those and other direct competition cases in support of its motion against Krishnan.[5] The distinguishing factor for Krishnan is that he is practicing in a different field of medicine from his former employer, SAA.

In today's new health care environment, a group of physicians practicing in one specialty, such as anesthesiology, may not be harmed by a former employee who practices in a different specialty, such as pain management. Attorneys representing individual physicians and medical practices in New York will have to take more care in drafting restrictive covenants and make sure that they take into account the inter-relationships among the many specialties that exist in the medical field.

—By Thomas A. Telesca, Ruskin Moscou Faltischek PC

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Disclosure: Telesca represents Rajmani Krishnan, M.D. in his litigation against Suffolk Anesthesiology Associates PC

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[1] See Suffolk Anesthesiology Associates PC et al. v. Mathew J. Verdone, 74 A.D.3d 953 (2d Dept. 2010).

[2] See Suffolk Anesthesiology Associates PC v. Mathew J. Verdone, Index No.: 37932/2008 (Gazzillo, J.).

[3] For instance, in Gelder Med. Group v. Webber, 41 N.Y.2d 680 (1977), the New York Court of Appeals held that a restrictive covenant against a former surgeon for five years and 30 miles was reasonable when he started a competing surgical practice in the same area. In Karpinski v. Ingrasci, 28 N.Y.2d 45 (1971), the court of appeals held that a restrictive covenant against an oral surgeon formally employed by another oral surgeon for five counties was reasonable, but the court refused to apply the restrictive covenant to the separate practice of dentistry. Lastly, in Albany Medical College v. Lobel, 296 A.D.2d 701, the Appellate Division, Third Department held that a restrictive covenant against a physician employed in an OBGYN practice for five years and 30 miles was also reasonable in light of the fact that she started a competing OBGYN practice nearby.

[4] See e.g., Gelder Med. Grp. v. Webber, supra; Karpinski v. Ingrasci, supra; and Albany Medical College v. Lobel, supra.

[5] Those other cases include: Battenkill Veterinary Equine PC v. Cangelosi, 1 A.D.3d 856 (3d Dept. 2003), where the court enforced a 35-mile restrictive covenant against a veterinarian who sought to compete with her former employer by operating another veterinarian practice and treat the same animals; North Shore Hematology/Oncology v. Zervos, 278 A.D.2d 210 (2d Dept. 2000), where a former employer obtained a preliminary injunction enforcing a restrictive covenant with a three-mile radius against a former physician employee who sought to solicit the employer's patients and referral sources; Peconic Surgical Group PC v. Cervone, No. 7026/2011, 2011 WL 2347613 (Sup. Ct. Suffolk Cty. June 1, 2011), where the court continued a temporary restraining order pending further order of the court which enforced a restrictive covenant of three years and 15 miles after two surgeons continued to see surgery patients and perform surgery within the prohibited area; Coppa v. Lederman, M.D., P.C., No. 04-cv-0399, 2004 WL 884258 (E.D.N.Y. March 11, 2004) where the court enforced a restrictive covenant of two years within the Borough of Staten Island that was limited to dermatology; and Awwad v. Capital Region Otolaryngology Head & Neck Group LLP, 18 Misc.3d 1111(A) (Sup. Ct. Albany Cty. 2007), where the court enforced a restrictive covenant for three years and 30 miles when a former employee physician sought to join another group and directly compete for the same patients.