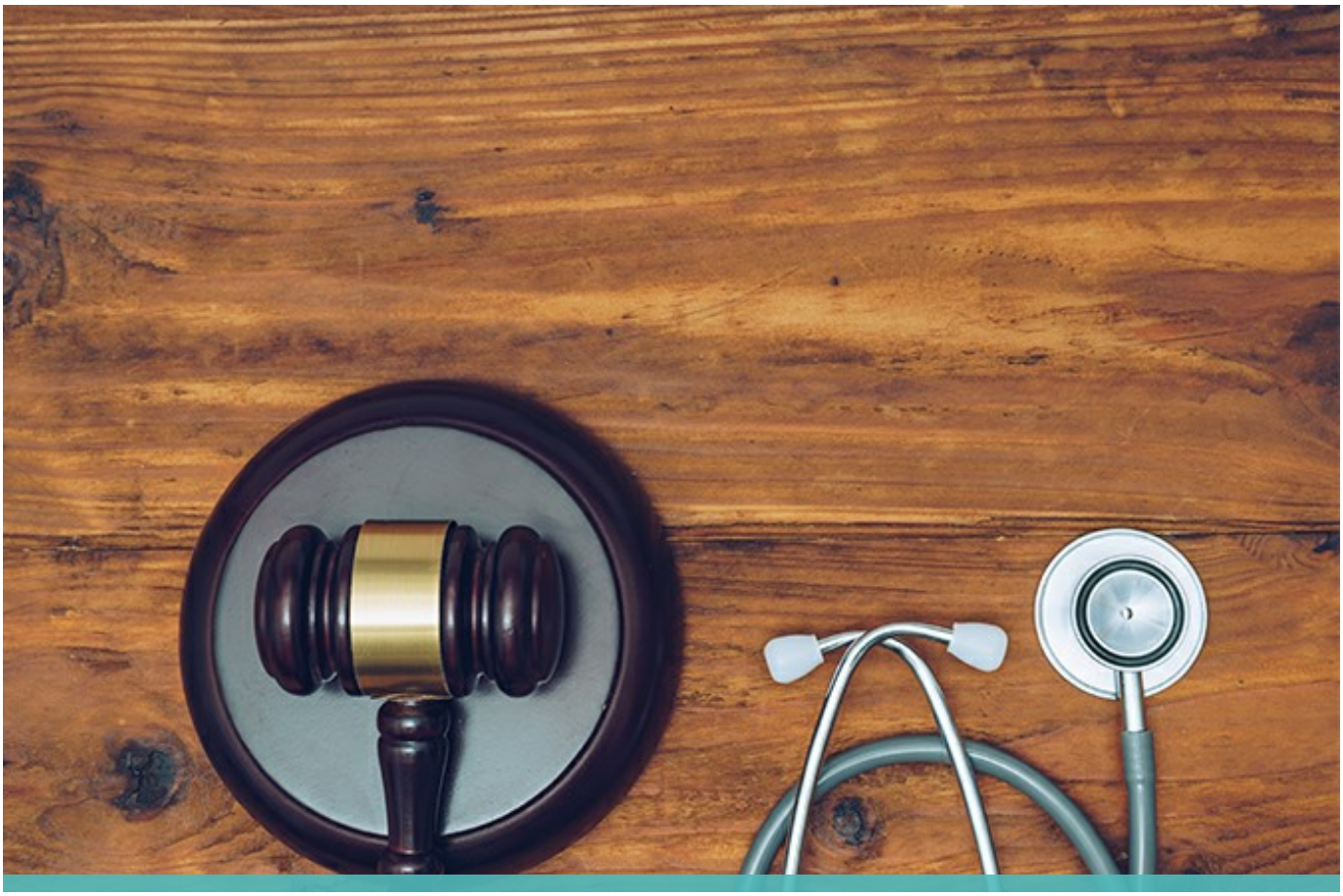
Recent Ohio case law highlights that physician non-competes must be narrowly drafted



Ryan Neumeyer | Wednesday, February 3, 2021

Physician employment agreements commonly contain restrictive covenants such as non-solicitation of patients, non-solicitation of staff and fellow physicians, non-disclosure of confidential information, and non-compete covenants. The latter typically specifies that a physician cannot practice medicine generally or within a specialty in a specific geographic area and during a certain period of time following termination of employment.

Non-compete covenants are generally enforceable in Ohio. However, Ohio courts currently engage in a balancing of equities to determine whether such covenants are enforceable as drafted. Typically, when a physician breaches a non-compete covenant, the practice group or other type of employer will bring an action for injunctive relief, which typically consists of a court order preventing the physician from engaging in the applicable activities.

In *Mario Castillo-Sang, M.D. v. The Christ Hospital Cardiovascular Associates, LLC*[1], Christ Hospital Cardiovascular Associates, LLC (Cardiovascular Associates) hired Castillo-Sang in 2015 as a cardiothoracic surgeon specializing in mitral valve repair and replacement, as well as left ventricular assist device therapy. Although already considered an expert in both procedures upon hiring, Castillo-Sang did gain more experience during the course of his employment with Cardiovascular Associates.

Castillo-Sang's written employment agreement with Cardiovascular Associates prevented him from,

among other things, engaging in business activities competing with Cardiovascular Associates for a period of 12 months following the termination of his employment, within Hamilton and all contiguous counties. Castillo-Sang also agreed to keep secret and not disclose or use "Cardiovascular Associates' programs, staff recruitment programs, trade secrets, patient lists, physician lists, patient programs, patient charts, records, files, computer data" and all other information relating to, among other things, his employer's business practices, financial and billing information, pricing policies, marketing information, business acquisition plans, new personnel acquisition plans, and technical processes, all defined as "Confidential Information." Castillo-Sang agreed not to solicit Cardiovascular Associates' employees, and that all restrictive covenants contained in his contract were necessary to prevent loss to Cardiovascular Associates. He further agreed that a court would have the authority to reform and rewrite a provision of the agreement that it found to be overly broad and unenforceable.

Prior to accepting a new position at St. Elizabeth's Hospital within the restricted area, Castillo-Sang filed an action seeking to hold his agreement with Cardiovascular Associates invalid. The trial court ruled in favor of Castillo-Sang and enjoined Cardiovascular Associates from enforcing the agreement and preventing him from working at St. Elizabeth's Hospital. The trial court found that the non-compete restrictions were greater than required to protect Cardiovascular Associates and caused undue hardship on Castillo-Sang.

On appeal, the First District stated that ["r]estrictive covenants are disfavored in the law, and "[t]his measure of disfavor is especially acute concerning restrictive covenants among physicians, which affect the public interest to a much greater degree."[2] Although not favored, covenants not to compete are not per se unenforceable in the medical profession and will be upheld if they are reasonable.[3] Courts will enforce covenants against physicians to the extent necessary to protect employers' legitimate interests. Absent any legitimate interest to be protected, the non-compete is considered unreasonable.[4]

The First District cited several cases where restrictive covenants against physicians had been upheld based on the employer's legitimate protectable interest, including (1) where a medical center prevented a physician from using referral sources after he separated employment[5]; and (2) a one-year employment agreement within a 5-mile radius upheld against a neurologist.[6]

Conversely, the First District cited to decisions where the employers were found not to have sufficient justification for a covenant not to compete where there was no evidence that referrals were based on anything other than "personal reputations," and where the physician's experience "increased no more than would have been through experience as cardiologists in solo practice."[7] In *Pratt*, the court further stated that an "employer needs to prove that some legitimate business interest of the employer—trade secrets, customer lists, inside information, special training, or some other circumstance that makes the employer particularly vulnerable to competition from his former employee—needs protecting, and the trial court must find that the restrictive covenant restrains the employee only to the extent necessary to protect that legitimate business interest. Without the proof of circumstances that threaten the employer with unfair competition, the physician employee cannot be constrained because the competition is merely ordinary and its restraint would violate the long-standing public policy against agreements in the restraint of trade."[8]

The *Castillo-Sang* court noted that Cardiovascular Associates had no evidence that Castillo-Sang had any of its confidential information such as knowledge of particular targeted doctors that it was recruiting, specific specialty areas that it was developing, or marketing and business plans targeting particular markets. The record demonstrated that most referrals at Cardiovascular Associates to Castillo-Sang were

internal, and the physicians did not spend time soliciting referrals.

The First District thereafter weighed other factors in favor of Castillo-Sang, including the fact that he would have to either live away from his family or move his family to work outside the restricted area, and that preventing him from performing mitral valve surgeries could be injurious to the public because he is one of few surgeons in the country who can perform this procedure. The court additionally noted that the lower court did not reform the agreement, "presumably concluding that no restriction was reasonable." Had Cardiovascular Associates drafted the agreement more narrowly, preventing Castillo-Sang from performing the mitral valve surgery in a more limited area, the non-compete may have been enforceable, based on the argument that patients are referred to Cardiovascular Associates' specifically for the availability of mitral valve surgery, a legitimate, and perhaps marketed, interest of Cardiovascular Associates. Patients travel at some length to have this surgery based on the fact that only a few physicians perform mitral valve surgery. Thus, limiting the reach of the non-compete could have prevented undue hardship on Castillo-Sang, even though the time period of the restrictive covenant was reasonable in that it provided the employer enough time to replace him.

Mario Castillo-Sang, M.D. v. The Christ Hospital Cardiovascular Associates, LLC stands for the proposition that employers need to be surgical in drafting employment agreements. When crafting an agreement for a physician, unless truly warranted, ensure that the prohibition does not prevent the physician from practicing anywhere in the U.S., anywhere in a specific state, a territory comprised of excessive miles from the employer's location and practice in certain counties.

Instead, look to the geographic area where patients are typically coming from and limit the geographic scope to that area. Likewise, look at (1) the timing and determine how long it may take to secure patients and referral sources in the event that a physician leaves a practice; (2) the amount of time needed for the employer to hire and train a replacement; (3) the amount of time necessary for patients to no longer associate the departing physician with the practice; (4) the period required to convince patients that the practice can continue to meet their needs in the absence of the departing physician; and/or (5) the length of time for confidential information to become obsolete.

The bottom line is that restrictive covenants are never a one-size-fits-all, especially when it comes to physicians. If you employ physicians, review your employment agreements to make certain that the restrictive covenants are not overly broad and narrowly protect your interests should a physician leave the practice. Failure to narrowly tailor your restrictive covenants at the onset of the employment relationship may completely hinder your efforts to protect your interests and annihilate the court's opportunity to reform the restrictive terms such as in *Mario Castillo-Sang, M.D. v. The Christ Hospital Cardiovascular Associates, LLC*.

[1] 2020-Ohio 6865 (1st Dist. Dec. 23, 2020).

[2] *Ohio Urology, Inc. v. Poll,* 72 Ohio App.3d 446, 452-453, 594 N.E.2d 1027 (10th Dist.1991).

[3] *Id. at 451-452*; *Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc.,* 3d Dist. Allen No. 1-10-81, 2011-Ohio-4466, ¶ 23; *Premier Assoc., Ltd. v. Loper,* 149 Ohio App.3d 660, 2002-Ohio-5538, 778 N.E.2d 630, ¶ 20.

[4] *General Medicine, P.C. v. Manolache,* 8th Dist. Cuyahoga No. 88809, 2007-Ohio-4169. ¶ 7.

[5] *Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc.,* 3d Dist. Allen No. 1-10-81, 2011-Ohio-4466.

[6] *Riverhills Healthcare, Inc. v. Guo*, 1st Dist. Hamilton No. C-100781, 2011-Ohio-4359.

[7] *Pratt v. Grunenwald*, 2d Dist. Montgomery No. 14160, 1994 WL 313050 (June 29, 1994).

[8] *Id.*

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