THE
NATIONAL LAW REVIEW

North Carolina Court of Appeals Orders Injunction In OB-GYN Covenant Not To Compete Case

Saturday, May 25, 2013

There is a lot of discussion among practitioners in **the field of trade secrets and covenants not to compete as to whether doctors might be exempt from covenants not to compete on a public policy basis**. The potential argument against their enforcement is that the providing of medical care is too important to restrict someone from practicing in any given area. Jonathan Pollard, citing such reasoning, crafted a passionate argument against the enforceability of covenants in a post on his non-compete blog.

On Tuesday, May 7, 2013, the **North Carolina Court of Appeals took on the question** of whether a covenant should be enforced in the context of a departing OB-GYN physician and ultimately decided the covenant should be enforced. Its opinion is good for establishing that breaches of covenants not to compete are breaches for which no adequate remedy at law exists. Unfortunately, the opinion does not address the extent, if any, public policy considerations may factor into the analysis.

Article By Poyner Spruill LLP
Joshua B. Durham
p.s. Under Lock and Key: Securing Trade Secrets in North Carolina and Beyond

UCC
Antitrust & Trade Regulation
Health Law & Managed Care
Litigation / Trial Practice
Labor & Employment
North Carolina

The Background

Andrea Teresa DiMichele joined Pinehurst Surgical Clinic, P.A. ("PSC") in August, 2008, at which time she signed an employment agreement containing a covenant not to compete and a liquidated damages clause. Pursuant to the covenant, DiMichele agreed that after her employment she would not compete with PSC for a period of two years within a thirty-five mile radius of PSC's Pinehurst facility. She could avoid such a restriction by paying the $100,000 liquidated damages within thirty days of her departure. If she failed to pay it, the covenant provided that PSC could seek injunctive relief.

On November 16, 2011, DiMichele resigned from PSC and she did not pay the liquidated damages to PSC. The following March, she began treating patients at Carolina Women's Health Center ("CWHC"), within the thirty-five-mile prohibited territory. A number of patients transferred their files from PSC to CWHC.

The Trial Court

PSC immediately sought a temporary restraining order, which was granted by the trial court. In early April, 2012, the parties came back before the court at the preliminary injunction hearing, at which time PSC hoped to get an order barring DiMichele from competing for at least the remainder of the case. The trial court found the covenant was valid and made the following findings of fact [at this point I ask the readers which way they think the court came out]:

9. As a practicing physician and director of [p]laintiff, [d]efendant was responsible for developing close working relationships with other physicians and staff of the practice, with patients, and with third parties who dealt with [d]efendant and other individuals at [p]laintiff during the course of any given period of time.

10. Plaintiff has invested many years of time and resources creating, developing, and protecting all aspects of its practice and cultivating relationships with patients,employees, and various entities in the region in which it does business.

11. The patients served by [d]efendant and others on [p]laintiff's behalf were developed at great expense over a number of years. Because [p]laintiff is a medical practice, its patients are critical to its business, and the practice incurs significant annual expenses to develop and maintain a loyal patient base and goodwill in the community.

12. During the course of [d]efendant's affiliation with [p]laintiff as an employee, owner, and director, she was provided with extensive confidential information regarding all aspects of [p]laintiff's medical practice and business affairs. Possession and use of that information was critical to the successful performance of [d]efendant's duties as an employee and of her role as a shareholder and director.

13. Plaintiff provided [d]efendant with an extensive patient base and the support necessary to maintain a successful medical practice, in addition to [p]laintiff's reputation, name recognition, and goodwill in the community.

If the readers believe the trial court granted the preliminary injunction, they would be incorrect. A little surprising, right?

In order to obtain a preliminary injunction, in addition to showing that the plaintiff is likely to succeed on the merits of the case, a plaintiff must show that it is likely to suffer irreparable loss unless the injunction is issued and that it has no adequate remedy at law to address such an injury. The trial court believed that since PSC could calculate the loss of clients to DiMichele and CWHC and the value of a physician with DiMichele's specialty, an adequate remedy at law existed and the harm was not irreparable.

The Appeal

PSC appealed that decision, and earlier this week the Court of Appeals reversed it. Citing well-established North Carolina law, the Court of Appeals stated:

[t]he focus in cases . . . is not only whether plaintiff has sustained irreparable injury, but, more important, whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law. [I]n a noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate. The plaintiff is not required to show actual damage by instances of successful competition, but it is sufficient if such competition, in violation of the covenant, may result in injury.

Since the trial court determined the covenant to be valid, and DiMichele clearly breached the covenant by competing within the restricted area, the trial court's denial, almost as a matter of course, had to be reversed. Moreover, on appeal, DiMichele did not challenge findings of fact 9 through 13 above. According to the Court of Appeals, these findings "show that plaintiff suffered irreparable harm. Therefore, the trial court's conclusion that plaintiff did not suffer irreparable harm is unsupported by its findings."

DiMichele, in an effort to avoid the outcome, argued that PSC breached the employment agreement first, thereby relieving her of any further obligations under it, and that PSC had acted inequitably. The Court of Appeals found that the undisputed findings of fact above all showed otherwise and remanded the matter with instructions that a preliminary injunction be entered.

Attorneys and companies seeking to enforce noncompete agreements will find a lot of useful authority in this opinion.

We're Left Wondering About Public Policy Though

A little internet sleuthing shows that the trial court's order denying the injunction [within the record on appeal] found that DiMichele was part of a "substantial pool" of OB-GYN physicians available to serve patients' needs in the geographic market served by PSC and CWHC. Such a factor would weigh in favor of enforcement of the covenant, as patients in that region would no doubt still have their pick of providers. We here at Under Lock & Key think it might have been nice, however, for the Court of Appeals to have at least acknowledged this part of the trial court's opinion. Such an acknowledgment would affirm that the availability of local providers is a valid consideration in departing physician cases. That the Court didn't even mention it is a little disappointing.

Source URL: https://www.natlawreview.com/article/north-carolina-court-appeals-orders-injunction-ob-gyn-covenant-not-to-compete-case