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HEALTH LAW
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Kansas Supreme Court Enforces Heart Surgeon Noncompete Agreement

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On June 3, the Kansas Supreme Court said noncompete agreements for heart surgeons are enforceable in Kansas. The decision in *Idbeis v. Wichita Surgical Specialists, P.A.*, was the Court's first pronouncement on physician noncompete agreements since its 1996 decision in *Weber v. Tillman*, where the Court suggested that noncompete agreements in medically necessary specialties, such as neonatology, might be unenforceable if the community would be left with a shortage in that specialty. Although this case involved heart surgeons, most of the Court's decision is applicable to employer-employee noncompete agreements in general. Foulston Siefkin LLP represented Wichita Surgical Specialists, P.A, the party seeking to enforce the noncompete agreement.

Four employee heart surgeons left a large surgical group, taking with them half of the group's cardiology referral base. (Cardiologists refer patients to heart surgeons for open-heart surgery.) The surgical group was left with five more-experienced heart surgeons, who had, over the years, shared their referral base with the departing heart surgeons.

Three of the departing heart surgeons' employment agreements had geographic restrictions, which said the surgeons could not practice medicine within a geographic area (either Sedgwick County or 75 miles, depending on the agreement) for two years after leaving the group. The fourth surgeon had a geographic restriction with a liquidated damages clause, which said if he practiced medicine in the restricted area he had to pay damages to the group based upon a pre-set ("liquidated") formula.

The case was complicated by the surgical group's decision to add a uniform liquidated damages clause to the employment agreements of all surgeons who had restrictive covenants, both those with only geographic restrictions, and those who also had the option to practice if they paid liquidated damages to the group. Although the surgical group voted to add the liquidated damages clause, no one ever signed a written amendment to the employment agreement.

Because noncompete agreements are both contracts and restraints on trade, they must satisfy the requirements of both contract law and restraint of trade law. To satisfy contract law there must be a meeting of the minds and consideration, among other things. To satisfy restraint of trade law, they must clear a four-part test:

- they must serve a legitimate business interest of the employer;
- they must be reasonable in scope - the time and mileage restrictions must be reasonable;
- they must not place an undue burden on the employee; and
- they must not violate public policy.

Legitimate Business Interest

The four heart surgeons who left sued Wichita Surgical Specialists, claiming the noncompete agreement did not serve a legitimate business interest and violated public policy. They claimed Wichita Surgical had no legitimate interest in protecting its referral base because the cardiologists who referred to the four plaintiffs did so because plaintiffs were the best heart surgeons, not because plaintiffs were part of Wichita Surgical.

The Kansas Supreme Court rejected the departed heart surgeons' argument, agreeing with Wichita Surgical that the referral base was developed by Wichita Surgical over a thirty-year period, and then shared with the four heart surgeons during their early years with the group. Wichita Surgical had the right to require the employees to leave the Wichita community to give Wichita Surgical time to hire replacement heart surgeons, with whom the referring cardiologists could become acquainted without interference from the departing heart surgeons.

Public Policy

Next, the four departing heart surgeons claimed the noncompete agreement violated public policy by restricting patient choice. If the four heart surgeons were required to leave town, the patients could no longer choose them to do heart surgery. The Supreme Court noted the relationship between a heart surgeon and a patient is very limited. Typically the patient sees the heart surgeon briefly before and after surgery. It is not an ongoing relationship. The trial court made no finding that prohibiting these four heart surgeons from practicing in Wichita and the surrounding area would leave the community without sufficient heart surgeons. Patients still had a choice of twelve other heart surgeons in the Wichita service area. Therefore, the noncompete agreement was reasonable because it did not fail to make a reasonable accommodation of patient choice.

Liquidated Damages

The Court said the liquidated damages clause did not become part of the employment agreement because Wichita Surgical offered to let the four surgeons pay the money and continue to practice, but the surgeons rejected the offer and sued Wichita Surgical instead. The parties failed to have a meeting of the minds on the liquidated damages clause, which is a contract law requirement.

Lessons learned from *Idbeis v. Wichita Surgical Specialists, P.A.*, No. 91,442 (Kan. June 3, 2005).

You can take away at least four things from the Kansas Supreme Court's decision.

1. The Court reaffirmed the validity of using restrictive covenants to protect legitimate business interests, and reaffirmed the four-part analysis in judging their reasonableness.

2. The Court made it clear that protecting referral sources is a valid business interest. The idea that over time an employer loses its interest in protecting its referral sources, which is often advocated by employees, was rejected by the Court.

3. The Court rejected the notion that noncompete covenants without liquidated damages clauses are less enforceable than restrictive covenants with the option to pay damages. Either is enforceable if it meets the four-part test.

4. The Court reiterated the public policy that freedom of contract is not to be interfered with lightly, and the courts are to enforce noncompete agreements freely entered into if they are reasonable under the four-part test. In physician contracts, reasonable accommodation of patient choice, and restriction of medically necessary specialties, are but two of a number of factors to review in determining the reasonableness of the noncompete agreement.

Action Required

This ruling can have significant impact on employment agreements, buy-sell agreements, asset purchase agreements, stock purchase agreements, operating agreements, corporate by-laws, and other documents which include noncompete agreements. You may wish to contact your legal counsel to review your documents and agreements to determine how this ruling affects their enforcement. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to review and modify your documents and agreements to specifically meet your business needs.

For Further Information

Foulston Siefkin's health care lawyers maintain a high level of expertise regarding federal and state regulations affecting the health care industry. The firm devotes significant resources to ensure our attorneys remain up-to-date on daily developments. At the same time, the relationship of our health care law practice group with Foulston Siefkin's other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For additional information, contact **Gary Ayers** at (316) 291-9530, or gayers@foulston.com. For more information on the firm, please visit our website at **www.foulston.com.**

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