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In *Wellspan Health v. Bayliss (2005)*, the Pennsylvania Superior Court held that the public's interest in access to specialty care was superior to the business interests of a hospital system. Wellspan is also noteworthy because, for the first time, the Court held that a hospital system's referral base was a business interest that could be protected by enforcing a noncompete agreement (also called a restrictive covenant) against a formerly employed physician.

Wellspan Health, a hospital system located in York County, hired Dr. Phillip Bayliss, a perinatologist, in 1993. When he joined Wellspan Health, Dr. Bayliss signed an employment agreement that contained a restrictive covenant prohibiting him from practicing perinatology in York County and its four contiguous counties (Lancaster, Adams, Dauphin, and Cumberland) for two years after termination of his employment for any reason. During Dr. Bayliss's employment, Wellspan Health considered plans to expand its perinatology services into Lancaster County, but failed to take any specific action to expand. In 2003, Dr. Bayliss resigned from Wellspan Health and immediately started a perinatology practice at a Lancaster County hospital, despite the restrictive covenant prohibiting him from practicing in Lancaster County.

In an attempt to stop Dr. Bayliss from competing, Wellspan Health went to court and obtained a court order prohibiting him from competing, but only in York and Adams Counties. Thus, to Wellspan Health's disappointment, the order did not prevent Dr. Bayliss from continuing his practice in Lancaster County. In a further attempt to stop Dr. Bayliss from competing in Lancaster County, Wellspan Health appealed to the Superior Court. On appeal, the Superior Court held against Wellspan Health and refused to enforce the noncompete agreement in Lancaster County, for reasons discussed below.

Pennsylvania Law on Physician Noncompetes

To appreciate the significance of the Wellspan decision requires a basic understanding of the law of noncompete agreements in Pennsylvania. Generally, noncompete agreements are not favored by Pennsylvania Courts, which have historically viewed them as unreasonable restraints on competition. Pennsylvania law requires a party seeking to enforce a restrictive covenant to show that its enforcement is reasonably related to the protection of a legitimate business interest. Therefore, to uphold the covenant against Dr. Bayliss, the Wellspan Court first had to find that Wellspan Health had a legally "protectable interest." It did just that. While previous Pennsylvania Courts had recognized a patient base as a legally protectable interest under noncompete agreements, for the first time in Pennsylvania, the Wellspan Court found that "the referral bases of a specialized medical care institution are analogous to a physician's patient relationships or an employer's customer relationships," both of which had been recognized as "protectable interests" by prior Commonwealth Courts.

Wellspring (emphasis added).

After finding a “protectable interest,” Pennsylvania Courts must then apply a balancing test established in *Hess v. Gebhard & Co., Inc.* (2002). The balancing test requires Courts to balance the employer’s interest protected by the covenant against the hardship its enforcement would impose on the employee’s ability to earn a living. Only if the employer’s protectable interest outweighs the employee’s interest in earning a living will the covenant be enforced against the employee. In addition, Pennsylvania Courts are reluctant to extend the protection of a restrictive covenant beyond what is reasonably necessary under the circumstances to protect the employer’s interests. This means that Pennsylvania Courts will apply covenants narrowly, such as by limiting the restricted geographic area or the number of years that the covenant will apply.

Special Considerations For Physician Noncompetes

In addition to the tests described above, in cases involving physicians, Pennsylvania Courts will more closely scrutinize restrictive covenants because physician services are valuable to the public. *Before enforcing a physician’s agreement not to compete, Pennsylvania Courts will undertake a quantitative analysis to determine if enough physicians practicing in a particular specialty are available to serve the community in the area restricted by the covenant.* This extra test for physician noncompete agreements means that it may be quite difficult for employers to enforce noncompete agreements against physicians, despite the parties’ written agreement not to compete, because the Court will also look carefully at the effect it may have on the community . It was this extra test that played an important role in the Wellspring Court’s decision. However, Wellspring is not the first Pennsylvania case to strictly scrutinize a physician’s noncompete agreement, or to consider the community impact of its enforcement.

In *New Castle Orthopaedic Assoc. v. Burns* (1978) the Pennsylvania Supreme Court found that greater harm would result from enforcing a covenant against an orthopedist where there was a shortage of orthopedists in the county and the orthopedist’s former employer failed to show it was substantially harmed by the orthopedist’s continued practice in the county. In reaching its decision, the New Castle Court found significant that the competing orthopedist had not solicited patients of his former employer and, further, that the former employer had not lost patients after the orthopedist began his own practice in the prohibited county. Finally, a major factor that the New Castle Court considered was the “effect of the action [in enforcing the noncompete] upon the interests of society as a whole.” The New Castle Court reasoned, “[p]aramount to the respective rights of the parties to the covenant must be its effect upon the consumer who is in need of the service.” After finding that a shortage of orthopedists in the county was resulting in significant delays for patients attempting to get appointments with orthopedists, the Court ruled against enforcing the covenant. Thus, the New Castle Court’s ruling against enforcement was due, in large part, to the potential harm to the community.

Applying the balancing test to the Wellspan facts, the Wellspan Court found that the restrictive covenant in Lancaster County was unreasonable and, therefore, unenforceable. That was the case because the facts indicated that Wellspan Health did not even compete for perinatology patients in Lancaster County because it drew only a very small percentage of patients from Lancaster County. As a result, there was no actual “protectable interest” of Wellspan Health that could reasonably be protected by a restrictive covenant in Lancaster County. The Court reasoned that if “an employer does not compete in a particular geographical area, enforcement of a non-competition covenant in that area is not reasonably necessary for that employer’s protection.” In addition, as in New Castle, the Wellspan Court was strongly influenced by the “paramount” interest of the consumer. The Court agreed with Dr. Bayliss that Lancaster County was an underserved area for perinatology services. In fact, Dr. Bayliss was the only perinatologist in that County. Therefore, the strong public interest in having a perinatologist available in Lancaster County, coupled with Dr. Bayliss’ interest in earning his living there, outweighed Wellspan Health’s protectable interest in Lancaster County.

Importance of *Wellspan*

Of great significance in northeastern Pennsylvania counties and other areas facing physician shortages is the Wellspan Court’s emphasis on the community impact of enforcing a noncompete agreement. Clearly, the Wellspan Court was reluctant to enforce a restrictive covenant against a specialist physician in an area underserved by that specialty. The Court recognized that, if it enforced the covenant, it would deprive the community of that specialist’s care despite the parties’ agreement to protect Wellspan Health’s interests. To do so would be against the strong public interest in having specialty care available. As in New Castle, the Wellspan Court found the public’s interest in access to specialty care was “paramount” and, therefore, superior to Wellspan Health’s protectable interests. In following New Castle, Wellspan further establishes in Pennsylvania law that the agreement between the parties, and the interests of the employer in that agreement, can be overridden by the community’s need for the physician’s services. Thus, in light of Wellspan, it may be increasingly difficult for hospitals, or other employers of specialty physicians, to enforce restrictive covenants against specialists who are in short supply in their geographic area.

The *Wellspan* decision is also significant because it is the first Pennsylvania case to find that a hospital has a “protectable interest” in its referral base. Now, after Wellspan, just as an employer can protect its customer base or a health care provider can protect its patient base with a noncompete agreement, a hospital can use a noncompete to protect its referral base. Legal recognition of this “protectable interest” may make it easier for hospitals to enforce geographically broader restrictive covenants against physicians where they can show a referral base in a broad area that will be harmed by competition from a formerly employed physician.

However, *Wellspan* also clearly suggests that to demonstrate the geographic scope of any “protectable interest,” such as its referral base, a hospital must demonstrate actual existing business activity related to the

protectable interest in that geographic area. For “protectable interests” such as patient and referral bases, such “protectable interests” will not be found if the facts fail to show that the hospital has sufficient existing patients and referral sources coming from that geographic area. Few referrals or patients, or mere hopes or plans to expand into an outlying geographic area, will not support a finding of a legitimate “protectable interest.”