A new hurdle to enforcement of physician non-competes in Colorado? Maybe.

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DISCLAIMER/NOTE: The author is not giving any legal advice to the reader of this article. The reader is advised to seek advice from counsel competent in the areas of competition restrictions before taking any action. No attorney-client relationship exists between the author and the reader unless and until the reader formally retains the author as counsel.

Elsewhere on this website I have posted articles relating to agreements not to compete entered into by physicians (in Colorado, "physician" is limited to only those with M.D. and D.O. degrees, as only they "practice medicine" under Colorado's medical practice statute). The purpose of this piece is to alert the reader to a new Colorado Court of Appeals opinion announced on March 8, 2018, *Crocker v. Greater Colorado Anesthesia, P.C.,* Court of Appeals No. 17CA0099.

Prior to *Crocker*, there was only one reported Colorado case addressing physician noncompetes, *Wojtowicz v. Greeley Anesthesia Services, P.C.*, 961 P.2d 520 (Colo. App. 1997), decided 21 years ago. Under *Wojtowicz*, the damages portion of a physician covenant not to compete is enforceable only if it calls for legitimate competitive damages, which in Colorado are limited to lost net profits incurred by the former employer due to the physician's continued post-termination practice. In Colorado, noncompete agreements which restrict a physician's ability to practice in any location he or she desires are statutorily void. Accordingly, *Wojtowicz* effectively limited physician non-compete covenants to lost profit damages. i.e. (1) patient revenue; (2) less direct expenses like physician compensation; and then (3) less an appropriate portion of general and administrative expenses, such as rent, staff salaries, malpractice premiums, etc. The result is typically a small fraction of patient revenue and may even be a negative amount. Such provisions are routinely in "liquidated damages" clauses in doctor non-competes. If you are a physician and under a covenant not to compete, the chances are very high that this is the nature of your restriction.

Crocker accepts the net profit limitations of *Wojtowicz* but goes a very significant step further by requiring that the former employer actually prove that it incurred such damages due to physician post-termination competition - not that it *will* incur damages, but that it *has* incurred them and the amount thereof. Accordingly, even if a liquidated damages provision is in the non-compete, the former employer must nonetheless prove that the physician's post-termination practice not only caused the former employer damages, but that such damages are a proper measure (likely limited to lost net profit) and at least a reasonable approximation of the amount thereof. The opinion notes that the express language of the Colorado Non-Compete Statute applicable to physicians limits damages in a physician noncompete only to damages which are reasonably related to the injury suffered *in the past tense*. The Court found that under such language, the reasonableness of the relationship between the amount set forth in the liquidated damages provision and the actual loss proven must be demonstrated, which it found could only be done post-termination, after actual post-termination practice occurred. It found any other damages not demonstrable by actual post-termination practice would be unduly speculative and improper.

Crocker has not yet been selected for "official publication" and thus is of somewhat limited precedential authority, at least for the time being. It could be officially published at a future date. Time will tell, and anyone reading this article should confirm whether *Crocker* has been officially published. A reading of *Crocker*, however, leads to a very clear conclusion. At least for the Court of Appeals in that case, any attempt to claim damages under a physician non-compete will be in vain unless the ex-employer is able to prove that the physician actually caused the ex-employer to incur proper damages set forth in the noncompete's liquidated damages clause directly as a result of the physician's continued post-termination practice.

In this regard, certain practice specialties such as anesthesiology and radiology do not place the physician in a direct physician-patient relationship. Likewise, hospitalists traditionally treat patients assigned to them within the hospital in which they work. Accordingly, for specialties like these, the fact that the physician might practice in a different clinical location than their former employer will not logically cause that former employer to lose any patients, and hence any patient revenue (and hence any lost net profit due to such revenue). Further, in modern practice, many physicians and patients alike are "locked in" to a specific network. If a physician leaves to become part of a different network where patients don't follow, logically there can be no loss of patient income to the former network due to the physician's post-termination practice in the other. The same dynamic is dominant in many modern "captive" referral systems. True patient and physician independence and true independent medical practice are rapidly becoming things of the past. This would appear to have significant impact when *Crocker* is applied.

If you are a doctor dealing with a covenant not to compete, you should consult with counsel with demonstrated competence under Colorado's unique noncompete statute. Colorado's special physician rule is one of a kind, so consulting with an attorney who knows this area thoroughly is essential.

In the end, the effect of *Crocker*, especially if it is selected for official publication, appears very favorable for Colorado physicians burdened by noncompete agreements.