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California Non-Compete Law Renders Surgeon Settlement Agreement Unenforceable

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Answering a question left from a previous appeal in the same case, a divided panel of the U.S. Court of Appeals for the Ninth Circuit has concluded that a settlement agreement provision between a physician and his former employer, the California Emergency Physicians Medical Group ("CEP"), constituted a "restraint of a substantial character" on the physician's medical practice and therefore violated California's non-compete provision, Cal. Bus. & Prof. Code § 16600. As a result, the entire settlement agreement was void and unenforceable. *Golden v. California Emergency Physicians Med. Grp.*, No. 16-17354 (9th Cir. July 24, 2018).

Background

Dr. Golden worked for CEP as an emergency room surgeon. CEP terminated his employment in 2007, ostensibly because he lacked board certification. He sued for race discrimination and, following mediation with a magistrate judge, the parties agreed in principal to settle the dispute. However, Dr. Golden balked when CEP circulated a proposed written agreement containing the following restrictive covenants:

The parties agree that . . . Golden shall not be entitled to work or be reinstated at any CEP-contracted facility or at any facility owned or managed by CEP. The parties further agree that if CEP contracts to provide services to, or acquires rights in, a facility that is an emergency room as defined and regulated by California law at which Golden is employed or rendering services, CEP has the right to and will terminate Golden from any work in the emergency room without any liability whatsoever. Similarly, the parties agree that if CEP contracts to provide services to, or acquires rights in, a facility at which Golden is employed or rendering services as a hospitalist, CEP has the right to and will terminate Golden from any work as a hospitalist without any liability whatsoever.

Dr. Golden refused to sign the agreement, claiming that this provision of the agreement violated Bus. & Prof. Code §16600. In response, his attorney withdrew and "moved to enforce the agreement so he could collect his fee." The district court granted the motion and ordered Dr. Golden to sign,

reasoning that because these provisions would only prevent Dr. Golden from working for, not competing with, CEP, they were not a restraint on his medical practice and Section 16600 did not apply. Dr. Golden continued to refuse to sign the agreement and appealed.

The Decision

First, the Ninth Circuit reviewed state law precedent addressing the parameters of Section 16600, concluding that a restraint on future employment may be considered "substantial" even if it is reasonable or narrowly-tailored. In light of this "undemanding" standard, the Court first ruled that the clause restricting Dr. Golden from working at any facility owned or managed by CEP was lawful, "as it simply restates the obvious proposition that an employee does not have a general right to work for an employer without the employer's consent" and, in any event, the restraint on Dr. Golden's ability to practice his profession was minimal because CEP owned or managed only a few clinics.

However, the Court of Appeals found that the clauses purporting to bar Dr. Golden from working at CEP-*contracted* facilities, now or in the future, violated Section 16600 due to the extent of CEP's current emergency room contracts in California (handling between 25% and 30% of all emergency room admissions in the state), as well as at facilities with which it may later contract, given its significant growth in the state during the previous decade. The dissent contended that the majority was engaging in rank speculation in this latter respect, especially given that Dr. Golden had worked continuously during the decade-plus since his departure from CEP; had never been denied employment since the litigation began; and could not point to "any evidence that he would be fired, actually restrained, or barred from engaging in his profession upon signing the settlement agreement." Nevertheless, the majority noted that the restrictive covenant would "affect[] not only Dr. Golden's employment at CEP itself, but also his [existing] and future employment at third-party facilities" where CEP provided services, even if the CEP services began after the commencement of Dr. Golden's employment, and even if the CEP services did not compete with the services Dr. Golden provided.

The majority also rejected CEP's argument that because Dr. Golden was no longer an ER surgeon, the restrictions in the settlement agreement would not substantially interfere with his ability to practice medicine. As the court noted, the agreement allowed CEP to terminate his employment at any facility where he worked in the ER or as a hospitalist.

Importantly, California courts have interpreted and applied Section 16600 and its related provisions strictly, noting that by its own language there are only two circumstances under which substantial restraints of trade are allowed: (1) where a person sells the goodwill of a business and (2) where a partner agrees not to compete in anticipation of dissolving a partnership. Moreover, for decades California courts have held that, in light of the underlying policy favoring open competition and employee mobility, courts may reform (*i.e.*"blue pencil") a contract only if a mistake was made and not to save an otherwise illegal contract. Thus, because neither of the narrow exceptions to Section 16600 existed, the Ninth Circuit declared the entire settlement agreement void and unenforceable, and remanded the case to the district court to proceed accordingly.

The Takeaway

Golden reinforces, if not establishes, that even if they are contained within a settlement agreement, in California a restraint on future employment deemed substantial (basically, anything other than re-employment with the same employer) is not beyond the restrictive scope of Section 16600, regardless of whether it is "reasonable" or narrowly tailored. Employers with operations in California

must therefore be cautious in attempting to incorporate or enforce such provisions into a settlement agreement, even if such provisions would be wholly acceptable in other jurisdictions in which they operate.

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