



Litigation Issues

Presented by:
Jeffrey C. Clark – Partner
David J. Pivnick – Associate
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Non-Compete Agreements

- Considerations center on reasonableness
 - Protectable interest/legitimate business interest
 - Scope of restricted activities
 - Geographic scope
- Irreparable harm/inadequate remedy at law
- Physician Non-Competes
 - Clarify restriction on ownership vs. practice of medicine
- Enforcement Always Questionable

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Drafting Considerations

- Narrow drafting is important
- Consider the specific interests being protected
 - Non-compete
 - Non-solicit
 - Customers, clients, suppliers, employees
 - Confidential information
- Jurisdiction and choice of law

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Enforcement

- State laws vary
 - Important to consider each state's law
 - Often is a matter of public policy
- Are non-competes permitted?
 - A review of several states' law identifies the variation in such laws

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Illinois

- Non-compete agreements are generally enforceable where:
 - Designed to protect a legitimate business interest
 - Where there is a near-permanent relationship with customers and absent employment, defendant would not have had contact; or
 - Nature of the business is considered
 - Where the former employee learned trade secrets or acquired other confidential information through his employment and subsequently used that information for his own benefit.
 - Temporal and geographic scope is reasonable
 - *Sunbelt Rentals, Inc. v. Ehlers*, 915 N.E.2d 862, 870 (Ill. App. Ct., 4th Dist. 2009)
 - Focused only on these factors

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Texas

- Section 15.50 of the Business & Commerce Code
 - Places limits on the manner in which physicians can be bound by non-compete agreements
 - Amended in 2009
 - Physician non-competes must include a buy-out
 - Applies only to non-competes relating to the practice of medicine
 - Does not apply to a physician's ownership interest in a licensed hospital or ASC
 - *Greenville Surgery Center, Ltd. V. Walter Beebe, M.D., et al.*, 2010 Tex. App. LEXIS 5377 (Tex. Ct. App. July 9, 2010)

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Louisiana

- Long-standing public policy against non-competes
- La. Rev. Stat. 23:921
 - States that non-competes are generally null and void
 - Sets forth exceptions including:
 - The sale of the goodwill of a business
 - The separation of an employee from his employment
 - Business entities
 - Partnerships, LLCs, and Corporations may agree that the respective partners, members or shareholders will not compete after they cease to be involved with the entity

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California

- California Business and Professions Code Section 16600
 - “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.”
- Exceptions
 - 1. agreements associated with the sale of a business, including goodwill (Section 16601);
 - 2. agreements entered into in anticipation of dissolution of, or dissociation from, a partnership (Section 16602);
 - 3. agreements in anticipation of the dissolution of, or termination of membership in, a limited liability company (Section 16602.5); and
 - 4. companies may protect their trade secrets

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Reimbursement Disputes

- In- versus Out-of-Network
- United Health Ingenix Settlement
- Balance Billing Issues

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Prompt Payment/Claims Administration

- Examples
 - United Healthcare Settlement
 - PacifiCare Investigation
- Most states have laws that include requirements for prompt payment of claims and claims administration

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ERISA

- Preemption Issues
- Impact on Payor-Provider Disputes
- Recent Cases

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Partnership Disputes

- Hospital Consolidation Leading to Increase in Disputes
- Economic Factors
- Redemption Issues
- Need for Consistency
 - Similar to Setting a Precedent in Employment Suits

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Contracting Disputes

- Existing Contract
- Negotiation Process

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False Claims Act

- The False Claims Act ("FCA") creates liability for persons or entities who submit claims and receive payment from the federal government improperly
- The FCA applies in the health care context, particularly with regards to Medicare claims
- FCA claims are on behalf of the federal government but can be brought by members of the public, known as Relators
- Several states have similar laws to recover false or fraudulent claims that are submitted to the state government

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31 U.S.C. § 3729(a)

- The FCA provides for liability in several situations, including where:
 - (1) **In general.**— Subject to paragraph (2), any person who—
 - (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
 - (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- This list is non-exclusive and there are other types of violations that are referenced in the FCA

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31 U.S.C. § 3729(b)

- (I) the terms “knowing” and “knowingly”—
- (A) mean that a person, with respect to information—
- (i) has actual knowledge of the information;
 - (ii) acts in deliberate ignorance of the truth or falsity of the information; or
 - (iii) acts in reckless disregard of the truth or falsity of the information; and
- (B) require no proof of specific intent to defraud;

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Whistleblowers

- Individuals, such as employees, former employees, contractors or patients may file an action on behalf of the United States Government.
- The lawsuits must initially be filed under seal to permit the Government an opportunity to determine whether to intervene.
- Regardless of whether the Government intervenes, the Relator may proceed with the lawsuit.
 - The Relator is entitled to a portion of any recovery regardless of whether the Government intervenes.
 - This provides Relators with a motivation to bring FCA lawsuits.

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Potential Liability

- Under the FCA, liability for claims arising before September 29, 1999 is a civil penalty ranging from a minimum of \$5,000 to a maximum of \$10,000 per claim, plus treble damages (based upon the value of the claim).
- For claims arising after September 29, 1999, liability is a civil penalty ranging from a minimum of \$5,500 to a maximum of \$11,000 per claim, plus treble damages (based upon the value of the claim that was submitted).

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Rising Importance of the FCA

- Recent amendments through the Fraud Enforcement and Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010
 - First FCA amendments in several years
 - The Department of Justice has requested a large increase in its fiscal year 2011 budget to protect the United States' interest, including the pursuit of financial fraud
 - The increase includes additional funds for economic fraud enforcement and the investigation and litigation of health care fraud cases
- There has been a substantial increase in FCA filings in recent years

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