

Enforceability and interpretation of agreements prohibiting “direct and indirect” solicitation of health care employees

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Earlier this month, the U.S. Court of Appeals for the Fourth Circuit held that several nursing homes breached their non-solicitation agreements with a therapy firm, where the nursing homes had assisted a rival therapy firm in recruiting and hiring therapists stationed at the nursing homes. The court found that this conduct was in violation of the nursing homes’ agreement not to “directly or indirectly” solicit or hire the therapy firm’s employees for a one-year period. The court also upheld the provisions regarding liquidated damages, which resulted in the nursing homes having to pay \$640,000 in liquidated damages, plus attorneys’ fees. See *ProTherapy Associates, LLC v. AFS of Bastian, Inc., et al.*, 2012 U.S. App. LEXIS 13628 (4th Cir. July 2, 2012). This court decision is a reminder of the importance of review by local counsel of non-solicitation provisions (as well as other restrictive covenants) for enforceability issues as well as to explain the specific types of activities that are prohibited.

ProTherapy Associates, LLC (ProTherapy), a provider of trained personnel for skilled nursing facilities, entered into service agreements with nine nursing homes. Each agreement required ProTherapy to train and supervise licensed therapy personnel to provide physical and occupational therapy and speech and language pathology services at the nursing home facilities. Each agreement contained a non-solicitation provision prohibiting the nursing homes from “directly or indirectly” soliciting, recruiting or hiring ProTherapy’s employees during the term of the agreements and

for one year thereafter. The agreements contained a liquidated damages provision, requiring any breaching nursing home to pay \$10,000 for each therapist “directly or indirectly” solicited or hired.

In August 2009, the nine nursing homes exercised their right to terminate the agreements within 90 days. During this same period, the nursing homes entered into a separate agreement with Reliant Pro Rehab, LLC (Reliant) to provide therapists for the nursing home facilities at a lower cost. While the ProTherapy agreements with the nursing homes were still in effect, Reliant began meeting with ProTherapy therapists and recruiting them to provide services to the nursing homes under the contract between Reliant and the nursing homes. The nursing homes assisted Reliant in recruiting these ProTherapy employees by: (1) providing Reliant with a list of all the ProTherapy personnel working at the nursing homes; and (2) making the therapists available to Reliant for employment discussions. Through these efforts, Reliant was able to hire 64 ProTherapy therapists to work for Reliant, beginning at the expiration of the 90-day notice period.

ProTherapy sued the nursing homes for breach of contract. In the lawsuit, ProTherapy alleged that the nursing homes had breached the non-solicitation agreements by using Reliant to “indirectly” solicit and employ ProTherapy therapists. In response, the nursing homes claimed they did not breach the agreements because they did not engage in any conduct that would be considered solicitation.

Further, it was Reliant (not the nursing homes) who was responsible for recruiting and employing the 64 therapists.

On July 2, 2012, the Fourth Circuit affirmed the trial court's ruling that, by providing a list of therapists and making therapists available for employment discussions, the nursing homes facilitated Reliant's recruitment of the therapists and "indirectly" hired ProTherapy's therapists, in breach of the non-solicitation agreements. The Fourth Circuit also agreed that: (1) the non-solicitation provisions were valid as reasonably necessary to protect ProTherapy's legitimate business interests; and (2) the liquidated damages provisions were enforceable in lieu of compensatory damages, since the \$10,000 per therapist amount was a "modest sum" in light of ProTherapy's greater expenses in hiring and training the therapists. The Fourth Circuit, therefore, affirmed the judgment in favor of ProTherapy in the amount of \$640,000 plus attorneys' fees.

In conclusion, what should health care businesses take away from the Fourth Circuit's decision in *ProTherapy Associates, LLC*?

First, not all types of restrictive covenants are enforceable in each state. If a non-solicitation agreement is enforceable in your state, it still must be carefully drafted to ensure that any restrictions are reasonably necessary to protect the enforcing party's legitimate business interests.

In addition, terms such as "indirectly solicit" or "indirectly hire" could be broadly construed by a court to include activities that management may not easily be able to control. For example, "indirectly solicit" or "indirectly hire" could include simply sharing a list of employee names with a third party or making employees available for discussions with a third party.

Finally, liquidated damages provisions in non-solicitation agreements may be found enforceable under certain circumstances. Thus, liquidated damages clauses may warrant careful consideration when negotiating non-solicitation agreements.



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