

# WHAT A \$24.3 MILLION JUDGMENT TELLS YOU ABOUT A POTENTIAL TOOL TO FIGHT UNFAIR AWARDS OF EXCLUSIVE CONTRACTS

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An interesting case illustrates a potential new tool in the arsenal to fight against fraudulent request for proposal (RFP) processes, “fixed” hospital exclusive contracts, and, potentially, against the advisors who helped put lipstick on the pig.

Many anesthesiology groups have been there: the situation in which a long-standing relationship with a hospital, whether or not via exclusive contract, is disrupted, in favor of another group.

In the classic fact pattern, something led to the hospital’s decision to enter into an, or change the existing, exclusive contract arrangement.

Perhaps our avatar group, let’s call it “Your Group,” has given pushback over quality issues. Perhaps some members of Your Group have complained about group leadership to the hospital’s COO in order to obtain the contract for themselves. Perhaps Your Group is also working at a competing facility across town and that’s pissed off the CEO.

As a result, the hospital issued an RFP, and perhaps it’s even hired a company that purports to manage the running of RFPs, one, even better, that’s developed a report to show why choosing another group (Group X) instead of Your Group is supported by evidence. Unfortunately, or there’d be no need for this article, Your Group loses the RFP in favor of Group X.

Historically, courts have been extremely deferential to hospital governing board decisions regarding awards of



exclusive rights, and therefore, to changes in who holds exclusive rights. Claims of breach of contract and of torts such as tortious interference generally fail. Which brings us to the very interesting New Jersey appellate decision in *Comprehensive Neurosurgical, P.C., etc., at al. v. The Valley Hospital, et al.* (Comprehensive).

First, it’s important to note that the *Comprehensive* case is an “unpublished” decision, meaning that it does not have precedential value. The decision is highly fact-specific, which, perversely, makes it highly informative for you.

Because the facts are long and complicated, I’m not going to set them all out. But here, in limited fashion, is what you need to know.

Comprehensive Neurosurgical, P.C. (CompNeuro) is a neurosurgical group that provided services at several hospitals, including at The Valley Hospital (Valley Hospital) and at Hackensack University Medical Center (Hackensack).

For over a decade, CompNeuro physicians provided on-call coverage in the emergency department (ED) at Valley Hospital and were instrumental in Valley Hospital acquiring specialized equipment, including biplane angiography and Gamma Knife equipment, that allowed stroke patients to receive treatment at Valley Hospital.

But then, in December 2015, Valley Hospital sent out a memo stating that after “almost a year of study” the Board of



Trustees unanimously voted to have neuro coverage of the ED performed exclusively by another neurosurgery group providing services at the facility, the "Columbia Group."

CompNeuro sued Valley Hospital, its board of trustees, its president and Columbia Group asserting breach of contract claims and tort claims, including breach of the implied covenant of good faith and fair dealing and tortious interference with prospective economic advantage.

Among other things, CompNeuro alleged that Valley Hospital and its president had a longstanding contentious rivalry with Hackensack. They asserted that that was the motivation to terminate CompNeuro physicians' long-enjoyed clinical privileges at Valley Hospital: losing the ability to perform the services they had helped develop and create was punishment for their affiliation with Hackensack. The trial court found in favor of CompNeuro and awarded it a \$24.3 million judgment.

By the time the case reached appeal, Valley Hospital was the only remaining defendant; it appealed from the \$24.3 million judgment entered against it. The only remaining claim was one pertaining to the allegations of breach of the implied covenant of good faith and fair dealing.

The parties squared off along these two, simplified lines of argument.

### VALLEY HOSPITAL'S ARGUMENT:

The Medical Staff bylaws provide that the on-call schedule is not a right or a privilege, but a responsibility.

We have conducted a year-long study (the White Paper) including reviewing data from a quality score vendor and input from a large, nationally known consulting firm. The results were that Columbia Group, not CompNeuro, was the better choice in terms of quality and cost for an exclusive arrangement including participation in a major strategic initiative essen-



tial to advancing the goal of becoming a neuroscience center of excellence.

### COMPNEURO'S ARGUMENT:

Your argument sounds good, but you just put on a show to cover up for your lack of good faith and fair dealing. We know it's a cover up because your own documents prove it.

What had CompNeuro found? Why did the court affirm the \$24.3 million judgment?

CompNeuro argued that discovered emails showed that the White Paper wasn't an objective study but that its outcome was predetermined to favor Columbia Group. For example:

1. A 2012 email from the head of Valley Hospital's planning department (Callandrillo) attached an article from Hackensack that highlighted a clinical trial on vaccines that one of CompNeuro's physicians was conducting there. The email stated that one of the physicians from the Columbia Group (D'Ambrosio) was very concerned about CompNeuro's benefiting from Columbia Group's intellectual capital.
2. A 2013 email chain included an email forwarded from D'Ambrosio to a Valley Hospital vice president (Bhavsar) and to Callandrillo complaining about a scheduling problem in the operating room and that, if true, it was an example of potentially dangerous physician communication, temperament and judgment. Bhavsar responded to Callandrillo that he spoke with D'Ambrosio who was very passionate on how the other group, i.e., CompNeuro, was hurting Valley Hospital's reputation and that the Columbia Group is very available to be "THE Valley Neurosurgery group." D'Ambrosio had told Bhavsar that he hoped the email "would be a catalyst in moving us towards" the direction of Columbia group "tak[ing] it all on."
3. Callandrillo replied to Bhavsar that she had spoken with Valley Hospital's president (Meyers), who said that "moving to an exclusive contract really is the nuclear option," to which Bhavsar responded, "Kaboom." Callandrillo

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lo replied, "The day will come . . . believe me."

4. In another email chain including Callandrillo and Meyers, Callandrillo forwarded an email that showed one of CompNeuro's physicians (Roth) was a guest speaker and the "Director of Neurosurgery" at Hackensack. Valley Hospital's general counsel (Goldfischer) responded, "truly unbelievable. Unfortunately, the hospitalist strategy will not stop the outmigration of Roth's cases, given his title and ties to Hackensack."
5. An analyst in the planning department emailed Callandrillo informing her that the quality and utilization analysis doesn't show any glaring difference in costs or quality between the groups.
6. Emails showed that Meyers asked Goldfischer if Valley Hospital could work on getting an exclusive contract after they heard that a Gamma Knife patient who "clearly came through our ED" and was a patient at Valley Hospital, then went to Hackensack. Goldfischer responded that there was "nothing



we can do if they have privileges," and that "the only thing [they] could do is close the service" to [Columbia Group], and Goldfischer asked Meyers if Valley Hospital had "the appetite for this." Goldfischer asked that if the answer was yes, she wanted clarification if they would be "closing the entire service or only the ER?" Meyers responded, "Only the ER for unassigned patients. Be prepared for a lawsuit, so we need to may [sic] a strong case ahead of time." A later related email from Goldfischer notes that they would "need to paper this carefully."

applicable state's laws, a potential violation of the implied covenant of good faith and fair dealing or of a business interference tort. That thinking netted CompNeuro \$24.3 million.

Consider this another arrow in your quiver against potentially fraudulent or impermissible hospital behavior that's been papered over with a patina of "board decisions that are entitled to deference," studies and consultants. ▲

## HERE'S THE REAL TAKEAWAY FOR YOU:

Don't immediately think that if your group loses an exclusive contract, or if your group's physicians are pushed out from exercising what are currently their medical staff and/or clinical privileges, that there's not, depending upon your

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