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Don’t Neglect Forum Selection and Choice of Law Provisions When Drafting or Litigating Restrictive Covenants

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Employment agreements with restrictive covenants typically contain both a forum selection clause, which determines the forum where a dispute must be heard, and a choice of law clause, which determines the law that applies to the dispute. As lawyers who regularly litigate post-employment restrictive covenant cases well know, enforcement or restrictive covenants often turns on which court decides the dispute, and what law applies, which is why these provisions are so important. Often, however, employers consider these provisions as mere drafting afterthoughts. They shouldn’t be, given the outsized importance they can play in determining enforcement. Moreover, at the dispute stage – whether seeking to enforce or resist a restrictive covenant – forum selection and choice of law provisions should inform, and often drive, litigation strategy.

Keep in mind, however, that several states (*e.g.*, California, Massachusetts, Washington) have recently enacted laws prohibiting enforcement against their citizens of forum selection and choice of law clauses designating some other state’s forum or law. And even in the absence of such a statute, courts will not always rubber-stamp an agreement’s forum selection and choice of law designations where they might conflict with state public policy considerations.

A recent noncompete case decided in Georgia illustrates this last point. In *Martin v. Hauser, Inc.*, 20-GSBC-0008 (Ga. Statewide Business Court, Oct. 30, 2020), Cameron Martin, an employee of Cincinnati-based insurance company Hauser Inc., resigned to take a job with a Hauser competitor after the company’s owner, Mark Hauser, pled guilty to fraud charges related to the “Varsity Blues” college admissions scandal. Martin explained in later pleadings that he quit because he was unsure how the fallout from Hauser’s conviction would impact his job, and he did not want his professional reputation tarnished by association with Hauser. Complicating his new work plans, however, Martin had signed an employment agreement with Hauser that contained three-year customer and employee non-solicitation and non-interference obligations. Importantly, although Martin had worked for Hauser exclusively in Georgia, his employment agreement contained an Ohio choice of law provision, but no forum selection clause.

Typical of many restrictive covenant cases, litigation maneuvering began almost immediately after Martin resigned on September 22, 2020. Two days later, Martin sued Hauser in Georgia state court, seeking a declaration that the restrictive covenants were unenforceable under Georgia law, despite the Ohio choice of law provision. About one week later, on October 2, 2020, Hauser sued Martin

(and his new employer) in Ohio seeking a temporary restraining order ("TRO") requiring him to comply with the covenants. Not to be outdone, Martin moved later that day for a TRO in the Georgia action to enjoin Hauser from enforcing the restrictive covenants. Hauser then removed the Georgia action from state court to federal court, the federal court remanded it back to state court, and, on October 30, 2020, the Georgia state court formally granted Martin's request for a TRO, enjoining enforcement of the restrictive covenants.

The Georgia court did not, however, order Hauser to dismiss all of its claims against Martin in the Ohio action. Yet it effectively gutted that case, enjoining enforcement of the non-solicitation and non-interference claims because it concluded that the Ohio court, applying Ohio law, would likely enforce them whereas enforcement under Georgia law would violate Georgia public policy. A different court, however, might well have reached a different conclusion. *See, e.g.,* *NuMSP, LLC v. St. Etienne*, 462 F.Supp.3d 330, 343-45 (S.D.N.Y. 2020) (enforcing New York choice of law against an employee who worked exclusively in Louisiana, despite that state's public policy disfavoring restrictive covenants). This simply underscores the importance of the forum court – even for deciding the threshold issue of which forum will decide the dispute!

Would this outcome have been different if there was a forum selection clause in Martin's agreement? Possibly, but this may well have turned on whether the case was litigated in state or federal court – which may be why Hauser tried to remove to federal court. *Compare* *Fortress Investment Group v. Holsinger*, 354 Ga.App. 405, 413 (2020) (invaliding New York forum selection clause in restrictive covenant agreement as against Georgia public policy) *with* *Pickvet v. Viking Grp., Inc.*, 2017 WL 460895, *4 (N.D. Ga. Feb. 3, 2017) (enforcing Michigan forum selection clause against Georgia citizen and transferring restrictive covenant case from Georgia to Michigan).

A few takeaways:

When drafting restrictive covenants, employers should consider including both forum selection and choice of law provisions that are both advantageous and defensible. They should also consider the impact of any state law restrictions on forum selection or choice of law provisions.

When litigating restrictive covenants, parties should consider the enforceability and impact of applicable forum selection and choice of law provisions, and the implications if these are absent. They should also consider whether there is a strategic advantage in being the first to file in court (availing themselves of the "first to file" rule in federal court) seeking either declaratory or injunctive relief, or both. If not the first to file, they should consider whether removal to federal court is an option and strategically advantageous – especially since state and federal courts often apply different standards in evaluating forum selection and choice of law provisions. Further, consider whether a particular court will entertain enjoining an action pending in another court or jurisdiction – many courts are loathe to do so. Finally, consider the public policies of both the state designated in the forum selection and choice of law provisions as well as the state in which the employee worked, and (perhaps most importantly) consider how the court in which litigation will, or may, occur, will likely apply those public policies.

In short, parties have significant (albeit not unlimited) control over *where* restrictive covenant disputes will be litigated, and *what law* will apply to those disputes. Given their critical importance to enforceability, these considerations should be top of mind both when drafting and litigating restrictive covenants.

Trade secret misappropriation impacts businesses across a variety of industries, and the

consequences can be severe. A potential victim of trade secret theft, or the accused, should swiftly consult experienced litigation counsel.

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