

CORPORATE COUNSEL

Solving the Multi-State Non-Compete Puzzle Through Choice of Law and Venue

By *Paulo B. McKeeby*

Differences among state non-compete laws create practical difficulties for employers and practitioners. Assessing enforcement likelihood often turns on which state's law should apply, particularly where an employee has worked in different states. One way of trying to obtain some measure of predictability is through contractual choice of law and venue provisions. While these provisions may help make outcomes more predictable in some circumstances, the degree of predictability can vary dramatically.

This article will address developments over the last few years where courts have assessed the viability of contractual choice of law and mandatory forum provisions in non-compete contracts in California, Massachusetts, and Texas. An analysis of legal developments in these states provides practical guidance for drafting enforceable non-compete agreements and assessing the likelihood of enforcing existing agreements.

California

Not surprisingly, many of the "race to the courthouse" cases involve California, where most customer non-solicitation and nearly all non-compete covenants are unlawful under Section 16600 of the California Business and Professions Code. Consequently, employers often include in employment agreements a choice of law provision of another state. However, a recent case in California suggests that this practice may not always produce the desired result.

In *Arkley v. Aon Risk Services Co. Inc.* (2012), three former employees filed suit in California federal district court



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seeking a declaration that an agreement prohibiting solicitation of former customers was unlawful. The employment agreement contained an Illinois choice of law clause, but apparently no mandatory venue provision. The employees were all California residents, worked for the defendant employer in California, and intended to work for a competitor in California.

The court had little difficulty in refusing to enforce the Illinois choice of law provision, finding that California had a materially greater interest than Illinois in the outcome of the case. Citing *Application Group Inc. v. Hunter Group Inc.* (1998), the court emphasized that it would have reached the same result even if the employees initially had resided in a different state and later had moved to California to work: "California's strong interest extends to 'persons whom California-based employers . . . wish to employ to provide services in California, regardless of the person's state of residence or precise degree of involvement in California projects,'

and it includes allowing California-based businesses to 'compete effectively for the most talented, skilled employees in their industries.'" *Id.*

On the other hand, California courts generally have declined to grant injunctions to prevent non-compete lawsuits in other states, even where the employees involved were California residents. For example, in *Advanced Bionics v. Medtronic* (2002), the California Supreme Court reversed a temporary restraining order enjoining Medtronic's prosecution of non-compete litigation in Minnesota against a California resident under an employment contract with a Minnesota choice of law provision. The court held that it lacked the authority to enjoin litigation in another state and that the illegality of non-compete agreements in California did not warrant an anti-suit injunction.

California courts also have refused to grant declaratory judgments to interfere with parallel non-compete litigation filed in other states. See, e.g., *Google Inc. v. Microsoft Corp.* (2005) (granting a stay to allow parallel litigation in Washington to proceed rather than deciding the merits of plaintiff employees' declaratory judgment action); *Swenson v. T-Mobil United States Inc.* (2006) (dismissing a declaratory judgment action where a Washington federal court had ruled on the choice of law issue and applied Washington law under the parties' contract.)

Massachusetts

The application of California law also was at issue in a recent federal district court case in Massachusetts. In *Aspect Software Inc. v. Barnett* (2011),

the former CEO of a Massachusetts-based telecommunications company accepted employment with a competitor in California. The employee resided in Tennessee, but worked part of the time in Massachusetts. The employment agreement contained a Massachusetts choice of law provision, but the employee argued that California had a greater interest than Massachusetts in the parties' dispute because of his intent to work in California. The court disagreed and found that, even though Massachusetts and California law conflicted as to non-compete agreements, Massachusetts had a fundamental interest in ensuring that contracts executed in Massachusetts are enforced.

The court in *Aspect Software* focused less on where the employee would be working after leaving his original employer and more on the facts that the employer had its principal place of business in Massachusetts and that the employee had worked at least in part in Massachusetts. The court also noted that "any harm caused by a violation of the non-compete clause will be felt in Massachusetts." The court did not address how this consideration was different, or if it was, from the fact that the employer's principal place of business was in Massachusetts. The opinion also did not state whether the court might have reached a different result had the employee never performed services in Massachusetts or if the employee had resided in California during his employment. The tenor of the opinion suggests that the court would have applied Massachusetts law even in light of those facts.

Texas

Texas courts have long held that the right to work and compete is a fundamental policy of the state and that Texas law should determine the employment rights of Texas residents. This rule was articulated in *DeSantis v. Wackenhut Corp.* (1990), and generally means that a Texas court will apply Texas law, notwithstanding the parties' contractual choice of law provision, if the employee worked most or all of his tenure in Texas. See, e.g., *Turford v. Underwood* (1997) (refusing to enforce Michigan choice of law clause and applying Texas law where the employee worked in Texas).

While Texas courts generally are hostile to choice of law provisions in the non-compete context, they will enforce forum selection clauses pursuant to the 2009 Texas Supreme Court decision *In re Autonation Inc.* (2007), where the court enforced a venue clause that provided that all litigation should be filed in Florida. The employee was a Texas resident and worked the entire tenure of his employment in Texas. He argued that requiring him to litigate his right to compete in Florida violated Texas public policy under *DeSantis* and that the venue provision should be disregarded. The court disagreed: "... even if *DeSantis* requires Texas courts to apply Texas law to certain employment issues, it does not require the suit to be brought in Texas when a forum selection clause mandates venue elsewhere." Accordingly, the court declined the employee's "... invitation to superimpose the *DeSantis* choice of law analysis onto the law governing forum-selection clauses."

Some Practical Considerations

The lessons from these cases are fairly straightforward. First, a contractual choice of law clause is no guarantee that an employer can control the law in a non-compete lawsuit. To the contrary, a variety of factors—such as the residence of the employee, both during and after the initial employment—may cause a court to refuse to honor a choice of law clause, particularly where there is a conflict between the law of the chosen state and the state where the employee worked. Second, a potentially better means of controlling the eventual legal proceedings process likely is through mandatory venue and consent to personal jurisdiction provisions.

As the cases above reveal, choice of law and venue considerations can be critical to the outcome of litigation and, as such, should be analyzed in drafting and reviewing non-compete agreements. In particular, multi-state employers should ask themselves: does a particular employee work in a state, such as California, where the law is particularly antagonistic to non-compete covenants; and, if so, is there an opportunity to apply the law of a different state through either a choice of law or a choice of venue provision, or some combination of both?

These questions can be even more complex in the context of employees who regularly provide services in multiple states or who may have moved from one state to another during the course of employment. Rather than having a "one size fits all" agreement, it may be advisable to assess the employee's individual circumstances to determine whether there is an opportunity for a preferable choice of law or venue other than that of the employee's place of residence. If so, as the case law above reveals, multi-state employers seeking to control the law as they enforce non-compete agreements are better off with both a mandatory venue provision and a choice of law provision, as opposed to only the latter of the two.

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