



Forum Shoppers Beware (But Not in Alabama)!

Insights

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Since non-compete law can vary drastically by state, many employers who operate in a multistate environment can benefit from utilizing forum-selection and choice-of-law clauses. These clauses are intended to ensure employers greater uniformity and predictability in managing their workforce. Employers can know in advance the forum and law that will apply if and when it needs to enforce a restrictive covenant against a rogue employee. Unfortunately, as many of the states have started to weigh in on the enforceability of these clauses, they have adopted different rules and at times made enforcement unpredictable and inconsistent.

The latest state to weigh in on the issue was Alabama. In *Ex parte PT Solutions Holdings, LLC*, the employee worked for a Georgia-based company but lived and worked in Alabama near the Alabama-Georgia border. In her position, she treated patients from Georgia and traveled to Georgia several times on business. To participate in the employer's bonus program, the employee signed a non-compete agreement that included a Georgia choice-of-law provision and selected the employer's headquarters as the forum for any disputes. When she went to work for a competitor located less than a half a mile from her employer (and took a customer and recruited two employees,) the employer sent her a cease-and-desist letter. The employee then preemptively filed a suit in Alabama to declare the outbound forum-selection and choice-of-law clauses unenforceable. The employer moved to dismiss but when the trial court denied its motion the employer had to file a petition for a writ of mandamus with the Supreme Court to enforce the forum-selection clause. The Court vacated the trial court's order and granted the motion to dismiss.

The employee needed to prove that the forum-selection clause, itself, violated Alabama's public policy. Instead, her arguments centered on why the contract *as a whole* contravened policy. Indeed, the employee had some strong arguments in support. Alabama was one of the many states recently enacting non-compete reform. Ala. Code § 8-1-197 went into effect January 1, 2016 and provides:

It is hereby declared that this article expresses the fundamental public policies of the State of Alabama [and] shall be applied instead of any foreign laws that otherwise might be applicable ... when the application of those foreign laws would violate the public policy expressed in this article.

Alabama generally disfavored applying non-competes to "professionals" such as the employee. However, the Supreme Court held that the employee's arguments were misplaced. "What matters is not whether the contract as a whole violates public policy, but whether the forum-selection clause

itself violates public policy.” Prior precedent established that the forum-selection clause did not violate Alabama public policy, and since there was no proof that the provision was procured by fraud or the product of coercion, it was enforceable.

The rule adopted by Alabama is an employer-friendly rule. It encourages the enforcement of forum-selection clauses so employers can realize their benefits. Unless the lawsuit is in California, rarely will there be a law declaring a forum-selection clause to be against public policy. It is similarly a high burden for employees to prove that a forum-selection clause, which is merely procedural in nature, was procured by fraud or coercion. In contrast, public policy arguments attacking the contract as a whole are more likely to be successful.

The outcome here in Alabama was employer-friendly, but if the employee lived in a different state with different laws or different approaches to forum-selection clauses, the result might have been completely different. Thus, *PT Solutions* serves as yet another example that employers operating in a multistate environment need to be on top of the law in the various states where they operate. Not only can their restrictive covenants be effected by these state law differences, now they have to be wary of inconsistent treatment of forum-selection or choice-of-law clauses based on where their workforce lives, works, and operates.