New York Court of Appeals: Choice of Law Provisions for Restrictive Covenants May be Unenforceable if Contrary to NY Public Policy

On June 11, 2015, the New York Court of Appeals held in *Brown & Brown, Inc. v Johnson* that "applying Florida law on restrictive covenants related to the non-solicitation of customers by a former employee would violate the public policy" of New York State.[1] The decision is significant for the enforceability of choice-of-law provisions in restrictive covenants in New York.

I. Factual Background and Procedural History

In 2006, Defendant employee, an insurance broker, was hired by Plaintiff to provide actuarial analysis as its vice-president of underwriting. On her first day in Plaintiff's employment, Defendant signed an Employment Agreement, which contained a non-solicitation clause prohibiting her from soliciting or serving *any* of Plaintiff's clients for two years after termination of employment; a confidentiality provision; and a clause prohibiting her from inducing other workers to leave Plaintiff's employment. Defendant was employed by the New York subsidiary of a Florida corporation. The agreement contained a Florida choice-of-law provision.

After being terminated by Plaintiff in February 2011, Defendant obtained employment with an industry competitor, where she serviced some of Plaintiff's former customers. Plaintiff brought suit for, among other causes of action, breach of the non-solicitation, confidentiality and non-inducement covenants. Defendant moved for summary judgment and the New York trial court partially granted Defendants' motion: the court found the choice-of-law provision in Defendant's employment agreement to be unenforceable because it "bore no reasonable relationship to the state of Florida", and that New York law should govern the contract claims.[2] However, the Court did not dismiss the portion of the breach of contract cause of action against Defendant alleging that she violated the non-solicitation provision by using client relationship that she initially developed while working for plaintiffs.

The Appellate Division, Fourth Department disagreed with the Supreme Court and found that in this case, Florida bore a reasonable relationship to the parties or transaction. However, it held that the choice-of-law provision was unenforceable as 'truly obnoxious' to New York public policy.[3] The Court also modified the Supreme Court's order by dismissing the portion of the breach of contract cause of action based on the non-solicitation provision, concluding that the provision was overbroad and unenforceable as it sought to bar Defendant from soliciting clients with whom she "never acquired a relationship through [her] employment."[4]

II. The Court's Examination of Florida Law

The Court of Appeals found that (1) the agreement's choice-of-law provision would violate the public policy of New York State and was unenforceable in relation to the non-solicitation provision; and (2) questions of fact existed as to whether Plaintiffs engaged in overreaching or used coercion to obtain the non-solicitation restrictive covenant.

---

[1] *Brown & Brown, Inc. v. Johnson*, No. 92, 2015 WL 3616181 (N.Y. June 11, 2015).

[2] *Brown & Brown, Inc. v. Johnson*, 980 N.Y.S.2d 631, 635 (4th Dep't. 2014) rev'd, No. 92, 2015 WL 3616181 (N.Y. June 11, 2015).

[3] *Id.* at 637.

[4] *Id.* at 171.

As a matter of public policy, New York courts will not "enforce agreements . . . where the chosen law violates 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.'"[5] To determine whether the public policy exception applies, the Court of Appeals compared the Florida statute governing restrictive covenants with New York law. While the Court found that the laws for restrictive covenants in New York and Florida are similar in some respects, it held that certain aspects of the Florida law violate the public policy New York State.[6]

The Court looked at which party bears the burden of showing that the restraint is overbroad or unnecessary. Under Florida law, the party seeking to enforce the covenant need only show that the covenant is necessary to protect a legitimate business interest before the burden shifts on the employee to show that the restraint is overbroad or unnecessary. In contrast, New York's three-prong test states that a covenant is reasonable only if it "(1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[7] In New York, an employer must prove all three prongs before the burden shifts to the employee to show that the restraint is overbroad or unnecessary. The Court also found that because "Florida law explicitly prohibits courts from considering the harm or hardship to the employee", the Florida statute conflicts with the protection of employee interests set out in the New York test.

Finally, considering New York's requirement that courts balance the interests of the employer, employee and general public, the Court found that the Florida statute's focus on the employer's interests and refusal to consider the harm to the employee would be "offensive to a fundamental public policy of [New York] State."[8] The "powerful considerations of public policy" which exist in New York State prevent a restrictive covenant from sanctioning the loss of a [person's] livelihood: therefore, the court found that the choice-of-law provision was unenforceable, and that New York law should govern the plaintiffs' claim based on the alleged breach of the non-solicitation covenant.[9]

The Court also considered whether the non-solicitation covenant should be partially enforced, limiting the provision to Plaintiff's customers with whom Defendant had directly interacted. While New York courts have expressly recognized the judicial power to partially enforce restrictive covenants, the Court found that factual issues prevented it from determining whether partial enforcement was appropriate.

III. Significance of the Decision

The Court of Appeals' decision in *Johnson* is a warning to employers who include choice-of-law provisions in their employment agreements: if the chosen state's law is inconsistent with New York public policy, a reasonable relationship to the parties or the transaction at issue may not prove sufficient to enforce a choice-of-law provision in relation to a restrictive covenant.

---

[5] *Johnson*, 2015 WL 3616181 (2015) (citing *Cooney v. Osgood Mach.,* 81 N.Y.2d 66, 78 (1993)).

[6] *Id*.

[7] *Id*. (citing *BDO Seidman v. Hirshberg,* 93 N.Y.2d 382, 388–389 (1999)).

[8] *Id*.

[9] *Id*. (quoting *Gramercy Park Animal Ctr. v. Novick,* 41 N.Y.2d 874, 874 (1977)).

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Glenn Waldrip at 212.701.3110 or gwaldrip@cahill.com.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.