This article recently appeared in the *Florida Bar Journal*, December 2005.

Outrunning Contractual Noncompete Undertakings: Does the 11th Circuit's Palmer & Cay Decision Offer "Earlybird Specials" for Florida Forum Shoppers?

by Courtney B. Wilson and Donald W. Benson

In *Palmer & Cay, Inc. v. Marsh & McLennan Companies*, 404 F. 3d 1297 (11th Cir. 2005), a panel of the 11th Circuit Court of Appeals held that Georgia's public policy narrowly restricting enforcement of otherwise valid noncompete agreements could ostensibly trump the public policy of other states with more significant contacts, solely because the former employee moved to Georgia and filed suit in Georgia. Although *Palmer & Cay* involved a conflict between Georgia law and New York/Illinois law, the court's express reliance on a case involving parallel noncompete litigation in Florida and Georgia courts left no doubt as to the decision's important implications for Florida attorneys and their clients litigating noncompete cases. Under the apparently sweeping holding of *Palmer & Cay*, a Florida employer who entered into a non-compete, valid under F. S. §542.335, with an employee living and working in Florida, could potentially be precluded from enforcing that contract *in Florida*, by the decision of a Georgia state or federal court having no prior connection to employer, the employee, or the contract.

In addition to the apparent inequity of the *Palmer & Cay* holding, it appears irreconcilable with prior decisions of another 11th Circuit panel, *Keener v. Convergys*, 312 F.3d 1235 (11th Cir. 2002), and a Georgia appellate court decision, *Hostetter v. Answerthink*, 599 S.E. 2d 271 (Ga. App. 2004), though *Palmer & Cay* purports to follow both decisions. This article suggests that all three decisions can be reconciled, and *Palmer & Cay's* apparent overbreadth limited, by positing that a hypothetical Florida court determining the preclusive effect of a prior judgment of the Georgia state or federal courts would follow *Cerniglia v. C&D Farms*, Inc., 203 So. 2d 1 (Fla. 1967). *Cerniglia* observes a distinction between noncompete agreements that are governed for all purposes by Georgia law, and therefore unenforceable anywhere, and those that are minimally connected to Georgia and therefore unenforceable only by Georgia courts in Georgia. Moreover, this is consistent with the *Palmer & Cay* recognition that the preclusive effect of a Georgia declaratory judgment in Florida, although governed by Georgia law, will be determined by the Florida court's interpretation and application of that law.

Keener v. Convergys[1]

Keener signed a noncompete, while he was working for Convergys in Ohio and the agreement provided for application of Ohio law. After five years, Keener resigned from Convergys, moved to Georgia, and became employed by a Convergys' competitor in Georgia. When Convergys learned of Keener's competitive activities, it notified his new employer of the noncompete and the new employer terminated Keener.

Keener filed suit in the federal district court in Georgia seeking a declaratory judgment and an injunction precluding enforcement of the noncompete, as well as damages for tortious interference. Convergys counterclaimed to enforce the noncompete. Addressing the threshold choice of law issue, the district court recognized some merit to Convergys' argument for Ohio law, in that that Keener "lived, worked, and performed on the contract in Ohio at the time it was entered" and never worked for Convergys in Georgia.[2] Recognizing that its deci-

[1] The facts are set forth in the 11th Circuit's initial opinion (*Keener I*) 312 F.3d 1236 (11th Cir. 2002).

[2] 205 F. Supp. 2d 1374, 1378.

sion "may wind up encouraging non-Georgia employees to 'flee to Georgia' to shed their NCAs," the court concluded that because Keener was now a Georgia resident, Georgia public policy dictated the result.[3] Thus, the court held Georgia law precluded enforcement of the noncompete as overbroad and not subject to being rewritten or "blue penciled" by the court.[4] Accordingly, the district court granted Keener's motion for summary judgment, found the noncompete unenforceable, and enjoined Convergys from attempting to enforce the agreement "in any court worldwide."[5]

On appeal to the 11th Circuit (*Keener I*), the court discerned a conflict in Georgia and 11th Circuit precedents as to when Georgia would apply its law to a noncompete with such a minimal connection to Georgia. Accordingly, *Keener I* certified to the Georgia Supreme Court the question of whether Georgia would follow the Restatement of Judgments §187(2) requiring that Georgia find a "materially greater interest" than the contractually chosen forum [Ohio] before substituting its own law to invalidate a noncompete.[6]

Answering this question in the negative, the Georgia Supreme Court held Georgia would apply its statutory public policy, limiting enforcement of noncompete agreements, upon a mere finding that "there were significant contacts with the State of Georgia, such that the choice of our law was neither arbitrary nor constitutionally impermissible."[7] Nevertheless, in a concurrence, three justices expressed their constraint to follow the Georgia statute and urged the legislature to adopt the Restatement rule instead as more consistent with the "prime objectives of contract law" and the "justified expectations of the parties."[8] Answering only the certified question on choice of law, the Georgia Supreme Court offered no insight on the proper scope of *remedies* in such cases.

Echoing the reluctance expressed by the concurring justices of the Georgia Supreme court, *Keener II* held that the application of Georgia law was not arbitrary or constitutionally impermissible because Keener was living and working in Georgia "where the effects [of enforcing the noncompete] would be felt."[9] Accordingly, *Keener II* affirmed the district court's decision that the agreement was unenforceable "in toto, thus entitling Keener to declaratory and injunctive relief."[10] However, without specifically mentioning any corresponding declaratory judgment, *Keener II* held that district court abused its discretion in failing to limit the injunction to Georgia:

Georgia of course is entitled to enforce its public policy interests within its boundaries and, in the circumstance that litigation over an NCA is initiated in Georgia, it may employ that public policy to override a contracted choice of law provision. However, Georgia cannot in effect impute its public policy decisions nationwide – the public policy of Georgia is not that everywhere. To permit a nationwide injunction would in effect interfere both with parties' ability to contract and their ability to enforce appropriately derived expectations.[11]

Indeed, *Keener II* further limited the injunction, or at least suggested grounds to modify it, by concluding that enjoining enforcement of the noncompete in Georgia was proper "while Keener remains a resident of Georgia."[12] Thus, while both the Georgia Supreme Court and the 11th Circuit panel expressed reluctance to even apply Georgia law to Keener's noncompete, the 11th Circuit clearly proscribed any extension of Georgia's public policy beyond its borders, at least until *Palmer & Cay*.

***Hostetler v. Answerthink*[13]**

Hostetler was a former employee of Answerthink in Georgia and was subject to a noncompete with a Florida choice-of-law provision. When Hostetler left Answerthink and began competing in Georgia, he brought an action in Georgia for declaratory and injunctive relief as to the enforceability of the noncompete. Answerthink subsequently commenced a parallel action in Florida to enforce the noncompete. The Georgia trial court ultimately declared the noncompete unenforceable but limited the scope of its judgment to "Georgia courts and those courts which apply Georgia law … ."[14]

On appeal, the intermediate Georgia appellate court reversed, holding that the trial court's judgment should not have been limited to Georgia. In affirming the application of Georgia law under principles of "lex loci contractus" and distinguishing *Keener II*, *Hostetler* recites that the noncompete was signed in Georgia, by a Georgia resident, working in Georgia, for an employer doing business in Georgia. Accordingly, *Hostetler* makes no distinction between the extra-territorial effect of the injunction[15] or the declaratory judgment, essentially finding that the agreement was void when created in Georgia and is thus unenforceable everywhere. In contrast to these obvious grounds for a Georgia court to deter-

---

[3] *Id*. at 1379.

[4] The term "public policy" has been described as a "very unruly horse, and when once you get astride it, you never know where it will carry you." *M&R Investments, Co., Inc., v. Hacker*, 511 So. 2d 1099, at n.1 (Fla. 5th D.C.A. 1987), *quoting Story, et al., v. First National Bank and Trust Co.*, 115 Fla. 436, 156 So. 101 (1934).

[5] *Id*. at 1382.

[6] 312 F. 3d 1236, 1241.

[7] 528 S.E. 2d 84, 85, *citing Allstate Ins. Co. v. Hague*, 499 U.S. 302 (1981).

[8] 528 S.E. 2d at 87-88.

[9] 342 F. 3d 1262 at 1268 & n.2.

[10] *Id*. at 1268, *citing Keener*, 205 F.Supp 2d at 1382.

[11] 342 F. 3d at 1269.

[12] *Id*. at 1271.

[13] *Hostetler v. Answerthink, Inc.*, 599 S.E. 2d 271 (Ga. App. 2004).

[14] 599 S.E. 2d 273-74.

[15] In like circumstances, a federal district court sitting in Georgia would be barred from enjoining an ongoing action in Florida. See *Bennett v. Medtronic, Inc.*, 285 F. 3d 801; 2002 U.S. App. LEXIS 4996 (9th Cir. 2002)(anti-injunction act bars federal court from enjoining ongoing state court proceedings to enforce noncompete).

mine the enforceability of Hosteler's noncompete *vel non*, the *Hostetler* court distinguishes the facts in *Keener*, because Keener, executed the noncompete and worked for the employer in another state [Ohio], only subsequently moving to Georgia and filing a preemptive suit to prevent enforcement of the noncompete.[16]

Palmer & Cay

James Meathe was an employee and shareholder in Johnson & Higgins, an insurance brokerage firm.[17] In 1997, Marsh & McLennan Companies (MMC) acquired all of the outstanding stock of Johnson & Higgins, including shares owned by Meathe. The stock purchase agreement between MMC, Meathe, and other shareholders included a noncompetition and nonsolicitation provision (the 1997 NCA). Several years later, in December 2002, Meathe signed another agreement not to solicit MMC customers or employees in exchange for the right to exercise certain stock options (the 2002 NCA). By the beginning of 2003, Meathe was employed by MMC as managing director and head of the midwest region for a MMC subsidiary, Marsh USA. As such, Meathe was responsible for Marsh's clients and employees in its midwest region.[18]

In January 2003, Meathe left his position with Marsh/MMC. Shortly thereafter, in February 2003, Meathe became president of *Palmer & Cay*, an insurance brokerage company competing directly with Marsh. Around the same time, Meathe moved to Georgia. At some time after Meathe moved to Georgia, Meathe, and his new employer, Palmer & Cay, filed suit in the U. S. District Court in Georgia seeking to prevent MMC from enforcing either the 1997 NCA or the 2002 NCA. MMC counterclaimed arguing that Meathe had violated both agreements "in order to expand P&C's business in the *Midwest*."[19] Although both the 1997 and 2002 NCAs contained forum selection clauses designating New York as the exclusive forum, the district court found that the parties waived this provision by litigating the merits of the claims, counterclaims, and defenses without challenging venue: "As a preliminary matter, the parties have waived any 'New York,' contractually forum-selected, venue rights they might hold. Plaintiffs did so by filing its case here; MMC did so by Answering, Counterclaiming and litigating the merits without challenging venue."[20]

Thereafter the parties filed cross motions for judgment on the pleadings. The district court issued a declaratory judgment declaring both the NCAs "unenforceable within the State of Georgia" and entered an injunction prohibiting MMC from enforcing either agreement "against Meathe in Georgia."[21]

On appeal, MMC argued that the district court erred in reaching its legal conclusion that both the 1997 and 2002 NCAs were unenforceable under Georgia law.[22] On cross appeal P&C and Meathe argued that the district court erred in limiting the scope of both its declaratory judgment and injunction to the state of Georgia. The 11th Circuit panel initially framed the issue as follows: "We must determine whether the District Court correctly granted judgment on the pleadings and if so, whether it correctly curtailed the geographic scope of the declaratory judgment and injunctive relief to Georgia."[23]

Initially, the 11th Circuit panel noted that under Georgia law an overbroad noncompete could be limited or "blue penciled" by a court if ancillary to the sale of a business but could not be enforced to any extent if ancillary to employment. Because the 1997 noncompete implicated Meathe's status as a shareholder of Johnson & Higgins rather than merely an employee of MMC, the court found factual issues precluded the district court from finding the agreement unenforceable as a matter of law. However, because Meathe was merely an employee at the time of the 2002 noncompete, the panel reached a contrary decision and held that the district court had correctly determined the 2002 noncompete was unenforceable as a matter of Georgia law.[24]

As to the cross-appeal, the court's opinion acknowledges some uncertainty as to whether the district court actually did limit its ruling to Georgia in a lengthy footnote considering but ultimately rejecting a judicial estoppel argument.[25] During the pendancy of the 11th Circuit appeal, MMC was proceeding with parallel litigation in Michigan to enforce the 1997 and 2002 NCAs. Meathe and Palmer & Cay responded by filing a motion to hold MMC in contempt. The district court denied the motion for contempt and "clarified" its intent to restrain MMC from bringing any further court actions "in Georgia to enforce its [noncompetition agreements] against Meathe" but it did not intend by its injunction "to restrain it [MMC] from enforcement actions elsewhere."

Having thus concluded that the district court had limited both its declaratory judgment and injunction to Georgia, the 11th Circuit panel separately addressed the proper scope of those companion remedies. Addressing the injunction first, the court quickly sided with the district court and MMC, holding that the prior panel decision in *Keener II* was dispositive and the district court was compelled to limit its injunction to Georgia. Likewise, and perhaps significantly, the court implicitly

[16] 599 S. E. 2d at 275.

[17] 404 F. 3d 1297, 1299.

[18] *Id*. at 1300-1301.

[19] *Id*. at 1302.

[20] 2003 WL 24096162 (S.D. Ga. Nov. 11, 2003).

[21] 404 F. 3d at 1302.

[22] Although other issues, not identified in the opinions, apparently remained to be resolved, the district court granted MMC's request to authorize an immediate, interlocutory appeal pursuant to **Fed. R. Civ. P**. 54(b).

[23] 404 F. 3d at 1299.

[24] *Id*. at 1303-1307. The court remanded that portion of the district court's decision for development of a factual record and determination of whether Meathe's 1997 noncompete was enforceable, to some extent, as ancillary to the sale of the business, despite its facial overbreadth. Thus, the issue of whether MMC could prevent Meathe from competing, in Georgia or elsewhere, even under Georgia law, remained an open question.

[25] *Id*. at 1307 & n. 16.

approved of the district court's decision to refuse to interfere in the ongoing Michigan proceedings by way of Meathe's motion for contempt.[26]

Next, however, the *Palmer & Cay* court turned its attention to what it viewed as the very different issue of the companion declaratory judgment.[27] Despite an apparent identity of issues, the court dismisses *Keener* with respect to the proper scope of the declaratory judgment as quickly as it had followed it as defining the proper scope of an injunction.[28]

The *Palmer & Cay* court declares *Keener II*'s dispositive rationale — that without more, Georgia's public policy prohibition on enforcement of certain noncompetes must be limited to Georgia — to be nothing more than "quotes . . . taken out of context" and inapplicable to a declaratory judgment. Inexplicably, the panel does not suggest that *Keener II* is merely analogous or persuasive when applied to the alternative remedy of a declaratory judgment: It affords *Keener II no weight* whatsoever in the analysis despite an identity of factual and legal underpinnings.[29] This distinction between a declaratory judgment and an injunction enforcing that judgment does not find support in precedent.[30]

Moving then to the freshly cleared legal landscape governing the proper scope of the declaratory judgment, the panel relies on *Semtek Int'l Inc. v. Lockheed Martin Corp*., 531 U.S. 497, 509 (2000), to guide its analysis. *Semtek* held, as a matter of federal common law, that a state court [Maryland] must look to the law of the state in which the rendering district court sits to determine the preclusive effect of a prior judgment of a district court sitting in a diversity case. *Palmer & Cay* notes that although the claim/issue preclusion law of the former, rendering jurisdiction applies, the decision is to be made by the enforcing court in the subsequent jurisdiction:

[S]ince enforcing states ultimately decide the scope of its judgment, a rendering state can "determine the extraterritorial effect of its judgment . . . only . . . indirectly by prescribing the effect of its judgments within the State… To vest the power of determining the extraterritorial effect of a State's own . . . judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." [31]

For this reason, *Palmer & Cay* recognizes that the rendering court is not ordinarily called upon to prescribe the intended preclusive effect of its judgments. Neither *Semtek*, nor any other federal case cited by *Palmer & Cay*, addresses the question of what scope the *rendering* court should attempt to give its judgment. Nevertheless, instead of returning to *Keener*, or properly leaving the issue to an enforcing court (such as the acknowledged, parallel litigation in Michigan), the *Palmer & Cay* panel plows ahead and uproots the previously discounted decision of an intermediate Georgia court: *Hostetler.*[32] Based largely on *Hostetler, Palmer & Cay* holds that the district court erred in attempting to constrain the effect of its declaratory judgment to Georgia. *Palmer & Cay* does not say that the district court should adopt the "anywhere in the world" language rejected in *Keener*, only that it should not limit its judgment to Georgia.

Cerniglia Follows Federal Law, Reconciles *Keener* and *Hostetler*, and Limits *Palmer & Cay*

In *Cerniglia*, the Florida Supreme Court directly confronted the question of whether a noncompete agreement, contrary to Florida public policy, is unenforceable only in Florida as the intermediate appellate court held, or in its entirety. The court concluded, much like *Keener*, that "Florida's public policy and statutes cannot be applied to a foreign contract to void its operation elsewhere. If performance, in Florida, of a foreign made contract is repugnant to our public policy it is unenforceable here, but not necessarily void or unenforceable in other jurisdictions."[33] This distinction is not unique to Florida but is based upon constitutional principles reflected in prior decisions of federal courts in Florida[34] and of the U.S. Supreme Court.[35]

Consistent with *Cerniglia*'s constitutional dichotomy, as the facts in *Keener* established only the minimal contacts with Georgia necessary to meet the "neither arbitrary nor constitutionally impermissible" standard, *Keener II* limited its vindication of Georgia public policy to prohibiting *enforcement* of the noncompete only *in Georgia*. That is, enforcement in Georgia was against public policy but the existence of the contract (in Ohio) was not.

---

[26] *Id*. at 1309.

[27] The Declaratory Judgment Act §2201(a) provides: "(a) In a case of actual controversy within its jurisdiction, . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

[28] 404 F. 3d at 1309.

[29] *Id*.

[30] *Samuels v. Mackell*, 401 U.S. 66 (1971): ("Ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. . . . Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would.")

[31] 404 F. 3d at 1310, *quoting Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270 & 272 (1980).

[32] 404 F. 3d at 1310.

[33] 203 So.2d 1 (Fla 1967), *citing Griffin v. Mc Coach*, 313 U.S. 498 (1941); *see also Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th D.C.A. 2001)(Although Florida cannot apply its public policy and statutes to a foreign contract to void its operation elsewhere, it can hold such a contract void or unenforceable in the state if said contract is repugnant to the public policy of the state.) *Title & Trust Co. of Fla. v. Parker*, 468 So.2d 520, 523 (Fla. 1st D.C.A. 1985)("[A]s a general rule, if the enforcement of a contract is contrary to the public policy of the forum state, the contract need not be enforced.")

[34] *Holderness v. Hamilton Fire Ins. Co. of New York*, 54 F. Supp. 145 (S.D.Fla. 1944)(When a contract right is obnoxious to public policy of a state, courts thereof may withhold their aid in affirmative enforcement of performance of contract in such state. They do not thereby deprive a party of such right, but simply remit him to forum wherein right is consistent with public policy).

[35] *Griffin v. Mc Coach*, 313 U.S. 498 (1941).

Likewise, in *Hostetler*, where the facts established Georgia had a "materially greater interest," *Cerniglia*, as well as Georgia's lex loci contractus rule, justify a broader finding that the noncompete was not merely *unenforceable in Georgia*, but was void when made *in Georgia*, and thus unenforceable anywhere.

Does *Palmer & Cay* necessarily upset this dichotomy? There is reason to argue that the decision recognizes, or at least does not conflict with, the *Cerniglia* analysis. First, *Palmer & Cay* recognized that a rendering court [presumably including one in Georgia] should not endeavor to determine the extraterritorial effect of its own judgments. Second, the *Palmer & Cay* panel did not disapprove of the district court's refusal to interfere in MMC's ongoing enforcement efforts in Michigan, implicitly leaving that decision to the enforcing court in Michigan. Finally, *Palmer & Cay* did not direct the lower court to enter a new declaratory judgment expressly extending its effect to courts outside Georgia, but only directed that the offending *limitation to Georgia*, be eliminated. Thus, *Palmer & Cay* could be read as merely holding that declaratory judgments ought not to include *any* jurisdictional prescriptions or proscriptions, properly leaving this task to enforcing courts under full faith and credit jurisprudence or federal common law. This interpretation adheres to precedents, constitutional mandates and a sense of relative balance among the interests of the relevant jurisdictions.

Practical Responses to *Palmer & Cay* in Florida

Unless and until a more definitive rule is laid down following *Cerniglia* or otherwise, Florida employers will want to take some practical steps before and after litigation commences to minimize the potential unpredictability engendered in the *Palmer & Cay* apparent holding favoring fleeing forum shoppers. Employees can more easily relocate if their former territories include states like Georgia, or if their job could be performed primarily by telephone or Internet from any state. A Florida employer with operations including or near Georgia should consider the likelihood of such relocations and draft its non-compete provisions with an eye toward enforceability in Georgia or other relevant jurisdictions.

Employers should carefully examine their contracts to make sure that they include useful forum selection, consent to jurisdiction, and choice of law provisions. Obviously MMC erred, in hindsight, in waiving venue and its New York forum selection clause.

Employers often send "cease and desist" letters prior to an enforcement action. Now, prolonged letter writing may just incite a former employee to rush to the courthouse to obtain a declaratory judgment in a more favorable jurisdiction. Litigants must also balance the merits of a forum where jurisdiction is easily obtained and where docket pressures allow a quick hearing on a temporary restraining order (TRO), against the importance of a forum applying favorable law. Employers may face multiple lawsuits, progressing in different forums. Litigation strategy must recognize that it is not the first court that enters a TRO or preliminary injunction, but the first to enter a final judgment that will have its judgment followed in other jurisdictions.[36] Consequently, Florida employers may be compelled to aggressively resist declaratory judgment actions in unfriendly forums until a final judgment can be obtained from a Florida court more willing to enforce noncompete agreements or at least apply the parties' contractual choice of law provisions. Conversely, Florida employees and their new employers seeking to help a new employee avoid the enforcement of an NCA will quickly investigate whether a declaratory judgment may be pursued in multiple jurisdictions and whether a non-Florida jurisdiction is more hostile to the noncompete agreement at issue.

[36] *See Hulcher Servs., Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 489, 543 S.E.2d 461, 464 (Ga. Ct. App. 2000) (holding that not *first* injunction, but *final* adjudication of the merits is entitled to res judicata and collateral estoppel).