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New race to Tennessee and Georgia courthouses over non-competition agreements

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Tennessee employers and employees with multi-state noncompete contracts may want to lace up their best pair of running shoes and get ready for a race. On April 1, 2005, in *Palmer & Cay Inc. v. Marsh & McLennan Companies Inc.*,[1] the 11th Circuit Court of Appeals revised a United States District Court, Southern District of Georgia, ruling that an employer's noncompete agreement was unenforceable *only in Georgia*. The employee initiated the case in Georgia in order to use the pro-employee Georgia law regarding noncompete and non-solicitation covenants (NCAs). The 11th Circuit extended the unenforceability to any other lawsuit between the same parties, *even if other lawsuits are filed outside of Georgia*. Tennessee employers who have employees with connections to Georgia should be concerned because this ruling may provide an avenue of escape from an otherwise valid NCA to employees who can relocate to Georgia and are willing to preemptively bring a declaratory judgment action in Georgia. Because so many of these cases would be removable to federal court on the basis of diversity of citizenship, the *Palmer & Cay* decision is attracting significant attention nationwide by confirming that federal courts sitting in diversity in Georgia will issue as broad of a declaratory judgment as Georgia state courts have extended in NCA disputes. Although the defendant filed a Petition for Rehearing En Banc on April 22,[2] the debate it is creating among commentators is likely to focus more and more attention on the importance of winning the race to the courthouse.

I. Tennessee vs. Georgia — enforceability of non-competition and non-solicitation covenants

Enforcing an employment-related restrictive covenant is much easier under Tennessee than Georgia law. Like Georgia, Tennessee disfavors restraints on trade; however, Tennessee courts will enforce covenants not to compete where the "restrictive contracts are reasonable as to territory and time, where a violation would result in serious damage or injury to the employer and impose no undue hardship upon the employee."[3]

While Georgia's proemployee case law does not allow courts to "blue pencil" or reform unreasonable restrictive covenants contained in employment contracts, under most circumstances; Tennessee courts will modify noncompetition agreements where either the time or territorial limitations are found to be unreasonable.[4] However, if there is evidence that an employer deliberately imposed unreasonable restrictions in a noncompetition agreement, the court will void the terms of the covenant not to compete altogether.[5] Both time and territorial restrictions in covenants not to compete must be no broader than necessary to protect the interests of the employer.[6]

For example, where a the Tennes-

[1] *Palmer & Cay Inc. v. Marsh & McLennan Companies Inc.*, No. 03-16248, 2005 U.S. App. LEXIS 5243, at *1 (11th Cir. Apr. 1, 2005).

[2] *Id.* (petition for rehearing en banc filed April 22, 2005). On Sept. 6, defendant filed its notice of filing in the 11th Circuit of petition for writ of certiorari to the U.S. Supreme Court.

[3] *Kaset v. Combs*, 434 S.W.2d 838, 841 (Tenn. Ct. App. 1968).

[4] *Cent. Adjustment Bureau Inc. v. Ingram*, 678 S.W.2d 28, 37 (Tenn. 1984).

[5] *Id.*

[6] *Allright Auto Parks Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966).

see Court of Appeals found that a six-month restriction on competition for a nail technician was unreasonable, the time limitation was reduced to two months.[7] Additionally, the Tennessee Court of Appeals modified a 20-year restriction on competition by reducing it to five years,[8] whereas a Georgia court likely would have invalidated the covenants altogether. After finding that such a temporal period was unreasonable, a Georgia court would not have modified the NCA, but instead would have declared the covenant unenforceable.[9] Although Tennessee courts have enforced nationwide geographic restrictions under certain circumstances,[10] Georgia courts have invalidated entire NCAs based on overbroad, even less than nationwide, geographic restrictions.[11] Clearly, employees seeking to get out from under restrictive NCAs are more likely to receive a favorable ruling in Georgia, while employers seeking to protect their legitimate business interests would rather litigate in Tennessee's courts.

II. Factual background

Marsh & McLennan Companies Inc. (MMC) bought the brokerage that employed James Meathe in 1997. As part of the sale and transition, Meathe sold his shares in the acquired brokerage and accepted employment with MMC, ultimately becoming managing director and head of the Midwest Region of MMC, and according to MMC residing in Michigan and Illinois.[12] Meathe executed a 1997 stock sales agreement containing NCAs and a 2002 employment-related NCA. In February 2003, Meathe left MMC, relocated to Georgia, and joined Palmer & Cay in allegedly direct competition with MMC in both Georgia and his former Midwest territory.

The 1997 stock agreement includes a provision that prevents seller for a specified time from accepting unsolicited business from any clients or prospects of the company who were solicited directly or indirectly by seller while with the company:

> (b) Each Seller who is not a director of the company as of the date herby agrees that during the Non-Solicit Period, such Seller will not (x) solicit, accept or service business that competes with businesses conducted by the Company, buyer or any of their affiliates who were solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such clients or prospects or (ii) from any former client who was such within two (2) years prior to such termination and who was solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such former client; or (y) solicit any employee of the Company or its affiliates to terminate his employment.[13]

The 2002 employment agreement includes a similar prohibition against accepting unsolicited business from clients of the company who were directly or indirectly solicited or serviced by employee within two years prior to the termination of employment:

> (a) solicit or accept business of the type offered by the Company during my term of employment with the Company, or perform or supervise the performance of any services related to such type of business, from or for (i) clients or prospects of the Company or its affiliates who were solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (ii) any former client of the Company or its affiliates who was such within two 2) years prior to my termination of employment and who was solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such former clients.[14]

To take advantage of Georgia's anti-NCA precedent, Meathe and his new employer, Palmer & Cay, filed a declaratory judgment action in the federal district court in Savannah, Ga., seeking an order that both the 1997 stock sale NCA and his 2002 employment-related NCA are unenforceable. MMC counterclaimed for enforcement of both agreements.

Although both the 1997 and 2002 agreements contained forum selection clauses, the District Court found that the parties had waived these contractual rights 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.[15]

A. Unenforceability of the 2002 employment restrictive covenant in Georgia

Georgia is one of the most difficult states for an employer to obtain enforcement of an employment-related NCA. Georgia will not "blue pencil" an overly broad, employment-related NCA to enforce it to the extent reasonable.[16] The 2002 restrictive covenant is in essence a non-solicitation of customers covenant without a geographic restriction. A nonsolicitation covenant that prohibits the solicitation of an employer's clients that the employee ac-

[7] *See, e.g., Baker v. Hooper*, 50 S.W.2d 463, 469 (Tenn. Ct. App. 2001).

[8] *Suggs v. Glenn*, C.A. No. 837, 1989 Tenn. App. LEXIS 37, at *16 (Tenn. Ct. App. Jan. 20, 1989).

[9] *See, e.g., Riddle v. Geo-Hydro Eng'rs Inc.*, 561 S.E.2d 456, 458 (Ga. Ct. App. 2002) (restrictive covenant containing nonsolicitation clause was unenforceable because it did not limit the purpose for which the ex-employee could not solicit clients of his former employer and therefore was unreasonable).

[10] *Id.*

[11] *See, e.g. Hulcher Servs. Inc. v. R.J. Corman Co. LLC*, 543 S.E.2d 461, 466 (Ga. Ct. App. 2000) (Court of Appeals upheld trial court ruling the covenant not to compete was unreasonable and therefore unenforceable where five state restriction was broader than the area where the employee worked).

[12] Defendant Marsh & McLennan Companies Inc.'s opposition to plaintiffs' motion for judgment on the pleadings, *Palmer & Cay Inc. v. Marsh & McLennan Companies Inc.*, No. CV403-094 (S.D.Ga. 2003).

[13] *Palmer & Cay*, 2005 U.S. App. LEXIS at *4.

[14] *Id.* at *6-7.

[15] *Palmer & Cay Inc*, CV403-094 (S.D.Ga. Nov. 11, 2003) (order granting motion for schedule of oral argument).

[16] *Id.*

tually contacted as part of his or her job for a business purpose can be enforceable without a geographic restrict ion.[17] Such an NCA can even extend to prospective customers where some business relationship was established by the employee as a part of the job.[18]

Unfortunately for MMC, although a non-solicitation NCA may be enforceable in Georgia without a geographic limit, it is *not* enforceable if the same restriction also precludes the former employee from accepting unsolicited business.[19] Such restrictions without a geographic territory can only restrict affirmative actions by the former employee.[20] If the employer wants to prevent the acceptance of unsolicited business, then the non-solicitation clause must specify a geographic territory, transforming it into a non-competition restriction.[21]

The District Court declared unenforceable the 2002 employment-related NCA preventing Meathe from accepting unsolicited business[22] and the 11th Circuit affirmed.[23]

B. The 1997 Stock Sale Agreement

The 1997 Stock Sale Agreement contains a nearly identical NCA, not limited by a geographic territory, restricting the solicitation of customers and prospective customers on whom Meathe called while employed. Once again the NCA prevents Meathe from accepting unsolicited business from such customers and prospective customers and is therefore un-enforceable in Georgia. If the 1997 agreement is interpreted as an employment-related NCA, then the noblue-pencil rule would prevent the court from severing overreaching provisions.[24]

Although Georgia law is quite antagonistic to employment-related NCAs, it will blue-pencil an NCA ancillary to the sale of a business.[25] Georgia courts apply a lower level of scrutiny to NCAs ancillary to the sale of a business and Georgia will reform or "blue pencil" those objectionable portions of NCAs to enforce them to the extent allowed by Georgia law.[26] Consequently, if the 1997 agreement is construed as ancillary to the sale of a business rather than employment, then its NCA might still be blue-penciled to be enforceable.

However, if a stock sale occurs at the same time that an employee joins the buying company, Georgia law has its own peculiarities for determining whether the NCA in a stock agreement is entitled to the lower blue-pencil standard or the stricter standards for employment-related NCAs. Georgia analyzes the bargaining capacity of the seller to determine if it is more like the bargaining power of a business owner or an employee.[27] The court will look to the facts of each situation, including whether there was consideration independent of employment for the NCA, the relative size of the seller's stock holding in the acquired company, the realistic power of seller's stock in a closely held corporation, whether the seller had exercised control over the decision to pursue a merger, or taken part in merger negotiations.[28]

Both the 1997 and 2002 agreements contained choice of law provisions declaring that the parties had agreed to interpret the contracts according to New York law.[29] MMC contended that the agreement's prohibition against accepting unsolicited business would be enforceable, whether the agreements were interpreted according to New York law, or the law of Illinois where they were executed by Meathe.[30] Therefore, the court's decision whether to abide by the choice of law provisions in the agreements proved determinative of the merits of the case.

III. Choice of law

The 11th Circuit's *Palmer & Cay* ruling does not break new ground on the issue of interpreting the parties' choice of law provision in an NCA agreement. In an earlier case, *Keener v. Convergys Corp.*,[31] the 11th Circuit referred a question of Georgia law to the Georgia Supreme Court regarding such choice of law provisions, and conformed its final judgment to the Georgia Supreme Court's ruling that Georgia would consider such a choice of law provision by first examining whether the NCA violated Georgia's public policy regarding NCAs.[32] In applying this choice of law analysis to the 1997 and 2002 agreements executed by Meathe, the District Court in *Palmer & Cay* found the NCAs in the 1997 and 2002 agreements violated Georgia's policy regarding NCAs by preventing acceptance of unsolicited business.

[17] *See, e.g. American Software USA Inc. v. Moore*, 264 Ga. 480, 448 S.E.2d 206 (1994); *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529 (1992).

[18] *See, e.g. Paul Robinson Inc. v. Haege*, 218 Ga. App. 578, 462 S.E.2d 396 (1995). The situation regarding potential customers is not quite so clear where the prior contact was little more than an unsuccessful "cold call." *Id*.

[19] *Habif, Arogeti & Wynne PC v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346, 353 (1998).

[20] *Singer v. Habif Arogeti & Wynne PC*, 250 Ga. 376, 297 S.E.2d 473 (1982); *Waldeck v. Curtis 1000 Inc.*, 261 Ga. App. 590, 583 S.E.2d 266 (2003).

[21] *Id.*

[22] *Palmer & Cay Inc*, CV403-094 (S.D.Ga. Nov. 11, 2003) (order granting motion for schedule of oral argument).

[23] *Palmer & Cay Inc.*, 2005 U.S. App. LEXIS 5243 at *1.

[24] *Id*. at *15.

[25] *Id*. at *12-13 (citing *White v. Fletcher/Mayo/Assocs. Inc*. 303 S.E.2d 746, 749 (Ga. 1983)).

[26] *Id*. (citing *Swartz Invs. LLC v. Vion Pharm. Inc.*, 556 S.E.2d 460, 463 (Ga. Ct. App. 2001)).

[27] *See, e.g. Advance Tech. Consultants Inc. v. Roadtrac LLC*, 551 S.E.2d 735, 737 (Ga. Ct. App. 2001); *Ward v. Process Control Corp.*, 277 S.E.2d 671, 673 (Ga. 1981).

[28] *Palmer & Cay Inc.*, 2005 U.S. App. LEXIS 5243 at *16-17 (citing *White v. Fletcher/Mayo/Assocs. Inc*. 303 S.E.2d 746,751 (Ga. 1983); *Drumheller v. Drumheller Bag & Supply Inc.*, 420 S.E.2d 331, 334-35 (Ga. Ct. App. 1992)).

[29] Defendant Marsh & McLennan Companies Inc.'s opposition to plaintiffs' motion for judgment on the pleadings at 15, n.6, *Palmer & Cay Inc. v. Marsh & McLennan Companies Inc.*, No. CV403-094 (S.D.Ga. May 21, 2003).

[30] *Id*. (citing *Ecolab Inc. v. K.P. Laundry Machinery Inc*. 656 F. Supp. 894, 898 (S.D.N.Y. 1987); *Howard Johnson & Co. v. Feinstein*, 609 N.E.2d 930, 935 (Ill. App. Ct. 1993)).

[31] *Keener v. Convergys Corp.*, 205 F. Supp. 2d 1374, 1383 (S.D.GA. 2002), *conflict-of-law question certified*, 312 F.3d 1236 (11th Cir. 2002), *answered, Convergys v. Keener* 276 Ga. 808 (2003), *answer conformed, Keener v. Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003).

[32] *Id*.

Tennessee's "reasonableness" approach versus Georgia's "all or nothing" approach, makes it much more probable that a Tennessee court would enforce a choice of law provision contained in a NCA. In Tennessee, in the absence of a choice of law provision, the rule of *lex loci contractus* applies, meaning that the contract will be governed by the law of the place where the contract is made.[33] However, it is well settled in Tennessee that the parties may mutually agree that the law of some place other than the place of making the contract will govern.[34] In order for a choice of law provision to govern (unless it is the choice of the place of making the contract), the parties must enter into the choice of law provision in good faith and the other state must have "some material connection with the transaction."[35] On the other hand, Georgia courts are likely to apply their own law where the law of the selected forum may conflict with the public policy of Georgia. Therefore, because of Tennessee's approach to NCA's in employment contracts, it also seems more likely that the parties' choice of law provision would be honored in Tennessee than in Georgia.

IV. Scope of declaratory judgment

As a result of applying Georgia's choice of law principles, the District Court granted a declaratory judgment to Plaintiffs Meathe and Palmer & Cay, finding the NCAs to be unenforceable in Georgia and enjoined MMC from enforcing them against Meathe in Georgia.[36] Thus, the territorial scope of the declaratory judgment from the District Court was limited in the same way as the scope of its injunctive award. This appeared to leave open the possibility that, if MMC could obtain jurisdiction over Meathe in some other jurisdiction, that it could sue him for competitive activities outside of Georgia and obtain a ruling using the parties' agreed upon choice of law provisions in the 1997 and 2002 agreements. The District Court, perhaps mindful of having been reversed in an earlier case for granting nationwide injunctive relief against enforcement of an invalid NCA under similar circumstances, restricted its ruling to a judgment that the NCA was declared unenforceable.[37]

The *Palmer & Cay* decision reverses the District Court's territorial limitation of its declaratory judgment as to the 2002 agreement, but remands for further findings as to whether the 1997 NCA was ancillary to employment or to the sale of a business. A federal court sitting in diversity in a state declaratory judgment action would apply that state's interpretation of its declaratory judgment statute's affect on claim and issue preclusion, unless that state's law conflicts with federal interests.[38] The 11th Circuit cited a Georgia case, *Hostetler v. Answerthink*, involving a race to state courts in Georgia and Florida, where the Georgia court was the first to issue a final declaratory judgment, fully resolving all issues and claims that the parties actually or could have brought based on the events before the court.[39] Because Georgia does not limit its declaratory judgments in employmentrelated NCA cases, the federal court sitting in diversity would give equally broad territorial, issue and claim preclusion affect to its ruling.

In essence, the 11th Circuit clarified that the declaratory judgment issued as to the 2002 NCA fully resolved the dispute between the parties based on the agreements and the facts alleged in the lawsuit. Although injunctive relief would not be issued on a nationwide basis because of limits in the federal statutory basis of injunctive authority, as confirmed in the earlier Keener case,[40] the declaratory judgment fully resolved the dispute wherever the parties may be, not just as to claims and issues presented in a Georgia state or federal court.[41]

V. Growth industry in forum shopping

Before *Palmer & Cay*, it was clear that if an employer had a valid NCA in, for example, Tennessee, and if it could obtain jurisdiction in Tennessee over its former employee who now lived in Georgia, then the NCA would likely be enforced under Tennessee law, particularly if the agreement includes an Tennessee choice of law clause.

It was also clear that if the employee located in Georgia was sued in Georgia, a court applying Georgia law would not enforce the agreement, even if the NCA stated that Tennessee law was to apply. Georgia's choice of law principles require its courts to bypass initially such choice of law provisions and first determine whether the NCA is enforceable under Georgia law. The strong Georgia public policy against NCAs would not allow a Georgia court to enforce an NCA contrary to that policy, despite a choice of law provision in the NCA. A federal court in Georgia hearing a case based on diversity jurisdiction would also apply Georgia law to such a contract dispute.

It was not yet clear what the employee could gain by preemptively rushing to court in Georgia for a judgment declaring the NCA unenforceable under Georgia law.[42] Would that protect him only from suit in Georgia? Could he still be sued elsewhere for his prior competition outside of Georgia? *Palmer & Cay* now indicates that in the 11th Circuit

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[33] *Vantage Tech. LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999) (citing *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 493 S.W.2d 45, 467 (Tenn. 1973)).

[34] *Goodwin Bros. Leasing Inc. v. H & B Inc.*, 597 S.W.2d 303, 306 (Tenn. 1980).

[35] *Id. See also Deaton v. Vise*, 210 S.W.2d 665, 669 (Tenn. 1948); *Stevenson v. Lima Locomotive Works Inc.*, 172 S.W.2d 812, 814-15 (Tenn. 1943) ("Where the parties agree to performance of the contract in a foreign state, the contract itself must be referable to that state, that is, its performance in the particular state is in some way either beneficial or desirable.").

[36] *Palmer & Cay Inc . v. Marsh & McLennan Companies*, No. CV403-094, Order filed 11/11/03, p. 11 (S.D.Ga. filed May 21, 2003).

[37] *Keener*, 342 F.3d at 1266.

[38] *Palmer & Cay Inc.*, 2005 U.S. App. LEXIS at *34.

[39] *Id.* (citing *Hostetler v. Answerthink Inc.*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004) (declaratory judgment from Georgia court precluded parties from re-litigating issue in simultaneous or subsequent litigation in another state's courts).

[40] *Keener v. Convergys Corp.*, 342 F.3d at 1269. (11th Cir. 2003).

[41] In *Palmer & Cay*, the District Court erred in ruling that on the pleadings, there was no set of facts on which MMC could show that the 1997 Agreement was ancillary to the sale of a business. The 11th Circuit remanded for further proceedings regarding the 1997 Agreement. *Palmer & Cay Inc.*, 2005 U.S. App. LEXIS 5243 at *____.

[42] *Enron Capital & Trade Resources Corp. v. Polasky*, 227 Ga. App. 727, 490 S.E.2d 136, 138 (Ga. App. Ct. 1997) (declaratory judgment is available where a legal judgment is sought that would control or direct future action like ongoing competition and employment).

the employee obtaining such a final declaratory judgment would be protected if he were simultaneously or later sued outside of Georgia, whether or not his competitive activities were restricted to Georgia.

Rushing to court in Georgia assures that Georgia's substantive restrictions against NCAs will many times find an NCA unenforceable, even if the state where it was originally signed and drafted would reach a different conclusion.

VI. Responding within, and outside, of Georgia

Employees can more easily relocate if their former territories include states like Georgia, or if their jobs could be performed primarily by telephone or internet from any state. Tennessee employers with operations in or near Georgia should consider the likelihood of such relocations and draft its NCA provisions with an eye toward enforceability in Georgia, not just the current location of its employee.

Companies often send "cease and desist" letters prior to an enforcement action. Now, prolonged letter writing may no longer be a useful tactic against a former employee willing to rush to the courthouse to obtain a declaratory judgment in a favorable jurisdiction.

Waiving venue and forum selection clauses may decide a case's outcome. Litigants must balance the merits of a forum where jurisdiction is easily obtained and where docket pressures allow for a quick hearing on a temporary restraining order (TRO) to be set 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.[43] Consequently, employers may be forced to aggressively fight any Georgia litigation until a final judgment can be obtained outside Georgia in a forum willing to apply the NCA's choice of law provisions.

Companies seeking to help a new employee avoid the enforcement of an NCA might pursue a declaratory judgment that it is unenforceable by rushing to a state or federal court applying favorable anti-NCA case law.

In response to this development, an ounce of prevention may be worth a pound of cure, even for employers in jurisdictions that have not faced the issue yet. Employers should carefully examine their contracts to make sure that they include useful forum selection, consent to jurisdiction, and choice of law provisions. Even if choice of law provisions will not be enforced in declaratory judgment actions brought in Georgia, could the employer prevent a declaratory judgment preemptive strike by providing in a forum selection clause that all disputes must be brought in a specific forum, with parallel consents to jurisdiction and service?

VII. Forum selection clauses

A race to the courthouse may be the only reliable protection for Tennessee employers because including a forum selection clause choosing a Tennessee court may not be enough to keep decisions regarding the enforceability of NCAs inside Tennessee. Although forum selection clauses are generally enforceable in Tennessee,[44] the dicta of two Georgia cases may indicate a willingness to refuse enforcement of forum selection clauses where enforcement would result in application of a choice of law provision contrary to the public policy of Georgia disfavoring restraints on trade. This is important to Tennessee employers because Tennessee courts may enforce or "blue pencil" an NCA that Georgia courts would find completely unenforceable.

In *Iero v. Mohawk Finishing Products Inc.*,[45] a forum selection clause in an noncompetition covenant was enforced by the Georgia Court of Appeals because Iero did not show that the clause was "unreasonable under the circumstances."[46] Unfortunately, Georgia courts have shed little light on what constitutes "unreasonable under the circumstances." Georgia courts consider more than whether the chosen forum would be merely inconvenient for one of the litigants, but also whether there is evidence of "fraud, undue influence or overweening bargaining power."[47]

Although *Iero* enforced a forum selection clause, the court noted that it was leaving open the issue of whether a forum selection clause would be unenforceable in Georgia as against public policy on a different factual record.[48] The Georgia Court of Appeals pointed out that the U.S. Supreme Court has noted that "certain contractual forum selection clauses may be held unenforceable if such clause contravenes 'a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.'"[49]

Perhaps this indicates that the Georgia courts will someday consider whether a forum selection clause is unenforceable because it damages the litigants by applying unfavorable law contrary to Georgia public policy in the selected forum, which the court expressly notes is an argument not raised by *Iero*.[50] A second Georgia Court of Appeals decision in *Hulcher v. Corman Railroad Co.*, also notes in dicta that the Iero appellant "failed to carry the burden of showing how the application of New York law would be contrary to the public policy of

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

[44] *Dyersburg Mach. Work Inc. v. Rentenbach Eng'g Co.*, 550 S.W.2d 378, 380 (Tenn. Ct. App. 1983).

[45] *Iero v. Mohawk Finishing Prod. Inc.*, 534 S.E.2d 136, 137-38 (Ga. Ct. App. 2000).

[46] *Id.* at 138-39.

[47] *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)).

[48] *Id.* at 138 ("Under these circumstances, Iero fails to show that the mere enforcement of a freely negotiated forum selection clause violates Georgia public policy. Indeed he does not even address whether the New York court would apply New York law. Accordingly, our inquiry is limited to whether enforcement of the forum selection clause is inconvenient or would deprive Iero of his day in court.").

[49] *Id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

[50] *Id.* (The Court expressly notes that Iero only argued that the forum selection clause harmed the form, not he litigants.)

Georgia and that 'enforcement of his employment contract would be unreasonable under the circumstances.'"[51] The *Hulcher* decision seems to be willing to consider whether a forum selection clause may fail if it dictates an objectionable choice of law. The repeated efforts by both opinions to phrase the standard in terms of public policy and to note arguments not raised by those appellants, may indicate that the enforceability of such forum selection clauses in employment-related NCA cases may see additional litigation.

As parties continue to assess the usefulness of the *Palmer & Cay* decision in avoiding NCAs, one message is clear: pro-active, aggressive litigation strategies have grown even more important for employers.

[51] *Hulcher Servs., Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 543 S.E.2d 461, 489 (Ga. C. App. 2000).