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“Red River Rivalry” Reaches Right To Restrict Employment



The United States Court of Appeals for the Fifth Circuit opened its October 29th opinion in *Cardoni v. Prosperity Bank* by noting that “[i]n addition to their well-known disagreements over boundaries and football” known as the Red River Rivalry, “Texas and Oklahoma do not see eye to eye on a less prominent issue: covenants not to compete.” As the Court went on to note, “Texas generally allows them so long as they are limited both geographically and temporally... Oklahoma generally does not.” “These different policy choices—Texas’s view which prioritizes parties’ freedom to contract and Oklahoma’s which emphasizes the right to earn a living and competition—came to a head” recently in dueling state court law suits removed to federal court, and consolidated. Addressing the impact of choice of law provisions in such agreements and the impact of the public policy of states on the question of the enforceability of such covenants, the Fifth Circuit held that an Oklahoma court could, on public policy grounds, refuse to enforce a Texas choice of law provision that would have supported application of a non-compete provision to employees working in Oklahoma. But the Court also remanded the matter for a determination of whether a non-solicitation clause would be enforceable under Texas law because Oklahoma public policy would not void a choice of law provision insofar as it required limitations on solicitation.

The decision highlights the need for employers to consider a multitude of factors when dealing with a multi-state employee population. First, efforts to promote uniformity among employees are not always as simple as choosing the law of a single state to apply to the written agreements containing post-employment restrictions. Second, all post-employment restrictions are not viewed monolithically under state law, and restrictions on solicitation may survive where broader bans on any competition would not, a particularly important consideration when dealing with an employee population in multiple states. Third, while choice of law analysis will often cite the multi-factor “most significant relationship test” of *Restatement (Second) of Conflict of Laws* when deciding choice of law questions, the “place of performance” factors often holds great sway in employment contracts. These and other factors will drive the enforceability of such covenants, and one must always consider the likelihood of success on the merits factor so critical at the initial injunctive relief stage on which these cases often turn. An employer often may be better off seeking to enforce narrow non-solicitation or confidentiality obligations than making broader claims to ban all competition. Counsel that can help an employer assess these state to state differences proves valuable for those with employees in multiple, sometimes disagreeing, jurisdictions.

Tags: Cardoni, Non-Compete Agreements, Non-Solicit Agreements, Oklahoma, Prosperity Bank, Texas

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