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OUR INSIGHTS

Massachusetts Court Provides Guidance on Choice of Law and Forum Selection Clauses in Restrictive Covenants

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Published Date: September 30, 2018

With Massachusetts's comprehensive noncompete law taking effect on October 1, 2018, many employers are reviewing and likely revising their restrictive covenants to ensure that they are compliant with the new law. In performing that review, employers may want to consider the potential effects that the Massachusetts Supreme Judicial Court's (SJC) recent decision in *Oxford Global Resources, LLC v. Hernandez* might have on their covenants' choice of law and forum selection clauses.

Background

In *Oxford*, an employer headquartered in Massachusetts hired an employee to work exclusively in California. As a condition of his employment, the employee signed a confidentiality, nonsolicitation, and noncompetition agreement. The agreement contained a choice of law provision that provided that the law of Massachusetts would govern the agreement and a forum selection clause that required the parties to litigate their disputes in the state and federal courts of Massachusetts.

After the employee left to work for one of the employer's competitors in California, he allegedly violated the confidentiality and nonsolicitation provisions of the agreement. His former employer then filed suit against him in Massachusetts to seek relief for those violations. On the employee's motion, the trial court dismissed the suit on the grounds that California was a more appropriate forum for the litigation. The employer appealed the dismissal of its complaint, and the SJC on its own initiative transferred the case from the Appeals Court.

The SJC's Decision

The SJC first considered the "enforceability of the Massachusetts choice of law provision . . . because the determination as to which State's substantive law shall govern the dispute has a bearing on" where the parties should litigate their dispute. The SJC found that although Massachusetts had a "substantial relationship" to the agreement because the employer was headquartered there, California had a "materially greater interest" in the dispute because the employee was interviewed, worked, was trained, and allegedly breached the agreement in California. Next, the SJC determined that enforcing the choice of law provision would undermine California's public policy because while the agreement's nonsolicitation provision would be enforceable under Massachusetts law, it would not be enforceable

under California law. Accordingly, the SJC held that the choice of law provision was not enforceable, California law applied to the employer's nonsolicitation claim, and California law also applied to the remaining claims because they were "interwoven with the claim of breach of the nonsolicitation provisions."

After holding that the choice of law provision was unenforceable, the SJC considered whether the forum selection clause precluded the employee from arguing that California provided a more appropriate forum for the case than Massachusetts. The SJC began this analysis by recognizing that the forum selection clause did not expressly purport to waive the employee's right to make such an argument. Even if the clause did, the SJC found that it would not deprive the employee of his right to seek to have another forum hear the case against him. At most, such a clause could waive the employee's "objection to the forum based on the inconvenience of the forum to him." It could not, however, waive the employee's ability to object to the forum based on other factors, such as the convenience to witnesses and the desirability of having a particular state's courts apply that state's law to a dispute. Because "everything relevant to [the] case happened in California," "all relevant witnesses [were] located in California," and the courts of California had an interest in seeing that California law was correctly applied to the dispute, the SJC held that a California court was a more appropriate forum for the litigation than a Massachusetts court.

Key Takeaways for Employers

The *Oxford* decision has two key takeaways for Massachusetts employers that require their employees to sign restrictive covenants. First, employers with covenants that contain Massachusetts choice of law provisions may want to consider whether another state has a greater interest in the employment relationship and, if so, whether that state's laws on unfair competition are friendlier to employees than Massachusetts's laws. (Note that, with respect to noncompetition agreements, Massachusetts's new noncompete law greatly limits the ability of employers to choose the law of another state for employees who are based in Massachusetts.) Second, employers may want to review their forum selection clauses to determine the extent to which they would be enforceable under *Oxford* and revise them if necessary.

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