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The ADR Loophole to Restrictive Non-Compete Agreements

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THE ADR LOOPHOLE TO RESTRICTIVE NON-COMPETE AGREEMENTS

JAD ITANI

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INTRODUCTION

In many business practices, a common form of protection for the business is implementing a non-compete agreement in the business’ employment contracts. Black’s Law Dictionary defines non-competes as clauses in an agreement that would deny an employee from conducting a similar business in a specific area for a specific period of time.¹ The common law of England first recognized a non-compete agreement as early as 1414, but did not strictly enforce it.² However, a few centuries later, a shift finally seemed to occur; in 1711, *Mitchel v. Reynolds* arose as a landmark decision where an English court first recognized the possible need for reasonable restraint on trade.³ The trend continued spiraling toward permitting the use of non-competes and even touched the United States. In 1889, the Supreme Court of South Carolina first stated that a non-compete agreement is enforceable and may be appropriate depending on location and circumstances.⁴ Since then, many American courts have continued to form and develop the evolution of non-compete agreements in today’s society.⁵ Currently, a majority of states have shifted over and now

1. *Non-Compete Clause*, THELAWDICTIONARY.ORG, <https://thelawdictionary.org/non-compete-clause/> [https://perma.cc/4UV8-ULT4] (last visited March 5, 2019).
2. Dyer’s Case YB 2 Hen. V, fol. 5, pl. 26 (1414) (Eng.).
3. *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347 (Q.B.).
4. *Carroll v. Giles*, 9 S.E. 422, 432 (S.C. 1889).
5. *See, e.g.*, *Pierce v. Fuller*, 8 Mass. 223, 226 (Mass. 1811); *Freudenthal v. Espey*, 102 P.280, 285 (Colo. 1909); *Fitness Experience, Inc. v. TFC Fitness Equip., Inc.*, 355 F. Supp. 2d 877, 888 (N.D. Ohio 2004).

permit the use of non-compete agreements.⁶ However, the following select states strongly regulate or prohibit them altogether: (1) California; (2) Oklahoma; and (3) North Dakota.⁷

As evidenced by custom business practices, non-compete agreements are typically included in employment contracts.⁸ Non-compete agreements in an employment contract are a means for employers to affirmatively protect trade secrets and to prevent competitors from stealing such trade secrets.⁹ Non-compete agreements in employment matters are more recently treated in a restrictive manner as a form of public protection.¹⁰ From the aforementioned restrictive states, California offers, by far, the most restrictive reading of non-compete agreements due to public policy concerns.¹¹ The Supreme Court of California stated that the inclusion of a non-compete agreement creates a significant public policy harm insofar as:

Every individual possesses as a form of property, the right to pursue any calling, business, or profession he may choose. A former employee has the right to engage in a competitive business for him-self and to enter into competition with his former employer, even for the business of those who had formerly been the customers of his former employer, provided that such competition is fairly and legally conducted.¹²

States like California, which adopt a restrictive reading of non-compete agreements, skeptically view a non-compete agreement that prohibits a former

6. See generally BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (David J. Carr et al. eds., 12th ed. 2017).

7. CAL. BU. & PROF. CODE § 16600 (1963); N.D. CENT. CODE § 9-08-06 (2018); OKLA. STAT. § 15-219A (2001); 1 BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY 1605–07 (David J. Carr et al. eds., 12th ed. 2017); 3 BRIAN MALSBERGER, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY 4465–67, 4595–97 (David J. Carr et al. eds., 12th ed. 2017).

8. See William M. Corrigan, Jr. & Michael B. Kass, *Non-Compete Agreements and Unfair Competition—An Updated Overview*, 62 J. MO. B. 81, 87 (2006).

9. Superior Gearbox Co. v. Edwards, 869 S.W.2d 239, 247–48 (Mo. Ct. App. 1993).

10. See generally Briskin v. All Seasons Servs., Inc., 206 A.D.2d 906, 907 (N.Y. App. Div. 1994); Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp., 369 N.E.2d 4, 6 (N.Y. 1977); Buffalo Imprints v. Scinta, 144 A.D.2d 1025, 1026 (N.Y. App. Div. 1988); Orchard Container Corp. v. Orchard, 601 S.W.2d 299, 303 (Mo. Ct. App. 1980).

11. Russell Beck, *Employee Noncompetes: A State-by-State Survey*, BECK REED RIDEN (Apr. 29, 2012), <http://www.beckreedriden.com/wp-content/uploads/2012/04/Noncompetes-50-State-Survey-Chart-04-29-2012.pdf> [https://perma.cc/35BY-WVZF] CAL. BUS. & PROF. CODE § 16600 (1963).

12. Cont'l Car-Na-Var Corp. v. Moseley, 148 P.2d 9, 12–13 (Cal. 1944).

employee from working with a similar company within a certain distance from the employer's company.¹³

This Comment considers a key question: do employers have a strategy to protect themselves if these restrictive states are restricting corporations from protecting their self-developed trade secrets? In doing so, Part II will discuss an approach that may allow employers to potentially circumvent the restrictive states. This can be achieved by requiring an employee to undergo private arbitration in a dispute with an employer—a strategy that has gained validity in light of the United States Supreme Court's holding that upholds arbitration clauses even where significant public policy concerns exist.¹⁴ Specifically, an employer in a restrictive state could potentially enforce an arbitration through a choice of law clause that would provide the employer an opportunity to follow another state's more lenient approach for non-compete agreements.

Then, this Comment will discuss two competing approaches to this problem of strict prohibition of non-compete agreements and a possible guideline for the third state to follow since no Legislative or Judicial action has addressed this maneuver. Accordingly, in Part III, this Comment will delve into the first approach based on California's non-compete policy. California, pursuant to its Business and Professional Code § 16600, states that “[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent *void*.”¹⁵ Consequently, any non-compete agreement that restricts an employee to work with a rival business would be void and any employee will be permitted to work for a competitor or even begin a similar practice of his or her own. Previously, employers attempted to be crafty in attempting to evade these restrictions through an arbitration clause in a non-compete agreement; however, legislatures caught on to their sly circumvention. As of December 1, 2017, the legislature enacted a Labor Code that would prevent potential employers from attempting to circumvent these restrictive clauses.¹⁶

Next, in Part IV, this Comment will discuss North Dakota's approach to a non-compete agreement. While North Dakota, like California, restricts non-compete agreements, its approach includes two exceptions where non-

13. OKLA. STAT. § 15-219B (2013) (stating that as long as the prior employee does not solicit customers from former employers, they may conduct similar business in the area). *See* Hendrickson v. Octagon Inc., 225 F. Supp. 3d 1013, 1026-27 (N.D. Cal. 2016) (favoring open competition and employee mobility); *Continental Car-Na-Var Corp.*, 148 P.2d at 12–13.

14. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

15. CAL. BUS. & PROF. CODE § 16600 (1963) (emphasis added). *See* *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 290–91 (Cal. 2008); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 696 (Cal. 2000); *Swenson v. File*, 475 P.2d 852, 858 (Cal. 1970); *Martinez v. Martinez*, 263 P.2d 617, 618 (Cal. 1953).

16. *See* CAL. LAB. CODE § 925 (2016).

competes are valid.¹⁷ Chapter 9-08 Section 6 of the North Dakota Century Code states that:

Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except:

1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part of either, so long as the buyer or any person deriving title to the goodwill from the buyer carries on a like business therein.
2. Partners, upon or in anticipation of a dissolution of the partnership, may agree that all or any number of them will not carry on a similar business within the same city where the partnership business has been transacted, or within a specified part thereof.¹⁸

Of the two exceptions, the first arises when a person sells his or her business.¹⁹ The seller may agree not to start another similar business within the respective area.²⁰ This agreement is voluntary and understanding, but the agreement is strictly limited to competing within a specific location.²¹ The second exception arises when partners dissolve their preexisting partnership.²² A defecting partner is then no longer permitted to carry on a similar business in the same area.²³ In reading the North Dakota Century Code, it appears that the North Dakota legislature strategically permitted some protection for employers by enforcing the use of non-compete agreements. This Comment will consider whether, given these exceptions, an arbitration clause could potentially assist in circumventing a state's prohibition on non-compete agreements, other than the two exceptions listed in the Code.²⁴

Then, in Part V, this Comment will analyze Oklahoma's restrictive non-compete statute and determine if the legislature, or the courts, have discouraged any attempt to circumvent the restrictions on these clauses.²⁵ Title 15, Chapter 5 Section 219A of Oklahoma's non-compete statute states that:

A. A person who makes an agreement with an employer, whether in writing or verbally, not to compete with the employer after the

17. N.D. CENT. CODE § 9-08-06 (2018).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See Osborne v. Brown & Saenger, Inc.*, 904 N.W.2d 34, 38–39 (N.D. 2017).

25. OKLA. STAT. ANN. tit. 15, § 219A (2001).

employment relationship has been terminated, shall be permitted to engage in the same business as that conducted by the former employer or in a similar business as that conducted by the former employer as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.

B. Any provision in a contract between an employer and an employee in conflict with the provisions of this section shall be void and unenforceable.²⁶

Like California, Oklahoma provides no exceptions and claims that any non-compete agreement signed into a contract is unenforceable.²⁷ The Oklahoma statute states that even if an employee agrees not to engage in the similar business as the employer, once the relationship has been terminated, the employee is permitted to conduct similar business as long as her or she does not directly solicit clients from the employer's business.²⁸ Although Oklahoma proves to be another strict non-compete state, no case law or legislation exists that deters employers from circumventing these clauses—as opposed to North Dakota and California. Accordingly, this Comment will suggest which approach Oklahoma should take for employers to protect their business and their respective trade secrets.

Finally, in Part VI, this Comment will conclude by assessing what is the best balance between protecting the rights of workers to seek work freely and for the business owners to properly protect their business.

I. ALTERNATIVE DISPUTE RESOLUTION

All hope is not lost for employers who are faced with the risk of losing some of their trade secrets because a restrictive state does not permit the use of non-compete agreements. Specifically, this section considers whether an alternative dispute clause is a route an employer may take to attempt to circumvent the law of a state that has imposed significant restrictions on a non-compete agreement. Alternative dispute resolution is the use of methods to resolve disputes outside of litigation.²⁹ Providing employers and companies with alternatives outside of litigation is beneficial because of the ability to save time, money, and stress; as opposed to the angst of dealing with a courtroom.³⁰

26. *Id.*

27. *Id.*

28. *Id.*

29. 28 U.S.C. § 651 (2017).

30. Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195, 197 (2008).

There are numerous methods of alternative dispute resolution; however, the most familiar forms are widely known as negotiation, mediation, and arbitration.³¹ Negotiation is the process in which two parties go back and forth, presenting offers with each other until both parties are satisfied.³² As one can imagine, negotiation is the most common method of alternative dispute resolution that people encounter on a regular basis.³³ On the other hand, mediation is the process where a neutral third-party assists two opposing parties in reaching a mutually acceptable position.³⁴ Unlike a judge, the neutral third-party does not make a decision as to who is wrong or right but, simply facilitates the conversation until the parties agree on settling the matter.³⁵ This provides parties an opportunity to shape and form their resolution into whatever they please, as opposed to only a monetary resolution that is never guaranteed.³⁶ Lastly, there is the process of arbitration. In arbitration, the parties select a third-party as the decision maker, like a judge.³⁷ This form of alternative dispute resolution is the most similar to litigation and the final decision by the arbitrator can potentially be binding.³⁸ Most times, depending on the party who is drafting the arbitration clause, these decisions are binding without an opportunity to appeal.³⁹

The procedure of arbitration is the method which employers could use to avoid the prohibition of the application of non-compete agreements.⁴⁰ In states where non-compete agreements are prohibited, employers may skirt these restrictions by including an arbitration clause in their employee contract, making arbitration agreements binding.⁴¹ Therefore, an employer could

31. Amber Murphy Parris, *Alternative Dispute Resolution: The Final Frontier of the Legal Profession?*, 37 J. LEGAL PROF. 295, 295 (2013).

32. U.S. DEP'T OF TRANSP. – FED. HIGHWAY ADMIN., NEGOTIATION AND MEDIATION, https://www.planning.dot.gov/PublicInvolvement/pi_documents/3b-d.asp [https://perma.cc/49LB-H523].

33. DEP'T OF JUSTICE, CANADA, DISPUTE RESOLUTION REFERENCE GUIDE (Jul. 31, 2017), <http://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/dprs-sprd/res/drrg-mrrc/03.html> [https://perma.cc/2LHN-2ZRN]; MARYLAND STATE BAR ASSOCIATION, INC., MEDIATION: A HANDBOOK FOR MARYLAND LAWYERS ¶ 5, Westlaw (database updated Mar. 2019).

34. Laura E. Weidner, *The Model Standards of Conduct for Mediators* (2005), 21 OHIO ST. J. DISP. RESOL. 547, 548 (2006).

35. *Id.*

36. *Id.*

37. 3 CAL. AFFIRMATIVE DEF. *Neutrality or Bias of Arbitrator* § 68:4, Westlaw (2d ed. 2018).

38. 9 U.S.C. § 2 (2017); Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 6–8 (2010).

39. *Id.*

40. See Corey A. Ciochetti, *Tricky Business: A Decision-Making Framework for Legally Sound, Ethically Suspect Business Tactics*, 12 CARDOZO PUB. L. POL'Y & ETHICS J. 1, 66 (2013).

41. *Id.*

potentially include a choice of law clause that would determine which jurisdiction's law the agreement must follow when considering the dispute between the employer and the employee.⁴² This choice of law clause would permit the parties to arbitrate the case under whichever state law they agree upon, including states that permit non-compete agreements.⁴³

For example, if an employer's principle place of business is located in California, in their arbitration clause the employer can include a choice of law provision that would follow Wisconsin's labor laws. Accordingly, if a dispute were to arise, the California employer would be permitted to enforce the non-compete since the law they are following—Wisconsin's labor laws—do permit the use of non-competes,⁴⁴ and the arbitration would then follow the applicable Wisconsin rules. However, implementing a choice of law provision connecting it to another state in an attempt to circumvent restrictive forum state laws: the business must have some connection to the state chosen in the choice of law provision.⁴⁵ A court can decline to follow the chosen state if the "forum state's interests would be more seriously impaired by enforcement of [the chosen law] than would the interests of the chosen state by application of the forum state['s law]."⁴⁶

Finally, this Comment will dive into the most restrictive states in America and discuss how the approach on non-compete agreements has recently changed. Given that this is a live issue, both Legislatures and the Judiciaries have taken action to prevent any possibility to circumvent the restrictions, for the most part. There is one remaining state that is restrictive however, which has not spoken on the method of circumventing the restriction, as the two other restrictive states have. Accordingly, this Comment will also provide insight as to what the best approach for the remaining state is.

II. CALIFORNIA

Turning to the most restrictive state, an employer in California is presented with a very difficult situation. If an employer was to attempt to circumvent these restrictive non-compete requirements, it would be quickly deterred. As of 2017, California legislatures have begun cracking down on employers' attempts to circumvent their restrictions and have implemented a new statute

42. Ross Ball, *FAA Preemption by Choice-of-Law Provisions: Enforceable or Unenforceable?*, 2006 J. DISP. RESOL. 613, 625 (2006).

43. 62B AM. JUR. 2D *Private Franchise Contracts* § 193, Westlaw (database updated Mar. 2019).

44. WIS. STAT. § 103.465 (2018).

45. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (AM. LAW INST.1988).

46. *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 898–99 (Cal. Ct. App. 1998).

prohibiting any such maneuver.⁴⁷ Pursuant to California's Labor Code Section 925, the following restrictions apply:

- (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:
 - (1) Require the employee to adjudicate outside of California a claim arising in California.
 - (2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
- (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California and California law shall govern the dispute
- (d) For purposes of this section, adjudication includes litigation and arbitration.
- (e) This section shall not apply to a contract with an employee who is in fact individually represented by legal counsel in negotiating the terms of an agreement to designate either the venue or forum in which a controversy arising from the employment contract may be adjudicated or the choice of law to be applied.
- (f) This section shall apply to a contract entered into, modified, or extended on or after January 1, 2017.⁴⁸

Working through California's Labor Code Section 925, we first encounter subsection (a) where it is apparent that the legislature intends to protect California employees by prohibiting certain conditions to employment. Under (a)(1), if an employee lives and works in California, they cannot be required to adjudicate outside the state when the case arises in California. Under subsection (a)(2), the legislature prohibits an employer from depriving an employee of California laws.⁴⁹ Therefore, using a choice of law clause under an arbitration provision seems to be strictly prohibited given the original restrictive California's Business and Professional Code Section 16600. The legislature went as far as to include that litigation and arbitration fall under this scope of the Code. The choice of law clause would no longer be permitted as of January 2017 and any attempt to maneuver out of the restrictions imposed is effectively terminated.⁵⁰

47. See CAL. LAB. CODE § 925 (2016).

48. *Id.*

49. *Id.* § 925(a)(2).

50. *Id.*

However, the legislature seemed to have provided employers one potential exception to permit their non-compete agreements. Under subsection (e), the code may permit a choice of law maneuver if the employees were represented by their own attorney when they were negotiating the terms of their employment agreement.⁵¹ If the employee's attorney negotiates the choice of law provision out of the employment contract, then that employee would be subject to following another state's law and the non-compete agreement may be valid. Therefore, although the California legislature seems to be averse to non-compete clauses and has attempted to eliminate any attempt to circumvent restrictions on non-competes, the legislature seemed to instill a possibility to include a choice of law provision to follow the majority of the states and their less restrictive approach to non-competes.

III. NORTH DAKOTA

Another state that is sternly opposed to non-compete agreements and tries to strictly limit them, is North Dakota. This Comment will explore the opportunity to circumvent and attempt to apply a choice of law clause in an arbitration provision. While Chapter 9-08 Section 6 of the North Dakota Century Code clearly states that non-competes will not be permitted, an employer may still have an opportunity to circumvent this restriction through arbitration clauses and choice of law provisions. However, as recent as December 7, 2017, North Dakota's Supreme Court specifically prohibited this approach, too.⁵² Although the North Dakota legislature did not enact a statute to forbid this approach, the judicial branch was clear in its intent.⁵³

In *Osborne v. Brown & Saenger, Inc.*, the Supreme Court of North Dakota determined that a choice of law clause and a forum selection clause in an employment contract are not enforceable because of the strong public policy that prohibits the use of non-compete agreements.⁵⁴ There, the defendant hired the plaintiff as a representative of its sales office to sell office supplies to other businesses.⁵⁵ The defendant company was headquartered in South Dakota, but it "operate[d] as a foreign business corporation in North Dakota."⁵⁶ The contract the plaintiff signed included two clauses that included non-compete agreements and a choice of law clause.⁵⁷ The non-compete agreement prohibited the employee from engaging in business with a competitor, or

51. *Id.* § 925(e).

52. *Osborne v. Brown & Saenger, Inc.*, 904 N.W.2d 34, 38–39 (N.D. 2017).

53. *Id.*

54. *Id.*

55. *Id.* at 35.

56. *Id.*

57. *Id.* at 35–36.

soliciting customers during their employment and for two years after within a 100-mile radius.⁵⁸ Additionally, the choice of law clause provided that South Dakota laws would govern the employment even though the defendant business was located in North Dakota.⁵⁹

In January 2017, the defendant terminated the plaintiff's employment.⁶⁰ After being terminated, the plaintiff sued, claiming "retaliation, improper deductions, and breach of contract . . . [and the plaintiff] also sought a declaratory judgment declaring the non-compete agreement to be void."⁶¹ The lower court granted a motion to dismiss in favor of the defendant company. On appeal, the court noted that the motion to dismiss was an error because "the forum-selection clause in her employment agreement is unenforceable under North Dakota law and selection of a foreign forum would be unreasonable."⁶² Eventually, the court sided with the plaintiff and agreed that "one may not contract for application of another state's law or forum if the natural result is to allow enforcement of a non-compete agreement in violation of . . . longstanding and strong public policy against non-compete agreements."⁶³ The court alluded to a few cases that agree with its conclusion and acknowledge that South Dakota permits non-competes which proves to be unfair to a party who contracted in state that has a strong public policy against such agreements.⁶⁴ Therefore, the court concluded that allowing this choice of law clause to be permitted would be detrimental and unfair to the plaintiff.⁶⁵

Although this is a fairly recent case and there have been no other statutes enacted to restrict this sort of maneuver, trying to circumvent the restrictions on non-compete agreements is now likely to fail in the state of North Dakota. The court seems to leave some openness and vagueness with what can and cannot be done with a choice of law clause and leaves some questions: Are choice of law provisions never permitted in North Dakota? Or are they permitted unless they violate public policy? If, like California, an employee had his or her own attorney do the negotiations, there may be no reason why it should be forbidden to include a choice of law provision. However, the court failed to address this issue and left numerous unanswered questions.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 38.

64. *Id.*

65. *Id.*

IV. OKLAHOMA

Finally, the last state that has a very restrictive approach when considering permissibility of non-compete agreements is Oklahoma.⁶⁶ Unlike California and North Dakota, Oklahoma has not yet enacted a statute that nor has the state supreme court prohibited a maneuver in which applying an alternative dispute resolution approach with a choice of law provision will circumvent these restrictions. Oklahoma provides the greatest opportunity to try and evade their restrictive non-competes by using this technique of including a choice of law provision in an arbitration clause. However, when considering precedent, it can be inferred that such a maneuver may be looked down upon.⁶⁷

In *Sw. Stainless, L.P. v. Sappington*, the defendants sold their interests in a corporation.⁶⁸ As a condition to this sale, the defendants agreed to execute and deliver certain agreements including future employment agreements and future noncompetition agreements.⁶⁹ The non-compete provisions stated:

During the . . . Noncompetition Period . . . the [former owner] specifically agrees that [he] shall not . . . either directly or indirectly . . . engage in any business within the States of Missouri, Texas, Oklahoma, Tennessee, Louisiana, Alabama and Florida . . . which competes in any manner with any business conducted by [Southwest] or [HD Supply] immediately prior to the Closing or during the term of [the former owner]’s employment with [Southwest] [T]he term “Noncompetition Period” shall mean the later of three (3) years after the Closing Date, or one (1) year after the [former owner] no longer receives any compensation from [Southwest], or any affiliate of [Southwest].⁷⁰

Southwest Stainless and HD Supply alleged that the defendants breached both the employment agreement and the noncompetition agreement by interfering with their business relations.⁷¹ The court began its analysis by considering the parties’ choice of law clause.⁷² Although this was executed in Oklahoma, the parties still disagreed about whether Florida or Oklahoma law

66. OKLA. STAT. ANN. tit. 15, § 219A (2001).

67. See *Sw. Stainless, L.P. v. Sappington*, 2008 WL 918706, at *6 (N.D. Okla. Apr. 1, 2008).

68. *Id.* at *1.

69. *Id.*

70. *Id.*

71. *Id.* at *3.

72. *Id.* at *4.

would govern.⁷³ The court here followed the Tenth Circuit approach where “federal courts must look to the forum state’s choice-of-law rules to determine the effect of a contractual choice-of-law clause.”⁷⁴ The agreement between the parties stated that Florida law would govern; however, the court needed to first see if Oklahoma law would permit the parties’ attempt to follow Florida law.⁷⁵

Under Oklahoma law, the contract would typically follow the state where the contract was entered into, with an exception if the parties agreed to follow the law of another state and as long as it is not against the law or against public policy.⁷⁶ When determining what public policy actually means, the Oklahoma courts have defined it as “synonymous with the policy of the law, expressed by the manifest will of the state which may be found in the constitution, the statutory provisions, and judicial records.”⁷⁷ Since the parties agreed to follow Florida law, the court had to first determine whether the application of Florida law would violate the public policy of Oklahoma.⁷⁸ After analyzing Florida law, the court concluded that the non-compete agreement did not conflict with Florida law since the duration was proper, there was proper interest in need of protection, and the location restricted is necessary for protecting their business interest.⁷⁹ However, when reviewing Oklahoma law, the court refused to follow Florida law because the choice of law clause violated Oklahoma law with contracts that would restrain people from trade.⁸⁰ According to Oklahoma law: “[N]on-compete agreements may not restrict competition beyond ‘a specified county and any county or counties contiguous thereto, or a specified city or town or any part thereof.’”⁸¹ Because Oklahoma makes businesses restrict competition in a more specific area, whereas Florida allows businesses to have a larger span of territory to not compete, Florida law is violating the public policy by restricting competition in seven states.⁸² The problem with the non-compete agreements in the case was that they were restricting competition in seven states, but the duration was valid.⁸³ Eventually, the court concluded that Oklahoma law would apply and the non-compete agreement would be

73. *Id.*

74. *Id.* (quoting *MidAmerica Constr. Mgmt., Inc. v. Mastec N. Am., Inc.*, 436 F.3d 1257, 1260 (10th Cir. 2006)).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at *6.

80. *Id.*

81. *Id.* (quoting OKLA. STAT. tit. 15, § 218 (2001)).

82. *Id.*

83. *Id.*

enforceable with the modification of the geographic restriction being limited to “those counties surrounding Tulsa county.”⁸⁴

In *Sappington*, it was clearly illustrated that Oklahoma, though containing some restrictive language regarding non-competes, have been shown to have some leniency. Additionally, it was observed that even a choice of law clause could have been permitted pursuant to the lack of geographical limitation. It seems likely that this attempt to circumvent the restrictive non-compete agreements could be permitted in Oklahoma if the case law is closely followed. Although public policy is clearly in the precedent, if an employer was certain that no public policy violations would occur and that the geographical restriction would not be overly oppressive, an employer may likely be able to circumvent the non-compete prohibition.

A. Which approach should Oklahoma follow?

In an attempt to balance whether it is more important to protect a business’ interest with respect to its trade secrets or whether the public interest at large is more important, Oklahoma has an opportunity to determine its future outlook on this issue. Looking at the legislative history, the legislature seems to be slowly veering in the favor of the employers.⁸⁵ In the twelve years between the initial enacting of Oklahoma Statute Annotated title 15 section 219 to the amendment in 2013, it seems as though the legislature has slowly begun to recognize the need to protect employers’ interests. However, acknowledging the power that a lot of corporations hold, this Comment is of the belief that by permitting employers this potential loophole, citizens will be subject to disadvantages when it comes to making their own future employment decisions.

In the most recent case discussing the use of non-compete agreements, the Court of Civil Appeals of Oklahoma reversed a ruling because the non-compete agreement violated Oklahoma’s law and public policy.⁸⁶ This case established that those in Oklahoma with non-compete agreements that violate Oklahoma law can void the agreement.⁸⁷ Additionally, *Autry* spoke on the availability for employers’ ability to restrict employees to try and solicit former coworkers, if drafted appropriately.⁸⁸ Finally, the decision in this case will likely permit

84. *Id.* at *8.

85. OKLA. STAT. ANN. tit. 15, § 219 (2001) (reasoning that the legislature enacted Section B to prohibit employees from soliciting their former coworkers).

86. *Autry v. Acosta, Inc.*, 410 P.3d 1017, 1023–24 (Okla. Civ. App. 2017).

87. *Id.*

88. *Id.*

employees to argue that following another state's law will violate public policy.⁸⁹

Following *Autry*, it seems that although the legislature has leaned towards protecting employers, the judicial branch seems to be leaning in the direction of North Dakota. Once the State Supreme Court speaks on this matter first-hand, it seems that such circumvention will be challenged, and the courts will agree that this is a violation of public policy. For those applying non-compete agreements in their business, this may be the best, and final time, to enforce the protection against competition. Given the few restrictive states speaking on this matter within the past two years, it is likely that the Oklahoma courts are likely to over-turn this circumvention, preventing such a maneuver and following both California and North Dakota's recent changes.

CONCLUSION

In summation, California, North Dakota, and Oklahoma still remain the most restrictive states in this country. Although other states may follow, for now, most states permit non-compete agreements more-so than the aforementioned states. One must ask if this is a good or bad thing. However, the answer truly depends on what perspective one is taking. When considering why these states are so reluctant to allow non-competes, the public interest is a compelling explanation. However, should that outweigh the protection of business and employers and their respective trade secrets? Employers have trade secrets that make their business unique and helps make the business an accomplishment. Should that be taken lightly because some employees would have some partial restrictions? The legislatures and the courts in California, North Dakota, and Oklahoma seem to think that public policy still should outweigh these interests; backing the David verse Goliath metaphor in favor of the little guy. However, what damage could the prohibition of non-competes do to the public in the long run? This could potentially have a domino-effect especially in a big tech-industry state like California. A shift in industries could occur and drive business out of the state to ensure proper protection against competition. California may be on to something by providing an opportunity for employers to implement a non-compete clause but only enforcing it if the employee had representation. This not only protects the public interest at large, but also protects businesses and their trade secrets. By encouraging employees to retain counsel in the midst of negotiations, both parties are likely to be content with the outcome. These are the types of considerations courts and legislatures should take into account before prohibiting non-compete agreements.

89. *Id.*