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CHOICE OF LAW AND EMPLOYEE RESTRICTIVE COVENANTS: AN AMERICAN PERSPECTIVE

Gillian Lester† and Elizabeth Ryan††

I. INTRODUCTION

Employees are increasingly mobile across state lines. This is partly the result of technological change facilitating individual movement and communication, but also a result of corresponding changes in corporate organization to establish offices and interests in multiple jurisdictions. With these developments, there has been a rise in litigation surrounding the enforcement of employee covenants not to compete when the parties or issues involved have connections to multiple jurisdictions. The emerging body of law intrigues and confounds lawyers and commentators because of its complexity and unpredictability. This essay is an effort to describe recent legal developments in the United States, situating them within the background doctrines of conflict of laws and parallel litigation that govern such disputes. Our aim is to provide a useful comparison with the other essays in this volume dealing with developments in other countries on the same subject.

A covenant not to compete (also referred to as a restrictive covenant or non-compete agreement or NCA) is an agreement that an employee will not compete against the employer, or go to work for a competitor, for some specified period after termination of employment.¹ The contract typically also specifies a geographic

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1. Rather than prohibiting competition altogether, a covenant might instead impose some kind of penalty in the event that a former employee competes, like a sum of liquidated damages, or forfeiture of stock options or pension benefits. Insofar as these also have the effect of inhibiting competition, courts will ordinarily analyze these in the same way they would analyze any employee restrictive covenant. *See, e.g.,* Anniston Urologic Ass'n, P.C. v. Kline, 689 So.2d

region, and may specify a trade or profession in which competition is prohibited. Although such restrictions are presumptively unenforceable at common law on public policy grounds, courts in most states will grant an exception if the employer can demonstrate that the covenant in question safeguards a legitimate interest and is reasonable in its scope. The most commonly recognized legitimate interest is the protection of trade secrets.² Depending on the state, courts may also recognize other legitimate interests such as customer relationships and goodwill,³ confidential information not rising to the level of a trade secret,⁴ and the services of employees with unique or extraordinary talents (although ordinary training is not usually protectable).⁵

The other limitation on enforceability is that the covenant must be "reasonable." A broad set of public policy concerns informs the reasonableness test: courts are concerned with protecting employees from hardship, often citing inequality of bargaining power as a basis for giving special scrutiny to non-compete agreements.⁶ Courts also articulate a general resistance to restraints on trade.⁷ There is a strong imperative that the restriction be no greater in terms of duration, geographic scope, and limitation on vocational activities than is reasonably necessary to protect the interests of the employer.⁸

54, 57 (Ala. 1997) (holding that a covenant reducing purchase price of employees' stock options in the event of competition is a restraint on practicing profession and the fact that it is couched in terms of liquidated damages rather than in negative form is not significant); B.D.O. Seidman v. Hirschberg, 712 N.E.2d 1220, 1222-23 (N.Y. 1999) (noting that an agreement requiring employee to pay monetary compensation for competing is, in purpose and effect, a form of ancillary anti-competitive agreement and subject to a reasonableness test).

2. Geritex Corp. v. Dermanite Indus., LLC, 910 F.Supp. 955, 959 (S.D.N.Y. 1996) (stating that protectable employer interests include trade secrets and confidential customer lists); Hayden's Sport Ctr., Inc. v. Johnson, 441 N.E.2d 927, 932 (Ill. App. Ct. 1982) (holding that enforcing a non-compete covenant requires an employer to show injury to a legitimate business interest, such as a trade secret, separate and distinct from defendants' breach of covenant).

3. Acas Acquisitions (Precitech) Inc. v. Hobert, 923 A.2d 1076 (N.H. 2007) (holding that protectable interests include employee's influence over customers and contracts obtained during employment and good will emanating from client); St. Clair Med. P.C. v. Borgiel, 715 N.W.2d 914 (Mich. Ct. App. 2006) (noting that legitimate interests include goodwill in the community developed by an employer's medical practice).

4. Modern Controls, Inc. v. Andreadakis, 578 F.2d 1264, 1268 (8th Cir. 1978) (holding that confidential information regarding a company's computer hardware development, while not rising to the level of a trade secret, protectable under a covenant not to compete).

5. See, e.g., The 7's Enters v. Del Rosio, 143 P.3d 23 (Haw. 2006) (holding unique training of a "briefer" in the tourism industry protectable in tandem with other factors); Clooney v. WCPO Television Division of Scripps-Howard Broad. Co., 300 N.E.2d 256 (Ohio Ct. App. 1973) (finding a television personality's unique services to be a legitimate interest).

6. RESTATEMENT (SECOND) OF CONTRACTS § 188, cmt. g (1981).

7. *Id.*

8. *Id.* § 188 (1)(a)(b), cmts. b-d. The seminal holding on the enforceability of reasonable restraints remains the eighteenth-century English decision of *Mitchel v. Reynolds*, (1711) 24

Occasionally, a court will declare a restrictive covenant contrary to the public interest independent of the other factors in the reasonableness test. For example, courts in some states have limited the enforcement of restrictive covenants against physicians on the basis that the public has an interest in unconstrained access to doctors' services.⁹ In the realm of legal services, the American Bar Association's Model Rules of Professional Conduct prohibit attorneys from entering into an "agreement that restricts the right of a lawyer to practice after termination . . . except an agreement concerning benefits upon retirement."¹⁰ As a result, most states are very hostile to restrictive covenants for attorneys, again with the rationale that it is in the interest of the public to have unencumbered access to attorneys.¹¹

Courts in some states are willing to reform an unreasonable non-compete agreement by either excising ("blue penciling") an unreasonable term,¹² or by redrafting an overbroad term to make it reasonable.¹³ Courts in other states categorically refuse to enforce overbroad restrictive covenants, concerned that employers will be tempted to draft overbroad contracts that chill employee mobility, knowing that if the contract is later challenged for overbreadth the drafter can request enforcement in a modified form.¹⁴

Eng. Rep. 347 (K.B.) (holding restraints on competition presumptively unenforceable, though presumption may be rebutted if restraint is reasonable).

9. See, e.g., *Murfreesboro Med. Clinic, P.A. v. Udom*, 166 S.W.3d 674, 682–83 (Tenn. 2005) (finding that public policy and legislative intent dictate that restrictive covenants against almost all physicians must be strictly limited). *But see Med. Specialists Inc. v. Sleweon*, 652 N.E.2d 517, 527 (Ind. Ct. App. 1995) ("Covenants . . . which restrict the provision of medical services . . . are not per se against public policy."); *Calhoun v. WHA Med. Clinic, PLLC*, 632 S.E.2d 563 (N.C. Ct. App. 2006) (finding that restrictive covenants for physicians are not *per se* unreasonable).

10. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2002).

11. *Jacob v. Norris*, 607 A.2d 142, 146 (N.J. 1992) (explaining that limited availability of restrictive covenants on attorneys will serve the public interest in having "maximum access to lawyers" and freedom of choice in selecting counsel); *Pettingell v. Morrison, Mahoney & Miller*, 687 N.E.2d 1237, 1239 (Mass. 1997) (stating that prohibition against restrictive covenants is motivated by the interests of clients, not the lawyers themselves).

12. See, e.g., *Intermountain Eye and Laser Ctrs., P.L.L.C. v. Miller*, 127 P.3d 121, 131 (Idaho 2005) (suggesting that trial court "blue-pencil" the restrictive covenant upon remand); *Bridgestone/Firestone Inc. v. Lockhart*, 5 F. Supp. 2d 667, 683 (S.D. Ind. 1998) (stating that Indiana courts will strike clauses to allow partial enforcement of the covenant); *B.D.O. Seidman v. Hirschberg*, 93 N.Y.2d 382, 395 (1999) (severing a portion of the covenant to provide for partial enforcement).

13. See, e.g., *Total Health Physicians, S.C. v. Barrientos*, 502 N.E. 2d 1240, 1242–43 (Ill. App. Ct. 1986) (limiting the geographic area of an overbroad covenant to an area that was reasonable). See also *Orchard Container Corp. v. Orchard*, 601 S.W.2d 299, 303–04 (Mo. Ct. App. 1980) (reducing scope of non-compete agreements from 200- to 125-mile radius); *Daughtry v. Capital Gas Co.*, 229 So.2d 480, 484 (Ala. 1969) (limiting injunctive relief to one Alabama county as opposed to the multi-county area prescribed by the non-compete agreement).

14. E.g., *CAE Vanguard, Inc. v. Newman*, 518 N.W.2d 652, 655 (Neb. 1994) (finding that Nebraska adopts the "minority view" that courts may not reform covenants since doing so is

A key point is that states vary widely in their friendliness to employee non-compete agreements. A few states, such as California, have such a strong policy favoring employee mobility that they either prohibit or very strictly limit such agreements.¹⁵ A number of legal scholars have speculated that the success of Silicon Valley may be due, at least in part, to California's weak enforcement regime. The nub of their argument is that weak enforcement within "high velocity" labor markets—where highly-skilled employees move fluidly between firms taking ideas and innovations with them—permits the rapid diffusion of information, leading to industry-wide technological gains that arguably swamp the investment disincentives that weak entitlements may engender.¹⁶ Moreover, even among states more willing to enforce reasonable agreements, the ease of creating and enforcing restrictive covenants varies widely. Some states operate under constitutional limitations that impose strict limits on enforcement,¹⁷ some require consideration,¹⁸ some statutorily limit

equivalent to creating private agreements); *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) (declining blue penciling in Georgia because it would encourage employers to write overbroad covenants and "exercise an *in terrorem* effect on employees") (citing Harlan M. Blake, *Employee Covenants Not to Compete*, 73 HARV. L. REV. 625, 641–46 (1960)).

15. See CAL. BUS. & PROF. CODE §§ 16600–16602.5 (2008) (prohibiting non-compete covenants beyond those attached to sale of goodwill of a business, or upon dissolution of partnership or limited liability corporation). See also HAW. REV. STAT. §§ 480-84(c) (2008) (prohibiting non-compete agreements except in connection with the sale of a business or partnership or to protect trade secrets); MONT. CODE. ANN. §§ 28-2-703–704 (2008) (prohibiting non-compete agreements except in connection with the sale of a business or withdrawal from a partnership, the use of a leased premises, and the preservation of trade secrets); N.D. CENT. CODE § 9-08-06 (2008) (prohibiting non-compete agreements except those in connection with the sale of a business or dissolution of a partnership). Note that even in states that have near-total prohibitions, reasonable employee restraints for purposes of protecting trade secrets are enforceable. See, e.g., *Loral Corp. v. Moyes*, 219 Cal. Rptr. 836, 841 (Cal. Ct. App. 1985) (citing *Muggill v. Reuben H. Donnelley Corp.*, 42 Cal. Rptr. 107 (Cal. Ct. App. 1965) (making an exception to an ordinary statutory rule invalidating covenants not to compete where covenant attempts to protect trades secrets)).

16. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 608–09 (1999); ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* 44 (2003).

17. Article III of the Georgia Constitution prohibits contracts that may have the effect of lessening competition, and Georgia courts have interpreted this as placing very strict limits on non-compete agreements. See *Allen v. Hub Cap Heaven, Inc.*, 484 S.E. 2d 259, 264 (Ga. 1997) (stating that while not all employee noncompetition covenants are held to run afoul of the Georgia Constitution, an agreement entered into by an employee is enforceable only where it is strictly limited in time and territorial effect and is otherwise reasonable considering the business interest sought to be protected).

18. E.g., *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 208 (S.C. 2001) (requiring additional consideration beyond continued at-will employment in order to enforce non-compete covenant); *Labriola v. Pollard Group, Inc.*, 100 P.3d 791, 794–95 (Wash. 2004) (holding a covenant not ancillary to an initial hiring agreement can be sustained only if supported by independent consideration beyond continued employment); *National Recruiters, Inc. v.*

duration,¹⁹ some limit protectable interests (other than trade secrets) to an employer's well-established customer relationships,²⁰ some distinguish between high-level employees and others,²¹ some permit, and others prohibit, reformation or blue-penciling.²²

It is this variation among states in their willingness to enforce non-compete agreements that creates the conditions for conflict of laws and strategic litigation. The employee may work for a company in one state and sign a non-compete agreement in that state, but then get recruited away to a company in another state that is less willing to enforce non-competes. The former employer wants to enforce the non-compete agreement and the employee and/or acquiring employer want to invalidate it. How do American courts decide which law to apply?

This article considers this question in two sections. In Section II, we briefly review the core principles that govern disputes involving conflicts between the laws of different states. Although this body of doctrine spans many different areas of law, our focus throughout is cases concerning employee non-compete agreements. In particular, we describe approaches courts have taken depending on whether the parties have or have not included a choice of law clause in their agreement. We also consider the influence of a forum selection clause. In Section III, we turn to the challenges associated with parallel litigation and describe the legal context in which parties may have an incentive to "race to the courthouse" to increase the likelihood of favorable judgment. Section IV briefly concludes.

Cashman, 323 N.W.2d 736, 740 (Minn. 1982); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W. 3d 877 (Tex. Civ. App. 2003).

19. See S. D. CODIFIED LAWS § 53-9-11 (2008) ("An employee may agree . . . [1] not to engage directly or indirectly in the same business or profession as the employer for any period not exceeding two years from the date of termination of the agreement and [2] not to solicit the employer's existing customers within a . . . county, . . . municipality, or other specified area for up to two years . . . if the employer continues to carry on a like business there."). See also LA. REV. STAT. ANN. § 23:921 (2009) (noting a two-year limitation on employee non-compete agreements).

20. OKLA. STAT. tit. 15, § 217 (2009) (prohibiting non-compete agreements except those connected to the sale of a business or dissolution of a partnership, or those prohibiting solicitation of business from former employer's established customers); *Applebaum v. Applebaum*, 823 N.E.2d 1074, 1082-83 (Ill. App. Ct. 2005) (discussing tests for determining when an employer has "near-permanent" employee relationships that may be protected by a non-compete covenant).

21. COLO. REV. STAT. § 8-2-113 (2008) (prohibiting covenants not to compete with the exception of those connected to the purchase and sale of a business or its assets, protecting trade secrets, time-limited agreements for reimbursement of training costs, and those entered into by executive and management personnel or their professional staffs).

22. See cases cited in *supra* notes 12, 14.

II. EMPLOYEE NON-COMPETE AGREEMENTS AND CONFLICT OF LAWS

Before a court hearing a non-compete dispute with multi-state aspects can reach any decision on the merits, it must determine what law governs the agreement. Under modern, policy-oriented approaches to choice of law, forum law should ordinarily provide the rule of decision, and the burden is on the party seeking to displace forum law to show that it would be proper to do so.²³ As an initial matter, the court should determine whether there is indeed a conflict between the different states' laws. If all potentially applicable laws would reach the same result, there is no conflict and the forum court will apply its own law or interchangeably apply different states' laws.²⁴ If potentially applicable laws would reach different results, but only one state has an interest in applying its law, the situation is called "a false conflict" and the forum court will apply the law of the only interested state.²⁵ If the forum and another state would reach different results and both states have an interest in applying their laws, then the forum must apply its own approach to choice of law to determine which substantive law to apply.²⁶ Courts perform choice of law analyses in two different circumstances: where the parties have agreed in advance through a choice of law clause what law should apply to a particular dispute, and when they have not.

In the discussion that follows, we will focus on the rules in the Restatement (Second) of Conflicts (hereinafter Restatement) given that most states have adopted them, at least formally.²⁷ To do so without any caveats, however, risks oversimplification. For one thing, not all states follow the Restatement. But even among states that adopt the Restatement, there is considerable variation in how their courts—both between and within jurisdictions—interpret and

23. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 242 (3d ed. 2002).

24. R.A. LEFLAR, AMERICAN CONFLICTS OF LAW § 92 (4th ed. 1986). See also *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230 (3d Cir. 2007); *Air Prods. & Chems.*, 272 F. Supp. 2d 482, 490 n.9 (E.D. Pa. 2003); *Boston Hides & Furs v. Sumitomo Bank*, 870 F. Supp. 1153, 1159 (Dist. Mass. 1994).

25. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959).

26. The forum court will apply the choice of law rules of its own state. See e.g., *Beckler v. State Farm Mut. Auto. Ins. Co.*, 195 Ariz. 282, 285 (1999); *Baxter v. Sturm, Ruger & Co.*, 230 Conn. 335, 345 n.6 (1994). A federal court must apply the choice of law rules in the state where it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Griffin v. McCoach*, 313 U.S. 498, 503 (1941).

27. Symeon C. Symeonides, *Choice of Law in the American Courts in 2008: Twenty-Second Annual Survey*, 57 AM. J. COMP. L. 269, 279 (2009) (reporting that a majority of states have adopted the Restatement rules).

implement the rules.²⁸ The state of the law is perhaps characterized more by inconsistency than anything else, so much so that commentators lament the “disarray”²⁹ and “mish-mash”³⁰ of the law, and criticize courts for their “post-hoc rationalizing of intuitions”³¹ or their use of a “hodgepodge of factors, often with insignificant explanation of how they decide what weight to give each.”³²

In this essay, we do not purport to make sense of the theories different courts adopt, nor to develop an independent theory of how conflicts ought to be resolved in cases involving covenants not to compete. Our goal is the more modest one of reviewing recent decisional law in American courts as they confront an increasing number of non-compete disputes with inter-state features, and offering some brief observations on how current law might influence both litigants and state regulatory policy going forward.

A. *Choice of Law Analysis in the Absence of a Choice of Law Provision*

In the absence of a choice of law clause, courts traditionally relied on territorial rules, such as *lex loci contractus* or the place of contracting rule, to determine which law to apply.³³ Although some continue to apply these relatively straightforward territorial rules, most states have now adopted the interest-based analysis from Currie’s “governmental interest approach” reflected in Restatement (Second) Conflict of Laws section 188, or something very similar.³⁴ The Restatement test is sometimes referred to as the “Center of Gravity” or “Grouping of Contracts” test, and is designed to determine which state has the most significant relationship to or greatest interest implicated by a particular transaction.

Under the Restatement test, a court weighs the interests of the place where the contract was negotiated and formed, the jurisdiction where performance or the object of the contract was to take place,

28. See generally, RICHMAN & REYNOLDS, *supra* note 23 at 272–76 (reviewing scholarly criticism of modern choice of law doctrine). See also Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (reviewing theories underlying choice of law analyses across states and showing how many courts apply more than one theory).

29. RICHMAN & REYNOLDS, *id.* at 272.

30. Robert Leflar, *The Nature of Conflicts Law*, 81 COLUM. L. REV. 1080, 1094 (1981).

31. Larry Kramer, *Choice of Law in American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465 (1991).

32. Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 732 (1990).

33. See, e.g., *Milliken v. Pratt*, 125 Mass. 374, 379 (1878).

34. See, e.g., *Convergys Corp. v. Keener*, 276 Ga. 808, 812 (2003); *Vantage Tech. LLC v. Cross*, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999); *Trans-American Collections, Inc. v. Continental Account Servicing House, Inc.*, 342 F. Supp. 1303, 1305 (D. Utah 1972).

and the citizenship or place of incorporation of the parties.³⁵ This gives courts considerable discretion, and does not always result in the application of the law of the forum.³⁶ Where a contract was made in one jurisdiction and parties intended to perform it in that same jurisdiction, there is a presumption that the law of that state will apply, even if it is different from the law of the forum state.³⁷ When the parties contracted in one place and intended to perform in another, modern courts often apply the law of the place of performance.³⁸ At least one state that applies the Restatement has adopted a bright line rule that, in the case of personal service contracts, the place of performance should apply.³⁹ However, in most states applying the Restatement there is no clear-cut rule and courts will sometimes apply the law of the place of contracting, particularly if any part of the performance occurred there.⁴⁰ Notably, courts will disregard the foregoing rules and apply the substantive law of the forum if applying another state's law would undermine the public policy of the forum.⁴¹

B. Choice of Law Analysis When Parties Have Included a Choice of Law Clause

Because the substantive law governing non-compete covenants varies substantially from state to state, parties often include a choice of law clause, which expressly designates a particular state's law for

35. RESTATEMENT (SECOND) OF CONFLICTS, § 188.

36. *See, e.g.*, *Rollins, Inc. v. Parker*, 755 So.2d 839 (Fla. Dist. Ct. App. 2000) (applying Georgia law); *Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc.* 690 S.W.2d 437 (Mo. Ct. App. 1985) (applying Kansas law).

37. *See, e.g.*, *Universal Winding Co. v. Clarke*, 108 F. Supp. 329 (D.C. Conn. 1952) (applying Rhode Island law in light of findings that agreement was executed and intended to be performed, and plaintiff's plant was located in, Rhode Island).

38. *Holland Furnace Co. v. Connelley*, 48 F. Supp. 543, 548 (E.D. Mo. 1942) (holding that in cases of conflict the *lex solutionis* will prevail over the *lex loci contractus*).

39. *DeSantis v. Wackenhurt Corp.*, 793 S.W.2d 670, 697 (Tex. 1990) (holding that, as a rule, the place of performance of personal services alone is conclusive in determining what state's law is to apply).

40. *See, e.g.*, *Award Incentives, Inc. v. Van Rooyen*, 263 F.2d 173, 176-77 (3d Cir. 1959).

41. There are some federal constitutional boundaries on the ability of a state to apply its own law. The limitations that do exist derive from the due process clause and full faith and credit clause, the gist being that a state should not apply its own laws when there is no connection between the forum and the litigants. However, the standard for permissible application of forum law is so liberal as to exclude only the most extreme cases. For application of the forum state's law to violate the Constitution it must be so "totally arbitrary or . . . fundamentally unfair" to a litigant that it violates the due process clause. *Allstate v. Hague*, 449 U.S. 302, 326 (1981). If the forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply forum law might so "[frustrate] the justifiable expectations of the parties" as to be unconstitutional. *Id.* at 327.

resolving future disputes.⁴² In general, courts defer to choice of law clauses because they are presumed to represent the express intention of the parties.⁴³ Courts have adopted varying approaches to deciding when to override party choice. Some states refuse to enforce any contract that, when interpreted under the law of the state selected in a choice of law clause, would violate a public policy of the forum.⁴⁴ The Restatement approach, at least theoretically, is more deferential to party choice. A court following the Restatement approach will not apply the law of the chosen state if either of two circumstances arises.⁴⁵ First, it will not defer to the choice of law clause if the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice.⁴⁶ Second, it will not apply the law of the chosen state if that law would be contrary to a fundamental public policy of a state with a materially greater interest than the chosen state in the determination of the particular issue, and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.⁴⁷

Analysis of the first inquiry—no substantial relationship or other basis—tends to be relatively straightforward, although one question that has generated mixed precedent is whether a party's place of incorporation is a significant enough connection to create a substantial relationship.⁴⁸ The second path to invalidation of a choice of law clause is more complex. Most courts cleave the analysis into two questions. First, they ask whether another state has a materially greater interest in the dispute, and second, whether applying the law chosen would violate the public policy of the state with a materially

42. See Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Non-Compete Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1383 n.8 (2008) (speculating, based on the frequent inclusion of choice of law clauses in sample or model contracts prepared by attorneys and others offering risk management advice, that inclusion of such clauses is becoming more common).

43. See, e.g., *Kuehn v. Children's Hosp.*, Los Angeles, 119 F.3d 1296, 1301 (7th Cir. 1997) ("Choice of law clauses are common and when reasonable are enforced.")

44. E.g., *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 159 (S.C. 2005).

45. RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 35, §§ 187–88.

46. *Id.* § 187(2)(a).

47. *Id.* § 187(2)(b).

48. Compare *Am. Exp. Fin. Advisors, Inc. v. Topel*, 38 F. Supp. 2d 1233, 1238 (D. Colo. 1999) ("Amex's principal place of business is in Minneapolis, Minnesota. This fact alone provides a sufficient basis for the parties' choice of law.") and *Nordson Corp. v. Plasschaert*, 674 F.2d 1371, 1375 (11th Cir. 1982) with *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948-49 (7th Cir. 1994) (invalidating a choice of law clause on grounds that no substantial relationship existed where the only relationship between the chosen state and the transaction was that it was the place of incorporation for one party).

greater interest and whose law would apply in the absence of a choice of law clause.

1. Materially Greater Interest

The question here is whether a state other than the chosen state—either the forum state or another state—has a materially greater interest in the dispute.⁴⁹ Most courts look to factors that are the same as or similar to those they would apply in the absence of a choice of law clause under the Restatement section 188 significant relationship test: they focus on the residency of contracting parties and where the parties intended the contract to be performed.⁵⁰ In the event of a tie, at least one court has said it will defer to the choice of law clause.⁵¹ Although the second question—whether application of the chosen law would offend the public policy of the state with a materially greater interest—should ordinarily follow, some courts conflate the two inquiries and conclude that another state has a materially greater interest *because* its public policy would be offended if the chosen law were applied.⁵² When this happens, the interest balancing test is reduced to a starker contest among competing public policies.

2. Violation of Public Policy

If the court concludes that a state other than the chosen state has a materially greater interest, then it must determine whether application of the chosen law would offend the public policy of that other state. A minor difference in laws is not enough, at least in

49. This inquiry does not necessarily come out in favor of the forum state. For example, an Indiana court asked to rule on a contract containing an Indiana choice of law clause found that Louisiana had a materially greater interest in the case. *Zimmer, Inc. v. Sharpe*, No. 3:09-CV-117 RM 2009 U.S. Dist. LEXIS 68907, at *26 (N.D. Ind. Aug. 4, 2009).

50. *See, e.g., King v. PA Consulting Group, Inc.*, 485 F.3d 577, 586 (10th Cir. 2007) (holding that Colorado had a materially greater interest in dispute between New Jersey company and plaintiff employee over a restrictive covenant with New Jersey choice of law clause because “King is a resident of Colorado, he signed the contract in Colorado, and his sole place of work was Colorado”); *Cherry, Bekaert & Holland v. Brown*, 582 So.2d 502, 507–08 (Ala. 1991) (determining that Alabama had a materially greater interest in enforceability of non-compete covenant between a North Carolina company and an employee working in its Alabama office despite North Carolina’s choice of law clause because defendant was trying to enforce covenant against an Alabama resident in Alabama).

51. *Pro Edge, L.P. v. Gue*, 374 F.Supp.2d 711, 739 (N.D. Iowa 2005).

52. *See, e.g., Elec. Distribs., Inc. v. SFR, Inc.*, 166 F.3d 1074, 1084 (10th Cir. 1999) (“Colorado has a substantial connection to the contract because SFR is a Colorado corporation with its principal place of business in Colorado. However, we believe that Utah has a materially greater interest in the resolution of the issue *because important policy considerations of Utah are involved* in assessing the validity of the covenant not to compete.”) (emphasis added).

theory, to violate public policy. Some courts hold that even differences that would change the outcome should not necessarily lead to the invalidation of the choice of law clause.⁵³ However, it remains unclear just how substantial the conflict must be to justify disregarding the chosen law.

Some courts find it virtually impossible to apply the law of another state that permits enforcement of non-compete covenants. The Georgia Supreme Court, for example, has held that the same public policies that underlie Georgia's firm prohibition against non-compete agreements inform its choice of law analysis, implying that choice of law clauses selecting law favorable to non-competes will be regularly invalidated.⁵⁴ In *Enron Capital & Trade Resources Corp. v. Pokalsky*, the parties executed a non-compete agreement containing a Texas choice of law clause while the employee worked for Enron in Texas.⁵⁵ The employee later accepted a position with a competitor in Georgia, and filed for a declaration in Georgia state court that the agreement was unenforceable. The Georgia Court of Appeals upheld the trial court's decision to ignore the choice of law clause and invalidate the non-compete agreement on the basis that the agreement was "particularly distasteful" because of its overbreadth.⁵⁶ Quoting *Nasco v. Gimbert*,⁵⁷ the court asserted that:

[T]he law of the jurisdiction chosen by parties . . . will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state. Covenants against disclosure, like covenants against competition, affect the interests of this state, namely the flow of information needed for competition among businesses, and hence their validity is determined by the public policy of this state.⁵⁸

53. *Labor Ready, Inc. v. Williams Staffing, LLC*, 149 F. Supp. 2d 398, 406–07 (N.D. Ill. 2001) (noting that although Washington more liberally blue penciled, and it was possible that applying chosen Washington law would produce a different outcome, the differences were not great enough to be repugnant to an interest of the state of Illinois); *Vencor, Inc. v. Webb*, 33 F.3d 840, 844–45 (7th Cir. 1994) (determining that even if Illinois law dictates a different outcome on a particular question than the law of the state designated by the employment contract, that difference does not require the court to find the chosen state's law so odious that a court does not respect the parties' election to be governed by it).

54. *Nasco Inc. v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977). See also Christopher D. David, *When a Promise is Not a Promise: Georgia's Law on Non-Compete Agreements, as Interpreted by the Eleventh Circuit in Keener v. Convergys Corporation, Gives Rise to Comity and Federalism Concerns*, 11 J. INTELL. PROP. L. 395, 399–405 (2004) (tracing the evolution of Georgia law with respect to foreign choice of law clauses in non-compete agreements).

55. *Enron Capital & Trade Resources Corp. v. Pokalsky*, 490 S.E.2d 136 (Ga. Ct. App. 1997) [hereinafter *Enron*].

56. *Id.* at 139.

57. *Nasco*, 238 S.E. 2d at 369.

58. *Enron*, 490 S.E.2d at 139.

The Eleventh Circuit affirmed this approach in *Keener v. Convergys*, in which an employee of an Ohio company relocated to Georgia after having signed a two-year non-compete agreement.⁵⁹ The court noted that “the contract was entered into in Ohio, the contract selected Ohio law, and it was the expectation of both parties that Ohio law would apply.”⁶⁰ And yet, the court affirmed a Georgia district court order granting summary judgment to the plaintiff on grounds that the non-compete agreement was contrary to Georgia public policy, that Georgia law therefore applied, and that the non-compete agreement was unenforceable under Georgia law.⁶¹ We discuss other important aspects of the *Keener* opinion below, in Section III.

Courts in California, another state with a strong public policy against non-compete agreements, have taken a similar position.⁶² The seminal case is *Application Group v. Hunter*, in which a Maryland employer sought to enforce a restrictive covenant containing a Maryland choice of law clause against a former employee who had departed to work for a California employer and yet was not, and had never been, a resident of California.⁶³ The California Court of Appeal held that California had a materially greater interest in the dispute, given that enforcement would be contrary to California Business and Professions Code section 16600,⁶⁴ whereas non-enforcement would not significantly impair Maryland interests because the type of competition would not actually impair any of the “protectable interests” required for enforcement of a non-compete in Maryland.⁶⁵ The Court declared that to enforce the Maryland choice of law clause would allow an out-of-state employer to limit employment and business opportunities in California and that “California courts are not bound to enforce a contractual choice of law provision which would . . . be contrary to this state’s fundamental public policy.”⁶⁶

59. *Keener v. Convergys*, 342 F.3d 1264 (11th Cir. 2003).

60. *Id.* at 1268 n.2.

61. *Id.* at 1269. *See also* *Hulcher Servs., Inc. v. R.J. Corman R.R.*, 543 S.E.2d 461, 465 (Ga. Ct. App. 2000) (refusing to honor Texas choice of law clause in non-compete agreement on grounds that application of Texas law would contravene public policy of Georgia).

62. *See* Christine L. Wu, *Non-compete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State’s Law?*, 51 U.C.L.A. L. REV. 593, 594–95 (2003).

63. *Application Group v. Hunter*, 72 Cal. Rptr. 2d 73, 76 (Cal. Ct. App. 1998) (“[I]t is undisputed that [the employee] Pike never set foot in California, even for pleasure, during the time she was employed by Hunter.”).

64. *See id.* (describing the policy against enforcement of employee non-compete agreements embodied in §16600).

65. *Id.* at 86.

66. *Id.*

A year later, the Ninth Circuit Court of Appeals decided *IBM Corp. v. Bajorek*, concerning an employee who, while working for IBM in New York, vested \$900,000 worth of stock options and then departed for a competitor in California.⁶⁷ The employee had signed an agreement containing a New York choice of law clause that required him to remit the value of any stock options if he worked for any competitor within six months of exercising the options. The court's analysis, while not facially inconsistent with *Application Group's* conclusion that California had a materially greater interest if application of another state's law would lead to enforcement of an employee covenant not to compete, applied the "narrow restraint" doctrine to justify application of New York law. Specifically, the Ninth Circuit treated the limitation on the exercise of stock options as a narrow restraint that did not offend section 16600 because it prohibited the employee from pursuing employment in only a small corner of the market.⁶⁸ Having reached this conclusion, the court reasoned that application of New York law would not violate California public policy.⁶⁹ The Ninth Circuit's narrow restraint doctrine has been controversial, and the California Supreme Court expressly disavowed it in a recent decision.⁷⁰

Another New York-California choice of law dispute, this time heard in a New York federal court, suggests that judgments about which state has a greater interest in a non-compete agreement dispute can be highly contingent on forum. *Estee Lauder Cos. v. Batra* involved an employee who lived in California throughout his employment with a Delaware company that had its principal place of business in New York.⁷¹ The parties had signed a non-compete with a New York choice of law clause. Plaintiff argued that California had a materially greater interest given the presence of significant contacts in California and the strong California public policy against enforcement of non-compete agreements.⁷² The New York court answered by acknowledging that the enforcement of the non-compete agreement in the present case would be contrary to a fundamental policy of California, but concluded that there were significant contacts to New York and therefore New York had a materially greater interest in the dispute,⁷³ and "New York's recognized interest in maintaining and

67. *IBM v. Bajorek*, 191 F.3d 1033 (9th Cir. 1999).

68. *Id.* at 1040-41.

69. *Id.* at 1041-42.

70. *Edwards v. Arthur Andersen LLP*, 189 P.3d 285, 291-92 (Cal. 2008).

71. *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006).

72. *Id.* at 171.

73. *Id.* at 173.

fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world . . . naturally embraces a very strong policy of assuring ready access to a forum for redress of injuries arising out of transactions spawned here.”⁷⁴

Despite the attention garnered by cases involving conflicts between states that are willing to enforce reasonable employee non-compete agreements beyond the limited context of protectable trade secrets and those that categorically prohibit or virtually prohibit them, it bears emphasis that conflicts also arise between states that have a common willingness to enforce reasonable covenants but differ by degree. An example is the recent case of *Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brand Int'l, Inc.*⁷⁵ In this case, an Illinois district court disregarded a Florida choice of law clause despite a reasonable basis for selection of Florida law, because under Illinois law, a court must consider hardship the covenant imposes on the individual employee, whereas Florida law specifically prohibits consideration of that factor in deciding the question of enforceability.⁷⁶ As such, the court ruled, application of Florida law would undermine a fundamental public policy of Illinois.⁷⁷ Another example is *DCS Sanitation Management, Inc. v. Castillo*, upholding the decision of a Nebraska district court to disregard the Ohio choice of law clause in the parties' non-compete agreement on the basis that Nebraska had materially greater interest in dispute and application of Ohio law would permit blue-penciling, which violates a fundamental public policy in Nebraska.⁷⁸

C. Forum Selection Clauses

Forum selection clauses have proven to be more resistant to judicial override. There are two types of forum selection clauses: exclusive and non-exclusive. Non-exclusive forum selection clauses require both parties to agree to waive objection to litigating in a particular venue, but do not require parties to give up the right to litigate elsewhere. Non-exclusive forum selection clauses help to resolve questions about personal jurisdiction, but are not relevant to the present discussion. Of interest to us are exclusive forum selection

74. *Id.*

75. *Del Monte Fresh Produce, N.A., Inc. v. Chiquita Brand Int'l, Inc.*, 616 F.Supp.2d 805 (N. D. Ill. 2009).

76. *Id.* at 816.

77. *Id.*

78. *DCS Sanitation Mgmt. Inc. v. Castillo*, 435 F.3d 892, 895-96 (8th Cir. 2006).

clauses, whereby parties agree that all disputes related to a particular transaction should be litigated in the chosen state.

Exclusive forum selection clauses are *prima facie* valid.⁷⁹ However, a choice of forum clause will be unenforceable if enforcement contravenes a strong public policy of the forum.⁸⁰ The Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.* gave four reasons a forum selection clause may not be enforced: (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons such as fraud or overreaching; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or, (4) the contractually selected forum would be seriously inconvenient for trial.⁸¹

In the non-compete context, although a choice of forum clause is not a sure bet to ensuring application of a particular state's law to any future disputes, recent decisions in a number of states suggest that courts are more willing to defer to choice of forum clauses than choice of law clauses.⁸²

For example, in *In re AutoNation*, the plaintiff was a Texas resident who managed a car dealership owned by the defendant company, whose principal place of business and head office were in Florida.⁸³ The parties' non-compete agreement contained Florida choice of law and forum selection clauses. After the plaintiff resigned to work for a competitor elsewhere in Houston, the parties filed parallel lawsuits in Texas and Florida disputing the enforceability of the non-compete agreement. The Texas Supreme Court stated that if it had heard the case it would likely have disregarded the choice of law clause for public policy reasons. Nonetheless, it observed:

[W]e have never declared that fundamental public policy requires that every employment dispute with a Texas resident must be litigated in Texas. . . . [E]ven if precedent] requires Texas courts to apply Texas law to certain employment disputes, it does not require suits to be brought in Texas when a forum-selection clause mandates venue elsewhere.⁸⁴

79. *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

80. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–19 (1972).

81. *Id.*

82. Glynn, *supra* note 42, at 1438 (identifying this phenomenon and discussing recent cases consistent with it); Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 742–47 (2006) (suggesting that the recent practice of including not only a choice-of-law clause, but also a choice-of-forum clause assigning exclusive jurisdiction to the courts of another state that enforces non-compete covenants, has operated to employers' advantage).

83. *In re AutoNation*, 228 S.W. 3d 663 (Tex. 2007).

84. *Id.* at 669.

A California court also recently enforced a forum selection clause, allowing the case to be decided in a state that would apply laws favorable to enforcement of a non-compete agreement.⁸⁵ Notably, the other court had already commenced proceedings, so it is not clear how much of the California court's holding was based on comity. Nonetheless, the language of the opinion suggests the court would have upheld the forum selection clause regardless of this. Even Georgia, which goes to great lengths to avoid enforcing choice of law clauses, has been willing to enforce forum selection clauses.⁸⁶

In sum, when a conflict of laws issue arises in litigation over employee restrictive covenants, choice of law clauses are by no means foolproof mechanisms for ensuring application of a particular state's law. The discretionary nature of conflicts rules, combined with the weight given to public policy concerns, combined with the fact that a public policy tension sits at the very heart of the law of employment restraints—a tension between public policies in favor of employee mobility, freedom of contract, and public access to certain kinds of professional services—means that resolution of these disputes can be highly unpredictable and depend a good deal on forum. Forum selection clauses are more reliable contractual devices for securing future application of a particular law, but they, too, offer no guarantee. The result is that, wholly aside from the substantive merits of a particular dispute over the enforceability of an employee non-compete agreement, parties have strategic incentives to seek a forum favorable to their respective positions in order to increase their chances of a favorable verdict.

As Section III reveals, these incentives are compounded by rules governing parallel litigation, i.e., multiple suits in different jurisdictions that have overlapping issues and parties.

85. *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101, 1105 (S.D. Cal. 2006) (“The question is not whether the application of the forum’s law would violate the policy of the other party’s state, but rather, whether enforcement of the forum selection agreement would violate the policy of the other party’s state as to the forum for litigation of the dispute. . . . [E]nforcement of the forum selection clause here does not contravene a California policy as to forum.”).

86. *Iero v. Mohawk Finishing Prods., Inc.*, 243 Ga. App. 670 (Ga. Ct. App. 2000) (holding that enforcement of a forum selection clause, even if contained within an employment contract that included a non-compete agreement, did not run afoul of Georgia public policy).

III. PARALLEL LITIGATION AND THE “RACE TO THE COURTHOUSE”

The law of parallel litigation is complicated, conflicting, and rife with incentives for parties to seek tactical advantages. When both parties file parallel lawsuits on the same matter in two different states, the dispute can take a number of different permutations: the litigation may end up entirely in federal courts, or there may be a federal and a state action, or there may be suits in the courts of two different states. Following a brief overview of the types of relief parties typically pursue, this part analyzes the various permutations of parallel litigation that can arise in non-compete disputes.

In a non-compete case, unlike in most employment litigation, the natural plaintiff is the former employer. The core instrument of enforcement is an injunction. Where trade secrets or confidential information are involved, the need for injunctive relief following departure of the employee may be quite urgent.

To obtain an injunction, the employer must prove that the lawsuit for which the remedy is sought will likely succeed on the merits, and that absent injunctive relief, irreparable harm is likely. Because resolution on the merits will probably involve delay, the plaintiff will frequently pursue temporary interim remedies available on a lesser standard of proof. Although our brief overview here of injunctive relief focuses on federal law, procedures under state law are similar.

The fastest relief is a temporary restraining order (TRO). In federal courts, a plaintiff can obtain a TRO without the appearance or consent of the defendant, so long as the plaintiff can show that it made an effort to notify the defendant and that irreparable injury will occur before the hearing for a preliminary injunction required by Rule 65(b) can be held.⁸⁷ The elements of proof required for a TRO are similar to those for a permanent injunction, with variations among circuits as to the scope and weight of the requirements.⁸⁸ The TRO expires

87. FED. R. CIV. P. 65(b)(1). See generally Edward T. Kole & Willard C. Shih, *Basics of Injunctive Relief in the Federal Court*, 226 N.J. 29, 29–30 (2004).

88. The court must consider (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable injury absent an injunction. In many jurisdictions, a court will also consider (3) whether the threatened injury to the movant outweighs the threatened harm to the non-movant if an injunction is granted; and, (4) whether the public interest would be served by granting the stay. MELVIN F. JAGER, *TRADE SECRETS LAW 1* (2009); CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D 11A* (2009). See also *Northeast Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006) (enumerating the factors weighed in deciding whether to grant a TRO or preliminary injunction and noting that these factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together); *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 734 (5th Cir. 2008).

within ten days.⁸⁹ Upon expiration of the TRO, a preliminary injunction may be entered and remain in force until the court is able to make a final adjudication on the merits of the permanent injunction. In contrast to a TRO, a preliminary injunction does require notice to the adverse party, but it can still be secured relatively quickly and without the full review of the substantive claim, particularly if a TRO was obtained initially.

Temporary injunctive relief can be a potent remedy on its own terms. For example, in industries where technological change is rapid, and the duration of a reasonable restrictive covenant may be relatively short, an employer that obtains immediate temporary injunctive relief pending resolution of the ultimate claim may achieve the functional equivalent of the desired non-compete regardless of the outcome of the dispute on its merits.⁹⁰ From the departing employee's perspective, it is critical to anticipate the possibility of immediate temporary injunctive relief pending resolution of the employer's substantive claim.

In this regard, declaratory relief may play an important role. A departing employee who is uncertain of her legal status under a non-compete agreement can seek a judicial declaration of her rights even before any coercive legal or equitable remedy is sought by the former employer. Under the federal Uniform Declaratory Judgments Act, parties may ask federal courts to declare their rights and legal relations, included in or independent of another substantive pleading.⁹¹ The declaration has full *res judicata* effect.⁹² Almost all states have adopted either the Uniform Declaratory Judgments Act or a separate statutory declaratory judgment provision that creates similar rights.⁹³ An employee who has signed a non-compete agreement in a state willing to enforce them, but who is relocating to a state that disfavors enforcement may have a clear incentive to seek declaratory relief in the destination state, assuming jurisdiction of the destination state over the employer can be established. This, then,

89. Rule 65(b). If the TRO is issued in state court and the matter is later removed to federal court, the ten-day clock begins at the time of issuance of the state order. *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439-40 (1974) (noting that *ex parte* temporary restraining order issued in state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, and in no event longer than the time limitations imposed by Rule 65(b)).

90. *E.g.*, *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D. N.Y. 1999) (invalidating a one-year restrictive covenant in significant part on the basis that one year was too long for a rapidly changing field like the Internet).

91. 28 U.S.C. §2201 (2000).

92. *Id.*

93. Unif. Decl. Judgments Act §1.

sets the stage for the proverbial “race to the courthouse” that has characterized much recent litigation in the area of employee restrictive covenants.

A. *Federal-Federal Parallel Litigation*

Although restrictive covenants are a matter of state law, it is not unusual for federal courts to exercise diversity jurisdiction in cases involving employees who have relocated to another state.⁹⁴ If both parties file in federal court, the party who filed first has a clear advantage. The “first-filed rule” is a strong presumption across federal circuits, in the interests of conservation of judicial resources and orderly administration of justice, that if two lawsuits relating to the same matter are filed in different federal courts, the first of the two claims should be allowed to proceed to judgment first.⁹⁵ The court of the second-filed action will usually defer by transferring the action, or by staying or dismissing it (sometimes also known as abatement).⁹⁶ In the non-compete context, the consequence of the first-filed rule is that if the employer and departing employee’s lawsuits both wind up in federal courts, the forum in which the suit was filed first will usually decide the choice of law question.

The decision of whether to apply the first-filed rule is ultimately a matter of judicial discretion, and federal courts do not invariably follow it. However, departures generally require proof by the party challenging the rule of the existence of special (sometimes

94. A dispute between citizens of different states is considered a “diversity” action, meaning that, under federal law, an out-of-state defendant may request removal to federal court. 28 U.S.C. § 1441(a). Alternatively, a plaintiff may bring suit in federal court in the first instance. *Id.* § 1332(a)(1). The purpose of federal diversity jurisdiction is to protect out-of-state litigants from potential favoritism by a state court toward the home-state party. *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945) (overruled on other grounds) (“Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias.”).

95. *See, e.g.*, *Church of Scientology of Cal. v. U.S. Dep’t of Def.*, 611 F.2d 738, 750 (9th Cir. 1979) (declining to abstain, but noting that the first-filed rule “should not be disregarded lightly”); *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (describing the first-filed rule as “well-established”); *Kerotest Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 182–83 (1952) (citing reasons for the first-filed rule). If a lawsuit is initiated in a state court and later removed to federal court, the time of filing is designated as when it was filed in state court. Any actions by the state court that removed a case before notice of removal was filed are presumed to be valid. *Palmisano v. Allina Health Sys. Inc.*, 190 F.3d 881, 885 (8th Cir. 1999).

96. James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 776–82 (discussing the range of remedies in parallel litigation). Professor George’s article offers an exhaustive, 200-page treatise on the law of parallel litigation that we found very helpful in preparing our own treatment.

“compelling”) circumstances.⁹⁷ Examples of such circumstances include evidence of bad faith, forum shopping, or indications that the plaintiff who filed first did so in an effort to anticipate and preempt litigation in a less favorable forum.⁹⁸ One might suppose that declaratory actions, when mirror images of a parallel suit, would raise particular concerns about forum shopping or bad faith. Even here, however, the mere fact that the first-filed suit is a declaratory action is not categorically grounds for exception to the first-filed rule.⁹⁹ Some courts even take the view that declaratory judgments are anticipatory by nature, parties have a natural desire to select the preferred forum, and that this ought not necessarily qualify as the sort of abuse that should justify departure from the first-filed rule.¹⁰⁰

If a litigant in a federal court is unsuccessful in persuading another federal court to stay or dismiss a parallel proceeding, the litigant may ask the court in which it brought its own suit to enjoin the parallel proceeding.¹⁰¹ The injunction would be against the opposing *party*, rather than the other court, but anti-suit injunctions nonetheless can be perceived as a challenge to another court’s authority and tend, perhaps for that reason, to be controversial.¹⁰² The factors for deciding whether to issue an intra-federal anti-suit injunction, if it comes to that, are essentially the same as for a stay or dismissal.¹⁰³

B. Federal-State Parallel Litigation

The law is more complicated for federal-state parallel litigation. The facially contradictory holdings of the Supreme Court in two decisions published thirty-five years apart, *Brillhart v. Excess Ins. Co. of America*,¹⁰⁴ and *Colorado River Water Conservation Dist. No. 7 v.*

97. See Michael A. Cicero, *First-to-File and Choice of Forum Roots Run too Deep for Micron to Curb Most Races to the Courthouse*, 90 J. PAT. & TRADEMARK OFF. SOC'Y 547, 553–57 (tracing the evolution, and intensification over time, of the first-to-file presumption in federal courts).

98. See George, *supra* note 96 at 787–88 (enumerating factors variously invoked in arguing special circumstances).

99. *Koresko v. Nationwide Life Ins. Co.*, 403 F. Supp. 2d 394, 401 (E.D.Pa. 2005) (holding that the “first-filed” rule between federal courts applies to declaratory judgment actions filed in good faith, and that some evidence of forum shopping or bad faith must be present to warrant departure from the rule). See also *Fed. Ins. Co. v. May Dep't Stores Co.*, 808 F. Supp. 347, 350 (S.D.N.Y. 1992) (including among the special circumstances that would militate in favor of dismissal of a first-filed request for declaratory judgment the misuse of declaratory judgment to gain a procedural advantage and preempt forum choice of the plaintiff).

100. Cicero, *supra* note 97, at 559.

101. George, *supra* note 96 at 808–12 (reviewing cases).

102. *Id.* at 781.

103. *Id.* at 808.

104. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942).

United States,¹⁰⁵ have led to inconsistency in the lower courts. In *Brillhart*, the Supreme Court reversed a Tenth Circuit holding that a federal district court had abused its discretion by dismissing a declaratory judgment action on grounds that a parallel action was pending in state court. The Supreme Court held that although the district court had jurisdiction under the Uniform Declaratory Judgments Act, it was under “no compulsion to exercise that jurisdiction,”¹⁰⁶ and that if the mirror image case were proceeding in a state court—the same issues of state law being involved—there should be a presumption in federal courts that the entire issue be heard in the state court.¹⁰⁷ *Brillhart* set out several non-exclusive factors a district court should consider in exercising its discretion over whether to assume jurisdiction.¹⁰⁸ An overarching concern expressed by the majority opinion was the need to dampen litigants’ incentives to strategically “shop” for the judicial forum most favorable to their interests.

Colorado River involved a water-rights dispute in which the United States government sought a declaration in federal court of its riparian rights in Colorado’s water division No. 7. Here, the Supreme Court affirmed the Eleventh Circuit’s reversal of a district court decision to abstain in deference to state court proceedings in division No. 7. The 4-3 majority opinion explicitly distinguished the case at bar from concurrent jurisdiction between federal courts, stating that in state-federal parallel litigation, there is *no* presumption that a federal court will defer to a parallel state suit. Due to the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,” the opinion held, a federal court may abstain in order to conserve federal judicial resources only in “exceptional circumstances.”¹⁰⁹ This is true “even if diversity of citizenship is the

105. *Colorado River Water Conservation Dist. No. 7 v. United States*, 424 U.S. 800 (1976).

106. *Brillhart*, 316 U.S. at 494.

107. *Id.* at 495 (“[O]rdinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.”).

108. *Id.* The factors to be weighed were (1) the scope of the pending state proceeding and the nature of the defenses available there; (2) whether the claims of all parties in interest can satisfactorily be adjudicated in that proceeding; (3) whether the necessary parties have been joined; and, (4) whether such parties are amenable to process in that proceeding. In a later decision, the Court added to the discretionary factors consideration of (5) avoiding piecemeal or duplicative proceedings; and (6) avoiding forum shopping. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 280 (1995) (upholding district court decision to stay declaratory judgment action in favor of parallel state litigation).

109. *Colorado River*, 424 U.S. at 817. See also *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 160 (S.D.N.Y. 2006) (denying defendant’s motion requesting federal court to abstain to first-filed state court order and noting “[b]ecause extraordinary circumstances have not been

only jurisdictional foundation.”¹¹⁰ *Colorado River* thus delivered an alternative, “balancing” approach for federal courts faced with the question of whether to defer to an ongoing state action.¹¹¹ The order of filing is only one factor listed among several, rather than preeminent as it is in the case of parallel litigation between two federal courts.¹¹²

Colorado River thus spawned confusion in the lower courts as to what presumption ought to inform federal courts faced with a parallel pending state suit. This was resolved to some degree after another twenty years by *Wilton v. Seven Falls Co.*, in which the Court clarified that *Brillhart* remains good law on *Brillhart* facts, i.e., when the question in the federal court is whether to stay a federal *declaratory judgment* action that parallels a state action.¹¹³ The distillation of the rule offered by these cases appears to be that a federal court may (1) apply the *Brillhart* standard to stay a federal declaratory judgment action that parallels a state action; or, (2) apply the more rigorous *Colorado River* balancing test to stay or dismiss a federal action, whether it seeks federal declaratory relief or not.¹¹⁴

The contrast between two federal non-compete cases, *Manuel v. Convergys Corp.*¹¹⁵ and *Google, Inc. v. Microsoft Corp.*,¹¹⁶ illustrates the broad scope for interpretation of the discretionary doctrines governing federal-state parallel litigation. In *Manuel*, an employee of

established, the motion is denied.”); *Cent. States Indus. Supply, Inc. v. McCullough*, 218 F. Supp. 2d 1073, 1094 (N.D. Iowa 2002) (refusing to stay proceedings).

110. *BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir. 1995).

111. *Colorado River*, 424 U.S. at 817–19 (setting out factors including the assumption of jurisdiction by either court over any res or property; inconvenience of the federal forum; avoidance of piecemeal litigation; the order in which jurisdiction was obtained by the concurrent forums; whether state or federal law supplies the rule of decision; and whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction). *See also* *Cone Mem. Hosp. v. Mercury Constr.*, 460 U.S. 1, 19–27 (1983).

112. *E.g.*, even if it will abstain because of a parallel state court proceeding, it might not use pure order of filing. Under the fourth factor, which examines which case has priority, the order in which jurisdiction was obtained “should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions.” *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1190 (5th Cir. 1988). *See also* *Estee Lauder*, 430 F. Supp. 2d at 168.

113. *Wilton*, 515 U.S. at 286 (asserting that federal courts have more leeway to abstain from exercising jurisdiction in the context of declaratory judgment than in other contexts, and need not limit such discretion solely to “exceptional” circumstances). *See also* *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136 (2007) (noting that district courts have been given considerable discretion to decide whether to grant declaratory relief because facts bearing on usefulness of the declaratory judgment remedy, and fitness of case for resolution, are peculiarly within their grasp).

114. *See* *George*, *supra* note 96, at 855–62 (analyzing *Brillhart*, *Colorado River*, and progeny).

115. *Manuel v. Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005).

116. *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018 (N. D. Cal., 2005).

Convergys, a large company whose principal place of business was Ohio, resigned from his job at a Florida subsidiary of Convergys and accepted a position in Georgia. Mr. Manuel's contract with Convergys contained a non-compete with an Ohio choice of law clause.¹¹⁷ When Manuel consulted an attorney, he was counseled that if Convergys obtained an Ohio judgment validating the non-compete, a Georgia court would likely enforce it and therefore that his best course of action would be to file first in Georgia.¹¹⁸ Between April 5 and April 20, 2004, Manuel did three things: he obtained a Georgia driver's license and a lease on a Georgia apartment; he told Convergys, where he had given notice but was still working, that he was not going to work for a competitor and that he had not accepted a job with another company; and he filed a request for declaratory judgment in a Georgia state court.¹¹⁹

Convergys responded by having the matter removed to a Georgia district court and filing a separate action in an Ohio state court to enforce the covenant.¹²⁰ Convergys then requested that the district court defer ruling on Manuel's motion pending resolution of the Ohio state action. The district court denied Convergys' request and granted summary judgment to Manuel.¹²¹

On appeal, the Eleventh Circuit found no abuse of discretion by the district court. Several aspects of the Court of Appeals decision are noteworthy. First, although the court cites *Wilton v. Seven Falls* as authority for the applicable standard of review, it is hard to read the case as consistent with the spirit of *Wilton*. There, where the Supreme Court's emphasis on the "unique and substantial" discretion of the district court was in the service of upholding a district court's decision to stay a declaratory judgment action during pendency of a parallel state proceeding due to concerns about forum shopping,¹²² The *Manuel* opinion, citing that same discretion, found no clear error of judgment by the district court, and gave central weight to the federal first-filed rule. The court cited the "compelling circumstances" that must exist to deviate from the first-filed rule, although it drew no distinction between the federal-federal parallel

117. *Id.* at 1134.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* The district court also granted Manuel's motion to dismiss a counterclaim by Convergys alleging misappropriation of trade secrets.

122. *Wilton v. Seven Falls Co.*, 515 U.S. at 277, 279–80 (1995).

litigation case it cited as authority for the rule, and the facts of the case at bar, which involved a federal-state parallel.¹²³

Second, in the face of strong evidence of anticipatory filing, the Court of Appeals asserted that “even if a court finds that a filing is anticipatory, this consideration does not transmogrify into an obligatory rule mandating dismissal. Such a finding still remains one equitable factor among many that a district court can consider in determining whether to hear a declaratory judgment action.”¹²⁴ The Court of Appeals was transparent about its normative posture: in response to the defendant’s argument that Manuel had engaged in improper forum shopping, the court stated simply that “there is nothing inequitable in Manuel seeking legal advice and later choosing to work in a state that shared his view that the NCA [non-compete agreement] was invalid and unenforceable.”¹²⁵ In essence, the Eleventh Circuit was unfazed by the possibility of strategic litigation, but rather suggested that such is the stuff of adversarialism.

By contrast, in *Google v. Microsoft*, a California district court stayed a first-filed declaratory judgment action by an employee, Kai Fu Lee, who resigned his position as Vice-President of Research and Development with Microsoft in Washington to accept a job with Google in California.¹²⁶ Lee had signed a one-year non-compete agreement that contained a Washington choice of law clause. The district court applied *Brillhart*’s discretionary test and concluded that granting declaratory relief would reward forum shopping on the part of plaintiffs Google and Lee, who “admit they filed [for declaratory action] to try to secure a California forum.”¹²⁷

The district court rejected the plaintiffs’ argument that *Brillhart* should not apply because the suits were not true mirror images, as the respective courts would apply different rules to resolve the same legal issues.¹²⁸ The district court declared this argument to be flawed because it overlooked the fact that the Restatement test for deciding choice of laws (adopted in both California and Washington) is forum-neutral, i.e., if the Washington court were to find that California has a materially greater interest than Washington in the validity of the

123. *Manuel v. Convergys Corp.*, 430 F.3d at 1132, 1135 (11th Cir. 2005).

124. *Id.*

125. *Id.* at 1137. The court also quoted the 5th Circuit decision in *McGuin v. Texas Power & Light*, 714 F.2d 1255, 1261 (5th Cir. 1983): “The existence of these choices [among various jurisdictions] not only permits but indeed invites counsel in an adversary system, seeking to serve his client’s interests, to select the forum that he considers most receptive to his cause.”

126. *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018 (2005).

127. *Id.* at 1021.

128. *Id.* at 1022.

covenant, then the Washington court must apply California law to decide the question of enforceability.¹²⁹ There was no reason, said the district court, that Google and Lee could not cite precedent such as *Application Group v. Hunter*¹³⁰ in urging the Washington court to apply California law.¹³¹

In sum, the legacy of Supreme Court jurisprudence in *Brillhart*, *Colorado River*, and *Wilton* is to give wide latitude to courts faced with federal-state parallel litigation, including in the context of non-compete agreements. Unless and until the Supreme Court offers further guidance, the federal (and state) courts may continue to take widely divergent views on whether strategic forum shopping even ought to be a matter for concern.

Thus far, the discussion has focused on discretionary decisions by federal courts to defer to another court by staying, transferring, or dismissing a suit. As in the federal-federal context, injunctions against proceedings in other courts are also an option. There are, however, very strict limits on the power of federal courts to enjoin parallel judicial proceedings in state courts. The Anti-Injunction Act¹³² provides that federal courts “may not grant an injunction to stay proceedings in a State court” unless the injunction falls within one of three specified exceptions.¹³³ The Act has been interpreted as applying to declaratory judgments if those judgments have the same effects as an injunction.¹³⁴ Despite the presence of exceptions, this is not an instance where the exceptions swallow the rule, and the Supreme Court has clarified that any doubts as to the propriety of a federal injunction against state court proceedings should be decided in favor of allowing state courts to proceed to resolution.¹³⁵ Moreover,

129. *Id.* at 1023.

130. *Application Group v. Hunter*, 72 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998). Recall the earlier discussion of the California Court of Appeals’ decision to ignore a Maryland choice of laws clause on the basis that California had a materially greater interest in deciding on the enforceability of a non-compete agreement between a Maryland company and a former employee who accepted a position with a California company. The court reasoned that applying the law of another state that might enforce the non-compete covenant would be contrary to California’s fundamental public policy. *See supra* text accompanying notes 63–66.

131. *Google*, 415 F. Supp. 2d at 1025.

132. 28 U.S.C. § 2283 (2009).

133. *Id.* The exceptions are where the injunction is “expressly authorized by Act of Congress,” “where necessary in aid of its jurisdiction,” and “to protect or effectuate its judgments” (also known as the “relitigation exception”). Also—although not an exception, exactly—the Anti-Injunction Act does not preclude injunctions against commencement of state judicial proceedings; only those judicial proceedings already initiated.

134. *Thiokol Chem. Corp. v. Burlington Industries, Inc.*, 448 F.2d 1328, 1332 (3d Cir. 1971), *cert. den.* 404 U.S. 1019 (1972). *See generally* WRIGHT ET AL., *supra* note 88, § 4222 n.11 (reviewing authorities).

135. *Atlantic Coast Line Rwy. Co. v. Bhd. of Locomotive Eng’rs*, 398 U.S. 281, 297 (1970). *See also* WRIGHT, ET AL., *supra* note 88, § 4226.

even if an exception applies, an injunction is not inevitable: the court must be satisfied as a separate and distinct matter that issuing an injunction would not undercut principles of equity, comity, or federalism that additionally restrain federal courts from interfering with state court proceedings.¹³⁶

Although the analysis in this section has focused on federal law with respect to parallel state litigation, the rule relating to the converse proposition—a state court enjoining litigation in a federal court—is clear: “While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions. . . .”¹³⁷

C. State-State Parallel Litigation

If parallel actions proceed simultaneously in two state courts, the first-to-file presumption does not exist. Until another state issues a final judgment, other states are not bound.¹³⁸ A state court *may* defer to another state action filed first, but usually will not do so by reason of avoiding duplicative litigation alone.¹³⁹ State courts are more likely to defer to actions in sister states if the second filed action is a declaratory action, if there is a forum selection clause selecting the other state, or based on the common law doctrine of *forum non conveniens*, which relies heavily on equitable principles of judicial comity.¹⁴⁰ When a state does defer on one or more of these grounds, it is more likely to stay than dismiss the action.¹⁴¹ Thus with inter-state litigation as with other kinds of parallel litigation, securing a favorable forum, and securing it first, can confer a strategic advantage.

In the remainder of this section, we focus our attention on two specific areas where questions about the proper interaction between state courts has generated sharp controversies affecting employee non-compete litigation. The first is the question of the geographic

136. WRIGHT, ET AL., *supra* note 88, § 4224 n.22, § 4222 nn.41–43 (citing *Mitchum v. Foster*, 407 U.S. 225, 243 (1972)).

137. *Donovan v. City of Dallas*, 377 U.S. 408, 412–13 (1964).

138. RESTATEMENT (SECOND) OF CONFLICTS, *supra* note 35, § 107 (“A judgment will not be recognized or enforced in other states insofar as it is not a final determination under the local law of the state of rendition”); *Hulcher Servs. Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 489 (Ga. Ct. App. 2000) (not first injunction, but final adjudication of the merits entitled to res judicata and collateral estoppel).

139. *George*, *supra* note 96, at 822–23.

140. *Id.*

141. *Id.* at 838.

reach of civil judgments and attendant remedies issued by state courts. The second is the problem of “dueling” anti-suit injunctions.

1. The Scope of Full Faith and Credit

An important question is how much deference state courts are constitutionally required to give to injunctions issued by sister states. (Here, we do not mean anti-suit injunctions of the sort discussed in the previous section; the subject here is the geographic scope of injunctions issued as a means of contract enforcement). At one time, Georgia courts were willing to give employees both declaratory relief and broad injunctive relief prohibiting an employer from attempting to enforce a non-compete anywhere else in the world.¹⁴² This had a potentially sweeping effect on non-compete law: assuming other states’ courts’ willingness to honor worldwide injunctions issued by Georgia courts an employee could, by making a sojourn to Georgia, vitiate the effect of a non-compete agreement not just in Georgia, but everywhere.¹⁴³

Federal courts applying Georgia law, however, retreated following the 1998 decision of the U.S. Supreme Court in *Baker v. GM*, which although not involving a non-compete agreement, is the leading decision on this question.¹⁴⁴ Baker involved a GM employee who had settled a lawsuit with GM in a Michigan state court. As part of the settlement, the employee was not allowed to testify against GM in the future.¹⁴⁵ New plaintiffs filed suit against GM in Missouri state court and GM removed to federal court.¹⁴⁶ The district court allowed the employee to testify because not allowing him to testify would violate the public policy of Missouri.¹⁴⁷ GM appealed based on the Full Faith and Credit Clause, saying that only a Michigan court should have been allowed to modify the order.¹⁴⁸

142. *Enron v. Capital & Trade Res. Corp. v. Pokalsky*, 490 S.E.2d 136 (Ga. Ct. App. 1997) (upholding declaration that NCA entered into in Texas and having Texas choice of law clause was void and upholding injunction against its enforcement anywhere in the world).

143. David, *supra* note 54 at 401 (arguing that the “startling repercussion” of *Enron* was that “Georgia could serve as a transitory stop or waypoint for employees seeking to shed the duties of their NCAs.”).

144. *Baker v. General Motors*, 522 U.S. 222 (1998). See also Comment, *Non-Compete Agreements and the Equity Conflict: Applying Baker v. General Motors Through the Lens of History*, 38 SETON HALL L. REV. 253 (2008).

145. *Baker, id.* at 228.

146. *Id.* at 229.

147. *Id.* at 230.

148. The Full Faith and Credit Clause provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and

The Supreme Court rejected GM's appeal, making clear the Michigan injunction did not reach the employee's conduct in other states.¹⁴⁹ The Court stressed that state courts need only to give full faith and credit to the substantive decisions of their sister states and not to the remedies they prescribe.¹⁵⁰ "Enforcement measures," the Court stated, "do not travel with the sister-state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law."¹⁵¹ Applied to non-compete agreements, *Baker* would suggest that a state court is bound by the merits of a sister state's final determination regarding the validity of a non-compete agreement, but is not required to apply the injunctive remedy ordered by another state's court.¹⁵²

Five years later, the Eleventh Circuit decided *Keener v. Convergys Corp.* (which, recall, upheld a Georgia district court decision to disregard an Ohio choice of law clause and declare the parties' NCA invalid under Georgia law against an employee who relocated to Georgia).¹⁵³ The court ruled that the district court's authority to enjoin enforcement of the non-compete agreement was limited to within the borders of Georgia, asserting that "Georgia cannot in effect apply its public policy decisions nationwide. . . ."¹⁵⁴ In its subsequent decision of *Palmer & Cay, Inc. v. Marsh & McLennon Companies, Inc.*, the Eleventh Circuit elaborated on the reach of declaratory judgments.¹⁵⁵ There the plaintiff challenged a Georgia district court decision that, citing *Keener*, limited to Georgia its declaration invalidating an out-of-state non-compete agreement and its injunction against enforcement of the agreement.¹⁵⁶ The plaintiff invoked the Full Faith and Credit clause, contending that it applied to the district court's judgment and prohibited the court from curtailing the extraterritorial effect of its judgment.¹⁵⁷

Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. Its implementing statute, Title 28 U.S.C. § 1738, provides in relevant part: "The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

149. *Id.* at 233.

150. A money judgment is a substantive decree enforceable nationwide. *Id.* at 234.

151. *Id.* at 235.

152. See Comment, *supra* note 144, at 268.

153. *Keener v. Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003). See also *supra* text accompanying notes 59–61.

154. *Id.* at 1269.

155. *Palmer & Cay, Inc. v. Marsh & McLennon Co., Inc.*, 404 F.3d 1297, *cert den.* 546 U.S. 998 (2005).

156. *Id.* at 1307.

157. *Id.*

The Eleventh Circuit affirmed that the district court's authority to enjoin enforcement of a non-compete agreement was limited to within the borders of Georgia, but clarified that *Keener* applied only to injunctions, and not declaratory judgments.¹⁵⁸ For judgments rendered by state courts, the court observed, wherein the Full Faith and Credit Clause and its implementing legislation govern claim and issue preclusion, a final judgment in one state has force nationwide, even if the rendering state's judgment is based on public policy offensive to the enforcing state.¹⁵⁹ The Eleventh Circuit concluded that since Georgia state courts had not limited the scope of declaratory judgments in non-compete cases to Georgia, neither should a federal court sitting in Georgia and applying Georgia law.¹⁶⁰ As such, the court vacated the district court's declaratory judgment to the extent it attempted to limit its application to Georgia.

The cleaving of substantive judgments from remedies for purposes of extraterritorial force shifts the focus, but not the existence, of strategic incentives in parallel litigation. Non-Georgia employers whose employees relocate to Georgia must simply shift their focus from being the first to obtain a TRO or preliminary injunction, to being the first to bring litigation to final judgment.¹⁶¹

2. The Specter of "Dueling" Anti-Suit Injunctions

The majority in *Baker* explicitly identified anti-suit injunctions as falling outside the ambit of the Full Faith and Credit Clause.¹⁶² The clause applies only to final judgments, which anti-suit injunctions are not.¹⁶³ The opinion suggested that the current state of law, by compelling no deference to an anti-suit injunction outside the issuing state, may strike the most reasonable compromise between more

158. *Id.* at 1309.

159. *Id.* Note that the ruling was issued by a federal court and the Full Faith and Credit clause does not apply to federal courts. The court explained that federal common law determines the scope of judgments for federal courts sitting in diversity, and provides that an enforcing court should apply the law of the state courts in the state where the rendering federal court sits (citing *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2000)). *Id.* at 1310.

160. *Id.* at 1310 (citing *Hostetter v. Answerthink*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004), which held that under Georgia law of claim and issue preclusion, a final declaratory judgment with respect to a non-compete agreement precludes subsequent claims or issues from being relitigated in other states).

161. Don Benson & Stephanie Bauer Daniel, *New Race to Tennessee and Georgia Courthouses over Non-Competition Agreements*, 41 TENN. B.J. 18, 25–26 (2005) (focusing on Tennessee litigation strategies and concluding that "a race to the courthouse may be the only reliable protection for Tennessee employers" with operations in or near Georgia).

162. *Baker v. General Motors*, 522 U.S. 222, 236 n.9 (1998).

163. *See generally*, George, *supra* note 96, at 840–49.

extreme positions that would give one state control over what goes on in another state's courts.¹⁶⁴

The case of *Advanced Bionics Corp. v. Medtronic, Inc.* has gained notoriety for raising the specter of "dueling" anti-suit injunctions in inter-state disputes over restrictive covenants.¹⁶⁵ Stultz, a manager in Minnesota for Medtronic, a company that designed and manufactured medical devices, resigned to accept a job with Advanced Bionics, a California competitor. When hired at Medtronic, Stultz had signed a two-year non-compete with a Minnesota choice of law clause. The day after Stultz resigned, Stultz and Advanced Bionics filed in California for a declaration that the non-compete agreement was unenforceable under California law; the next day, they applied for a TRO enjoining Medtronic from taking any action to enforce the non-compete agreement in a court other than the California court that was deciding the declaratory judgment action. Medtronic responded by removing the matter to federal court and filing a separate suit in Minnesota state court to enforce the non-compete.

The Minnesota court issued a TRO (which later was dissolved and replaced by a preliminary injunction) enjoining Stultz from working for Advanced Bionics, and also enjoining Stultz and Advanced Bionics from taking any action to interfere with the Minnesota proceeding.¹⁶⁶ Meanwhile, the federal court in California remanded the matter for lack of subject matter jurisdiction and the state court, in turn, granted the plaintiffs' anti-suit injunction. The Minnesota court directed Stultz and Advanced Bionics to move to vacate the TRO obtained in the California action, but that court refused to vacate its order.¹⁶⁷ Medtronic appealed, without success, to the California Court of Appeals. The California Supreme Court reversed.

The California Supreme Court expressed a strong reluctance use a TRO to enjoin proceedings in a sister state, "for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal."¹⁶⁸ The court acknowledged that "[t]he possibility that one action may lead to a judgment first and then be applied as *res judicata* in another action 'is a natural consequence of parallel proceedings in courts with concurrent jurisdiction, and not

164. *Baker*, 522 U.S. 236 n.9.

165. *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231 (Cal. 2002). We borrow the analogy to "dueling" from David, *supra* note 54, at 409.

166. *Advanced Bionics*, 59 P.3d at 234.

167. *Id.* at 235.

168. *Id.* at 236 (quoting *Arpels v. Arpels*, 170 N.E. 2d, 670, 671 (N.Y. 1960)).

reason for an injunction.”¹⁶⁹ The court rejected the plaintiffs’ argument that California’s strong public policy against non-compete agreements provided the exceptional circumstance of the sort that should justify upholding the California TRO, and asserted that even if the contract would be void in California, sovereignty concerns and the principle of comity compelled judicial restraint.¹⁷⁰ The court also rejected the plaintiffs’ argument that the first-filed rule offered alternative support for upholding the TRO, stating simply that the first-filed rule was never meant to apply where the two courts involved are not courts of the same sovereignty.¹⁷¹ The court concluded that “Advanced Bionics remains free to litigate the California action unless and until Medtronic demonstrates to the Los Angeles County Superior Court that any Minnesota judgment is binding on the parties.”¹⁷² The concurring judgment of Brown, J. very explicitly identified the contractarian and forum-shopping concerns that informed her decision: “Stultz, having enjoyed the benefits of his contract with Medtronic, should not be free to avoid his side of the agreement and thereby cancel some of the value for which Medtronic legitimately bargained.”¹⁷³ And later:

[C]ourts have a natural bias favoring the law of the state in which they sit, and litigants are aware of this bias, explaining in part the procedural maneuvering and forum shopping that occurred here. If we permit California courts to apply California law to a dispute like the one at issue here, then California’s economic strength gives rise to a kind of political imperialism, absorbing every state into the California legal ethos. Relocating to California may be, for some people, a chance for a fresh start in life, but it is not a chance to walk away from valid contractual obligations, claiming California policy as a protective shield. We are not a political safe zone vis-à-vis our sister states, such that the mere act of setting foot on California soil somehow releases a person from the legal duties our sister states recognize.¹⁷⁴

California courts have continued to take a conservative approach to issuing anti-suit injunctions.¹⁷⁵ However, this may not be true in other states. Some courts, for example, are statutorily restrained from

169. *Id.* (quoting *Auerbach v. Frank*, 685 A.2d 404, 407 (D.C. 1996)).

170. *Id.* at 237.

171. *Id.*

172. *Id.* at 238.

173. *Id.*

174. *Id.* at 239.

175. *See, e.g., Biosense Webster, Inc. v. Superior Court*, 135 Cal. App. 4th 827, 839 (Cal. Ct. App. 2006) (holding trial court abused its discretion in ordering anti-suit injunction in cases involving employees who moved from one California employer to another after having signed non-compete agreements containing New Jersey choice of laws clauses).

deferring on the basis of comity when doing so would violate a fundamental public policy of the state.¹⁷⁶

When taken together, modern rules on choice of laws and parallel litigation create significant incentives for parties in litigation over non-compete agreements to seek an advantageous forum. In the next and final part of this article, we briefly consider the normative implications of these incentives for forum shopping, and the evidence (based on our survey of selected reported cases) suggesting that the practice occurs and may be on the rise.

IV. A MARKET FOR LAW?

In a recent article, Professors Erin O'Hara and Larry Ribstein argue that a "second revolution" is underway in the realm of conflict of laws (the first having been the shift from bright-line but arbitrary rules to more nuanced but ultimately equally arbitrary standards).¹⁷⁷ In this second revolution, increasing ease of party and asset mobility fuels a regime in which parties choose their own governing law (by using choice of law or forum selection clauses, and by relocating activities and operations to jurisdictions that enforce those contracts, and avoiding those that do not).¹⁷⁸ As a consequence, they argue, the interests of individual parties and firms have begun to take precedence over the interests of states.

O'Hara and Ribstein do not lament the change; instead they argue that, as a normative matter, letting parties shop for the laws of jurisdictions outside their place of residence is likely to increase efficiency, and that as a practical matter, "states must either get on the jurisdictional-choice bandwagon or lose their power to regulate altogether."¹⁷⁹ For the market for law to be efficient, O'Hara and Ribstein argue, there must be a very strong thumb on the scale for deferring to party choice.¹⁸⁰ To the extent party choice is overridden at all, it would occur in only the exceptional case, by politically-determined, clear, predictable legislative rules, rather than routinely by judges applying discretionary doctrines limning vaguely defined

176. David, *supra* note 54, at 410 (suggesting that if a *Medtronic* scenario were to arise in Georgia, the Georgia courts would be precluded by Georgia Constitution § 1-3-9 from deferring to other jurisdictions on the basis of comity).

177. Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147, 2149 (2008).

178. *Id.*

179. *Id.*

180. *Id.* at 2157.

public policy and state interests.¹⁸¹ An example of the role for legislative override would be in a case where interstate competition for law market “patrons” turned into a race to the bottom leading to a choice of law regime insufficiently protective of some aspect of public welfare (O’Hara and Ribstein offer the example of spiraling laxity of laws regulating sales of child pornography).¹⁸²

Thus, O’Hara and Ribstein acknowledge that the market-for-law model might have limitations in certain areas of contracting. More specifically, where there is unilateral control over choice of law, or asymmetry between the parties in terms of their sophistication or access to information that would enable them to understand the range of negotiable options, the law market might generate negative externalities.¹⁸³ Another cautionary example they cite is consumer contracts, although they note that consumer groups have proven very successful in lobbying for concessions in the political process, and interest-group competition, as suggested by public choice theory, would enable consumers disadvantaged in the process of bargaining for choice of law to press for state or federal legislative intervention to circumvent the law market.

Timothy Glynn, in another recent article, takes a substantially darker view of the market for law, specifically with respect to non-compete agreements.¹⁸⁴ Glynn anticipates the specter of a race to the bottom as states compete for business with the promise of employer-favorable choice of law rules for resolving NCA disputes. As an example, Glynn cites the Minnesota courts’ actions in *Medtronic v. Advanced Bionics*,¹⁸⁵ arguing that the Minnesota courts not only seemed complicit in Medtronic’s obstruction of the California action but also “aggressively sought to ensure extraterritorial application of Minnesota’s employer-friendly NCA law.”¹⁸⁶ While Glynn acknowledges that “such judicial behavior does not establish that Minnesota is consciously marketing its legal regime as a commodity,” he argues nonetheless that “it is consistent with the incentives described above and illustrates the role courts can play in furthering a state’s competitive aims. In this setting, comity seems to run only one way, leaving California’s public policy at risk to aggressive state-law exporters.”¹⁸⁷

181. *Id.* at 2159.

182. *Id.* at 2155–56.

183. *Id.* at 2158–59.

184. Glynn, *supra* note 42.

185. *See supra* text accompanying notes 165–74.

186. Glynn, *supra* note 42, at 1387.

187. *Id.*

Glynn would encourage courts that wish to protect the interests of employees to exercise the broad discretion afforded them to disregard foreign choice of law and forum selection clauses, to stand firm in the face of pressure to defer to a competitor state's jurisdiction, despite traditional notions of comity, when fundamental state policies are at stake and the other jurisdiction is not acting reciprocally, and to embrace the discretion afforded by the Supreme Court decision in *Baker* to limit injunctive relief ordered by a competing state court.¹⁸⁸ Beyond these limited defenses accorded by current doctrine, Glynn argues, states seeking to defend against aggressive state-law exporters may need to alter the way in which they enforce employment mandates, specifically, by shifting to public enforcement of local law against firms trying to take advantage of foreign law, rather than relying on private enforcement.

As nonparties to the litigation, agency authorities and attorneys general are not bound by foreign judgments in disputes between private parties. . . . [T]he threatened use of civil or even criminal sanctions for conduct that directly contravenes local policies may have its own, countervailing deterrent effect on firms that might otherwise seek to enforce contract terms in their preferred forum.¹⁸⁹

Both articles are provocative, and are welcome efforts to make sense of the broader social implications of the confusing body of law that governs litigation over non-compete agreements having multi-state features. We think, however, that each article may slightly overstate its case. O'Hara and Ribstein's confidence that the political process will enable groups lacking sufficient sophistication or information to bargain effectively over choice of laws seems heroic. More is needed to explain why these vulnerable groups would be expected to organize and lobby reliably and effectively for legislative override of disadvantageous choice of law rules. To be sure, there are examples of consumer groups and trade unions that have navigated the political process with both force and finesse, but there are ample examples to the contrary as well: unrepresented consumers and workers who fail to grasp the nature of their contractual rights, let alone bargain or politically organize to assert them. The gap between ideals and practicality may be larger than O'Hara and Ribstein hope. They argue for federal legislative oversight, and yet are in the minority among scholars who study conflict of laws, a group described by treatise-writers Richman and Reynolds as having reached a

188. *Id.* at 1437-40.

189. *Id.* at 1441.

“consensus”—despite strong disagreements on the appropriate alternatives—that the subject matter of conflict of laws is too complex to be susceptible of effective legislative solutions.¹⁹⁰

Glynn’s characterization of courts such as those in Minnesota as aggressive state-law exporters, in turn, likely understates the reciprocal aggressiveness of acquiring firms and the states in which they are located. To cite examples from our earlier discussion, Mr. Manuel of *Manuel v. Convergys*, Mr. Lee of *Google v. Microsoft*, and Mr. Stultz of *Medtronic v. Advanced Bionics* each appeared to be high-level employees well-advised by lawyers and joined as plaintiffs by powerful corporations that had a strong motive of luring key employees with valuable information away from major competitors. Both California state courts and Georgia state and federal courts have been amply aggressive not just in defending but also exporting their laws to affect employees residing and employers doing business outside the state who face very real competition from California and Georgia rivals. We tend to believe as a policy matter that innovation and technological change would be well served by the relaxation of contractual restraints on employee competition. But this is a different argument from the one that Glynn makes, implying that employer-friendly states are the predators in the business of exporting state laws and policies, and that employee-friendly states are the natural defenders. Notwithstanding our differences of opinion on factual characterization of the conduct of the parties participating in the “race,” Glynn is rightly skeptical that interest groups favoring greater employee protection are likely to prevail in pressing for robust federal regulatory protections.¹⁹¹ For states that wish to create a “high road” employment regulatory regime, the challenges of stemming the phenomenon by which regulatory competition erodes employee-protective common law and legislation are very real. If we are to concede the “disarray” that characterizes modern conflict of laws doctrine and recognize the very salient incentives for strategic conduct, then Glynn’s realpolitik assertion seems apt that states wishing to maintain strong employee-favorable laws need to acknowledge what O’Hara and Ribstein call the “jurisdictional-choice bandwagon” and meet the competition.

190. RICHMAN & REYNOLDS, *supra* note 23, at 279. O’Hara & Ribstein acknowledge that Congress has not shown an interest in enacting choice of law rules. O’Hara & Ribstein, *supra* note 177, at 2177.

191. Glynn, *supra* note 42, at 1440–41.

