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Race to the Courthouse Is a Race to an Advantageous Remedy: An *Analysis of Palmer & Cay, Inc. v. Marsh & McLennan Cos.*

By Shaun K. Ramey

The Eleventh Circuit Court of Appeals's decision in *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*[1] has spawned a battle between employers, employees, and states with competing policy concerns. The decision holds that a Georgia federal court's invalidation of a nonsolicitation agreement is binding on other courts nationwide.

Opponents of the decision describe it as creating a "perverse regime in which any employee can achieve nationwide invalidation of a nonsolicitation agreement, or of any other type of agreement, if he can mount a successful race to a courthouse in Georgia or another state that disfavors such agreements."[2] These opponents claim that the decision offends basic notions of federalism and state sovereignty, injures employers, and creates an outcome-determinative test for such contracts, which not only encourages a race to the courthouse for litigants but also a race between states with competing policy concerns. In contrast, *Palmer's* proponents describe the decision as simply a recognition that a "final judgment of a federal court sitting in jurisdiction over the parties and the subject matter is res judicata as between those parties in the other courts of the United States and the various states."[3] These proponents claim that a contrary ruling would result in total chaos with courts nationwide, potentially rendering multiple contradictory judgments on the same set of facts, and that, but for *Palmer* and its logic, any noncompetition, nonsolicitation, or similar agreement would have to be litigated in each of the 50 states to determine the full scope of the agreement's enforceability.

The U.S. Supreme Court recently denied a writ for certiorari filed by Marsh & McLennan, the former employer, seeking to overturn *Palmer*.[4] This article outlines the arguments on both sides of the *Palmer* debate, as the battle between employers, employees, and the states over the enforceability of noncompete and nonsolicitation agreements is sure to heat up. This article also provides guidance to both employers and enterprising employees in light of the *Palmer* decision.

The *Palmer* Decision

James Meathe was a senior executive at the national insurance brokerage firm Marsh USA, Inc. Meathe held the title of managing director, and beginning in 2000, he served as the head of Marsh's Midwest region.[5] In the course of

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Race to the Courthouse

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Meathe's employment, he entered into various covenants with Marsh, restricting his ability to compete and solicit business for a period of two years after his employment with Marsh ended.[6] The covenants contained a choice-of-law provision providing that New York law would govern the enforcement of the agreements.[7] Meathe was a resident of Illinois immediately preceding his departure from Marsh on January 1, 2003.[8] One month later, Meathe took employment with Palmer & Cay, a competitor of Marsh. He moved to Georgia as part of his job with Palmer & Cay.[9]

Shortly thereafter, Meathe and Palmer & Cay filed a declaratory judgment action in the Southern District of Georgia, seeking a judgment enjoining Marsh from enforcing the covenants.[10] Marsh filed a counterclaim alleging that Meathe had violated the agreements in order to expand Palmer & Cay's business in the Midwest.[11] The district court held that the nonsolicitation agreements were unenforceable in the state of Georgia and enjoined Marsh from enforcing the covenants against Meathe in Georgia.[12] Both sides appealed the decision to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit held the agreement was contrary to Georgia public policy and unenforceable because one of the agreements contained a provision that prohibited the employee from accepting unsolicited business from former clients after leaving employment.[13] Furthermore, the court did not follow the New York choice-of-law provision because New York's law on the subject was contrary to Georgia's public policy.[14] This aspect of the court's decision was not terribly surprising in light of Georgia's long history of applying its own law and nullifying such agreements as being contrary to its public policy. What was significant was the scope of the court's declaratory judgment. Rather than void the agreement only in the state of Georgia as the district court had done, the court declared that the agreement was invalid nationwide.[15]

In so holding, the Eleventh Circuit cited the U.S. Constitution's Full Faith and Credit Clause for the proposition that a final judgment in one state qualifies for recognition throughout the land.[16] For claim and issue preclusion (res judicata) purposes, the court stated that the judgment of the rendering state gains nationwide force even if the rendering state's judgment is based on public policy offensive to the enforcing state.[17] Furthermore, because the case was before a federal court sitting in diversity, federal common law determines the scope of the judgment, and under federal common law, an enforcing court should apply the law of the state court in the state where the rendering state sits, unless the state's law conflicts with federal interests.[18] Because Georgia does not attempt to limit its declaratory judgments in cases involving noncompetition agreements, the court held that a federal district court sitting in Georgia and applying Georgia law should not either.[19]

Even though the Georgia court was not the enforcing court but rather was the rendering court with respect to the scope of the judgment, the court appeared to nonetheless recognize the power of the rendering court to determine the scope/breadth of the judgment because its decision would at least indirectly prescribe the effect of the judgment in other states pursuant to the Full Faith and Credit Clause and federal common law.[20] Consequently, the Eleventh Circuit's decision invalidated the agreement nationwide despite the fact that the agreement was created in the Midwest, was designed to govern the parties' actions in the Midwest, and explicitly stated that it was to be governed by New York law, which favors such agreements.

The Battleground Created by *Palmer*

Full Faith and Credit Clause and Preclusion Principles

Proponents of *Palmer* claim that the decision is based on nothing more than fundamental principles of claim and issue preclusion and is consistent with the Full Faith and Credit Clause.[21] They claim that the very purpose of the Full Faith and Credit Clause "alter[s] the status of the several states as independent sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[22] These proponents further point to various policy concerns that were raised in *Hostetler v. Answerthink*, in which the Georgia Court of Appeals noted that:

> [t]he final judgment in a declaratory judgment action, finding the restrictive covenants void and unenforceable, should also have injunctive relief to prevent the re-litigating of such issue in other jurisdictions, because [the employer] can bring repeated actions in other jurisdictions to harass and to delay competition even though such actions are ultimately dismissed under the res judicata and collateral estoppel doctrines. . . . [M]ore importantly under full faith and credit, res judicata, and collateral estoppel, the final judgment of Georgia courts bind these parties as well as courts of other jurisdictions.[23]

In contrast, opponents of *Palmer* claim that the decision allows one state to control the enforcement of contracts in its sister states based on unique judgments about public policy, and such a result offends basic notions of federalism and state sovereignty.[24] Put another way, they claim that the Eleventh Circuit's decision elevates one state's public policy above all others.[25] In support of this point, the opponents to *Palmer* cite to the U.S. Supreme Court decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, in which the Court stated, "[a] basic

principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measures of punishment, if any, to impose on a defendant who acts within its jurisdiction."[26]

Thus, the *Palmer* opponents claim that this case and others like it stand for the proposition that a state cannot control matters within the borders of another state.[27] While these opponents admit that the Full Faith and Credit Clause necessarily alters the status of the several states as independent sovereignties, they claim that this principle "does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."[28]

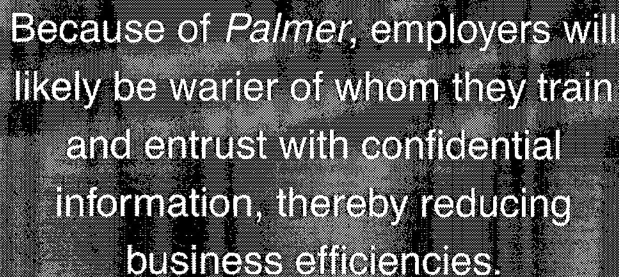
The *Palmer* opponents also attack *Palmer*'s reliance on preclusion principles and Full Faith and Credit by claiming that unique "federal interests" are at issue that prevent the mechanical application of those principles.[29] They claim that these federal interests include the right of the United States to regulate interstate and international disputes implicating the conflicting rights of states.[30] In response, the *Palmer* proponents claim that there is no recognized roving public policy exception to the Full Faith and Credit Clause and long-established preclusion principles.[31]

Lastly, the employer in *Palmer* made the interesting observation that "this is the *first* lawsuit between these parties, not the second."[32] Accordingly, the employer claimed that the issue of preclusive effect will not arise until the judgment is invoked in a later case and hence has no application to the present case.[33] Thus, the employer claimed that it was not for a *rendering* state such as Georgia to tell an *enforcing* state such as Illinois how it was to determine the enforceability of the nonsolicitation agreement in light of the Georgia court's decision.

Consequences for Employers

Palmer opponents claim that the decision will have devastating consequences on businesses that use noncompete and nonsolicitation agreements to protect their trade secrets and confidential information from unfair opportunism of former employees and business competitors.[34] They claim these agreements are necessary for businesses to invest in their key employees by training and entrusting them with confidential information and thus, in essence, turning them into "human capital."[35] Because *Palmer* directly affects the enforceability of those agreements, employers will likely be warier of whom they train and entrust with such information, thereby reducing business efficiencies, which directly benefit the public in the form of lower costs for goods and services.[36] The U.S. Chamber of Commerce, which claims to be the largest federation of businesses, believes that businesses are so affected that they filed an amicus curiae brief with the U.S. Supreme Court in support of the petitioner.

The *Palmer* opponents have little response to this assertion other than to claim that there has been presented no substantial proof that businesses are adversely affected.[37] However, perhaps a more pertinent measurement of how this decision will affect businesses is to compare the impact on the businesses that lost the departing employee to the impact on the businesses that gained that same employee. Businesses should be careful what they wish for—the same business could just as easily find itself on the side of the employer who has gained the departing employee as on the side of the employer who has lost the employee. Indeed, a business may find itself on both sides of the debate with respect to the same employee by first hiring the employee away from a competitor and then later having that same employee be lured away by another competitor.



The Race to the Courthouse

Perhaps most importantly, opponents claim that the *Palmer* decision creates an outcome-determinative result for the enforceability of such agreements that is won by the race to the courthouse.[38] This results from the strong presumption across the federal circuits that favors the parties proceeding in the forum where the first suit is filed under the first-to-file rule.[39] The race, in turn, creates rampant forum shopping with the employee searching for a favorable forum, such as Georgia or California, in which to challenge the noncompete or nonsolicitation agreement. Opponents further point to the fact that enterprising employees can gain an unfair advantage in this race by lying to their former employers regarding their future business intentions, thus, lulling their employers into a false sense of security. As a result, the employer may not file an action in its own forum (or not before the employee files elsewhere), giving the employee an opportunity to win the race to the courthouse and file his/her own declaratory judgment action in a favorable forum first. That is precisely what happened in *Keener v. Convergys Corporation*, which was the predecessor case to *Palmer*.[40] Similarly, in *Manuel v. Convergys Corporation*, the Eleventh Circuit, once again, rewarded an employee by invalidating his noncompete despite the fact that the employee lied to his employer regarding his future business intentions to win the race to the courthouse.[41]

In response, the *Palmer* proponents claim that issues regarding who wins the race to the courthouse and whether the agreement at issue contains a choice of law provision should not govern the enforceability of that agreement. Rather, they argue that the governing principle should be the effect the agreement will have on the employee and the hiring employer, especially if they are in a state that disfavors such agreements.[42] They argue that not just anyone can file suit in friendly forums like Georgia or California; rather, plaintiffs must establish jurisdiction in such a state. In *Palmer*, for example, the employee established jurisdiction in Georgia by becoming a bona fide Georgia resident working for a Georgia employer.[43] Hence, *Palmer* proponents claim Georgia law should be applied since that state's interests are directly affected. In response, the *Palmer* opponents claim that to take advantage of an employee-friendly forum, the plaintiff only needs to prove that the defendant is subject to the jurisdiction of the state at issue (not even that the plaintiff be subjected to jurisdiction there), which they argue is relatively easy.[44] "In an increasingly fluid, technology-driven economy that finds corporations 'doing business' everywhere, it is not difficult for enterprising plaintiffs to ensnare corporate defendants in virtually any forum of their choosing."[45]

Opponents of *Palmer* claim that this race to the courthouse involving noncompete and nonsolicitation agreements will not stop with just those types of agreements.

This race is not limited just to the litigants but arguably to the respective states as well. The *Palmer* opponents claim that the decision encourages states "to outflank one another in an effort to exert nationwide control over contested questions of public law and policy."[46] In the prior case of *Advanced Bionics Corp. v. Medtronic, Inc.*, the employee-friendly state of California and the employer-friendly state of Minnesota entered into such a contest.[47] In that case, after some procedural jockeying, both parties obtained antisuit injunctions prohibiting the other party from pursuing the suit that it had filed. The California Supreme Court prohibited the employer from continuing its enforcement attempts in Minnesota, and the Minnesota court ordered the employee to cease any attempts to have the California court declare the noncompete invalid and compelled him to pursue the matter only in Minnesota.[48] The parties and courts were thus deadlocked. While the California Supreme Court finally ended the standoff by yielding to the Minnesota court, despite the fact the Minnesota action was filed second, it did so on discretionary grounds of judicial restraint and comity.[49] Nevertheless, opponents of *Palmer* point to this decision as illustrative of what could become an unchecked power struggle between the states.

The opponents claim that this race to the courthouse involving noncompete and nonsolicitation agreements will not stop with just those types of agreements. They claim that many types of other contractual provisions will be subjected to the same race, including contractual indemnification clauses and agreements containing arbitration provisions that are subject to different treatment nationwide.[50] Likewise, much of this same analysis regarding state sovereignty and preclusion principles could also apply to other public policy contexts, such as whether sister states will recognize gay unions or similar rights that may be recognized in other states.[51]

One important point regarding the race to the courthouse is that it is not necessarily a race to the courthouse but a race to the first final judgment. In *Answerthink*, the court stated that "[i]n the race to the courthouse, victory does not go to the swiftest litigant with the first injunction, but to the litigant with the first final judgment, making a final disposition on the merits."[52] Nevertheless, given the first-to-file rule, the race to the courthouse often determines this as well.[53]

Employers and Employees Need to Act Quickly

Irrespective of the merits of the *Palmer* debate, the most important thing that both employers and employees should grasp from the decision is that they need to act quickly to protect their interests. They need to file their action first to win the race to the courthouse. While getting to the courthouse first does not necessarily win the war, it is a crucial battle, and winning it goes a long way to determining the ultimate relief granted. Departing employees should consult with an attorney long before they give their resignation, take whatever steps may be necessary to obtain jurisdiction in a favorable forum (i.e., get a driver's license and sign a lease in the state in question), and then actually file their declaratory judgment actions on the day they tender their resignation. Such an approach maximizes the ultimate possibility that the employees will be freed from their noncompetition or nonsolicitation agreement, provided, of course, that they can form a legally significant relationship with a state like Georgia or California, which disfavors such agreements.

On the other hand, while the employer likely will not have the same advantages, once the employer receives a resignation or has reason to believe that the employee is going to leave, the employer should contact its attorney immediately so that it will be ready to file its own action. Although the cost of filing such actions must be carefully weighed, if the employer has any reason to believe that the departing employee is going to attempt to violate the agreement, the employer should file an action immediately,

irrespective of any assurances provided by the employee.

Finally, while the practical implications of *Palmer* clearly favor the departing employee, all employers should be cognizant that they may find themselves aligned with the employee's side: by hiring that same departing employee away from a competitor and, thus, taking advantage of the same race that they now protest. ■

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Endnotes

1. Palmer & Cay, Inc. v. Marsh & McLennan Cos. 404 F.3d 1297 (11th Cir. 2005).
2. Petition for Writ of Certiorari at *10, Marsh & McLennan Cos. v. Palmer & Cay, Inc., No. 05-274 (U.S. Aug. 29, 2005), 2005 WL 2109171.
3. Brief of Respondent in Opposition to Petition for Writ of Certiorari at *1, Marsh & McLennan Cos. v. Palmer & Cay, Inc., No. 05-274 (U.S. Sept. 30, 2005), 2005 WL 2454844.
4. Marsh & McLennan Cos. v. Palmer & Cay, Inc., 126 S. Ct. 567 (Oct. 31, 2005).
5. *Palmer*, 404 F.3d at 1300.
6. *Id.* at 1299–1300.
7. Petition for Writ of Certiorari at *6, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2454844.
8. *Id.* at *5.
9. *Palmer*, 404 F.3d at 1302.
10. *Id.* at 1302.
11. *Id.*
12. *Id.*
13. *Id.* at 1302--07.
14. Petition for Writ of Certiorari at *8, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2109171.
15. *Palmer*, 404 F.3d at 1307–10.
16. *Id.* at 1309–10.
17. *Id.* at 1310. A rendering state is the state that issues the first decision with respect to a parties' dispute. An enforcing state is the state that subsequently adjudicates a case in light of the first/rendering state's decision.
18. *Id.* at 1310.
19. *Id.*
20. *Id.*
21. Brief of Respondent in Opposition to Petition for Writ of Certiorari at *2, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2454844.
22. Baker v. General Motors Corp., 522 U.S. 222, 232 (1998).
23. Hostetler v. Answerthink, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004).
24. Petition for Writ of Certiorari at *5, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2109171.
25. *Id.* at *7.
26. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003).
27. Petition for Writ of Certiorari at *8, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2109171.
28. *Id.* at *9 (quoting Nevada v. Hall, 440 U.S. 410, 423–24 (1979)).
29. Chamber of Commerce of the United States of America's Motion for Leave to File a Brief as Amicus Curiae in Support of Petitioner at *9, Marsh & McLennan Cos. v. Palmer & Cay, Inc., No. 05-274 (U.S. Oct. 3, 2005), 2005 WL 2464518.
30. *Id.* at *10.
31. Brief of Respondent in Opposition to Petition for Writ of Certiorari at *7, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2454844.
32. Reply Brief of Petitioner in Support of Petition for Writ of Certiorari at *2, Marsh & McLennan Cos. v. Palmer & Cay, Inc., No. 05-274 (U.S. Oct. 11, 2005), 2005 WL 2646360.
33. *Id.*
34. Petition for Writ of Certiorari at *5, *11, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2109171.
35. *Id.* at *11.
36. *Id.*
37. Brief of Respondent in Opposition to Petition for Writ of Certiorari at *9, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2454844.
38. Petition for Writ of Certiorari at *10, *Marsh & McClennan Cos.*, No. 05-274, 2005 WL 2109171.
39. U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co., 920 F.2d 487, 488 (8th Cir. 1990); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982); Church of Scientology of Cal. v. U.S. Dep't of Defense, 611 F.2d 738, 750 (9th Cir. 1979).
40. Keener v. Convergys Corp., 342 F.3d 1264 (11th Cir. 2003).
41. Manuel v. Convergys Corp., No. 04-16032, 2005 WL 3040815, at *1–2 (11th Cir. Nov. 15, 2005).
42. *Id.* at *3.
43. Brief of Respondent in Opposition to Petition for Writ of Certiorari at *4, *8, *Marsh & McClennan Cos.*, No. 05-274, 2005 WL 2454844.
44. Reply Brief of Petitioner in Support of Petition for Writ of Certiorari at *5–*6, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2646360.
45. Chamber of Commerce of the United States of America's Motion for Leave to File a Brief as Amicus Curiae in Support of Petitioner at *7, *Marsh & McLennan Cos.*, No. 05-274, 2005 WL 2464518.
46. *Id.*
47. Advanced Bionics Corp. v. Medtronic, Inc., 59 P.3d 231, 234 (Cal. 2002).
48. *Id.*
49. *Id.* at 235–38.
50. Petition for Writ of Certiorari at *10, *Marsh & McLennan Cos.*, (No. 05-274), 2005 WL 2109171.
51. *See generally The Public Policy Doctrine and Interjurisdictional Recognition of Civil Unions and Domestic Partnerships*, 3 AVE MARIA L. REV. 531 (2005).
52. 599 S.E.2d 271, 275 (Ga. Ct. App. 2004).
53. *But see* Advanced Bionics Corp. v. Medtronic, Inc., 59 P.3d 231, 234 (Cal. 2002) (race to the courthouse was not determinative of the final judgment).