A Funny Thing Happened on the Way to the Forum: It Moved and Your Client Agreed to Litigate There

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Your client delivered hoagies for a company in LoDo, but started a banh mi restaurant in Capitol Hill. Your client is in your office because she was summoned to answer a breach of contract lawsuit in Philadelphia for violating her non-compete agreement with her former hoagie company. Because of the agreement's forum selection and choice of law clause, it will be tough to transfer the case to Colorado. But if the hoagie company shorted your client on her last paycheck or you can convince a court that enforcement of the forum selection clause would violate Colorado public policy, you might be able to transfer the case to Colorado.

This article reviews the enforceability of forum selection clauses and public policy exceptions to their enforcement. It explores strategies for keeping employment litigation in Colorado despite a forum selection clause.

Forum Selection Clauses in Employment Agreements

Many employment agreements, especially those with covenants not to compete, contain a forum selection clause. In *Atlantic Marine Constr. Co., Inc. v. United States Dist. Court for the Western Dist. of Texas*, the Supreme Court reaffirmed that forum selection clauses are enforceable and "should be 'given controlling weight in all but the most exceptional cases.'"[1] These clauses may apply to breaches of the terms of the agreement, including bonus structures and covenants not to compete. Some clauses apply to all employment disputes, including discrimination and wage claims.

If the forum selection clause includes a choice of law provision, your client may lose substantive rights. When your client has an agreement not to compete with the employer, it may be enforceable in another jurisdiction while never legally binding in Colorado. For example, where the non-compete agreement has a forum selection clause, courts outside of Colorado have no problem enforcing non-compete agreements against Colorado residents even when the resident's only contact with the foreign state is the agreement to submit disputes to its jurisdiction.[2]

There are options for challenging these clauses. The clause may not cover the scope of the employee's claims. The clause may only permit, but not mandate, litigation in another forum. Courts may not transfer a case to another forum when the clause does not mandate litigation in that forum. When such clauses mandate litigation of the claims in a different forum, public policy may sway a court to deny a motion to transfer.

Enforcing Forum Selection Clauses

Forum or venue selection clauses[3] may be mandatory, which require litigation in a certain forum, or permissive, which permit litigation in a certain forum but do not prevent litigation in another forum.[4] A mandatory forum selection clause requires "clear language showing that jurisdiction is appropriate only in the designated forum."[5] A permissive forum selection clause "does not prevent the parties from litigating in a different forum."[6] The Tenth Circuit has explained this with examples. A mandatory clause: "[V]enue for any dispute arising under or in relation to this contract shall lie only in the Seller's state and county."[7] And an example of a permissive clause: "The parties agree that in the event of litigation between them, Franchise Owner stipulates that the courts of the State of Michigan shall have personal jurisdiction over its person, that it shall submit to such personal jurisdiction, and that venue is proper in Michigan."[8]

Colorado follows the forum selection clause rule from the Restatement (Second) of Conflict of Laws, which treats "a forum selection clause [as] presumptively enforceable unless it is unreasonable, fraudulently induced, or against public policy."[9] Federal courts and most states follow this rule.[10]

When a party seeks enforcement of a clause and asks to transfer an action to another court, courts first "look[] at a clause's relevance - whether it covers the claim at issue - and its insistence - whether it mandates or only permits transfer."[11] A party challenging enforcement of a forum selection clause carries the burden of showing that the provision is invalid.[12]

Even if venue is proper, 28 U.S.C. § 1404(a) "permits transfer to any district where venue is also proper (i.e., 'where [the case] might have been brought') or to any other district to which the parties have agreed by contract or stipulation."[13] And forum non conveniens permits a state court to "dismiss the case so that the plaintiff may re-file it in the specified forum."[14]

Atlantic Marine Constr. Co.

Typical § 1404(a) analysis weighs "the convenience of the parties and various public-interest considerations."[15] And "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice."[16]

While "the overarching consideration" is still "whether a transfer would promote 'the interest of justice,'"[17] *Atlantic Marine* adjusts section § 1404(a) analysis in cases with forum selection clauses.[18] Ordinarily, the "party moving to transfer a case pursuant to section 1404(a) bears the burden of establishing that the existing forum is inconvenient."[19] But a "party defying [a] forum-selection clause * * * bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."[20] The party "waive[s] the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation," and courts should not consider their private interests.[21] A "court may consider arguments about public-interest factors only," but "those factors will rarely defeat a transfer motion."[22]

The public-interest factors that may defeat the presumptive enforceability of a forum enforcement clause include: the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.[23]

This is not an exhaustive list of factors, but some courts are treating these factors as "the only relevant factors."[24] A forum selection clause is also "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[25]

Choice of Law Makes Things Worse

Your client may lose substantive rights and claims depending on the forum's choice of law analysis. When a forum selection clause includes a choice of law provision, the court will not apply Colorado law unless the forum's conflict of laws analysis mandates it. States following the Restatement (Second) of Conflict of Laws apply the law of the chosen state unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice" or its application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."[26] Convincing a court in another state that its own non-compete laws violate a fundamental policy is difficult.[27] If the clause chooses a state's law "without regard to" its conflict of law rules, the court may enforce the clause without conflict of law analysis.[28]

Strategies for Challenging Forum Selection Clauses

There are more arguments to keep a case in a court despite a clause selecting a different forum than there are to transfer a case from a court selected in a clause. When litigation over a breached non-compete agreement that includes a forum selection clause seems imminent, filing suit in a Colorado court before the employer files suit in the selected forum may result in the Colorado court denying a motion to transfer. Counsel should consider whether to try to seek a declaratory judgment action under C.R.C.P. 57 to declare that a non-compete provision and accompanying forum selection clause are not valid.

Permissive or Mandatory

Compare the language of the forum selection clause to clauses that courts determined are mandatory or permissive.[29] *Atlantic Marine* concerned a mandatory clause and does not distinguish between the two. But courts have noted that *Atlantic Marine* does not apply when the plaintiff files suit in a court different from that selected in a permissive clause.[30] A permissive clause should be weighed differently on a transfer motion because while a party may have "waive[d] the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation,"[31] it has not waived the right to file suit in another forum.[32] A permissive forum-selection clause is only a "bargain for what may constitute a proper forum, rather than what constitutes the exclusive forum for litigating disputes."[33]

If the clause is permissive, and your client has claims against the employer, filing suit in a convenient forum before the employer can file suit in the selected forum may retain the convenient

forum. A forum selection clause may subject your client to the jurisdiction of another state's courts, but it "does not divest a [Colorado] court of personal or subject matter jurisdiction."[34] Rely on the cases distinguishing the mandatory clause in *Atlantic Marine* from permissive clauses to argue that a permissive clause carries less weight. A Colorado court will not thoughtlessly transfer a case to another forum, but will consider whether the forum selection clause is "unreasonable, fraudulently induced, or against public policy."[35] Even if the clause is mandatory, a Colorado court seems more likely to conclude that Colorado public policy requires the case be heard in Colorado. And if the defendant does not answer, even a mandatory forum selection clause may not be grounds to set aside a default judgment.[36]

While a permissive forum clause may not sway a court to transfer venue to the permissive forum, it likely will sway a court not to transfer venue if the employer files suit in the permissive forum.[37] A court distinguished a case where the plaintiff relied on the clause to oppose transfer from those cases where the defendant relied on the clause to seek transfer and applied *Atlantic Marine*'s direction to "consider arguments about public-interest factors only."[38] The court explained that the reasoning behind those cases was not applicable because "[a]ffording the clause controlling weight * * * would not have the effect of transforming it into a mandatory clause, but rather would hold the parties to their bargain by keeping the suit in a forum expressly allowed by their contract."[39]

Public Policy May Defeat Forum Selection

When a client's employment agreement has a forum selection clause, consider whether there enforcement of the clause violates a public policy.[40] Courts generally do not consider "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."[41] However, the Colorado Supreme Court has not foreclosed consideration of whether the forum's law would violate public policy.[42] Colorado courts have relied on arguments that public policy requires Colorado courts hear certain claims to deny the enforceability of forum selection and arbitration clauses.[43]

For instance, Colorado's Wage Claim Act permits plaintiffs to file suit "in any court having jurisdiction over the parties."[44] The Act voids any agreement "purporting to waive or to modify [an] employee's rights in violation of" the Act.[45] Relying on the statutory language and *Lambdin v. District Court*,[46] which held that an arbitration clause was unenforceable against public policy because of these provisions, *Morris v. Towers Fin. Corp.* declined to enforce a forum selection clause because it "would contravene the strong public policy embodied in the Colorado Wage Claim Act."[47] A federal court, however, did not follow *Lambdin* or *Morris,* compelled arbitration of wage claims, and explained that, "the Wage Act does not mandate a forum or venue."[48]

Colorado has a public policy prohibiting "the restraint of trade or * * * the right to make a living" underlying its statute voiding covenants not to compete.[49] A covenant not to compete is void unless it meets one of four exceptions.[50] Some courts have weighed public policies against non-compete agreements on motions to transfer involving mandatory clauses. One explained that Colorado's public policy against non-compete agreements "mandate[d] a more complex analysis" of whether a forum selection clause was enforceable before enforcing the forum selection clause because it found that enforcement of the non-compete agreement met one of C.R.S. § 8-2-113(2)'s exceptions.[51] Another court weighed its public policy against non-compete agreements on a motion to transfer, but concluded that transfer would protect its public policy because the state to which forum would be transferred applied the same conflict of laws rules.[52] The transferee forum would "determine whether the choice of law provision should be enforced, or whether to do so would be contrary to the public policy of the state that has the greater material interest."[53]

However, courts in other states with public policies against non-compete agreements have enforced forum selection clauses to transfer cases to forums without similar public policies.[54] An Oklahoma court considered the state's "public policy concerning non-competition agreements as a public interest factor, but [did] not weigh [it] heavily in [its] analysis under *Atlantic Marine Constr. Co.* in determining whether the forum selection clause is enforceable."[55] Another explained that weighing Colorado's public policy against non-compete agreements in forum analysis "conflates the question of which State is the proper **forum** with the question of which State's **substantive law** will be applied to interpretation and enforcement of the Agreement."[56]

Enforcing Forum Selection Clauses Included In Covenants Not To Compete Violates Public Policy

Unlike C.R.S. § 8-2-113(3), the provision voiding physician non-compete agreements upon termination, which excludes "all other provisions of such an agreement enforceable at law" from its coverage, the plain language of

C.R.S. § 8-2-113(2) does not exclude other provisions of a non-compete agreement from its coverage. Colorado courts have relied on the plain language of C.R.S. § 8-2-113(2) to interpret the legislative intent behind the statute.[57]

If a void non-compete agreement includes a forum selection and choice of law clause, but no other covenants aside from consideration for the agreement not to compete, or if the forum selection and choice of law clause applies solely to the non-compete portion of a larger agreement, then under Colorado law, the non-compete agreement, including the forum selection and choice of law clause, is void ab initio. While courts have implicitly held that the remaining portions of an agreement containing a covenant not to compete are binding despite C.R.S. § 8-2-113(2),[58] it is difficult to see how a forum selection and choice of law clause that solely applies to a covenant not to compete would survive when the function of that clause is to make a void agreement legally binding. The entire agreement should be void because of public policy. Enforcing the forum selection clause, though, transforms an otherwise void contract into an enforceable one that violates the public policy that voids it.

In *Cagle v. Mathers Family Trust*, the Colorado Supreme Court analyzed why the public policies behind the Colorado Wage Claims Act and Wrongful Withholding of Security Deposits Act preclude enforcement of a forum selection clause while the Colorado Securities Act does not by weighing the purpose of the policies. It noted that the purposes of Wage Act and Security Deposits Act are to protect Colorado residents alone, while the purpose of the CSA is "to protect investors and maintain confidence in the public securities markets."[59] The Wage Act applies to any person working for a Colorado employer, but does not exclude non-residents.[60] C.R.S. § 8-2-113(2) protects the same employees. *Cagle* noted that "Colorado has a strong interest in making sure a Colorado employee * * * can seek relief in a Colorado court."[61]

Cagle questioned weighing the result of enforcing a forum selection clause, but did not foreclose the possibility. *Cagle* declined to evaluate a choice of law provision's effect on a forum selection clause, noting that "[r]equiring a court to consider a choice of law clause at the same time as a forum selection clause forces a court to attempt to determine the potential outcome of the case under the chosen law at the outset of the litigation."[62] Because the court could not determine the outcome of the case, it did not analyze the result of a choice of law clause.[63]

However, an earlier U.S. Supreme Court case, *Piper Aircraft Co. v. Reyno*, indicates that analyzing the result of litigation in a different forum is appropriate because the adequacy of the remedy provided by the alternative forum is relevant to whether transfer serves the interest of justice, "the overarching consideration"[64] on a motion to transfer.[65] The adequacy of a defense should also be relevant to whether transfer serves the interest of justice.

The Supreme Court's decision in *Bremen* supports looking to the resulting effect of enforcing a forum selection clause too. In *Bremen*, the Court analyzed a public policy argument. The Court previously held in *Bisso v. Inland Waterways Corp.* that exculpatory clauses in towage contracts are void against public policy.[66] The contract in *Bremen* had an exculpatory clause and a forum selection clause requiring disputes be brought in England.[67] *Bremen* held that the public policy in *Bisso* was not applicable because the *Bremen* contract concerned international towage while the *Bisso* holding was limited to American towage contracts.[68] The Court explained that exculpatory contracts made sense in the international context because of "uncertainties and dangers in the new field of transoceanic towage."[69] Seemingly, if the *Bisso* holding applied to international towage contracts, *Bremen* may have invalidated the forum selection clause because enforcement of that clause would have resulted in enforcement of the exculpatory clause.

Enforcement of a forum selection clause that transforms a void contract into an enforceable one violates "[t]he core policy underlying the unenforceability of noncompetition provisions[,] a prohibition on the restraint of trade or * * * the right to make a living."[70]

And with non-compete agreements, a Colorado court may determine and analyze the result of litigation in a different forum. Interpretation of a written contract is a question of law for the court.[72] If there are no disputed facts necessary to resolve whether a non-compete agreement meets one of the exceptions in C.R.S. § 8-2-113(2), a court can conclude that a non-compete agreement is void and enforcement would violate public policy. If the forum selection clause solely applies to the non-compete agreement, a court can conclude that it is void too.

In declining to consider whether the result of the forum court's law would violate public policy, *Cagle* relied on another case that explained that arguments about the result of a forum selection clause render the clause "largely meaningless as it would depend on who filed first and whether that forum's law was more favorable to them."[72]

But declining to analyze the resulting effect of enforcing a forum enforcement clause in a case involving a non-compete agreement that is void under C.R.S. 8-2-113(2) renders the statute largely meaningless and departs from the United States Supreme Court's willingness to

analyze the resulting effect of enforcement of a forum selection clause.

Conclusion

Even before *Atlantic Marine*, most reported decisions granted transfer motions based on mandatory forum enforcement clauses. They are presumptively valid. Approach them that way. A client with a non-compete agreement that contains a forum selection clause should avoid giving her former employer reason to file suit in another court. But when the employer has already filed suit or if the employee is considering filing suit on other employment claims, the language of the clause and public policy arguments may sway a court to transfer a case to or maintain a case in Colorado. ▲▲▲

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Endnotes:

[1] *Atlantic Marine Constr. Co., Inc. v. United States Dist. Court for the W. Dist. of Tex.*, 134 S.Ct. 568, 581 (2013) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

[2] *H&R Block Enterprises, LLC, v. Taxes Latinos Americanos, LLC*, No. 4:14-cv-00135-BP (W.D. Mo. Feb. 19, 2014) (applying Missouri law to restrain former employee from preparing tax returns in 50-mile radius in Colorado).

[3] This article and many district court cases include forum and venue selection clauses under the term "forum selection clause" despite the Tenth Circuit's instruction that the term "should be applied only to agreements which clearly confine litigation to specific tribunals to the exclusion of all others." *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 582 (10th Cir. 1997).

[4] *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 321 (10th Cir. 1997).

[5] *Id*. at 321 (quoting *Thompson v. Founders Group Int'l*, 886 P.2d 904, 910 (Kan. Ct. App.1994)).

[6] *Cardoni v. Prosperity Bank*, No. 14–CV–0319–CVE–PJC, 2014 WL 3369334, at *5 (N.D. Okla. July 9, 2014) (citing *SBKC Serv. Corp. v. 1111 Prospect Partners, L.P.*, 105 F.3d 578, 581-82 (10th Cir.1997)

[7] *Excell*, 106 F.3d at 321 (citing *Thompson*, 886 P.2d at 910).

[8] *Id.* (quoting *Utah Pizza Serv. v. Heigel*, 784 F. Supp. 835, 837 (D. Utah 1992)).

[9] *Nickerson v. Network Solutions, LLC*, 339 P.3d 526, 530 (Colo. 2014).

[10] *M/S Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1 (1972); *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 624 (N.J. 1996) ("The holding in *Bremen* represents the prevailing view on the enforceability of forum-selection clauses, and is consistent with the position adopted by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS.").

[11] *McKenna v. CDC Software, Inc.*, No. 08-CV-00110-EWN-MEH, 2008 WL 4197740, at *6 (D. Colo. Sept. 9, 2008).

[12] *Riley v. Kingsley Underwrit. Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992).

[13] *Atl. Marine*, 134 S.Ct. at 579.

[14] *Cagle v. Mathers Family Trust*, 295 P.3d 460, 464 (Colo. 2013).

[15] *Atl. Marine*, 134 S.Ct. at 581.

[16] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

[17] *Atl. Marine*, 134 S.Ct. at 581.

[18] *Id.* at 581.

[19] *Scheidt v. Klein*, 956 F.2d 963, 965 (10th Cir. 1992).

[20] *Atl. Marine*, 134 S.Ct. at 581.

[21] *Id.* at 582.

[22] *Id.* at 582.

[23] *Piper Aircraft Co.*, 454 U.S. at 241, n. 6 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)).

[24] *Nelson v. Aramark Sports & Entm't Servs., LLC*, No. 2:14-CV-00474, 2015 WL 1014579, at *2 (D. Utah Mar. 9, 2015).

[25] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

[26] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

[27] *ViSalus, Inc. v. Smith*, No. 13-10631, 2013 WL 2156031, at *7 (E.D. Mich. May 17, 2013) ("Defendant's argument that Colorado Revised Statute § 8–2–113 prohibits the type of nonsolicitation agreement at issue in this case is creative but unpersuasive.").

[28] *Brill v. Regent Commc'ns, Inc.*, No. 82A01-1304-PL-174, 2014 WL 2917481 (Ind. Ct. App. June 27, 2014) transfer denied, 2014 WL 5545518 (Ind. Oct. 30, 2014) (relying on "without regard to" language to apply Virginia substantive and procedural law); *OrbusNeich Med. Co., BVI v. Boston Scientific Corp.*, 694 F. Supp. 2d 106, 114 (D. Mass. 2010) (interpreting "without regard to" language "as a statement of the parties intention that this court disregard all conflicts of law provisions that might otherwise apply."); *Resurgence Fin., LLC v. Chambers*, 173 Cal. App. 4th Supp. 1, 7 (Cal. Ct. App. 2009) (considering California's public policy despite "without regard to" language).

[29] *Excell*, 106 F.3d at 321 and *K & V Scientific Co., Inc., v. Bayerische Motoren Werke Aktiengellschaft*, 314 F.3d 494, 499 (10th Cir. 2002) give several examples of mandatory and permissive clauses.

[30] *Fin. Cas. & Sur., Inc. v. Parker*, No. CIV.A. H–14–0360, 2014 WL 2515136, at *3 (S.D. Tex. June 4, 2014) ("If the forum-selection clause is permissive, the courts have consistently declined to apply *Atlantic Marine*.").

[31] *Id.* at 582.

[32] *Waste Mgmt. of La., L.L.C. v. Jefferson Parish*, 48 F.Supp.3d 894, 912 (E.D. La. 2014) motion to certify appeal granted sub nom. *Waste Mgmt. of La., L.L.C. v. Parish*, No. CIV.A. 13-6764, 2014 WL 5393362 (E.D. La. Oct. 22, 2014) and leave to appeal denied sub nom. *Waste Mgmt. of La., L.L.C. v. Jefferson Parish ex rel. Jefferson Parish Council*, 594 F. App'x 820 (5th Cir. 2014) ("the forum selection clause . . . is permissive, and thus the *Atlantic Marine* framework does not control.").

[33] *United States ex rel. MDI Serv., LLC v.*

Fed. Ins. Co., No. 13–2355, 2014 WL 1576975, at *3 (N.D.Ala. Apr. 17, 2014) (internal citations omitted).

[34] *Nickerson*, 339 P.3d at 530.

[35] *Id.*

[36] *Id.* at 531-32 ("the trial court erred in setting aside the default judgment as void for lack of jurisdiction; forum selection clauses do not deprive a court of personal or subject matter jurisdiction").

[37] *Karl W. Schmidt & Associates, Inc. v. Action Envtl. Solutions, LLC*, No. 14-CV-00907-RBJ, 2014 WL 6617095, at *6 (D. Colo. Nov. 21, 2014).

[38] *Id.*

[39] *Id.*

[40] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). "enforcement would contravene a strong public policy of the forum in which suit is brought.").

[41] *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101, 1105 (S.D. Cal. 2006); *Meyer v. Howmedica Osteonics Corp.*, No. 14CV2496 AJB NLS, 2015 WL 728631, at *11 (S.D. Cal. Feb. 19, 2015) ("the proper inquiry is the reasonableness of the forum selection clause itself, not the reasonableness of the effect of enforcing it.").

[42] *Cagle v. Mathers Family Trust*, 295 P.3d 460, 470 (Colo. 2013).

[43] *Morris v. Towers Fin. Corp.*, 916 P.2d 678, 679 (Colo. App. 1996) (voiding forum selection clause under Wage Claim Act's anti-waiver provision); *Ingold v. AIMCO/Bluffs, L.L.C. Apts.*, 159 P.3d 116, 123 (Colo. 2007) (voiding arbitration clause under the Wrongful Withholding of Security Deposits Act's anti-waiver provision); *but see Cagle*, 295 P.3d at 469 (Colorado Securities Act).

[44] C.R.S. § 8-4-110(2).

[45] C.R.S. § 8-4-121.

[46] *Lambdin v. District Court*, 903 P.2d 1126 (Colo. 1995).

[47] *Morris v. Towers Fin. Corp.*, 916 P.2d 678, 679 (Colo. App. 1996).

[48] *Brownlee v. Lithia Motors, Inc.*, No. 13-CV-03242-LTB-KMT, 2014 WL 2781428 (D. Colo. June 19, 2014).

[49] *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 844 (Colo. App. 2007).

[50] *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763, 765 (Colo. App. 1988).

[51] *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 WL 4205476, at *22 (E.D. Pa. Sept. 19, 2012).

[52] *Thrasher v. Grip-Tite Mfg., Co.*, No. 8:07CV400, 2007 WL 4180716, at *5 (D. Neb. Nov. 21, 2007).

[53] *Id.*

[54] *Cardoni v. Prosperity Bank*, No. 14-CV-0319-CVE-PJC, 2014 WL 3369334, at *8 (N.D. Okla. July 9, 2014) ("Oklahoma's public policy concerning non-competition agreements * * * will not weigh heavily in the Court's analysis under *Atlantic Marine Constr. Co.*"); *Swenson v. T–Mobile USA, Inc.*, 415 F.Supp.2d 1101, 1104 (S.D. Cal. 2006) (rejecting challenge to clause on basis that transfer would violate California's public policy against non-compete agreements).

[55] *Cardoni*, 2014 WL 3369334, at *8.

[56] *United Natural Foods, Inc. v. Hagen*, No. 3:10CV807-JBA, 2010 WL 3211070, at *5 (D. Conn. Aug. 13, 2010) (emphasis in original).

[57] *DISH Network Corp. v. Altomari*, 224 P.3d 362, 367 (Colo. App. 2009)

[58] *Colorado Accounting Machines, Inc. v. Mergenthaler*, 44 Colo. App. 155, 156, 609 P.2d 1125, 1126 (1980) ("the trade secret provision is valid; the restrictive covenant is not.").

[59] *Cagle v. Mathers Family Trust*, 295 P.3d at 469 (citing C.R.S. § 11–51–101(2)).

[60] C.R.S. § 8-4-101(5)-(6).

[61] *Cagle v. Mathers Family Trust*, 295 P.3d 460, 469 (Colo. 2013).

[62] *Id.* at 470 (citing *Swenson*, 415 F. Supp. 2d at 1105.

[63] *Cagle*, 295 P.3d at 470.

[64] *Atlantic Marine Constr. Co., Inc. v. United States Dist. Court for the Western Dist. of Texas*, 134 S.Ct. 568, 581 (2013).

[65] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

[66] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

[67] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 2 (1972).

[68] Id. at 15-16.

[69] Id.

[70] *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 844 (Colo. App. 2007).

[71] *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1313–14 (Colo. 1984).

[72] *Swenson*, 415 F. Supp. 2d at 1105.