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COLORADO LAW MAY GOVERN NONCOMPETE DESPITE CHOICE-OF-LAW PROVISION

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Colorado law is not particularly friendly to noncompete agreements. A Colorado statute prohibits all such agreements unless they fall within one of four specific exemptions. *See* CRS §8-2-113(2). When the desired agreement does not fit neatly within those exceptions, one possible approach is to choose another state's (more favorable) law to govern the noncompete agreement. However, as a recent case reminds us, that approach will not always work.

In *LS3 Inc. v. Cherokee Federal Solutions*, L.L.C. (D. Colo. 9/29/2021) (Brimmer, C. J.), a former employer sued several former employees for (among other things) breach of their noncompete agreements. Chief Judge Philip Brimmer of the United States District Court for the District of Colorado rejected the parties' choice of Maryland law to govern the agreements and held that the agreements were governed by - and unenforceable under - Colorado's noncompete statute.

Under Colorado law, the parties' choice of law to govern their contract will be respected unless (1) "application of the law of the chosen state would be contrary to a fundamental policy of a state" that (2) "has a materially greater interest than the chosen state in the determination of the particular issue." *See King v. PA Consulting Group, Inc.*, 485 F.3d 577 (10th Cir. 2007). In *LS3*, Judge Brimmer concluded that Colorado had a materially greater interest than Maryland in the dispute over the noncompete agreements, because all but one of the individual defendants lived and worked in Colorado, while the only connection to Maryland was that the plaintiff employer was incorporated there. The judge then concluded that applying Maryland law to the dispute would violate a fundamental policy of Colorado because (1) Colorado's noncompete statute is a fundamental policy of the state and (2) the noncompete agreements would have been enforceable under Maryland law but unenforceable under Colorado law. Therefore, the judge found the agreements to be void and unenforceable.

This case reminds us that a choice-of-law provision in a noncompete agreement is not a magic bullet. Where the parties and the dispute have greater connection to Colorado than the chosen state, Colorado's noncompete statute will probably govern. Therefore, in such cases, employers should attempt to ensure that the noncompete agreement will satisfy Colorado's relatively unfriendly statute.

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