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## CONTENTS

### [THE NONCOMPETE PENDULUM CONTINUES SWINGING FOR EMPLOYERS IN TEXAS](#)

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The Texas Supreme Court has addressed Texas noncompete law twice since October 20, 2006. On October 20, 2006, it handed down its most significant noncompete opinion since 1994, making it far easier to enforce noncompetes under Texas law (an issue we addressed in a previous Alert). *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644 (Tex. 2006). On June 29, 2007, the Court decided that a forum selection clause that required a Texas resident to litigate his noncompete in Florida ought to be enforced. *In re AutoNation*,—S.W.3d —, 2007 WL 1861341 (Tex. 2007).

The essential facts of *In re AutoNation* are uncomplicated. The Florida employer, AutoNation, filed suit in Florida to enforce its noncompete agreement with its former employee. The employee then filed suit in Texas to enjoin the Florida litigation and proceed with the litigation in Texas. Thereafter, the matter worked its way to the Texas Supreme Court after the trial court granted the anti-suit injunction against AutoNation, and the trial court affirmed. *Autonation, Inc. v. Hatfield*, 186 S.W.3d 576, 579 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Generally speaking, Texas courts have regularly enforced forum selection clauses. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-12 (Tex.2004); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134- 35 (Tex.2004). However, whether a forum selection clause would be enforceable in a noncompete case has been questionable due to the potential implications raised by *DeSantis v. Wackenhut*, 793 S.W.2d 670 (Tex.1990). In *DeSantis*, the Texas Supreme Court determined that a choice-of-law clause that purported to apply Florida law to a Texas-resident's agreement not to compete was unenforceable. Its rationale for its decision was essentially that the imposition of another forum's noncompete law on a Texas resident was offensive to Texas public policy and thus, the parties' choice of law should not be respected. *DeSantis* did not, however, in any way address the choice of forum issue.

*In re AutoNation* is significant because it settles the forum selection issue that was not in play in *DeSantis*. Equally important is the question of whether *In re AutoNation* weakens the rule announced in *DeSantis*, a result disclaimed by the Court in *In re AutoNation* ("Our decision today in no way questions the reasoning of *DeSantis*, but we decline Hatfield's invitation to superimpose the *DeSantis* choice-of-law analysis onto the law governing forum-selection clauses."). Nonetheless, later in the opinion the Court tacitly acknowledges that the chosen forum, rather than a Texas court, will make the choice-of-law determination as a result of its decision. *In re AutoNation* at \*4 ("Accordingly, and without offending *DeSantis*, we will not presume to tell the forty-nine other states that they cannot hear a non-compete case involving a Texas resident-employee and decide what law applies, particularly where the parties voluntarily agree to litigate enforceability disputes there and not here.").

The decision announced in *In re AutoNation* is hardly surprising. Indeed, the same result was reached earlier by a Houston Court of Appeals panel in *Holeman v. National Business Institute*, 94 S.W.3d 91, 101 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Still, it is now reasonably certain that out-of-state employers can require their Texas employees to litigate noncompete agreements in another forum. Just as significant is the fact that the forum states will decide whether to apply Texas law or the law of the forum. In sum, out-of-state employers will realize a significant benefit in enforcing noncompete agreements with Texas residents, who can no longer rely on the comfortable technicalities of Texas noncompete law to avoid their obligations to former employers.

▲ [Top](#)



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