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Supreme Court of Texas.
In re Autonation, Inc. and Auto M. Imports North, Ltd., d/b/a Mercedes-Benz of
Houston-North, Relators.
No. 05-0311.

October 19, 2006.

Appearances:
Charles T. Frazier Jr. (argued), Cowles & Thompson, Dallas, TX, for relators.
Andrew S. Golub (argued), Dow Golub Berg & Beverly, LLP, Houstin, TX, for real party in interest.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, Harriet O'Neill

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JUDGE O'NEILL: May it please the Court. [inaudible]

ORAL ARGUMENT OF CHARLES T. FRAZIER JR. ON BEHALF OF THE PETITIONER

MR. FRAZIER: Good morning, your Honor. May it please the Court. This case involves the enforcement of [inaudible] alleged process evidence is not complete, countersigned by room coordinators. Their advil of what with Autonations. As this Court has recently held in brief cases, the enforcement of four selection involves his manager, unless there is a strong and clear showing that enforcement of the clause is both unreasonable and unjust or is invalid because of fraud of aborigine. There are natural claims that there is no fraud of aborigine that simply that they are unreasonable because the enforcement then would violate of a policy of Texas and so the issue is, did the trial Court commit a clear view of discretion and denied Autonations motion to dismiss on a full selection clauses, those clauses are mandatory, they're exclusive. It's unambiguous that Florida shall be the jurisdiction at which this contracts are litigated. This contracts of course involved protecting confidential information from other nation which he received in consideration of his employment. Not soliciting employees in countravention of other nation, and of course

not compete it and it violated this clauses, it did compete and admits an integrity. Now they also ...

JUDGE O'NEILL: This applications of other states laws, governing covenants not to compete violate Texas public policy.

MR. FRAZIER: The application of other states law as regarding covenants not to compete ...

JUDGE O'NEILL: Protects its employees.

MR. FRAZIER: This Court have held in the sentence that Texas law has to apply.

JUDGE O'NEILL: And if it would violate public policy.

MR. FRAZIER: Yes. Texas law does not apply that at issue here and this is ...

JUDGE O'NEILL: I'm leading to my next question.

MR. FRAZIER: Yes, yes your Honor.

JUDGE O'NEILL: Then, then why would it not be fit under the unjust exception for forms selection clauses because if the Florida Court is going to apply above the law and why is that not unjust?

MR. FRAZIER: That's the issue, the issue is not though choice of law, the issue is where would the parties litigate? Different policy reasons, your Honors. I ...

JUDGE O'NEILL: Now, I understand that difference -

MR. FRAZIER: Yes.

JUDGE: - but, but if, if the form selection clause results in being in a form that will apply its own law rather than Texas law. Well, my understanding here is the form selection clauses valid to require in going to Florida to litigate this. But Texas law, as a matter- matter of public policy, as we said in this sentence, would apply in the Florida Court. Right?

MR. FRAZIER: Yes.

JUDGE O'NEILL: But if the Florida Court is indicated that it will not apply Texas law, presume that would me. Then, why would it not be unjust then to require them to get to Florida.

MR. FRAZIER: That presumes that Florida will apply for law.

JUDGE O'NEIL: How do you applies?

JUDGE JEFFERSON: Is that not a legal get in the

JUDGE O'NEILL: If that presumption is valid-- if that presumption is valid, the Florida Court will ban Florida law then you agree the Court was this- was good. Are the results correct?

MR. FRAZIER: Well, in-- not entirely. Here's, here's what I want to get into also; the statute and the Business Commerce Code is now affect that it's of plans that come along Texas and the statute governs and this Court enlighten and every work is applied to statute. And so whether or not the same public policy issue stated in the sentence would apply I think, still Navy, up in the air Navy to be revisit or decided by this, by this Court. But as the sentence says that, that holding stands than application that Indiana law would contravene ...

JUDGE JEFFERSON: No wonder but a-- it says our application, bring him in contravene of both those laws.

MR. FRAZIER: Our-- Yes.

JUDGE WILLETT: Didn't say we got to go out around the country or stop everybody else that plan for.

MR. FRAZIER: Well, and, and that's our, our point. If we get in to where Texas or any other state, it's into the practice of when the merits of the laws of other states then that may were-- that will affect, if not undermine our system of federal sovereign states. The inter-state judicial system, I think is something that is potentially at risk here because can Texas go and say "we're going to decide, we're

going try to figure out what thing would do if litigated there and if we don't like that or we think that's going to violate our policy, then we are not going to enforce the clause, we're not going to allow a suit even that's already timely or partly found in Florida to go forward." That get's into, I think a, a very dangerous practice. Other states can do that to Texas, the whole system I think could eventually if we get there collapse. And we have to give deference to a-- an equal sovereign Florida to allow them to decide, it's just where or to litigate nothing in the statute in the non-compete consecutive act. In the Business Code has a venue clause and that's where the states had looked at to see if enforcing a form selection clause would in fact violate the Brandon Public Policy Exception which I'm not sure if this Court has frankly adopted it, but assuming it has, those instances for, for the, for up to 20 cases, your Honors and it all deal with a states statute says, "venue has to be here" or state statute says, "we won't except form selection clauses." A state statute says, "We will not divide law suits so form selection clause explicit case would violate public policy." Cases that say Bankruptcy Court law is important, it protect creditors, so we're not allow form selection clause to litigate this creditors right over here, it has to be in the Bankruptcy Court. Those are the instances, your Honors in which the Brandon Public Policy Exception has been applied but this Court in Louisiana case for instance said that they will be enforced unless they are fair, unfair or and reasonable, and the restatement secant of conflicts of law in section 8 has a different analysis than restatement secant 187 and 88 on conflicts of laws which the Court of course have went through in the sentence. The comment to restatement secant 8 of conflict, said that four selection clauses are for their benefit and convenience of parties unless there is fraud and aborigine and unless the form is seriously convenient as supported to the comment. Then, we will-- they will be enforced. And we believe that that analysis of a restatement 80 governs the form selection clause is not all the faulty considerations like [inaudible] enforce the law because enforce of the law obviously is different.

JUDGE HECHT: The sentence said that the enforcement of non-compete arrangements is not just a policy in Texas but a fundamental policy in Texas. Is that change your analysis?

MR. FRAZIER: No, your Honor. I, I, it, it does not.

JUDGE HECHT: Even though in re, I will, I you said that one of the exceptions to enforcement of a form selection clause is if the enforcement were contravene a strong public policy in form.

MR. FRAZIER: Yes. That's-- if the Court adopts the Brandon, that is an exception. But our position is, your Honor is that the statement of fundamental policy in the sentence dealt with restrain of trade in applying Texas Courts, applying Texas law. The question is, can the party's free to contract to litigate a contract outside of Texas? It's the locus-- the place of litigation. So I think it's a different argument just as Reinwhite on where you litigate as suppose to the substance of the choice of law issue.

JUDGE O'NEILL: Would you take me to have that place saying house? So you would say, form selection clause requires if they go to Florida and wait and see what the Florida Court does and let's say the Florida Court applies the Florida law and let's presume a conflex with hours, we don't, we don't about that. I understand that if I says we don't really have that but let's presume that they apply Florida law that's different from ours. Goes up to appeal, goes up to their highest Court. They say they we're going to enforce this covenant not to compete restraining order. Now, what happens to deck action?

MR. FRAZIER: In Texas?

JUDGE O'NEILL: In Texas.

MR. FRAZIER: Well, we think at that point in time, the deck action, the deck action should have been dismissed. What's going to happen is that if Autonation were to prevail under your hypothetical-- It would have to take that judgment and then bring it to Texas and seek to enforce it under Texas law of enforcing judgment. And at that point in time, then that they have on the decision, I think I've on what was decided-- or may perhaps even tell how it's decided. Then, Texas Court which will have to it enforce the judgment, couldn't look at that. There is a public policy exception to the full faith of credit law as the Supreme Court recognize specific insurance 99 and perhaps that's when, if the fact we get all of that way then look at that. What we're saying here is that, that decision of the respondents holding in position of requiring interest is, we cannot have all those steps. We cannot have all those steps, in the middle you say, you can't even go and litigate, even though sophisticated business people have decided that's where it is to be. For all the causes or other proper reasons, that new Supreme Court criminalize and said, certainty related to the business autonation has there was see ups all around, let them do that there.

JUDGE JOHNSON: So it's a practical matter if the Florida Court issue that a restraining order, that have to get that, acknowledge in Texas that have to domesticate that restraining order, in order to have an enforcement?

MR. FRAZIER: I believe so your Honor. I've made a-- the unction in fact. Actually, there is, there are cases that by this Court that injunctions are not judgments that in a full figure credit clause it applies and so if there is a judgment on the merits that's enforceable, I believe it has to be domesticated to be in frontier.

JUDGE JOHNSON: I'll have that temporary injunction, any domesticated temporary injunction?

MR. FRAZIER: I think ...

JUDGE JOHNSON: 'cause that's were the damage loss -

MR. FRAZIER: Yes.

JUDGE JOHNSON: - to be draw. They got the time it goes up three or four years and you get the domestication of a final judgment even restrained four years in the entire on the covenants expired that sort of miss the entire process -

MR. FRAZIER: Yes.

JUDGE JOHNSON: - so if you don't have any mechanism to get jurisdictional enforcement in Texas of the temporary injunction, then ...

MR. FRAZIER: We would certainly argue that the Texas Court should investigate and enforce of the injunction. But it has to be done here; Florida can't. We believe Florida can't say and enforce the judgment without have been domesticated and-- so I think that's another step when it comes to Texas and enforce the judgment and into our cases that say that full faith of critical laws didn't applied to, you know, mandatory orders such as injunction. So ...

JUDGE JOHNSON: So you'd say whatever happens in Florida is not going to bind him in any event for the next Court five years as this Court is wide through the system.

MR. FRAZIER: Possibly, could not.

JUDGE KEASLER: Actually had bills are not compete expires next February, didn't it?

MR. FRAZIER: Actually, your Honor. It already has expired.

JUDGE KEASLER: It has expired already?

MR. FRAZIER: Say, they expired February of, of this year -

JUDGE KEASLER: This year.

MR. FRAZIER: - and as far as we know, the Court didn't asked for nothing of a Florida proceeding that of course we understand that certain counsels can clarify that he, he is at work and that there is an injunction in place in Florida on the separate independent ground of not this appropriating trade secrets cognintial information and soliciting employees which the Court done that he have as ordered him to re- re-return.

JUDGE JOHNSON: But in your view, he's not binding 'cause he's not domesticated here and if it violated public policy whenever that issue might come up, then it would bind him.

MR. FRAZIER: I think so, at the he's-- well, no. It's, it's a Florida Court asking him to do that and so to the extent that he applies with that-- he has.

JUDGE HECHT: For, for temporary injunction this issue, this personal jurisdiction of individual then there could be a four calls of hearing on contempt and their actions that could be taken against the individual in the Florida Court as to the Florida proceeding or Florida interest of that individual, there lot's of things that could happen in Florida Court as to have here rather than-- without having to domesticate the temporary injunction. I'm not sure what that actually means, but there are lots of things that could happen to had fell short of that.

MR. FRAZIER: Yes, the, the Court and to be frank, the Florida Court did find a personal jurisdiction over Mr. Hotfield, and that was the first issue that was appealed as relies the Court and it thus before actually that he found, they found a personal jurisdiction, it was affirmed and then there was an injunction that was appealed to the Florida Court of Appeals and that was also affirmed and that's the status where even though, if there's any attempt to go up if the courts agree or

JUDGE BRISTER: Autonation versus Hankins Florida Supreme Court opinion.

MR. FRAZIER: Yes, your Honor.

JUDGE BRISTER: Does that or does that not make it pretty clear that Florida Courts will apply Florida Law in this case?

MR. FRAZIER: I don't think so your Honor.

JUDGE BRISTER: Why not?

MR. FRAZIER: First of all, it's a child court unpublished memoranda opinion by a Judge who was no longer sitting in this Court, and it's not binding, and getting into whether or not, we object because one judge is no longer on the bench held this way. We don't know what parties-- what the parties argued, the evidence, you don't know what to be done here. And so whether a certain judge will follow his predecessor, we don't know. So I, I don't think that that's his possive or, or orientation of what will happen, the parties have a right to litigate there, and then later arguments in this case and see what this new Judge decides.

JUDGE BRISTER: And have you in certain in the law but you don't think that pre-sentence in that case point pretty get indication where Florida Courts have indicated.

MR. FRAZIER: Your Honor, I, I think when we get into a guessing game of, of whether Florida law has been applied and impose decision of what he's going to do. I think that gets in to that slope of giving into the, the business of the sovereigns states and I, I don't think

that, that unpublished decision which is the only one I know of addresses this issue that they have cited should make a determination of law.

JUDGE BRISTER: In the where you said has as South Second Site.

MR. FRAZIER: 7621 South 2nd 306, anything else?

JUDGE BRISTER: Yes.

MR. FRAZIER: And that uphold it yet but it says it support the Supreme Court case.

JUDGE BRISTER: That Hankins is support the Supreme Court case?

JUDGE JEFFERSON: Autonation versus Hankins

MR. FRAZIER: Okay. I will.

JUDGE JEFFERSON: Thank you.

MR. FRAZIER: The opinion that, that we've been looking at is, is the immigrant opinion of, of the trial court but I don't know if that is, that is a Supreme Court-- I don't think this is a Florida Supreme Court holding on this very issue on this clauses, your Honor. We'll certainly it should have expire.

JUDGE JEFFERSON: Any other questions? Thank you Mr. Frazier. The Court is now ready to hear argument from Realtor.

MS. BEVERLY: May it please the Court. Mr. Golub will have argument [inaudible]

ORAL ARGUMENT OF ANDREW S. GOLUB ON BEHALF OF THE RESPONDENT

MR. GOLUB: May it please the Court. There are two reasons why the petition for remand should be null on this case. But before turning my focus to the argument, I'd like to address a couple of the questions that the judge asked, just as plain right I think the case that we're asking about out in the Florida Supreme Court is a Mezounni farm. Which is the Florida's Supreme Court most recent announcement on conflict of laws. It was the principles of the mesony farm that were applied in the Hankin's case in Florida that had the Florida Court rejecting application of the sentence in a case brought there against the Texas general manager which is exactly the same situation that we would have here. Now, there are two reasons why we know that Florida law would apply if the non-compete had to be litigated there. And, and just by way of clarification, other parts of the case are being litigated in Florida. Other aspects of the contract are governed by Florida law for the parties agreement. The only difference here stands from the Santos versus Rackenheit and this Courts determination as part of it's conflict of laws analysis that with respect to Texas employees working in Texas, its fundamental policy here that those non-compete be regulated under Texas law and that is the only piece of the case that the trial Court kept here.

JUDGE WILLETT: But when can you say that Florida has to apply Texas law.

MR. GOLUB: Well, you didn't-- you did not say that Florida has to apply Texas law, but what this Court is saying in other context talking about form selection clauses is that their application are subordinated to the public policy of the state so we enforced them.

JUDGE WILLETT: What's the difference in-- why does everybody, why does the employers all want to be in Florida law, and employees all want to be in Texas law. What's so bad about our law?

MR. GOLUB: I don't know that, that's true. I think it's a-- I

think it's a

JUDGE WILLETT: If there's no difference, why are we doing this?

MR. GOLUB: Well, actually there, there is a difference between Florida Law and Texas law. I think in this context ...

JUDGE WILLETT: We're hostile to them and they're ...

MR. GOLUB: They're less hostile.

JUDGE WILLET: All right.

MR. GOLUB: But, but according to the santas, when determining choice of law here, we don't consider what the outcome is going to be. And we took hanes in our briefing to point out that that's not the concern here. The concern is that, when assassin whether reform selection clause should be enforced. The exception is when a public policy of this state would be supported. So the default position is we respect them.

JUDGE WILLETT: But we can't have the situation where you go find and stay and thinks it's public policy is actually it's something should have been enforced. And then bring a lawsuit to drives stop everybody from concerned and some statements in which it could be.

MR. GOLUB: Well, I, I don't think that would have been at issue but for the fact that they are in the other state attempting to enforce the non-compete -

JUDGE WILLETT: Not to mention the fact that your guy signed the contract and say I'll be happy to do it there.

MR. GOLUB: That's right.

JUDGE WILLETT: I mean, the whole thing that bothers me about non-compete is with that somebody who signed something in writing saying, "I won't compete for two years" and then when they quit, they change their minds. Now, this is even worse. If when I quit, I won't compete and if we have a disputes, I'll do it in Florida and I'll change my mind on that too. And now, the whole deal of this is equity and what possible way is this equitable? For Texas courts to tell two grown ups, both with a lot of money. You can't do this in Florida.

JUDGE HECHT: Well, the, the reason is because of this Court's opinion--

MR. GOLUB: Because of the sentence. Because the sentence-

JUDGE WILLETT: So isn't this so the sentence is the source of inequity. Is it not?

MR. GOLUB: I don't think it's the source of inequity. Because ...

JUDGE WILLETT: But your, but your whole equitable argument is, "cause you all said so." There is no equity, take there's just law.

MR. GOLUB: I think that's all for the good argument to say that this [inaudible]

JUDGE HECHT: I agree with that but there's-- but your-- I just want to make it clear. Your argument is solely legal, there is no equitable argument; this is a good idea we should do this despite all the parties arguments here in Texas.

MR. GOLUB: I would disagree with you because of what the sentence says. The sentence takes hanes to balance their competing interest. Texas is not always going to apply Texas laws to non-compete agreements. Texas is going to undertake the interest analysis that is said out in the sentence. It is going to look at which state has a greater relationship to the transaction. Which state, has a greater interest in the outcome and does that state have a fundamental policy like our state does. And using those ...

JUDGE WILLETT: Casted in the policy is--

MR. GOLUB: And of-- and of the policy--

JUDGE WILLET: - you don't want Texas people starve and then doing

all the don't.

MR. GOLUB: Well, the Texas policy is and I will just quote from the sentence at state here is whether a Texas resident can leave one job-- one Texas job to start a competing business in Texas. Does Texas is directly interested in the sentence as an employee in the state. In black and hot as a national business employer doing business in the state. In RDI as a new competitive business being formed in the state, and in consumer's of the services furnished in Texas by Rackenheit and RDI can perform by the sentence.

JUDGE WILLETT: Question is, couldn't we wait for the Florida Court? to see if the Florida Court ever said, "You can't go to work at another Texas job and then decide to apply Texas public policy?

MR. GOLUB: No, and for two reasons. Number one, it would be too late, and number two, they're going to sue to seek not just some titled injunctive relief but damages for the breach. And by the time there's a judgment in that case, this Court-- this Court in Texas would be required to do full faith in credit to that judgment. So Hotfield could end up subjected to a million dollar judgment in Florida for having violated a contract that this Court would say, would say and we think would say is unenforceable. So the proper procedure, and this is why the trial Court did not abuse it's discretion is that he looked to all the sign post that are out there, the sentence. Holman versus the National Business Institute which is the exact same situation as this case, with one exception. Holman failed to show what was going to happen in Georgia. He didn't even brief the issue and so the Court of Appeals was left with no basis to conclude that Georgia would refuse to apply Texas law.

JUDGE WILLETT: If we issue, have that been brief in that case? Could the trial Judge still gone the way to you?

MR. GOLUB: I think it depends on what Georgia law is and I have not-- I haven't look at that. But I think -

JUDGE WILLETT: I'm just wondering about when you say, "abuse of discretion." Is that mean the trial judge can just go either way?

MR. GOLUB: I, I think, I think the answer to your question is, "Yes, the trial judge might have exercised it's discretion the same thing to Georgia" anyway.

JUDGE WILLETT: So if this trial judge had ruled against you-- you just be unlaw-

MR. GOLUB: I think we may have been in the same situation as Holman except the argument is better if one can show us a version of public policy. But I think, under the case law, the decision of whether to uphold a form selection clause is ultimately discretionary. So as long as the Court considers what the guide pose are, it says, "well, I'm going to make a judgment called this way or that way if probably is on asylum." For that reason, Judge Brook did not abuse his discretion. I'd like to wrap up to-- to one other point with respect to what Florida is going to do. And we submitted this morning a one page exhibit that quoted, "Just the governing of all provisions from the three contracts that are at issue here and what this-- what all of this agreement say is that the contract should be governed according to Florida law, without regard to it's principles of conflict of laws. Now, let's put aside Masony farms out of the Florida Supreme Court, which I think says they're going to use Florida law anyway. If they had an equivalent case, like the sentence which says, "We're going to do interest analysis, we're going to look at which state has the, the most important relationship to this and you may have a public policy. This contracts foreclose the Florida Courts even from considering Florida

conflict of laws analysis. So what ends up happening in this case is that, the choice of form clause is effectedly a choice of law clause. Because once it's in Florida, Florida law will apply and there is no getting out of that by their pattern.

JUDGE WILLETT: So do you think enforcing any form selection clause, the Florida Court has to look at the selected forms law, substantive law or maybe procedural law. And see how the cases going to come out and see if that's unjust.

MR. GOLUB: No. I, I, I disagree with that for, for two reasons: one, I think most of the time that there is a form selection clause, there is not going to be an important state public policy involved. One good -

JUDGE WILLETT: On, on what basis do you think that ...

MR. GOLUB: I would look to, In re:EIU which is one of the recent cases that this Court decided on form selection clauses. Their -

JUDGE WILLETT: Nobody argue that EIU that we should look at the substantive law is he have a case is a conflict.

MR. GOLUB: Well,-- and nor are we. We're not looking, we're not looking at this -

JUDGE WILLETT: I don't see where that amount Florida was going to say.

MR. GOLUB: I think-- and, and we brief this below while we moved for summary judgment. But it's not a relevant factor according to the sentence to determining whether Texas law ought to apply to this dispute. That, that's my point. Is that, whether or not Texas law applies to a non-compete involving a Texas citizen who works in Texas for an out of state employer or an out of state business like autonation. You don't consider what the outcome is going to be because it is a question of public policy, our law could be less favorable to grant that deal. Our law could be more favorable to grant that deal but as a matter of policy, this states believes that its imperative is to apply Texas law to that contract.

JUDGE WILLETT: But we don't think-- maybe we'll talk about it, this we'll see. And what if that every other state in the United States ought to apply Texas Law?

MR. GOLUB: That's right. We don't think that becauase-

JUDGE WILLETT: They should make a thrown on us.

MR. GOLUB: because-- exactly why in, in the sentence, the Court had a lenghty footnote citing all of the other jurisdictions that into choose their own law when it comes to interpreting non-competes and the reason is that in most states, it is a fundamental policy, so when you go to the sentence interest analysis, you, you've reach the conclusion that our states law in most situation should apply. But here is a situation where it wouldn't. Suppose it were a Texas business with a contract, just like the one's in this case. But they employ citizens of Wisconsin, working in Wisconsin. If that Texas business files suit in Hera's County seeking to enforce the non-competes. Do this sentence interest analysis is going to look at: number one, which state has a more important relationship to the transaction, Wisconsin; which state has a more important interest in the outcome, Wisconsin; does Wisconsin have a fundamental public policy where they would choose their law in a similar situation. The answer is, yes. And the Court in, in Hera's County would under the sentence be required to apply the other states laws. So we don't always insist that Texas law apply, in this case long term Texas employee working in Texas. Texas law must apply and we know that from the sentence because it's not distinguishable in anyone. One point, the, the counsel made was the amendments to the business in

commerce code. And I have two responses to that. One, is that those amendments were affected when the sentence was decided. The sentence deferred considering whether the retroactivity provision in the, in the code-- in the Business and Commerce Code had any effect on the contract there, but and it didn't, because the court found that it would be unenforceable under either the old standard or the new standards and therefore really didn't have to decide which one the defendant that we apply. But the other reason why that is really a redherring, is that when the legislature said in the amendments that this is the exclusive source of law, with respect to non-compete agreements, that was really underscoring what the sentence said, which is that this state has a very significant interest in uniform application of non-compete law. The legislature put an exclamation point on that. When they said, this is going to be the only source of law with respect to non-competes in Texas and Garret Hotfield only work for them in Texas. The only work in cago ships and is used in area that were affiliated with autonation and he, that he had no connection to Florida and Florida has no interest in the outcome here and as a result, it, it just highlights the point of one of those prongs of the de sentence analysis.

JUDGE WILLETT: Why did it sign and why did it agreed to litigate in Florida now?

MR. GOLUB: Judge, that is not in the record and, and, and I don't think that is relevant for the following reason. Which is, under the sentence-- it says two things about public policy. One is that the state certainly has a public policy regarding freedom to contract. But number two, this is a limited party autonomy state. There are some types of agreements that people cannot enter into. We can enter into a contract to do something illegal and we cannot according to the sentence enter into a contract to have another states law applying to a Garret Hotfield employment, non-compete agreement arising out of his employment in Texas. So-

JUDGE WILLETT: So it's not just a public policy it be, it's the same as illegal--

MR. GOLUB: Well,-

JUDGE WILLETT: It just being illegal for people to agree the bad about Florida law.

MR. GOLUB: I would say it's unenforceable. I, I don't think illegal is the right word. What I do think is that there are some types of agreements that simply cannot be enforced and this arise in the law in various context. One of them is in the context of non-compete agreement.

JUDGE WILLETT: Usually, on things when we say it looked, usually it's a free country. People can contract whatever they want, if against the law they can't do it. Non-competes are not against the law. So again, the only reason this is against the law is because of the sentence.

MR. GOLUB: The only reason that it shouldn't be enforced in this context is because to do so what undermine Texas public policy is strong and fundamental public policy. "Strong" was the word used in Bremont and in In re: EIU.

JUDGE WILLETT: Well, are you saying that it's strong because the legislature said so. Some, some think the legislature said that strong because they were sending a message to this Court not to other States. ' Cause this Court was cons-- was repeatedly striking down covenants non-compete.

MR. GOLUB: But.

JUDGE WILLETT: Are you sure that the legislatures intent was weak,

demand that only Texas law applies to employment contracts in Texas.

MR. GOLUB: That's, that's not what I'm saying, what I'm, what I'm saying is that, in the first part of the sentence where the court goes to the analysis of which states law should apply. There is an extensive description of why this is important to Texas to have uniform application of the laws. When the legislature said, here's what the rules are going to be and this rules are going to be exclusive, I think that's simply underscore that first part of the sentence which is the conflict of law fundamental policy question.

JUDGE WILLETT: Now, I think that you're saying this is a voidable contract and that's, and that's because there's language that you emphasize to us without regard to its principles of conflicts of laws -

MR. GOLUB: What, what I think that means is if this case were litigated in Florida, the non-compete will being assessed in Florida. Other nations would argue just as they did in Hankin's that Florida law should apply. They would argue just as they did in the companion case before the NI suit injunction was issued; that Florida law should apply. And if we were to argue that Florida law shouldn't apply because of conflict of laws principles, they would hold up the contract claim which say, as a matter of contract law, Florida Court you cannot consider conflict of law principles. Florida law must apply without regard to conflicts of law.

JUDGE WILLETT: But not for that language, they should be an enforceable form clause?

MR. GOLUB: Well, I don't think so. Because if you look at Mesony farms, Florida conflict of law analysis simply looks at whether the choice of law is offensive to Florida public policy. They don't run through the sentence type analysis.

JUDGE WILLETT: Does the length of time, your point was employed in duration. Does that have any impact on this case?

MR. GOLUB: I think it does, and in a favorable way to the sentence rule. But, but if that gets into the question of substance, I think if, if happen with only work for autonation for a couple of days in Texas which is the case in unpublished opinion that was included by a relator in the record. The case out of the Northern district of Texas called Witlock versus autonation Witlock had moved here from out of state, he worked for autonation or one of their dealership with another state moved here to take a competing job that tells somehow within it's non-compete and the Court dismissed it and enforce the form selection clause but part of the logic was you've only been here in Texas for a couple of days. We don't have that issue it have to at least lived here for about 20 years, he worked in, in a car industry of Houston for-- I don't know the exact number but a number of years and he'd worked for autonation affiliate, affiliated dealership for several years. So that, that the extent that's irrelevant criteria with respect to determining the fundamental policy question, there is every reason to believe that the sentence looks favorably upon the choice of law question for Hotfield and unfavorably upon autonations position.

JUDGE JOHNSON: Would you explain to me again, why it wouldn't work to let it go through the Florida system and then at the domestication in Texas state. Texas can then evaluate whether it violates public policy here.

MR. GOLUB: Because when they have their judgment, that's going to follow him around forever. And as long as it's not offensive to Florida law, it would be unassailable by appeal there. They will have a determination perhaps that he breached the contract. He didn't go to compete during the terms, but if there is a determination by the

Florida Court that he breached the contract, that he owes them money. What happens when he moves to Florida when he breached the contract that is frankly not breachable in Texas because it's not enforceable.

JUDGE JOHNSON: Well, but, but a proceeding could move to Florida if that were placed? And two, he agree to that, in this, in this contract that Florida will apply. So I can see how it might say, it can't enforce against to be in Texas but I did agree that it would be enforceable in Florida and you may not be able to domesticate it and prevent it from working.

MR. GOLUB: It well, it does prevent them from work and it did prevent them from work. He did not go to work for the competing dealership for the four-year long period as a result of the uncertainty brought by this litigation. They got the unenforceable non-compete by default. By virtue of threatening him with that judgment, now I can't tell you right now that they won't create some case and try to prove to the Court in Florida that he nonetheless breached the non-compete agreement during the term and that he therefore should have to pay damages in attorney's fees but if the-- if it is not enforceable here and I see that my time has expired right now, I just finished the answer it quickly. If Hotfield becomes subject to a judgment in Florida, that will follow him around forever. But it is a judgment and a, and a conclusion that is-- that would not be enforceable against him here, but one that they get by default by trying to invoke the foreign Court. As I said earlier, the choice of form provision in this case is essentially a choice of law provision. Because if he's forced to litigate there, Florida law will ...

JUDGE JOHNSON: But I guess what I'm saying here is, if that's the case, then it satisfies Texas's concern that it can't be enforce in Texas and if it could be enforce anywhere else, it's really not matter of Texas policy anymore.

MR. GOLUB: No, the answer is no because of what the sentence said, the sentence talks about one of the competing interest being the interest of the Texas citizen to leave employment in Texas and move to a new business or a new competitor which is what I have wanted you to do if, if a company-

JUDGE JOHNSON: We're in Texas but the judgment in Florida is not going to compete him, from leaving from employer to employer in Texas.

MR. GOLUB: Absolutely, it will. The threat of being subjected to a judgment in a foreign state, the threat of being subjected to injunction or contempt in a form of foreign state is enough and was in this case to convince him not to compete and after the new competitor which wanted to employ him and if Hotfield which wanted to go be employee there, and if this were unenforceable contract, non-compete was-- then there wouldn't be an issue here. I mean, we wouldn't be litigating the issue but we, we looked at the law, we looked at the contract, we don't think that this is enforceable. The trial Court reached a preliminary conclusion when granting the temporary injunction that it was likely unenforceable here and the, and the threat is that, just by having the ability to go that other state, it will starting me the competition here in Texas.

JUDGE WILLETT: Other questions?

MR. GOLUB: Thank you.

MR. GOLUB: Now we have to look to have today, over the late Court's record see that this whole case had build position and more important, the respondent's order is based on what he responded, believed what's happened in Florida. Florida will likely apply a legal standard contrary to the public policy of this state and sent out more

specifically in sentence. This is in the order. According to the case law, Florida appears interested only in one of the parties towards the form etcetera, etcetera, that's in the injunction order.

MR. GLOUB: That was the basis of I believe the decision solely upon what is going to happen in Florida. Now, this Court in Laurence versus City Surfing Services said that free in the contract is just I've just to mentioned is a strong and as a paramount of a policy and we have sophisticated business executive.

JUDGE WILLETT: What if they're not sophisticated? Does it matter?

MR. GOLUB: Then-- I, I don't think it depends on any bargaining position is a Supreme Court exception or issue. Can you consider that?

JUDGE O'NEILL: And that's clear it very well here, Okay?

MR. GOLUB: Pardon?

JUDGE O'NEILL: Well,-

JUDGE JOHNSON: We haven't found an equal bargaining to preclude many contracts such as this.

MR. GOLUB: No, No. And this Court and we have found no Texas case, your Honors. Non-enforcing a form selection clause based upon public policy exception and as I mentioned earlier, they are just a handful across the country, and that's because the Courts are going to let parties contract and let the contract be carried out. The substantial consideration has been received.

JUDGE WILLET: Can you tell us again why the sentence does not stand in the way your argument, one of the two or three points.

MR. GOLUB: The sentence addressed choice of law, your Honor. And the, and the policy issues considerations for determining choice of law that a Texas Court should apply to a dispute of Texas are markedly different than the policies addressing enforceability of form selection clauses which this Court has held are mandatory, absent a very strong showing with a heavy burden that it's unreasonable or unjust. It's, i'ts-- so the sentence never address that. There was not a first filed suit. So there's no issue of, of comity of done jurisdiction of looking at that. There was no issue giving into the free in the contract. It would lead up to raise there, it was whether Texas Court should apply Texas law. That is different here and what their position is advocating again is to look and get some briefing and find out if the Court-- the Trial Court can determine with some certainty enough to non-abuse of discretion as to what the actions would be, that's dangerous. And that adversely affects our federal system of laws.

JUDGE WILLETT: Autonation is heard on a original proceeding.

MR. GOLUB: Yes, your Honor.

JUDGE WILLETT: Autonation also filed and accelerated interlocutory appeal and had a decision from the 14th Court of Appeals, what's the status of that and then explain and then you don't have a lot of time left but why there's no adequate remedy about appeal if there's exhilarated interlocutory appeal process that autonation has availed itself of.

MR. GOLUB: The decision of the Court of Appeals was not reviewed in this Court-- were not sought, I mean not seek review in this Court, we did file a motion for rehearing on bond rehearing and reconsideration. Which was denied after about nearly three months of consideration. So that interlocutory appeal is, is dead if you will respond, I should say. Now, the reason why we have [inaudible] by appeal. First of all is this Court will know as chapter 51 of the ramy's code is very specific about what order should we appeal interlocutory unless you dismiss in form, selection clause is not one of them. In the brief, the relief that was sought that we have won in

the Court of Appeals, the result would be inquisite injunction would have been reversed and the result would be still two law suits. That's the only relief, that's the older relief that we asked for in all the relief that we could ask for. And having two law suits when there is a form selection clause, this Court held if you argue is clear of harassment. Where you have to go through the expense in time, waste of judicial resources on the case that will automatically be reversed is no remedy by appeal. So the reason why we don't have a remedy by appeal in interlocutory appeal, is because the oral dismissal was not reviewable there and even if it won, we will still have a question that this Court has held is not accurate. I see my time is up.

JUDGE WILLET: Any further questions? Thank you counsel. The case is submitted and the Court will be in recess.

COURT ATTENDANT: All rise.

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