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When a Promise is not a Promise: Georgia's Law on Non-compete Agreements, as Interpreted by the Eleventh Circuit in Keener v. Convergys Corporation, Gives Rise to Comity and Federalism Concerns

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WHEN A PROMISE IS NOT A PROMISE: GEORGIA’S LAW ON NON-COMPETE AGREEMENTS, AS INTERPRETED BY THE ELEVENTH CIRCUIT IN KEENER V. CONVERGYS CORPORATION, GIVES RISE TO COMITY AND FEDERALISM CONCERNS

I. INTRODUCTION

When an employer hires and trains a high-level employee, that employer invests a staggering amount of time, energy, and money in order to bring the employee up to speed and make him profitable. Often, this process exposes the employee to trade secrets and other sensitive information. When the training process ends, the employee is more marketable due to skills he has learned and the inside information he has garnered. Employers are aware of their particular vulnerability in this situation; an employee who no longer requires expensive training and has the “inside scoop” in his employer’s industry is a prime target for competing firms. Not only is that employee vested with costly training and skills learned at the expense of the employer, but he is also vested with an intimate knowledge of his employer’s customer lists, means of production, marketing strategies, and strategic plan.¹

Though employers often seek to protect the trade secrets that have been disclosed to departing employees through litigation and express non-disclosure agreements, these means offer limited, imperfect, or expensive protection. Litigation over trade secret misappropriation is costly, time-consuming, and unpredictable, even when compared to other types of litigation.² The required legal elements for a misappropriation claim are broad and, therefore, unlikely to be resolved by summary judgment.³ Thus, misappropriation cases often proceed to trial, where the outcome is uncertain and maintenance expensive.⁴ Express non-disclosure agreements are also an imperfect means of protecting trade secrets in the instance of departing employees. These contracts attempt to prohibit employees from disclosing certain information, usually including trade secrets, to

¹ See, e.g., Pepsico v. Redmond, 54 F.3d 1262, 1265-66, 35 U.S.P.Q.2d (BNA) 1010, 1014 (7th Cir. 1995) (describing general types of trade secrets, including a strategic marketing plan).
⁴ Gilson, supra note 2, at 598-601.
competitors. To a certain extent though, employees will inevitably disclose at least some of their prior employers' protected information; such employees will be unable to perfectly cordon off the knowledge restricted by the non-disclosure agreement.\(^5\) Thus, the express non-disclosure agreement is, at best, an incomplete protection against disclosure.

Employers look to cover the risk of disclosure by a departing employee completely before any and without the expense inadvertent disclosure and uncertainty of extended litigation. Therefore, an employer might seek an alternative to litigation and express non-disclosure agreements by entering into a non-compete covenant or agreement (NCA) with the employee. This agreement, which is most often ancillary to the employment contract, seeks to restrict the employee from working for a competitor for a certain length of time after the employee-employer relationship is terminated.\(^6\) In effect, a successful non-compete agreement seeks to ensure that any trade secrets the employee obtains become outdated and useless by the time the employee has the opportunity to disclose them while working for a competitor.

Different jurisdictions receive non-compete agreements with varying degrees of acceptance.\(^7\) While some courts are fairly lenient and uphold most NCAs, others apply strict scrutiny to these covenants and refuse to enforce NCAs that do not fit their particular tastes. Of these restrictive jurisdictions, perhaps the most extreme are Georgia and California.\(^8\) Both states routinely strike down such covenants as unenforceable. Consequently, these jurisdictions host a relatively high rate of employee mobility, which allows for an employee market that is unrestrained by strong NCAs and facilitates the free-flow of employees and the skills and information they possess.\(^9\) According to some scholars, this situation leads to faster and cheaper technological innovation and, in turn, a faster growing and stronger economy within each jurisdiction.\(^10\)

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\(^5\) The notion of inevitable disclosure is premised on the idea that an employee cannot compartmentalize his brain in order to exclude the trade secrets learned from a prior job when performing tasks for his new employer. See Redmond, 54 F.3d 1262 (issuing, on theory of inevitable disclosure, permanent injunction for unlimited duration in order to prevent employee from disclosing memorized trade secrets). In Redmond, the court reasoned that the employee would inevitably disclose the former employer's trade secrets or at least use them for the competitor's advantage. While the result in Redmond is atypical, courts are increasingly willing to recognize its rationale. See Gilson, supra note 2, at 624.


\(^7\) See infra note 23 and accompanying text.

\(^8\) See infra notes 64-65 and accompanying text.

\(^9\) See Gilson, supra note 2, at 598-601.

\(^10\) See generally ANNALEE SAXENA, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (Harvard University Press 1994); Gilson, supra note 2; Hanna
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This Note begins by critically reviewing Georgia’s almost blanket refusal to enforce non-compete agreements and then postulates current and future repercussions of Georgia’s anti-intangible-property and anti-freedom-of-contract stance regarding NCAs. Finally, the crux of this Note focuses on the constitutional repercussions of the Eleventh Circuit’s decision in Keener v. Convergys Corporation. In particular, this Note explores whether the Eleventh Circuit’s ruling turned Georgia into a safe haven for employees wishing to shed their restrictive covenants. This safe haven gives rise to comity concerns and implicates the Privileges and Immunities Clause and the Dormant Commerce Clause of the Constitution.

II. BACKGROUND

A. A BRIEF OVERVIEW OF GEORGIA’S HOSTILITY TOWARDS NON-COMPETE AGREEMENTS

Georgia courts are averse to upholding non-compete agreements (NCAs) ancillary to employment contracts. Article III of the Georgia Constitution disallows enforcement of contracts that defeat or lessen competition, and thus, serves as the fountainhead of the courts’ reluctance to enforce NCAs. In interpreting Article III, the Georgia Supreme Court has deemed NCAs to be partial restraints on trade. The court held that while the Georgia Constitution does not prohibit enforcement of all NCAs, such agreements are only enforceable “if [the agreement] is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.” The court has condensed the preceding requirements by first balancing certain interests of the employer and employee and then applying a three-element reasonableness test that examines, with marked skepticism, the duration, territorial coverage, and scope of restricted activity set forth by the NCA. Thus, Georgia


11 342 F.3d 1264 (11th Cir. 2003).
12 GA. CONST. art. III, § 6, ¶ V(c).
14 Id. (citing Rakestraw v. Lanier, 30 S.E. 735 (Ga. 1898)) (holding that while general restraints on trade offend the language of Article III of the Georgia Constitution, partial restraints on trade do not do so per se).
15 Watson v. Waffle House, Inc., 324 S.E.2d 175, 178 (Ga. 1985) (holding that the three-element reasonableness test is “not...an arbitrary rule but...a helpful tool in examining the reasonableness of the particular factual setting to which [the test] is applied”); see W.R. Grace, 422 S.E.2d at 531.
courts apply strict, if not entirely severe, scrutiny to NCAs ancillary to employment contracts.\textsuperscript{16}

Moreover, if a court finds a single term or clause of a NCA ancillary to an employment agreement to be unreasonable, the court will refuse to enforce the entire covenant, as well as any other NCAs within the overall employment agreement.\textsuperscript{17} While most jurisdictions are more lenient and will modify or sever the unacceptable term or clause in order to save the NCA—which is known as the blue pencil doctrine—Georgia has consistently rejected this approach.\textsuperscript{18} If only one aspect of one NCA is overbroad and unenforceable, the court will void that NCA, as well as any other NCAs contained in the employment agreement.

The restrictive rules outlined above make drafting and enforcing NCAs in Georgia a daunting task with a high chance of failure. In Georgia, NCAs are more likely than other contracts to be struck down entirely, despite professional drafting. Consequently, Georgia's approach to NCAs has received much criticism from the bar and bench.\textsuperscript{20} Mr. Chief Justice Jordan's now-famous quote, that "[t]en Philadelphia Lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of [the Georgia Supreme Court," serves as the catch-phrase of this criticism.\textsuperscript{21} Indeed, Georgia's stance on NCAs seems to be anti-property, and seems to stifle (applying the three-element reasonableness test). For a thorough and recent discussion of the interest-balancing and three-element reasonable test, and the strict manner in which they are applied, see generally Steven E. Harbour, Restrictions on Post-Employment Competition by an Executive Under Georgia Law, 54 MERCER L. REV. 1133, 1135-66 (2003). For a comparison of Georgia's enforceability test for NCAs that are ancillary to employment agreements as opposed to those that are ancillary to sale of business contracts, see generally Gary P. Kohn, Comment, A Fresh Look: Lowering the Mortality Rate of Covenants Not to Compete Ancillary to Employment Contracts and to Sale of Business Contracts in Georgia, 31 EMORY L.J. 635 (1982).


\textsuperscript{17} Advance Tech. Consultants, Inc. v. RoadTrac, LLC, 551 S.E.2d 735, 737-38 (Ga. Ct. App. 2001) (overruling, in part, Wright v. Power Indus. Consultants, Inc., 508 S.E.2d 191 (Ga. Ct. App. 1998) (evaluating multiple non-compete covenants within a single employment agreement individually)). Courts may evaluate non-compete covenants and non-disclosure covenants independently, however, and are not bound to strike down both if only one is unenforceable. Compare Wright, 508 S.E.2d at 194-95 (upholding a non-disclosure covenant and some, but not all, non-compete covenants contained in the same employment agreement individually), with RoadTrac, LLC, 551 S.E.2d at 737-38 (overruling Wright only so far as the court upheld one non-compete covenant but not another within the same employment agreement).

\textsuperscript{18} For a more detailed discussion of the blue pencil doctrine, see Kohn, supra note 15, at 691-98. See, e.g., Harville v. Gunter, 495 S.E.2d 862, 864 (Ga. Ct. App. 1998) (refusing to sever, or blue pencil, an offending term of a NCA despite the presence of a severability clause).

\textsuperscript{19} Harbour, supra note 15, at 1194.

\textsuperscript{20} Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977) (Jordan, J., dissenting).
freedoms of contract and employment. But more fundamentally, the high failure rate of NCAs in Georgia draws the most fire from critics.\textsuperscript{22}

B. THE COURTS' INCREASING WILLINGNESS TO APPLY GEORGIA LAW TO NON-COMPETE AGREEMENTS MADE OUTSIDE GEORGIA

As previously noted, Georgia has espoused a thoroughly restrictive view of NCAs that is incongruous with that of most states.\textsuperscript{23} This disconnect between Georgia's law and the law in a majority of states leads to frequent conflict-of-law issues. Conflicts are particularly common when a party to a NCA executed outside of Georgia attempts to enforce the covenant within Georgia's borders.\textsuperscript{24} While the application of Georgia NCA law to out-of-state covenants may come as a surprise to some contracting parties,\textsuperscript{25} others have foreseen this development and have addressed it with a choice-of-law clause. Recently though, Georgia courts have been increasingly willing to disregard a NCA's choice-of-law clause and, instead, apply Georgia law to the agreement. This trend began with the Georgia Supreme Court's 1977 decision in \textit{Nasco, Inc. v. Gimbert}.\textsuperscript{26} The \textit{Nasco} court first recited that, in general, choice-of-law clauses may not be adverse to the policy or interests of the state\textsuperscript{27} and then reiterated that the validity of NCAs and non-disclosure covenants also turns on the same public policy because they "affect the flow of information needed for competition among businesses. . ."\textsuperscript{28} The court's reasoning suggests that the policy considerations dictating the enforceability of

\textsuperscript{22} \textit{See}, e.g., Barnes Group, Inc. v. Harper, 653 F.2d 175, 178-79 (5th Cir. Aug. 1981) (remarking that Georgia NCAs have a high mortality rate, which makes gleaining a rule out of prior Georgia cases difficult) (citations omitted).

\textsuperscript{23} \textit{See} Gilson \textit{supra} note 2, at 603-06 (outlining Massachusetts's forgiving NCA law, and likening it to most other jurisdictions).

\textsuperscript{24} \textit{See}, e.g., Dothan Aviation Corp. v. Miller, 620 F.2d 504, 507 (5th Cir. 1980) (finding that Alabama's approach to enforcing non-compete covenants in employment contracts, including its use of the "blue pencil" doctrine, was in direct conflict with corresponding Georgia law).

\textsuperscript{25} The parties may not have foreseen a scenario in which their NCA is subjected to the rigors of Georgia law. While this may be a pleasant surprise to the restricted employee, it nonetheless represents a seeming disparity between contractual intent and interpretation.

\textsuperscript{26} 238 S.E.2d 368 (Ga. 1977).

\textsuperscript{27} \textit{Id.} at 369 (citing Ulman, Magill & Jordan Woolen Co. v. Magill, 117 S.E. 657 (Ga. 1923) and \textit{Restatement (Second) of Conflict of Laws} § 187(2)(b) (1971)). The \textit{Nasco} court stated that "[t]he law of the jurisdiction chosen by the parties will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state."

\textsuperscript{28} \textit{Id.} (citing Thomas v. Best Mfg. Corp., 218 S.E.2d 68 (Ga. 1975) and Howard Schultz & Assoc. of S.E., Inc. v. Broniec, 236 S.E.2d 265 (Ga. 1977)). \textit{See supra} notes 13-15 and accompanying text (outlining the policy that determines enforcement of NCAs in Georgia).
NCAs in Georgia also control a choice-of-law inquiry.\(^2\) This rule, pushed to its limits, seems to state that if any NCA asserted in Georgia does not comport with Georgia's substantive law, then Georgia law will apply to, and thus invalidate, the agreement.\(^3\) In effect, this means it is Georgia's way or no way concerning NCA enforcement within the state. \(Nasco\) did not press its rule this far though. The \(Nasco\) employee was a citizen of Georgia at the time he executed the NCA and was to perform his employment duties within the state.\(^4\) The possibility of enforcement of the NCA and litigation in Georgia courts was thus foreseeable.\(^5\) Because the parties in \(Nasco\) foresaw, or at least should have foreseen, that the NCA was likely to be enforced within Georgia, the court did not hesitate to apply Georgia law to their agreement. The court cited the covenant's close and numerous ties with Georgia to justify its rule and applied Georgia law despite the choice-of-law clause to the contrary.\(^6\)

Initially, Georgia courts followed the rationale underlying the \(Nasco\) decision and relied, at least implicitly, on a connection between the NCA and the state of Georgia to justify disregarding a choice-of-law clause in a NCA.\(^7\) In the last six years, however, the courts have discarded the importance of that connection. In 1997, in \textit{Enron Capital & Trade Resources Corp. v. Pokalsky},\(^8\) the Georgia Court of Appeals refused to observe a choice-of-law clause in a NCA that had almost no connection to the state of Georgia. The court applied the rule in \(Nasco\) to a NCA that was presumably executed in Texas and governed an employee whose primary duties were also in Texas.\(^9\) While the employer's scope of business was national, and included Georgia, neither the employer nor the employee seemed to contemplate specifically the prospect of enforcing the NCA in Georgia.\(^10\) Thus, the covenant had only the most remote connection with Georgia.

Furthermore, the employee was able to void the NCA proactively by entering the employ of a Georgia corporation and then seeking declaratory relief from the

\(^{29}\) \textit{Cf. Nasco}, 238 S.E.2d 368 (announcing that choice-of-law clauses in a NCA cannot go against Georgia's public policy or state interest); W.R. Grace & Co. v. Mouyal, 422 S.E.2d 529 (Ga. 1992) (defining Georgia's public policy and state interest in the context of NCAs).

\(^{30}\) \textit{See Nasco}, 238 S.E.2d 368.

\(^{31}\) \textit{Id.} at 369. Furthermore, the covenant was drafted on behalf of a corporation located in the neighboring state of Tennessee.

\(^{32}\) \textit{Id.}

\(^{33}\) \textit{Id.}

\(^{34}\) \textit{See Dothan Aviation Corp. v. Miller}, 620 F.2d 504 (5th Cir. 1980) (disregarding a choice-of-law clause in a NCA that had significant contacts with Georgia, including the fact that the employment on which the NCA was based was to be performed within Georgia).


\(^{36}\) \textit{Id.} at 139.

\(^{37}\) \textit{Id.} at 137-38.
NCA using Georgia law. The court not only upheld the employee's motion for declaratory judgment but also upheld an injunction prohibiting the employer from attempting to enforce the NCA in Texas or anywhere else. The court's ruling rendered the NCA void not only within Georgia but also anywhere in the world. In effect, the court completely rescinded the NCA.

This worldwide injunction had startling repercussions on trade secret law—and specifically NCA enforceability—in Georgia, as well as in other jurisdictions. As the law stood after Enron, any promisor-employee could apply Georgia's strict laws to his NCA. If that NCA were contrary to Georgia's public policy, then the court would enjoin the promisee-employer from attempting to enforce the covenant in any jurisdiction whatsoever. Thus, Georgia could serve as a transitory stop or waypoint for employees seeking to shed the duties of their NCAs. An employee could persuade a Georgia court to declare his NCA void, even though this covenant would have been either enforced as-is or as-modified in most other jurisdictions. The employee could then compete with his former employer, with whom he promised not to compete, in Georgia and in all other jurisdictions. Thanks to Enron, the employee would be free from the employer's reprisals or enforcement attempts because of the worldwide injunctive relief afforded by a Georgia court.

While the result in Enron appears extreme at first, the facts of the case seem to bolster the court's leap from precedent. The covenant was grossly overbroad in terms of the duration, territorial coverage, and scope of restricted activity. The NCA would most likely have been unenforceable in its original form and in

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38 Id. In fact, the employee and his new employer, Southern Electric International, Inc., filed an action seeking a declaratory judgment that the NCA was subject to Georgia law, and therefore void, on the day the employee resigned from his former Texas employer (Enron).

39 Id. at 138-39. Instead of filing an action in Texas, the former employer should have, according to the court, structured its attempts to enforce the NCA as a compulsory counterclaim in the employee's declaratory action in Georgia. Id.

40 That is assuming, of course, that the court had personal jurisdiction over the employee and employer. See O.C.G.A. § 9-10-91 (1982) (setting forth requirements for personal jurisdiction over nonresidents).

41 See supra notes 18-19 and accompanying text.

42 That is, the employee had the ability to move to Georgia and have a court disregard a NCA's choice-of-law clause and declare the covenant void under Georgia law even though neither the employee nor the NCA had any definite connections with Georgia.

43 Before the decision handed down in Enron, Georgia courts had disregarded choice-of-law clauses in NCAs that had connections that were more concrete with the state of Georgia so that the parties, at least theoretically, could have foreseen enforcing the NCA within Georgia. See, e.g., Dothan Aviation Corp. v. Miller, 620 F.2d 504 (5th Cir. 1980) (disregarding a choice-of-law clause in a NCA governing a Georgia employee).

44 Enron, 490 S.E.2d at 139; Watson v. Waffle House, Inc., 324 S.E.2d 175, 178 (Ga. 1985) (outlining and explaining three-factor reasonable test for NCAs).
need of heavy modification under either Texas law or the laws of most other jurisdictions. Therefore, when the court struck down the NCA on a global scale, it was at least approximating the NCA's fate in other courts.

Since handing down the Enron decision in 1997, the Georgia Court of Appeals has been increasingly willing to disregard choice-of-law clauses in NCAs, despite the covenants' attenuated connections with Georgia. These cases set the stage for a expansion post-Enron of Georgia's refusal to observe choice-of-law clauses in NCAs ancillary to employment agreements. Indeed, Georgia courts were pushing the Nasco rule toward its limits. Enron foreshadowed that courts applying Georgia law would soon invalidate any NCA asserted in a Georgia court that does not comport with its restrictive substantive law. Moreover, Enron's injunctive relief would serve to void the covenant on a global scale, and in effect, rescind the NCA.

C. THE DECISION IN KEENER

In Keener v. Convergys Corporation, the Eleventh Circuit simultaneously reinforced and limited Georgia's law on out-of-state NCAs. The court first clarified Georgia's stance on choice-of-law provisions in NCAs and then checked the Georgia Court of Appeals' push toward invalidating NCAs on a global scale.

First, the Eleventh Circuit clarified Georgia's conflict of laws rule on choice-of-law clauses via a certified question to the Georgia Supreme Court. The Georgia Supreme Court responded by reaffirming Georgia's traditional lex loci contractus rule, while expressly rejecting the Restatement approach to choice-of-law clauses in a certified question to the Georgia Supreme Court.

45 See Butler v. Arrow Mirror & Glass, Inc., 51 S.W.3d 787, 792 (Tex. App. 2001) (outlining Texas' statutory requirements for NCAs ancillary to employment contracts, which include both reasonableness requirements and compulsory blue penciling). If a court had applied Texas law to Enron's NCA, the compulsory blue pencil doctrine might have saved the covenant, albeit in an altered and limited form.
46 See Hulcher Servs., Inc. v. R.J. Corman R.R. Co., 543 S.E.2d 461 (Ga. Ct App. 2000) (refusing to observe a choice-of-law clause in a NCA that was not executed in Georgia and performance of which was not intended in Georgia); Wolff v. Protege Sys., Inc., 506 S.E.2d 429 (Ga. Ct. App. 1998), overruled on other grounds by Advance Tech. Consultants, Inc. v. RoadTrac, LLC, 551 S.E.2d 735 (Ga. Ct. App. 2001) (disregarding a choice-of-law clause in a covenant that, while not executed in Georgia, did include certain Georgia counties as geographical limitations).
47 342 F.3d 1264 (11th Cir. 2003), certifying questions to 582 S.E.2d 84 (Ga. 2003), and overruling in part 205 F. Supp. 2d 1374 (S.D. Ga. 2002).
48 See id. at 1266-67.
49 The Georgia Supreme Court explained:

Under this approach, "[contracts] are to be governed as to their nature, validity and interpretation by the law of the place where they were made, except where it appears from the contract itself that it is to be performed in a State other than that in which it was made, in which case . . . the laws of that sister State will be
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Initially, the traditional rule seems to constrain Georgia courts from disregarding choice-of-law provisions more so than the Restatement approach. The Georgia Supreme Court downplayed the importance of any choice-of-law rule, however, stating that such inquiries do not turn on the black-letter law but are instead governed by public policy. Thus, through its certified question, the Eleventh Circuit allowed Georgia to solidify its policy-based rule on choice-of-law clauses in NCAs and to settle any debate regarding the ease with which the courts can ignore these clauses for policy reasons.

Second, the Eleventh Circuit restricted the scope of Georgia courts’ ability to invalidate NCAs by limiting the courts’ ability to enjoin a party’s enforcement attempts. Before Keener, the Georgia Court of Appeals had enjoined an employer from attempting to enforce a NCA, to which Georgia law applied and invalidated, on a global scale. The district court, in trying Keener, followed this precedent and

applied..."


The Restatement requires that, in order to override a choice-of-law clause, the overriding jurisdiction must have a “materially greater interest” in applying its laws. To make this determination, the Restatement advances the “center of gravity” or “grouping of contacts” theory on conflicting laws in a choice-of-law context. According to the Restatement, this theory requires the court to examine five factors in order to determine which state law to apply in contract cases involving choices of law. These factors include (1) the place of contracting, (2) the place of negotiation, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residency, nationality, place of incorporation, and place of business of the parties.

Trimm, 311 S.E.2d 460 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971)). Because the NCA in Keener was negotiated, executed, and performed, at least in part, in Ohio or Illinois (and not Georgia), application of the Restatement test may well have the court to uphold the choice-of-law clause. See Keener, 582 S.E.2d at 1268.

Keener, 582 S.E.2d at 86-87 (deciding a certified question from the Eleventh Circuit).

Cf. supra notes 45-46 and accompanying text.

See Keener, 582 S.E.2d at 87 (deciding a certified question from the Eleventh Circuit).

By addressing the Eleventh Circuit’s certified question, the Georgia Supreme Court corrected the circuit’s eleven-year misunderstanding of Georgia law. In Nordson Corp. v. Plasschaert, 674 F.2d 1371 (11th Cir. 1982), the Eleventh Circuit upheld a choice-of-law clause in a NCA asserted in Georgia notwithstanding the fact that the covenant would have been unenforceable if Georgia law applied. See also Bryan v. Hall Chemical, 993 F.2d 831 (11th Cir. 1993) (arriving at a similar conclusion by relying on Nordson). The Nordson court reached its conclusion by applying section 187(2) of the 1971 Restatement (Second) of Conflict of Laws. Subsequently, the Georgia Supreme Court expressly rejected the Eleventh Circuit’s reliance on the Restatement and disproved of the outcomes in Nordson and Hall Chemical. Keener, 582 S.E.2d at 86-87.

crafted an injunction against the employer that was also global in scope.\textsuperscript{56} The district court not only applied Georgia law to the NCA despite the parties' express intentions and anticipations to the contrary, but it also prevented the employer from enforcing the covenant in any jurisdiction whatsoever.\textsuperscript{57} In effect, the district court rescinded the contract and allowed the employee to compete at will.

The Eleventh Circuit, in \textit{Keener}, curtailed this worldwide injunctive relief for NCAs that violate Georgia public policy.\textsuperscript{58} The court held that Georgia may only apply its public policy within the borders of the state. Therefore, a Georgia court that strikes down a NCA can only enjoin the employer-promisee from enforcing the covenant within Georgia.\textsuperscript{59} By requiring the scope of an injunction prohibiting enforcement of unacceptable NCAs to be reasonable, and therefore, limited to Georgia, the court implicitly overruled the Georgia Court of Appeals' injunctive technique in \textit{Enron}.\textsuperscript{60} Georgia courts could no longer enjoin an employer's enforcement attempts on a global scale.

After \textit{Keener}, Georgia no longer serves as a potential waypoint for employees looking to shed a NCA and then seek employment within another jurisdiction. If employees wish to free themselves from NCAs that are enforceable in other, less restrictive jurisdictions, then they must remain in Georgia until the duration

\textsuperscript{56} \textit{Keener}, 205 F. Supp. 2d 1374.
\textsuperscript{57} See id. at 1382.
\textsuperscript{58} \textit{Keener}, 342 F.3d at 1269.
\textsuperscript{59} Id. The court stated:

\begin{quote}
We hold that the district court abused its discretion because it did not tailor the injunction to include Georgia only. The NCA is unenforceable under Georgia law, however, because the public policy of Georgia is hostile toward any limitations on competition, and it will apply its own law to any agreements against its public policy even if the parties contracted in another state with the understanding that the other state's law would apply. . . . Georgia of course is entitled to enforce its public policy interests within its boundaries and, in the circumstance that litigation over a NCA is initiated in Georgia, it may employ that public policy to override a contracted choice-of-law provision. However, Georgia cannot in effect apply its public policy decisions nationwide—the public policy of Georgia is not that everywhere. To permit a nationwide injunction would in effect interfere both with parties' ability to contract and their ability to enforce appropriately derived expectations. . . . The district court extended the injunction beyond a reasonable scope by permitting the public policy interests of Georgia to declare a NCA unenforceable nationwide, when its law was not intended by the parties to apply in the first place. Accordingly, the injunction should be modified to preclude Convergys from enforcing the NCA in Georgia only.
\end{quote}

\textit{Id.} at 1269-70.
\textsuperscript{60} See id. at 1269-70; see also \textit{Enron}, 490 S.E.2d at 729-30 (upholding a world-wide injunction against an employer-promisor which prohibited enforcement of a NCA that was contrary to Georgia public policy).
of their NCA expires. If the employee opts to stay within Georgia, however, the statewide injunction—still permissible under Keener—will free him not only from the NCA in at issue but also from any other non-compete covenants within the employment contract because those covenants are inseverable.61 Recall, however, that non-disclosure agreements are not subject to the inseverability rule.62 While the employee may be able to escape multiple non-compete covenants by moving to Georgia, he will still be bound by any non-disclosure agreements. Nonetheless, the employee will most likely be free to compete with his former employer inside the bounds of Georgia without fear of an injunction. Georgia courts are not even close to recognizing a theory of inevitable disclosure and will, therefore, be unlikely to enjoin the employee from competing in order to enforce a non-disclosure agreement.63 Thus, Georgia remains a safe haven for employees who seek to escape NCAs; however, these employees must now remain in Georgia to benefit from Georgia's liberally applied injunctive relief.

III. ANALYSIS

A. COMITY AND FEDERALISM PROBLEMS CREATED BY GEORGIA'S OUTLOOK ON CHOICE-OF-LAW CLAUSES IN NON-COMPETE AGREEMENTS

1. California: A Useful Comparison. Keener ended the questionable practice of granting worldwide injunctions to employees restricted by NCAs that do not suit Georgia's tastes. The Eleventh Circuit's decision prompts concerns, however over comity and federalism issues and implicates the Equal Protection and Dormant Commerce clauses of the Constitution. A comparison between NCA jurisprudence in Georgia and California exposes these uncertainties. Because of the similarity of both the underlying policy and choice-of-law rules in the two jurisdictions, this comparison yields predictive value. The problems and issues raised and adjudicated in one jurisdiction can serve as a bellwether for the other, both in terms of passive prediction and active, suggestive precedent.

California, like Georgia, embraces a strong public policy against contractual restraints on trade64 and imposes restrictions on NCAs ancillary to employment

61 See supra note 17 and accompanying text.
63 See supra note 5 and accompanying text.
64 Compare GA. CONST. art. 3, § 6, ¶ V(c), with Cal. Bus. & Prof. Code § 16600 (West 1999). California, unlike Georgia, expresses its policy against restraints on trade via statute and not constitution. Nonetheless, the two states' policies against restraints on trade are similar in structure and effect. See Harville, 495 S.E.2d at 864.
contracts which are analogous to those in Georgia. Furthermore, California and Georgia are similar in their views toward—or, more aptly, their disregard of—choice-of-law provisions in NCAs. California courts apply their restrictive substantive law to NCAs asserted in California between non-California employees and non-California employers even if the covenant was executed in a foreign state and performance was contemplated in a foreign state. As in Georgia, a foreign employee governed by a NCA may take a job in California, seek declaratory judgment against his former employer, and enjoy California's restrictive, employee-friendly laws.

2. Race to the Courthouse and Parallel Enforcement: Recently Developed Certainty in California and Ambiguities in Keener.

a. Race to the Courthouse and Parallel Enforcement. One way to attempt to clarify the law governing a contract is to draft a choice-of-law clause within the agreement. As demonstrated above though, jurisdictions like California and Georgia seldom heed these clauses. Often, the best way to ensure that a desired state's laws apply to a contract is to file the dispute within that state's courts. This is particularly true in disputes concerning choice-of-law clauses within NCAs. If an employer seeks to enforce a NCA pursuant to its choice-of-law clause, it will file in the state specified by the choice-of-law clause. The employer will then have both the contractual choice-of-law clause and the state's conflict-of-law rules working in its favor. Conversely, the employee who seeks to apply more

65 For instance, California presumes NCAs to be impermissible restraints on trade and only enforces them if they are narrowly tailored and necessary to protect trade secrets. See Gilson, supra note 2, at 607-09 nn.108-09. Professor Gilson cites several California cases that recognize the necessary-protection-for-trade-secrets exception to California's general stance against NCAs. Gilson continues, however, by observing that these cases merely provide an exception in dicta. Indeed, research reveals no case in which a California court has upheld a NCA based on the purported necessary-protection-for-trade-secrets exception. If California does not adhere to this exception and invalidates NCAs per se, then California's NCA law would be even stricter than, and less analogous to, Georgia's stance on NCAs.

66 See Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73, 75 (Cal. Ct. App. 1998). The court stated:

California law may be applied to determine the enforceability of a covenant not to compete, in an employment agreement between an employee who is not a resident of California and an employer whose business is based outside of California, when a California-based employer seeks to recruit or hire the nonresident for employment in California.

Id.


68 For example, an employer sues to enforce a NCA in Massachusetts. This NCA contains a choice-of-law clause specifying Massachusetts law as applicable to the covenant.

69 States' conflict-of-law rules presume, with varying levels of strength, that their own
favorable substantive law to the NCA, in spite of the choice-of-law provision, will file a suit seeking declaratory judgment (declaring that first, the choice-of-law clause is not operative, and second, the NCA is void) in a state with a restrictive stance on NCAs and their choice-of-law provisions such as Georgia or California. 70

The difference between the employee's and the employer's desired jurisdiction leads to two related problems. First, the employee and employer will engage in a race to their respective courthouses in order to gain certain procedural advantages. 71 The employer will attempt to file first in the choice-of-law specified state; the employee will also try to be the first to file, but in a state with a more restrictive stance towards NCAs and their choice-of-law clauses. 72 This race-to-the-courthouse scenario is the subject of much criticism 73 and seems intrinsically unfair. How can justice be served when the choice of outcome-determinative, substantive law 74 is based upon which party was the first to file and argue its suit?

Second, both parties strive to be the first to file in order to gain a measure of priority over the other in the event of parallel actions. 75 Parallel actions, which are two suits filed in different jurisdictions by the same parties seeking resolution of the same issue, can lead to a conflict between state courts. This conflict can have substantive laws will apply to a dispute brought in their courts. See supra notes 49-50 and accompanying text (outlining the Restatement and lex loci choice-of-law rules).

70 Note that the employee's desired jurisdiction will hardly ever be the state specified by the choice-of-law clause. In these cases, the employer usually drafts the choice-of-law clause and will certainly choose a state with a more favorable outlook on NCAs than Georgia or California, for example. Even if the employee possesses some bargaining power and can influence the choice-of-law clause, any rational and informed employer would not agree to apply California or Georgia law to the NCA. To do so would at least require the employer to restrict severely the scope of the NCA in order to maintain compliance with strict rules. More likely, however, specifying Georgia or California law to apply to a NCA not drafted within the jurisdiction would, in effect, damn the covenant to failure even as it is drafted. See Harbour, supra note 15, at 1194; see also Fuller v. Kolb, 234 S.E.2d 517, 518 (Ga. 1977) (Jordan, J., dissenting).


73 See Rogers, supra note 71 (criticizing the race-to-the-courthouse situation in the context of patent litigation appellate jurisdictional issues).

74 Often, the parties contest the choice-of-law clause issue so vehemently because the application of one state's law over another's will determine whether the NCA is upheld as-is, modified, or voided altogether.

75 For instance, the later-filed action may be affected by adjudications in the first-filed action. Decisions in the first action may have a preclusive effect (e.g., res judicata) on the second-filed action.
embarrassing consequences as the two courts engage in a power struggle to apply their own law and decide the issue before them.

Recently, in California, this exact type of a power struggle arose in a context similar to Keener. In Advanced Bionics Corp. v. Medtronic, Inc.,76 the Supreme Court of California was presented with a vexing scenario. An employee sought to escape his NCA by filing for declaratory relief in employee-friendly California. Shortly thereafter, his employer attempted to enforce the NCA by filing a complaint in Minnesota pursuant to the NCA’s choice-of-law clause.77 After some procedural jockeying, both parties obtained antisuit injunctions prohibiting the other party from pursuing the suit that it filed.78 Thus, the California Supreme Court prohibited the employer from continuing its enforcement attempts in Minnesota and required that it litigate the matter only in California.79 In response, the Minnesota court ordered the employee to cease his attempts to have the California court declare the NCA invalid and compelled him to pursue the matter only in Minnesota.80 The parties and the courts were deadlocked. While the California Supreme Court finally ended the standoff by yielding to the Minnesota courts, despite the fact that the Minnesota action was filed second, it did so on discretionary grounds of judicial restraint and comity.81 The California Supreme Court failed to craft a clear rule and instead reached its holding after a balancing of conflicting policies and a fact-specific analysis.82 Employers and employees,

77 Medtronic, 59 P.3d at 233. Presumably, Minnesota’s NCA laws were more favorable to the employer than were California’s.
78 Id. at 234. The lower court issued an ex parte temporary restraining order and a show-cause order preceding a temporary injunction. In effect, the court prohibited the employer from “taking any action whatsoever, other than in [the California court] to enforce the [covenant not to compete] . . . or otherwise restrain” the employee from competing.
79 Id. at 234; Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 446 (Minn. Ct. App. 2001) (recounting that the Minnesota “District Court issued a temporary injunction prohibiting [the employee] from interfering with the noncompete agreement . . . and barring [the employee] from ‘providing [competitive] service or assistance’ ”).
80 Medtronic, 59 P.3d at 234.
81 Id. at 235-38. The California Supreme Court first stated the need for judicial restraint to avoid a race to the courthouse and multiple inconsistent judgments. The court then cited comity considerations—that California should extend the courtesy of recognition to Minnesota’s laws. The California Supreme Court then held that the principles of restraint and comity outweighed California’s strong public policy against restraints on trade. Id.
82 Cf. id. at 237 (stating that although “a California court might reasonably conclude that the [NCA] at issue here is void in this state, this policy interest does not, under these facts, justify issuance of a TRO against the parties in the Minnesota court proceedings”); id. at 238-39 (Brown, J., concurring) (advocating a more concrete rule, and justifying the majority opinion on choice-of-law
therefore, gained little predictive value or guidance from Medtronic's holding. Employees learned that moving to California was not a foolproof way to escape a choice-of-law clause in their NCAs; at the same time, employers learned that they might be able to enforce a NCA in California that runs contrary to California law and policy. If employers are willing to initiate a parallel action in response to an employee's declaratory judgment suit and incur the added expense of litigating in two fora, they may be rewarded with favorable results.

b. Ambiguities in Keener. The struggle between state courts, and the ensuing uncertainty exemplified in Medtronic, could surface in Georgia after Keener. While the Eleventh Circuit curtailed the scope of Georgia courts' injunctive power in NCA suits to extend only to Georgia’s borders, its rule on the scope and effect of such injunctions is ambiguous. The court found the permissible scope of the injunction to prohibit “enforcement of the NCA in Georgia, while [the employee] remains a resident of Georgia.” Ambiguity arises in the two possible meanings of the word “enforcement” as used by the court. If the Eleventh Circuit meant only to prohibit the employer from attempting enforcement of the NCA in a Georgia court, then the parallel action problem in Medtronic would not surface. The scope of the permissible injunction pursuant to this reading of Keener would not impact the employer's enforcement attempts outside of Georgia (i.e., a parallel action), as California's injunction did in Medtronic. Thus, the scenario of dueling injunctions and the attendant issues of sovereignty and federalism in Medtronic would not arise.

The dueling injunction problem could surface, however, if the Eleventh Circuit meant to enjoin the employer from any attempted enforcement of the NCA while that employee remained within Georgia and not just actions initiated in Georgia courts. Under this interpretation, the Eleventh Circuit’s injunction reached beyond the borders of Georgia by prohibiting the employer from filing

and not policy-balancing grounds).

83 See Keener v. Convergys Corp., 342 F.3d 1264, 1269-70 (11th Cir. 2003); see also supra notes 58-60 and accompanying text.

84 Keener, 342 F.3d at 1271.

85 In this interpretation, the injunction would seem redundant in light of the claim and issue preclusive effects of the enjoining court’s decision. Nonetheless, the wording of the district court’s order and the appellate court’s modification in response, supports this interpretation. The district court ordered that the employer “is permanently enjoined from enforcing the NCA against [the employee] in any court worldwide.” Keener v. Convergys Corp., 205 F. Supp. 2d 1374, 1382 (S.D. Ga. 2002) (emphasis added). Consequently, the appellate court, in effect, modified the injunction to prohibit “the enforcement of the NCA in Georgia, while [the employee] remains a resident of Georgia.” Keener, 342 F.3d at 1271 (emphasis added). Thus, the appellate court’s opinion could be read as modifying and restricting the “any court worldwide” language of the district court to include only Georgia courts. See Keener, 205 F. Supp. 2d at 1382.

86 Medtronic, 59 P.3d at 237-38.
an enforcement attempt in any jurisdiction for as long as the employee remained a resident of Georgia. If this is a proper statement of the precedent set forth by Keener, then a scenario of dueling injunctions, like in Medronic, is possible within Georgia.87

Furthermore, if a Medronic scenario did arise in Georgia, the Georgia courts would be prevented by Section 1-3-9 of the Georgia Code from deferring to the other jurisdiction on the basis of comity. Thus, the California court’s solution in Medronic is thus unavailable to Georgia courts.88 Indeed, the Georgia Supreme Court used the same section of its code to justify applying Georgia law over a foreign jurisdiction’s law in Keener.89 Georgia courts, unlike their California counterparts, would not and could not back down when faced with dueling antisuit injunctions. To resolve the conflict, the other state would have to acquiesce and allow Georgia to have its way with the NCA. Otherwise, the employer, employee, and the courts would be locked in a stalemate swirling with threats of contempt proceedings and troubling issues of federalism and sovereignty.90

87 Under this interpretation, the employer in Keener could not have filed a parallel action after the district court issued the injunction, at least not without risking contempt proceedings. In similar scenarios after Keener, however, an employer could file a parallel action any time before the trial court issued an injunction like the one issued in Keener without facing the risk of being held in contempt.

88 See O.C.G.A. § 1-3-9 (2000); Medronic, 59 P.3d at 236-38. Section 1-3-9 states:
The laws of other states and foreign nations shall have no force and effect of themselves within this state further than is provided by the Constitution of the United States and is recognized by the comity of states. The courts shall enforce this comity, unless restrained by the General Assembly, so long as its enforcement is not contrary to the policy or prejudicial to the interests of this state.

89 See Convergys Corp. v. Keener, 582 S.E.2d 84, 85-87 (Ga. 2003) (deciding a certified question, and citing Nasco, Inv. v. Gimbert, 238 S.E.2d 368 (Ga. 1977)) (using an interpretation of Section 1-3-9 to justify and approve of the district court’s decision to ignore a choice-of-law clause, and apply Georgia law to the NCA in Keener).

90 For a detailed discussion of the constitutional impact of antisuit injunctions, which is beyond the scope of this Note, see generally John Ray Phillips, III, Comment, A Proposed Solution to the Puzzle of Antisuit Injunctions, 69 U. CHI. L. REV. 2007 (2002); Chris Heikaus Weaver, Note, Binding the World: Full Faith & Credit of State Court Antisuit Injunctions, 36 U.C. DAVIS L. REV. 993 (2003).
B. Friction Between the Rule in Keener and the Privileges and Immunities and Dormant Commerce Clauses

1. Privileges and Immunities Clause. In order to enjoy a safe haven from a NCA that cannot pass Georgia's strict tests, an employee must be a resident of Georgia and must stay in Georgia for the duration of his NCA. Conversely, employees who do not reside and work in Georgia are not afforded this safe haven. Thus, Georgia's law regarding NCA injunctions, as announced by the Eleventh Circuit in Keener, differentiates between employees on the basis of residence.

If Keener's discriminatory effect is a correct statement of Georgia law, then Georgia law may be in violation of the Privileges and Immunities Clause. The Privileges and Immunities Clause was meant "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those states are concerned." While the Keener court phrases its holding in terms of state residency and not citizenship, "it is now established that the terms 'citizen' and 'resident' are 'essentially interchangeable' for purposes of analysis of most cases under the privileges and immunities clause." Furthermore, the Supreme Court has implied that state judicial action, in addition to state legislation, is subject to the strictures of the Privileges and Immunities Clause. Therefore, the Privileges and Immunities Clause restrictions are fully applicable to the Georgia law as interpreted in Keener.

When a state law differentiates on the basis of residency, courts apply a two-tiered test to determine whether the law is permissible under the Privileges and Immunities Clause. First, the court must determine whether the state law

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91 See Keener v. Convergys Corp., 342 F.3d 1264, 1271 (11th Cir. 2003) (stating that the permissible scope of a NCA injunction is to "enjoin the enforcement of the NCA while [the employee] remains a resident of Georgia").

92 U.S. CONST. art. IV, § 2, cl. 1 ("The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States.").


94 See Keener, 342 F.3d at 1271 (holding that an injunction prohibiting an employer from enforcing the NCA while the employee remains "a resident of Georgia" is permissible).


96 See Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) (evaluating the constitutionality, under the Privileges and Immunities Clause, of a rule of court promulgated by a state supreme court that required attorneys to be residents of Virginia in order to practice law within the state).

infringes a privilege or immunity that is "‘fundamental’ to the promotion of interstate harmony" and is, therefore, protected by the Clause. Employment free of undue discrimination is one such a protected privilege.

The injunctive rule in Keener infringes on a fundamental privilege of employment by discriminating between employees on the basis of residence. While an employee who is both a party to a foreign NCA and a resident of Georgia may benefit from Georgia’s employee-friendly NCA laws, a similarly situated non-resident employee cannot receive such benefits. This discrimination implicates and infringes upon a non-resident’s privilege of freedom from undue state employment discrimination. Therefore, Georgia law, as expressed by Keener, would infringe a privilege or immunity protected by Article IV.

If the court finds that the state law infringes on a privilege or immunity protected by Article IV, as it should in a situation like Keener, it must then apply the test’s second tier and decide whether the state has a “substantial reason” to discriminate. If no reason exists, then the state law offends the Privileges and Immunities Clause and is unconstitutional.

Georgia seems to have only two reasons for its discriminatory application of NCA laws against non-residents, neither of which appear substantial. First, Georgia public policy dictates its harsh stance toward NCAs. Second, as stated in Keener, Georgia cannot extend this policy to nonresidents or beyond the

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98 This first prong of the test differentiates between protected privileges and immunities and those that are not protected. United Bldg. & Constr. Trades Council, 465 U.S. at 218 (remarking that “[n]ot all forms of discrimination against citizens of other States are constitutionally suspect”).

99 See id. at 219 (remarking that “[c]ertainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause”) (citing Baldwin v. Fish & Game Comm’n of Montana, 436 U.S. 371, 387 (1978)); Toomer, 334 U.S. at 396 (stating that “one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State”).

100 Recall that in the resident employee’s case, if the NCA were contrary to Georgia’s public policy, Georgia’s choice-of-law rule would apply to the NCA, which would be voided in Georgia. See Enron Capital & Trade Res. Corp. v. Pokalsky, 490 S.E.2d 136, 137-38 (Ga. Ct. App. 1997). After Keener, however, non-resident employees in the same situation would not be entitled to injunctive relief from a NCA that was identical to the resident-employee’s voided NCA. See Keener, 342 F.3d at 1271 (holding that only Georgia residents may benefit from injunctive relief from NCAs given by Georgia courts).

101 U.S. CONST. art. IV, § 2, cl. 1.

102 Id.

103 Toomer, 334 U.S. at 396-398 (stating that “the privileges and immunities clause is not an absolute,” and that the analysis under this second prong “must be concerned with whether such [substantial] reasons do exist and whether the degree of discrimination bears a close relation to them”).

104 See supra notes 12-14 and accompanying text.
borders of the state.\textsuperscript{105} A preference against NCAs, even if enunciated by a state constitution,\textsuperscript{106} does not seem sufficiently concrete to excuse Georgia from infringing nonresidents' protected privileges and immunities,\textsuperscript{107} nor does Keener's requirement that Georgia apply its NCA law only to residents of Georgia. In fact, Keener's holding seems only to retrofit Georgia's NCA law in an attempt to appease related concerns of federalism.\textsuperscript{108} Keener's discriminatory rule, which most likely infringes on a protected privilege, cannot be justified by a substantial reason to discriminate. Therefore, the rule is a probable violation of the Privileges and Immunities Clause.

2. Dormant Commerce Clause. The rule in Keener, which allows employees to shed their NCAs only if they remain in Georgia, also presents potential Dormant Commerce Clause problems because the rule is economically discriminatory. In order to understand these problems, it is first necessary to appreciate the economic and geographic repercussions of the court's decision.

\textit{a. The Economic Geography Context: The Impact of the Law After Keener.} Georgia's restrictive NCA rules garner direct economic consequences. The anti-restraint public policy which girds Georgia NCA rules effects an outcome in line with the policy. Employees are able to compete more freely absent the restraints of a strong NCA. Consequently, these employees are highly mobile; they are able to move between employers with relative ease. According to some scholars, this mobility leads to a number of positive economic consequences on a regional level.

In his influential article, Professor Gilson seeks to explain the causal relationship between restrictive NCA laws, employee mobility, and flourishing regional technical economies.\textsuperscript{109} According to Gilson, weak or nonexistent NCAs permit employees to move freely between different firms within a region.\textsuperscript{110} This "high velocity employment scheme" facilitates knowledge spillover, or inadvertent

\textsuperscript{105} Keener, 342 F.3d at 1271.
\textsuperscript{106} See GA. CONST. art. III, § 6, ¶ V(c).
\textsuperscript{107} See Toomer, 334 U.S. at 398 (requiring that, in order to satisfy the second prong of the Privileges and Immunities test, the state must "indicate that non-citizens constitute a peculiar source of the evil at which the [law] is aimed").
\textsuperscript{108} See Keener, 342 F.3d at 1269 (setting forth the court's holding regarding the scope of injunctive relief).
\textsuperscript{109} Gilson, \textit{supra} note 2. For a reaction to, and exploration of, Gilson's theory, see Jason S. Wood, Comment, \textit{A Comparison of the Enforceability of Covenants Not To Compete and Recent Economic Histories of Four High Technology Regions}, 5 VA. J.L. & TECH. 14 (2000) (using empirical data from four technology regions to question the causality and relationship of NCAs to regional economic growth sectors). For a related discussion from a practitioner's standpoint, see Hanna Bui-Eve, Note, \textit{To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitor's Employees}, 48 HASTINGS L.J. 981 (1997). All of the proceeding works base their analyses, at least in part, on SAXENIAN, \textit{supra} note 10.
\textsuperscript{110} Gilson, \textit{supra} note 2, at 602-03.
and inevitable trade secret sharing, between firms caused by employees who move from one firm to the next.\textsuperscript{111} Knowledge spillover is essential for initial regional economic growth. It lowers firms' operating costs, attracts highly skilled employees and employers, and thus helps establish the region as a specialized technology hub.\textsuperscript{112}

Regional technology hubs such as California's Silicon Valley bring immense benefits to the state's economy in which the hub is located.\textsuperscript{113} Therefore, states strive to create these hubs, and if successful, they jealously guard them. According to Gilson, as states like Georgia continue to expand their body of restrictive NCA law and, in turn, encourage increased employee mobility, they will effect growth of specialized hubs.\textsuperscript{114} For example, Atlanta already serves as a developing bioscience hub.\textsuperscript{115} Certainly the biotech industry in Atlanta is a close enough analogue to the computer industry in Silicon Valley to benefit from

\textsuperscript{111} Id at 582 and 584-85 (explaining that spillover of tacit knowledge involves sharing the "skill and experience associated with effectively creating, developing, and implementing" technological innovation).

\textsuperscript{112} Id at 582-83. Gilson explains that spillover creates and fosters second-stage agglomeration economies, or economies of scale on a regional, and not firm-wide level. Competing firms cluster within a region in order to benefit from the cost-shareable aspects of the business, such as information gathering. Most high technology sectors deal in large part with information that is shareable regardless of distance though. Therefore, clustering within a region would not be necessary in order to share information. Id at 582. Spillover of trade secrets gained from employee mobility does require, however, that numerous competitors locate and remain within the same region. Employees can change firms within a region with relative ease and without the costs of relocating their residences and families. Thus, in order to enjoy the economic benefits of knowledge spillover on a sector-wide level, including the eventual distribution of competitors' trade secrets, firms must remain clustered in a certain region. Id at 582. This clustering is a "positive feedback process" whereby the migration of firms to a region attracts skilled workers, and the migration of skilled workers, in turn, attracts more firms. Id at 583. Meanwhile, this process sustains the region's growth.

\textsuperscript{113} For instance, technology hubs provide employment, increase the tax base, and foster secondary service industries to support the primary industries.

\textsuperscript{114} See Gilson, \textit{supra} note 2, at 620 (explaining that the "legal infrastructure [e.g., NCA laws] gave rise to a dynamic that helped shape each district's characteristic business culture and industrial organization").

\textsuperscript{115} Georgia is ranked ninth in the nation in number of biotech companies, with more than 200 firms in metro Atlanta alone. Atlanta serves as "domestic headquarters for major pharmaceutical companies such as Solvay, UCB, and MeriaL Atlanta is also home to well-known bioscience companies like AtheroGenics, Cell Dynamics, CIBA Vision, Cryolife, Immucor, Inhibitex, Matria Healthcare, Novartis Opthalmics, Novoste, Proxima Therapeutics, Serologicals, Spectrx and Theragenics." These industries are supported by a research sector comprised of the Centers for Disease Control (CDC), as well as the research departments of Emory University, The Georgia Institute of Technology, and the University of Georgia. Metro Atlanta Bioscience Council, \textit{available at} \(\text{http://www.adlantabioscience.com/industry.asp}\) (last visited Mar. 20, 2004).
Gilson’s findings. According to Gilson’s theory, Atlanta’s biotech sector, and the State of Georgia in turn, are benefiting from Georgia’s restrictive NCA laws and resultant employee mobility.

Furthermore, Georgia should continue to reap economic benefits from its restrictive, employee-friendly outlook on NCAs. According to Gilson, Georgia has good reason to foster employee mobility within Georgia by attracting out-of-state employees to the state, and allowing employees to move freely between firms within the state. Doing so will create and expand technology hubs which bring enormous benefits to the state. By the same token, Georgia is—or should be—interested in maintaining its existing technology hubs by preventing employees from leaving the state. Whether intentionally or inadvertently, Keener helps to advance both of these interests. While Georgia can no longer serve as a transitory stop or pass-through for employees running from NCAs, it remains a safe haven for NCA-governed employees wishing to enter into employment within Georgia. Keener reinforces the Georgia courts’ ability to strike down foreign NCAs by disregarding their choice-of-law clauses while restricting the newly freed employees to Georgia. Thus, Keener completes the journey, begun in Nasco, toward becoming a safe haven. The same body of law that attracts these employees to Georgia serves to contain them within the state. Employees are now able to avail themselves of Georgia’s NCA laws as long as they come to, and remain in, Georgia. If Professor Gilson’s theories are correct, this one-way portal benefits Georgia immensely. Not only is Georgia profiting from the influx of human capital and the increased employee mobility within the state, but it is also preventing that valuable human capital from leaving the state.

b. Dormant Commerce Clause Violation. By requiring employees to stay within Georgia, the ruling in Keener is economically discriminatory against other states in two respects. First, the injunctive law in Keener confines the economic benefits derived from knowledge spillover within Georgia’s borders.

116 Both include intellectual property driven research and specialized research techniques. Furthermore, both industries require a pool of highly skilled and highly educated labor.


118 See supra note 54 and accompanying text.

119 See supra notes 59-60, and text following note 60.

120 See supra notes 26-29 and accompanying text.

121 See Gilson, supra note 2, at 583-87.
high-level employers away from other states and into Georgia and then to keep
them within the state.\textsuperscript{122}

This kind of economic discrimination and protectionism along state lines
smacks of Dormant Commerce Clause problems.\textsuperscript{123} Primarily, the Dormant
Commerce Clause prohibits states from enacting laws that facially discriminate
against out-of-state commerce.\textsuperscript{124} In effect, the clause prohibits states from
inhibiting or blocking the stream of interstate commerce from escaping its
borders.\textsuperscript{125} While the Supreme Court has applied Dormant Commerce Clause
restrictions to numerous state regulations and legislative acts, it has yet to subject
judge-made law to the strictures of the doctrine. The issue of applicability to
judge-made, or common, law is emerging, however, in the district and circuit
courts with varied results.\textsuperscript{126} The full details and implications of this schism are

\begin{itemize}
\item[\textsuperscript{122}]{Id. at 583 (explaining the positive feedback phenomenon).}
\item[\textsuperscript{123}]{The Dormant Commerce Clause imposes restrictions on a state’s ability to effect commerce outside of its borders and is derived, by negative implication, from the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. (“Congress shall have Power to ... regulate Commerce ... among the several States.”). Recently, the District Court of New Jersey encapsulated contemporary Dormant Commerce Clause jurisprudence: “The affirmative grant to Congress of authority to regulate interstate commerce encompasses an ‘implied [or dormant] limitation on the power of the States to interfere with or impose burdens on interstate commerce.’” Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 253 (D.N.J. 2000) (quoting Healy v. Beer Inst., Inc., 491 U.S. 324, 326 n.1 (1989)). “When a state statute ‘directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,’ it is subject to strict judicial scrutiny.” Id (quoting Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 578-79 (1986) and citing Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 824 (3d Cir. 1994)).}
\item[\textsuperscript{124}]{The Supreme Court stated: The opinions of the Court through the years have reflected an alertness to the evils of “economic isolation” and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually \textit{per se} rule of invalidity has been erected. City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); see Beretta U.S.A., 123 F. Supp. 2d at 253 (quoting Brown-Forman Distillers, 476 U.S. at 578-79 and citing Instructional Sys., Inc. v. Computer Curriculum Corp., 35 F.3d 813, 824 (3d Cir. 1994)).}
\item[\textsuperscript{125}]{\textit{City of Philadelphia}, 437 U.S. at 624 (stating that “[t]he clearest example of [a violation of the Dormant Commerce Clause] is a law that overtly blocks the flow of interstate commerce at a State’s borders”).}

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beyond the scope of this Note, but if the Dormant Commerce Clause does
govern state judicial action, then the rule announced in Keener would, most likely,
implicate and offend it.

The Dormant Commerce Clause imposes an almost per se prohibition on laws
which discriminate facially against out-of-state commerce, even if the law
advances a legitimate state interest. Courts will strike down a facially
discriminatory law unless it falls within one of a narrow group of exceptions. The Eleventh Circuit's decision in Keener may be classified as facially
discriminatory because the court expressly differentiated between Georgia
residents and nonresidents and allowed the economic advantages of Georgia's
strict stance on NCAs, both in terms of knowledge spillover and comparative
employer advantage, to extend only to Georgia's borders. At the expense of
other states, Georgia is benefiting from the influx of human capital and the
increased employee mobility within the state and is preventing that valuable
human capital from leaving the state. Furthermore, no exception to the Dormant
Commerce Clause is applicable to the holding in Keener. If the Dormant
Commerce Clause applies to the rule set forth in Keener, as judge-made law, then
it will probably offend the clause and be deemed unconstitutional.

IV. CONCLUSION

Litigation and non-disclosure agreements are imperfect means of protecting
trade secrets. To supplement these means and to protect their investment in

judge-made punitive damages awards). Other district courts have declined to apply the Dormant
Commerce Clause to judge-made law. See, e.g., Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777,
784 n.9 (3d Cir. 1992) (stating that “[t]hough there are numerous cases holding state legislative action
invalid under the Dormant Commerce Clause, we have found none invalidating liability founded on
principals of state common law”); Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1272 (N.D.
Cal. 2001) (remarking that “the Third Circuit has expressed doubt as to whether state common law
claims could violate the dormant commerce clause”); Beretta, 123 F. Supp. 2d at 254 (explaining that
“[t]he applicability of the dormant commerce clause to causes of action under state tort law is
unsettled’’).

arguing that the state legislative intent, and not the law’s effect, is operative in a Dormant
Commerce Clause inquiry).
129 See, e.g., West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (suggesting that a direct
subsidy is not subject to Dormant Commerce Clause restraints); South-Central Timber Dev., Inc.
v. Wunicke, 467 U.S. 82 (1984) (holding that a law otherwise offensive to the Dormant Commerce
Clause is permissible if the state actively participates in the affected market); Prudential Ins. Co. v.
Benjamin, 328 U.S. 408 (1946) (holding that Congress may consent to, and thus validate, a state law
otherwise offensive to the Dormant Commerce Clause).
130 Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003).
human capital, employers also make use of NCAs. Since the approach to NCAs varies widely by jurisdiction, an employer will often draft into the agreement a choice-of-law clause in an attempt to preserve the parties’ expectations at the time of assent. Georgia’s law regarding invalidation of NCAs and their choice-of-law clauses was recently clarified by the Eleventh Circuit in *Keener*.

The Eleventh Circuit first reiterated Georgia courts’ ability to disregard choice-of-law clauses in NCAs and, instead, to apply restrictive Georgia law. Second, the court curtailed the injunctive relief available to employees bound by unacceptable NCAs. That relief is now only available to Georgia residents who remain in Georgia for the duration of the NCA. The court’s decision represents a discouraging, or even unconstitutional, development in Georgia trade secret law. While the state of the law governing NCAs in Georgia—with its propensity to disregard choice-of-law clauses and award world-wide injunctive relief—was less than perfect before *Keener*, the Eleventh Circuit’s fix is a step in a wrong, if not unconstitutional, direction.

By reiterating Georgia’s ability to disregard choice-of-law clauses in NCAs, the Eleventh Circuit exposed Georgia courts to an increased risk of serious and embarrassing issues of comity and federalism. Yet the Georgia Supreme Court exposed itself to this risk in answering the Eleventh Circuit’s certified question and must now—or sometime in the future—deal with the consequences of its answer. More importantly, however, by limiting injunctive relief to Georgia residents who remain employed in Georgia, the Eleventh Circuit interpreted Georgia law in a way likely to offend the Constitution in light of the Privileges and Immunities Clause and Dormant Commerce Clause doctrines. If the Eleventh Circuit carried its charge by correctly interpreting Georgia’s state law, then the Georgia courts are wholly responsible for the dubious constitutionality of the injunctive technique promulgated by *Keener*. A Georgia court would have reached the same ruling if it had addressed the facts of *Keener*. The Eleventh Circuit may have substituted its own judgment, however, for what it thought Georgia’s judgment would be or leapt too far from state law precedent to divine accurately Georgia’s probable rule. In this scenario, the responsibility for the constitutional uncertainties in *Keener* rests squarely on the Eleventh Circuit’s shoulders.

Regardless of which institution is responsible for *Keener*’s shortcomings, the potential problems in the case originate from Georgia’s treatment of choice-of-law clauses within NCAs. Without the almost blanket refusal to honor these clauses, Georgia courts would not face the comity issues outlined above. Furthermore, if Georgia courts were more willing to recognize choice-of-law

131 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (abolishing federal general common law and requiring federal courts to apply the “laws of the several states,” which includes both state statutory and case law, except in matters governed by the federal constitution or statutes).
clauses in NCAs, the potential Privileges and Immunities Clause and Dormant Commerce Clause problems could be avoided. By honoring the parties’ agreements, Georgia courts would diminish the safe haven situation. Foreign employees would no longer be enticed into Georgia by the prospect of a court disregarding the choice-of-law clause to which they agreed, and applying strict, employee-friendly substantive law to their NCA. Georgia NCA law would be less discriminatory on the basis of residence and thus less likely to offend the Privileges and Immunities Clause because parties could contract around Georgia’s strict substantive NCA law. Moreover, a reduction of the safe haven effect would obviate the economic discrimination prohibited by the Dormant Commerce Clause. Georgia would no longer entice and hold captive employees who are otherwise constrained by NCAs, and therefore, would not enjoy the benefits of increased employee mobility at the expense of other states. In order to exist more peacefully among the several states and within the minimum constraints of federalism, Georgia must adjust its outlook on choice-of-law clauses within NCAs.

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