Arbitration Clause in Non-Compete Agreements:
The United States Supreme Court Chimes In

By Neal F. Weinrich, Esq.

Many non-competes lawsuits involve agreements containing mandatory arbitration clauses. Sometimes an employment agreement expressly authorizes the employer to seek temporary injunctive relief from a court prior to arbitration as an exception to the mandatory arbitration clause. Sometimes the agreement permits the employee to seek injunctive relief prior to arbitration. When an agreement permits an employee to seek injunctive relief from a court, the employee may ask a court to enjoin the employer from seeking to enforce any overbroad restrictive covenants, in an arbitration or otherwise.

The latter situation creates an inherent tension between the public policy concerns raised by restrictive covenants which restrain trade and the law's favor for enforcing arbitration clauses and having courts avoid reaching the merits of claims which are subject to arbitration. A recent *per curiam* decision from the United States Supreme Court suggests that this tension should be resolved in favor of strict enforcement of arbitration clauses. *Nitro-Lift Techs., L.L.C. v. Howard,* -- U.S --, 133 S. Ct. 500 (Nov. 26, 2012). This article discusses the implications of *Nitro-Lift* on the viability of two Georgia appellate cases.

While Georgia law generally favors the enforcement of arbitration clauses, in two decisions the Georgia Court of Appeals has affirmed the decisions of two trial courts which made final rulings on the enforceability of restrictive covenants in agreements containing mandatory arbitration clauses. In *Global Link Logistics, Inc. v. Briles*, 296 Ga. App. 175, 674 S.E.2d 52 (2009), Global Link Logistics, Inc. ("GLL") filed a lawsuit in Delaware in which it

sought injunctive relief against Jim Briles, its former employee. Mr. Briles then filed a declaratory judgment action in Georgia seeking to invalidate his restrictive covenants. *Id.* at 175, 674 S.E.2d at 53. GLL moved to compel arbitration of the Georgia lawsuit, arguing that Mr. Briles' claims were subject to a mandatory arbitration clause. *Id.* Relying on language in the agreement which allowed either party to seek interim relief in court prior to the arbitrators having been selected, Mr. Briles successfully argued that the trial court could strike the unenforceable restrictive covenants before compelling arbitration as to the remainder of the agreement. *Id.* at 176, 674 S.E.2d at 54. The Georgia Court of Appeals affirmed the trial court's ruling, rejecting GLL's argument that the mandatory arbitration clause precluded the trial court from making a final ruling on the enforceability of the restrictive covenants. *Id.* at 178-79, 674 S.E.2d at 55-56.

Bellsouth Corp. v. Forsee, 265 Ga. App. 589, 595 S.E.2d 99 (2004), is another case where a mandatory arbitration clause impacted whether the trial court could make a final ruling on the enforceability of overbroad restrictive covenants. Gary Forsee was the vice chairman of domestic operations for BellSouth and was the chairman of the board of directors for Cingular. *Id.* at 589, 595 S.E.2d at 100. BellSouth and Cingular filed complaints in the Superior Court of Fulton County and sought temporary restraining orders to enjoin Mr. Forsee from accepting employment with Sprint. *Id.* at 589, 595 S.E.2d at 101. After conducting an emergency hearing, the trial court found that the noncompetition covenant in Mr. Forsee's employment agreement was unenforceable and dissolved an earlier-issued *ex parte* temporary restraining order. *Id.* BellSouth and Cingular then moved to compel arbitration based on an arbitration clause in Mr. Forsee's employment agreement. *Id.* The trial court granted the motion to compel arbitration as

to any controversy arising out of the nondisclosure provision of his employment agreement, but denied the motion with regard to any claims arising out of the noncompetition covenant. *Id.*

On appeal, the Georgia Court of Appeals affirmed the trial court's decision to sever the unlawful provision in Mr. Forsee's employment agreement prior to arbitration. The Court of Appeals found that BellSouth and Cingular had invoked the jurisdiction of the trial court to temporarily enjoin Mr. Forsee from accepting employment with Sprint. *Id.* at 596, 595 S.E.2d at 105. Once BellSouth and Cingular invoked the jurisdiction of the trial court, it was authorized to make a preliminary determination as to the enforceability of the noncompetition covenant. *Id.* at 596, 595 S.E.2d at 105-6. Once the covenant was found unenforceable, the severability clause authorized the trial court to remove it from the arbitrator's consideration. *Id.*

Global Link and *Bellsouth* suggest that under certain circumstances, Georgia trial courts may make final rulings regarding the enforceability of restrictive covenants notwithstanding the presence of mandatory arbitration provisions in the agreements at issue. However, the Supreme Court's opinion in *Nitro-Lift* appears to conflict with *Global Link* and *BellSouth*. *Nitro-Lift* involved two employees who worked for their employer in Oklahoma. *Id.* at 502. The employees' non-compete agreements contained arbitration clauses. *Id.* After the employer served the employees with a demand for arbitration, they filed a declaratory judgment action in an Oklahoma state court. *Id.* While the trial court dismissed the lawsuit based on the arbitration clause, the Oklahoma Supreme Court found that the trial court could rule that the non-competes were unenforceable. *Id.* The United States Supreme Court granted *certiorari* and reversed, finding that the Oklahoma Supreme Court had "assumed the arbitrator's role by declaring the

non-competition agreements null and void." *Id.*, at 503. The United States Supreme Court stated further that "when parties commit to arbitrate contractual disputes, it is a mainstay of the [Federal Arbitration] Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved 'by the arbitrator in the first instance, not by a federal or state court.'" *Id.* (*quoting Preston v. Ferrer*, 552 U.S. 346, 349, 128 S. Ct. 978 (2008)). Thus, the Oklahoma Supreme Court was bound by the Federal Arbitration Act ("FAA") to enforce the arbitration clause, and the trial court could not rule on the covenants in light of the arbitration clause. *Id.* at 504.

Under *Nitro-Lift*, while a party may challenge the validity of an agreement to arbitrate in a court, attacks regarding the validity of the substance of the contract – such as an attack on the enforceability of restrictive covenants - must be decided by the arbitrator. *Nitro-Lift* therefore calls the validity of *BellSouth* and perhaps *Global Link* into question. More specifically, under *Nitro-Lift*, the rulings by the Georgia trial courts in *BellSouth* and *Global Link* which were affirmed by the Georgia Court of Appeals arguably conflict with the FAA, just as the United States Supreme Court found that the Oklahoma Supreme Court's ruling was in conflict with the FAA. Because of the Supremacy Clause, if there is a conflict, *Nitro-Lift* and the FAA trump *BellSouth* and *Global Link*. *Nitro-Lift*, 133 S. Ct. at 504.

Practitioners thus must consider the implications of *Nitro-Lift* when litigating non-compete cases involving agreements containing mandatory arbitration clauses.

Neal F. Weinrich is a senior associate with Berman Fink Van Horn P.C. The focus of Neal's practice is advising employers and employees on disputes involving computer fraud, trade secrets, non-competes and other competition-related issues. Neal is a co-author of a chapter

on Restrictive Covenant Litigation in Georgia Business Litigation , a treatise that will be published in August 2013 by Daily Report Books.

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