Supreme Court Increases Burden on Parties Seeking to Evade Valid Forum-Selection Clauses

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Employment agreements, especially those involving restrictive covenants, often contain forum-selection clauses under which the parties agree in advance to litigate their disputes in a particular federal or state court. The U.S. Supreme Court has clarified the procedural standard for enforcing forum-selection clauses, and confirmed their enforceability. *Atlantic Marine Constr. Co. v. U.S. District Court for the Western District of Texas*, 187 L. Ed. 2d 487 (2013). Specifically, the Court held that when a defendant seeks to enforce a forum-selection clause pointing to a federal court other the one in which suit has been brought, by filing a motion to transfer venue, under 28 U.S.C. § 1404(a), "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." This high standard also applies where the defendant seeks to enforce a forum-selection clause pointing to a state court by filing a motion to dismiss the action for *forum non conveniens*.

Background

Although *Atlantic Marine* did not arise in the employment context, a brief summary of the facts is helpful. A Texas company (J-Crew Management, Inc.) entered into a subcontract with a Virginia company (Atlantic Marine) to perform work on a construction project in Texas. The subcontract included a forum-selection clause. The clause stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."

When a dispute about payment under the subcontract arose, however, J-Crew sued Atlantic Marine in the U.S. District Court for the Western District of Texas, invoking that court's diversity jurisdiction. Both the federal district court and the Fifth Circuit Court of Appeals rejected Atlantic Marine's attempts to enforce the forum-selection clause to have the action brought in a Virginia court. The Supreme Court reversed.

Balancing-of-Interests Standard

Ordinarily, *if the parties to a dispute are not bound by a valid forum-selection clause* , a district court considering a motion to transfer venue under 28 U.S.C. § 1404(a) will evaluate whether the moving party has met its burden of showing that the convenience of the parties and witnesses, and various public- and private-interest factors, weigh, on balance, in favor of the transfer.

The private-interest factors in this context generally include:

(1) the relative ease of access to sources of proof;

(2) the availability of processes for compelling the attendance of unwilling witnesses and the cost of obtaining the attendance of willing witnesses;

(3) the possibility of viewing the premises, if appropriate; and

(4) other practical concerns that make a trial easy, expeditious and inexpensive.

The public-interest factors in this context may include:

(1) the administrative difficulties flowing from court congestion;

(2) the local interest in having localized controversies decided at home; and

(3) the interest in having the trial in a court that is familiar with the applicable law.

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In addition, some weight is given to the plaintiff's choice of forum. The overarching consideration is whether a transfer would promote "the interest of justice." This balancing-of-interests standard also is used to evaluate a motion to dismiss an action based on the common-law doctrine of *forum non conveniens*, which § 1404(a) codifies.

Forum-Selection Clause Given Controlling Weight

When the parties to a dispute are bound by a valid forum-selection clause , however, the Supreme Court found that the calculus changes and the forum-selection clause should be "given controlling weight in all but the most exceptional cases." The Supreme Court said that district courts should adjust their analysis of motions to transfer venue under 28 U.S.C. § 1404(a) in three ways.

First, the plaintiff's subjective choice of forum merits no weight and the plaintiff, as the party defying the forum-selection clause, bears the burden of establishing that the transfer to the forum for which the parties bargained is unwarranted.

Second, a district court must deem the private-interest factors to weigh entirely in favor of the preselected forum because parties that have agreed to a forum-selection clause have waived the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. As a result, district courts should consider the public-interest factors only, and "[b]ecause those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases."

Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, the transfer, when effected, will not carry with it the original venue's choice-of-law rules (i.e., the court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right). Because both Section 1404(a) and the *forum non conveniens* doctrine entail the same balancing-of-interests standard, the Court found that district courts should evaluate a forum-selection clause pointing to a state forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.

Conclusion

In effect, where the parties have contracted to have their disputes heard in a particular forum, the Court's ruling in *Atlantic Marine* shifts the burden of proof on a motion to transfer venue (or on a motion to dismiss for *forum non conveniens*) to the party seeking to avoid the preselected forum and substantially increases the difficulty of showing that a valid forum-selection clause should not be enforced. Consistent with its recent decisions enforcing arbitration agreements, the Court has made clear that parties will be held to their bargain. (See e.g., U.S. Supreme Court Again Confirms Viability of Arbitration Agreements and U.S. Supreme Court Issues Latest Ruling Upholding Agreements to Arbitrate.)

In the context of non-competition and non-solicitation agreements, employers often use forum-selection clauses (in conjunction with choice-of-law clauses) to secure ease of enforcement and consistency of interpretation. The Supreme Court's *Atlantic Marine* confirms that this strategy is worthy of consideration.

If you have any questions about this case or other workplace developments, please contact the Jackson Lewis attorney with whom you regularly work.