



Litigation Update April 2017

CALIFORNIA SUPREME COURT RULES ON FEE AWARDS IN FORUM SELECTION CLAUSE DISMISSALS

By Asa Markel

This past week, the California Supreme Court weighed in on whether trial judges should award attorneys' fees against the losing side where the California litigation is dismissed because the parties' contractual forum selection calls for litigation elsewhere. In *DisputeSuite.com, LLC v. Scoreinc.com*, No. S226652 (Cal. Apr. 6, 2017), the trial court had found that a clause in one of the parties' agreements specified that the parties would litigate any disputes in Florida, in spite of the fact that the plaintiff had filed suit in Los Angeles County, California. The California Supreme Court affirmed the trial judge's decision not to award fees, even though the parties' called for the prevailing party to be awarded its attorneys' fees. The Supreme Court found that the merits of the dispute were not yet decided, and since the same dispute was being litigated in the proper forum, the trial court had not abused its discretion to find no party had yet prevailed for purposes of obtaining a fee award. The Supreme Court cautioned that it was not ruling against fee awards in all such forum selection disputes, but did state that any fee award "should be supported by a record showing that the contract claims have been finally resolved."

The California Supreme Court's decision in *DisputeSuite.com* makes clear that defendants in California courts are unlikely to recover their attorneys' fees simply by obtaining a favorable ruling enforcing a forum selection clause. The *DisputeSuite.com* court's reasoning is consistent with an earlier decision in the New York County Commercial Court, in which the judge parsed through New York appellate opinions on fee awards to conclude that claims that were dismissed and could not be refiled would entitle a defendant to an award of attorneys' fees under a contract clause requiring such an award. However, the judge determined that dismissals on procedural grounds, which did not preclude later litigation over those claims, did not render the defendant a prevailing party entitled to a fee award. See *Am. Guard Servs., Inc. v. Griffin Security Servs., Inc.*, 2015 N.Y. Slip Op. 31709(U) (N.Y. County Sept. 4, 2015). A few months prior to the decision in *American Guard Services*, a federal judge in New York rejected claims for fees in another forum selection case where the claimed entitlement to fees was based only upon the law of the chosen forum, rather than an express attorneys' fee clause in the contract. See e.g. *Atomi, Inc. v. RCA Trademark Mgmt., S.A.S.*, 2015 U.S. Dist. LEXIS 40621 (S.D.N.Y. Mar. 30, 2015). Thus, the major commercial jurisdictions in the United States appear to be coalescing behind the rule that victory based upon a forum selection clause does not entitle a defendant to an award of attorneys' fees, while the merits of the underlying dispute are still to be determined elsewhere.

For those parties concerned about enforcing their forum selection clauses, the prospects for obtaining compensation for wasted litigation when their counterparts file suit outside of the contractually specified jurisdiction are still not clear in the American courts. The California and New York courts will make it difficult, if not impossible, to obtain an award of fees in the action that is dismissed. Yet, the party attempting to honor the forum selection clause still has the possibility of pursuing its wasted costs in an action properly filed in the agreed forum. The English courts can be expected, for example, to award the party who ultimately prevails its costs for the original, improperly filed lawsuit. See e.g. *Union Discount Co. v. Zoller*,



[2002] 1 W.L.R. 1517 (C.A.). However, the American courts have split on this issue. New York and Delaware judges have allowed damages to be recovered in the subsequent action for the cost of the first, abortive action if it was commenced in breach of a forum selection clause. See *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 758 N.Y.S.2d 308 (App. Div. 2013); and *El Paso Natural Gas Co. v. TransAm. Natural Gas Corp.*, 669 A.2d 36, 40 (Del. 1995). The Seventh Circuit (sitting in Chicago) has been hostile to such claims, viewing them as an “end run” around the “American Rule” that each party should pay its own litigation costs unless a statute or contract says otherwise. See *Fednav Int'l v. Continental Ins. Co.*, 624 F.3d 834 (7th Cir. 2010).

As businesses continue to contract with partners in other states and countries, the importance of forum selection clauses will only increase in the coming years. Currently, the law regarding what damages, if any, may be recoverable where one party breaches a forum selection clause by filing suit in the wrong jurisdiction remains in flux in the United States. However, the California Supreme Court's recent *DisputeSuite.com* decision reinforces the view that U.S. courts hearing the original, improperly filed action, are less likely to award attorneys' fees to a prevailing defendant who seeks only to enforce the forum selection clause. Therefore, the reception of state law to the notion that the attorneys' fees incurred in the improperly filed action can be recoverable damages in a breach of contract claim in a later, properly filed action, will be crucial to determining what options parties have to deter breaches of forum selection clauses.

For more information about this or any other California litigation law topic, please contact Asa Markel at 310.630.5900 or via email at amarkel@masudafunai.com.



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