

NEWSLETTERS

Sometimes When You Gamble, You Lose: Risks Of Ignoring Forum Selection Clauses

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Exclusive forum selection clauses are a staple of commercial contracts and come with many benefits. Among them are avoiding races to the courthouse, mitigating the risk of litigating in multiple venues, and reducing the time and expense of litigating *forum non conveniens* motions. But what happens when a party attempts to avoid the negotiated forum?

More plaintiffs are learning that dismissals without prejudice or transfers of venue are not the worst-case-scenarios of initiating litigation outside of the contractual forum. Instead, they are seeing courts across the country imposing severe consequences when parties deliberately violate unambiguous forum selection clauses with the hope of litigating in more preferable forums.

For example, courts have awarded attorneys' fees to the non-breaching party as damages for breach of contract and have refused to toll statutes of limitations to rescue time-barred claims. These consequences are more difficult to avoid now that the U.S. Supreme Court has made forum selection clauses easier to enforce. See *Atlantic Marine Construction Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas*, 134 S. Ct. 568 (2013) (holding that forum selection clauses should control except in unusual and extraordinary cases). Thus, a litigant must carefully consider whether they have a good-faith basis to challenge a forum selection clause and think twice before disregarding the bargained-for provision. The costs of ignoring such a clause can be costly, and even fatal, to a case.

Barred Claims

In the past, plaintiffs have utilized equitable tolling and statutory tolling periods to avoid having the applicable statutes of limitations run on their claims while those claims were pending in the wrong court. Equitable tolling can be available where a litigant actively pursued judicial remedies but mistakenly asserted his rights in the wrong forum. *Ownes v. Carman Ford, Inc.*, 2013 WL 5496821, at *2 (Del. Sup. Ct. Sept. 20, 2013). Some states, like Illinois, have codified this principle. Illinois permits a plaintiff to commence a new action within one year if the original claim was dismissed by a district court for lack of jurisdiction or for improper venue. 735 ILCS 5/13-217. Thus, if the plaintiff's claim was dismissed in the original forum due to an exclusive forum selection clause, it could ask the proper court to toll the limitations period to allow time to refile the complaint there without it being time-barred.

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Recent decisions from Delaware, however, indicate that this option may no longer be available to plaintiffs who purposefully ignore an unambiguous exclusive forum selection clause. These courts are starting to give teeth to forum selection clauses by refusing to toll the limitations period for expired claims, holding that plaintiffs should not receive the benefit of equitable remedies when they themselves did not act in good faith.

For example, in *Huffington v. T.C. Group, LLC*, No. N11C-01-030 JRJ CCLD, 2012 WL 141593 (Del. Supr. Ct. Apr. 18, 2012), the plaintiff ignored an unambiguous forum selection clause and filed suit in Massachusetts. The Massachusetts court dismissed the case as being filed in the improper forum. *Id.* at 2. The plaintiff appealed and lost again. *Id.* By the time the suit was refiled in the proper forum, Delaware, the plaintiff's claims were time-barred under Delaware law. *Id.* at 6. The plaintiff asked the Delaware court to apply the Massachusetts statute of limitations, which had not yet run. *Id.* at 9.

The Delaware court refused, declining to use equity principles to help a party who acted in bad faith by trying to avoid an explicit exclusive forum selection clause. *Id.* at 6, 9. The court stated: "Sometimes when you gamble, you lose. [The plaintiff] could have hedged his bet by filing in Delaware immediately after the District Court dismissed his suit. Instead, he went 'all in' and pursued an appeal rather than filing a claim within the statute of limitations in the forum he contractually agreed to." *Id.* at 9.

The plaintiff in *Carlyle Investment Management L.L.C. v. National Industries Group (Holding)*, No. 5527-CS, 2012 WL 4847089 (Del. Ch. Oct. 11, 2012), met a similar fate. There, the plaintiff ignored a forum selection clause selecting Delaware as the exclusive forum and filed in Kuwait. *Id.* at 1. The plaintiff brought suit against the defendant to recoup \$10 million it gave to the defendant to invest in a closed-end investment fund. *Id.* The defendant sought to enforce the exclusive forum selection provision by filing a complaint in Delaware, eventually obtaining a default judgment enjoining the plaintiff from litigating the dispute outside of the state. *Id.* After the statute of limitations for its cause of action had expired in Delaware, the plaintiff contested the default judgment. *Id.* It argued that, because the time to bring a claim in Delaware had expired, enforcement of the forum selection clause would be inequitable. *Id.* The court had no sympathy for the plaintiff. *Id.* at 11. It stressed that the plaintiff had, through its own choices, caused the statute of limitations in the contractually-chosen forum to expire. *Id.* Thus, the court concluded that, where the plaintiff's "own voluntary decision to violate the forum selection clause and to duck this litigation for more than two years may have left it without a forum, it has no equitable basis to ask that this court endorse its breaching behavior." *Id.*

A recent Delaware case from August 2016, *CMS Investment Holdings, LLC v. Castle*, No. 9468-VCMR, 2016 WL 4411328 (Del. Ch. Aug. 19, 2016), reaffirmed the principles asserted in *Huffington* and *Carlyle*. In *CMS Investment Holdings*, the third-party plaintiffs filed their original complaint in Denver County (Colorado) District Court in November 2014, in contravention of a forum selection clause naming Delaware as the appropriate forum. *Id.* at 2. The Colorado court dismissed the claim pursuant to the clause, and the third-party plaintiffs refiled their third-party complaint in Delaware in August 2015. *Id.* at 1, 3. The statute of limitations for their claim, however, expired in January 2015. *Id.* at 2. The

third-party plaintiffs argued that their claim should not be barred because they had timely brought substantially the same claims against the same parties in November 2014 in Denver County District Court. *Id.* The Delaware court flatly rejected this argument and dismissed the third-party complaint, holding that the third-party plaintiffs chose to disregard an unambiguous, valid, and enforceable forum selection clause. *Id.* at 3. Because the third-party plaintiffs had brought this outcome upon themselves, the court refused to invoke equity to save their case. *Id.*

Breach of Contract Damages

Even if the party ignoring a forum selection clause avoids having its claim time-barred, it still is exposed to risk. Specifically, the party may have to pay damages in the form of attorneys' fees to the opposing side under a breach-of-contract theory.

Forum selection clauses, although often boilerplate, are generally enforceable, particularly after *Atlantic Marine*. Indeed, courts around the country recognize that a party may recover the damages they incur as direct and proximate result of an opposing party's attempt to litigate a case in a non-contractual forum. See, e.g., *Digimark Corp. v. Verance Corp.*, No. 10-1489-JE, 2011 WL 7077315, at *12 (D. Or. Sept. 19, 2011) (explaining that "there is no principled reason why the breach of [a] forum selection clause is not actionable"); *Molnar v. 1 800-Flowers.com, Inc.*, No. 08-0542 CAS (JCx), 2008 WL 4772125, at *5 (C.D. Cal. Sept. 29, 2008) (denying motion to dismiss defendant's counterclaim for breach of forum selection clause); *Ball v. Versar, Inc.*, 454 F. Supp. 2d 783, 809 (S.D. Ind. 2006) (assuming that "there is no legal obstacle to an award of damages for breach of forum selection clause, at least where the clause is exclusive by its terms"); *Allendale Mut. Ins. Co. v. Excess Ins. Co. Ltd.*, 992 F. Supp. 278, 286 (S.D.N.Y. 1998) (finding defendants liable for uncompensated expenses that plaintiff incurred defending case in foreign forum in breach of forum-selection clause); *Lab. Corp. of America, Inc. v. Upstate Testing Lab., Inc.*, 967 F. Supp. 295, 299 (N.D. Ill. 1997) (granting summary judgment in favor of plaintiff on breach of contract claim where defendant had filed a separate cause of action in New York in breach of Illinois forum-selection clause).

Moreover, courts in multiple jurisdictions have rejected the American Rule, which generally requires each party to pay its own attorneys' fees, as a defense to breach-of-contract claims. Although there is a split of authority, multiple jurisdictions have found that awarding such damages does not contravene the American Rule. See, e.g., *Counsel Fin. Services, LLC v. Leibowitz*, No. 09-cv-1025S, 2012 WL 1057311, at *3, n.8 (W.D.N.Y. Mar. 27, 2012) ("[U]nder New York law, an action to recover attorney fees based on breach of a forum-selection clause, specifically authorized by the contract, is permissible."); *Molnar*, 2008 WL 4772125, at *5 (holding that award of attorneys' fees as damages "does not contravene the American rule"); *Cornerstone Brands, Inc. v. O'Steen, CIV. A. 1501-N*, 2006 WL 2788414, at *4 (Del. Ch. Sept. 20, 2006) ("[T]he Supreme Court of Delaware [has] implied that damages may be obtained for a breach of a forum selection clause, and an award of such damages does not contravene the American Rule."); *Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank*, 758 N.Y.S. 2d 308, 311 (2003) ("[A]n award of such damages does not contravene the American rule that deems attorneys' fees a mere incident of litigation.").

Other courts have held that the American Rule precludes recovery of attorneys' fees as damages for breach of contract. See, e.g., *Versatile Housewares & Gardening Sys., Inc. v. Thill Logistics, Inc.*, 819 F. Supp. 2d 230 (S.D.N.Y. 2011) (rejecting *Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank* and finding that American rule precluded recovery of attorneys' fees, "although attorney fees defendant incurred defending suit in Wisconsin may have been foreseeable result of plaintiff's breach of New York forum selection clause in parties' agreements."); *Brown Rudnick, LLP v. Surgical Orthomedics, Inc.*, No. 13-cv-4348 (JMF), 2014 WL 3439620, at *14 (S.D.N.Y. July 15, 2014) (same).

Regardless, even if the recovery of attorneys' fees is not allowed, the breaching party may still suffer monetary consequences for its actions. In fact, at least one court has held that the non-breaching party is entitled to any damages, other than attorneys' fees, that it incurred in enforcing a forum selection clause. See *Versatile Housewares & Gardening Sys., Inc.*, 819 F. Supp. 2d at 247 ("The Court has determined that SAS is entitled to recover any damages it incurred that resulted from Versatile's breach of the forum selection clause except its attorneys' fees.").

With the threat of monetary damages and time-barred claims looming over plaintiffs' heads, choosing to ignore unambiguous forum selection clauses is a high-stakes bet. If parties do choose to take this gamble, they should fully understand the risks and be prepared to face the consequences if they lose.

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