

To Avoid Unintended Results, Forum Selection Clauses Must Be Precise; IN PRACTICE Daily Report (Fulton County GA) February 3, 2015 Tuesday

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HEADLINE: To Avoid Unintended Results, Forum Selection Clauses Must Be Precise;
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BODY:

FORUM SELECTION clauses, whereby parties to a contract agree that subsequent disputes regarding the contract must be brought in a specific venue, are commonly included in most contracts. Many lawyers may not be aware, however, that minor changes in the wording of a forum selection clause can have a dramatic impact on its scope.

For example, agreeing to jurisdiction in courts "of" a certain venue is very different than agreeing to jurisdiction in courts "in" the venue. Likewise, use of the phrase "shall" does not necessarily guarantee that a forum selection clause is mandatory.

As discussed below, courts have taken differing approaches to interpreting and enforcing these clauses-sometimes with inconsistent results. As a result, it is imperative to be as precise as possible in drafting forum selection clauses.

Mandatory vs. Permissive Forum Selection Clauses

Because forum selection clauses are the result of a voluntary agreement between the parties, courts have found them to be "presumptively valid" and will enforce them "absent evidence of fraud, overreaching or similar inequitable conduct." ¹⁴In reviewing such a clause, a court must determine whether the clause is mandatory or permissive.

- A permissive clause permits jurisdiction in a particular venue but does not prohibit litigation elsewhere.

- In contrast, a mandatory clause requires that litigation related to the contract must occur only in the designated venue.

In interpreting forum selection clauses, courts apply the principles of contract construction.

Thus, among other things, an ambiguous forum selection clause will be construed against the drafter.

Use of the term "shall" often is synonymous with mandatory clauses and, in most cases, evidences a clear and unambiguous intent of the parties that litigation shall occur only in the specified venue. For example, a forum selection clause which provides that all disputes related to the contract "shall be litigated in the Superior Court of Fulton County, Georgia, or the United States District Court for the Northern District of Georgia" will be interpreted as mandatory.

There are instances, however, where courts have found that use of the term "shall" does not necessarily create a mandatory clause. For example, in *First State Bank v. Georgia S04 Investments*,ⁿ² the forum selection clause stated that a specific venue "shall have jurisdiction to hear" disputes related to the contract. The court found this to be a permissive clause because it did not unequivocally require that all disputes regarding the contract must be brought in the specified venue: "Merely affirming that certain courts have jurisdiction does not, by itself, indicate that no other court has jurisdiction."

Determining Which Court Has Venue

In many instances, forum selection clauses do not specify a particular court (e.g., Superior Court of Fulton County, Georgia). Instead, some clauses reference courts in a geographical area such as a particular state or county. For example, it is common for forum clauses to designate venue in courts "in" or "of" a particular state. While the difference between "in" and "of" may seem trivial, it can have a substantial impact whether the clause allows litigation in both state and federal courts.ⁿ³

Most courts agree that a reference to courts "in" a particular state includes both state and federal courts in that state. Courts disagree, however, about the meaning of the term "courts of" a particular state. The majority of the courts to address the issue have adopted the bright line rule that "courts of" a particular state do not include federal courts in that state. For example, in *Doe 1 v. AOL*,ⁿ⁴ the forum selection clause designated venue in the "courts of Virginia." The Ninth Circuit explained that "courts 'of' Virginia refers to courts proceeding from, with their origin in Virginia-i.e., the State of Virginia. Federal district courts, in contrast, proceed from, and find their origin in, the federal government." The Ninth Circuit also noted that the First, Fifth and Tenth Circuits had also adopted this bright line rule that the phrase "courts of" a particular state does not include federal courts in that state.

By contrast, the Eleventh Circuit has taken a different view and has held that the phrase "courts of" a particular state is ambiguous. In *Starline Power Corp. v. Kremer*,ⁿ⁵ the forum selection clause called for litigation in "the courts of the State of Florida." The court decided that the foregoing phrase was ambiguous, "potentially including not only state courts but federal courts as well." Construing the ambiguity against the drafter of the contract, the court held that the forum selection clause included federal courts in Florida.

Further confusion arises from forum selection clauses that refer to a specific county. Some courts have held that reference to a specific county only confers jurisdiction on state courts in that county.

For instance, in *Sompo Japan Insur. v. Alarm Detection Services*,ⁿ⁶ the forum selection clause specified venue "in Kane County, Illinois." The court held that this only included the state courts in Kane County because "venue in the federal system is stated in terms of

judicial districts, not counties. Thus, where a forum selection clause merely designates a particular county, venue lies only in the state courts in that county."

The Eleventh Circuit has taken a different view. In *City of West Palm Beach v. VisionAIR*,ⁿ⁷ the forum selection clause provided for litigation "in Palm Beach County, Florida." The court held that the clause permitted venue in either the state or federal courts located in Palm Beach County.

In many instances, however, the federal district court that has jurisdiction over a specific county does not have a physical courthouse in that county. That was the case in *Cornett v. Carrithers*,ⁿ⁸ where the forum selection clause stated that "venue shall be Suwanee County, Florida." Suwanee County is part of the U.S. District Court for the Middle District of Florida, but there is no federal courthouse in that county. Thus, the court held that the forum selection clause did not include federal courts.

Drafting Advice

When drafting forum selection clauses, lawyers should be as precise as possible. If the clause is intended to be mandatory, it should state that any dispute "shall be litigated" in the designated venue. Alternatively, the clause can provide for "exclusive jurisdiction" in a particular venue.

Moreover, the best practice is to designate a particular court (i.e., Superior Court of Fulton County, Georgia, or U.S. District Court for the Northern District of Georgia) as opposed to particular counties or states. If the forum selection clause does refer to a geographic locale, it is best to refer to courts "having jurisdiction over" the specific state or county, or specify whether the venue is "state courts" or "state or federal courts" in the locale.

As is often the case, precise drafting can avoid future litigation.

Footnotes

- [\[note 1\]](#) *Rucker v. Oasis Legal Finance, LLC*, 632 F.2d 1231 (11th Cir. 2011)
- [\[note 2\]](#) 715 F. Supp. 2d 1301
- [\[note 3\]](#) While parties cannot confer federal jurisdiction by agreement, they can agree to waive federal jurisdiction by agreement.
- [\[note 4\]](#) 552 F.3d 1077 (9th Cir. 2007).
- [\[note 5\]](#) 148 Fed. Appx. 770 (11th Cir. 2005) (unpublished opinion).
- [\[note 6\]](#) 2003 WL 21877615 (N.D. Ill. 2003).
- [\[note 7\]](#) 199 Fed. Appx. 768 (11th Cir. 2006) (unpublished opinion).
- [\[note 8\]](#) 465 Fed. Appx. 841 (11th Cir. 2012) (unpublished opinion).