LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com

TUESDAY, JUNE 18, 2019

PERSPECTIVE

When drafting choice-of-venue clauses, check a map

By Karin Bohmholdt

Contracts of all types frequently include a mandatory choice of venue or geographic limitations for litigation in the event a dispute arises, and the U.S. Supreme Court has long given effect to such clauses. *See National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)*. Consequently, contracting parties and their counsel may give only passing thought to these clauses beyond things like how far they want to travel in the event of a dispute. The client may just want to be close to home if they ever have to fight over their sales contract. In a real estate dispute, the parties may simply want a judge who understands the local market. In a multi-geographic business, to avoid potential unconscionability issues, a company may even want to provide that jurisdiction will be in the county where the individual customer is located.

Whatever the geographic preference and reasons for it, parties may mistakenly give little thought to the language of the clause. Parties and their counsel may draft and throw in phrases like: "Any litigation relating to any disputes between the parties shall be filed in a Court of Competent jurisdiction in Butler County, MO" or "In the event that any legal action is taken in connection with this Agreement, the proper venue for said action shall be Polk County, Florida." In a form contract used by a company across multiple geographic locations, such as an assisted living facility contract, the drafting party may require that venue be "in the county in which the Facility" that particular resident uses is located. Easy enough, and problems solved. Client or customer knows they're a rideshare away from court if they ever have to go.

But what happens when the only courthouse in El Paso, Colorado, or Polk County, Florida, is a state court? Have the parties to the contract really chosen only a state court forum to the exclusion of a federal one?

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The 9th U.S. Circuit Court of Appeals in *City of Albany v. CH2M Hill, Inc.*, 2019 DJDAR 4577 (9th Cir., May 29, 2019) recently joined a growing majority of courts to hold "yes," finding that a similar clause unambiguously selected a state court over federal forum simply by pointing to the map. In short, a provision the contracting parties may have given little thought to has much more serious consequences.

In *CH2M Hill*, the city of Albany sued an engineering firm, CH2M Hill for breach of an engineering contract to provide services to the city. CH2M removed the case based upon diversity of citizenship, but the city moved to remand the case back to state court based upon a perfectly ordinary choice-of-venue provision. The choice-of-venue provision required that "[v]enue for litigation shall be in Linn County, Oregon." The wrinkle? Although there is, of course, a federal courthouse *serving* Linn County, and cases filed in state court in Linn County are routinely removed to the appropriate forum in Lane County, there is no *actual* federal courthouse situated in Linn County. Over CH2M's claims of ambiguity, the 9th Circuit reviewed the clause and the map, and held that where a venue-selection clause provides that litigation shall occur "in" a county in which there is no federal courthouse, the parties have unambiguously contracted to litigate only in state court.

The choice of venue provision required that '[v]enue for litigation shall be in Linn County, Oregon.' The wrinkle? Although there is, of course, a federal courthouse serving Linn County, and cases filed in state court in Linn County are routinely removed to the appropriate forum in Lane County, there is no actual federal courthouse situated in Linn County.

In 2018, the 4th Circuit drew the same conclusion in *Bartels v. Sabder Healthcare Grp.*, LLC, 880 F.3d 668 (4th Cir. 2018), following the 2nd Circuit in *Yakin v. Tyler Hill Corp.*, 566 F.3d 72 (2d. Cir. 2009). In *Bartels*, a form assisted living residency contract provided that "the county in which the Facility is located shall be the sole and exclusive venue for any dispute between the parties, including, but not limited to, litigation, special proceeding, or other proceeding between the parties that may be brought, arise out of or in connection with or by reason of this Agreement." The defendant removed under the Class Action Fairness Act, but the case was remanded to state court because there was no federal court in the relevant county. Again, although the defendant urged a different meaning — namely, that the federal court serving that county was included — the 4th Circuit held that the language was unambiguous and compelled a conclusion that federal court was not an option in counties where no such courthouse sat.

The reach of these decisions is not yet clear. What happens, for example, when there is no courthouse of any kind in the chosen city or county? Are the parties deemed to have chosen some other form of litigation? What if the courthouse moves? What if the parties have chosen a county in which there is no state court, there is a federal court, but there is no federal subject-matter jurisdiction? Is there an ambiguity? Certainly, because these cases grow out of the plain contractual language and relevant facts surrounding them, the facts of each case will dictate whether a true ambiguity exists or whether courts might use equitable powers to fill missing terms.

So, *CH2M* teaches that counsel and parties should check to make sure they know exactly *what building* they have chosen to litigate in. And, if parties want to ensure that they remain open to federal courts, they need to expand their contractual language. The easiest fix to ensure that all forums remain available may be to specify that venue will lie "in any state or federal court of competent jurisdiction in, or serving, County X. If no such courthouse is available, then the parties agree to venue in the next closest state or federal court of competent jurisdiction." In all events, parties and counsel would be wise to pay close attention to their favorite map apps to make sure they don't get less than they bargained for. ■

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