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California Supreme Court upholds out-of-state forum clauses without jury trials

In *EpicentRx*, the California Supreme Court upheld a forum selection clause naming the Delaware Court of Chancery, rejecting a constitutional challenge based on its lack of jury trials – and signaling broader implications beyond Delaware entities.

By Paul A. Reynolds

On July 21, the California Supreme Court issued its long-awaited opinion in *EpicentRx, Inc. v. Superior Court*. The court reversed a decision from the California Court of Appeal affirming a trial court order denying a forum non conveniens motion on the ground that the clause's selection of the Delaware Court of Chancery — the highly influential court specializing in litigation of internal corporate disputes — coupled with that court's lack of jury trials, rendered it invalid as running afoul of the California Constitution's bar of pre-dispute jury waivers.

The case garnered significant attention because of the growing prominence of mandatory choice of forum provisions selecting the Delaware Court of Chancery in the certificates of incorporation and/or bylaws of publicly traded and privately held Delaware corporations (and the formative agreements of limited liability companies and limited partnerships), as was the case here. But, as will be seen the court's decision, has ramifications even beyond that context.

Procedural background

The plaintiff, EpiRx L.P., a stockholder in EpicentRx (the Company), filed a lawsuit against it and several of its directors and officers, alleging claims for breach of fiduciary duty, breach of contract and promissory fraud, among others. The defendants moved for dismissal on the grounds of forum non conveniens, pointing

to mandatory forum selection clauses in both the certificate of incorporation and the bylaws of the Company, which selected the Delaware Court of Chancery for derivative claims; claims for breach of fiduciary duty against a company officer or director; claims arising under the Delaware General Corporation Law or the Company's constitutive documents; and claims covered by the internal affairs doctrine — a choice of law doctrine holding that disputes between and among the various constituents of a corporation are governed by the law of the state of incorporation.

The trial court denied the motion, ruling that a jury trial was unavailable in the Delaware Court of Chancery, a court of equity that does not use juries. Delaware is one of four states

that still maintain bifurcated court systems for law and equity. The court held that the choice of forum provision was a *de facto* pre-dispute waiver of the right to a jury trial, which California law does not allow, per *Grafton Partners v. Superior Court*, 36 Cal.4th 944, 956 (2005). In further briefing and at another hearing, the defendants argued that there was not a jury trial right even under California law on their claims. (It has been held that claims for breach of fiduciary duty against corporate fiduciaries are inherently equitable, analogous to claims by a beneficiary against a trustee, and thus do not have a jury trial right. See *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 17 Cal. App. 5th 292, 344-50 (2017); but see *ZF Micro solutions, Inc. v. TAT Capital Partners,*

Ltd., 82 Cal. App. 5th 992, 999-1002 (2022) (holding that *McAfee* only applies to shareholder derivative actions alleging breach of fiduciary duty to minority shareholders, but when a claim for breach of fiduciary duty is brought by the company itself against its fiduciaries it can be, and was here, an inherently legal claim, to which a jury trial right attaches). The trial court rejected this argument by noting that at least some of the plaintiff's claims were legal and not inherently equitable, and that trial in the Court of Chancery would therefore impermissibly deprive the plaintiff of a jury trial on those claims.

On a petition for a writ of mandate to the Court of Appeal, the Court denied relief. The Court of Appeal



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first noted that, ordinarily, the party opposing enforcement of a forum selection clause bears the burden of proving why it should not be enforced; but that burden flips where the claims at issue are based on unwaivable rights created by *California Statutes*, citing *Handoush v. Lease Finance Group, LLC*, 41 Cal. App. 5th 729, 739 (2019). Under that case, the court found that the right to a jury trial was a fundamental right that could not be waived pre-dispute, that at least some of the plaintiff's claims would be entitled to a jury trial in California and, as such, that the defendants had not met their burden in showing that jury trial right would be upheld in the Court of Chancery.

The Supreme Court granted the defendant's Petition for Review, resulting in its opinion.

The Supreme Court's opinion

Forum non conveniens generally

That opinion by Chief Justice Guerrero, and joined by all other justices, started by examining "forum non conveniens generally" — i.e., outside of the context of a mandatory forum selection clause. It noted that, in this context, an alternative forum is "suitable" (i.e., at least has the potential to have a motion to dismiss to be granted in its favor, which will occur if the court in its discretion finds the alternative forum more convenient to the parties and the public) if it (1) has jurisdiction and (2) the claim will not be barred in it by the statute of limitations in that court. Slip Opinion at 10. That the "law is less favorable to the plaintiffs in the alternative forum, or that recovery would be more difficult, if not impossible, is irrelevant ... unless the forum provides no remedy at all" (e.g., where "the alternative forum is a foreign country whose courts are ruled by a dictatorship"). Slip Opinion at 11 (citing *Guimei v. Gen. Elec. Co.*, 172 Cal. App. 4th 689, 696-97 (2009)). Under this approach, the court has held that the fact that "the law of the forum state is more favorable to the plaintiff than that of the alternative jurisdiction — including the availability of a jury trial — should not be accorded any weight ... as long as some remedy is afforded" *Id.* at p. 11 (citing *Strangvik v. Shiley, Inc.*, 54 Cal. 3d 744, 753 n.5 (1991) (cleaned up)). That said, a "California resident's choice of a California forum should rarely be disturbed. ..." Slip Opinion at 11 (quoting *Strangvik*, 54 Cal. 3d, at 754).

Forum selection clauses

Where there is a mandatory forum selection clause, "the approach changes significantly" when choosing another forum; such clauses are valid and may be given effect — unless the party resisting enforcement of the clause carries its burden of demonstrating unreasonableness, which it cannot do merely by pointing to factors of inconvenience and expense. *Id.* at 12. Indeed, the court noted that "almost 50 years ago" it had brought California in line with the "modern trend ... favor[ing] enforceability" of such clauses by holding that, even where the plaintiff is a California resident, the policy favoring access to California courts by residents "is satisfied in those cases where ... a plaintiff has freely and voluntarily negotiated away his right to a California forum." *Id.* at 13 (quoting *Smith Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 495 (1976) (cleaned up)).

Forum selection and public policy

The court then discussed the impact of California public policy on enforcing forum selection clauses. It noted that an exception to Smith's general rule of enforcement of mandatory forum selection clauses arises when enforcement would "bring about a result contrary to [California's] public policy." *Id.* at 14 (quoting *Intershop Comms, AG v. Superior Court*, 104 Cal. App. 4th 191, 200 (2002)). The court noted that courts are "reluctant" to invoke this exception, especially "where no statute or constitutional provision directly speaks to the issue." *Id.* at 16 (quoting *Kaufman v. Goldman*, 195 Cal. App. 4th 734, 745 (2011). Enforcement of mandatory forum selection provisions is "especially important" in certain "specific circumstances," such as international agreements selecting a foreign forum. *Id.* at 16-17 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-14 (1972)).

Nonetheless, "the Legislature has identified a number of circumstances in which enforcement of a forum selection clause would violate public policy," including, for example, Business and Professions Code section 3040.5 (barring forum selection clauses selecting another state in franchise agreements for businesses operating in California), California Uniform Commercial Code section 10106(b) (prohibiting forum selection clauses in consumer personal property lease agreements), Labor Code section 925(a)(1) (generally prohibiting forum selection clauses in employment agreements with employees primarily residing and working in California

unless represented by counsel in negotiating agreement), and Labor Code section 532.6 (prohibiting any waiver of "any right, forum, or procedure for violation of any provision of the California fair Employment and Housing Act"). *Id.* at 18-19. California and federal courts have also barred enforcement of such provisions. *Id.* at 19 (collecting cases).

Public policy and civil jury trial rights in California

The court then noted that the plaintiff in the case before it "does not contend that any statute or constitutional provision expressly prohibits enforcement of the forum selection clause at issue"; rather, it pointed to "California's strong public policy in favor of the right to trial by jury." *Id.* at 20. The court then stated its holding: "In other words, plaintiff maintains that a court cannot enforce a forum selection clause that would require a party to litigate in a forum, like the Delaware Court of Chancery, that does not afford the party the same right to a jury trial as in California. We disagree. Even where enforcement of a forum selection clause may effectively deprive a plaintiff of the right to a trial by jury, this circumstance alone does not provide a basis to avoid its enforcement." *Id.*

Although California public policy supports the right to trial by jury where applicable via Article I, section 16 of the California Constitution, subject to waiver as provided by statute — enacted by the legislature through Code of Civil Procedure section 631 — "it is apparent from these provisions that they concern the right to a jury trial in California courts, and not elsewhere; when litigation proceeds in another forum, the jury trial right the parties enjoy in our courts would not travel with them." *Id.* at 20-21 (emphasis added) (quoting *Rincon EV Realty, LC v. CP III Rincon Towers, Inc.*, 8 Cal. App. 5th 1, 18 (2017) (cleaned up)). As such, the "California Constitution and related statutory provisions do not reflect any public policy regarding a right to a civil jury trial in other forums." *Id.* at 21.

Although the plaintiff analogized the forum selection clause to a pre-dispute jury waiver provision — which the court had ruled unconstitutional in *Grafton*, 36 Cal. 4th, at 950 — the court found the analogy "inapt." *Id.* A forum selection clause "reflects where a dispute will be litigated," while a pre-dispute jury waiver "reflects how it will be litigated." *Id.* at 22. "*Grafton Partners* considered the circumstances in

which California courts may enforce a jury trial waiver. It did not consider whether parties may agree to avoid the California forum altogether." *Id.* Although the practical effect may be the same, "California public policy does not require invalidation of the forum selection clause in all circumstances for that reason alone." *Id.* Indeed, California courts have enforced forum selection provisions designating foreign courts that did not provide jury trial rights. *Id.* at 222 n.5 (citing *Intershop*, 104 Cal. App. 4, at 200 (enforcing provision selecting courts of Germany, which do not provide for jury trials)).

The court then noted that California's jury trial right applies to all litigants in California courts, even if they are not California residents. Under plaintiff's theory, "any litigant who can satisfy California's jurisdiction and venue requirements could maintain an action in California so long as the litigant invokes the right to a jury trial, notwithstanding an agreement to litigate in a foreign forum if the litigant could show its jury trial rights in the foreign forum could be impaired. Because civil jury trials are highly atypical outside the United States, California would become a magnet for such foreign disputes — again, notwithstanding the fact the litigants have expressly agreed to submit to a foreign forum. ... California public policy does not require such a result" *Id.* at 22-23.

The court next addressed *Handoush*, 41 Cal. App. 5th, at 729, which the Court of Appeal had relied upon. In that case, the court "adopted a framework that has developed in the Court of Appeal for analyzing forum selection clauses that may impact a parties unwaivable rights under California statutory law." Under that framework, "the usual burden if proof is reversed and the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually designated forum will not diminish in any way the substantive rights afforded under California law." *Id.*, at 23 (cleaned up). This rule was also applied in *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 157 (2015), *America Online, Inc. v. Superior Court*, 90 Cal. App. 4th 1, 10 (2001), and *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.*, 32 Cal. App. 4th 1511, 1522 (1995)). *Id.* at 23-24.

In *Wimsatt*, the court shifted the burden to a franchisor defendant seeking to enforce a Virginia choice of forum provision in a franchise agreement with a California franchisee plaintiff based on the franchise Investment Law's anti-waiver

provision because “there is no guarantee that California’s franchise laws will be applied to a franchisee’s claims.” As such, the franchisor was required to demonstrate that litigation in Virginia would “not diminish in any way the substantive rights afforded California franchisees under California law.” *Id.*, at 24. In *America Online*, where the plaintiff asserted claims under the California Consumer Legal Remedies Act, the court refused to enforce a Virginia choice of forum and law clause, given the CLRA’s anti-waiver provision, because they would force the plaintiff to allege claims under Virginia’s scheme for consumer protection, which was “far less favorable to plaintiffs than the CLRA.” *Id.* at 25. And in *Verdugo*, the court refused to enforce Texas choice of forum and law provisions against a plaintiff asserting a wage and hour claim based on the Labor Code’s anti-waiver provision, because the defendant was unable to meet its burden that Texas law would grant “comparable remedies for violation of these rights.” *Id.*

In *Handoush*, by contrast with the above cases, the jury trial right at issue was not “based on a statutory scheme which includes an anti-waiver provision.” Nonetheless, the court there applied the burden-shifting paradigm expressed in those cases, given the jury trial right being unwaivable pre-dispute under *Grafton* and its belief that, while not a strictly substantive right, it was “intimately bound up with the state’s substantive decision making” and serving “substantive state policies ...” *Id.* at 25-26 (quoting *Handoush*, 41 Cal. App. 5th, at 736, 739). The Supreme Court found *Handoush*’s reasoning to be “unpersuasive” as “[t]he California right to a jury trial is unlike the substantive rights at issue in the other cases.” *Id.* at 26. This is because, first, “the civil jury trial right is a procedural one, not a substantive one.” *Id.* at 26-27 (citing, *inter alia*, *World Wide Imports, Inc. v. Bartel*, 145 Cal. App. 3d 1006, 1013 (1983)). Second, the statutory anti-waiver provisions in the other cases are “unlike the provisions governing a party’s right to a civil jury trial,” as the California Constitutional and statutory provisions regarding civil jury trial waiver “do not purport to void jury trial waivers that do not confirm to the statute or to prohibit parties from

agreeing to them. They simply state that such waivers will not be enforced in California.” *Id.*, at 28 (citing *Grafton Partners*, 36 Cal. 4th, at 967).

In sum, “California has a strong public policy in favor of the right to a jury trial and against predispute waivers of the right. But California does not have a strong public policy against forum selection clauses or agreements to litigate in a jurisdiction that does not recognize that same civil jury trial right.” *Id.* at 29. As such, “the Court of Appeal below, and *Handoush* before it, erred by treating them as equivalent.” The Supreme Court therefore reversed the Court of Appeal and disapproved of *Handoush*, as well as *The Comedy Store v. Moss Adams, LLP*, 206 Cal. App. 5th 784 (2024), which had followed it. And the court specifically declined to “consider the merits of *Wimsatt*, *America Online*, *Verdugo*, or similar cases involving potentially unwaivable substantive rights.” *Id.* at 29-30 & n. 7.

Additional issues

Finally, in a postscript, the court made some clarifications of what its ruling did — and did not — decide. First, it made clear it was only deciding whether “the lower courts were correct to decline enforcement of forum selection clause on public policy grounds based solely on the clause’s impact on plaintiff’s jury trial right.” It did not consider “whether California’s strong public policy in favor of the right to a jury trial might be relevant, in combination with other factors, to the enforceability of a forum selection clause in other contexts or under other theories.” *Id.* at 30. Nothing in the opinion “detracts from our long-standing recognition that the right to a jury trial is a fundamental feature of the California forum.” *Id.*

Second, the court noted that the plaintiff also contended the Delaware choice of forum provision was invalid “based on its manner of adoption as part of the [Company’s] certificate of incorporation and bylaws.” *Id.* at 30-31. Although the court observed the existence of *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696 707-10 (2018), which upheld the validity of such clauses in such corporate constitutive documents, because that issue had not been decided by the lower courts

in the case currently before it, the court declined to rule address that issue and left it to the lower courts to do so in the first instance. *Id.* at 31.

Implications and takeaways

The key takeaways and implications of the decision are as follows:

- First and most obviously, of course, is that choice of forum provisions selecting the Delaware Court of Chancery for intra-corporate, or internal affairs, disputes in corporate constitutive documents (certificate of incorporations and/or bylaws) will be enforced by California courts in the face of an argument that doing so would impermissibly deny the plaintiff a jury trial. The same rule would also apply to the formation documents of Delaware limited liability companies (operating or LLC agreements) and limited partnerships (limited partnership agreements). The same goes for cases where such a Delaware choice of forum provision is in a more traditional agreement, such as a stock purchase agreement in a private securities transaction). Finally, the outcome will likewise be the same for any choice of forum provision selecting a court system that does not have jury trials — most notably, courts in foreign countries, the vast majority of which do not have juries.

- The right to a jury trial in a California court has been held to be a procedural, not a substantive, right. Further, the concept of shifting the burden to the proponent of a choice of forum and/or law provisions to demonstrate that enforcing it would not result in an unwaivable California statutory right not being vindicated does not apply when the statutory right is procedural rather than substantive. *Handoush* is therefore no longer good law. But that burden-shifting rule does still apply when the unwaivable statutory right at issue is substantive. *Wimsatt*, *America Online*, and *Verdugo* are thus still good law.

- Although the court declined to rule on the issue of whether a choice of forum provision in a company’s certificate of incorporation or bylaws will be found to bind a shareholder who purchases shares in that company, it did note that *Drulias* had ruled on this issue. That case followed the Delaware Supreme Court’s decision in *Boilermakers Local 154*

Ret. Fund v. FedEx Corp., 73 A.3d 934, 954 (Del. 2013), which found that, under Delaware law, choice of forum provisions in corporate constitutive documents will be enforced, even against stockholders who bought securities of a public company on the open market and even if those provisions were adopted after the stockholder bought his shares. *Drulias* found that result does not conflict with California public policy and will be enforced in California courts. Notably, a Petition for Review was filed after the Court of Appeal’s *Drulias* decision, and the Supreme Court denied it. Thus, *Drulias*, as the only published California appellate decision on the issue, binds all California trial courts. Although it is at least possible that another court of appeal could decide the issue the other way — including the one in *EpicientRx* on remand — and that such a split in authority could cause the Supreme Court to grant a petition for review, unless and until that happens, *Drulias* is binding in California.

- The court stated that it left open “whether California’s strong public policy in favor of the right to a jury trial might be relevant, in combination with other factors, to the enforceability of a forum selection clause in other contexts or under other theories,” suggesting there may be different factual circumstances that could lead to a different outcome. But it is hard to conceive of a set of facts that would result in a different outcome based on the logic and reasoning of the court’s decision.

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