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# California Superior Court Refuses to Enforce Forum Selection Clause Requiring Litigation in Delaware Chancery Court Over Jury Trial Rights

Delaware entities have increasingly relied on forum selection clauses mandating litigation in the Delaware Court of Chancery, in recognition of the Chancery Court's expertise and consistency in its application of corporate law. A recent California trial court decision may threaten that reliance. On July 29, 2020, a judge of the California Superior Court ruled in *West v. Access Control Related Enterprises, LLC*<sup>1</sup> that a forum selection clause mandating litigation in Delaware was unenforceable in California because the site of the expected litigation in Delaware—the Chancery Court—did not provide for civil jury trials. The court held that the enforcement of the forum selection clause would have abridged the right to a civil jury trial under California law. This decision should not apply to equitable and derivative claims, so many of the actions that currently are litigated in the Court of Chancery would not be affected by this ruling. That said, the decision invites litigation over whether specific types of claims are subject to its holding, adding uncertainty as to whether Delaware entities can rely on the Court of Chancery being their forum of choice. Further, the decision may spur other courts to push back on the frequent enforcement of such forum selection clauses, especially where enforcement of those clauses may implicate the interests of other states.

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## Case Synopsis

The plaintiff, William West, brought suit against his former employer for wrongful termination, conversion, breach of fiduciary duty, and declaratory relief. Based on a forum selection clause in the governing agreement mandating litigation in Delaware courts, the California Superior Court stayed the action. The plaintiff then filed suit in Delaware and motion practice around jurisdiction and venue issues in Delaware ensued. The Delaware Superior Court granted a motion to transfer the action to the Chancery Court and held that the defendant's motion to strike the jury trial demand was moot, given that the Chancery Court does not conduct jury trials. After that ruling, the plaintiff moved to lift the stay in California Superior Court on the ground that litigation in the Court of Chancery would deprive him of the right to a jury trial under California law.<sup>2</sup>

The California court lifted the stay and refused to enforce the forum selection clause, finding that its enforcement would impermissibly effect a pre-dispute waiver of the right to a jury trial under California law. The court reviewed precedent which taught that forum selection clauses that potentially impinge on “unwaivable rights created by California statutes” are presumed to be unenforceable.<sup>3</sup> The court noted that the right to a jury trial could only be waived under California law in a small number of specific circumstances (*i.e.*, failure to appear at trial, failure to demand a jury trial, failure to pay the required fees, and consent after the beginning of the litigation). The court also relied on a recent California appeals court decision, *Handoush v. Lease Finance Group, LLC*, which held that a forum selection clause that included a pre-dispute jury waiver was unenforceable.<sup>4</sup> Extending *Handoush*, the court—after observing that the Delaware Court of Chancery “simply does not conduct jury trials”<sup>5</sup>—found that the forum selection clause before it impermissibly effected a waiver of the plaintiff's jury trial rights. Because the Chancery Court did not conduct jury trials, as “a matter of fair process under the California Constitution,” the court refused to enforce the forum selection clause at issue.<sup>6</sup>

## Implications

Delaware entities have relied increasingly on forum selection clauses in merger agreements, securities purchase agreements, financing agreements and other similar contracts—and even in their bylaws and certificates of incorporation—to ensure that litigation over key agreements and internal corporate matters is heard in the Delaware Court of Chancery. It is unsurprising that Delaware entities would prefer the Chancery Court. That court is widely known as expert in corporate law. In fact, even the court in *Access Control* recognized that the “Chancery Courts are on the

cutting-edge of corporate law.”<sup>7</sup> In addition, by having their disputes settled in one court, Delaware entities can take comfort in being able to operate under a consistently-applied body of law. Delaware courts too have recognized these benefits for Delaware entities, and regularly enforce forum selection clauses.<sup>8</sup>

For these reasons, it is noteworthy when a court in another jurisdiction, particularly a populous jurisdiction with a large local economy like California, calls into question the broad enforceability of such forum selection clauses. For example, as in *Access Control*, defendants may now need to litigate claims for which a jury trial is available, such as employment-related or contract-based claims, in California courts to the extent that plaintiffs bring those claims in California. Further, the decision does not appear to draw a distinction between natural person and entity plaintiffs, or unsophisticated *pro se* parties and sophisticated parties represented by counsel. The decision therefore could have broad applicability.

But, to be sure, there are limits to the potential application of the *Access Control* decision. Under California law, there is no right to a jury trial for actions under equity<sup>9</sup> and for stockholder derivative actions.<sup>10</sup> For that reason, California courts should respect a Delaware Court of Chancery forum selection clause in some of the more common disputes in corporate and deal litigation, such as suits for injunctive relief, declaratory judgment, specific performance, and shareholder derivative actions.

Still, the *Access Control* decision threatens the certainty Delaware entities enjoy that their disputes will predictably be heard in the Court of Chancery. First, whether, in the view of a California court, a claim that is normally litigated in the Delaware Chancery Court is an action at equity or law, or both, may now be the subject of litigation, leaving Delaware entities uncertain as to whether a forum selection clause mandating the Delaware Chancery Court is enforceable for a particular type of claim. Second, the decision provides a potential roadmap for other courts, wary of the proliferation of Delaware-specific forum selection clauses and the potential impingement on home state interests, to expand the rejection of these forum selection clauses to other situations, and to other states.

Accordingly, Delaware entities, to the extent that they operate or have shareholders based in California, may consider relying on forum selection clauses that mandate litigation in the Delaware Chancery Court, but have as a fallback a clause that requires a separate form of dispute resolution, such as in a court of law like the Delaware Superior Court or in arbitration.<sup>11</sup>

1. BC642062 (Cal. Super. Ct. 2016).
2. *Id.* at \*2.
3. *Id.* at \*3 (quoting *Verdugo v. Alliantgroup, L.P.*, 237 Cal. App. 4th 141, 147 (2015)).
4. 41 Cal. App. 5th 729 (2019).
5. *Id.* at \*5.
6. *Id.* at \*8 (emphasis omitted).
7. *Id.* at \*7-8.
8. See, e.g., *Nat’l Indus. Grp. (Hldg.) v. Carlyle Inv. Mgmt., L.L.C.*, 67 A.3d 373, 381 (Del. 2013).
9. *C&K Eng’g Contractors v. Amber Steel Co., Inc.*, 23 Cal.3d 1, 19 (1978).
10. *Caira v. Offner*, 126 Cal. App. 4th 12, 39 (2005).
11. See *Grafton Partners v. Superior Court*, 36 Cal. 4th 944, 959 (2005) (pre-dispute arbitration agreements enforceable).