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### Anti-Waiver Arguments and Enforcement of Forum-Selection Clauses

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Anti-waiver provisions in state franchise acts have traditionally been used to trump the venue designated in the franchise agreement and to successfully enforce the designated venue. However, a recent decision from the U.S. District Court for the Eastern District of Michigan has added weight to a small but growing body of cases enforcing franchisee venue in states with franchise acts containing anti-waiver provisions.

In *Allegra Holdings, LLC v. Davis*, 2014 U.S. Dist. LEXIS 57086 (E.D. Mich. Apr. 24, 2014), the court held that the anti-waiver provision of the Michigan Franchise Act prevented franchisors from abrogating the rights afforded by the Act to franchisees. The court concluded that, despite the Act's anti-waiver provision, the clause designating Michigan as the proper venue was valid since it did not operate as a waiver of the franchisee's rights under the Act; the franchisee could still sue in Michigan if it wanted to, and the court would favor enforcing the parties' chosen venue.

#### The Intersection of Forum-Selection Clauses and Anti-Waiver Provisions

Contractual forum-selection clauses — where the parties agree on the judicial or arbitral forum for resolution of any future disputes — are a fairly standard part of many commercial contracts. In franchise agreements, these provisions often designate the state where the franchisor's home office is located as the proper venue. In a 40-year history, these clauses may seem insignificant, but they are critical in litigation and must be given considerable attention.

There is a well-developed body of law favoring enforcement of forum-selection clauses in commercial contracts. But despite the deference afforded to such clauses, there are significant hurdles in enforcing them. Venue in the jurisdiction agreed upon by the parties to a franchise agreement is not a foregone conclusion because many states have franchise statutes containing anti-waiver laws designed to make forum-selection clauses unenforceable. For example, the anti-waiver provision in the Michigan Franchise Act provides that a provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise operating within this state." Cal. Bus. & Prof. Code §20040.5. Similar anti-waiver provisions have been adopted by many other states, including Connecticut, Louisiana, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, Texas, Washington, and Wisconsin. This makes it difficult to predict whether or not a forum-selection clause in a franchise agreement will be enforced, as some of the laws only apply in specific circumstances or policy based discretion. That sort of uncertainty is a big concern for franchisors.

Franchisees who view their home states as more convenient or more favorable frequently use these anti-waiver provisions in an attempt to negate the venue designated in the franchise agreement when they signed the franchise agreement. Against this backdrop, the *Allegra v. Davis* opinion is significant, and perhaps paves the way for greater enforcement of franchisee venue regarding where their disputes will be heard.

#### *Allegra v. Davis*

The *Allegra* case initially arose out of a franchisee's alleged violation of a post-term non-competition covenant contained in the franchise agreement. The plaintiff was Allegra Holdings, LLC (the franchisee) and two individual Minnesota residents (guarantors of the franchise agreement). Two Allegra entities — the franchisor and the guarantors — filed suit in the U.S. District Court for the Eastern District of Michigan for injunctive relief and damages under theories of trademark infringement, unfair competition, breach of franchise agreement and breach of contract.

The defendants responded with a motion for change of venue, which sought to move the case to the U.S. District Court for the District of Minnesota. The defendants argued that the franchise agreement and the Minnesota Franchise Act required that Allegra litigate its claims against them solely in the state of Michigan.

The franchise agreement provided for suit exclusively in "the state or federal court of general jurisdiction in or nearest to Troy, Michigan" — the East Troy, Michigan location of the franchisor. The forum-selection clause further provided that nothing in the franchise agreement abrogated or reduced any of the franchisee's rights under Minnesota law to any procedure, forum or remedies provided by Minnesota law. The clause specifically acknowledged that Minn. Stat. Sec. 80C.21 and Minn. Stat. Sec. 80C.22 (except in certain specified cases) from requiring venue outside of Minnesota.

The defendants maintained that despite their explicit agreement to litigate in Michigan, the franchisor's filing suit in the Eastern District was tantamount to a waiver of the Michigan venue provision.

of Minnesota and was thus a violation of both the franchise agreement and Minnesota law (specifically Section 80C.21 of the Minnesota Franchise Act).

In rejecting the defendants' arguments and refusing to transfer venue, the court issued two key holdings. First, the court sided with Allegra that there was no violation of the Minnesota Franchise Act because the franchise agreement limited the defendants' access to Minnesota courts should they choose to file a lawsuit. Second, the court found that the Minnesota statute and rule did not violate the Minnesota Franchise Act from agreeing to a forum-selection clause.

The court looked specifically at the language of both the Minnesota Franchise Act and the Rule. The anti-waiver provision of the Minnesota Franchise Act provides that any provision purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, any person who, at the time of acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with the provisions of 80C.022 or any rule or order thereunder is void." Minn. Stat. §80C.21. The court held that the defendants read too much into this provision by arguing that the franchise agreement prohibited the franchisor from litigating in a non-Minnesota forum. Rather, the court reasoned that the plain meaning of the anti-waiver provision is to prohibit the franchisor from waiving the rights afforded to Minnesota franchisees under the franchise act.

Likewise, the Minnesota Rule that it "shall be unfair or inequitable for any person to ... require a franchisee to waive his or her rights to a jury trial or other remedies provided for by the laws of the jurisdiction" did not prohibit litigation outside of Minnesota. Minn. R. 2960.4400(J). Here again, the court concluded that the franchise agreement did not waive the franchisee's rights under the franchise act and held that nothing in the choice of forum provision in any way diminished defendants' right to avail themselves of the remedies provided by the laws of the jurisdiction.

### **Lessons Learned from *Allegra***

There are a few key points that parties to a franchise agreement should take away from the *Allegra* opinion. First and foremost, as long as a forum-selection clause does not operate as a waiver of a franchisee's rights under an applicable state franchise act, the clause can be deemed proper and valid.

Second, the U.S. Supreme Court's recent decision in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Washington* (2013), on which the court in *Allegra* relied heavily, provides the analytical framework courts should use to evaluate motions to transfer venue pursuant to a forum-selection clause. The court in *Atlantic Marine* found that when the parties' contract contains an agreement as to venue, the principle concern is to "not undermine the parties' expectations." *Atl. Marine*, 134 S. Ct. at 583. When there is a forum-selection clause, considerations of private factors such as convenience of the parties are automatically weighed in favor of the preselected forum, requiring courts to consider only the public interest factor in deciding a motion to transfer venue. The court would "weigh the relevant factors and decide whether, on balance, a transfer would serve 'the convenience of parties and with justice.'" *Id.* at 581 (quoting 28 U.S.C. §1404(a)).

In *Atlantic Marine*, the U.S. Supreme Court found that when the parties' contract contains an agreement as to venue, the principle concern is to "not undermine the parties' expectations." *Atl. Marine*, 134 S. Ct. at 583. When there is a forum-selection clause, considerations of private factors such as convenience of the parties are automatically weighed in favor of the preselected forum, requiring courts to consider only the public interest factor in deciding a motion to transfer venue. The court would "weigh the relevant factors and decide whether, on balance, a transfer would serve 'the convenience of parties and with justice.'" *Id.* at 581 (quoting 28 U.S.C. §1404(a)).

Finally, *Allegra* confirms that a section 1404(a) motion to transfer is the proper method for franchisees to challenge the venue prescribed by a forum-selection clause. In *Allegra*, the court brought their motion pursuant to Fed. R. Civ. P. 12(b)(3), which provides that a party may assert certain defenses such as improper venue but not lack of due diligence. Instead, relying on *Atlantic Marine*, it treated the motion as a motion to transfer venue under 28 U.S.C. §1404(a). The court determined that, since the franchise agreement contained a forum selection clause, it was a motion to transfer venue and not a motion to dismiss under Rule 12(b)(3).

### **Conclusion**

*Allegra* represents a huge victory for franchisors seeking to enforce the forum-selection clauses of their franchise agreements in the face of state franchise acts that prohibit such clauses. While franchisors may still encounter an uphill battle in some states, enforcement of valid forum-selection clauses appears to be gaining some traction.

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