A Win for the Home Team!

How do I convey the highest congratulations and the deepest gratitude to you? It will take me years, but let's get started.

First, congratulations to you for just having hosted a tremendously successful Annual Meeting in Fort Worth. Fort Worth last hosted the event in the 1990s. The number of years since our last hosting grew longer and longer as each speaker mentioned thanks that Fort Worth was back on the map. But the most important fact is that you committed, contributed, and did it all with a tremendous amount of grace.

Second, you do not know how much I owe you for this past year's support and last week's gift. Your support made the difference in the election and opened a door that had been closed to us for too long. You have always said "yes" to appointments to help the State Bar, and you continued to raise high the Tarrant County Bench and Bar's flag in local and state matters of importance for Texas citizens, lawyers, judges, and justices.

Likewise, the gift that you gave Cindy and me at the President's Gala was the surprise of a lifetime. I think that the last time that just the two of us took a trip was 23 years ago. The gift is unexpected and undeserved, but we will not give it back! I am grateful for the opportunities and lessons of the last couple of years. I could not be more proud of the statewide reputation of Tarrant County's Bench and Bar. Let's be sure that we keep that reputation and not forget how we got to this point in our community and in Texas. Even during these tough economic times for all Texas citizens, Tarrant County's Bench and Bar have hung in there and always been ready to go the extra mile when asked.

I applaud you in all of your efforts to make a difference for others—including TCBA's winning the SBOT's Award of Merit! I look forward to having Fort Worth in the Annual Meeting rotation, having others from Fort Worth run for statewide offices, and supporting you. I pledge that during the years ahead, I will find creative ways to return the thanks that I owe. Best to you!

—Roland

Commercial Litigation: Forum-Selection Clauses Are Stronger Than Ever

By Scot Pierce, Brackett & Ellis

Many, if not most, contracts contain forum-selection clauses. If you are involved in just about any commercial litigation matter, you are likely to run into one of these clauses. Of course, whether your client opts to enforce or fight a forum-selection clause is often a tactical decision. These clauses, however, may very well have boundaries to their enforceability. The Texas Supreme Court has said that "[w]e have consistently refused to close the door to the possibility that exceptional circumstances could exist [for refusing to enforce a forum-selection clause], even as we have chosen not to confront them in particular cases." *In re ADM Investor Servs., Inc.,* 304 S.W.3d 371, 376 (Tex. 2010). Unfortunately for practitioners, it is not clear what these exceptional circumstances might be.

Texas law weighs heavily in favor of enforcing forum-selection clauses. To overcome the presumption of enforceability, the party opposing enforcement must show that (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons of fraud or overreaching; (3) the enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be a seriously inconvenient forum for trial. *In re AIU Ins. Co.*, 148 S.W.3d 109, 112 (Tex. 2004). Consequently, the burden of proof on the party opposing enforcement of a forum-selection clause is heavy. *Id*. at 113.

Even in the face of such a burden, several recent cases have focused on a number of arguments to oppose such clauses. How the Texas Supreme Court handled three of these arguments is particularly illustrative of how difficult it is to overcome the presumption against enforcement of forum-selection clauses.

So where does this leave us?

In an opinion issued in February of this year, the Court rejected an argument that litigating in a foreign forum would cause a medical hardship. *ADM*, 304 S.W.3d at 371. In that case, the defendant filed a motion to dismiss, arguing that a forum-selection clause required the matter to have been brought in an Illinois court, not a Texas court. The plaintiff made a number of arguments against enforcement, including arguing that litigating in Illinois would cause her medical hardship. The plaintiff submitted an affidavit stating she was eighty years old, suffered from

chronic health issues (including fibromyalgia and heart problems), had difficulty walking, and had been hospitalized several times in recent months. The Court held that the affidavit from the plaintiff—without more—was not enough to overcome the forum-selection clause. The Court even seemed to cast doubt as to whether health problems alone would be sufficient to avoid enforcement of a forum-selection clause.

Justice Willett, however, issued an insightful concurrence that may provide an argument for medical-hardship cases in the future. He agreed that the evidence in this case was not sufficient to avoid enforcement, but he suggested that the party opposing enforcement might have prevailed if a competent medical provider had testified that travel to the agreed forum would not only be inconvenient but medically prohibitive. He then acknowledged that no Texas court has ever directly addressed whether medical hardships are sufficient to overcome a forum-selection clause. ...*continued to page 16*

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This case, therefore, may signal an opening for a party with the right set of facts and evidence to overcome a forum-selection clause.

In a case decided in June 2008, the Texas Supreme Court rejected financial and logistical hardships as bases for overcoming the strong presumption in favor of enforcement of forum-selection clauses. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228 (Tex. 2010). In that case, the parties entered into an agreement that contained a forum-selection clause requiring litigation between the parties to be conducted in Pennsylvania instead of Texas. The plaintiff filed suit in Texas. Among the plaintiff's many arguments for denying enforcement of the forum-selection clause was that Pennsylvania was an inconvenient forum for the plaintiff because of the costs and distance involved. The plaintiff submitted an affidavit stating that it was a small, local business that did not have the financial or logistical ability to pursue its claims in Pennsylvania. Of course, attempting to create financial and logistical difficulties for the opposing party is often among the primary reasons that companies use forum-selection clauses. Not surprisingly, the Court rejected these arguments. It stated that "[i]f merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless." *Id.* at 234. The Court seems to not only recognize the tactical advantage of using these clauses but even to approve using them for this tactical advantage.

In this same case, the Court also rejected plaintiff's argument that enforcing the forum-selection clause would be contrary to public policy. In the underlying case, the plaintiff alleged that the defendant's contract was usurious. The plaintiff argued that unlike Texas law, Pennsylvania law precluded its claims for usury because Pennsylvania does not allow a corporation to maintain a cause of action for usury. The Court rejected the public-policy argument for three reasons. First, it decided that absent a statute requiring that suit be brought in Texas, the mere existence of a Texas law does not establish such a strong policy that a forum-selection clause should be negated. Second, it found that the plaintiff made no showing that a Pennsylvania court would apply Pennsylvania law, rather than Texas law, in this matter. Third, the Court found that the plaintiff did not provide specific evidence that enforcing the forum-selection clause would contravene a Texas public policy regarding usury. The Court, therefore, conditionally granted a writ of mandamus and ordered the case dismissed.

So, where does this leave us? I am not sure if we are any closer to knowing the limits of enforcing forum-selection clauses. What is clear is that such clauses are very hard to overcome. What is also clear is that if you attempt to overcome a forum-selection clause for medical reasons or public policy, you need to provide independent, third-party evidence that specifically addresses why enforcement of the forum-selection clause would be dangerous, impossible, or would clearly and directly contravene a policy of the state of Texas. Even with that, it is still a difficult battle to win.