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California Court Of Appeal Holds That Party Seeking To Enforce Forum Selection Clause As To Unwaivable Statutory Rights Has Burden To Show Enforcement Would Not Diminish Rights

California Business & Professions Code § 16600 contains a strong public policy against non-competition agreements. To address this prohibition, some employers have included choice of forum provisions in their employment contracts to give them the option of initiating an action in a more non-compete friendly jurisdiction and obtain leverage in the litigation. Some federal district courts have enforced those forum selection clauses. *Marcelo v. Ivy Ventures, LLC*, No. C 10-04609, 2010 U.S. Dist. LEXIS 134333 (N.D. Cal. Dec. 9, 2010); *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018 (N.D. Cal. 2005); *Hartstein v. Rembrandt IP Solutions*, 2012 U.S. Dist. LEXIS 105984 (N.D. Cal. July 30, 2012); *see also Hegwer v. American Hearing and Assocs.,* 2012 U.S. Dist. LEXIS 24313 (N.D. Cal. Feb. 27, 2012); *Swenson v. T-Mobile USA, Inc.*, 415 F. Supp. 2d 1101 (S.D. Cal. 2006) (in case filed by employee in California after former employer had commenced enforcement action in Washington, California court dismissed and held that "[e]nforcement of the [Washington] forum selection clause itself here does not contravene a strong public policy of California).

The California court of appeals holding in *Verdugo v. Alliantgroup, L.P.*, (Cal. Ct. App., 4th App. Dist. 2015) may undermine that strategy.

Ordinarily, the party opposing the enforcement of a forum selection clause has the burden to show the enforcement of the clause would be unreasonable or unfair. In *Verdugo,* the court held that the burden is reversed when the underlying claims are based on statutory rights that the California Legislature has deemed unwaivable.

In *Verdugo*, the plaintiff employee Rachel Verdugo sued her employer, Alliantgroup, in a class action asserting eight causes of action: (1) unpaid overtime wages under Cal. Labor Code § 1194; (2) failure to provide accurate itemized wage statements under Cal. Labor Code § 226; (3) failure to provide meal breaks under Cal. Labor Code § 226.7; (4) failure to pay all wages due at time of termination under Cal. Labor Code § 203; (5) failure to pay commissions under Cal. Labor Code §§ 200 to 204; (6) failure to pay vacation pay under Cal. Labor Code § 227.3; (7) unfair and unlawful business practices under Cal. Bus. & Prof. Code § 17200, *et seq*. and (8) civil penalties under the Cal. Labor Code Private Attorneys General Action of 2004. Alliantgroup moved to stay or dismiss the action based on a forum section clause in an Employment Agreement signed by Verdugo.

Verdugo began her employment with Alliantgroup in 2007 in its Irvine, California office as an "Associate Director". Alliantgroup is headquartered in Texas, with offices in 11 states, including California.

Verdugo's Employment Agreement included a combined forum selection and choice of law clause:

> Choice of Law/Jurisdiction/Venue: This Agreement shall be governed in all respects, including, but not limited to, validity, interpretation, effect and performance by the laws of the State of Texas. The parties agree that proper subject matter and personal jurisdiction shall be had solely in [the] State of Texas. The sole venue for disputes arising hereunder shall be in Harris County, Texas." (Italics, underscoring, and bold typeface omitted.)

The trial court granted Alliantgroup's motion. Verdugo appealed.

The *Verdugo* court began its analysis by noting the general standard that California favors enforcement of forum selection clauses, provided they are entered into freely and voluntarily, and provided their enforcement would not be unreasonable. A mandatory forum selection clause—one that requires that a matter be litigated in a particular forum as opposed to merely permitting it—is given effect unless the enforcement would be unreasonable or unfair. The *Verdugo* court pointed out that, despite this, California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates California public policy.

Alliantgroup argued that it was Verdugo's burden to demonstrate that the forum selection clause should not be enforced. The *Verdugo* court disagreed. Citing *Wimsatt v. Beverly Hills Weight etc. Internat., Inc.*, 32 Cal.App.4th 1511 (1995)(dealing with claims under California's Franchise Investment Law) and *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1 (2001)(dealing with claims under California's Consumer Legal Remedies Act), the *Verdugo* court held that where the claims at issue in the litigation are based on unwaivable statutory rights, the burden shifts to the party seeking to enforce the forum selection clause to show that the forum selected will not diminish in any way the substantive rights afforded under California law.

Alliantgroup attempted to distinguish *Wimsatt* and *America Online*, arguing that, in each case, the statute at issue specifically stated that attempts to waive the protections of the law are void. The *Verdugo* court dismissed this argument, noting that California Labor Code §§ 219 and 1194 include non-waiver language and further noting that case law recognized the protections of the Labor Code at issue were unwaivable. Alliantgroup then tried to argue that Verdugo had not waived her rights, but merely agreed to litigate her claims in Texas. The *Verdugo* court also dismissed this argument, holding that the forum selection clause had the potential to operate as a waiver, and it was Alliantgroup's burden to show it would not.

Having held that Alliantgroup bore the burden of establishing that the selection of Texas as a forum would not diminish in any way the substantive rights afforded under California law to Verdugo, the *Verdugo* court proceeded to address whether Alliantgroup had met that burden. The court first addressed whether it was necessary to conduct a comparative analysis of each state's law to determine whether they offered materially different protections. Citing *America Online*, the *Verdugo* court noted that there the court had found such an analysis unnecessary—enforcing the clause would deny a California resident the specific protections the California Legislature enacted and made unwaivable. Nonetheless, noting that the *America Online* court had proceeded to conduct just such an analysis, the *Verdugo* court held such an analysis was necessary to determine whether enforcement of the forum selection and choice of law clauses would violate California's public policy. The *Verdugo* court held that the defendant could meet its burden only by showing that the foreign forum provides the same or greater rights than California, or that the foreign forum will apply California law.

Alliantgroup contended that a Texas court would, under Texas choice of law, *most likely* apply California law. The *Verdugo* court found this unpersuasive, noting that Alliantgroup could have omitted any uncertainty by stipulating to the application of California law. Instead, Alliantgroup "carefully preserved its ability to argue to a Texas court that it should apply Texas law. . . ." Holding that Alliantgroup had

failed to identify or compare Texas and California law on any of the relevant statutory claims, the *Verdugo* court held Alliantgroup had not met its burden.

Alliantgroup argued against a full reversal of the lower court's ruling, arguing that the stay should be left in place on *forum non conveniens* grounds, with the right to resume litigation if the Texas court refused to apply California law and was thus, "unsuitable." The *Verdugo* court held that a California trial court lacked the power to simply stay the action on *forum non conveniens* grounds. The *Verdugo* court held that the issue was not whether Texas was suitable for purposes of *forum non conveniens*—an analysis limited to whether the court lacks jurisdiction or the action is barred on statute of limitations grounds. A Texas court's decision to apply Texas law would not make Texas an *unsuitable* forum. And the California trial court would not necessarily have a basis to resume proceedings.

Out of state employers seeking to enforce forum and choice of law clauses against California employees should be mindful that the clauses cannot be used to undercut the unwaivable protections of the California labor code. An out of state employer that wishes to enforce a forum selection clause should be prepared to stipulate to application of California law as to the unwaivable protections of the California Labor Code on claims at issue if it wishes to have its choice of forum outside California enforced by a California court.

It remains to be seen to what extent this ruling may be used by employees to escape the effect of forum selection clauses in cases involving non-competition agreements. Although Cal. Business & Professions § 16600 does not specifically use the term "waive," it states that: "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Case law does not permit employers to use choice of law provisions to avoid the impact of Cal. Business & Professions § 16600 (*Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881, 901-905 (1998)), but employers have used choice of forum clauses to enforce non-competition agreements. Employers may anticipate that employees with non-competition agreements facing forum selection clauses that may result in enforcement of the terms will argue that the provisions of §16600 are not waivable and, pursuant to *Verdugo*, may not be litigated in foreign forums that would enforce them.

Tags: Alliantgroup, California, forum selection clause, Non-Compete Agreements, Verdugo
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