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Citation: **1989 U.S. Dist. LEXIS 16395**

*1989 U.S. Dist. LEXIS 16395, \*; Comm. Fut. L. Rep. (CCH) P24,556*

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in its corporate capacity, Plaintiff,  
v. GELDERMANN, INC., an Illinois corporation; UMIC, INC., a Tennessee corporation;  
CHARLES ALEX DENNY; ARTHUR A. WALLACE; BRYAN E. GREEN; and GREGG CROSBY,  
Defendants

No. CIV-89-609-T

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

1989 U.S. Dist. LEXIS 16395; Comm. Fut. L. Rep. (CCH) P24,556

August 1, 1989, Decided and Filed

### CASE SUMMARY



**PROCEDURAL POSTURE:** Defendants filed motions to dismiss claims for damages and equitable relief based upon an alleged violation of the Commodity Exchange Act, 12 U.S.C.S. § 1730, filed by plaintiff Federal Savings and Loan Insurance Corporation (FSLIC). Defendants claimed that under a forum selection clause contained in contracts with the FSLIC's predecessor-in-interest, venue was limited to the Northern District of Illinois and the court lacked jurisdiction.

**OVERVIEW:** When defendants were unable to obtain FSLIC's consent to a transfer of venue to the Northern District of Illinois, defendants filed motions to dismiss asserting that the contract that defined the respective parties' rights and liabilities contained a valid forum selection clause and only the court thereby selected was entitled to exercise jurisdiction. FSLIC claimed that the present venue was proper because it was the district in which the claim arose and was the only forum in which all defendants were subject to service. The court denied the motion to dismiss. Holding that a venue selection clause neither imposed absolute duties nor endowed parties with absolute rights, the court found that FSLIC was not absolutely bound by the forum selection clause even if it were subject to all contractual defenses. The court noted that while it would be inclined to transfer the case if the proposed transfer was neither unreasonable nor unjust, any transfer would require severance of claims and defendants because not all of them were subject to process in the transferee district. The court found that a single forum was most suitable for adjudicating the various claims and denied dismissal.

**OUTCOME:** The court denied motions to dismiss filed by defendants in response to FSLIC's filing of a lawsuit in a court other than that designated in a valid forum selection clause in a contract under which FSLIC was asserting claims.

**CORE TERMS:** forum selection clause, venue, inconvenience, transferred, partial, motions to dismiss, personal jurisdiction, corporate capacity, customer agreement, entire case, savings, co-defendants, detriment, litigate, joined, weigh, reply

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**HN1** The applicability of a venue selection clause is an issue of fact. Such clauses do not impose absolute duties, nor do they endow parties with absolute rights. [More Like This Headnote](#)

**OPINIONBY: [\*1]**

THOMPSON

**OPINION: ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS**

RALPH G. THOMPSON, UNITED STATES DISTRICT JUDGE

Before the Court are motions to dismiss filed by: (1) defendant Geldermann, Inc. ("Geldermann") on June 2, 1989; (2) defendants UMIC, Inc., and Charles Alex Denny (collectively "UMIC and Denny") on June 5, 1989; and (3) defendant Arthur A. Wallace on June 8, 1989. Plaintiff, Federal Savings and Loan Insurance Corporation, in its corporate capacity ("FSLIC"), filed a consolidated response on June 27, 1989. Defendant Bryan F. Green responded on July 24, 1989. UMIC and Denny filed a reply on July 24, 1989, and Geldermann filed a reply on July 21, 1989. This contract action seeks damages and equitable relief based upon an alleged violation of the Commodity Exchange Act. 12 U.S.C. § 1730.

**FINDINGS & ANALYSIS**

Geldermann moves for dismissal based on improper venue pursuant to its contracts' provisions for forum selection. Fed. R. Civ. P. 12(b)(3). Geldermann notified FSLIC on May 19, 1989, that pursuant to the forum selection provision in its contracts it elected that the claim be brought in the Northern District of Illinois, but FSLIC refused to consent to the transfer on May 31, **[\*2]** 1989. Defendants Wallace, Green, UMIC and Denny join in the motion on the same grounds, and further argue that the Court is consequently without personal jurisdiction as to these defendants. Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 187-88 (7th Cir. 1985). Defendant Gregg Crosby has not joined in the motions.

Geldermann first contends that this suit arises from FSLIC Receiver's acquisition of the assets of Universal Savings on February 13, 1987, and the subsequent assignment to FSLIC in its corporate capacity. The gist of Geldermann, Wallace, Green, UMIC and Denny's arguments is that: (1) forum selection clauses are prima facie valid, Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988); (2) the clause acts as a waiver of statutory provisions for venue, Furry v. First Nat'l Monetary Corp., 602 F. Supp. 6, 8 (W.D. Okla. 1984); (3) the contract was negotiated at arm's length; (4) the clause is not unreasonable; (5) FSLIC is a governmental agency which litigates nationwide, and could receive a fair hearing in the Northern District of Illinois in Chicago, see Janko v. Outboard Marine Corp., 605 F. Supp. 51, 52 (W.D. Okla. 1985); (6) **[\*3]** pursuant to 28 U.S.C. § 1406(a) this Court may either dismiss the case or transfer it to the Northern District of Illinois; and (7) all participants are subject to the forum selection clause, Friedman v. World Transp., Inc., 636 F. Supp. 685, 690-91 (N.D. Ill. 1986).

FSLIC responds with an avalanche of arguments, and authorities: (1) venue is only proper in the Western District of Oklahoma, which is where the claim arose and is the only forum where suit could be brought against all defendants, 28 U.S.C. § 1391(b); (2) transfer can only be made to a forum "in which it could have been brought," which therefore excludes Chicago, 28 U.S.C. § 1406(a); Hoffman v. Blaski, 363 U.S. 335, 343, 345 (1960); (3) all of Geldermann's co-defendants cannot be subjected to service in Chicago; and the forum selection clause was not subject to specific bargaining and should not be automatically enforced; Kolendo v. Jerell, Inc., 489 F. Supp. 983, 985 (S.D. W. Va. 1980); but see The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972) (admiralty case); Manetti-Farrow, Inc. v.

Gucci America, Inc., 858 F.2d at 509 (international contract); cf. Couch v. First Guaranty, Ltd., 578 F. Supp. [\*4] 331, 333 (N.D. Tex. 1984) (boiler plate forum selection clause will not be enforced); (4) the customer agreement contract containing the forum selection clause suffers numerous defects, including acceptance, application to suits brought by Geldermann as it argued elsewhere, and it is permissive and not exclusive, see, e.g., Wilmot H. Simonson Co. v. Green Textile Assoc., Inc., 554 F. Supp. 1229 (N.D. Ill. 1983); Midwest Mech. Contractors v. Tampa Contractors, Inc., 659 F. Supp. 526 (W.D. Mo. 1987); cf. Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 185-86 (7th Cir. 1985) (mandatory and exclusive language in forum selection clause); (5) the bulk of claims and parties are unrelated to the customer provision, and a transfer could result in piecemeal litigation, Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848 (8th Cir. 1986); (6) the customer agreement is tainted by fraud, *id.* at 851; see also Rouse v. Woodstock, 630 F. Supp. 1004, 1009-11 (N.D. Ill. 1986); (7) justice would be circumvented by transfer of part or all of the suit because deference should be shown to plaintiff's forum selection; at issue are the rights of Oklahoma depositors [\*5] and creditors, and the failed savings and loan institution resided in Oklahoma; FSLIC also did not bargain for the forum selection clause; the transfer is inconvenient to most witnesses, except for Geldermann's employees; process is unavailable for some witnesses; and, judicial resources can be saved by keeping the whole action in Oklahoma.

~~HN1~~ The applicability of a venue selection clause is an issue of fact. Such clauses do not impose absolute duties, nor do they endow parties with absolute rights. See Hospah Coal Co. v. Chaco Energy Co., 673 F.2d 1161, 1163-64 & n.2 (10th Cir.), cert. denied, 456 U.S. 1007 (1982). While the FSLIC, as successor-in-interest, is subject to all contractual defenses, it does not necessarily follow that FSLIC is absolutely bound by the forum selection clause.

Rather than dismiss this case, the Court would be inclined to transfer it as justice requires if such a transfer was not unreasonable nor unjust. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974) (forum selection clauses should control in absence of a strong showing that they should be set aside); see also Geldermann's brief at 6 n.3 (June 2, 1989) ("Thus, if the Court chooses [\*6] to transfer rather than dismiss FSLIC's claims, they should be transferred to [the Northern District of Illinois]."). FSLIC argues that not all of Geldermann's co-defendants are subject to personal jurisdiction in the Northern District of Illinois. See 28 U.S.C. § 1406(a) (The Court may dismiss or transfer the case to any district where "it could have been brought.") Therefore, the Court is confronted with multiple defendants and the possible severance of the claims. Geldermann argues that "[I]f venue is improper as to only some defendants in a case, the claims against those defendants must be dismissed and plaintiff may, if it elects, assert those claims in a proper forum." However, the analysis in Geldermann's own appellate authority convinces this Court to do otherwise:

Ordinarily transfer of a suit against multiple defendants is proper only if all of them would have been amenable to process in, and if venue as to all of them would have been proper in, the transferee court. If, however, suit might have been brought against one or more defendants in the court to which transfer is sought, the claims against those defendants may be severed and transferred while the claims against [\*7] the remaining defendant, for whom transfer would not be proper, are retained in the original court.

But before thus putting asunder what the plaintiff has joined, the court must weigh carefully whether the inconvenience of splitting the suit outweighs the advantages to be gained from the partial transfer. It should not sever if the defendant over whom jurisdiction is retained is so involved in the controversy to be transferred that partial transfer would require the same issues to be litigated in two places. That being the situation here, the district court should not have served the claims if there were any alternative. Manifestly, the plaintiffs will suffer some inconvenience if they are forced to litigate their claims in two courts, half the work apart from each other, with not only the consequent added expense and inconvenience but also the possible detriment of inconsistent results. A single forum is also most suitable for

determining possible counter- and cross-claims. The public also has an interest in facilitating a speedy and less-expensive determination in one forum of all of the issues arising out of one episode.

Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d [\*8] 1140, 1148-49 (5th Cir. 1984) (deciding to transfer entire case), overruled by In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147 (5th Cir. 1987). The Court finds that the forum selection clause should be set aside for the policy reasons set forth above to support another proposition regarding transfer of the entire case in Liaw Su Teng, which weigh against severing this case through a partial transfer. 743 F.2d at 1148-49. Moreover, this Court is persuaded by the public policy concerns flowing from FSLIC's mission to stabilize the nation's economy through taking over the assets of failed savings and loan institutions, and litigating claims with public resources. That is yet another factor leaning toward a finding of the unjustness and unreasonableness of the forum selection clause that FSLIC, having brought this suit where the institution failed, should have to replicate litigation in a separate forum to the detriment of the public.

Accordingly, the Court finds that FSLIC's arguments are convincing, and its authorities are persuasive, and the motions to dismiss are DENIED.

IT IS SO ORDERED this 1st day of August, 1989.







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