International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 22 – December 4, 2014

Courts: No Interlocutory Appeal Where Absence of "Substantial Ground for Difference of Opinion"

Waste Management of Louisiana v. Jefferson Parish, No. 14-90040 (5th Cir. Nov. 28, 2014)

The Fifth Circuit has declined to exercise its discretion to hear an interlocutory appeal requested by a Louisiana Parish, finding that there was no actionable difference of opinion among lower courts on the disposition of "permissive" venue selection clauses.

Waste Management of Louisiana (Waste Management) and Jefferson Parish, Louisiana entered into a contract with a permissive forum clause. The clause specifically stated "Jurisdiction: This Agreement and the performance thereof shall be governed, interpreted, construed and regulated by the laws of the State of Louisiana and the parties hereto submit to the jurisdiction of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana. The parties are hereby waiving any and all plea[s] of lack of jurisdiction or improper venue."

Notwithstanding the clause, Waste Management filed a breach of contract claim against Jefferson Parish in the Eastern District of Louisiana. The parish moved to dismiss on the grounds of *forum non conveniens,*. but conceded that the clause in question was permissive. The Parish supported this argument with *Atlantic Marine Construction Co*., 134 S. Ct. 568 (2013), wherein the Supreme Court held that forum selection clauses should be enforced absent exceptional circumstances.

The District Court denied Jefferson Parish's motion, holding that *Atlantic Marine* does not apply to permissive forum selection clauses like the one at issue in the case. The court then authorized an interlocutory appeal to the Fifth Circuit asking whether *Atlantic Marine* applies to permissive forum selection clauses.

HELD: The Fifth Circuit declined to exercise its discretion to hear the interlocutory appeal, holding there is no significant difference of opinion on the issue.

DISCUSSION: The court began by noting that interlocutory appeals are reserved for "exceptional cases," and that granting such an appeal required the District Court to certify that the issue involves "[1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court's subsequent analysis focused on the second element. The Fifth Circuit noted that it has long recognized the difference between mandatory and permissive forum selection clauses, and highlighted that other courts have as well. *Atlantic Marine* involved a mandatory selection clause and, according to the Court, said "nothing disagreeing with the mandatory/permissive distinction" that so many lower courts acknowledge.

The determining factor for the Circuit Court was not so much this basic interpretation of *Atlantic Marine,* but rather that the majority of district courts and the one other Circuit that have examined the issue all rejected *Atlantic Marine's* application to permissive selection clauses. Simply put, "Jefferson Parish [did] not persuade[the Court] that [it] should exercise [its] discretion to hear this interlocutory appeal."

http://www.ca5.uscourts.gov/opinions/unpub/14/14-90040.0.pdf (last accessed Dec. 4, 2014)