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Attorney Fees May Be Available for Breach of Forum Selection Clause

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Special to the DLW

The Court of Chancery recently interpreted a Delaware Supreme Court decision to allow a claim seeking damages based on a violation of a forum selection clause.

Chancellor William Chandler, in *Cornerstone Brands Inc. v. O'Steen*, 2006 WL 2788414 (Del. Ch. Sept. 20, 2006), relied on *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36, 40 (Del. 1995), to deny a motion to dismiss and allow a claim to proceed which sought attorney fees incurred when suit was filed in Ohio contrary to the forum selection clause requiring suits to be brought in Delaware.

The court explained that this was not in contravention of the "American Rule" (which does not allow for an award of attorney fees unless a statute, contract or procedural rule makes the award explicit). The court seemed to treat the award of attorney fees for breach of a forum selection clause as part of the damages that would flow from breach of contract regarding that aspect of the agreement, as opposed to bad faith, for example.

I predict that this short letter opinion will be relied on frequently to "put teeth" in the general enforceability of forum selection clauses. See generally, *In re IBP Inc. Shareholders Litigation*, 2006 WL 406292 at *9 and n.21 (Del. Ch. 2001) (upholding forum selection clause as prima facie valid).

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Broadly speaking, the crux of the dispute between the parties in this case was whether a binding agreement was

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reached regarding the vesting of options for the defendant in 2005, with the understanding that the options for 2006 and 2007 would be forfeited after an impending merger.

Also noteworthy about this recent

Chancery Court decision is footnote 1 which refers to an oral decision made from the bench earlier in this case, denying a separate motion to dismiss based on the court's finding that the defendant here consented to personal jurisdiction in Delaware due to his status as a third-party beneficiary of the merger agreement between the plaintiff and another party not directly involved in the lawsuit. See *Cornerstone Brands Inc. v. O'Steen*, C.A. No. 1501-N, Chancellor C. (Del. Ch. Jan. 23, 2006) (oral ruling denying motion to dismiss).

Other aspects of the opinion covered less exciting issues, and though perhaps more mundane, are still important "basic tools" for Chancery Court practice. The court reviewed the three foundations of subject matter jurisdiction in Chancery Court: (1) If one or more of the plaintiff's claims for relief is equitable in character; (2) If the plaintiff requests relief that is equitable in nature; or (3) If subject matter jurisdiction is conferred by statute. (citations omitted.)

This case involved a dispute over the validity of stock options pursuant to an alleged settlement agreement. The court determined that 8 Del. C. Section 111 was broad enough to cover "alleged" agreements for options, as well as disputes regarding the validity of existing instruments for such options. Lastly, the court also denied a motion to dismiss claims for both promissory estoppel and equitable estoppel which were presented as alternatives to specific performance arguments. •