Think Globally, Fight Locally: How to Secure Home-Field Advantage for Business Disputes

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With modern technology, you can market and grow your business throughout the United States (and, indeed, the world, but the latter is beyond the scope of this article). In the pursuit of your business objectives, you have no use for, and would prefer to ignore, state lines. But when you get into a dispute with a customer or another business that can't be resolved amicably, you want home-field advantage for both tactical and economical reasons. How do you get it? According to a recent decision from the North Carolina Court of Appeals, you can obtain home-field advantage if:

- You maintain a place of business in North Carolina;
- You have a written contract that was executed (even just by you at your home office) in North Carolina;
- The contract contains a choice-of-law provision designating North Carolina law as applying to the contract; and,
- You accept payments under the contract in North Carolina.

If you do all of those things, the North Carolina courts likely will conclude that your opponent has sufficient contact with the Tar Heel State to make it fair to require your opponent to defend itself in North Carolina.

Is Home-Field Advantage Important?

As anyone who follows sports will tell you, home-field advantage is very important. Although judges will endeavor to resolve cases solely on the merits of the parties' respective claims, there is an intrinsic advantage to having a case heard in the state and county where you operate rather than in another state. First, it will be much less expensive for you. Second, it will be much less time-consuming for you. Litigation is terrible for businesses if for no other reason than it distracts you from your core mission and objectives, whether it be to make profits, satisfy customers, or both. If you have to be in court, wouldn't you rather walk to the courthouse or drive a few miles instead of flying across the country? Third, if you litigate in North Carolina, you likely will have an attorney who already knows and understands your business, North Carolina law, and the local procedures. You also may have a basic familiarity with North Carolina law that will allow you to effectively assist your attorney. If you have to fight in another jurisdiction, you will have to find counsel in that state who will have to be educated on your business. You will be unfamiliar with the attorney and the other state's laws, and your out-of-state attorney will be unfamiliar with you. That is a recipe for additional expense and time spent on the case.

On the flip side, if you can keep your case in North Carolina, the disadvantages rest with your opponent. The opponent is the one that will have to travel, retain out-of-state counsel, and become familiar with the way we do it here. Sometimes, these factors alone can be leverage to secure an early and favorable settlement of a dispute.

Furthermore, North Carolina law is much more "business friendly" than the laws of many other states and, if
you are located in North Carolina and have a local attorney who has prepared or vetted your contracts, chances are they incorporate, to your best advantage, North Carolina law. Thus, you can maximize your tactical advantage.

Getting Home-Field Advantage

The recent North Carolina Court of Appeals decision mentioned above dealt with a North Carolina company that leased equipment to a South Carolina company. The equipment was located and used in South Carolina. Although the decision does not state, it may be that the equipment was never in North Carolina. You might think that with a South Carolina company using equipment in South Carolina, the laws of the Palmetto State would apply.

Not so. First, the Court looked at the contract between the parties. It was in writing and signed in North Carolina. This is a good time to point out that technology is wonderful and we all (well, many of us) love email and texting, but nothing beats an old-fashioned paper contract with inked signatures on it. Second, the contract stated that the lease would be "governed by and subject to the laws of the state of North Carolina." Isn't that a wonderful piece of legalese? The lease is governed by, and subject to, North Carolina law, as if it could somehow be governed by but not subject to North Carolina law. And isn't it helpful that the draftsperson used "state of North Carolina," lest anyone take the position that the lease was subject to the laws of the University of North Carolina.

Third, the Court pointed out that the South Carolina lessee sent its lease payments to North Carolina. A word of caution: If you use a payment processor, and it is located outside the state, then you have just lost one of your arguments for home-field advantage. Perhaps you should consider bringing that business back to the Tar Heel State.

The Court did not mention this factor, but here is another way to improve your chances of securing home-field advantage: Include a "forum-selection clause" in your contract. The "choice-of-law" provision mentioned above states what law applies but does not, on its face, say which court will hear the dispute. So there is nothing to stop your crafty opponent from arguing that an Idaho judge can interpret North Carolina law just fine and that Ketchum is the logical place to hear the case. The forum-selection clause will spell out where the case will be heard – the county and whether in state or federal court. Assuming you have a signed contract and the business relationship is one of relative equals, the court in all likelihood will tell your opponent that he is bound by the contract terms and that it hopes he likes college basketball or NASCAR so he won't get bored while he's here.

A forum-selection clause also brings clarity to the dispute. So much of litigation, and when I say "litigation," I mean the invoice you get from your attorney and the interminably slow pace of the case, will reflect, for the most part, not the actual determination of the merits of your dispute, but all the preliminary procedural skirmishing. This is one way to try to neutralize that. Like a boxing match where neither side can agree on Las Vegas or Atlantic City, this is the way to shut up the yammering managers and promoters, get the fighters in the ring, and get it on.

Conclusion

Getting home-field advantage will not guarantee success in your business disputes. But for the reasons discussed, it makes better business sense to be "protecting your house" than "going on the road." If you take the time to incorporate the simple recommendations mentioned in this article – a written contract, North Carolina choice-of-law and forum-selection clauses, and a practice of receiving payments in North Carolina – you can have reasonable confidence that you will be close to home when you litigate your case, and your
opponent, not you, will become very acquainted with full-body scans.

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For further information regarding the issues described above, please contact Lance P. Martin.

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