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2-10-2011

### Summary of Tuxedo International Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2

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*Nevada Law Journal*

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#### Recommended Citation

Garcia, Nechole, "Summary of Tuxedo International Inc. v. Rosenberg, 127 Nev. Adv. Op. No. 2" (2011).  
*Nevada Supreme Court Summaries*. 284.  
<https://scholars.law.unlv.edu/nvscs/284>

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### **Summary**

Appeal from the Eighth Judicial District Court's dismissal of a complaint that alleged tort claims arising out of a contract containing a forum selection clause.

### **Disposition/Outcome**

Reversed district court's dismissal and remanded case to district court to re-examine motion to dismiss under new standard articulated by the Nevada Supreme Court.

### **Factual and Procedural History**

During the spring of 2005, appellant Tuxedo International Incorporated ("Tuxedo") and respondents Michael Rosenberg and Lima Uno (collectively "Rosenberg") had several meetings regarding a possible investment project involving horse book and sports betting in Peru. During these meetings Rosenberg and his associates falsely represented to Tuxedo that he owned approximately 400 slot machine casinos in Peru. According to Tuxedo, these claims of ownership largely influenced Tuxedo's decision to participate in the venture.

As a result of these meetings, the parties subsequently signed a series of agreements. On June 25, 2005, Tuxedo and Rosenberg signed a memorandum of understanding, which contained a clause that stated the laws of Peru would govern the agreement. It also represented that any disputes would be submitted to arbitration in Peru. Approximately six months later, on December 15, 2005, the parties signed a more extensive agreement that incorporated the memorandum of understanding. The December 15 agreement also included a "Choice of law and forum" clause that declared that the agreement would be "construed, interpreted and enforced according to the laws of Peru." According to the agreement, the parties also consented to jurisdiction in Lima, Peru.

On June 12, 2006, the parties signed a third agreement that was between Tuxedo, Rosenberg and a third entity, DGS Systems Corp., and pertained to the transmission of video feeds of horse and dog races. This agreement contained a clause entitled "Governing Law and Jurisdiction" which specified that the agreement would be construed in accordance with the laws of the Country of Peru. Each party also consented to personal jurisdiction in the County of Peru.

Pursuant to these agreements, Tuxedo paid out over \$650,000 in costs and expenses for locations that never opened. Consequently, in April 2008 Tuxedo filed a complaint in the Eighth Judicial District Court against Rosenberg alleging theft-conversion by fraud and unjust enrichment. Approximately one month later, Rosenberg brought a motion to dismiss, arguing that the complaint should be dismissed because, pursuant to the December 15 agreement, the parties had already agreed that Peru is the proper forum for this dispute. After a hearing on Rosenberg's motion, the district court found the forum selection clauses valid and enforceable,

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<sup>1</sup> By Nechole Garcia

and dismissed the complaint. Tuxedo appealed to the Nevada Supreme Court, arguing that the district court erred in enforcing the forum selection clause to preclude its complaint for tort claims.

## **Discussion**

The Supreme Court of Nevada first noted that it had not yet addressed whether tort-based causes of action that are indirectly related to a contract are subject to the contract's forum selection clause. The Court next considered the three general approaches courts in different jurisdictions have used to determine whether tort-based claims related to a contract are subject to a forum selection clause: 1) a bright line approach; 2) a rule based approach; and 3) the intent of the parties approach.

### *The Bright Line Approach*

Under the bright line approach, if a forum selection clause is otherwise enforceable, then it will be enforced although the plaintiff's complaint alleges a tort-based claim such as fraud in the inducement of the agreement. This approach was used in *American Patriot Insurance Agency v. Mutual Risk Management*, where the Seventh Circuit Court of Appeals rejected an attempt to avoid a forum selection clause on the basis that "a dispute over a contract does not cease to be such merely because instead of charging breach of contract the plaintiff charges a fraudulent breach, or fraudulent inducement, or fraudulent performance."<sup>2</sup>

### *The Rule Based Approach*

Within the rule based approach are three different rules used to determine whether a forum selection clause contained in an agreement applies to tort-based claims. The First Circuit uses a "same operative facts" rule, which requires a determination as to whether a plaintiff's cause of action directly concerns the formation or enforcement of the contract containing the forum selection clause.<sup>3</sup> If the contract related tort claims have the same operative facts as a parallel claim for breach of contract, then the forum agreed upon by the parties should hear the claim. The Ninth Circuit rule entails examining "whether resolution of the claims relates to the interpretation of the contract."<sup>4</sup> If the court cannot adjudicate the tort claims at issue without analyzing whether the parties complied with the contract, they fall within the scope of the forum selection clause. Finally, the Third Circuit rule looks to the relationship between the parties. If the relationship between the parties is contractual, then the forum selection clause is enforceable against a plaintiff's tort claims.<sup>5</sup>

### *The Intent of the Parties Approach*

Under the intent of the parties approach, the court attempts to deduce whether the parties intended that the forum selection clause apply to tort-based claims by examining the text of the

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<sup>2</sup> Am. Patriot Ins. Agency v. Mut. Risk Mgmt., 364 F.3d 884, 889 (7<sup>th</sup> Cir. 2004).

<sup>3</sup> Lambert v. Kysar, 983 F.2d 1110, 1122 (1<sup>st</sup> Cir. 1993).

<sup>4</sup> Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9<sup>th</sup> Cir. 1988).

<sup>5</sup> Coastal Steel v. Tilghman Wheelabrator Ltd., 709 F.3d 190, 203 (3<sup>rd</sup> Cir. 1983).

forum selection clause and the facts of the case. If the court finds that enforcement of the forum selection clause to tort claims runs contrary to the parties' intentions, then the clause will not be applicable to the claims.

### *The Best Approach for Nevada Courts*

The Court noted that it did not find any of the established approaches to be entirely satisfactory. Additionally, it recognized that in selecting an approach for Nevada courts, the Court should focus on the terms of the parties' actual agreement, with the objective of furthering a balance between the parties freedom to contract while also avoiding substantial injustice. It is also important that the selected approach provide consistency and predictability for the parties.

Next, the Court considered the strengths and weaknesses of each approach, beginning with the bright line approach and Third Circuit rule. The bright line approach, while simplistic, is too inflexible and may lead to substantial injustice. Furthermore, because the approach fails to take into account the actual text of the disputed forum selection clause, it may actually violate the contractual intent of the parties. The Court also found the Third Circuit's rule, based on the relationship between the parties, was essentially the bright line approach in rule form, and therefore equally dissatisfactory.

The Court then examined the remaining two rule based approaches. It found that the First Circuit's "same operative facts" test fails to sufficiently account for the intention of the parties. However, this test can be useful as a secondary factor when the court cannot discern the intentions of the parties. The Court found the Ninth Circuit's rule to be the closest of the rule based approaches to the ideal because it focuses on the actual language of the parties' agreements. However, since the issue of whether tort claims involve questions of compliance should not be the primary concern, this approach is has more utility as a secondary factor.

Having addressed the bright line and rule based approaches, the Court then turned to the intent of the parties approach. It concluded that the intent of the parties approach represents the best of the various approaches because it emphasizes a determination of the parties' intent, as established through a thorough examination of the text of the contract's forum selection clause. This approach also best fulfills the Court's objective to further the parties' freedom of contract while also examining the individual facts of the case to avoid substantial injustice.

The Court also conducted a de novo review of the relevant clauses in each of the three agreements and found that the district court failed to recognize two problematic issues. First, although the parties seemed to treat the forum selection clauses found in each of the three agreements as achieving the same ends, the Court found that the language of the agreements indicate the clauses may contain separate and distinct meanings. Second, the language of each of the agreements raises the issue as to which forum selection clause is controlling in this case. Consequently, upon remand the district court should conduct a thorough review of the language in each provision to determine which clause is controlling, and then thoroughly examine the controlling clause to discern the intent of the parties.

### *Adopting a Hybrid Test*

Although the intent of the parties approach is the best approach for Nevada courts, because the parties' intent cannot always be determined even after a thorough review of the applicable contract, the Court decided to adopt a hybrid test. The hybrid test first utilizes the intent of the parties approach. Thus, the district court must first attempt to ascertain the intent of the parties as reflected in the text of the relevant clauses and in the facts of the case.

If, however, the court cannot ascertain the intent of the parties, then it can use the Ninth and First Circuit rules as secondary factors. Accordingly, the district court should determine whether resolution of the tort-based claim relates to the interpretation of the contract. If so, then the claim is within the scope of the forum selection clause. However, if for some reason the application of that rule still does not resolve the issue, then the district court should determine whether the plaintiff's contract-related tort claims involve the same operative facts as a parallel breach of contract claim. If the answer is in the affirmative, then the forum selection clause is applicable to the tort claims. Finally, the Court noted that in applying this analysis, the plaintiff bears the burden of demonstrating that tort-based claims related to a contract are not subject to the agreement's forum selection clause.

Because the parties and the district court did not have the benefit of the hybrid test, the Court reversed the district court's dismissal and remanded the case so that the district court could determine which of the three purported forum selection clauses discussed by the parties is the controlling clause. The district court could then apply the Court's hybrid test to determine whether the forum selection clause is enforceable.

### **Conclusion**

When determining whether a forum selection clause applies to tort claims, the district court should first attempt to determine whether the parties intended the forum selection clause apply to contract related tort claims by examining the relevant text of the agreement. If unable to ascertain the intent of the parties through examination of the agreement, then the district court should determine whether resolution of the tort-based claims pleaded by the plaintiff relates to the interpretation of the contract. If that approach that still does not resolve the issue, then the district court must determine whether a plaintiff's contract-related tort claims involve the same operative facts as a parallel breach of contract claim.