



## Does California's Anti-Waiver Statute Void Choice Of Forum Agreements?

By Keith Paul Bishop on September 29, 2011

California Corporations Code Section 25701 is derived from Section 410(g) of the Uniform Securities Act (1956). Section 25701 voids any condition, stipulation or provision purporting to bind any person acquiring any security to waive compliance with any provision of the Corporate Securities Law or any rule thereunder.

Does this statute prevent investors from agreeing that disputes will be decided by courts in other states?

Earlier this year, investors in a Colorado company persuaded the Colorado Court of Appeals that Colorado's anti-waiver statute voided application of the choice-of-law and choice of forum provisions in their investment applications. *Mathers Family Trust v. Cagle*, Colo. Court of Appeals Case No. 10CA0093 (May 12, 2011). Colorado's statute is also based on the USA but includes the words "or disposing". The Colorado appellate court cited the California decision in *Hall v. Superior Court*, 150 Cal. App. 3d 411 (1983), a case that I discuss in my article, [California Blue Sky Law Problems for Foreign Issues and Foreign Issuers](#).

If nothing in the California and Colorado securities laws requires that actions under those laws be brought in those states, how can a forum selection clause constitute a waiver of compliance with those laws?

The rationale for voiding forum selection clauses appears to be that they are too intertwined with choice of law provisions. In other words, issuers don't just want to litigate in a particular court, they are expecting that the court will also apply the laws of the state in which it sits. Thus, the California Court of Appeal observed in *Hall*:

Real parties in interest seek to avoid the inevitable by arguing, "Nothing prevents any Nevada court from enforcing California law where it is applicable." At oral argument, however, counsel for real parties in interest rejected the notion of a stipulation to the application of California law in the Nevada forum. We have found no reported decision discussing an agreement to litigate future disputes

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arising out of a California securities transaction according to California law in another forum, but we are not called upon to decide that question.

Moreover, we find this belated argument by real parties in interest particularly disingenuous, as it is in sharp contrast with the position they advanced before the trial court, **where they persistently urged the application of Nevada law.**

The Colorado Court of Appeals made a similar observation in *Mather*:

Although defendants concede for the purposes of this appeal that the CSA [Colorado Securities Act] applies to plaintiffs' claims, they also contend that the ventures are not securities subject to the CSA, and a Texas court construing the agreements in accordance with the laws of Texas might agree, thereby depriving plaintiffs of the opportunity to litigate their CSA claims.

The states are clearly engaged on the issue. The [North American Securities Administrators Association](#) filed this [amicus brief](#) in *Mathers* in which it argued that the choice of law provision, including the forum selection clause, was void.

There are some logical inconsistencies in the NASAA's position. For example, the investors in *Mather* also asserted claims under the securities laws of California, Illinois and Vermont. Yet, NASAA seems to have no problem with a Colorado court adjudicating those claims. Also, it is very common for state claims to be tried in federal courts throughout the country. Would NASAA argue that a forum selection clause that chooses the federal district courts in another state is ok, but not a forum selection clause choosing the state courts of that state? While the courts in *Hall* and *Mather* noted that choice of forum may be used reinforce a choice of law provision, there are independent reasons for an issuer to seek to have disputes resolved in a particular forum. For example, it is likely to be far less expensive to litigate in the issuer's home state.

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