

## Choosing Delaware Law Does Not Mean You Can Litigate in Delaware

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Provisions designating the law governing contractual disputes are commonplace. However, designation of the governing law does not necessarily establish the jurisdiction within which the dispute must be decided. Parties who do not appreciate this distinction may be surprised that they cannot litigate their dispute in the jurisdiction they selected for the governing law.

This was precisely the fate that befell the plaintiff in *EBP Lifestyle Brands Holding, Inc. v. Boulbain*.<sup>[1]</sup> EBP is a closely-held Delaware corporation with its principal place of business in California. Boulbain worked for EBP in California. Boulbain was not subject to a non-compete of any type with respect to his employment relationship, presumably because such restrictions are prohibited in California. In an attempt to impose such restrictions, EBP included a non-compete and nonsolicitation restriction in a stockholder agreement that Boulbain was required to sign in connection with exercise of his EBP stock options at the time of his termination of employment. Since these restrictions were part of the acquisition of equity and not a continuing employment arrangement, EBP may have believed that they could get around the California limitations on restrictive covenants by including such restrictions in a stockholders' agreement which provided that it would be governed by Delaware law. The restrictive covenants were very broad in that they applied throughout the world, and only ended upon the expiration of two years following Boulbain's disposition of his EBP stock, which disposition was at the sole discretion of EBP's board of directors. Although the stockholder agreement designated Delaware law as governing law, it did not include a consent-to-jurisdiction or forum selection clause.

Shortly after leaving EBP, Boulbain began working in California for a competitor of EBP and allegedly solicited other EBP employees to join his new employer. EBP filed suit in Delaware seeking specific performance and injunctive relief to enforce the restrictive covenants. It was imperative for EBP to maintain its claim in Delaware because California law would not permit enforcement of the restrictive covenants. Boulbain challenged EBP's effort to sue him in Delaware because he had no contacts with the state. The court agreed with Boulbain and dismissed EBP's lawsuit for lack of personal jurisdiction. The court further commented *in dicta* that it also would likely dismiss for failure to state a claim against Boulbain because the restrictive covenants were too onerous to be enforced under Delaware law.

This decision stands as a stark reminder for parties desiring to have their contractual disputes governed by Delaware law *and in a Delaware forum* to couple appropriate choice of law, forum selection, and consent-to-jurisdiction clauses. Without forum selection and consent-to-jurisdiction provisions, proceeding in Delaware, regardless of Delaware choice of law, will be subject to challenge, as a choice of law provision in and of itself does not confer jurisdiction where none otherwise exists. This is particularly problematic where the contract counterparty has questionable contacts with Delaware, and public policy considerations warrant proceeding in a foreign jurisdiction.



If you have questions or would like additional information, please contact Marc Casarino (casarinom@whiteandwilliams.com; 302.467.4520), Lori Smith (smithl@whiteandwilliams.com; 212.714.3075) or another member of our Corporate and Securities Group.

[1] C.A. No. 2017-0269-JRS (Del. Ch. Aug. 4, 2017).

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