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FORUM-SELECTION CLAUSES: LIMITATIONS ON ENFORCEABILITY

This Commentary *discusses the jurisdictional limitations of forum-selection clauses, the inconsistencies with their enforceability, and the potential for the establishment of a standardized procedure to enable companies to evaluate forum-selection clauses with more certainty going forward.*

Companies that do business outside their own backyards frequently rely on carefully drafted forum-selection clauses to limit their risk (reducing litigation expenses and avoiding the threat of hostile foreign laws, judges, and/or juries). Despite such documented intentions, the initial venue of all litigation is where a plaintiff files suit. And unless the plaintiff has chosen the stipulated forum, the enforceability of a forum-selection clause may be dependent on where the plaintiff commences its lawsuit. More specifically, in the Third, Fifth, or Sixth Circuit, existing case law suggests that, despite a valid, mutually agreed-upon forum-selection clause dictating venue elsewhere, litigation filed in those circuits may very well remain in those circuits' courts. However, the legal analysis, and quite possibly the result of an attempt to enforce a forum-selection clause, could be drastically different if adjudicated in the Second, Fourth, Seventh, Eighth, Ninth, Tenth, or Eleventh Circuits.

ATLANTIC MARINE: ADDRESSING THIS SPLIT AMONG THE CIRCUITS

On April 1, 2013, the United States Supreme Court granted certiorari in the matter of *Atlantic Marine Construction Co., Inc. v. J-Crew Management, Inc.*, 701 F.3d 736 (5th Cir. 2012) ("*Atlantic Marine*"), to hopefully resolve this conflict and provide direction and/or certainty for parties negotiating forum-selection clauses.

The SCOTUS web site[1] identifies the following issues to be resolved:

1 http://www.supremecourt.gov/qp/12-00929qp.pdf.

> Following the Court's decision in *M / S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority of federal circuit courts hold that a valid forum-selection clause renders venue "improper" in a forum other than the one designated by contract. In those circuits, forum-selection clauses are routinely enforced through motions to dismiss or transfer venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406. The Third, Fifth, and Sixth Circuits, however, follow a contrary rule. This Petition presents the following issues for review:
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> 1. Did the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), change the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)?
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> 2. If so, how should district courts allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause?

Briefing is due on this matter in early summer 2013.

Background of *Atlantic Marine.* *Atlantic Marine* involves a dispute between a general contractor (Atlantic) and a material and labor supplier (J-Crew). The two litigants entered into a contract with a forum-selection clause selecting the "Circuit Court for the City of Norfolk, Virginia or the United States District Court for the Eastern Division of Virginia, Norfolk Division" for any formal litigation. The parties did not agree, however, upon a choice-of-law clause. The project at issue was constructed in the Western District of Texas. J-Crew, having alleged that it has not been paid for work performed, filed suit in the Austin Division of the Western District of Texas. Atlantic moved for dismissal of the suit under Rule 12(b)(3) and 28 U.S.C. § 1406 and in the alternative requested that the district court transfer the matter pursuant to 28 U.S.C. § 1404(a).

Atlantic argued that Rule 12(b)(3) and 28 U.S.C. § 1406 require the matter to be dismissed for failure to file in a proper forum (a forum not identified in the parties' contract). Atlantic has further argued that its position is supported by *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which states that a forum-selection clause is presumptively valid and, through its language, invalidates any forum other than the forum identified in the contract. Separately, and in the alternative, Atlantic requested that the court transfer the litigation to Virginia on the basis of 28 U.S.C. § 1404(a).

The Fifth Circuit ultimately determined that the proper procedural mechanism for removal was not Rule 12(b)(3) and 28 U.S.C. § 1406 (requiring dismissal) but that under 28 U.S.C. § 1404(a), it should perform an analysis using factors relevant to the litigation (one of which was the forum-selection clause) to determine proper venue for the dispute. The Fifth Circuit cited *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), to justify its decision, which it read to state that while a forum-selection clause is a factor identifying intent of the parties at the time of contract, the proper forum is in the purview of the court.

After selecting the procedure, the court determined that the matter was properly venued in Texas and that the defendant, Atlantic, had not met its burden of showing that a transfer was proper or necessary. On appeal, the Fifth Circuit denied Atlantic's request that the matter be transferred or dismissed. Thereafter, in response to Atlantic's submitted request, the United States Supreme Court granted certiorari in this matter.

WHICH STATUTE TO APPLY–28 U.S.C. § 1404(a) OR 28 U.S.C. § 1406?

An analysis of the relevant decisions reveals a fundamental difference of opinion among the circuit courts. Specifically, the courts have either: (i) determined that the forum-selection clause renders any forum other than the contractually specified forum an improper forum and applied the standards under Rule 12(b)(3) and 28 U.S.C. § 1406 to determine if a matter should be dismissed from the forum selected by the plaintiff; or (ii) looked to see if, regardless of the forum-selection clause, the forum selected by the plaintiff was jurisdictionally proper and then, using the standards set forth in 28 U.S.C. § 1404(a) and case law interpreting the same, determined if the matter should be transferred to the stipulated forum using factors, including the forum-selection clause, to determine if transfer was proper.

Frequently, and not surprisingly, the choice of which statutory framework to use is outcome-determinative. The relevant statutory language is quoted below:

> **Federal Rule of Civil Procedure 12(b).** HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (3) improper venue . . . .
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> **28 U.S.C. § 1406(a).** The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
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> **28 U.S.C. § 1404(a).** For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

EXISTING CIRCUIT SPLIT

The circuit courts have generally split their analysis of the impact of a forum-selection clause into two camps. First, as in the Fifth Circuit, some courts look to 28 U.S.C. § 1404(a) so long as venue would otherwise be proper, taking the forum-selection clause into consideration as a factor in this analysis. These courts often rely on the Supreme Court's opinion in *Stewart* as dictating this result. Other courts, however, have held that the forum is improper and dismissal is appropriate under FRCP 12(b)(3) where the plaintiff filed suit in a forum other than that chosen by the forum-selection clause. Many of these courts look to the Supreme Court's analysis in the *Bremen* case for support. The following tables identify the divergent paths taken by the different courts of appeal.

CIRCUITS WITH CASE LAW UTILIZING 28 U.S.C. § 1404(a) TO ADJUDICATE VENUE

Circuit	Case(s) and Relevant Details
Third	The Third Circuit, citing *Stewart*, held that 28 U.S.C. § 1404(a) is the proper mechanism to analyze the effect of a forum-selection clause on the plaintiff's choice of jurisdiction because dismissal of a case for improper venue pursuant to 28 U.S.C. § 1406 is inappropriate where venue would otherwise be proper under the federal venue statute. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995). The court explained that, in analyzing a motion to transfer under 28 U.S.C. § 1404(a), a forum-selection clause should be "treated as a manifestation of the parties' preferences as to a convenient forum" but that, because the plaintiff's selected forum was not improper under federal venue statutes, dismissal of the matter under 28 U.S.C. § 1406 was not the correct procedural mechanism to resolve the venue challenge. *Id.* at 875, 880.
Fifth	As discussed above, in *Atlantic Marine* the Fifth Circuit Court of Appeals upheld the district court's conclusion that when a forum-selection clause designates a specific federal forum, 28 U.S.C. § 1404(a), and not FRCP 12(b)(3) and/or 28 U.S.C. § 1406, is the proper procedural mechanism for enforcement of the forum-selection clause. Note, however, that some earlier opinions by the Fifth Circuit Court of Appeals utilized FRCP 12(b)(3) to enforce forum-selection clauses. *See,* e.g., *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898 (5th Cir. 2005); *Jackson v. W. Telemarketing Corp. Outbound*, 245 F. 3d 518 (5th Cir. 2001); *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112 (5th Cir. 1996).
Sixth	In *Kerobo v. Southwestern Clean Fuels Corp.*, the Court of Appeals for the Sixth Circuit found that, at least where a case had already been removed from state to federal court, it was inappropriate to dismiss the case under FRCP 12(b)(3) on the basis of a forum-selection clause. 285 F.3d 531 (6th Cir. 2002). The court reasoned that 28 U.S.C. § 1404(a) governed the analysis because the venue had been determined to be "proper" in the district court. *Id.* at 536–37.

CIRCUITS WITH CASE LAW UTILIZING 28 U.S.C. § 1406 AND FRCP 12(B)(3) TO ADJUDICATE VENUE

Circuit	Case(s) and Relevant Details
Second	The Second Circuit enforced a forum-selection clause through an FRCP 12(b) motion. *TradeComet.com, LLC v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011). In *TradeComet.com*, the court stated that an FRCP 12(b) motion should be analyzed under the *Bremen* standard. *Id*. at 475. The court was not persuaded that *Stewart* required application of 28 U.S.C. § 1404(a), reasoning that, in *Stewart*, the court applied 28 U.S.C. § 1404(a) because that was the motion before the court. *Id.* at 476–77.
Fourth	The Fourth Circuit held that "a motion to dismiss based on a forum-selection clause should properly be treated under Rule 12(b)(3)." *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549–50 (4th Cir. 2006). However, in *Langley v. Prudential Mortg. Cap. Co.*, the same court remanded the case so that the district court could "entertain a motion to enforce the forum selection clause under FED.R.CIV.P. 12(b)(6) *or* 28 U.S.C. § 1404(a)." 546 F.3d 365, 366 (6th Cir. 2008) (emphasis added) (overturning the district court's conclusion that the contracts containing the forum-selection clauses were invalid).
Seventh	The Seventh Circuit Court determined that a "challenge to venue based upon a forum-selection clause can appropriately be brought as a motion to dismiss the complaint under [FRCP] 12(b)(3)." *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760 (7th Cir. 2006).
Eighth	In *Union Electric Co. v. Energy Ins. Mutual Ltd.*, the Eighth Circuit held that the district court appropriately dismissed the case under FRCP 12(b)(3) on the basis of the parties' contractual forum-selection clause, which required litigation in a different district. 689 F.3d 968 (8th Cir. 2012). The court stated that the Bremen standard should apply and also noted that Stewart "nowhere *requires* a court to consider a forum selection clause pursuant to §1404(a)." *Id.* at 972 (citing, *inter alia*, *I-T-E Circuit Breaker Co. v. Becker*, 343 F.2d 361, 363 (8th Cir. 1965)).
Ninth	While the Ninth Circuit Court of Appeals has not analyzed the issue at length, in *Hillis v. Heineman* the court upheld the dismissal of a claim for improper venue under FRCP 12(b)(3) on the basis of a forum-selection clause requiring suit to be brought in an alternate jurisdiction. 626 F.3d 1014 (9th Cir. 2010).
Tenth	The Tenth Circuit Court of Appeals in *Riley v. Kingsley Underwriting Agencies, Ltd.* upheld dismissal under FRCP 12(b)(3) where the parties agreed in a forum-selection clause to resolve any disputes in the courts of England. 969 F.2d 953, 957 (10th Cir. 1992). The court reasoned that "[w]hen an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect." *Id.* (citing, *inter alia*, *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).
Eleventh	In *Slater v. Energy Servs. Gr. Int'l, Inc.*, the Court of Appeals for the Eleventh Circuit concluded that FRCP 12(b)(3) is the proper avenue for a party's request for dismissal on the basis of a forum-selection clause, while 28 U.S.C. § 1404(a) is proper when a party seeks to transfer a case to enforce a forum-selection clause. 634 F.3d 1326, 1333 (11th Cir. 2011).

ADDITIONAL LEGAL ISSUES RAISED BY *ATLANTIC MARINE*

Issue of Burden Shifting. The second issue identified by the Supreme Court for resolution in the *Atlantic Marine* matter relates to the holder of the procedural burden. In the majority of jurisdictions (those using 28 U.S.C. § 1406 to analyze the venue challenge), once the moving party presents a valid forum-selection clause, the burden shifts to the plaintiff to justify the filing of the suit outside the agreed-to jurisdiction.

However, in *Atlantic Marine*, the Fifth Circuit (using 28 U.S.C. § 1404(a) to analyze the venue challenge) held that the moving party (the defendant, Atlantic) had the burden of proving both that the venue chosen by the plaintiff was improper and that the matter should be re-venued in the contractually identified jurisdiction.

In its initial appeal, Atlantic argued unsuccessfully that it was improperly assigned the burden and that the burden should be on the party violating the forum provision, not the party trying to enforce the contractual language. The Fifth Circuit Court of Appeals disagreed. In response to Atlantic's position, however, the court of appeals sidestepped this issue, stating that *Stewart* did not address the issue of burden and that, regardless of who holds the burden, the reviewing court will still consider the forum-selection clause in its evaluation. *Id.* at 742.

Ultimately this issue should be resolved by the Supreme Court, which, as discussed above, has identified burden as an issue to be briefed and adjudicated.

Federal Courts v. Arbitration, State Court, or Foreign Court. Another issue related to forum-selection clauses is the importance of the type of forum agreed to by the contracting parties. Although discussed by the court only briefly in *Atlantic Marine*, if a forum-selection clause identifies a forum other than a federal court, 28 U.S.C. § 1404(a) and 28 U.S.C. § 1406 are no longer applicable because they "only allow for transfer in the federal system." 701 F.3d at 740. More specifically, if a forum-selection clause identifies arbitration, a state court, or even a foreign court, the district court is compelled by the forum-selection clause to dismiss the matter as being improperly venued. *Id.*

It is worth noting for contracting purposes that, on the basis of *Atlantic Marine*, the courts are more likely to enforce an arbitration requirement, a state-court forum provision, or even a foreign forum provision than language requiring litigation in a specific federal venue.

Choice-of-law implications. Discussed briefly in the *Atlantic Marine* matter was the failure of the parties to agree to a choice-of-law provision. Assuming that the contractual negotiation of a predetermined venue is governed by state law coupled with the argument by Justice Scalia in *Stewart* (487 U.S. at 39, dissenting) that "state law controls the question of the validity of a forum-selection clause," choice of law is critical in negotiating a forum-selection clause. This is particularly important if the matter is litigated in the Third, Fifth, or Sixth Circuit and a 28 U.S.C. § 1404(a) analysis is imposed as part of the court's determination of whether or not to transfer the matter. If the law of the identified state has a higher or lower tolerance for forum-selection clauses, it is likely to impact the ability to enforce the contractually agreed-to forum.

Jurisdictional Limits on Forum-Selection Clauses. Although not addressed in the *Atlantic Marine* matter, several states have statutes specifically limiting (or barring) forum-selection clauses in specific circumstances. Out-of-state or foreign entities must be aware of these limitations when negotiating a contract or evaluating the cost of a potential dispute.

As an example, a party contracting for construction or property-improvement work done in Texas cannot enforce a forum-selection clause requiring litigation (or arbitration) to occur in a jurisdiction other than Texas.[2] It is not clear

2 Texas Bus. & Com. Code § 272.001 states:
(a) This section applies only to a contract that is principally for the construction or repair of an improvement to real property located in this state.
(b) If a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair.

from the published Fifth Circuit Court of Appeals *Atlantic Marine* opinion if this statute (which appears on its face to invalidate the forum-selection clause) was considered by the lower court as part of the 28 U.S.C. § 1404(a) venue analysis as a defense to the motion to dismiss or otherwise. However, it is of key importance for all contracting parties to consider these types of statutes before contracting outside their own backyards.

CONCLUSION

Forum-selection clauses may not be automatically or uniformly enforceable. They are subject to the laws of the jurisdiction where the contractual services were provided, they depend on the forum the parties intend to use to resolve their conflicts (arbitration or litigation; state, federal, or foreign), and they currently depend on which circuit court the plaintiff selects to file suit. With the acceptance of the writ of certiorari in *Atlantic Marine*, the conflict amount, the circuit courts, and the issue of governing statutes will hopefully be resolved. In the meantime, the issues discussed herein must be carefully analyzed before entering into or relying upon any forum-selection clauses.

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