# U.S. SUPREME COURT TO DECIDE EFFECT OF CONTRACTUAL FORUM-SELECTION CLAUSES IN FEDERAL COURTS

On April 1, 2013, the United States Supreme Court granted a petition for a writ of certiorari in a case that should resolve disagreements among federal courts about how much weight they must give to forum-selection clauses that require a different federal-court venue. *See In re Atlantic Marine Construction Co.*, 701 F.3d 736 (5th Cir. 2012), *cert. granted*, No. 12-929, 2013 WL 1285318 (U.S. Apr. 1, 2013). The principal question presented by the petitioner in *Atlantic Marine* is whether a federal district court should give effect to an otherwise valid forum-selection clause by dismissing or transferring the case in deference to the parties' agreement, or instead apply a "discretionary, balance-of-conveniences analysis" to determine whether to retain venue over the matter. The Supreme Court's future decision in this case might solidify an emerging federal-law rule favoring enforcement of forum-selection clauses, or, conversely, might endorse a more cautious approach to enforcement that takes as its starting point the Fifth Circuit panel majority's view that a forum-selection clause "cannot render venue improper in a district if venue is proper under federal law." Either way, the decision in *Atlantic Marine* is likely to have a profound impact on the enforceability of domestic forum-selection clauses in federal court, and therefore should be of interest to anyone wishing to create an enforceable agreement to litigate claims in a particular federal district court.

## Background and Analysis

The federal courts and many state courts have been moving away from a traditional reluctance to allow private parties to honor forum-selection clauses. Traditionally, a court was likely to view a forum-selection clause as an improper attempt to divest it of jurisdiction. Today, U.S. courts typically enforce forum-selection clauses, as long as they are mandatory, broad enough to cover the dispute and independently valid, *i.e.*, not the product of fraud or overreaching. This change in approach is based in large part on the U.S. Supreme Court's seminal decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *The Bremen*, a case decided under admiralty law, the Court held that a forum-selection clause mandating litigation in London should have been enforced. The Court acknowledged that forum-selection clauses had "historically not been favored by American courts," but nevertheless decided that the better approach would be to consider such clauses "*prima facie* valid" as long as they are "unaffected by fraud, undue influence, or overweening bargaining power" and enforcement would not be "unreasonable and unjust." *Id.* at 9-10, 12, 15. Although some states maintain exceptions to enforcement of forum-selection clauses on public policy grounds with respect to particular kinds of contracts (contracts of insurance, for example), and some state courts remain reluctant to enforce forum-selection clauses in general, the trend is toward fairly vigorous enforcement in most circumstances. An exception to this trend in a significant minority of federal courts is at the heart of the dispute in *Atlantic Marine*.

In *Atlantic Marine*, a diversity case involving a contract for the construction of a child care facility in Fort Hood, Texas, the Supreme Court has been asked to evaluate how the rights of contracting parties to select a mandatory forum for dispute resolution can be enforced consistent with federal venue statutes. The first question presented is whether a case that is filed in a federal district court where venue otherwise would be proper under 28 U.S.C. § 1391 can be dismissed for improper venue if a valid forum-selection clause provides that the claims must be brought in a different federal district. A majority of circuits – the Second, Seventh, Eighth, Ninth and Eleventh – have held that a federal court can dismiss an action for improper venue under those circumstances, either under Federal Rule of Civil Procedure 12(b), or pursuant to 28 U.S.C. § 1406.[1] Three circuits – the Third, Sixth and now Fifth – have held that if venue is proper under 28 U.S.C. § 1391, dismissal is not appropriate; instead, in those circuits, the only appropriate framework for analyzing whether and how a district court should enforce a forum-selection clause is a motion to transfer venue under 28 U.S.C. § 1404(a), which requires a balancing of interests and puts the burden on the party seeking the transfer.[2] This split has been caused by the circuit courts' differing interpretations of a 1988 Supreme Court decision, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). *Stewart* holds that "federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer [the] case," but arguably does not decide whether a party seeking to enforce a forum-selection clause could move to dismiss under Fed. R. Civ. P. 12 or 28 U.S.C. § 1406, *id.* at 32, 28 & n.8, leading to a circuit split on the latter question, which *Atlantic Marine* should resolve.

In *Stewart*, the majority also did not discuss how a district court should analyze a motion to transfer venue under Section 1404(a) based on a forum-selection clause, because the procedural posture of the case dictated that it remand to the district court. *Stewart*, 487 U.S. at 32. But Justice Kennedy, in a concurring opinion joined by Justice O'Connor, "observe[d] that enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system," and added that "[t]he justifications we noted in *The Bremen* to counter the historical disfavor forum-selection clauses had received in American courts . . . should be understood to guide the District Court's analysis under § 1404(a)." *Id.* at 33 (internal citation omitted).

In *Atlantic Marine*, the Supreme Court might reach the issues addressed in Justice Kennedy's concurrence in *Stewart*. If the Court agrees with the minority of U.S. circuits that a district court with venue over an action cannot dismiss based on a forum-selection clause, but instead must limit its review to a motion to transfer under Section 1404(a) using a balancing-of-interests test,

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1 *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 478-79 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis v. Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

2 *See Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-78 (3d Cir. 1995); *Atlantic Marine*, 701 F.3d at 739-41.

Petitioner has asked the Court to decide how the district court should "allocate the burdens of proof among parties seeking to enforce or to avoid a forum-selection clause." *Atl. Marine Constr. Co. v. J-Crew Mgmt., Inc.*, No. 12-929, 2013 WL 315712, at *i (U.S. Jan. 25, 2013) (petition for writ of certiorari). The Court may view this question narrowly and decide only which party bears the burden of proof under Section 1404(a) in these circumstances. More likely, given confusion in the lower courts and the analysis the Court will have to conduct to answer the first question presented, the Court will provide some broader guidance on how a valid forum-selection clause should inform a district court's determination of a motion to transfer.

**Conclusion**

There is a significant anomaly in the enforcement of forum-selection clauses in certain federal courts. If the operative agreement contains a forum-selection clause requiring litigation in a foreign court or a state court, the courts will dismiss the action on the basis of the forum-selection clause under *The Bremen*.[3] But those same federal courts, confronted with a forum-selection clause providing for litigation in a different federal court, will not dismiss, and will evaluate a motion to transfer under a standard far less deferential to the parties' agreement to limit litigation of disputes to a different court, as the Fifth Circuit's decision in *Atlantic Marine* demonstrates. Practitioners drafting forum-selection clauses should be aware of this anomaly, and should be attuned to the Supreme Court's forthcoming decision in *Atlantic Marine* to understand whether and how the Court resolves the problem.

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[3] *See, e.g., Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 35-36 (5th Cir. 1997); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114-15, (5th Cir. 1996).