

# Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses

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*The Supreme Court's 2013 decision in Atlantic Marine v. U.S. District Court perhaps usefully resolved the issue of the appropriate procedural means for ascertaining the proper court where the parties' agreement includes a forum-selection clause. However, the Court's decision was predicated on the presupposition that the forum-selection clause was valid—a presupposition that begged that threshold question. Thus, the Court's presupposition threw a significant set of antecedent questions into legal limbo, namely: (1) what body of law applies to evaluate the validity and enforceability of a forum-selection clause, (2) what court should make that determination, and (3) when should that determination be made? This Article explores the problem of forum-selection, choice-of-law, and arbitration clauses in the context of the federal courts' longstanding fixation on the problem of creative forum-shopping and other gamesmanship to gain litigation advantage, strategies the courts have long eschewed. Nonetheless, despite the concerted efforts of courts and legislators to thwart such techniques through judicial fiat and legislative enactment, actors in the judicial arena continue to invent resourceful methods to circumvent new constraints. This Article argues that consumer forum-selection and arbitration clauses ought to be viewed through the lens of litigation gamesmanship, as procedural means whereby corporate defendants are able to establish forum advantage without any countervailing benefit to consumers who unwittingly agree to such clauses. The Court consistently has turned a blind eye and deaf ear on the problem of consumer forum-selection and arbitration clauses, instead merging consideration of consumer agreements with jurisprudence developed in the dissimilar context of sophisticated business partners freely negotiating at arm's length. The Court's continued failure to distinguish and address the problem of consumer forum-selection and arbitration clauses—left unchanged or worsened by Atlantic Marine—calls for legislative action to close this legal advantage conferred on corporate defendants who exploit it to their economic benefit.*

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## INTRODUCTION

The Supreme Court loves forum-selection clauses. It has told us so at least four times.<sup>1</sup> In the most recent consideration of such clauses, the Court in *Atlantic Marine Construction Co. v. U.S. District Court* resolved a conflict among the lower federal courts concerning the appropriate procedural means for ascertaining the proper court in litigation where the parties' agreement included a forum-selection clause.<sup>2</sup> We now know that when a party invokes a forum-selection clause, the proper means for locating the appropriate forum is through a transfer of venue under 28 U.S.C. § 1404(a),<sup>3</sup> rather than through a motion to dismiss under Rule 12(b)(3), 12(b)(6), or 28 U.S.C. § 1406.<sup>4</sup> In addition, a court's consideration of the transfer motion is governed by the jurisprudence for § 1404(a) transfers, and not jurisprudential principles governing motions to dismiss for a lack of venue, improper venue, or failure to state a claim upon which relief can be granted.<sup>5</sup>

While resolving this procedural problem, however, the Court notably failed to address the most vexing problems relating to litigation that involves forum-selection clauses: namely, what law applies to determine the validity and enforceability of the clause, which court makes that determination, and when such a determination is appropriately made. Thus, perhaps the Court's most significant and important admission in *Atlantic Marine* is in footnote 5, where the Court simply noted that its "analysis presuppose[d] a contractually valid forum-selection clause."<sup>6</sup> The Court's unanimous decision, centering on § 1404(a) transfers, begs the primary question of which court should determine the validity of a forum-selection clause, subject to what law, and when.<sup>7</sup> This inquiry is

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1. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (2013); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Actually, the Supreme Court really, really loves forum-selection clauses. The Court has enforced every forum-selection clause in an international contract that has come before it. In addition to the above decisions, see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540–42 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974).

2. See generally Sarah Sheridan, Note, *Atlantic Marine v. J-Crew: The Future of Forum-Selection Clauses in Federal Courts*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1 (2013); Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521 (2014); David K. Duffee et al., *U.S. Supreme Court Reaffirms That Forum-Selection Clauses Are Presumptively Enforceable*, BUS. L. TODAY (Jan. 2014), [http://www.americanbar.org/publications/blt/2014/01/keeping\\_current\\_duffee.html](http://www.americanbar.org/publications/blt/2014/01/keeping_current_duffee.html).

3. *Atl. Marine*, 134 S. Ct. at 579–80.

4. *Id.* at 577–79.

5. *Id.* at 579–80.

6. *Id.* at 581 n.5.

7. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting) ("But the Court's description of the issue begs the question: what law governs whether the forum-selection clause is

further muddled by the Court's determination that in cases involving forum-selection clauses and § 1404(a) transfers—unlike transfer cases not involving forum-selection clauses—the law of the forum *does not* transfer to the transferee court.<sup>8</sup>

This Article examines the unresolved questions left open by the Court's *Atlantic Marine* opinion, focusing on the question concerning a threshold determination of the validity and enforceability of forum-selection clauses. The Court has opened the door to this inquiry by virtue of footnote 5. If we reject the Court's presupposition that a forum-selection clause is valid, then at least three legitimate questions arise: (1) What body of law applies to evaluate the validity and enforceability of a forum-selection clause? (2) What court should make that determination? (3) When should that determination be made? Furthermore, how might the answers to these possible questions intersect with the Court's conclusions in *Atlantic Marine*?

Part I briefly discusses the Court's *Atlantic Marine* decision against the background of the Court's other forum-selection clause decisions. In particular, it focuses on Justice Scalia's dissenting opinion in *Stewart Organization v. Ricoh*,<sup>9</sup> where Justice Scalia at least seemed interested in the antecedent question concerning judicial determination of the validity and enforceability of a forum-selection clause, as well as the applicable law to make that determination.<sup>10</sup> Needless to say, Justice Scalia's concerns in *Ricoh* seem not to have resurfaced in *Atlantic Marine*, unless those concerns were subsumed and accounted for by footnote 5.

Part II then discusses the Court's enduring fixation on litigation gamesmanship, with particular attention to the problem of forum shopping.<sup>11</sup> The Court has consistently eschewed litigation gamesmanship and attempted to constrain all forms of creative forum shopping. Here this Article makes two points. First, the judiciary's evolving jurisprudence has not only failed to prevent gamesmanship, but has instead fostered inventive procedural circumventions by practicing attorneys. No matter what the courts attempt to do to rein in gamesmanship—by statute, rule, or judicial opinion—attorneys still manage to invent new means to gain litigation advantage through

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a *valid* or *invalid* allocation of any inconvenience between the parties. If it is invalid, *i.e.*, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination.”).

8. *Atl. Marine*, 134 S. Ct. at 582 (“[W]hen a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.” (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)).

9. 487 U.S. at 33–41 (Scalia, J., dissenting).

10. *Id.*

11. See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (“[T]win aims of the *Erie* rule [are the] discouragement of forum-shopping and avoidance of inequitable administration of the laws.”); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 n.6 (1938).

creative pre- and postlitigation practices. This is why we continue to have these cases. For the most part, courts have focused on postfiling procedural tactics, while paying less attention to prelitigation gamesmanship to achieve strategic advantage. Although courts have sought to avert egregious preemptive devices such as corporate reincorporation across state borders to achieve or defeat diversity jurisdiction, courts have not viewed forum-selection clauses through the lens of prelitigation gaming tactics. In the realm of consumer contracts, an appreciation of forum-selection and arbitration clauses as another form of sophisticated gamesmanship, presumably eschewed by the Court, ought to merit some attention and consideration. As will be discussed, this involves reframing the debate as a question of undesirable gamesmanship.

Second, the Court's forum-selection clause jurisprudence continues to perpetuate a muddled set of principles. It consistently fails to distinguish among parties to litigation, applying the same principles to cases involving uninformed consumers as to sophisticated business entities. In addition, if litigation arises in the Court's admiralty jurisdiction, federal law applies to assess the validity and enforceability of a forum-selection clause, but no such body of federal *contract* doctrine applies to forum-selection clause litigation in the Court's diversity or federal question jurisdiction. As Justice Scalia pointed out in his dissent in *Stewart*, this anomaly gives rise to an array of strategic litigant behavior and gaming opportunities, which result in unsatisfactory and inconsistent outcomes depending on those choices.<sup>12</sup> The gaming scenarios envisioned by Justice Scalia in his *Stewart* dissent have not been mitigated by *Atlantic Marine*. Instead, *Atlantic Marine* has further complicated this terrain by failing to answer these questions as well, or answering them with a variant set of rules for different situations. Finally, in the realm of arbitration clauses—analagized by the Court to forum-selection clauses<sup>13</sup>—the Court has determined that the Federal Arbitration Act preempts application of state unconscionability jurisprudence, thus giving primacy to federal law and leaving scant room for consumers wishing to challenge such clauses.<sup>14</sup>

Part III then focuses on the implications of *Atlantic Marine* for forum-selection clauses in consumer contracts, and by analogy to arbitration clauses. This discussion reiterates the theme of questions left unanswered by the *Atlantic Marine* decision, noting that the *Atlantic Marine* litigation involved a contractual agreement between sophisticated business entities. Thus, the Court had no reason to address enforceability problems in consumer contracts. Given the pervasive utilization of such

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12. 487 U.S. at 40 (Scalia, J., dissenting).

13. *Id.* at 36 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

14. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

clauses, including arbitration clauses, by business entities in consumer transactions, the Court's jurisprudence fails to provide adequate protection to consumers who are unwitting parties to unconscionable agreements. *Atlantic Marine's* presupposition that such clauses are valid means that a consumer plaintiff will have her dispute transferred to the contractual forum preference, or adjudicated pursuant to alternative dispute resolution techniques apart from the court system. But if a consumer instead chooses to challenge the validity of a forum-selection clause, *Atlantic Marine* has left the parties in doctrinal limbo concerning what law, what forum, and the timing of such determination.

This Article concludes by contending that the problems in this arena cannot effectively be resolved by rule revision or further doctrinal elaboration. Instead, the doctrinal uncertainties engendered by *Atlantic Marine* ought to be remedied by a federal statute setting forth substantive principles that apply to forum-selection (and choice-of-law) provisions in consumer contracts, but that do not confer any presumptive validity on such provisions. In essence, such statutory provisions should set forth a body of contract unconscionability principles that would apply in all cases within the federal court's jurisdiction and, in the same fashion as the Federal Arbitration Act, preempt varying state law.

#### I. *ATLANTIC MARINE*: THE SUPREME COURT'S LATEST VOYAGE IN FORUM-SELECTION CLAUSES

##### A. ANSWERED QUESTIONS: WHAT THE COURT DECIDED

Whether one agrees with the outcome in *Atlantic Marine* or not, the Court's decision did resolve one of those quirky problems that had inspired a vexing conflict among the lower federal courts concerning the interrelationship of contractual forum-selection clauses and attempts to implement forum selection according to those clauses.<sup>15</sup> As Justice Roberts might characterize this decision, a unanimous Court in *Atlantic Marine* exercised its function of calling balls and strikes (in this instance, calling a series of three strikes against the plaintiff, and sending them back to the dugout for another at-bat in Texas).<sup>16</sup>

The essential problem in *Atlantic Marine* addressed the issue of the appropriate procedural means to effectuate a contractual forum-selection clause, particularly in cases where a plaintiff sued a defendant in some locality other than the contractual forum. In such cases, defendants

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15. See generally Sorensen, *supra* note 2 (comprehensively discussing and analyzing split among federal courts concerning appropriate procedural means for implementation of a forum-selection clause).

16. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

typically invoke and seek enforcement of the forum-selection clause in the plaintiff's chosen forum, requesting to have the litigation relocated to the contractual forum or otherwise dismissed from the plaintiff's choice of forum.

The nub of the issue that percolated among federal courts centered on a disagreement concerning the proper procedural approach to enforcing a forum-selection clause. Litigants and courts resorted to a dazzling array of different procedural options to construe and implement a forum-selection clause.<sup>17</sup> First, some defendants invoked Federal Rule 12(b)(3)<sup>18</sup> and sought to have the case dismissed for a lack of proper venue.<sup>19</sup> Second, some defendants invoked 28 U.S.C. § 1406<sup>20</sup> alleging improper venue, and sought to have the court relocate the case to the "proper" venue pursuant to the forum-selection clause.<sup>21</sup> Third, other defendants instead relied on 28 U.S.C. § 1404(a),<sup>22</sup> arguing for a change of venue for the convenience of the parties and in the interests of justice.<sup>23</sup> In more unusual scenarios, other defendants looked to Rule 12(b)(6),<sup>24</sup> Rule 12(c),<sup>25</sup> and Rule 56<sup>26</sup> to dismiss the case altogether on

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17. See Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1639–42 (2011) (collecting cases).

18. FED. R. CIV. P. 12(b)(3). Federal Rule of Civil Procedure 12(b)(3) permits a defendant, before answering, to bring a motion to dismiss for "improper venue." Neither the federal venue statute nor the Federal Rules of Civil Procedure define "wrong" or "improper" venue. See generally 28 U.S.C. §§ 1391–1413 (2012).

19. See, e.g., *Petersen v. Boeing Co.*, 715 F.3d 276, 279 (9th Cir. 2013) (reviewing district court's decision to enforce a forum-selection clause under Rule 12(b)(3) for abuse of discretion); *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970–74 (8th Cir. 2012) (examining Rule 12(b)(3) and § 1406(a) as procedural devices to give effect to forum clauses); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005) (holding Rule 12(b)(3) and § 1406(a) are the procedural vehicles for dismissing or transferring an action that has been brought in an improper forum); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2004) (discussing proper treatment of disputed facts relating to a forum-selection clause on a Rule 12(b)(3) motion, citing authorities).

20. 28 U.S.C. § 1406(a). Section 1406(a) mandates dismissal or transfer of a "case laying venue in the wrong division or district." The district court has discretion to choose between transfer and dismissal in evaluating motions pursuant to § 1406(a).

21. See *Union Elec. Co.*, 689 F.3d at 970–74.

22. 28 U.S.C. § 1404(a) (motion to transfer for the convenience of the parties and in the interest of justice).

23. See *United States ex rel. J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at \*5 (W.D. Tex. Apr. 6, 2012) (relying on 28 U.S.C. § 1404(a) as the appropriate procedural mechanism when invoking a forum-selection clause, but holding that Atlantic Marine failed to show that transfer pursuant to this provision would be in the interest of justice or increase the convenience of the witnesses and the parties); see also *Williamson-Dickie Mfg. Co. v. M/V Heinrich J.*, 762 F. Supp. 2d 1023, 1028 (S.D. Tex. 2011) (surveying district court case law); *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 683–84 (S.D. Miss. 2005) (same).

24. FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted). See *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 387 n.3 (1st Cir. 2001) (surveying "the variegated views among the circuits concerning the appropriate vehicle for a motion to dismiss based on a forum-selection clause"); *Lawson Steel, Inc. v. All State Diversified Prods., Inc.*, No. 1:10-CV-1750,

dispositive grounds.<sup>27</sup> Finally, yet other litigants invoked the federal common law doctrine of *forum non conveniens* to accomplish a dismissal from the plaintiff's chosen forum.<sup>28</sup>

The Supreme Court in *Atlantic Marine* seemingly cut through this procedural Gordian knot and set forth a simple set of negative and positive precepts relating to the enforcement of forum-selection clauses. Distilled to its essence, *Atlantic Marine* held the following: First, a party seeking to enforce a forum-selection clause cannot seek dismissal under 28 U.S.C. § 1406 (a) or Rule 12(b)(3).<sup>29</sup> Second, a forum-selection clause should be enforced through a motion to transfer venue under 28 U.S.C. § 1404(a).<sup>30</sup> Third, a forum-selection clause that designates a state or a foreign forum can be enforced through application of the doctrine of *forum non conveniens*.<sup>31</sup> Fourth, the Court declined to consider whether a defendant could use a Rule 12(b)(6) motion to enforce a forum-selection clause.<sup>32</sup>

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2010 WL 5147905, at \*3 (N.D. Ohio Nov. 23, 2010) (citing *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995)) (“The Circuit Courts of Appeal are split on the general question of whether a Rule 12(b)(6) motion may be used to dismiss a case for improper venue based on a forum selection clause. Approval of Rule 12(b)(6) as a mechanism to dismiss a case for improper venue based on a forum selection clause has been deemed a minority view, however.” (citation omitted)). Two circuits held Rule 12(b)(6) as the appropriate mechanism for enforcing forum-selection clauses. See *Silva*, 239 F.3d at 387; *Instrumentation Assocs., Inc. v. Madsen Elecs. (Can.) Ltd.*, 859 F.2d 4, 6 n.4 (3d Cir. 1988); see generally Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party, *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (2013) (No. 12-929) (arguing defendant in a breach-of-contract action should be able to obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a valid forum-selection clause).

25. FED. R. CIV. P. 12(c) (motion for a judgment on the pleadings); see, e.g., *NYMET Indus. Solutions, Inc. v. Maersk, Inc.*, 818 F. Supp. 2d 511, 516 (E.D.N.Y. 2011) (finding forum-selection clause enforceable; granting defendant's motion to dismiss under Rule 12(c)).

26. FED. R. CIV. P. 56 (summary judgment as a matter of law); see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588, 595 (1991) (enforcing a forum-selection clause via summary judgment); *Rogen v. Memry Corp.*, 886 F. Supp. 393, 396–97 (S.D.N.Y. 1995) (“[S]ummary judgment is an appropriate vehicle to assess the enforceability of a forum selection clause.” (quoting *Grissom v. Colotti*, 644 F. Supp. 903, 904 (D.P.R. 1986))).

27. See *supra* note 26 and accompanying text.

28. See *Aguas Lenders Recovery Grp. v. Suez, S.A.*, 585 F.3d 696, 700 (2d Cir. 2009) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)) (holding where parties contract to a permissive forum-selection clause “that designates a forum in advance, but does not preclude a different choice, the M/S *Bremen* presumption of enforceability does not apply; instead, in such cases, the traditional *forum non conveniens* standards apply”); *Kanza Constr., Inc. v. Kansas City S. Ry. Co.*, No. 13-CV-0489-W-DGK, 2014 WL 1356676 (W.D. Mo. Apr. 7, 2014) (holding subcontractor's motion to dismiss on *forum non conveniens* grounds, based on mandatory forum-selection clause, was warranted).

29. *Atl. Marine*, 134 S. Ct. at 577–79.

30. *Id.* at 579–80.

31. *Id.* at 580.

32. *Id.* The Court declined to evaluate the Rule 12(b)(6) procedural option on the grounds that the defendant had not sought to enforce the forum-selection clause through this provision, and that the issue had not been briefed to the Court. However, the Court further indicated that even if a defendant could use Rule 12(b)(6) to enforce a forum-selection clause, it would not change the conclusion that § 1406(a)

Elaborating on its fundamental conclusion that forum-selection clauses should be enforced through a motion to transfer under 28 U.S.C. § 1404(a), the Court further opined that “when the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.”<sup>33</sup> The presence of a valid forum-selection clause should be given controlling weight in all but the most exceptional circumstances.<sup>34</sup> Conversely, courts should deny a motion to transfer only under extraordinary circumstances that are unrelated to the convenience of the parties.<sup>35</sup>

In addition, the Court announced that courts now needed to modify the “calculus” governing § 1404(a) transfers in three additional ways.<sup>36</sup> First, the plaintiff’s choice of forum merited no weight.<sup>37</sup> Instead, the plaintiff resisting transfer to the contractual forum henceforth carried the burden of establishing that the transfer was unwarranted.<sup>38</sup> Second, in evaluating a defendant’s § 1404(a) transfer motion, courts should not consider arguments about the parties’ private interests, an inquiry that typically informs a traditional transfer motion.<sup>39</sup> Third, on a § 1404(a) transfer based on a forum-selection clause, the case would not carry with it the original venue’s (the transferee court’s) choice-of-law rules.<sup>40</sup> In so ruling, the Court carved out an exception—for forum-selection clause cases only—to the principles from *Van Dusen v. Barrack* and *Ferens v. John Deere Co.* that govern the applicable law on transfer motions.<sup>41</sup>

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and Rule 12(b)(3) were not the proper mechanisms to enforce a forum-selection clause. The ruling on the Rule 12(b)(6) argument was effectively the third strike, or at least, called as a foul ball.

33. *Id.* at 581.

34. *Id.* The Court did not define what such exceptional circumstances might be.

35. *Id.* The Court did not suggest what such extraordinary circumstances might be, noting that no exceptional circumstances were presented by the underlying facts in the case.

36. *Id.* at 581–84.

37. *Id.* at 581.

38. *Id.*

39. *Id.* at 582 (“When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum.”).

40. *Id.* at 582–83.

41. *See generally* *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (holding transferee court applies law of transferor court on plaintiff’s motion for transfer); *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding transferee court applies law of transferor court on defendant’s motion for transfer).

B. UNANSWERED QUESTIONS: WHAT THE COURT DID NOT DECIDE, OR,  
CONFOUNDING CHOICE-OF-LAW IMPLICATIONS

I. *Mitigating the Harshness of Atlantic Marine: All Those Qualifiers*

The purpose of this Article is not to evaluate the legitimacy of the Court's reasoning in *Atlantic Marine* or its conclusions concerning the appropriate procedural mechanism for enforcing a forum-selection clause. Rather, taking as given the Court's core ruling that § 1404(a) provides the proper vehicle for a defendant's invocation of a forum-selection clause, this Article instead focuses on the opaque and somewhat discouraging doctrine for consumers engendered by the Court's opinion, as well as crucial issues the Court failed to address.

In the realm of doctrinal murkiness, it is unclear whether, post-*Atlantic Marine*, forum-selection clauses are presumptively valid unless somehow and somewhere proven otherwise. In various portions of the opinion, the Court seemed to nudge its pronouncements in the direction favoring such presumptive validity.<sup>42</sup>

Nonetheless, the Court's opinion is littered with qualifying language and rhetoric that presumably leaves open several avenues by which a dissenting party might challenge a forum-selection clause in the future. Whether these fissures in the Court's decision will provide meaningful opportunities to contest the possible transfer or dismissal of a case pursuant to a forum-selection clause remains unclear, but this seems highly unlikely given the overall tone of the Court's pronouncements. Thus, judges in forthcoming decisions will have the unhappy task of providing some content to *Atlantic Marine's* qualifying language.

For example, in contemplating situations where parties have agreed to a contractual forum-selection clause, the Court has inverted (actually, completely abandoned) the usual federal court deference to a plaintiff's choice of forum. Instead, the Court announced that henceforth a plaintiff's choice of forum merits *no* weight.<sup>43</sup> Thus, a plaintiff who attempts to resist a forum-selection clause has the burden to establish that a transfer to the forum for which the parties bargained is *unwarranted*.<sup>44</sup> This weasel word in the Court's opinion provides scant content to the plaintiff's evidentiary burden of establishing what constitutes a *warranted* or an *unwarranted* transfer.

As indicated above, the Court in *Atlantic Marine* substantially modified the test for a § 1404 transfer of venue, stripping that inquiry of consideration of private interest factors that undergird traditional forum

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42. See *infra* notes 53–55 and accompanying text.

43. *Atl. Marine*, 134 S. Ct. at 581.

44. *Id.*

non conveniens analysis.<sup>45</sup> The Court twice noted in its opinion that when a defendant files a § 1404(a) transfer motion, a district court should transfer the case unless *extraordinary* circumstances unrelated to the convenience of the parties clearly disfavor a transfer.<sup>46</sup> The Court concluded that no such *exceptional* factors were present in the case, leaving one to wonder what the district court has left to do on remand.<sup>47</sup> Further, the Court opined that since public interest factors rarely defeat a transfer motion,<sup>48</sup> “the practical result is that forum-selection clauses should control except in *unusual* cases.”<sup>49</sup> One assumes that on remand the federal district court for the Western District of Texas is supposed to heed the Supreme Court’s overtones.

What the Court has not told us in *Atlantic Marine* is what remaining *extraordinary* or *exceptional* public interest factors will defeat a motion to transfer or dismiss a case pursuant to a forum-selection clause. In addition, the Court has not told us what *unusual* cases will overcome a defendant’s motion to transfer or dismiss.

Justice Alito, citing Justice Kenney’s concurring opinion in *Stewart*, reiterated that proper application of § 1404(a) requires that a forum-selection clause be “given controlling weight in all but the most *exceptional* cases.”<sup>50</sup> But the *Atlantic Marine* decision fails to indicate what types of cases (or circumstances) qualify as exceptional so as to provide less heft to consideration of a forum-selection clause. In the relatively few post-*Stewart* instances where a plaintiff invoked Justice Kennedy’s “exceptional case” qualification, courts have concluded that plaintiffs had not met the burden of showing that the case provided the exceptional circumstances in which the clause should not be enforced

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45. *See id.* at 582.

46. *Id.* at 575, 581 (“Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.”).

47. *Id.* at 581, 584 (“Although no public-interest factors that might support the denial of *Atlantic Marine*’s motion to transfer are apparent on the record before us, we remand the case for the courts below to decide that question.”).

48. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (defining public interest factors as embracing administrative difficulties such as docket congestion; burden of jury duty imposed on citizens in a location with no relationship to the litigation (that is, the competing interests of forums); and difficulties presented by application of choice-of-law questions); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260–61 (1981) (*Gulf Oil* public interest factors favored litigation in Scotland). *See generally* Michael M. Karayanni, *The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine*, 21 WIS. INT’L L.J. 327, 330, 335–63 (2003) (arguing that the distinction between private and public law factors in *Gulf Oil* is incoherent); 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828.4 (4th ed. 2013) (citing forum non conveniens cases illustrating the balancing of private and public interests).

49. *Atl. Marine*, 134 S. Ct. at 582 (emphasis added).

50. *Atl. Marine*, 134 S. Ct. at 579 (emphasis added) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

because it was unreasonable.<sup>51</sup> Thus, Justice Kennedy's "exceptional cases" qualification, rotely recited in *Atlantic Marine*, is likely to remain a toothless tiger for parties opposing application of a forum-selection clause.

As indicated above, the *Atlantic Marine* decision was predicated on the presupposed validity of the forum-selection clause in that case. But other assumptions pervade the Court's decision. In declaring that judges should no longer consider private interest factors relating to party convenience on a § 1404(a) transfer motion, the Court concluded that this was justified because any inconvenience resulting from being forced to litigate in a contractual forum "was clearly foreseeable at the time of contracting."<sup>52</sup>

That conclusory pronouncement begs the question whether this is indeed factually true in any particular case. Thus, the problem of a reasonable foreseeability of inconvenience to the parties has substantial relevance to cases involving consumer contracts, where it is highly unlikely that the "contracting" consumer either has knowledge of the forum-selection clause or has reasonably calculated and waived the consumer's relative inconvenience if she subsequently seeks remediation.

Summing up, what we have here is a bleak house, at least for consumers ensnared unknowingly and unwittingly by forum-selection clauses inserted into ordinary consumer contracts. On the one hand, the Court decorated the *Atlantic Marine* decision with lots of ornamental modifiers intended, one supposes, to soften the impact of its actual harsh consequences. Thus, we have the language of unwarranted, unusual, exceptional, most exceptional, extraordinary, and unforeseeable. On the other hand, the Court seems to be wishing litigants good luck with all that. To make a prospective challenger's life even more difficult, the Court has now declared that if one gets to the point of evaluating a transfer analysis, only public interest factors count. Only if a litigant can somehow demonstrate any or all of the qualifying adjectives may she avoid the effect of a forum-selection clause.

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51. See *Fluidtech, Inc. v. Gemu Valves, Inc.*, 457 F. Supp. 2d 762, 766-67 (E.D. Mich. 2006) (finding no exceptional circumstances to render forum-selection clause unenforceable); *Freedman v. Am. Online, Inc.*, 294 F. Supp. 2d 238, 243 (D. Conn. 2003) (same); *Stewart v. Dean-Michaels Corp.*, 716 F. Supp. 1400, 1401-02 (N.D. Ala. 1989) ("Plaintiffs here strive to convince this court that they come within some exception recognized by the Eleventh Circuit in *In re Ricoh Corporation*. Not having been told by the Eleventh Circuit what, if any, exceptional circumstances would justify choosing a forum other than the forum provided in a forum selection clause, this court is unconvinced that either set of plaintiffs comes within any exception." (citation omitted)). It is difficult to locate any case in which a court has concluded the opposite: those exceptional circumstances compel nonenforcement of a forum-selection clause.

52. *Atl. Marine*, 134 S. Ct. at 582 (emphasis added) ("As we have explained in a different but 'instructive' context, '[w]hatever "inconvenience" [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.'" (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972) (citing *Stewart*, 487 U.S. at 33)).

## 2. *The Still Unresolved Chicken-and-Egg Problem*

The core problem with the *Atlantic Marine* decision has less to do with a collection of grey rhetorical minutiae than with the Court's basic premise. In its final analysis, the entire *Atlantic Marine* edifice is erected on the foundational concept that the forum-selection clause in that case was valid.<sup>53</sup> In footnote 5 the Court simply noted that "[its] analysis presuppose[d] a contractually valid forum-selection clause."<sup>54</sup> Thus, the *Atlantic Marine* decision proceeds from that presupposition of validity,<sup>55</sup> notwithstanding all the surrounding language qualifying that presupposition in other cases.

Obviously, the Court's analysis begs the question of what conclusions might follow if a forum-selection clause is not valid, or not presumptively valid. In turn, this foundational premise inspires a confounding host of chicken-and-egg-like issues relating to a threshold determination of the validity and enforceability of forum-selection clauses. The Court opened the door to these inquiries by virtue of footnote 5. If we cannot rely on a presupposition that a forum-selection clause is valid, then, at a minimum, at least three legitimate questions arise: (1) What body of law applies to evaluate the validity and enforceability of a forum-selection clause? (2) What court should make that determination? (3) When should that determination be made? Furthermore, how might the answers to these possible questions intersect with the Court's other conclusions in *Atlantic Marine*?

These inquiries are further complicated if the contract also contains a choice-of-law provision,<sup>56</sup> in addition to or even in the absence of a forum-selection clause.<sup>57</sup> The Court in *Atlantic Marine* did not have to address this additional doctrinal wrinkle because there seems not to have been a parallel choice-of-law provision in the underlying contract.<sup>58</sup>

However, in cases where a contract includes an applicable law provision, myriad problems emerge. Thus, a choice-of-law provision might point to the application of law other than the law of the plaintiff's chosen forum. In such cases, as a matter of first instance, does the plaintiff's chosen forum apply its own law to determine the validity and

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53. *Id.* at 581 & n.5.

54. *Id.* at 581 n.5.

55. *Id.* at 581.

56. *See generally* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (enforcing Florida federal forum based on presence of choice-of-law provision in Burger King franchise agreement selecting Florida law as applicable to disputes arising out of the contract despite the fact that the contract did not include a forum-selection clause).

57. *Id.*

58. *See* United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co., No. A-12-CV-228-LY, 2012 WL 8499879, at \*1 (W.D. Tex. Apr. 6, 2012) (discussing forum-selection clause designating Circuit Court of Norfolk, Virginia or U.S. District Court for the Eastern District of Virginia, Norfolk Division, as chosen jurisdiction and venue).

enforceability of the clauses, or does the choice-of-law provision compel interpretation of validity and enforceability based on the contractual forum's law? Does the answer to this question vary depending on whether the court's authority is based on admiralty, federal question, or diversity jurisdiction? And, if the threshold dispute centers on the validity and enforceability of choice-of-law and forum-selection clauses, why should another forum's law (other than the plaintiff's chosen forum), govern these questions?

3. *Of Suppositions: No Court Determined the Validity or Enforceability of the Atlantic Marine Forum-Selection Clause*

These threshold problems of what court determines the validity and enforceability of a forum-selection clause according to what applicable law are not easily addressed and answered. The *Atlantic Marine* litigation provides an interesting illustration of precisely these problems. For example, the contractual agreement underlying the original *Atlantic Marine* litigation seems not to have included a choice-of-law provision, but only a forum-selection clause.<sup>59</sup> The dispute between Atlantic Marine and its subcontractor J-Crew arose out of a land-based construction dispute (to distinguish this from the sea-based admiralty cases) that was filed in federal court based on diversity.<sup>60</sup> Consequently, it would appear that under the *Erie Railroad Co. v. Tompkins/Klaxon Co. v. Stentor* doctrine,<sup>61</sup> the court ought to have looked to Texas law to have determined the validity and enforceability of the clause.

And, indeed, J-Crew argued precisely that: it challenged the enforceability of the forum-selection clause based on the Texas Business and Commerce Code, which effectively voids such provisions in construction contract disputes.<sup>62</sup> Nonetheless, the district court ruled that Texas state law did not apply. This is because the construction project giving rise to the payment dispute was in Fort Hood, Texas, a federal enclave, and that Texas had ceded exclusive jurisdiction of Fort Hood to the United States in 1950. Hence, federal law applied to the question of whether Texas law voided the clause, which the district court held it did not.<sup>63</sup>

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59. *Id.*

60. *Id.* at \*5.

61. See generally *Klaxon Co. v. Stentor*, 313 U.S. 487 (1941) (holding states' choice-of-law regimes are substantive for *Erie* purposes; courts sitting in diversity jurisdiction must apply forum state choice-of-law principles to determine application law); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding federal courts sitting in diversity jurisdiction apply state substantive law but federal procedural rules).

62. See TEX. BUS. & COM. CODE ANN. § 272.001 (West 2014) ("Voidable Contract Provision"); *J-Crew Mgmt.*, 2012 WL 8499879, at \*2.

63. *Id.* at \*2-3.

That is as far as the court's analysis went. Significantly, the district court never determined whether the forum-selection clause, as a primary matter, was valid and enforceable; instead the court pivoted exclusively to lengthy digression of the appropriate procedural means for effectuating the clause.<sup>64</sup> This focus, in turn, dictated that the appellate court's review of the district court's rulings similarly concentrated exclusively on that question.<sup>65</sup> Hence, the Supreme Court's supposition that the contested forum-selection clause in *Atlantic Marine* was valid was precisely that: a supposition. The lower courts had never determined the validity of the clause at any point in the proceedings, and certainly had not addressed what law should apply to make that determination. Nor did the appellate court consider these questions on review. Theoretically, then, the validity of the forum-selection clause in *Atlantic Marine* is still an open question, as well as what law applies to make that determination.

#### 4. *Justice Scalia on Threshold Determinations of Validity and Enforceability of Forum-Selection Clauses*

One might note that Justice Scalia, dissenting in *Stewart*, recognized this set of problems.<sup>66</sup> In *Stewart*, the majority held that when a defendant invokes a forum-selection clause, § 1404(a) governs the issue of whether to give effect to the parties' forum-selection clause and transfer the case to the designated forum.<sup>67</sup> But the majority further held that in conducting an analysis under § 1404(a) and evaluating the relative private and public interests that inform a § 1404(a) request, courts must assess countervailing arguments under federal and state law to determine what weight to give to a forum-selection clause.<sup>68</sup> With this pronouncement, the *Stewart* majority in essence fashioned a federal common law jurisprudence governing forum-selection clauses in diversity cases.

Justice Scalia began his dissent by agreeing with the Court's conclusion that the question of the validity of a forum-selection clause falls within the analysis of a § 1404(a) transfer.<sup>69</sup> But he disagreed that federal courts could fashion a judge-made rule to govern this issue of contract validity.<sup>70</sup> Scalia opined, "Since no federal statute or [r]ule of

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64. *Id.* at \*4-9.

65. *See generally In re Atl. Marine Constr. Co.*, 701 F.3d 736 (5th Cir. 2012) (deciding without considering the threshold question of validity and enforceability of the forum-selection clause).

66. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33-41 (1988) (Scalia, J., dissenting).

67. *Id.* at 32 (majority opinion).

68. *Id.* at 30.

69. *See id.* at 33 (Scalia, J., dissenting).

70. *Id.*; *see also id.* at 37 ("Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law. It is difficult to believe that state contract law was meant to be pre-empted by this

[p]rocedure governs the validity of a forum-selection clause, the remaining issue is whether federal courts may fashion a judge-made rule to govern the question. If they may not, the Rules of Decision Act, 28 U.S.C. § 1652, mandates use of state law.”<sup>71</sup>

Scalia further suggested that the majority’s opinion begged the question of what law governs whether a forum-selection clause is a valid or invalid allocation of any inconvenience between the parties. After a lengthy *Erie* analysis, Scalia ultimately concluded that *Erie* and its progeny mandated that state law controls the question of the validity of a forum-selection clause.<sup>72</sup>

Thus, if a forum-selection clause was invalid and should be voided, it is not, in Scalia’s view, entitled to any weight in the § 1404 determination.<sup>73</sup> Moreover, Scalia protested that it was inappropriate for the determination of a forum-selection clause’s validity to be “wrenched” from state contract principles.<sup>74</sup> He suggested that Congress, in enacting the Federal Arbitration Act’s preemption provision, demonstrated that it knew how to preempt state contract law, and “in precisely the same field of agreement regarding forum selection.”<sup>75</sup>

Significantly, in eschewing the majority’s fashioning of a federal common law to govern § 1404(a) transfers in forum-selection clause cases, Scalia expressed concern that the Court’s interpretation of § 1404(a) would lead to significant and inevitable encouragement of forum shopping.<sup>76</sup> In the underlying case, the Eleventh Circuit had held, as a matter of federal law, that the parties’ forum-selection clause was valid and required the transfer of the case to New York City, even though Alabama state law, where the plaintiff filed suit, did not recognize the validity or enforceability of forum-selection clauses.<sup>77</sup> Justice Scalia concluded that the Eleventh Circuit’s rule “clearly encourages forum

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provision that we have said ‘should be regarded as a federal judicial housekeeping measure.’” (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964)).

71. *Id.* at 38 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72–73 (1938)).

72. *Id.* at 38–39. *Accord* *Martinez v. Bloomberg LP*, 740 F.3d 211, 221 (2d Cir. 2014) (eschewing creation and application of a federal common law governing the interpretation of forum-selection clauses; arguing that contract law is quintessentially substantive for *Erie* purposes and therefore in the realm of the states).

73. *Stewart*, 487 U.S. at 34 (Scalia, J., dissenting).

74. *Id.* at 36 (“[Section] 1404(a) was enacted against the background that issues of contract, including a contract’s validity, are nearly always governed by state law. It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision.”).

75. *Id.*; see Federal Arbitration Act, 9 U.S.C. § 2 (2012) (preempting state contract law). See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding Federal Arbitration Act preempts California state law on contract unconscionability principles governing contractual arbitration clauses).

76. *Stewart*, 487 U.S. at 38 (Scalia, J., dissenting).

77. *Stewart Org., Inc. v. Ricoh*, 810 F.2d 1066 (11th Cir. 1987).

shopping,”<sup>78</sup> and described at least two scenarios where, as a consequence of the majority’s holdings, litigants would attempt to game the system:

Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum. Transfer to such a less desirable forum is, therefore, of sufficient import that plaintiffs will base their decisions on the likelihood of that eventuality when they are choosing whether to sue in state or federal court. With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and nonresident defendants will be encouraged to shop for more favorable law by removing to federal court. In the reverse situation—where a State has law favorable to enforcing such clauses—plaintiffs will be encouraged to sue in federal court. This significant encouragement to forum shopping is alone sufficient to warrant application of state law.<sup>79</sup>

The Court’s decision in *Atlantic Marine* was unanimous, so whatever concerns or reservations Justice Scalia expressed in his *Stewart* dissent were not urged again or reflected in *Atlantic Marine*. Certainly the Court’s conclusion in *Atlantic Marine* that § 1404(a) is the procedural mechanism for effectuating forum-selection clauses is consistent with its prior holding in *Stewart*, and Justice Scalia joined with the *Stewart* majority in that holding.

Nonetheless, Justice Scalia’s silence in *Atlantic Marine* concerning what law applies to determine the validity of a forum-selection clause is somewhat baffling because of the fuss he made over this question in his *Stewart* dissent, emerging as a champion of state law. Several theories suggest themselves. It could be that the Court’s presupposition in *Atlantic Marine* of the validity of the forum-selection clause averted any further discussion of what law applies to determine a clause’s validity and therefore Justice Scalia concluded that this issue—not raised—merited no further discussion. It could be that Justice Alito’s analysis of § 1404(a) convinced Justice Scalia that federal law simply applies to preempt any state law conflict. It could be that Justice Alito’s excise of private law factors from a § 1404(a) analysis—that is, no weighing of relative inconvenience to the parties—foreclosed discussion of underlying factual questions relating to state contract formation principles and unconscionability doctrine. Maybe Justice Scalia simply forgot his prior dissenting position in *Stewart*. Who knows?

At any rate, the Court’s *Atlantic Marine* decision arguably advances a more robust version of its *Stewart* holdings. Thus, the Court determined, consistent with *Stewart*, that § 1404(a) applies as the

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78. *Stewart*, 487 U.S. at 39 (Scalia, J., dissenting).

79. *Id.* at 39–40 (citations omitted).

procedural vehicle for implementing a forum-selection clause on a transfer motion. In addition, the Court federalized the law concerning validity of a forum-selection clause within the context of a § 1404(a) transfer motion, pursuant to a new set of highly constricted principles that left no room for the application of possibly conflicting state law doctrine on contract unconscionability.

## II. THE JUDICIAL SYSTEM'S LONGSTANDING PREOCCUPATION WITH AND ANTIPATHY TOWARD GAMING THE SYSTEM

### A. CREATIVE MANIPULATION OF FEDERAL JURISDICTION, VENUE, AND OTHER INTERESTING GAMBITS

Assume for the purpose of discussion that Justice Scalia in his *Stewart* dissent was correct with regard to forum-selection clauses, the Court's federalization of forum-selection clause validity, and the consequent effects of all this on forum shopping. If Justice Scalia was correct about the forum-shopping problem engendered by forum-selection clauses, then, at best, nothing has changed much by virtue of the *Atlantic Marine* decision.

To generalize, post-*Atlantic Marine*, it makes sense for plaintiffs who might be subject to a forum-selection clause in some unfavorable location to sue in a state court that disallows (or looks unfavorably upon) enforcement of forum-selection clauses—say in an Alabama or California state court. Likewise, it makes sense for a defendant in such situations to remove to federal court and then seek transfer pursuant to § 1404(a), invoking the forum-selection clause and basically getting a free pass to the contractual forum under the new *Atlantic Marine* forum-selection clause transfer principles.

However, where state law favors enforcement of forum-selection clauses, plaintiffs are now essentially out of luck. Plaintiffs will have little incentive to file in either state or federal court, because it will be well-nigh impossible to successfully challenge the enforcement of a forum-selection clause in either a state or federal forum.

Either way, the problem with these forum-shopping possibilities is that forum-selection clauses will almost always provide defendants with a “heads I win, tails you lose” forum preference. Forum-selection clauses, then, rather unfairly stack the deck in defendants' favor because, either as a matter of original or removal jurisdiction, defendants will wind up in federal court with the ability to enforce the forum-selection clause to transfer a case to the forum of the defendant's choosing. It may be protested that this is not unfair given the parties' contractual agreement, but in consumer cases, knowing and willing agreement to the contract

typically is not the case.<sup>80</sup> Moreover, against this backdrop, forum-selection clause jurisprudence does an inadequate job—actually a fairly poor job—of distinguishing among types of forum-selection clause cases.<sup>81</sup>

The Court's forum-selection clause doctrine is built on the foundation of contract law rather than jurisdictional jurisprudence,<sup>82</sup> and the Court's four forum-selection clause opinions are suffused with rhetoric surrounding the sanctity of contract law.<sup>83</sup> Lower federal courts in lockstep have endorsed the sanctity-of-contract approach to forum-selection clauses.<sup>84</sup> Because of the enormous strategic advantage conferred by contractual forum-selection clauses on defendants and the fundamental unfairness of the law to consumers governing such provisions, it is thought provoking to view forum-selection clauses, then, as a strategic mechanism to game the system rather than through the lens of sanctified contract principles. From this gamesmanship perspective, courts might have a different reception to forum-selection clauses and their consequent effects on the justness and fairness of the legal system.

### I. *A Brief Historical Survey of Gamesmanship in Federal and State Court*

In this regard, federal courts have long been preoccupied with resisting or restraining litigants' attempts to game the system. In the twentieth century, the enactment of the Federal Rules of Civil Procedure, as well as various statutory jurisdictional provisions, has served to enhance creative means for manipulating strategic advantage in a dual

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80. See, e.g., *Rud v. Liberty Life Assur. Co. of Boston*, 438 F.3d 772, 776 (7th Cir. 2006) (“When the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* held enforceable a forum-selection clause printed on the back of a cruise ticket, it brushed aside the arguments that many consumers don't read the fine print in their contracts and do not appreciate the significance, or perhaps even the meaning, of a forum-selection clause.” (citation omitted)).

81. See, e.g., *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 389 (1st Cir. 2001) (rejecting argument challenging boilerplate forum-selection clause printed on back of employment contract).

82. See, e.g., Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553 (2012); Linda S. Mullenix, *Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions*, 12 NEV. L.J. 549 (2012) [hereinafter Mullenix, *The Titanic of Worst Decisions*]; Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992) [hereinafter, Mullenix, *Another Easy Case*]; Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988).

83. See *supra* note 1 and accompanying text.

84. See, e.g., *Braspero Oil Servs. Co. v. Modec (USA), Inc.*, 240 F. App'x 612, 615 (5th Cir. 2007) (endorsing principle that forum-selection clauses are presumptively valid and enforceable because they eliminate uncertainty as to forum for the resolution of disputes); *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 610 (2d Cir. 2006) (“[The Supreme Court's] approach is to treat a forum-selection clause basically like any other contractual provision and hence to enforce it unless it is subject to any of the sorts of infirmity, such as fraud or mistake, that justify a court's refusing to enforce a contract. Freedom of contract requires no less.”).

court system. Not that there is anything wrong with this; this is what attorneys zealously representing their clients are expected to do.<sup>85</sup> Yet federal courts have drawn distinctions between legitimate lawyering efforts and litigation gambits that cross an impermissible line to unacceptable gamesmanship.<sup>86</sup>

One does not have to research very extensively to discover the courts' historical antipathy to questionable litigation gamesmanship, including dubious tactics that attorneys attempt in both pre- and postfiling efforts. Much of this preoccupation with strategic gamesmanship has focused on techniques to secure forum advantage.<sup>87</sup> Congress and the judiciary, in reaction to these creative lawyering ventures, have responded with various ameliorative amended rules, statutory provisions, and sanctions intended to fix perceived problems and to level the litigation playing field between plaintiffs and defendants.

Beginning with the *Erie* decision itself,<sup>88</sup> numerous examples illustrate the judicial aversion to litigation gamesmanship. The *Erie* Court, in addressing the problem of forum shopping to obtain the advantage of more favorable federal common law, noted the forum-shopping problem engendered by the classic *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* case,<sup>89</sup> where the Brown & Yellow taxicab company, ostensibly a Kentucky corporation, simply reincorporated over the border in Tennessee and executed its contract there in order to gain the advantage of favorable Tennessee contract law.<sup>90</sup> The *Erie* decision thus represents a doctrinal solution intended to frustrate the *Black & White Taxicab* prelitigation behavior

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85. See generally Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25 (2005) (defining and defending forum-shopping techniques); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990) (describing forum-shopping activities on a continuum; arguing that some forum-shopping activities may enhance remediation opportunities).

86. See *supra* note 85 and accompanying text.

87. Gamesmanship may take many forms during the litigation process:

Gamesmanship is also said to occur when lawyers forum shop, refuse to examine their own witnesses in depositions to prevent opponents from gleaning information, file excessive or unnecessary motions, institute lawsuits involving identical issues simultaneously in state and federal courts, fail to obey court orders, employ tactical delays, file frivolous pleadings and engage in "recreational" litigation, enter into settlement agreements in bad faith to strip federal courts of exclusive jurisdiction, and exercise the removal jurisdiction of the federal courts in some cases. Significantly, courts acknowledge that undue gamesmanship often occurs within the rules of procedure. Arguably, much of the gamesmanship appears to involve not the violation of, but rather the strategic use of, court rules.

Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 207-08 (1994).

88. See generally 304 U.S. 64 (1938).

89. *Id.* at 73 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928)).

90. *Id.*

that patently was intended to manipulate forum selection and applicable law.

Over the years, attorneys have continued to resort to all sorts of creative means for manipulating jurisdiction. As incredible as this sounds, prospective decedents (aided by their attorneys) accomplished one of the more interesting subchapters in forum manipulation.<sup>91</sup> This curious subgroup of folks (1) anticipated their own death, (2) foresaw a dispute over their estate, (3) understood the difference between state and federal law, (4) desired to have any such claims litigated in federal court rather than state court, and (5) therefore contractually designated an out-of-state representative as the executor of the estate in order to secure federal diversity jurisdiction.<sup>92</sup> By the mid-1970s and '80s there were enough of these odd cases that the federal courts balked and Congress stepped in to effectively resolve this type of forum manipulation by amending the federal diversity statute.<sup>93</sup>

Statutory law,<sup>94</sup> bolstered by judicial rulings, has repudiated litigant efforts to secure federal jurisdiction by collusive joinder through sham contractual assignment of rights.<sup>95</sup> Congress and the courts, through statutory provisions as well as decisional law, have also repudiated efforts to defeat removal jurisdiction by plaintiffs' improper or fraudulent joinder of nondiverse defendants.<sup>96</sup> The principle relating to fraudulent joinder extends to the post-removal tactic of subsequently joining nondiverse defendants to defeat removal and support a remand motion.<sup>97</sup>

The judicial system has further manifested its distaste for jurisdictional gamesmanship through the doctrine of artful pleading. The artful pleading doctrine is intended to curb creative complaint design, whereby plaintiffs inventively massage claims or damages with the

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91. See generally Linda S. Mullenix, *Creative Manipulation of Federal Jurisdiction: Is There Diversity After Death?*, 70 CORNELL L. REV. 1011 (1985) (discussing this form of forum manipulation; citing cases).

92. With regard to this strange line of cases, one can only wonder why a decedent would care about applicable law after her own death.

93. See 28 U.S.C. § 1332(c)(2) (2012) (stating that an estate's administrator or executor has the same citizenship as the decedent).

94. See *id.* § 1659 (collusive joinder of parties); *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969) (finding collusive joinder of party through sham contract agreement violated statutory prohibition against such collusive joinder).

95. *Kramer*, 394 U.S. at 824.

96. See generally 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 364I.1 (3d ed. 1998) ("Devices to Defeat Diversity Jurisdiction—Joinder of Nondiverse Parties.").

97. See, e.g., *Ibis Villas at Miami Gardens Condo Ass'n, Inc. v. Aspen Specialty Ins. Co.*, 799 F. Supp. 2d 1333, 1335 (S.D. Fla. 2011) (holding courts should be highly suspicious of joinder of nondiverse party after removal but before discovery, for intended purpose to defeat diversity jurisdiction); see also 28 U.S.C. § 1447(e) ("If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court . . . ." (citation omitted)).

intention to circumvent or defeat removal to federal court.<sup>98</sup> Indeed, courts and commentators have noted that congressional enactment of the Class Action Fairness Act of 2005 (“CAFA”) was intended, in significant part, to deal with plaintiffs’ gamesmanship in pursuing class action litigation in more favorable state forums and pleading around potential federal removal jurisdiction.<sup>99</sup> Congress also intended, in CAFA, to address a form of jurisdictional gamesmanship whereby plaintiffs’ attorneys filed copycat class actions, alleging the same injuries on behalf of the same classes of plaintiffs, in multiple state courts.<sup>100</sup>

The so-called “forum defendant rule” has likewise unleashed what one federal court has deemed “the latest litigation fad” in forum-shopping gamesmanship.<sup>101</sup> The forum defendant rule provides that a case is removable “only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.”<sup>102</sup> The particular removal language “properly joined and served” has turned into a fruitful avenue for removal gamesmanship, allowing defendants to seek speedy removal before any defendant is served in state court. At least one federal court has noted, disapprovingly, that while congressional intent in enacting the forum defendant rule was to circumvent gamesmanship by plaintiffs,<sup>103</sup> that statutory language is now being deployed by defendants to game the system:

The tactics employed by defendants such as in the instant case turn Congressional intent on its head by allowing *defendants* to employ gamesmanship, specifically by rushing to remove a newly filed state court case before the plaintiff can perfect service on anyone. Given that Congress intended the “properly joined and served” language to *prevent* litigant gamesmanship, “it would be especially absurd to interpret the same ‘joined and served’ requirement to actually condone

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98. See, e.g., *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475–76 (2009) (“If a court concludes that a plaintiff has ‘artfully pleaded’ claims [by failing to plead a necessary federal question], it may uphold removal even though no federal question appears on the face of the plaintiff’s complaint. The artful pleading doctrine allows removal where federal law completely preempts a plaintiff’s state-law claim.”).

99. See Class Action Fairness Act of 2005, Pub. L. No 109-2, 119 Stat. 4 (2005); see also *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 424 (5th Cir. 2008); S. REP. NO. 109-14, at 35 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 34 (Congress emphasized that term class action should be defined broadly to prevent jurisdictional gamesmanship); Edward S. Sledge, IV & Christopher S. Randolph, Jr., *Setting the Edges: Defending Against Plaintiff End Runs Around CAFA*, 80 DEF. COUNS. J. 178, 184 (2013) (“Congress specifically mentioned damage stipulations as an example of jurisdictional gamesmanship that it sought to end.”).

100. See *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009) (addressing argument that plaintiffs should not be allowed to “game” jurisdiction statutes by filing copycat cases).

101. See *Ethington v. Gen. Elec. Co.*, 575 F. Supp. 2d 855, 863 (N.D. Ohio 2008) (noting the “growing trend of district courts wrestling with this latest litigation fad”).

102. 28 U.S.C. § 1441(b) (2012).

103. *Ethington*, 575 F. Supp. 2d at 862.

a similar kind of gamesmanship from defendants” in instances such as the case at bar. In other words, “a literal interpretation of the provision creates an opportunity for gamesmanship by defendants, which could not have been the intent of the legislature in drafting the ‘properly joined and served’ language.”<sup>104</sup>

The Court’s preoccupation with litigation gamesmanship extends not only to actual practices, but to fear of potential gambits as well (which the Court has signaled it wishes to nip in the bud). Thus, the Court’s decision in *Owens Equipment & Erection Co. v. Kroger*<sup>105</sup> represents perhaps one of the strangest judicial overreactions to potential gamesmanship. There, the Court held that the doctrine of supplemental jurisdiction could not be extended to permit assertion of jurisdiction over a nondiverse party that was impleaded and sued in a defendant’s cross-claim.

This exception to supplemental jurisdiction seemingly was predicated on the quasi-absurd theory that the judicial system had an interest in preventing a plaintiff from colluding with a defendant to subsequently implead and assert a cross-claim against a nondiverse party whom the plaintiff could not have sued originally, thereby gaining jurisdiction over that party through assertion of supplemental jurisdiction.<sup>106</sup> The *Owen* exception, designed to head off this type of prospective gamesmanship, is now codified in the supplemental jurisdiction statute.<sup>107</sup>

The Court’s concern with litigant forum shopping to gain advantage is, of course, similarly manifested in its applicable law decisions. Thus, the Court in *Ferens*—reflecting on its precedential *Van Dusen* ruling—explained:

*Van Dusen* also sought to fashion a rule that would not create opportunities for forum shopping. Some commentators have seen this policy as the most important rationale of *Van Dusen*, but few attempt to explain the harm of forum shopping when the plaintiff initiates a transfer. An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws. The *Van Dusen* policy against

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104. *Id.* (citing *Allen v. GlaxoSmithKline PLC*, No. 07-5045, 2008 WL 2247067, at \*4 (E.D. Pa. May 30, 2008)); *Brown v. Organon Int’l, Inc.*, No. 07-3092(HAA), 2008 WL 2833294, at \*5 (D.N.J. July 21, 2008) (“To apply the ‘properly joined and served’ language literally where an in-state defendant removes, would promote the same type of litigant gamesmanship that the rule seeks to limit, and thus violate the clear purpose of the legislative provision.”); *DeAngelo-Shuayto v. Organon USA Inc.*, No. 07-2923(SRC), 2007 WL 4365311, at \*5 (D.N.J. Dec. 12, 2007).

105. 437 U.S. 365 (1978).

106. *Id.* at 374 (“The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded. Yet under the reasoning of the Court of Appeals in this case, a plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead non-diverse defendants.”); *see also id.* at 374–75 n.17 (explaining “this is not an unlikely hypothesis,” but that “the requirement of complete diversity would be eviscerated by such a course of conduct”).

107. *See* 28 U.S.C. § 1367(b) (2012); *see also Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 573 (2005) (noting § 1367(b) codified the *Owen* rule).

forum shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue. In the *Van Dusen* case itself, this meant that we could not allow defendants to use a transfer to change the law.<sup>108</sup>

Finally, judicial antipathy towards litigation gamesmanship extends to an array of postfiling attorney behavior. Thus, in particular, courts have criticized strategic gamesmanship during discovery proceedings,<sup>109</sup> strategic motion practice intended to cause unnecessary delay,<sup>110</sup> and the filing of frivolous motions for a similar purpose.<sup>111</sup> Courts typically deal with these types of gamesmanship through sanctioning powers under the federal rules,<sup>112</sup> federal statutes,<sup>113</sup> or through exercise of the court's inherent powers.<sup>114</sup> It might be noted that, similar to other judicial attempts to curb litigation gamesmanship, discovery practice especially has proven entirely resistant to repeated efforts to deal with alleged discovery abuse. Hence, the discovery provisions may claim the dubious honor as the federal rules most repeatedly amended in efforts to restrain litigation gamesmanship.<sup>115</sup>

108. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (citing 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4506 (2d ed. 1982); *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964)).

109. *See, e.g.*, *Digital Ally, Inc. v. Z3 Tech., LLC*, No. 09-2292-KGS, 2012 WL 2402771, at \*2 (D. Kan. June 26, 2012) (“The purpose of discovery and initial disclosures is to avoid one side ambushing the other, and the litigants should not indulge in gamesmanship with respect to their disclosure obligations.”); *Inland Am. (LIP) SUB, LLC v. Lauth*, No. 1:09-CV-00839-SEB-JMS, 2010 WL 670546, at \* 2 (S.D. Ind. Feb. 19, 2010) (“Defendant’s request for a stay of discovery smacks of the type of gamesmanship that has no place in litigation in federal court.”); *cf. Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 710 (7th Cir. 1979) (disapproving of trial court procedures that promote “gamesmanship aspects of litigation”). *See generally* Enoch, *supra* note 87 (citing examples).

110. *See generally* Enoch, *supra* note 87 (citing cases and example).

111. *Id.*

112. *See* FED. R. CIV. P. 11 (pleading sanctions); FED. R. CIV. P. 37 (discovery sanctions); *Digital Ally*, 2012 WL 2402771, at \*3 (“Rule 37(c) is designed to prevent the ‘sandbagging’ of an opposing party with new evidence and prevent gamesmanship.”); *CSC Holdings, Inc. v. Berube*, No. 01-1650 DRH MLO, 2004 WL 3541331, at \*3 (E.D.N.Y. July 7, 2004) (“Rule 37(c)(1) is designed to avoid” gamesmanship and “to provide a strong inducement for disclosure of Rule 26(a) material.” (citing *Hein v. Cuprum*, 53 Fed. Appx. 134, 136 (2d Cir. 2002))).

113. *See* 28 U.S.C. § 1927 (2012) (providing for sanctions for attorneys who unreasonably and vexatiously multiple proceedings).

114. *See generally* *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (discussing inherent power of the courts to sanction attorneys).

115. *See generally* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE (2013), available at <https://web.archive.org/web/20131029053101/http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf> (the proposed amendments would revise FED. R. CIV. P. 26, 30, 31, 33, 34, 36, and 37).

## B. FORUM-SELECTION CLAUSES: MUDDLED JURISPRUDENCE

As we have seen, federal courts eschew various litigant tactics intended to game the system, with forum shopping and creative manipulation of federal jurisdiction at the top of this list followed closely by gambits to secure preferable law. A reframing of the problem of forum-selection clauses (as well as choice-of-law provisions and arbitration clauses) is through the lens of litigation gamesmanship, rather than contract law. The Court's evolving forum-selection clause jurisprudence, then, invites such one-sided gamesmanship.

A not insignificant problem with forum-selection clause jurisprudence, which opens the door to such gamesmanship, is that it embraces a complicated tangle of principles that vary according to different contexts. This tangle works to the advantage of prospective corporate defendants who, knowledgeable of these principles and their consequences, exploit forum-selection and choice-of-law clauses to their advantage.

Thus, if harm occurs at sea, the litigation arises in the court's admiralty jurisdiction and principles of federal common law from *The Bremen v. Zapata Off-Shore Co.* apply to assess the validity and enforceability of a forum-selection clause.<sup>116</sup> The Court's *Zapata* decision indicates that forum-selection clauses in the admiralty context are prima facie or presumptively valid and should be enforced unless the resisting party demonstrates that enforcement of the clause would be "unreasonable" under the circumstances.<sup>117</sup> In discussing the possible unreasonableness of a forum-selection clause, the *Zapata* majority embraced contract unconscionability analysis. Thus, the Court suggested that a forum-selection clause was not unreasonable if it was "unaffected by fraud, undue influence, or overweening bargaining power," and therefore should be given legal effect.<sup>118</sup> These *Zapata* unconscionability principles, then, apply to determine the enforceability of forum-selection clauses in cases arising in admiralty jurisdiction for harms occurring at sea.

Litigation that arises from land-based harm, on the other hand, generally invokes the court's diversity jurisdiction where the party seeking to enforce the clause urges transfer to another state or foreign court. Until the Court decided *Atlantic Marine*, courts disagreed upon whether federal common law or *Erie* principles applied, requiring recourse to state contract law to interpret the validity and enforceability of the clause.<sup>119</sup> It is unclear whether the *Atlantic Marine* decision has

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116. See generally *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

117. *Id.* at 10 ("We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty. It is merely the other side of the proposition recognized by this Court in *National Equipment Rental, Ltd. v. Szukhent.*" (citing 375 U.S. 311 (1964))).

118. *Id.* at 12-13.

119. See *supra* notes 72-74 and accompanying text.

definitively resolved this debate in favor of exclusive application of federal common law principles, but it would seem so.<sup>120</sup> Justice Scalia did not think this was correct in his *Stewart* dissent, and several lower federal courts agreed that the *Erie* doctrine mandates application of state contract law to resolve these questions.<sup>121</sup>

Nonetheless, the Court in *Atlantic Marine* recognized that the invocation of a forum-selection clause in nonadmiralty cases presented a different litigation scenario. Thus, in these contexts, having determined that § 1404(a) is the appropriate procedural means for enforcing a forum-selection clause, the Court explained:

[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer.<sup>122</sup>

It would seem, then, that post-*Atlantic Marine*, one set of principles apply to forum-selection clause cases arising in the admiralty context, which permit (if not require) some reference to contract unconscionability analysis, but another set of principles apply to land-based forum-selection cases, which are subjected to a now restricted forum non conveniens analysis. Indeed, in its cribbed description of what constitutes a forum non conveniens analysis under § 1404(a) in these cases, the *Atlantic Marine* decision seems to have eliminated recourse to contract unconscionability arguments.

The complicated forum-selection clause interpretive landscape is not limited to the simple dichotomy between sea-based or land-based harms, with distinctions arising from admiralty, diversity, or federal question jurisdiction. Forum-selection clause jurisprudence is further complicated by the presence or absence of a choice-of-law provision,<sup>123</sup> whether the

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120. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 579–81 (2013).

121. *See supra* notes 72–74 and accompanying text.

122. *Atl. Marine*, 134 S. Ct. at 580 (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

123. *See, e.g., Brenner v. Nat'l Outdoor Leadership Sch.*, No. 13-02908 (DSD/JJG), 2014 WL 2069364, at \*5 (D. Minn. May 19, 2014) (“In a transfer analysis, ‘a district court . . . must decide whether the [forum-selection] clause applies to the type of claims asserted in the lawsuit.’” (quoting *Terra Int'l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 692 (8th Cir. 1997))). Thus, the court interprets the forum-selection clause to determine its applicability to the instant dispute. Although *enforceability* of a forum-selection clause is analyzed under federal law, where there exist both valid forum-selection and choice-of-law clauses, the substantive law identified in the choice-of-law clause governs *interpretation* of the forum-selection clause. *See Atl. Marine*, 134 S. Ct. at 581 (holding the lower court “erred in failing to make the adjustments required . . . when the transfer motion is premised on a forum-selection clause”); *Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014) (“[C]ourts must apply the law contractually chosen by the parties to interpret the [forum-selection] clause.”). *But see Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596–97 (8th Cir. 2007); *Martinez*, 740 F.3d at 214 (“[W]here a contract contains both a valid choice-of-law clause and a forum selection clause,

forum-selection clause is mandatory or permissive,<sup>124</sup> and whether the forum-selection clause involves international commercial transactions.<sup>125</sup>

Moreover, since *Zapata*, the Court's forum-selection clause jurisprudence has arced towards a unified theory of federalized forum-selection clause law, with ever more restrictive pronouncements narrowing the ability of an opposing party to successfully challenge such provisions. Thus, the Court has consistently refused to distinguish among parties to litigation, applying the same principles to cases involving uninformed and unsophisticated consumers as to cases involving sophisticated business entities on both sides of a contract.<sup>126</sup>

### C. ARBITRATION CLAUSES: ANOTHER VARIATION ON THE THEME OF GAMING THE SYSTEM

Finally, the Court in *Scherk v. Alberto-Culver Co.*<sup>127</sup> analogized arbitration clauses to forum-selection clauses, declaring, “[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”<sup>128</sup> *Scherk* was decided two terms after *Zapata*, and the Court simply transposed *Zapata*'s reasoning and conclusions onto arbitration clauses. Thus, in lockstep with *Zapata*, the Court noted that a forum-selection clause should control absent a strong showing that it should be set aside and that the elimination of forum uncertainty by agreeing to a forum in advance “is an indispensable element in international trade, commerce, and contracting.”<sup>129</sup>

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the substantive law identified in the choice-of-law clause governs the interpretation of the forum selection clause, while federal law governs the enforceability of the forum selection clause . . .”).

124. *See, e.g.*, *Montoya v. Fin. Fed. Credit, Inc.*, 872 F. Supp. 2d 1251, 1263–64 (D.N.M. 2012) (“The difference between a mandatory and permissive forum selection clause is that [m]andatory forum selection clauses contain clear language showing that jurisdiction is appropriate only in the designated forum. In contrast, permissive forum selection clauses authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere.” (quoting *Am. Soda, LLP v. U.S. Filter Wastewater Grp.*, 428 F.3d 921, 926–27 (10th Cir. 2005))). Hence, before determining what law applies to determine the validity and enforceability of a forum-selection clause, several courts have indicated that a threshold inquiry involves deciding whether a forum-selection clause is mandatory or permissive.

125. *See generally* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

126. *Id.* (enforcing forum-selection clause in the context of two sophisticated business entities contractually agreeing to a foreign forum); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing a forum-selection clause against consumers who purchased cruise line ticket).

127. 417 U.S. 506, 519 (1974).

128. *Id.*

129. *Id.* at 518 (quoting *Zapata*, 407 U.S. at 13–14); *see also id.* at 516 (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

Three points are compelling about the *Scherk* decision, in which the contested clause specified that any breach of the parties' contractual agreement would be referred to arbitration before the International Chamber of Commerce in Paris.<sup>130</sup> First, when Alberto-Culver, respondent, sought to sue over disputed trademark issues, the Court upheld the arbitration clause designating Paris as the forum based on the Court's *Zapata* reasoning. However, the Court also indicated that Illinois state law would govern the dispute,<sup>131</sup> because that state's law also was designated in the contract. The Court rendered this opinion without any reflection on the threshold issue of what law applied to determine the validity and enforceability of the choice-of-law provision, and it seems odd to enforce a Paris forum but dictate application of Illinois state law.<sup>132</sup>

Second, in exact contrast to the theme of this Article, the *Scherk* Court determined that enforcement of arbitration clauses was desirable because enforcement of these provisions would eliminate parties' attempts to game the system. Thus, the Court noted, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."<sup>133</sup> As will be discussed, forum-selection

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130. *Id.* at 508.

131. *Id.* at 519 n.13 ("Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, '[t]he laws of the State of Illinois' were explicitly made applicable by the arbitration agreement.").

132. Summarizing the Supreme Court's arbitration clause jurisprudence in several cases following *Scherk*, the Eleventh Circuit concluded:

Together, these Supreme Court precedents propound several overarching themes: (1) courts should apply a strong presumption in favor of enforcement of arbitration and choice clauses; (2) U.S. statutory claims are arbitrable, unless Congress has specifically legislated otherwise; (3) choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law; and (4) even if a contract expressly says that foreign law governs, . . . courts should not invalidate an arbitration agreement at the arbitration-enforcement stage on the basis of speculation about what the arbitrator will do, as there will be a later opportunity to review any arbitral award.

*Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1269 (11th Cir. 2011).

133. *Scherk*, 417 U.S. at 517. The Court explained how the parties, in the absence of an arbitration clause, might game the system:

In the present case, for example, it is not inconceivable that if *Scherk* had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

clauses and arbitration clauses may be viewed in exactly the opposite fashion: as a means of unilateral jockeying to secure tactical litigation advantage, which the *Scherk* majority eschewed.

Third, in analogizing arbitration clauses to forum-selection clauses in reliance on *Zapata*, the Court adopted *Zapata's* standards for determining the validity and enforceability of arbitration clauses, as well. Thus, a set of contract principles set forth in an admiralty case were engrafted onto an arbitration clause in a land-based international commercial dispute.<sup>134</sup> But whether an arbitration clause constituted a contract of adhesion was an issue for the arbitral tribunal, not the court in which the clause was challenged.<sup>135</sup>

*Scherk* was a five-to-four decision. With significant prescience for the subsequent evolution of forum-selection and arbitration clauses, the Court's four liberal Justices recognized the unfairness of transposing *Zapata* rationales to arbitration clauses and objected to the Court's sweeping endorsement of *Zapata* in the international arbitration context:

This invocation of the "international contract" talisman might be applied to a situation where, for example, an interest in a foreign company or mutual fund was sold to an utterly unsophisticated American citizen, with material fraudulent misrepresentations made in this country. The arbitration clause could appear in the fine print of a form contract, and still be sufficient to preclude recourse to our courts, forcing the defrauded citizen to arbitration in Paris to vindicate his rights.<sup>136</sup>

Notwithstanding this dissent, numerous courts post-*Scherk* and its progeny have invoked *Scherk* to uphold arbitration clauses in international

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*Id.*

134. The Eleventh Circuit summarized the *Zapata* "test" as holding that forum-selection clauses are presumptively valid unless:

(1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy.

*Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1296 (11th Cir. 1998).

135. *See, e.g., JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 170 (2d Cir. 2004) (holding issue of contract unconscionability was question for the arbitral tribunal to determine).

136. *Scherk*, 417 U.S. at 529 (Douglas, J., concurring and dissenting).

commercial contracts,<sup>137</sup> and expanded these international commercial holdings to domestic arbitration clauses, as well.<sup>138</sup>

Given the trajectory of forum-selection clause jurisprudence, it was perhaps inevitable that *Zapata* principles eventually would be engrafted from the international arbitration commercial context onto the domestic consumer arbitration arena. Thus, in the latest expansion of the reach of forum-selection clause doctrine, the Court determined that the Federal Arbitration Act preempts application of state unconscionability jurisprudence—in this case, California state law.<sup>139</sup> In this regard, forum-selection and arbitration clause jurisprudence essentially have converged into the same highly restrictive and anti-consumer doctrine embodied in the *Carnival Cruise Lines, Inc. v. Shute* line of cases.

Finally, it is well to consider whether, post-*Atlantic Marine*, there are lingering *procedural* issues regarding the appropriate means to seek enforcement of an arbitration clause. Thus, in an *Atlantic Marine* echo-chamber, some courts have considered requests to compel arbitration on a Rule 12(b)(6) or a Rule 56 summary judgment motion, with the remedy either a stay of proceedings or outright dismissal of the case.<sup>140</sup> Other defendants have moved for enforcement of an arbitration provision under a Rule 12(b)(1) motion for a lack of subject matter jurisdiction,<sup>141</sup> or a Rule 12(b)(3) motion for a lack of venue.<sup>142</sup>

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137. See, e.g., *Lindo*, 652 F.3d at 1275 (“[U]nder . . . Supreme Court and Circuit precedent, there is a strong presumption in favor of freely-negotiated contractual choice-of-law and forum-selection provisions, and this presumption applies with special force in the field of international commerce.”); see also *JLM Indus.*, 387 F.3d at 171 (“Moreover, as our Court has recently repeated, we are mindful that “[t]he federal policy favoring the liberal enforcement of arbitration clauses . . . applies with particular force in international disputes.” (quoting *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 654 (2d Cir. 2004))).

138. See, e.g., *Huffman v. Hilltop Companies*, 747 F.3d 391 (6th Cir. 2014) (enforcing arbitration clause in employment litigation based on the Fair Labor Standards Act violations); *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36 (1st Cir. 2012) (requiring franchise to arbitrate claims against franchisor where arbitrator clause was referenced only in other agreements); *Gore v. Alltel Commc'ns LLC*, 666 F.3d 1027 (7th Cir. 2012) (holding consumer fraud claim, among others, was subject to arbitration; whether an arbitration clause was procedurally unconscionable was a question for arbitrator in the first instance).

139. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

140. See, e.g., *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 771 (3d Cir. 2013) (holding district court should employ Rule 56 summary judgment standards when considering a motion to compel arbitration); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 597 (3rd Cir. 2004) (considering motion to compel arbitration under Rule 12(b)(6) standard); *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 620 (3d Cir. 2009).

141. See FED. R. CIV. P. 12(b)(1).

142. See, e.g., *Faulkenber v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 807 (7th Cir. 2011) (holding Rule 12(b)(3) motion to dismiss for improper venue is appropriate means to seek enforcement of an arbitration clause provision); *Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2004) (“Although circuits are split on the issue of whether Rule 12(b)(1) or 12(b)(3) is the proper motion for seeking dismissal based on a forum selection or arbitration clause, . . . neither side has substantively briefed the merits of the question. Because our court has accepted Rule 12(b)(3) as a

Thus, one wonders what procedural effect *Atlantic Marine* has on the enforcement of arbitration clauses. The Court in *Atlantic Marine* determined that the appropriate procedural means for effectuating a forum-selection clause is through a § 1404(a) transfer motion, applying forum non conveniens analysis. But this conclusion has scant applicability to the presence of an arbitration agreement in a party's contractual relationship because federal courts lack the power to *transfer* a case to an arbitral tribunal.

Hence, enforcement of an arbitration provision must be accomplished through some procedural vehicle other than a § 1404 transfer motion, and subject to some other prevailing jurisprudential standards. In a post-*Atlantic Marine* decision, the Seventh Circuit suggested that “[a]n arbitration clause is simply a type of forum-selection clause, and a motion seeking dismissal based on an agreement to arbitrate therefore should be decided under Rule 12(b)(3).”<sup>143</sup> How does this conclusion, then, square with the *Atlantic Marine* analysis that forum-selection clauses are not a matter of venue?

### III. FORUM-SELECTION CLAUSES IN CONSUMER CONTRACTS POST- *ATLANTIC MARINE*

#### A. A REPRISÉ ON GAMING THE SYSTEM

##### 1. *What Zapata Hath Wrought*

In this post-*Atlantic Marine* era, one may trace a daisy chain of legal authority essentially derived from *Zapata* and extending through *AT&T v. Concepcion*. Thus, what originated as a doctrine in the context of admiralty law in a dispute arising between sophisticated international businesspersons has been transmuted over the decades into a narrowly restrictive doctrine of presumptive validity of forum-selection and arbitration clauses in consumer and nonconsumer contracts. Moreover, the doctrine has embraced some peculiar eddies, such as the *Burger King Corp. v. Rudzewicz* decision where Burger King was able to sue its franchisees in a Florida forum based not on a forum-selection clause, but solely on a choice-of-law clause.<sup>144</sup>

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proper method for seeking dismissal based on a forum selection clause, we need not decide whether a Rule 12(b)(1) motion would be appropriate.” (citation omitted)).

143. *Johnson v. Orkin, LLC*, 556 F. App'x 543, 544 (7th Cir. 2014) (citation omitted).

144. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481–82 (1985) (holding choice-of-law clause designating application of Florida law placed franchisees on notice that disputes arising from franchise agreement would be litigated in a Florida forum). In nearly thirty-five years of teaching the *Burger King* decision, I have yet to find students with sympathy for Rudzewicz and MacShara, the franchisees, who arguably fail to qualify as sophisticated businesspersons precisely because their Burger King franchise failed.

In recent years, the tentacles of forum-selection clause doctrine have reached further and further—beyond nautical disasters, international commercial trade agreements, domestic cruise line passengers—and eventually ensnared domestic commercial agreements, ordinary consumer contracts, employment agreements, brokerage agreements, and basically any arrangement governed by contract. Moreover, once the Supreme Court announced that arbitration clauses were a *kind* of forum-selection clause, the courts easily embraced forum-selection clause jurisprudence as applicable to arbitration clauses. Thus, the ultimate evolution of *Zapata* jurisprudence was crowned in the Court's *Concepcion* decision, which accorded primacy to federal arbitration law as preempting state unconscionability doctrine.<sup>145</sup>

The law of forum-selection and arbitration clause jurisprudence might be summed up as follows:

(1) If a disaster occurs at sea in a contract governed by a forum-selection clause, one might be able to prevail against a forum-selection clause on unconscionability grounds, but probably not; where the parties most likely were sophisticated businesspersons, the clause is *prima facie* valid unless shown unreasonable; hence, the challenger will lose;

(2) If a dispute arises as a consequence of an international commercial transaction (land-based), one might be able to prevail against a forum-selection clause on unconscionability grounds, but probably not; where the parties were sophisticated businesspersons the clause is *prima facie* valid unless shown unreasonable; hence, the challenger will lose;

(3) If a dispute arises as a consequence of a domestic commercial dispute (land-based), one may challenge a forum-selection clause which, if presumptively valid as between sophisticated businesspersons will be subject to a § 1404(a) transfer, pursuant to forum non conveniens analysis, but no private right factors may be taken into account, only limited public law factors; hence, the challenger will lose;

(4) If a dispute arises as a consequence of the presence of a forum-selection clause in a passenger ticket, one may challenge a forum-selection clause which, if presumptively valid, will be subject to a § 1404(a) transfer, pursuant to forum non conveniens analysis, but no private right factors may be taken into account, only limited public law factors; hence, the challenger will lose, and it will be of no consequence that the corporation was sophisticated and the passenger was not;

(5) If a dispute arises as a consequence of the presence of a forum-selection clause in a consumer contract (employment agreement, brokerage agreement, etc.), one may challenge a forum-selection clause which, if presumptively valid, will be subject to a § 1404(a) transfer, pursuant to forum non conveniens analysis, but no private right factors may be taken into account, only limited public law factors; hence, the challenger will lose, and it will be of no consequence

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145. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

that the corporation was sophisticated and the consumer had no idea what was going on;

(6) If a dispute arises and the contract contains an arbitration clause, a defendant may seek to enforce the arbitration clause under Rule 12(b)(1), 12(b)(3), 12(b)(6) or Rule 56; federal law overrides any countervailing state contract unconscionability principles, thereby providing presumptive enforcement to the arbitration provision; the determination of the validity of the arbitration clause is within the purview of the arbitral tribunal; effectively the challenger will lose, if the arbitration clause was between sophisticated businesspersons in the international or domestic commercial markets; and it will be of no consequence that the corporation was sophisticated and the consumer had no idea what was going on.

If one sifts through the thousands of reported federal forum-selection clause decisions since *Zapata*—and there are thousands of such decisions<sup>146</sup>—one cannot help but be struck by the following fact: in virtually every case the party seeking enforcement of the clause wins, and the party seeking to invalidate the clause loses. This reality applies with equal force and consequence to arbitration clauses since *Scherk*.<sup>147</sup> Thus, the doctrinal bar to prevailing on an unconscionability objection to a forum-selection or arbitration clause is so great as to render that challenge practically moot. In the realm of forum-selection and arbitration clauses, the primacy of contract law prevails and the possibility of invalidating such clauses on unconscionability grounds largely remains illusory.

## 2. *Zapata's First Premises: On Public Policy and Ousting a Court's Jurisdiction*

As indicated above, current forum-selection and arbitration clause jurisprudence chiefly derives from *Zapata* and its progeny, where the Court reversed the historical aversion to forum-selection clauses.<sup>148</sup> The *Zapata* Court noted that federal and state courts had refused to enforce such clauses on two primary grounds: (1) the clauses were contrary to public policy, and (2) the effect of such clauses was to oust courts of their jurisdiction.<sup>149</sup> Adopting a “modern” view, the Court pivoted to announce that forum-selection clauses were prima facie valid and

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<sup>146</sup>. Search Results for “Forum-Selection Clause”, WESTLAWNEXT, <http://www.westlawnext.com> (search “adv: ‘forum-selection clause’ & DA (aft 06-12-1972)” in “All Federal” category; click “cases”) (reporting 9987 case citations as of Feb. 2, 2014).

<sup>147</sup>. Search Results for “Enforce Arbitration Clause”, WESTLAWNEXT, <http://www.westlawnext.com> (search: “adv: ‘enforce arbitration clause’ & DA (aft 06-12-1972)” in “All Federal” category; click “cases”).

<sup>148</sup>. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (“Forum-selection clauses have historically not been favored by American courts.”).

<sup>149</sup>. *Id.*

enforceable unless the challenging party could show that the clause was unreasonable under the circumstances.<sup>150</sup>

Several points are noteworthy in relation to the subsequent vast expansion of *Zapata* principles. Regarding the underlying facts, the *Zapata* Court's repudiation of prior forum-selection clause jurisprudence was limited to the admiralty context of that case.<sup>151</sup> In addition, the Court embraced its new forum-selection clause doctrine because the case arose in the setting of an international commercial transaction that involved sophisticated businesspersons on both sides of the contract.<sup>152</sup> The Court especially noted that its decision was supported by "present-day commercial realities and expanding international trade," and the fact that "the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element of international trade."<sup>153</sup> Notwithstanding this limited factual context, the Court expanded these rationales to embrace cruise line passenger tickets in *Carnival Cruise Lines*—another admiralty jurisdiction case—enlarging the reach of forum-selection clause jurisprudence to consumer contracts.<sup>154</sup>

The *Zapata* Court's legal rationales also bear scrutiny. The Court analogized its new position on forum-selection clauses as equivalent to parties' consensual waiver of notice.<sup>155</sup> The problem, however, is that service of process has always been a waivable defense,<sup>156</sup> while the same cannot be said for subject matter jurisdiction, which is not consensually waivable by the parties.<sup>157</sup> To reach the conclusion that subject matter jurisdiction is not waived by virtue of a forum-selection clause one must first conclude that such clauses are not jurisdictional, as many courts have so decided.<sup>158</sup>

150. *Id.* at 10.

151. *Id.*

152. *Id.* at 10–11.

153. *Id.* at 13, 15.

154. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991).

155. *Zapata*, 407 U.S. at 10–11 (citing *Nat'l Equip Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964)).

156. *See* FED. R. CIV. P. 12(h)(1)–(2); *Royster v. Mohr*, No. 2:11-CV-1163, 2013 WL 2404065, at \*2 (S.D. Ohio May 31, 2013) ("The waivable defenses listed in Rule 12(b)(2)–(5) are lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process.>").

157. *See* FED. R. CIV. P. 12(h)(3); 5C CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1393 (3d ed. 2004) ("The final defense expressly preserved against waiver as expressly set forth in Federal Rule 12(h)(3), is a challenge to the district court's subject matter jurisdiction. . . . [T]he federal courts have made it clear beyond peradventure that not only is it impossible to foreclose the assertion of this defense by the passage of time or the notion of estoppel, but also it is impossible to cure or waive a defect of subject matter jurisdiction by consent of the parties.>").

158. *See, e.g., Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA*, 502 F.3d 740, 743 (7th Cir. 2007) ("Enforcement of a forum selection clause (including an arbitration clause) is not jurisdictional; it is a waivable defense . . ."); *Nat'l Renal Alliance, LLC v. GAIA Healthcare Sys., LLC*, No. 3:10-0872, 2010 WL 4659804, at \*3 (M.D. Tenn. Nov. 9, 2010) (holding issue

The *Zapata* court further rejected the argument that a forum-selection clause ousted a court of its jurisdiction based on the theory that the court exercised its jurisdiction to determine the validity and enforceability of the clause in the first instance. In rejecting the “ouster of jurisdiction” argument, the court explained:

The argument that such clauses are improper because they tend to “oust” a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause “ousted” the District Court of jurisdiction over *Zapata*’s action. The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.<sup>159</sup>

The *Zapata* Court’s facile rejection of the “ouster of jurisdiction” theory, however, suggests that perhaps that doctrine deserved a more decent burial. A long line of cases undergirded this theory, which traditionally was coupled with a recognition that forum-selection clauses were against public policy.<sup>160</sup> The *Carbon Black Export, Inc. v. Monrosa* decision—repudiated by the *Zapata* Court—indicated:

Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence.<sup>161</sup>

The *Carbon Black* decision further noted that in England and the United States, it was settled law that a court’s jurisdiction could not be ousted by the private agreement of individuals made in advance, private persons were incompetent to make such binding contracts, and all such contracts were illegal and void as against public policy.<sup>162</sup>

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of forum-selection clause is an independent contractual concern created by the actions of the parties, and is not linked to the inherent subject matter jurisdiction of the court).

159. *Zapata*, 407 U.S. at 12.

160. See, e.g., *Carbon Black Export, Inc. v. Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958) (finding forum-selection clause unenforceable; reiterating the traditional view of many American courts that “agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced”); *Chemical Carriers, Inc. v. L. Smit & Co.’s Internationale Sleepdienst*, 154 F. Supp. 886, 888 (S.D.N.Y. 1957) (“Such agreements, particularly those calling for exclusive jurisdiction in a foreign court, are not looked upon with favor and will not be enforced by the Federal courts if they are unreasonable in themselves or in the effect they may have on the rights of the parties to the dispute.”).

161. *Carbon Black Export*, 254 F. 2d at 300–01 n.9.

162. *Id.*

However, in rejecting the “ouster of jurisdiction” theory, the *Zapata* Court did not altogether repudiate public policy challenges to forum-selection clauses. Thus, the Court stated, “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”<sup>163</sup> The Court further noted that “selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum.”<sup>164</sup>

*Zapata’s* legacy has had a substantial impact on the evolving jurisprudence of forum-selection and arbitration clauses, not only with regard to the expansion of that decision’s scope, but also in terms of arguments lost. Thus, the *Zapata* Court effectively eliminated the “ouster of jurisdiction” argument from the forum-selection clause conversation. Moreover, public policy arguments have receded or failed to gain traction in subsequent cases. Finally, the Court’s *Concepcion* decision, giving primacy to federal arbitration law over countervailing state law,<sup>165</sup> hammered a definitive nail in the public policy coffin.

## B. THE NEED FOR CONSUMER PROTECTION

### 1. *The Misguided Expansion to Consumer Agreements*

The impetus for a radical revision of forum-selection clause doctrine originated in the context of international shipping and transnational commercial transactions conducted between sophisticated contracting parties. Over time, the Court engrafted its revised doctrine onto any contractual arrangements entered into by anyone, embracing the realms of consumer and noncommercial contracts. In the *Atlantic Marine* decision, the Court further extended its forum-selection clause jurisprudence to conclude that by consensually agreeing to a forum-selection clause, a prospective plaintiff effectively has waived its forum “privilege,” thereby overriding the longstanding deference that courts have paid to a plaintiff’s choice of forum.<sup>166</sup>

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163. *Zapata*, 407 U.S. at 15 (holding public policy was not offended by enforcement of the forum-selection clause in that case).

164. *Id.* at 17.

165. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

166. *Atlantic Marine* found that:

[T]he plaintiff’s choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the “plaintiff’s venue privilege.” But when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively

While the Court's forum-selection clause jurisprudence carries force in its original international commercial context, the extension of these principles to ordinary consumer transactions is misguided, unprincipled, and ultimately unfair.<sup>167</sup> The further expansion of these principles to the realm of arbitration clauses constitutes a one-two punch to unsuspecting consumers in their everyday lives. The Court accomplished this expansion of forum-selection and arbitration clause doctrine into the consumer arena in its *Carnival Cruise Lines* and *Concepcion* decisions.<sup>168</sup>

The Court in *Carnival Cruise Lines* held that a forum-selection clause was dispositive of the jurisdictional issue and essentially was governed by principles articulated in *Zapata*.<sup>169</sup> A seven-Justice majority rejected the Ninth Circuit's view that a non-negotiated forum-selection clause in a form ticket is never enforceable simply because it does not result from bargaining.<sup>170</sup> Instead, the Court suggested that forum-selection clauses in consumer contracts should be subject to a refined *Zapata* test of reasonableness.<sup>171</sup>

The Justices identified four reasons why the forum-selection clause in the cruise line ticket was reasonable. First, the provision limited the places where the cruise line could be sued, and, because ships travel to many locales, the cruise line had an interest in not being subjected to litigation in multiple forums.<sup>172</sup> Second, such clauses eliminate confusion over the place of litigation, reducing litigation costs that might result from jurisdictional motions.<sup>173</sup> Third, such clauses conserve judicial resources that might otherwise be devoted to deciding jurisdictional issues.<sup>174</sup> And fourth, that "it stands to reason that passengers who purchase tickets containing a forum clause . . . benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."<sup>175</sup>

The major policy reasons underlying the enforcement of forum-selection clauses are that they ensure the certainty of the place of suit

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exercised its "venue privilege" before a dispute arises. Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.

Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 581–82 (2013) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964)).

167. See generally Mullenix, *Another Easy Case*, *supra* note 82; Mullenix, *The Titanic of Worst Decisions*, *supra* note 82.

168. See *supra* note 1 and accompanying text.

169. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991). This portion of the analysis is adapted from Mullenix, *Another Easy Case*, *supra* note 82, at 340–41.

170. *Carnival Cruise Lines*, 499 U.S. at 593.

171. *Id.* at 593–94.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

and reduce cost and delay, thereby enhancing judicial administration. But as the thousands of reported forum-selection clause decisions suggest, this has simply proven not to be true.<sup>176</sup> Instead, forum-selection clauses have contributed much litigation, great expense, and a good deal of delay, usually resulting in dismissal of the plaintiff's case. Because the effect of these clauses is ultimately to make many plaintiffs' cases go away, in that sense the provisions can be said to have a docket-clearing benefit. But why defendants should be given a preference in where they are sued is inexplicable and ultimately unjustifiable.

The Court in *Carnival Cruise Lines* bolstered its extension of forum-selection clause doctrine to consumer contracts by explaining that consumers enjoyed an economic pass-along of the benefits of these clauses. But to date, empirical studies have not demonstrated such economic pass-along to consumers, or how forum-selection clauses actually benefit consumers entrapped by what essentially constitutes a defendant's unilateral forum preference.

The entire doctrine surrounding the sanctity of forum-selection and arbitration clauses in the consumer arena essentially has been constructed based on a series of somewhat fantastical premises about these agreements. It first assumes that the contracting parties consist of a (sophisticated) consumer and a corporate or business entity. The doctrine assumes a knowledgeable consumer who understands that at some future point, the consumer may be involved in a dispute with the business entity. The doctrine assumes that this consumer understands what a forum choice means (or for that matter, what a choice-of-law or arbitration provision entails). It assumes that this consumer understands the consequences of a forum or choice-of-law designation. The doctrine assumes that the consumer has read the agreement and noticed and read the forum-selection, choice-of-law, or arbitration clause. The doctrine assumes that the consumer willingly agrees, in advance of any dispute, to waive its choice of forum (or choice of law, or access to the adjudicative system). The doctrine assumes that the consumer (or employee, or small consumer/investor) is receiving some unspecified economic benefit from agreeing to the forum-selection, choice-of-law, or arbitration provision. The doctrine assumes, as Justice Alito put it in *Atlantic Marine*, that the consumer knowingly and willingly waives its "venue privilege."<sup>177</sup>

But what if none of this—apart from the existence of contracting parties—is true? In the current age of computer-generated online contractual form agreements that require consumers to scroll through dozens of dense, small-print online boxes that allow for no modification or negotiation of terms, but then requires the consumer to "click Agree,"

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176. See Mullenix, *Another Easy Case*, *supra* note 82, at 360.

177. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581–82 (2013).

it seems unreasonable to base enforcement of these clauses on the premise that a consumer could be said to knowingly and willingly have waived their venue privilege as a consequence.

## 2. *What Is to Be Done?*

In the consumer context, the evolution of forum-selection, choice-of-law, and arbitration clause jurisprudence has resulted in a system that unfairly favors corporate defendants. This jurisprudence now extends beyond consumer contracts to all types of agreements, including employment and brokerage contracts. Because the Court has sanctified these provisions on the basis of contract law, there is no level playing field among contracting parties and corporate preferences for forum choice, applicable law, or alternative dispute resolution effectively prevail in all cases.

As long as courts continue to construe these clauses in the context of contract law, consumers will continue to be vulnerable to corporate litigation manipulation in businesses' favor. To resist or reject such manipulation requires revisiting discarded first principles: namely, whether forum-selection clauses are jurisdictional and whether they effectively oust courts of jurisdiction. As discussed above, federal courts historically have long resisted all manner of creative manipulation of jurisdiction, venue, and applicable law to game the litigation system for strategic advantage. Viewing forum-selection, choice-of-law, and arbitration clauses as creative means to manipulate jurisdiction under the cloak of contract law might result in a different judicial reception to these provisions.

In addition, consumers would fare better with meaningful recourse to public policy arguments that eschew such provisions, arguments the courts have effectively eviscerated. The Court's substantial federalization of applicable law relating to forum-selection and arbitration clauses has left little room for countervailing state law contravening such clauses, especially state law doctrines of contract unconscionability. However, given the Court's increasingly severe jurisprudential arc regarding forum-selection and arbitration clauses—as well as the Justices' ideological predispositions—the likelihood of any federal doctrinal shift that is more sympathetic to consumers seems implausible.

The procedural and substantive unfairness engendered by these clauses that affect the lives of consumers, employees, and others will not be remedied through doctrinal elaboration and cannot be remedied through rule amendments. If consumers are to be afforded meaningful relief from such clauses,<sup>178</sup> then federal statutory substantive law is

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178. *See, e.g.*, The Cruise Industry Passenger Bill of Rights, CRUISE LINES INT'L ASS'N, <http://www.cruising.org/regulatory/issues-facts/safety-and-security/cruise-industry-passenger-bill-rights>

needed to determine the validity and enforcement of a forum-selection or choice-of-law clause challenged by a plaintiff<sup>179</sup> or the validity and enforcement of an arbitration clause sought by a defendant.

In this regard, the federal collusive joinder statute is a marvel of simplicity.<sup>180</sup> It simply states, “[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.” To address the growing problem of adhesive forum-selection (and similar) clauses, why can we not have a statute that simply states:

A district court shall not have jurisdiction or venue of a civil action in which a party of superior bargaining strength has drafted, imposed, and made a contract of adhesion designing a particular forum, applicable law, or arbitration, relegating the subscribing party only to the opportunity to adhere to the contract or reject it, and the clauses are unfairly one-sided.

This type of statute would, at the outset, exclude from its purview *Zapata*-style cases arising in the international or domestic commercial contexts that involve sophisticated business partners on both sides of a deal. Instead, this statute would focus on the particular situations of consumer, employment, and brokerage contracts where one party has superior bargaining strength and the subscribing party is subjected to a take-it-or-leave contractual arrangement.

In such cases, modifying the rules relating to presumptions and allocations of burdens of proof might also work towards leveling the playing field. Thus, in such situations, courts should not engage in a threshold presumption of validity favoring the provisions’ drafter; instead, such clauses should be presumptively invalid until shown to constitute an informed meeting of the minds and actual consensual agreement. Moreover, the party seeking enforcement should have the burden of demonstrating the validity and enforceability of these

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(last visited Apr. 4, 2015). This industry self-regulation was highly criticized for its failure to protect consumers from forum-selection clauses in passenger tickets. See Thomas A. Dickerson, *The Cruise Passenger’s Rights and Remedies 2014: The Costa Concordia Disaster: One Year Later, Many More Incidents Both on Board Megaships and During Risky Shore Excursions*, 38 TUL. MAR. L.J. 515, 526 (2014) (“While superficially encouraging, the Passenger Bill of Rights promises little more than what cruise lines are already legally obligated to do and does nothing to level the litigation playing field, which is obstructed by roadblocks . . . . For example, if [the Cruise Line International Association (“CLIA”)] really wants to help cruise passengers, then cruise lines should stop inserting Miami, Florida, forum selection clauses into ticket contracts and allow injured passengers to sue in a forum convenient to them.”).

179. Senator Charles Schumer of New York, following CLIA’s announcement of its Industry Passenger Bill of Rights, indicated that he planned to introduce legislation to protect cruise line passengers. To date, no such legislation has been introduced. See Letter from Sen. Charles Schumer to Christine Duffy, CEO & President, Cruise Line Int’l Ass’n (Mar. 18, 2013), available at <http://www.schumer.senate.gov/record.cfm?id=341068>.

180. 28 U.S.C. § 1359 (2012) (parties collusively joined or made).

provisions, rather than imposing contrary burdens on the party seeking to deny enforcement. This shifting of burdens is precisely the doctrine that courts apply when evaluating a plaintiff's motion alleging impermissible collusive joinder under 28 U.S.C. § 1359.<sup>181</sup> Finally, when a defendant seeks enforcement, the statute could be implemented on a Rule 12(b)(6) motion—the procedural question that dominated the *Atlantic Marine* litigation.

### CONCLUSION

Historically, Congress and the federal courts have acted to constrain or prevent prefiling actions by prospective litigants who intended to confer strategic litigation advantage if a dispute arose in the future. From the broadest prospective, our legal system has simultaneously encouraged zealous representation while at the same time eschewed certain types of litigation gamesmanship. In particular, legislative bodies and the courts have been sensitive to prefiling forum-shopping gambits designed to secure a preferable forum or applicable law. Consequently, many of the legislative or judicial initiatives to constrain such behaviors have been aimed at forum-shopping techniques in their varying and creative incarnations.

The legislature and the judiciary have repeatedly intervened to thwart litigation gamesmanship. By statute, Congress has precluded individuals from engaging in sham contractual assignments to create federal jurisdiction and, in decedents' estate cases, effectively ended the practice of appointing out-of-state executors to gain entry to federal court after a decedent's demise. CAFA and the cases construing it represent a large-scale legislative and judicial effort to suppress forum-shopping gamesmanship in the class action arena. By doctrinal pronouncements, courts have foiled plaintiffs' attempts to gain litigation advantage through stratagems such as reincorporating over state lines to confer diversity jurisdiction or transferring litigation to gain preferable law in another venue. While many of these constraints have been directed

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<sup>181</sup> According to the District Court for the Southern District of New York:

To rebut this presumption, the party invoking jurisdiction must “articulate a legitimate business purpose for the assignment,” . . . and bears a “heavy burden of proof.” Indeed, “simply offering evidence of a business reason will be insufficient to rebut the presumption. Instead, the burden falls on the party asserting diversity to demonstrate that the reason given for the assignment is legitimate, not pretextual.” . . . “In assessing whether an assignment is improper or collusive, courts consider, among other things, ‘the assignee’s lack of a previous connection with the claim assigned; the remittance by the assignee to the assignor of any recovery; whether the assignor actually controls the conduct of the litigation; the timing of the assignment; the lack of any meaningful consideration for the assignment; and the underlying purpose of the assignment.’”

LCE Lux HoldCo S.a.r.l. v. Entretencimiento GM de Mexico S.A. de C.V., 287 F.R.D. 230, 239 (S.D.N.Y. 2012) (internal citations omitted).

at parties' jurisdictional manipulation, the legislature and judiciary have similarly imposed limitations on venue manipulation.

Most reform initiatives have been directed toward litigants' pre-filing actions intended to game the system. There is scant reason, however, not to apply such forum-shopping constraints on defendants' pre-filing actions where the prospective defendants' purpose is similarly to game the system and accomplish the defendants' preference for forum selection, applicable law, or arbitration. That is the practical effect of these clauses that corporate defendants routinely insert in consumer and employment contracts, which are enforced against largely unsuspecting and unsophisticated individuals. In the consumer arena, the expansion of forum-selection clause jurisprudence to arbitration clauses has exacerbated the inequity visited upon the vulnerable and conferred tremendous advantage on the business entities that customarily include such provisions in their contracts.

The reality is that scarcely any plaintiff in the post-*Zapata* era who has sought to invalidate a forum-selection, choice-of-law, or arbitration clause has been able to successfully prevail on a contract unreasonableness defense. In a world where the Court has now announced that courts should give no weight to a plaintiff's historical venue privilege as a consequence of the presence of a forum-selection clause, this doctrine instead unfairly confers a venue privilege on the contracting defendant. The imbalance of equities in forum-selection clause jurisprudence should be remedied by changing the narrative that gives primacy to contract law and returning the conversation to that of jurisdictional ouster, litigation gamesmanship, and public policy concerns.