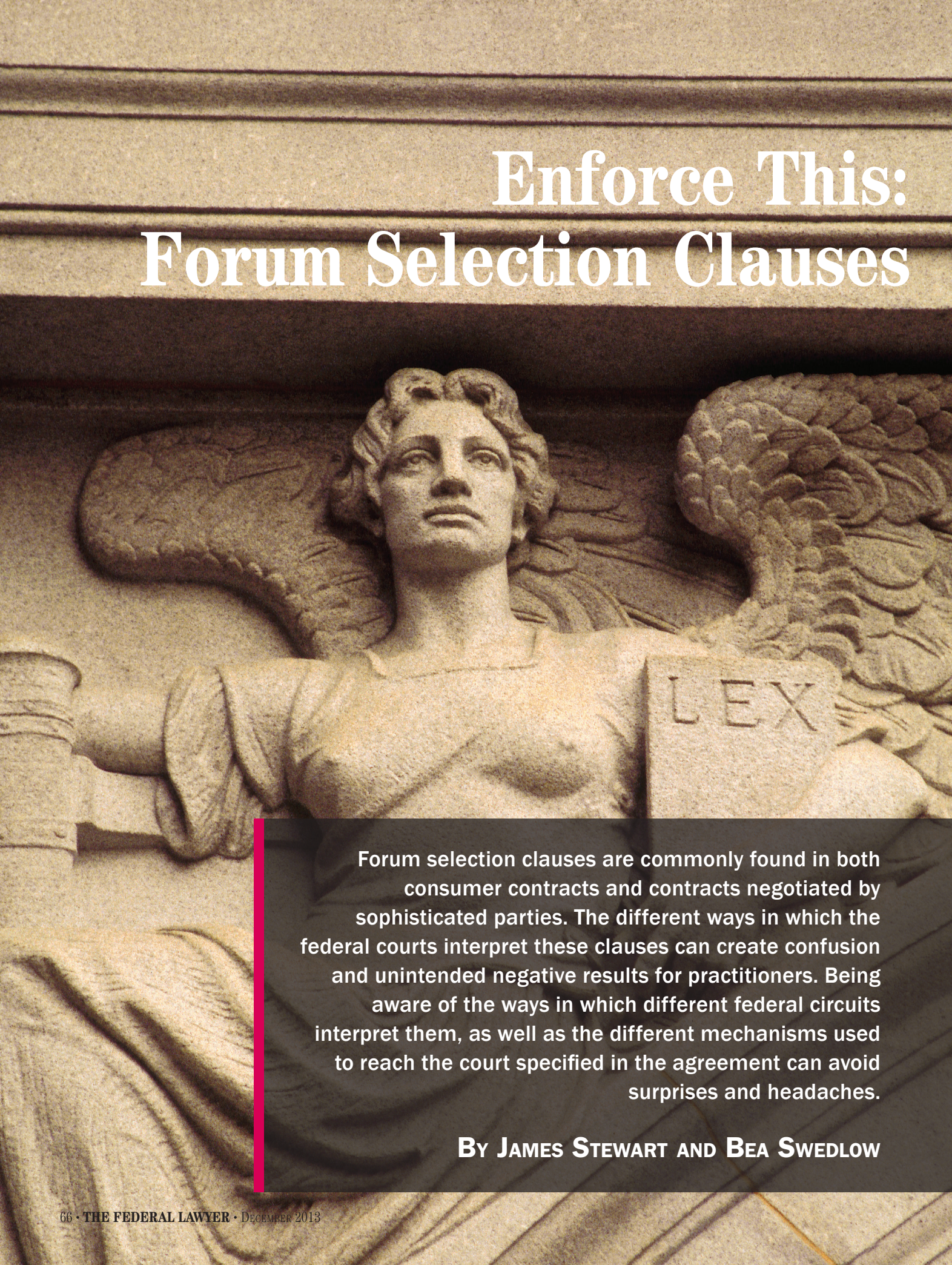


# Enforce This: Forum Selection Clauses

A stone relief sculpture of a winged figure, likely representing Justice or Liberty, holding a tablet with the word "LEX" on it. The figure is carved in a classical style with detailed wings and a serene expression. The background is a textured stone surface.

Forum selection clauses are commonly found in both consumer contracts and contracts negotiated by sophisticated parties. The different ways in which the federal courts interpret these clauses can create confusion and unintended negative results for practitioners. Being aware of the ways in which different federal circuits interpret them, as well as the different mechanisms used to reach the court specified in the agreement can avoid surprises and headaches.

**BY JAMES STEWART AND BEA SWEDLOW**

# in Federal Courts

Imagine you have a client, ABC MicroProcessors, Inc. (ABC), which has its principal place of business in Dallas, Texas. ABC sells and services microprocessors customized to specific industries, such as automotive, construction, aerospace, and finance, throughout the United States. Several years ago, ABC entered into a service agreement for consulting services with ConsultantSpeak Associates, which is located in Michigan. ConsultantSpeak's role was to identify areas in which ABC's automotive division, also located in Michigan, could improve its products and services. During the term of the agreement, ConsultantSpeak employees held regular meetings with the ABC automotive division in Michigan. They also traveled regularly to ABC in Dallas and to automotive manufacturers and suppliers throughout the United States. Payment was based on ConsultantSpeak achieving specific performance standards. Unfortunately, a dispute arose concerning the parties' goals and payment.

As a result, ConsultantSpeak filed an action in Michigan state court alleging breach of the service agreement and non-payment of fees. ABC provides you with the served copy of ConsultantSpeak's complaint and tells you that the service agreement provides that all disputes are to be governed by Texas law, and Texas is the exclusive forum for resolving any disputes arising from the contract. Perhaps not surprisingly,

having already determined that Texas is a favorable forum in the service agreement, ABC wants to move the litigation to Texas.

Because there is complete diversity between ABC and ConsultantSpeak, you first remove the action to the U.S. District Court for the Eastern District of Michigan pursuant to 28 U.S.C. § 1332. Your next problem is how to move it to Texas.

This article will discuss the different ways to transfer a case like ABC's to the venue defined in the forum-selection clause. First, the article will discuss which types of forum-selection clauses are more likely to be enforced and what precise language is necessary to trigger the relief sought. Next, the article will explore how to transfer a case to different federal district courts and how to choose the best method for your client.

## Forum-Selection Clauses Generally

To enforce a forum-selection clause, it must be precise and dictate which forum was exclusively chosen. Essentially, the clause must protect against the argument that it merely indicates where litigation *may* occur as opposed to where it *must* occur.

All circuits enforce forum-selection clauses according to the Supreme Court's standard, which states that "[forum selection] clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."<sup>1</sup> These clauses "should control absent a strong showing that [they] should be set aside" by the opposing party.<sup>2</sup> While the circuit courts have adopted this standard, there remain additional nuances worth considering.

Generally, courts require that forum-selection clauses clearly indicate that a particular venue is to be used *exclusively*, instead of merely consenting to a particular venue.<sup>3</sup> The Second,<sup>4</sup> Fourth,<sup>5</sup> Fifth,<sup>6</sup> Sixth,<sup>7</sup> Seventh,<sup>8</sup> Eighth,<sup>9</sup> Ninth,<sup>10</sup> Tenth,<sup>11</sup> and Federal Circuits<sup>12</sup> have expressly endorsed this principle, and none of the circuits have rejected it. For example, the Second Circuit held that a forum-selection clause stating, "All disputes or differences which may arise in the course of fulfillment of, or in connection with, the present Contract, shall be considered by the Arbitration Court of St. Petersburg and the Leningradskaya Oblast" is mandatory because the claim could only be considered by those specific courts.<sup>13</sup> The Sixth Circuit has held that the language "[p]lace of

jurisdiction for all disputes arising in connection with the contract shall be at the principal place of business of the supplier” creates a mandatory clause. Reasoning that, in this instance, the supplier’s principal place of business is Germany, the court concluded that those courts exclusively govern and are mandatory.<sup>14</sup> An example of a forum-selection clause that is not mandatory is: “[T]he parties consent to jurisdiction to [sic] the state courts of the State of Illinois.” In this clause, the parties consented to jurisdiction in Illinois, but did not limit jurisdiction only to the Illinois state courts.<sup>15</sup>

Some clauses may appear mandatory but are held to be permissive because exclusivity has not been explicitly stated in the clause. In *K & V Scientific v. BMW*, the Tenth Circuit held that the clause “[j]urisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany” provided for permissive, rather than exclusive, jurisdiction.<sup>16</sup> The court found that the “clause refers only to jurisdiction,” but by “non-exclusive terms.”<sup>17</sup> Therefore, litigating in another jurisdiction could be appropriate while still applying German law.

Exclusivity is very important. The First Circuit held that the phrase “expressly agree to submit” is not mandatory language.<sup>18</sup> The Seventh and Eighth Circuits suggest that the terms “shall,” “only,” or “must” be included in a forum-selection clause to demonstrate exclusivity.<sup>19</sup> A forum-selection clause does not necessarily have to identify a specific court, as found by the Sixth Circuit. It held that a clause that stated “[p]lace of jurisdiction for all disputes arising in connection with the contract shall be at the principal place of business of the supplier”<sup>20</sup> was a mandatory forum-selection clause even though it did not identify a particular court. However, it is preferable to err on the side of specificity when drafting a forum-selection clause, thus avoiding any potential dispute over whether the clause is mandatory or permissive.

Some circuits focus on whether there is ambiguity in the forum-selection clause. For example, the Third Circuit emphasizes “dispel[ling] uncertainty as to where suit could be brought” and will generally enforce forum-selection clauses that specify where suits may be brought.<sup>21</sup> However, courts have discretion to decline to enforce a forum-selection clause even where there is no ambiguity.

The Eleventh Circuit likewise focuses on ambiguity to determine whether a clause is permissive or mandatory, holding that ambiguity results in a permissive clause.<sup>22</sup> The District of Columbia Circuit also embraces the ambiguity test.<sup>23</sup> While this does not greatly differ from those of other circuits, it will be helpful to be aware of the difference when seeking to enforce the clause.

To withstand the test of any circuit, a forum-selection clause should include the words “shall,” “only,” “must,” or “exclusive.” Under this construction, the clause in our hypothetical example, set forth above, would satisfy the majority rule that requires exclusivity, as well as the rule regarding there be no ambiguity. Once you determine that the forum-selection clause at issue is mandatory and provides for exclusive jurisdiction, the next hurdle is to decide how best to enforce it.

### Enforcing the Forum-Selection Clause

Once you conclude that operative language in the clause mandates litigation in a certain jurisdiction, you will want to move promptly to enforce it—but what is the best way to do so? Your first thoughts may be to file a motion to dismiss for improper venue under Federal Rule 12(b)(3)<sup>24</sup> or a motion to transfer under 28 U.S.C. § 1404.<sup>25</sup> However,

some circuits may not permit a motion to dismiss under 12(b)(3), and there may be an alternative for your client under Federal Rule 12(b)(6).<sup>26</sup> This article examines each of these possibilities.<sup>27</sup>

### Which Law Applies?

Once you remove your case from state court to district court, you will want to confirm the law of the forum that applies to the enforceability of the forum-selection clause or the related federal law. Often the state law will not be particularly different than the federal law, but some states, especially in the context of consumer contracts or online contracts, have expressed policies against the enforcement.

This situation arose in the Sixth Circuit in *Wong v. PartyGaming Ltd.*<sup>28</sup> In *Wong*, Ohio residents had registered with PartyGaming for online poker. Because PartyGaming is based in the British Territory of Gibraltar, the terms and conditions on its site included a forum-selection clause that Gibraltar law would apply to all disputes and that Gibraltar courts would have exclusive jurisdiction. The plaintiffs had sued in Ohio State Court alleging breach of contract, misrepresentation, and violation of the Ohio Consumer Protection Act. The defendant removed the case to federal district court. PartyGaming moved for dismissal under FRCP 12(b)(3) and under FRCP 12(b)(6). The trial court denied the motions as moot but *sua sponte* dismissed the case on the basis of forum non conveniens. In affirming the decision, the Sixth Circuit first addressed the choice of law issue and in doing so, reviewed the law of the other federal circuits on this issue.

The Sixth Circuit began its analysis with the Supreme Court’s decision in *Stewart v. Ricoh Corp.*,<sup>29</sup> which had established a strong federal policy favoring the enforcement of forum-selection clauses and had held that federal law applies to the analysis of forum-selection clauses under admiralty law, the analysis of a motion to transfer under 28 U.S.C. §1404 or a dispute involving a federal statute. However, the Sixth Circuit noted that the Supreme Court had declined to answer the *Erie*<sup>30</sup> issue of what law would apply when a federal court sitting in diversity analyzes a forum-selection clause in the absence of a controlling federal statute.

The court noted that the Sixth Circuit had not decided this and that in the past, state law and the federal law favoring enforcement of forum-selection clauses had not varied significantly. It noted however, that in recent years, some states had backed away from that policy, especially in the context of consumer contracts. The court thus reviewed and analyzed what the other circuits had done when confronted with this issue. It observed that six circuits<sup>31</sup> had found that federal law applies to this issue. However the Seventh and Tenth Circuits have resolved the issue by relying on the law of the forum that governs the contract as a whole.<sup>32</sup> In the Fourth Circuit, different panels had reached different results.<sup>33</sup> Concluding that there was a strong federal interest in procedural matters, the Sixth Circuit applied the majority view and held that in diversity actions, federal law governed the enforceability of the forum-selection clause. *Wong* is thus valuable for practitioners in other circuits addressing the choice of law issue. And as we shall see later in the article, the Sixth Circuit affirmed the district court’s dismissal under 28 U.S.C. §1404 but did so by a more rigorous analysis reflecting the federal law view favoring forum-selection clauses.

### 12(B)(3) Motion to Dismiss

A motion to dismiss under 12(b)(3) may appear as the most logical mechanism to enforce a forum-selection clause and may be the

best solution in some circuits. After all, the parties have contractually agreed on another proper venue. However, certain courts will likely deny such a motion. The circuits that refuse to permit the use of Rule 12(b)(3) motions to enforce forum-selection clauses consider the application of federal statutes as discussed by the Sixth Circuit in *Kerobo v. Southwest Clean Fuels*.<sup>34</sup>

The parties in *Kerobo* agreed to a forum-selection clause, which stated, “Jurisdiction for any action for breach, damages or default shall be within the County of Orange, State of California.”<sup>35</sup> The plaintiff sued the defendant in Michigan state court and the defendant removed the case to the U.S. District Court for the Eastern District of Michigan.<sup>36</sup> The district court then granted the defendant’s Rule 12(b)(3) motion to dismiss for improper venue.<sup>37</sup> The Sixth Circuit reversed and remanded the case, holding the U.S. Supreme Court ruling that determination of proper venue in removal cases is governed by 28 U.S.C. § 1441(a).<sup>38</sup> This statute limits removal “to the district court of the United States for the district and division embracing the place where such action is pending.”<sup>39</sup> The defendant, therefore, “removed to the only venue permitted by § 1441(a),” which was the District Court for the Eastern District of Michigan.<sup>40</sup> Thus, the court held that “in the case of an action removed from state court to federal

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court . . . [t]here is only one federal venue into which a state court action may be removed, and that is in the statutorily dictated ‘district’ [defined in § 1441(a)]”<sup>41</sup> and that “if venue is proper under the statute, a motion to transfer for improper venue will not lie.”<sup>42</sup>

While certain other circuits agree that Rule 12(b)(3) is not the proper method to enforce a forum-selection clause, several circuits have not yet addressed this issue. Some have even declined to decide which Rule 12(b) motions may be used to enforce forum-selection clauses. The First Circuit allows only a Rule 12(b)(6) motion to enforce a forum-selection clause.<sup>43</sup> The Second and Eighth Circuits have not disapproved of the use of Rule 12(b)(3) motions, but also have not affirmatively approved of their use either.<sup>44</sup> The Third Circuit allows a Rule 12(b)(6) motion to enforce the clause, but has not ruled out the possibility of the use of a Rule 12(b)(3) motion.<sup>45</sup> Alternatively, the Seventh Circuit allows the use of a Rule 12(b)(3) motion, but has not ruled out the use of a Rule 12(b)(6) motion.<sup>46</sup>

The Fourth, Fifth, Ninth, and Tenth Circuits allow enforcement of forum-selection clauses through dismissal under Rule 12(b)(3) even in diversity actions.<sup>47</sup> The Fourth, Ninth, and Tenth Circuits have not explained why they allow the motion, but only cited precedent where Rule 12(b)(3) had been used to enforce forum-selection clauses in the past.<sup>48</sup> However, the Fifth Circuit held that a Rule 12(b)(3) motion is proper where “a forum-selection clause designates an arbitral, foreign, or state court forum” and when the venue of the initial suit is improper.<sup>49</sup> In some instances, a Rule 12(b)(3) motion may be the only option to enforce forum-selection clauses where transfer is inapplicable because the clause mandates a state, rather than a federal, forum. While some practitioners may prefer a 12(b)(3) motion, its caveats and implications in diversity proceedings suggest care before filing.

#### **28 U.S.C. § 1404**

Perhaps a § 1404 motion would thus seem to be a more logical way to transfer an action pursuant to a forum-selection clause.<sup>50</sup> Section 1404 allows a district court to transfer a case to another district having a more convenient jurisdiction.<sup>51</sup> District courts have discretion to allow the transfer<sup>52</sup> and consider all aspects of the case, including convenience of a particular forum for the parties, fairness in how the forum was chosen, and who has bargaining power.<sup>53</sup> However, the § 1404 motion can have some negative aspects, especially for a defendant like ABC [in our hypothetical example] who wants to change venue solely on the language of the forum-selection clause.

In *Stewart Org., Inc. v. Ricoh Corp.*, *supra*, the Supreme Court held that when considering a § 1404, motion, the forum-selection clause is only one factor of many.<sup>54</sup> The court noted that this type of motion was created to give the district court discretion according to a specific fact analysis of each particular case.<sup>55</sup> In evaluating whether to grant the motion, the district court must “balance a number of case-specific factors” with the “forum-selection clause . . . [considered] a significant factor that figures centrally in the district court’s calculus.”<sup>56</sup> The court also considers “the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of ‘the interest of justice.’”<sup>57</sup> It is possible that these additional factors may outweigh the language of the forum-selection clause and lead to a denial of a motion to transfer.<sup>58</sup> In this analysis, the clause will “receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided.”<sup>59</sup> All circuits follow this view. Thus, if you choose to file a motion pursuant to § 1404, remember that the forum-selection clause is not dispositive.

Because of the many factors that a court considers when deciding a § 1404 motion to transfer, it may not be the best approach for a defendant like ABC. Most of the facts central to our fictional case take place in Michigan, and there are likely witnesses and evidence that may be inconvenient to relocate to Texas. Any defendant who has a forum-selection clause that is not in the same jurisdiction where most of the activity occurs may well run up against strong public and private interest factors leading to denial of the motion to transfer, despite a forum-selection clause. As a result, in our hypothetical example, a motion under § 1404 could be too risky.

#### **Alternatives to § 1404 And 12(B)(3) Motions**

Where § 1404 or Rule 12(b)(3) motions are determined to be unfavorable, your client has alternative options. You may file a motion to dis-

miss pursuant to Rule 12(b)(6) for failure to state a claim, depending, of course, on the circuit.<sup>60</sup> Or a Rule 12(b)(6) motion to dismiss may be more advantageous for a client similar to ABC, who has agreed to a forum-selection clause that will provide opposing counsel some fodder for argument about convenience. Therefore, it would be more advantageous for a client in ABC's position to move under Rule 12(b)(6).

The Sixth Circuit's decision in *Security Watch, Inc. v. Sentinel Systems, Inc.* illustrates this alternative.<sup>61</sup> In *Security Watch*, the parties accepted a distribution agreement providing that Security Watch would service security systems that Sentinel distributed.<sup>62</sup> The contract included a forum-selection clause requiring litigation to occur in Virginia state or federal courts.<sup>63</sup> Security Watch sued for breach of contract in the Western District of Tennessee, and the defendants moved to dismiss under Rule 12(b)(6).<sup>64</sup> The district court enforced the agreement.<sup>65</sup> On appeal, the Sixth Circuit stated that "forum-selection clauses generally are enforced by modern courts unless enforcement is shown to be unfair or unreasonable."<sup>66</sup> Unless there is fraud, inability by the transferee court to handle the case, or severe inconvenience, the Sixth Circuit will enforce the forum-selection clause.<sup>67</sup> Thus, in the Sixth Circuit, a forum-selection clause appears to be given more weight on a 12(b)(6) motion than a § 1404 analysis.<sup>68</sup>

The First Circuit also recognizes a Rule 12(b)(6) motion as a method to enforce a forum-selection clause.<sup>69</sup> In this circuit, the district court performs a typical Rule 12(b)(6) analysis: accepting the allegations in the complaint as true, drawing inferences, and evaluating whether there is any possible recovery.<sup>70</sup> The circuit then enforces the forum-selection clause unless there is "the kind of fraud or overreaching required to render the forum selection clause unenforceable."<sup>71</sup>

In *Salovaara v. Jackson National Life Insurance Co.*, the Third Circuit held that a forum-selection clause may be enforced through either a Rule 12(b)(6) or § 1404 motion.<sup>72</sup> However, this circuit emphasizes that § 1404 considerations may be included in a Rule 12(b)(6) analysis.<sup>73</sup> In *Salovaara*, the defendants moved to dismiss under Rule 12(b)(6), but the district court ultimately conducted a § 1404 analysis holding that this was a permissible approach by the district court.<sup>74</sup> The court's analysis in *Salovaara* could alter how advantageous the 12(b)(6) approach for enforcing forum-selection clauses in the Third Circuit is.

The Second Circuit, however, has held that instead of selecting a specific motion to dismiss, the court will allow motions to dismiss pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6).<sup>75</sup> This Circuit allows the enforcement of forum-selection clauses under a motion to dismiss, unless enforcement would be unreasonable to the parties.<sup>76</sup> Because the Supreme Court has not specified under which section of a Rule 12(b) the motion should be made,<sup>77</sup> the Second Circuit "refuse[s] to pigeon-hole ... claims into a particular clause of Rule 12(b)."<sup>78</sup>

The Fifth Circuit has followed a similar course in declining to specifically state under which section of 12(b) the motions must be made in a diversity action, though it has thus far only considered whether the motion should fall under 12(b)(1) or 12(b)(3).<sup>79</sup> This court enforces forum-selection clauses if the venue where the suit was initially brought is statutorily proper.<sup>80</sup> If so, the court may then give effect to the forum-selection clause and transfer the suit. However, if the venue is not statutorily proper, the Fifth Circuit will dismiss the case under Rule 12(b)(3) or § 1406.<sup>81</sup> The Eighth Circuit also has not chosen a specific section of 12(b) for forum-selection clause enforcement, though it has considered Rules 12(b)(3) and 12(b)(6).<sup>82</sup> In *Farmland Industries v. Frazier-Parrot*

*Commodities*,<sup>83</sup> the Eighth Circuit held that a forum-selection clause will be enforced unless it would be unreasonable.

The Circuit Court for the District of Columbia has likewise not chosen a specific section of Rule 12(b) to enforce a forum-selection clause, but it does acknowledge that both § 1404 and Rule 12(b) motions are acceptable.<sup>84</sup> When presented with a motion to dismiss, this circuit also assumes that such clauses are valid unless attained by fraud or enforcement is unreasonable.<sup>85</sup>

The Fourth Circuit has weighed the options of moving under Rules 12(b)(1), 12(b)(3), or 12(b)(6).<sup>86</sup> This court expressed concerns regarding Rule 12(b)(1) motions for lack of subject-matter jurisdiction, stating it is a "legal fiction that the [forum selection] clause affects the power of the court to adjudicate the dispute" and that it *could be brought at any time, even after appeal*.<sup>87</sup> Rule 12(b)(6) is less problematic than Rule 12(b)(1), but the court suggested that the Supreme Court previously held that Rule 12(b)(6) is not the correct motion to use for forum-selection clauses.<sup>88</sup> Under Rule 12(b)(6), it is possible that the motion could be brought very late in the case.<sup>89</sup> This circuit ultimately determined that Rule 12(b)(3) would avoid the timing issues and followed Supreme Court precedent,<sup>90</sup> although the issue of diversity was not considered. In enforcing the forum-selection clause, the Fourth Circuit also follows the view that on a motion to dismiss, the court will apply the forum-selection clause unless it is "unreasonable" to enforce.<sup>91</sup> This would seem to provide more leeway to enforcement than the balancing test under a § 1404 analysis.

**Unlike the other circuits, the Ninth Circuit has addressed the Rule 12(b)(3) motion in both diversity and federal question suits. On both occasions, the court settled on Rule 12(b)(3) as the proper motion for enforcing a forum selection clause. It holds that forum selection clauses are "presumptively valid" and the burden to not enforce the clause is heavy.**

The Seventh Circuit adopted similar reasoning and held that a Rule 12(b)(3) motion forces selection of the proper venue as soon as possible.<sup>92</sup> In *Faulkenberg v. CB Tax Franchise Systems*, the forum-selection clause between the two parties required suit in Texas, but the plaintiffs filed in Illinois because that is where they owned a tax business franchise.<sup>93</sup> The district court granted the motion to dismiss based on the forum-selection clause.<sup>94</sup> On appeal, the Seventh Circuit considered the contract language in finding that the forum-selection clause was enforceable.<sup>95</sup> While the court emphasized the contract language and unreasonableness more than the courts in *Security Watch*, the test still appears to give more credence to what the clause actually says than any external factors.

The Tenth Circuit also has chosen to allow a Rule 12(b)(3) motion to enforce forum-selection clauses<sup>96</sup> and will do so unless

enforcement is shown to be unreasonable.<sup>97</sup>

While the Eleventh Circuit has found no “significant doctrinal error” with the First Circuit’s adoption of the Rule 12(b)(6) motion, it has held that a Rule 12(b)(3) motion is the most appropriate.<sup>98</sup> This court agrees that forum-selection clauses should be enforced unless unreasonable. Grounds for declining enforcement include fraud, the inability of the plaintiff to fairly present the case, the lack of a remedy, or that enforcement would be against public policy.<sup>99</sup>

Unlike the other circuits, the Ninth Circuit has addressed the Rule 12(b)(3) motion in both diversity and federal question suits. On both occasions, the court settled on Rule 12(b)(3) as the proper motion for enforcing a forum-selection clause.<sup>100</sup> It holds that forum-selection clauses are “presumptively valid” and the burden to not enforce the clause is heavy.<sup>101</sup>

### *An Interesting Development out of the Fifth Circuit*

The Fifth Circuit takes a minority approach when enforcing forum-selection clauses. In *In re Atlantic Marine*, the court held that a Rule 12(b)(3) motion to dismiss only applies when the clause specifies that suits must be brought in state court and when the venue in which the suit was initially brought was improper.<sup>102</sup> Alternatively, where the forum-selection clause designates a federal forum, the Fifth Circuit allows transfer pursuant to § 1404(a).<sup>103</sup> Under this approach, a motion for dismissal seems inappropriate where transfer to another federal forum is available.<sup>104</sup> Section 1404(a) cannot be used to enforce a forum-selection clause that requires suit in state courts because it only allows transfer *within* the federal system.<sup>105</sup>

It is important to note that the U.S. Supreme Court granted certiorari on April 1, 2013, to review *In re Atlantic Marine* and may ultimately overrule the Fifth Circuit’s analysis.<sup>106</sup> However, those who bring suit in the Fifth Circuit should understand the standard for enforcement of forum-selection clauses as it currently stands in this jurisdiction. Moreover, all practitioners, and particularly those in the Fifth Circuit, should monitor the Atlantic Marine case in the Supreme Court.

### *Which to Choose?*

As this article highlights, a one-size-fits-all solution does not exist when it comes to enforcing forum-selection clauses. Instead, the best method depends on a number of variables, which include the language of the clause, the circuit you are in, and the facts of the case. Before deciding which motion to file, one needs not only to understand the obligations of the forum-selection clause (i.e., mandatory versus permissive jurisdiction), but also to be fully versed on the law of the applicable circuit. Such understanding will ensure that your client gets the benefit of its bargained-for forum-selection clause.

### **Conclusion**

Forum-selection clauses can be advantageous for your client. Legal counsel’s job is to ensure that clients’ interests are protected by enforceable clauses. Out of the options available, a motion to dismiss—in the jurisdictions that permit such a motion—may be the best way to do so.

To resolve client ABC’s turmoil, counsel should consider filing a Rule 12(b)(6) motion to dismiss in the Sixth Circuit. The § 1404 motion may not be beneficial because the majority of the actual work was performed in Michigan and there are likely factors that would suggest the dispute should remain in Michigan rather than transferring to Texas. The Rule 12(b)(3) motion in a diversity suit is also not viable

because removal to federal court acts as a concession that federal court in Michigan is a proper forum for the case. A Rule 12(b)(6) motion, therefore, is likely the best option. It is up to practitioners to navigate through the different options in their particular circuits. Good luck! ☺

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### **Endnotes**

- <sup>1</sup>*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).
- <sup>2</sup>*Id.* at 15.
- <sup>3</sup>*E.g., Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 17 (1st Cir. 2009) (explaining that the initial issue is to determine whether the clause is mandatory and then to look for exclusive jurisdiction).
- <sup>4</sup>*S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 708 (2d Cir. 2010).
- <sup>5</sup>*Albemarle Corp. v. Astrazenecka UK Ltd.*, 628 F.3d 643, 653 (4th Cir. 2010).
- <sup>6</sup>*City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004).
- <sup>7</sup>*Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994).
- <sup>8</sup>*Muzumdar v. Wellness Int’l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006).
- <sup>9</sup>*Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003).
- <sup>10</sup>*Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (finding that no exclusivity means the clause is permissive).
- <sup>11</sup>*K & V Scientific Co. v. BMW*, 314 F.3d 494, 500 (10th Cir. 2002) (finding that no exclusivity is permissive).
- <sup>12</sup>*Powertech Tech. Inc. v. Tessera, Inc.*, 660 F.3d 1301, 1310 (Fed. Cir. 2011).
- <sup>13</sup>*S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 706, 708 (2d Cir. 2010).
- <sup>14</sup>*Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1097, 1099 (6th Cir. 1994).
- <sup>15</sup>*Dunne v. Libbra*, 330 F.3d 1062, 1063, 1064 (8th Cir. 2003).
- <sup>16</sup>314 F.3d 494, 496, 500 (10th Cir. 2002).
- <sup>17</sup>*Id.* at 500.
- <sup>18</sup>*Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 18 (1st Cir. 2009).
- <sup>19</sup>*Muzumdar v. Wellness Int’l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006) (“SHALL BE PROPER” as mandatory language); *Dunne*, 330 F.3d at 1064 (using “exclusive,” “only,” “must,” or any other terms that might suggest exclusivity” create a mandatory forum-selection clause).
- <sup>20</sup>*Gen. Elec. Co.*, 29 F.3d at 1097.
- <sup>21</sup>*Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 913 (3d Cir. 1988).
- <sup>22</sup>*Fla. Polk Cnty. v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 n.8 (11th Cir. 1999).
- <sup>23</sup>*Commerce Consultants Int’l v. Vetrerie Riunite*, 867 F.2d 697, 698–99 (D.C. Cir. 1989).
- <sup>24</sup>FED. R. CIV. P. 12(b)(3).
- <sup>25</sup>28 U.S.C. § 1404 (2010).

<sup>26</sup>FED. R. CIV. P. 12(b)(6).

<sup>27</sup>The majority of the circuit courts have determined that federal law applies in a forum-selection analysis. This article is premised on the assumption that federal law applies. The Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all agree that federal law should govern a forum-selection analysis. *Albemarle Corp. v. Astrazenecka UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010); *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009); *AOL*, 552 F.3d at 1083; *Ginter v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007); *P & S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995). *But see Huffington v. T.C. Group, LLC*, 637 F.3d 18, 23 (1st Cir. 2011) (“[O]nce again . . . we can sidestep the *Erie* question . . . of whether to treat the issue of a forum selection clause’s enforceability as ‘procedural’ . . . or as ‘substantive’ . . . because, in determining enforceability, both Delaware and Massachusetts follow the federal common-law standard.”) (citation omitted); *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears . . . .”); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) (holding that a forum-selection clause in the international context should be enforced under the same law as the rest of the contract).

<sup>28</sup>589 F.3d 821 (6th Cir. 2009).

<sup>29</sup>*Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988).

<sup>30</sup>*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>31</sup>*Wong*, 589 F.3d at 827 FN 5 (the 8th, 9th, 5th, 2d, 11th, and 3d Circuits).

<sup>32</sup>*Id.* at 827; *Abbott Labs. v. Takeda Pharms. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity . . . of a forum selection clause. . . by reference to the law of the jurisdiction whose law governs the rest of the contract. . . .”); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir.2006) (“We see no particular reason . . . why a forum-selection clause . . . should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.”).

<sup>33</sup>*Wong*, 589 F.3d at 827; *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir.1985) (“[T]his Court has applied [The Bremen] reasoning in diversity cases not involving international contracts.”), with *Nutter v. New Rents, Inc.*, 1991 WL 193490 at \*5 (4th Cir.1991) (“In this diversity action, we apply the conflicts of law rules of West Virginia, the state in which the district court sits.”).

<sup>34</sup>285 F.3d 531 (6th Cir. 2002).

<sup>35</sup>*Id.* at 532-33.

<sup>36</sup>*Id.* at 533.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 534.

<sup>39</sup>28 U.S.C. § 1441(a) (2012).

<sup>40</sup>*Kerobo*, 285 F.3d at 534.

<sup>41</sup>*Id.* at 535.

<sup>42</sup>*Id.* at 536.

<sup>43</sup>*Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15

(1st Cir. 2009).

<sup>44</sup>*Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 822 (2d Cir. 2006); *Rainforest Cafe, Inc. v. Eklecco, L.L.C.*, 340 F.3d 544, 545 n.5 (8th Cir. 2003).

<sup>45</sup>*Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 299 (3d Cir. 2001).

<sup>46</sup>*Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995).

<sup>47</sup>*Baker v. Adidas Am., Inc.*, 335 F. App’x 356, 358, 359 (4th Cir. 2009); *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1136, 1137 (9th Cir. 2004); *K & V Scientific Co. v. BMW*, 314 F.3d 494, 497 (10th Cir. 2002).

<sup>48</sup>*Baker*, 353 F. App’x at 359; *Murphy*, 362 F.3d at 1137; *K & V*, 314 F.3d at 497.

<sup>49</sup>*In re Atl. Marine Constr. Co.*, 701 F.3d 736, 740 (5th Cir. 2012).

<sup>50</sup>28 U.S.C. § 1404 (2010) (“(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented. (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court . . . .”).

<sup>51</sup>*Id.* at § 1404(a). While § 1404 can be used to transfer cases between district courts, it may not be used if the forum-selection clause is for a non-U.S. forum because it lacks authority. *See Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 536 (6th Cir. 2002) (stating that forum-selection clause demanding transfer to an English court in *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995), was not possible because the motion to transfer internationally is “not . . . available”).

<sup>52</sup>28 U.S.C. § 1404(b).

<sup>53</sup>*Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988).

<sup>54</sup>*Id.* at 29-31.

<sup>55</sup>*Id.* at 29.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 30.

<sup>58</sup>*Id.* at 30-31.

<sup>59</sup>*Id.* at 31.

<sup>60</sup>FED. R. CIV. P. 12(b)(6) (“[F]ailure to state a claim upon which relief can be granted”).

<sup>61</sup>176 F.3d 369 (6th Cir. 1999).

<sup>62</sup>*Id.* at 370.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 374.

<sup>67</sup>*Id.* at 375.

<sup>68</sup>The Sixth Circuit has also enforced forum-selection clauses by dismissing suits based on *forum non conveniens*. *Wong v. PartyGaming Ltd.*, demonstrates how the forum-selection clause garners more weight under this analysis than under a § 1404 motion. 589 F.3d 821 (6th Cir. 2009). Sitting in diversity, the court affirmed dismissal of the suit based on *forum non conveniens*. *Id.* at 825. Under the doctrine of *forum non conveniens*, a court will only decline to enforce a forum-selection clause if it came about by “fraud, duress, or other unconscionable means,” the transferee forum is unable to effectively handle the suit, or the inconvenience imposed upon the plaintiff is so great as to lead the court to deter-

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## HEIMESHOFF V. HARTFORD LIFE INSURANCE (12-729)

Appealed from the U.S. Court of Appeals for the Second Circuit

Oral Argument: Oct. 15, 2013

Julie Heimeshoff was a longtime Walmart employee who became ill and applied for long-term disability benefits from Hartford Life & Accident Insurance Company, but Hartford denied her claim. She filed suit under the Employment Retirement Income Security Act (ERISA) to challenge the insurance determination, but the district court granted the respondent's motion to dismiss because Heimeshoff had missed the filing deadline, a ruling which the Second Circuit then affirmed. The Supreme Court will now consider when the statute of limitations starts to run for an ERISA disability claim. Heimeshoff argues that a bright-line rule is necessary under federal law so that potential plaintiffs will be able to understand the filing deadline. Hartford contends that the statute of limitations should

be what is directed in the plan's accrual provision unless it is unreasonable. This case will implicate how much control insurance companies have over the statute of limitations for claims. Full text is available at [www.law.cornell.edu/supct/cert/12-729](http://www.law.cornell.edu/supct/cert/12-729). ©

Written by Jacob Brandler and T. Sandra Frung. Edited by Allison Nolan.

## BURT V. TITLOW (12-414)

Appealed from the U.S. Court of Appeals for the Sixth Circuit

Oral Argument: Oct. 8, 2013

On August 12, 2000, police officers found Donald Rogers dead on his kitchen floor. As would later be revealed, Donald's wife and his niece had engaged in burking, a practice of inebriating a person with alcohol to the point of unconsciousness and then smothering him or her to death. Donald's niece, Vonlee Nicole Titlow, went on to accept a plea deal

in exchange for testifying against Donald's wife but later withdrew. As a result, the prosecutor charged Titlow with murder rather than manslaughter, and a jury subsequently found her guilty of second-degree murder. On appeal, Titlow argued that her trial attorney, whom she had hired to replace another just days before withdrawing from the plea, had been ineffective for allowing Titlow to withdraw. The Michigan State Court of Appeals rejected this argument and affirmed the trial court's decision, and Titlow subsequently filed for habeas relief. The District Court for the Eastern District of Michigan denied Titlow's petition, but the Sixth Circuit reversed and ordered the prosecutor to re-offer the plea. At stake are concerns regarding the integrity of the country's plea-bargaining system as well as the evidentiary standards defendants must meet to be successful on ineffective-assistance-of-counsel claims. Full text is available at [www.law.cornell.edu/supct/cert/12-414](http://www.law.cornell.edu/supct/cert/12-414). ©

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mine that a transfer is inappropriate. *Id.* at 828.

<sup>69</sup>*Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009).

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* at 16.

<sup>72</sup>246 F.3d 289, 298 (3d Cir. 2001).

<sup>73</sup>*Id.* at 299.

<sup>74</sup>*Id.* at 298-99.

<sup>75</sup>*Tradecom.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011).

<sup>76</sup>*Id.* (citations omitted).

<sup>77</sup>*Id.*

<sup>78</sup>*Id.* (quoting *Asoma Corp. v. SK Shipping Co., Ltd.*, 467 F.3d 817, 822 (2d Cir. 2006)) (citation omitted).

<sup>79</sup>*Lighthouse MGA v. First Premium Ins.*, 448 F. App'x 512, 514 n.3 (5th Cir. 2011).

<sup>80</sup>*In re Atlantic*, 701 F.3d at 741.

<sup>81</sup>*Id.* at 740.

<sup>82</sup>*Rainforest Cafe, Inc. v. Eklecco, L.L.C.*, 340 F.3d 544, 545 n.5 (8th Cir. 2003).

<sup>83</sup>*Id.* at 849.

<sup>84</sup>*Marra v. Papandreou*, 216 F.3d 1119, 1123 (D.C. Cir. 2000).

<sup>85</sup>*Id.* at 1124.

<sup>86</sup>*Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544 (4th Cir. 2006).

<sup>87</sup>*Id.* at 548-49.

<sup>88</sup>The court referenced a Ninth Circuit opinion stating that 12(b)(6) was not a Supreme Court-approved tool to use for enforcement of forum-selection clauses. *Id.* at 549.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 649 (4th Cir. 2010).

<sup>92</sup>*Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995).

<sup>93</sup>637 F.3d 801, 803-04 (7th Cir. 2011).

<sup>94</sup>*Id.* at 804.

<sup>95</sup>*Id.* at 809-11.

<sup>96</sup>*Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992).

<sup>97</sup>*Id.* at 957.

<sup>98</sup>*Lipcon v. Underwriters by Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998).

<sup>99</sup>*Id.* at 1295-96.

<sup>100</sup>*Doe v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009).

<sup>101</sup>See *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137-38, 1140 (proceeding to evaluate a diversity suit under a motion 12(b)(3) and establishing the circuit's standard of review for the motion while noting the heavy burden in not enforcing a forum-selection clause).

<sup>102</sup>*In re Atl. Marine Constr. Co.*, 701 F.3d 736, 740 (5th Cir. 2012).

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

<sup>105</sup>*Id.*

<sup>106</sup>*Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 133 S. Ct. 1748 (2013).