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# Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform

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**ENFORCING FORUM-SELECTION CLAUSES:  
AN EXAMINATION OF THE  
CURRENT DISARRAY OF FEDERAL FORUM-  
SELECTION CLAUSE JURISPRUDENCE AND A  
PROPOSAL FOR JUDICIAL REFORM**

*Maxwell J. Wright\**

*This Note examines the current disarray of federal forum-selection clause jurisprudence. Theoretically, a forum-selection clause can provide a degree of stability and predictability to a contractual relationship by limiting where the parties can sue or be sued under the contract. Unfortunately, a lack of Supreme Court guidance and the absence of a federal rule or statute on point have created confusion and varying approaches among lower federal courts as to how they should treat such clauses. This Note outlines the various approaches that federal courts currently employ when enforcing valid exclusive forum-selection clauses, and it highlights the strengths and weaknesses of each approach. It then proposes a simple, uniform solution that is aimed at abrogating the current confusion among federal courts in order to allow exclusive forum-selection clauses to perform their central function—to provide predictability, stability, and foreseeability to contractual relationships regarding where litigation may occur.*

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## I. INTRODUCTION

A plaintiff may believe “that as the initiator of a lawsuit he is the lord and master of where the litigation will be tried and under what law.”<sup>1</sup> However, if his suit is based on a contract that contains a forum-selection clause, “his view of himself as ruler of all he surveys may, like an inflated balloon, suffer considerable loss of altitude.”<sup>2</sup> A forum-selection clause is a contract provision under which the parties agree to file any suit arising under their contract in a specified forum.<sup>3</sup> In theory, forum-selection clauses can provide a degree of predictability and stability to a contractual relationship by limiting where parties can sue or be sued under the contract.<sup>4</sup> Because the right to litigate in one forum or another has an economic value that can be estimated with reasonable certainty,<sup>5</sup> forum-selection clauses play a significant role in promoting business transactions where a lack of certainty and foreseeability can impose great burdens on the parties involved.<sup>6</sup> Unfortunately, modern federal forum-selection clause jurisprudence has rendered predictability, stability, and foreseeability in this context a myth.

A lack of Supreme Court guidance, and the absence of a federal rule or statute specifically addressing the enforceability of forum-selection clauses, have led to confusion and varying approaches among lower federal courts. As a result, whether a clause is enforceable, and the appropriate procedural mechanisms with which to enforce it, will depend on the particular federal court in which the suit is filed. Thus, the federal system completely undermines one of the central purposes of forum-selection clauses—to provide predictability, stability, and foreseeability to a contractual relationship. Current federal forum-selection clause jurisprudence

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1. Phillips v. Audio Active, Ltd., 494 F.3d 378, 381 (2d Cir. 2007).

2. *Id.*

3. ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 427 (3d ed. 2009).

4. See Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 663 (1997). Forum-selection clauses play a particularly important role in both interstate and international commercial agreements. *Id.*

5. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 57 (1992).

6. Lee, *supra* note 4, at 664.

has made predicting the effect that a given forum-selection clause will have on a federal court proceeding a daunting, if not impossible, task.

This Note addresses the current confusion and uncertainty surrounding the enforcement of forum-selection clauses in diversity cases. Part II provides a background of federal forum-selection clause jurisprudence. Part III outlines the variety of approaches that federal courts currently employ when enforcing forum-selection clauses. Part IV highlights the strengths and weaknesses of these different approaches. Part V proposes that the Supreme Court should act to clarify the appropriate federal procedural mechanisms that courts should use when they enforce forum-selection clauses; further, it explains how the proposal will function and recapitulates why such changes are necessary. Finally, Part VI concludes this Note.

## II. BACKGROUND

The history of forum-selection clause enforcement in the United States is marked by evolution. In the nineteenth century, unlike the courts in most other nations, U.S. courts uniformly refused to enforce forum-selection agreements.<sup>7</sup> This all changed during the second half of the twentieth century,<sup>8</sup> when forum-selection clauses began to gain acceptance because of courts' efforts to maintain parties' contract expectations.<sup>9</sup> The U.S. Supreme Court endorsed the increasing trend of enforcing forum-selection clauses when it recognized the right of parties to enter into "non-exclusive" forum-selection agreements<sup>10</sup> in *National Equipment Rental, Ltd. v. Szukhent*.<sup>11</sup> Since *Szukhent*, the Court has addressed the forum-selection clause issue significantly in three cases.

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7. Borchers, *supra* note 5, at 56–57.

8. *Id.* at 57.

9. John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C. L. REV. 888, 888 (1992).

10. For a definition and description of non-exclusive forum-selection clauses, see *infra* Part III.A.

11. See *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (“[P]arties to a contract may agree in advance to submit to the jurisdiction of a given court.”); Borchers, *supra* note 5, at 62 (discussing the holding and effects of *Szukhent*).

## A. The Bremen v. Zapata Off-Shore Co.

The first, and most notable, is the landmark case *The Bremen v. Zapata Off-Shore Co.*<sup>12</sup> (“*The Bremen*”), which the Court decided in 1972. *The Bremen* was an admiralty case based on an international towage contract.<sup>13</sup> Zapata, a Houston-based American corporation, contracted with Unterweser, a German corporation, to tow Zapata’s ocean-going, self-elevating drilling rig (“the Chaparral”) from Louisiana to a location off the coast of Italy, where Zapata had planned to drill certain wells.<sup>14</sup> The contract contained a forum-selection clause providing that “any dispute arising must be treated before the London Court of Justice.”<sup>15</sup> In January of 1968, Unterweser’s deep sea tug boat (“the *Bremen*”) departed Louisiana with the Chaparral in tow; however, it did not reach its destination.<sup>16</sup> While in international waters in the Gulf of Mexico, a severe storm arose and caused serious damage to the Chaparral.<sup>17</sup> Zapata instructed the *Bremen* to tow the damaged rig to Tampa, Florida—the nearest port of refuge.<sup>18</sup> Several days later, Zapata, ignoring the forum-selection clause, sued Unterweser in personam and the *Bremen* in rem in the U.S. District Court for the Middle District of Florida in Tampa.<sup>19</sup> Unterweser invoked the forum-selection clause and moved to dismiss for lack of jurisdiction or, in the alternative, on forum non conveniens grounds.<sup>20</sup>

After the district court and the court of appeals denied both motions, the Supreme Court reversed and, for the first time, recognized the right to enter into reasonable “exclusive”<sup>21</sup> forum-selection clauses.<sup>22</sup> The Court held that in admiralty cases, forum-selection “clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be

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12. 407 U.S. 1 (1972).

13. *Id.* at 2.

14. *Id.*

15. *Id.*

16. *Id.* at 3.

17. *Id.*

18. *Id.*

19. *Id.* at 3–4.

20. *Id.* at 4.

21. For a definition and description of exclusive forum-selection clauses, see *infra* Part III.A.

22. See *The Bremen*, 407 U.S. at 10; Borchers, *supra* note 5, at 57.

‘unreasonable’ under the circumstances” for reasons of fraud, undue influence, or overweening bargaining power.<sup>23</sup> The Court explained that the expansion of American business and industry would not be encouraged if, notwithstanding solemn contracts, the courts insisted on a parochial concept that all disputes must be resolved under U.S. laws and in U.S. courts.<sup>24</sup> The Court ultimately vacated the court of appeals’ judgment and remanded the case for further consideration as to whether enforcing the forum-selection clause was unreasonable under the circumstances pursuant to the standards that the Court set forth.<sup>25</sup>

B. *Stewart Organization, Inc. v. Ricoh Corp.*

The Supreme Court next addressed the forum-selection clause issue in *Stewart Organization, Inc. v. Ricoh Corp.*,<sup>26</sup> a 1988 diversity case.<sup>27</sup> The dispute grew out of a dealership agreement that obligated Stewart Organization (“Stewart”), an Alabama corporation, to market copier products manufactured by Ricoh Corporation (“RicoH”), a nationwide manufacturer with its principal place of business in New Jersey.<sup>28</sup> The contract contained a forum-selection clause providing that any suit arising under the contract could only be brought in a court located in the borough of Manhattan in New York City.<sup>29</sup> At some point, the business relationship between the parties deteriorated and Stewart, notwithstanding the forum-selection clause, filed suit for breach of contract in the U.S. District Court for the Northern District of Alabama.<sup>30</sup> Relying on the forum-selection clause, Ricoh moved to transfer the case to the U.S. District Court for the Southern District of New York pursuant to 28 U.S.C.

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23. *The Bremen*, 407 U.S. at 10, 12.

24. *Id.* at 9.

25. *Id.* at 20.

26. 487 U.S. 22 (1988).

27. *Id.* at 24.

28. *Id.*

29. *Id.* at 24 n.1 (“Specifically, the forum-selection clause read: ‘Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.’”).

30. *Id.* at 24.

§ 1404(a)<sup>31</sup> or to dismiss the case pursuant to 28 U.S.C. § 1406(a)<sup>32</sup> for improper venue.<sup>33</sup>

The district court denied the motion.<sup>34</sup> However, the court of appeals reversed the district court's decision on the grounds that questions of venue in diversity cases are governed by federal law and the parties' forum-selection clause was enforceable under *The Bremen*.<sup>35</sup> The Supreme Court affirmed the court of appeals' decision to enforce the clause, but on somewhat different grounds.<sup>36</sup> The Court explained that it disagreed with the court of appeals' articulation of the relevant issue in the case as whether the forum-selection clause was unenforceable under *The Bremen* standards.<sup>37</sup> It noted that, although *The Bremen* may be instructive in resolving the parties' dispute, the federal common law that has developed under admiralty jurisdiction cannot be freely transferred to diversity cases.<sup>38</sup> It then explained that the question for consideration was actually whether § 1404(a) itself controlled Ricoh's request to give effect to the forum-selection clause and transfer the case to a court in the designated forum.<sup>39</sup>

The Court ultimately held that federal law, specifically § 1404(a), governed the district court's decision whether to give effect to the forum-selection clause and transfer the case to a court in the specified forum.<sup>40</sup> It explained that a motion to transfer under § 1404(a) calls on the district court to balance certain case-specific factors,<sup>41</sup> and it reasoned that "[t]he presence of a forum-selection

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31. 28 U.S.C. § 1404(a) (2006) ("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.").

32. *Id.* § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.").

33. *Stewart*, 487 U.S. at 24.

34. *Id.*

35. *Id.* at 25.

36. *Id.*

37. *Id.* at 28–29.

38. *Id.* at 28.

39. *Id.* at 29.

40. *Id.* at 32. The Court did not address the propriety of the district court's denial of the § 1406(a) motion to dismiss because the parties did not raise this issue on appeal. *See id.* at 28 n.8.

41. When courts exercise their discretion to transfer under § 1404(a), they

clause . . . will be a significant factor that figures centrally in the . . . court's calculus."<sup>42</sup> The Court further explained that "[t]he forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as [Rico] might have [had] it) nor no consideration . . . ."<sup>43</sup>

### C. Carnival Cruise Lines, Inc. v. Shute

The last time the Supreme Court significantly addressed the forum-selection clause issue was in *Carnival Cruise Lines, Inc. v. Shute*<sup>44</sup> in 1991, which was, like *The Bremen*, an admiralty case.<sup>45</sup> The Shutes (a married couple) had purchased tickets from an Arlington, Washington, travel agent for a seven-day cruise on Carnival Cruise Lines' ("Carnival") ship the *Tropicale*.<sup>46</sup> They paid the agent for the tickets, and the agent forwarded the payment to Carnival's headquarters in Miami, Florida.<sup>47</sup> Carnival then sent the tickets to the Shutes in Washington.<sup>48</sup> The face of each ticket contained the following forum-selection clause:

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.<sup>49</sup>

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consider a number of factors, including a strong preference for plaintiff's choice of forum, ease of access to sources of proof, the availability of compulsory process for unwilling witnesses, the cost of obtaining attendance of willing witnesses, practical problems that make trial of a case easy, expeditious, and inexpensive, and public interest factors, including the relative congestion of court dockets, choice of law considerations, and the relationship of the community in which the courts and jurors are required to serve to the occurrences that gave rise to the litigation.

IDES & MAY, *supra* note 3, at 422.

42. *Stewart*, 487 U.S. at 29.

43. *Id.* at 31.

44. 499 U.S. 585 (1991).

45. *See id.* at 587.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 587-88.

The Shutes boarded the *Tropicale* in Los Angeles, California.<sup>50</sup> The ship sailed to Puerto Vallarta, Mexico, and returned to Los Angeles.<sup>51</sup> While en route, in international waters off the Mexican coast, Mrs. Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley.<sup>52</sup> Notwithstanding the forum-selection clause printed on their tickets, the Shutes sued Carnival in the U.S. District Court for the Western District of Washington, claiming that Carnival and its employees negligently caused Mrs. Shute's slip-and-fall accident.<sup>53</sup>

Carnival moved for the case to be dismissed or transferred pursuant to § 1406(a).<sup>54</sup> It argued that venue was improper in the Western District of Washington because the forum-selection clause required the Shutes to bring their suit in Florida,<sup>55</sup> "to the exclusion of the Courts of any other state."<sup>56</sup> In the alternative, Carnival moved for dismissal on the basis that the district court lacked personal jurisdiction over Carnival because Carnival's contacts with Washington were insufficient.<sup>57</sup> The district court granted the motion to dismiss based on insufficient contacts.<sup>58</sup> However, the U.S. Court of Appeals for the Ninth Circuit reversed, finding that Carnival did, in fact, have sufficient contacts with the forum state.<sup>59</sup> Additionally, relying on *The Bremen*, it held that the forum-selection clause was unenforceable because the parties did not freely bargain for it.<sup>60</sup> The Supreme Court granted certiorari to address whether the court of appeals was correct in holding that the district court should have heard the Shutes' claim.<sup>61</sup>

The Court ultimately reversed the Ninth Circuit's decision on the basis that the forum-selection clause was dispositive; thus, it did

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50. *Id.* at 588.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 388 n.9 (9th Cir. 1990).

55. *Id.* at 387.

56. *Carnival Cruise*, 499 U.S. at 588.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 589.

61. *Id.*

not address the personal jurisdiction issue.<sup>62</sup> The Court distinguished this case from *The Bremen*.<sup>63</sup> It explained that while *The Bremen* involved a far-from-routine transaction negotiated by two business corporations, the passage contract at issue in this case was purely routine, nearly identical to every passage contract that Carnival and most other cruise lines issued, and was likely not negotiated.<sup>64</sup> The Court then refined the analysis of *The Bremen* to “account for the realities of form passage contracts.”<sup>65</sup> First, it rejected the court of appeals’ finding that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it was not the subject of bargaining.<sup>66</sup> Instead, the Court held that a reasonable forum-selection clause in a form contract is permissible.<sup>67</sup> However, it emphasized that such clauses are subject to judicial scrutiny for fundamental fairness.<sup>68</sup> It then held that a party attempting to have such a clause set aside for reasons of inconvenience bears a heavy burden of proof, which the Shutes had failed to satisfy.<sup>69</sup>

The trifecta of cases described above has left the federal forum-selection clause analysis in shambles because lower courts disagree as to how they should interpret these cases collectively. First, although it is uncontroverted that federal law applies to the validity and enforceability of forum-selection clauses in admiralty cases,<sup>70</sup> lower courts are split as to the law that applies in the context of diversity jurisdiction.<sup>71</sup> This confusion is rooted, in part, in the courts’ differing interpretations of *Stewart*. Did the *Stewart* Court hold that federal law generally applies to the validity and enforceability of forum-selection clauses,<sup>72</sup> or merely that federal procedural standards govern the enforcement of otherwise valid and

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62. *Id.*

63. *Id.* at 592–93.

64. *Id.* at 593.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 595.

69. *Id.* at 594–95.

70. *Id.* at 590; *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 12 (1972).

71. Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1926–29 (2009).

72. *See M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 n.4 (8th Cir. 1999).

enforceable clauses?<sup>73</sup> Additionally, confusion surrounding *Stewart* and *Carnival Cruise* has led courts to disagree over the appropriate procedural mechanisms that they should use when enforcing forum-selection clauses.<sup>74</sup> As a result, the federal courts are divided as to the appropriate law to apply and mechanisms to use when they determine when and how to enforce forum-selection clauses.<sup>75</sup> This Note will focus on the latter and will leave the applicable law problem for future discussion.

### III. CURRENT LEGAL FRAMEWORK

#### A. Interpreting Forum-Selection Clauses: *The Federal Taxonomy*

When a federal court considers the implications of a contractual forum-selection clause, its first step is determining the type of clause it is being asked to enforce.<sup>76</sup> The taxonomy that is generally employed distinguishes between “mandatory” and “permissive” clauses.<sup>77</sup> A mandatory clause has been described as one that requires any dispute arising under the contract to be brought *only* in a specified state or foreign court.<sup>78</sup> Alternatively, a permissive clause has been described as one that allows a contract dispute to be brought in either a state or federal court located in the designated forum.<sup>79</sup>

However, current case law indicates that courts no longer adhere to the foregoing definitional framework. Currently, the general rule is that a forum-selection clause is treated as mandatory (hereinafter “exclusive”<sup>80</sup>) *only if* it contains clear, unambiguous language of the parties’ intent to make the specified forum compulsory and

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73. See *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 826 (6th Cir. 2009).

74. See *infra* Part III.B.

75. See *Holt*, *supra* note 71; *infra* Part III.B.

76. *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 17 (1st Cir. 2009) (“Under federal law, the threshold question in interpreting a forum[-]selection clause is whether the clause at issue is permissive or mandatory.”); *Res Exhibit Servs., LLC v. Tecan Grp., Ltd.*, No. 09-CV-6659, 2010 U.S. Dist. LEXIS 60948, at \*6 (W.D.N.Y. June 21, 2010) (“The first step for assessing the enforceability of a forum[-]selection clause is to determine whether the clause is mandatory or permissive.”).

77. *Rivera*, 575 F.3d at 17.

78. See *IDES & MAY*, *supra* note 3, at 427–28.

79. See *id.* at 428.

80. It is appropriate to label these clauses “exclusive” rather than “mandatory” because doing so more adequately reflects their definition.

exclusive.<sup>81</sup> Therefore, a clause that merely authorizes jurisdiction in a specified forum, but does not clearly prohibit litigation elsewhere, will be interpreted as permissive (hereinafter “non-exclusive”<sup>82</sup>).<sup>83</sup> Furthermore, if a clause is ambiguous or is subject to opposing, yet reasonable, interpretations of the parties’ intent, it will be construed against its drafter.<sup>84</sup> Under this framework, a clause that allows suit to be filed in either a state or federal court in a particular state or county can be classified as exclusive so long as it contains the requisite language of exclusivity.<sup>85</sup>

*B. Lack of Uniformity Problem:  
Determining How the Federal Courts  
Will Treat a Particular Forum-Selection Clause*

Once a federal court has classified a forum-selection clause as exclusive or non-exclusive, it can determine the appropriate

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81. *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft* (“BMW”), 314 F.3d 494, 499 (10th Cir. 2002); *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1036–37 (9th Cir. 1995); *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 52–53 (2d Cir. 1994); *Xerox Corp. v. Premiere Colors, LLC*, No. 3:10-CV-412, 2010 U.S. Dist. LEXIS 106566, at \*5 (E.D. Va. Oct. 4, 2010); *Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG*, 560 F. Supp. 2d 432, 436 (W.D.N.C. 2008); *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 618 (N.D. Cal. 2002); *Intermetals Corp. v. Hanover Int’l Aktiengesellschaft Fur Industrierversicherungen*, 188 F. Supp. 2d 454, 460–61 (D.N.J. 2001).

82. It is appropriate to label these clauses “non-exclusive” rather than “permissive” because doing so more accurately reflects their definition.

83. *Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, LLC*, 526 F.3d 1379, 1381 (11th Cir. 2008); *K & V Scientific*, 314 F.3d at 498; *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 763–64 (9th Cir. 1989); *Xerox*, 2010 U.S. Dist. LEXIS 106566, at \*5. In addition to the exclusive and non-exclusive categories, one court has held that there is a third category of forum-selection clauses to consider. *Ocwen*, 526 F.3d at 1381. The Eleventh Circuit has explained that there are also “hybrid clauses.” *Id.* A hybrid clause is one that is non-exclusive regarding a plaintiff’s decision as to where to file suit, but exclusive as to a defendant’s acceptance of the plaintiff’s choice of venue. *Id.* In *Ocwen*, the court found the following clause to be a hybrid: “SELLER AND PURCHASER, WAIVE ANY OBJECTION TO THE VENUE OF ANY ACTION FILED IN ANY COURT SITUATED IN THE JURISDICTION IN WHICH THE PROPERTY IS LOCATED AND WAIVE ANY RIGHT TO TRANSFER ANY SUCH ACTION FILED IN ANY COURT TO ANY OTHER COURT.” *Id.* While this category may be adopted by other courts in the future, currently the Eleventh Circuit is the only one that has recognized it. Therefore, at this point, it is simply noteworthy and will not be discussed going forward.

84. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987); *Citro Fla., Inc. v. Citrovale, S.A.*, 760 F.2d 1231, 1232 (11th Cir. 1985); *Intermetals*, 188 F. Supp. 2d at 461; *Caldas & Sons, Inc. v. Willingham*, 791 F. Supp. 614, 619–20 (N.D. Miss. 1992).

85. *Excell, Inc. v. Sterling Boiler & Mech.*, 106 F.3d 318, 321 (10th Cir. 1997). In that case, the court held that a forum-selection clause providing “[j]urisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado,” was exclusive. *Id.* In other words, the language of the clause allowed suit to be filed in a federal court as long as the court was located in El Paso County, Colorado. *See id.*

mechanisms with which to enforce the clause.<sup>86</sup> Unfortunately, there is currently no uniform approach among the federal courts for enforcing forum-selection clauses.<sup>87</sup> Lower federal courts are most noticeably divided about the appropriate procedural mechanisms for enforcing exclusive forum-selection clauses.

Exclusive forum-selection clauses raise two important questions. First, does an exclusive forum-selection clause make venue proper in an otherwise improper forum?<sup>88</sup> In other words, will a court enforce an exclusive forum-selection clause when an action is filed in a forum that the clause specifies, but in which venue is improper under the applicable venue statute or statutes?<sup>89</sup> The second, more complicated question is whether an exclusive forum-selection clause makes venue improper in an otherwise proper forum.<sup>90</sup> In other words, will a court enforce a clause at a defendant's request when a plaintiff has filed suit in a forum other than one that the clause specifies, but in which venue is otherwise proper under the applicable venue statute or statutes?<sup>91</sup> This section will address each of these questions independently.

### 1. Does an Exclusive Clause Make Venue Proper in an Otherwise Improper Forum?

Federal courts have generally accepted that a forum-selection clause can make venue proper in an otherwise improper forum.<sup>92</sup> It has long been established that venue—the place where judicial authority may be exercised—though defined by legislation, is related to the convenience of the parties and is, therefore, subject to their disposition.<sup>93</sup> Thus, venue statutes merely accord a defendant a personal privilege with respect to venue, which she may assert, or waive, at her own election.<sup>94</sup> Therefore, parties can agree to venue in

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86. *See infra* Part III.B.2.

87. Holt, *supra* note 71, at 1918–29.

88. *See infra* Part III.B.1.

89. *See infra* Part III.B.1.

90. *See infra* Part III.B.2.

91. *See infra* Part III.B.2.

92. *See* *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167–68 (1939).

93. *Id.* at 168.

94. *Id.*; *Commercial Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 179 (1929); *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923).

an otherwise improper forum and, in effect, contractually waive their rights to object to venue in the specified forum.

## 2. Does an Exclusive Clause Make Venue Improper in an Otherwise Proper Forum?

Whether an exclusive forum-selection clause makes venue improper in an otherwise proper forum will dictate the appropriate procedural mechanism or mechanisms for enforcing the clause.<sup>95</sup> Federal courts are sharply divided on this issue<sup>96</sup> due to differing interpretations of *Stewart* and *Carnival Cruise*.

In *Stewart*, the Court seemed to adopt the view that venue is proper in a given forum, notwithstanding an exclusive forum-selection clause to the contrary, so long as an applicable venue statute is satisfied.<sup>97</sup> Thus, since venue was proper in the Northern District of Alabama—notwithstanding the forum-selection clause designating Manhattan as the exclusive forum for litigation under the contract<sup>98</sup>—a motion to transfer under § 1404(a) (the proper-to-proper venue transfer statute<sup>99</sup>) rather than § 1406(a) (the improper-to-proper venue transfer statute<sup>100</sup>) was appropriate for enforcing the exclusive forum-selection clause.<sup>101</sup> However, according to the Court, the parties did not dispute whether the district court properly denied the motion to dismiss for improper venue under § 1406(a).<sup>102</sup> Thus, the issue regarding the appropriate motion to transfer for enforcing the forum-selection clause was technically not before the Court.<sup>103</sup> The Court's determination that § 1404(a), rather than § 1406(a), was appropriate because venue was proper notwithstanding the forum-selection clause was, therefore, arguably dicta.<sup>104</sup>

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95. See *infra* Part III.B.2.a–b.

96. See *infra* Part III.B.2.a–b.

97. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30–31 (1988).

98. *Stewart*, notwithstanding the forum-selection clause, originally filed suit for breach of contract in the U.S. District Court for the Northern District of Alabama. *Id.* at 24.

99. 28 U.S.C. § 1404(a) (2006); *Van Dusen v. Barrack*, 376 U.S. 612, 633–34 (1964).

100. 28 U.S.C. § 1406(a); *Van Dusen*, 376 U.S. at 634.

101. *Stewart*, 487 U.S. at 30–31.

102. *Id.* at 28 n.8. The Court seemed to blatantly ignore that Ricoh had in fact raised the issue in its appellate brief. Resp't Br. on the Merits, *Stewart*, 487 U.S. 22 (No. 86-1908).

103. *Flake v. Medline Indus., Inc.*, 882 F. Supp. 947, 951 (E.D. Cal. 1995).

104. *Id.*; Georgene M. Vairo, *Effect of Forum Selection Clauses*, in 17 MOORE'S FEDERAL PRACTICE-CIVIL § 111.04(4)(a)(ii) (2011).

The Court added to the confusion with its decision in *Carnival Cruise*.<sup>105</sup> Although transfer was surely a viable alternative for enforcing the forum-selection clause in that case,<sup>106</sup> the Court did not address whether the action should have been transferred, and if so, under which statute.<sup>107</sup> Nor did the Court remand the case for consideration of the transfer issue.<sup>108</sup> It merely held, in one sentence, that it reversed the judgment of the court of appeals.<sup>109</sup> On remand, the Ninth Circuit apparently read the Supreme Court's decision as reinstating the district court's unconditional dismissal.<sup>110</sup> Thus, it affirmed the judgment of the district court "for the reasons set forth in [the Supreme Court's decision],"<sup>111</sup> which effectively dismissed the action because of the forum-selection clause.<sup>112</sup> Since § 1404(a) only permits transfer, the Court arguably overruled *Stewart* and endorsed § 1406(a) as the appropriate mechanism for enforcing exclusive forum-selection clauses.<sup>113</sup>

The confusion that these cases have created manifests itself in the variety of approaches that federal courts have adopted for enforcing exclusive forum-selection clauses in the context of both motions to dismiss and motions to transfer.

*a. Motions to dismiss based on  
valid exclusive forum-selection clauses*

The federal courts are especially divided regarding which motions to dismiss are appropriate for enforcing exclusive forum-selection clauses. One approach is to treat these motions under Federal Rule of Civil Procedure 12(b)(3) ("12(b)(3)") as motions to dismiss for improper venue.<sup>114</sup> Courts that employ this approach, at least implicitly, hold that a valid exclusive forum-selection clause

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105. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

106. See *Stewart*, 487 U.S. at 30–31; Vairo, *supra* note 104, § 111.04(4)(a)(iii).

107. *Carnival Cruise*, 499 U.S. at 589–97; Vairo, *supra* note 104, § 111.04(4)(a)(iii).

108. *Carnival Cruise*, 499 U.S. at 589–97; Vairo, *supra* note 104, § 111.04(4)(a)(iii).

109. *Carnival Cruise*, 499 U.S. at 597.

110. Vairo, *supra* note 104, § 111.04(4)(a)(iii).

111. *Shute v. Carnival Cruise Lines*, 934 F.2d 1091, 1091 (9th Cir. 1991); Vairo, *supra* note 104, § 111.04(4)(a)(iii).

112. *Carnival Cruise*, 499 U.S. at 589.

113. *Flake v. Medline Indus., Inc.*, 882 F. Supp. 947, 952 (E.D. Cal. 1995).

114. See, e.g., *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006).

makes venue improper in all forums except those that the clause specifies.<sup>115</sup> Conversely, the courts that denounce the 12(b)(3) approach generally hold that exclusive forum-selection clauses do not make venue improper in an otherwise proper forum.<sup>116</sup> Courts that subscribe to this latter principle have analyzed motions to dismiss based on exclusive forum-selection clauses under Federal Rules of Civil Procedure 12(b)(1) (“12(b)(1)”), 12(b)(6) (“12(b)(6)”), and the federal common law doctrine of forum non conveniens.<sup>117</sup>

Currently, it appears that the majority of federal courts analyze motions to dismiss based on exclusive forum-selection clauses under 12(b)(3) as motions to dismiss for improper venue. The Fourth, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all endorsed this approach.<sup>118</sup> The Eighth Circuit has yet to resolve the issue,<sup>119</sup>

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115. *See id.* at 550–51.

116. *E.g.*, *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984) (holding that an exclusive forum-selection clause did not make venue improper because venue was otherwise proper under the applicable federal venue statute); *TriState HVAC Equip., LLP v. Big Belly Solar, Inc.*, No. 10-1054, 2010 U.S. Dist. LEXIS 112574, at \*36 (E.D. Pa. Oct. 20, 2010) (denying the 12(b)(3) motion to dismiss based on a forum-selection clause because “the Third Circuit has held that a forum-selection clause does not render venue improper in an otherwise proper forum”).

117. *E.g.*, *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 833–34 (6th Cir. 2009) (affirming the district court’s dismissal based on an exclusive forum-selection clause pursuant to the doctrine of forum non conveniens); *LFC Lessors*, 739 F.2d at 7 (holding that a motion to dismiss based on an exclusive clause “should have been filed under 12(b)(6), urging dismissal for failure to state a claim upon which relief can be granted” (citation omitted)); *Cfirstclass Corp. v. Silverjet PLC*, 560 F. Supp. 2d 324, 327–29 (S.D.N.Y. 2008) (treating a motion to dismiss based on a forum-selection clause as a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction).

118. *Baker v. Adidas Am., Inc.*, 335 Fed. App’x 356, 359 (4th Cir. 2009) (“The validity of a forum-selection clause is properly analyzed under Federal Rule of Civil Procedure 12(b)(3) . . . .” (citation omitted)); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (“A motion to enforce a forum[-]selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3) . . . .”); *Trafigura Beheer B.V. v. M/T PROBO ELK*, 266 F. App’x 309, 311 (5th Cir. 2007) (dismissing the case based on an exclusive forum-selection clause that provided for exclusive venue in certain foreign courts because the United States was an improper forum); *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 746 (7th Cir. 2007) (“It is not entirely clear whether a motion seeking dismissal based on a forum[-]selection clause, including an arbitration clause, is better conceptualized as an objection to venue, and hence properly raised under Rule 12(b)(3), or as a failure to state a claim, and thus properly raised under Rule 12(b)(6). Wright and Miller observe, however, that ‘most of the decided cases use [Rule 12(b)(3)] as the basis’ for deciding such a motion. This court has followed the majority rule.” (citation omitted)); *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft (“BMW”)*, 314 F.3d 494, 497 (10th Cir. 2002) (“A motion to dismiss based on a forum[-]selection clause frequently is analyzed as a motion to dismiss for improper venue under Fed.R.Civ.P. 12(b)(3).” (citing *Riley v. Kinglsey Underwriting Agencies, Ltd.*, 969 F.2d 953, 956 (10th Cir. 1992))); *Lipcon v. Underwriters at Lloyd’s, London*, 148 F.3d 1285, 1290 (11th Cir. 1998) (“[W]e hold that motions to dismiss upon the basis of choice-of-forum . . .

however, the district courts within the circuit appear to uniformly employ the 12(b)(3) approach.<sup>120</sup> The Second Circuit is similarly undecided, but, unlike the district courts in the Eighth Circuit, Second Circuit district courts are split as to the appropriate motion to use.<sup>121</sup> Courts in the Second Circuit have, on different occasions, analyzed motions to dismiss based on exclusive forum-selection clauses under 12(b)(1),<sup>122</sup> 12(b)(3),<sup>123</sup> and 12(b)(6).<sup>124</sup> The First and

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clauses are properly brought pursuant to Fed.R.Civ.P. 12(b)(3) as motions to dismiss for improper venue.”); *Commerce Consultants Int’l, Inc. v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697, 699–700 (D.C. Cir. 1989) (affirming the district court’s dismissal based on an exclusive forum-selection clause under 12(b)(3)).

119. *Rainforest Cafe, Inc. v. EklecCo, L.L.C.*, 340 F.3d 544, 545 n.5 (8th Cir. 2003) (“Rainforest moved to dismiss under Rules 12(b)(3) and 12(b)(6) of Civil Procedure. Although not addressed below, we recognize that there is some controversy as to whether Rule 12(b)(3) or 12(b)(6) is the proper vehicle for bringing a motion to dismiss based on improper venue when the issue turns on a forum[-]selection clause in the parties’ underlying contract . . . . The question appears to be open in this circuit, and we need not address it in this appeal since EklecCo has moved under both subsections of Rule 12.”).

120. *Webb Candy, Inc. v. Walmart Stores, Inc.*, No. 09-CV-2056 (PJS/JJK), 2010 U.S. Dist. LEXIS 55985, at \*10 (D. Minn. June 7, 2010) (“[T]his Court agrees with the circuit courts and district courts that have held that a motion to dismiss on the basis of a forum-selection clause is properly brought as a motion to dismiss for improper venue under *Rule 12(b)(3)*, and not as a motion to dismiss for failure to state a claim under *Rule 12(b)(6)* (or as a motion to dismiss for lack of subject-matter jurisdiction under *Rule 12(b)(1)*.”); *CFMOTO Powersports Inc. v. NNR Global Logistics USA, Inc.*, No. 09-2202 (JRT/JJK), 2009 U.S. Dist. LEXIS 113058, at \*6 n.2 (D. Minn. Dec. 4, 2009) (“The Eighth Circuit has not definitively decided the question of whether a motion to dismiss pursuant to a forum-selection clause is properly brought under *Federal Rule of Civil Procedure 12(b)(3)* or *12(b)(6)* . . . . District courts in this circuit, however, have determined that a 12(b)(3) motion is a proper vehicle by which to challenge venue under a forum-selection clause.”); *Tockstein v. Spoeneman*, No. 4:07CV00020 ERW, 2007 U.S. Dist. LEXIS 82849, at \*7 (E.D. Mo. Nov. 7, 2007) (“Because most circuits that have decided that *Fed. R. Civ. P. 12(b)(3)* is the proper vehicle for seeking enforcement of a forum[-]selection clause . . . the Court will treat Defendants’ motion to dismiss for lack of jurisdiction based on the forum[-]selection clause as a motion under *Fed. R. Civ. P. 12(b)(3)*.”).

121. *See Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384, 393 (2d Cir. 2007) (affirming in part the district court’s 12(b)(3) dismissal for improper venue based on an exclusive forum-selection clause); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 508 n.6 (2d Cir. 1998) (“Because the district court based its decision to grant [defendant’s] motion to dismiss on the court’s finding of a forum-selection clause, the dismissal is founded on Rule 12(b)(6).”); *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148, 152, 160 (2d Cir. 1984) (affirming the lower court’s dismissal under 12(b)(1) based on an exclusive forum-selection clause).

122. *AVC Nederland*, 740 F.2d at 152, 160; *Cfirstclass*, 560 F. Supp. 2d at 326–27 (“There is a split of authority in the Second Circuit regarding the appropriate procedural mechanism by which to enforce a forum[-]selection clause . . . . [Defendant] brings the present motion pursuant to Rule 12(b)(1), which the Court believes is appropriate.”).

123. *See Phillips*, 494 F.3d at 384, 393.

124. *S.K.I. Beer Corp. v. Baltika Brewery*, 612 F.3d 705, 707, 712 (2d Cir. 2010); *Evolution Online*, 145 F.3d at 508 n.6.

Third Circuits have clearly held that courts should analyze these motions under 12(b)(6).<sup>125</sup> Finally, separate panels in the Sixth Circuit, in two fairly recent decisions, have endorsed the use of both 12(b)(6) and the doctrine of *forum non conveniens*<sup>126</sup> as appropriate vehicles for enforcing valid exclusive forum-selection clauses.<sup>127</sup>

*b. Motions to transfer based on  
valid exclusive forum-selection clauses*

Courts also disagree about the appropriate motion to transfer for enforcing exclusive forum-selection clauses. Similar to the courts' confusion regarding motions to dismiss, this disagreement is largely due to uncertainty as to whether such a clause makes venue improper in all but the specified forum or forums.<sup>128</sup> Again, the Supreme Court's decisions in *Stewart* and *Carnival Cruise* are to blame for this confusion.<sup>129</sup> Some courts hold that exclusive forum-selection clauses vitiate otherwise proper venue and, therefore, § 1406(a) applies. However, others hold that such clauses do not affect venue and, thus, § 1404(a) controls.<sup>130</sup> Under the former approach, a valid

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125. *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009) ("In this circuit, we treat a motion to dismiss based on a forum[-]selection clause as a motion alleging the failure to state a claim for which relief can be granted under Rule 12(b)(6)."); *Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 6, 9 (3d Cir. 1988) (granting a motion to dismiss based on a forum-selection clause pursuant to 12(b)(6)).

126. The use of *forum non conveniens* for enforcing forum-selection clauses has not really caught on in any significant way; the Sixth Circuit appears to be the only circuit that still explicitly endorses it. Therefore, this approach, mentioned here simply to further highlight the pervasive disagreement among federal courts, will not be discussed further.

127. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009) (holding that *forum non conveniens* was the appropriate procedural vehicle through which to enforce a valid exclusive forum-selection clause); *Langley v. Prudential Mortg. Capital Co., LLC*, 546 F.3d 365, 366 (6th Cir. 2008) ("Because a valid and enforceable contract exists, we vacate and remand for the district court to entertain a motion to enforce the forum[-]selection clause under FED. R. CIV. P. 12(b)(6) . . .").

128. See *Haskel v. FPR Registry, Inc.*, 862 F. Supp. 909, 915 (E.D.N.Y. 1994).

129. See *infra* Part III.B.2.b.

130. *Flake v. Medline Indus., Inc.*, 882 F. Supp. 947, 950–51 (E.D. Cal. 1995) (comparing *Haskel*, 862 F. Supp. at 913–16 (finding a forum-selection clause unenforceable by motion to dismiss for improper venue), and *Lambert v. Kysar*, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993) (dismissal for improper venue based on forum-selection clause inappropriate), with *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (*per curiam*) (dismissal for improper venue based on forum-selection clause appropriate), and *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456, 1457 n.1 (S.D.N.Y. 1990) (motion to dismiss based on forum-selection clause properly considered as motion to dismiss for lack of venue)). Compare *Se. Consulting Grp., Inc. v. Maximus, Inc.*, 387 F. Supp. 2d 681, 684–86 (S.D. Miss. 2005) (employing the § 1404(a) approach), and *Water Energizers Ltd. v. Water Energizers, Inc.*, 788 F. Supp. 208, 210–13 (S.D.N.Y. 1992) (applying § 1404(a) to a motion to transfer based on an exclusive forum-selection clause), with *Hoffman v.*

exclusive forum-selection clause will carry dispositive weight in the transfer-dismissal analysis.<sup>131</sup> Under the latter approach, courts disagree about the appropriate weight that an exclusive forum-selection clause will carry in the transfer analysis. Some courts hold that such clauses are the most important—and often dispositive—factor in making the § 1404(a) transfer determination.<sup>132</sup> Others hold that courts should give such clauses neither dispositive weight nor zero weight in the transfer analysis.<sup>133</sup> This is yet another example of the pervasive lack of uniformity that plagues federal forum-selection clause jurisprudence.

#### IV. CRITIQUE OF EXISTING LAW

Many courts, including federal courts, recognize the freedom to contract regarding the forum in which disputes arising under an agreement shall be adjudicated.<sup>134</sup> However, the most important purpose of forum-selection clauses—to provide predictability, stability, and foreseeability as to where suits arising under a contractual agreement can or will be litigated<sup>135</sup>—has been severely undermined by the lack of uniformity among federal courts regarding the enforcement of such clauses.<sup>136</sup> The remainder of this Note will examine the aforementioned predominant approaches that federal

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Burroughs Corp., 571 F. Supp. 545, 551 (N.D. Tex. 1982) (holding that a motion to transfer based on an exclusive forum-selection clause is “more appropriately treated under section 1406(a)”), and *Russo v. Ballard Med. Prods.*, 352 F. Supp. 2d 177, 182 (D.R.I. 2005) (granting a motion to transfer based on an exclusive forum-selection clause under § 1406(a)).

131. See *Russo*, 352 F. Supp. 2d at 182; *Hoffman*, 571 F. Supp. at 550–51.

132. *REO Sales, Inc. v. Prudential Ins. Co. of Am.*, 925 F. Supp. 1491, 1493 (D. Colo. 1996) (“[I]t is clear that an enforceable forum-selection clause will often carry the day when making a section 1404(a) determination.”). See *Outek Caribbean Distribs., Inc. v. Echo, Inc.*, 206 F. Supp. 2d 263, 266 (D.P.R. 2002) (acknowledging the considerable weight of the forum-selection clause in determining whether to transfer to a different forum); *Black & Veatch Constr., Inc. v. ABB Power Generation, Inc.*, 123 F. Supp. 2d 569, 581 (D. Kan. 2000) (deeming the existence of an exclusive forum-selection clause the most important factor in the transfer analysis).

133. See, e.g., *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 537–38 (6th Cir. 2002); *Tex. Cmty. Bank, N.A. v. Dunn*, No. H-09-3514, 2010 U.S. Dist. LEXIS 82765, at \*9–10 (S.D. Tex. Aug. 13, 2010); *Ohio Learning Ctrs., LLC v. Sylvan Learning, Inc.*, No. 1:10-CV-1062, 2010 U.S. Dist. LEXIS 70575, at \*13 (N.D. Ohio July 14, 2010); *Shoremaster, Inc. v. Hanson Marine Props.*, No. 09-1099-CV-W-FJG, 2010 U.S. Dist. LEXIS 42837, at \*15 (W.D. Mo. May 3, 2010).

134. See Richard T. Franch et al., *Choice of Law and Choice of Forum Are Both Crucial: Parties to International Agreements Should Give Careful Thought to Each*, NAT’L L.J., Feb. 11, 2002, available at [http://www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C296%5CNLJweb.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C296%5CNLJweb.pdf).

135. See *supra* Part I.

136. See *supra* Part III.

courts employ when enforcing valid and enforceable exclusive forum-selection clauses in order to (1) illustrate how those approaches function when courts apply them; (2) highlight their strengths and weaknesses; (3) propose a simple uniform solution to the forum-selection clause problem; and (4) explore the practical and doctrinal implications of that proposal.

*A. The Motion to Dismiss Problem:  
Examining the Strengths and Weaknesses of Each Approach*

As noted *supra*, courts are divided about the proper motion to dismiss for enforcing exclusive forum-selection clauses—12(b)(1), 12(b)(3), or 12(b)(6).<sup>137</sup> When examining how each of those motions operates, it becomes apparent that 12(b)(1) and 12(b)(6) are both practically and doctrinally unfit to be employed in the forum-selection clause context. The 12(b)(3) approach, on the other hand, does not suffer from the same pitfalls and, thus, is more appropriate for enforcing exclusive forum-selection clauses.

First, when a court analyzes a 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction based on an exclusive forum-selection clause, it must operate under the precept that the clause somehow affects the court's power to adjudicate the dispute.<sup>138</sup> However, the argument that forum-selection clauses tend to "oust" federal courts of jurisdiction is little more than an archaic legal fiction that the Supreme Court dispelled in *The Bremen*.<sup>139</sup> The basis on which a defendant seeks dismissal when invoking a forum-selection clause—namely, that the agreement between the parties prohibits the litigation from proceeding in a particular forum—is completely unrelated to the basis of federal subject-matter jurisdiction (that is, either federal question jurisdiction or diversity of citizenship).<sup>140</sup>

Forum-selection clauses designate venue,<sup>141</sup> which concerns whether the geographic location of a lawsuit is convenient for a just

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137. See *supra* Part III.B.2.a.

138. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548 (4th Cir. 2006).

139. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

140. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1289 (11th Cir. 1998).

141. *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986).

resolution of the dispute.<sup>142</sup> Venue is considered a defendant's personal right that the defendant can waive or alter by agreement.<sup>143</sup> Subject-matter jurisdiction, on the other hand, imposes nonwaivable structural limits on a court's power to adjudicate a dispute.<sup>144</sup> Thus, a forum-selection clause cannot alter the court's ability to exercise subject-matter jurisdiction. However, because venue is related to the convenience of the parties and is, therefore, subject to their disposition,<sup>145</sup> it seems intuitive that a valid and enforceable exclusive forum-selection clause can render venue improper in a forum that would otherwise be proper under an applicable venue statute.

Additionally, when a court treats a motion to dismiss based on an exclusive forum-selection clause as a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court may only consider facts and documents that are part of, or incorporated into, the complaint.<sup>146</sup> Under this standard, the pleadings are accepted as true<sup>147</sup> and the court's analysis is confined therein.<sup>148</sup> In contrast, when a court treats a motion to dismiss based on a forum-selection clause under 12(b)(3), it may freely consider evidence outside the pleadings.<sup>149</sup> The latter is far more consistent with the Court's decision in *The Bremen*, which provided that a forum-selection clause is presumed valid unless the resisting party presents evidence that enforcing the clause would be unreasonable under the circumstances.<sup>150</sup>

Finally, and most importantly, forum-selection clauses determine venue,<sup>151</sup> and judicial economy requires that selection of the proper forum for adjudication be made as early as possible in the

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142. *IDES & MAY*, *supra* note 3, at 403.

143. *Id.*

144. *Id.*

145. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939).

146. *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009) (quoting *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 321 (1st Cir. 2008)).

147. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549 (4th Cir. 2006).

148. *Rivera*, 575 F.3d at 15.

149. *Sucampo Pharms.*, 471 F.3d at 549–50.

150. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

151. *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986).

litigation.<sup>152</sup> However, using 12(b)(1) or 12(b)(6) to enforce forum-selection clauses severely undermines this axiom.<sup>153</sup> A 12(b)(1) motion to dismiss “is non-waivable and may be brought at any time—even on appeal—regardless of whether a litigant raised the issue in an initial pleading.”<sup>154</sup> Therefore, under the 12(b)(1) approach, litigants can withhold their forum-selection clause objections until after substantial judicial resources have been expended—until after discovery or even after an adverse verdict.<sup>155</sup> Similarly, a party may bring a 12(b)(6) motion to dismiss at any time during litigation prior to adjudication on the merits.<sup>156</sup> Thus, as with the 12(b)(1) approach, under the 12(b)(6) approach, litigants can withhold their forum-selection clause objections until after substantial expenditure of judicial resources.<sup>157</sup>

Conversely, because courts disfavor 12(b)(3) motions to dismiss for improper venue, under this approach, a defendant must raise the forum-selection clause issue in her first responsive pleading or waive the right to invoke the clause altogether.<sup>158</sup> Thus, unlike the 12(b)(1) and 12(b)(6) approaches, the 12(b)(3) approach will result in efficient disposition of cases involving forum-selection clauses and will avoid wasting judicial resources on cases that will ultimately have to be dismissed and relitigated in a different forum.<sup>159</sup>

*B. The Motion to Transfer Problem:  
§ 1404(a) Versus § 1406(a)*

When a plaintiff files suit in a forum other than that designated by an exclusive forum-selection clause, a defendant may, instead of moving to dismiss, ask the court to enforce the clause by transferring the case to the designated forum.<sup>160</sup> Unfortunately, as with most

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152. *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995).

153. *See id.*; *Sucampo Pharms.*, 471 F.3d at 548–49.

154. *Sucampo Pharms.*, 471 F.3d at 548.

155. *Id.* at 549.

156. *Id.*

157. *See id.*

158. *Id.*; *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995) (“An objection to venue must be made at the earliest possible opportunity.”).

159. *Sucampo Pharms.*, 471 F.3d at 549.

160. *See supra* Part III.B.2.b. A motion to transfer is not available when enforcing a forum-selection clause that does not have a federal court option because a federal district court cannot transfer a case to a state or foreign court. *See* 28 U.S.C. §§ 1404(a), 1406(a) (2006). Thus, if an exclusive forum-selection clause requires that suit be brought in either a particular state court or a

aspects of federal forum-selection clause jurisprudence, federal courts are divided as to which motion to transfer is appropriate for enforcing such clauses—§ 1404(a) or § 1406(a).<sup>161</sup> In order to appreciate how these motions differ in practice, it is helpful to examine how they each function.

### 1. The *Van Dusen v. Barrack* Rule

Under § 1404(a), a “district court may transfer any civil action to any other district or division where it might have been brought.”<sup>162</sup> Thus, the statute allows transfer from one proper forum to another.<sup>163</sup> In *Van Dusen v. Barrack*,<sup>164</sup> the Supreme Court held that when a court grants a motion to transfer under § 1404(a), the transferee court must apply the state law that the transferor court would have applied had there been no change of venue.<sup>165</sup> This rule stems directly from the central policy that underlies the *Erie* doctrine, which the Supreme Court laid out in *Erie v. Tompkins*<sup>166</sup>—that a “suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result” because of the mere happenstance of federal diversity jurisdiction.<sup>167</sup> The *Van Dusen* rule is intended to “ensure that the ‘accident’ of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.”<sup>168</sup> This purpose would be defeated if non-resident (diverse) defendants, properly subject to

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court in a foreign country, it cannot be enforced via transfer, but only via dismissal. See *IDES & MAY*, *supra* note 3, at 427–28; 28 U.S.C. §§ 1404(a), 1406(a).

161. See *supra* Part III.B.2.b.

162. 28 U.S.C. § 1404(a) (2006).

163. See *Van Dusen v. Barrack*, 376 U.S. 612, 633–34 (1964) (discussing the difference between § 1404(a) and § 1406(a)).

164. *Id.*

165. *Id.* at 639; *IDES & MAY*, *supra* note 3, at 423 (explaining that under *Van Dusen*, the substantive law that the transferor court would have applied follows the case to the transferee court).

166. 304 U.S. 64 (1938). The Court there held that in diversity cases, federal courts should apply state substantive law and federal procedural law. *Id.* at 79–80.

167. *Van Dusen*, 376 U.S. at 638 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

168. *Id.*

suit in the transferor state, could invoke § 1404(a) to gain the benefits of the transferee jurisdiction's law.<sup>169</sup>

Under § 1406(a), a party can transfer a suit from an improper venue to a proper one.<sup>170</sup> Unlike a transfer under § 1404(a), when a court transfers a case under § 1406(a), the transferee court need not apply the law that the transferor court would have applied because that law does not follow the case.<sup>171</sup> The reason for this difference is that the *Erie* concerns that arise when transferring from one proper venue to another do not exist when transferring from an improper venue to a proper one.<sup>172</sup> A transfer under § 1406(a) is appropriate when a plaintiff has improperly exercised his or her venue privilege and the defendant is not properly subject to suit in the forum where the action was originally filed.<sup>173</sup> Thus, a § 1406 transfer does not create a situation where the accident of federal diversity jurisdiction enables a defendant to utilize the transfer "to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."<sup>174</sup> This is because the case could not have properly been heard in the forum in which it was originally filed, and, thus, the laws of that venue would not have applied in the first place.<sup>175</sup>

## 2. Sections 1404(a) and 1406(a): Application and Implications

This sub-section will employ a hypothetical exclusive forum-selection clause to illustrate the aforementioned differences between §§ 1404(a) and 1406(a) and their implications on the forum-selection clause analysis. Imagine two parties: Al and Beth. Al resides in State

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169. *Id.* ("What *Erie* and the cases following it have sought was an identity or uniformity between federal and state courts; and the fact that in most instances this could be achieved by directing federal courts to apply the laws of the States 'in which they sit' should not obscure that, in applying the same reasoning to § 1404 (a), the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed." (citation omitted)).

170. *Id.* at 634; 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or . . . transfer such case to any district or division in which it could have been brought." (emphasis added)).

171. IDES & MAY, *supra* note 3, at 423.

172. *See Van Dusen*, 376 U.S. at 638.

173. *See id.* at 634, 638.

174. *See id.* at 638.

175. *See id.* at 634, 638.

Y, whose law, like federal law, looks favorably on forum-selection clauses. Beth resides in State X. Al and Beth enter into a contract that contains an exclusive forum-selection clause providing that “any dispute or lawsuit arising under or out of this contract must be brought in a court located in State X.” Beth allegedly breaches the contract. Al then files suit for breach of contract based on diversity jurisdiction in a federal district court in State Y because State Y’s law is considerably more favorable to his case than that of State X. Beth then moves to enforce the contractual forum-selection clause via transfer to the designated forum (State X). Assume venue is proper in State Y under the applicable venue statute.

The forum-selection clause in the Al-Beth contract is an exclusive clause that by its very terms prohibits litigation anywhere other than in a court in State X.<sup>176</sup> Thus, the district court in State Y can enforce the clause by transferring the case to a district court in State X.<sup>177</sup> However, the vehicle it uses to do so will depend on whether the court is one that adheres to the precept that exclusive forum-selection clauses make venue improper in all but the designated forum.<sup>178</sup> If the court finds that such clauses do so, it will grant Beth’s motion to transfer under § 1406(a)—the improper-to-proper venue transfer statute<sup>179</sup>—notwithstanding that venue is proper in State Y under the applicable venue statute.<sup>180</sup> Thus, the suit will be transferred to a federal court in State X pursuant to the forum-selection clause, and the State X court (the transferee court) will resolve the dispute pursuant to its own substantive law.<sup>181</sup>

Conversely, if the court finds that exclusive forum-selection clauses do not make otherwise proper venues improper, the court

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176. See *supra* Parts III.A, IV.B.2.

177. 28 U.S.C. §§ 1404(a), 1406(a) (2006). It could also dismiss, but for purposes of illustration, dismissal will not be discussed. See *supra* Part III.B.2.a.

178. See *supra* Part III.B.2.b.

179. 28 U.S.C. § 1406(a); *Van Dusen*, 376 U.S. at 634.

180. See *supra* Part IV.B.2.

181. When a court transfers a case under § 1406(a), the law of the transferor does not follow the case. *IDES & MAY*, *supra* note 3, at 423. In practice the law to be applied on transfer is tied to choice of law principles. See *Van Dusen*, 376 U.S. at 627–28. Thus, when a case is transferred under § 1406(a), the transferee court will apply its own choice of law principles, which may or may not dictate that its own substantive law applies when deciding the merits. See *id.*; *IDES & MAY*, *supra* note 3, at 423. However, for purposes of simplicity, assume that in this hypothetical State X’s choice of law principles dictate that its own substantive law applies to the merits of the Al-Beth dispute.

will treat Beth's motion to transfer under § 1404(a)—the proper-to-proper venue transfer statute.<sup>182</sup> Thus, like what occurs under § 1406(a), the case will be transferred to a federal district court in State X.<sup>183</sup> However, unlike under § 1406(a), under § 1404(a), the State X court (the transferee court) must apply the substantive law that the State Y court (the transferor court) would have applied when resolving the dispute,<sup>184</sup> and in this case, State Y law is more favorable to the plaintiff's (Al's) case than is State X law.<sup>185</sup>

Due to the difference between §§ 1404(a) and 1406(a), the motion-to-transfer problem implicates the twin aims of *Erie*—to discourage forum-shopping and to avoid inequitable administration of the law.<sup>186</sup> First, it encourages forum-shopping by allowing plaintiffs who want to circumvent an exclusive forum-selection clause to do so by filing suit in a federal district court that employs the § 1404(a) approach. For example, in the Al-Beth dispute, the substantive law of the forum that is designated in the forum-selection clause (State X) is potentially deleterious to Al's case.<sup>187</sup> Thus, Al has a considerable incentive to “shop” for a federal court that employs the § 1404(a) approach in a forum whose laws are more favorable to his case (for example, State Y).<sup>188</sup> If he succeeds, he can more or less avoid enforcement of the forum-selection clause.<sup>189</sup> Although the court will enforce the clause's geographic terms and transfer the suit to the designated forum, Al can still avoid the application of the unfavorable substantive law of the designated forum (State X) and enjoy the more favorable substantive law of the transferor state (State Y).<sup>190</sup>

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182. 28 U.S.C. § 1404(a); *Van Dusen*, 376 U.S. at 634.

183. Section 1404(a) is discretionary and the court could retain the case if it so desires. However, because State Y favors forum-selection clauses, assume that the court is one that gives valid and enforceable exclusive forum-selection clauses near-dispositive weight in the transfer analysis.

184. *Van Dusen*, 376 U.S. at 639.

185. See *supra* Part IV.B.2. Again, for purposes of simplicity, assume that in this hypothetical State Y's choice of law principles dictate that its own substantive law applies to the merits of the Al-Beth dispute. See *supra* note 181.

186. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

187. See *supra* Part IV.B.2.

188. See *Van Dusen*, 376 U.S. at 639.

189. See *supra* Part IV.B.2.

190. See *Van Dusen*, 376 U.S. at 639.

Second, the motion-to-transfer problem promotes inequitable administration of the law. In a single dispute between one pair of parties (such as the Al-Beth dispute), the forum-selection clause (a freely negotiated contract provision) will have a substantially different effect depending on the approach that the court employs.<sup>191</sup> If the court employs the § 1406(a) approach, it will transfer the case to the designated forum (State X), and the substantive law of that forum will guide the resolution of the dispute.<sup>192</sup> Alternatively, if the court employs the § 1404(a) approach, the case will still be transferred to the designated forum (State X), but the transferee court will have to apply the substantive law of the transferor court (the State Y court) when resolving the dispute.<sup>193</sup> Thus, if the substantive laws of the transferor and transferee courts differ significantly, as they do in this hypothetical,<sup>194</sup> the substantive outcome of the case will be completely different depending on which motion to transfer the transferor court employs.

V. THE REMEDY:  
A SIMPLE UNIFORM SOLUTION

*A. The Supreme Court Should Act*

The Supreme Court must remedy the problems that plague federal forum-selection clause jurisprudence so that forum-selection clauses can serve their primary function—to provide predictability, stability, and foreseeability to contractual relationships regarding where litigation may occur.<sup>195</sup> The Supreme Court should either promulgate a new Federal Rule of Civil Procedure<sup>196</sup> specifically addressing the problems outlined *supra* or grant certiorari to a case on point to provide a remedy by way of judicial holding.

Under either approach, the Court should provide the following. First, notwithstanding applicable federal venue statutes, a valid and enforceable exclusive forum-selection clause—a clause that contains

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191. *See supra* Part IV.B.2.

192. *IDES & MAY*, *supra* note 3, at 423.

193. *Van Dusen*, 376 U.S. at 639.

194. *See supra* Part IV.B.2.

195. *See supra* Part I.

196. “The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals.” 28 U.S.C. § 2072(a) (2006).

clear, unambiguous language of the parties' intent to make the specified forum or forums compulsory and exclusive<sup>197</sup>—renders venue improper in any forum but those designated in the clause. Second, federal courts must use federal procedural mechanisms to enforce valid and enforceable exclusive forum-selection clauses—when enforcing such a clause, a court may either dismiss the case under 12(b)(3) or § 1406(a), or transfer the case to the specified forum under § 1406(a). Regardless of whether the Supreme Court does decide to act and adopt this rule (“the Rule”), the lower federal courts that currently employ the 12(b)(1), 12(b)(6), and § 1404(a) approaches should take it upon themselves to do so.

*B. The Supreme Court's Rule:  
How It Would Solve the  
Forum-Selection Clause Problem*

If the Supreme Court were to act to create the Rule, it would alleviate the practical and doctrinal problems that currently plague the enforcement of exclusive forum-selection clauses in federal court. It would abrogate the confusion that *The Bremen*, *Stewart*, and *Carnival Cruise*<sup>198</sup> created by providing federal courts with a clear set of guidelines for enforcing exclusive forum-selection clauses.

Namely, the Rule would alleviate the current confusion among federal courts regarding the proper procedural mechanisms to use when enforcing exclusive forum-selection clauses.<sup>199</sup> It would reaffirm that courts should use federal procedural mechanisms to enforce valid and enforceable exclusive forum-selection clauses.<sup>200</sup> Additionally, by providing that exclusive forum-selection clauses make venue improper in all but the forum or forums that are specified in the clause, and by specifically providing that courts should use 12(b)(3) and § 1406(a) to enforce such clauses,<sup>201</sup> the Court would eradicate the possibility of confusion regarding both the proper motion to dismiss and the proper motion to transfer.

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197. See, e.g., *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft* (“BMW”), 314 F.3d 494, 499 (10th Cir. 2002).

198. See *supra* Parts II–III.

199. See *supra* Part III.B.

200. See *supra* Part III.

201. See *supra* Part V.A.

The Rule would alleviate the doctrinal concerns surrounding the motion-to-dismiss problem.<sup>202</sup> Enforcing a forum-selection clause under 12(b)(3)<sup>203</sup> is consistent with the basis on which a defendant seeks dismissal when invoking a forum-selection clause—namely, that the agreement between the parties prohibits the litigation from proceeding in a particular forum.<sup>204</sup> Additionally, the Rule is consistent with the federal standard of validity and enforceability of forum-selection clauses<sup>205</sup> because it allows a court to freely consider evidence outside the pleadings.<sup>206</sup> Most importantly, it would promote judicial economy<sup>207</sup> because under 12(b)(3) a defendant must raise the forum-selection clause issue at the earliest possible moment or risk waiving the clause altogether.<sup>208</sup>

Similarly, the Rule would alleviate the doctrinal concerns surrounding the motion-to-transfer problem.<sup>209</sup> By requiring that motions to transfer based on exclusive forum-selection clauses be treated under § 1406(a) rather than under § 1404(a), the Rule would preclude the possibility that a plaintiff could use transfer to circumvent the effect of a forum-selection clause.<sup>210</sup> Moreover, it would ensure the preservation of the twin aims of *Erie*.<sup>211</sup> Under this uniform approach, plaintiffs would have no incentive to shop for a forum with a more favorable approach because there would be only one available approach. Furthermore, inequitable administration of the law would be avoided because the effect of an exclusive clause would not turn on the court's approach.<sup>212</sup>

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202. See *supra* Part IV.A.

203. A motion to dismiss for improper venue. FED. R. CIV. P. 12(b)(3).

204. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1289 (11th Cir. 1998); see *supra* Part IV.A.

205. See *supra* Part IV.A. This standard is used when federal court jurisdiction is derived from something other than diversity—as in admiralty cases. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972).

206. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549–50 (4th Cir. 2006).

207. *Id.* at 549; see *supra* Part IV.A.

208. *Sucampo Pharms.*, 471 F.3d at 549 (citing FED. R. CIV. P. 12(h)(1)); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995) (“An objection to venue must be made at the earliest possible opportunity.”); *supra* Part IV.A.

209. See *supra* Part IV.B.

210. See *supra* Part IV.B.2.

211. See *supra* note 186 and accompanying text.

212. See *supra* Part IV.B.2.

## VI. CONCLUSION

The current disarray of federal forum-selection clause jurisprudence mandates judicial attention. At this point, it is nearly impossible to predict the effect that a given exclusive forum-selection clause will have on federal court proceedings. The primary purpose of forum-selection clauses—to provide predictability, stability, and foreseeability to contractual relationships—has been severely undermined by federal courts' failure to adopt a uniform enforcement approach. The Supreme Court should make substantial efforts to develop a uniform federal approach so that contracting parties can fairly predict how a forum-selection clause will affect litigation in federal courts. A Supreme Court holding, or a new Federal Rule of Civil Procedure, that clearly outlines such an approach will abrogate the pervasive confusion among federal courts,<sup>213</sup> thereby creating a more predictable environment in which the courts can uphold parties' expectations.

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213. Again, if the Supreme Court fails to act, lower federal courts that currently employ the 12(b)(1), 12(b)(6), and § 1404(a) approaches should take it upon themselves to abrogate the current disarray of federal forum-selection clause jurisprudence by adopting the Rule.