

# **“Contractually Valid” Forum Selection Clauses**

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*In Atlantic Marine Construction Company v. United States District Court, the Supreme Court held that a “contractually valid” forum selection clause should be enforced by federal courts absent extraordinary circumstances. Unfortunately, the Court provided no guidance on how to assess whether a clause is “contractually valid.” This Article fills the gap. It argues that the answer to this question turns on three separate inquiries. First, a court should determine whether the forum selection clause is valid as a matter of contract law. Second, the court should interpret the forum selection clause to determine whether it is exclusive and applies to the claims asserted. Third, the court should evaluate whether the forum selection clause is enforceable as a matter of conflict of laws. Until each of these inquiries is complete, it is impossible to know whether a clause is “contractually valid” as that term is used in Atlantic Marine.*

*The Article first surveys federal law in each of these areas to provide an analytical framework for determining when a clause is “contractually valid.” It then relies on an original, hand-collected dataset of 669 federal cases decided after Atlantic Marine to evaluate how the federal courts actually resolve cases where one party challenges the enforceability of a forum selection clause. The cases in that dataset show that forum selection clauses are enforced by the federal courts roughly 87% of the time. They also show that federal courts are reluctant to strike down forum selection clauses for being unreasonable. This reluctance, combined with other doctrinal innovations that favor the enforcement of these clauses, means that the current legal regime overwhelmingly and unduly favors the large corporations that write forum selection clauses into their agreements with customers and employees. In an attempt to address this imbalance, the Article urges the lower federal courts to adopt a number of specific reforms—none of which requires intervention by Congress or the Supreme Court—that would make it easier for individuals litigating in federal court to avoid these clauses.*

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## INTRODUCTION

On December 3, 2013, the United States Supreme Court issued its opinion in *Atlantic Marine Construction Company v. United States District Court*.<sup>1</sup> The case resolved a longstanding circuit split relating to the procedure for enforcing a forum selection clause in federal court.<sup>2</sup> The answer, a unanimous Court held, depends on the identity of the court named in the clause. When the chosen court is a federal court in a different federal district, the matter is governed by the federal transfer statute, 28 U.S.C. § 1404(a). When the chosen court is a state court or a foreign court, the matter is governed by the doctrine of *forum non conveniens*. The decision was generally well-received by scholars and has been widely cited by the lower federal courts. It did not, however, address the most complex and vexing issue relating to forum selection clauses—the issue of when a forum selection clause is enforceable in the first place.

The Court's decision not to engage with this issue was purposeful. A footnote buried deep in the opinion stated that the Court's "analysis presupposes a contractually valid forum-selection clause."<sup>3</sup> In making this presupposition, the Court avoided having to grapple with the thorny question of what, exactly, makes a clause "contractually valid."<sup>4</sup> Over the past eight years, federal judges and their law clerks have devoted countless hours to answering this question. They have pored over state contract law. They have reviewed the Supreme Court's seminal decisions in *The Bremen* and *Carnival Cruise*.<sup>5</sup> They have grappled with mind-bogglingly complicated choice-of-law issues. They have considered whether special venue provisions in federal statutes trump forum selection clauses. And they have researched whether the federal courts are obliged to follow state statutes invalidating forum selection clauses. None of these questions has easy answers. Taken together, they form a dense knot of doctrine.<sup>6</sup>

This Article seeks to untangle the knot. Its first goal is to supply an answer to the question of whether a forum selection clause is "contractually valid" as that term is used in *Atlantic Marine*. This inquiry is complex. Indeed, it is so complex that a federal court must undertake three separate inquiries to answer it. First, the court must determine whether a

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<sup>1</sup> *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 62 n.5 (2013).

<sup>2</sup> This Article uses the term "forum selection clause" to refer to a contract provision that selects a court to resolve disputes between the parties. The term does not include arbitration clauses.

<sup>3</sup> *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 at 62 n.5. In a perfect world, the Court would have stated that its analysis presupposes a "contractually valid *and enforceable* forum selection clause" to more clearly indicate that validity and enforceability are separate inquiries. To date, however, all of the lower courts have construed the "contractually valid" language to encompass issues of enforceability.

<sup>4</sup> Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719, 721 (2015) ("The Court's unanimous decision, centering on § 1404(a) transfers, begs the primary question of which court should determine the validity of a forum-selection clause, subject to what law, and when."); Steve Sachs, *Forum Selection After Atlantic Marine: Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 766 (2014) ("Atlantic Marine places enormous weight on whether a forum-selection clause is valid and enforceable. If it is, enforcement is virtually automatic . . . Yet the opinion says nothing about which clauses are valid in the first place.").

<sup>5</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

<sup>6</sup> Most scholars writing about *Atlantic Marine* have focused on the procedural questions that were the focus of the Court's opinion. See, e.g., Robin J. Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693 (2015); Matthew J. Sorenson, *Enforcement of Forum Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521 (2014); Bradley Scott Shannon, *Forum Selection After Atlantic Marine: Enforcing Forum-Selection Clauses*, 66 HASTINGS L.J. 777 (2014). For one of the few articles that focus on the contractual validity of a forum selection clause after *Atlantic Marine*, see John M. Doroghazi and David J. Norman, *What's Left to Litigate About Forum Selection Clauses? Atlantic Marine Turns Four*, 36 FRANCHISE L.J. 581, 581 (2017).

forum selection clause is *valid* as a matter of contract law. If a clause appears in a contract that is not supported by consideration, for example, the clause is not valid. The inquiry is complicated, however, by the fact that the courts have devised special rules of contract law that apply exclusively to forum selection clauses. Some of these rules relate to fraud. Others relate to third-party beneficiaries. Still others relate to contract termination. As a first step in assessing whether a clause is valid, the court must apply these rules to determine whether the parties have entered into a binding agreement to resolve their disputes in a particular forum and identify which individuals are in fact bound to that agreement.

Second, the court must *interpret* the clause to determine its meaning. If one party is seeking to dismiss or transfer a case on the basis of a forum selection clause, for example, it must persuade the court that the clause selects the court of the chosen jurisdiction to the exclusion of all others. If the resisting party argues that the clause is not broad enough to cover the claims asserted, the court must look to the precise language in the clause to evaluate its intended scope. When the clause is ambiguous, as it often is, the courts must look to prior decisions to assign a presumptive meaning to specific words and phrases to determine the meaning of the clause.

Third, the court must determine whether the clause is *enforceable* as a matter of conflict of laws. There are, broadly speaking, two reasons why a forum selection clause might not be enforceable. First, a clause may be unenforceable because it is contrary to public policy. Second, a clause may be unenforceable because it is unreasonable. While public policy and reasonableness are famously elastic concepts, the courts have over the years identified a number of criteria that they consistently apply to determine whether a clause is unenforceable on one of these grounds.

When a forum selection clause is valid, exclusive, applicable, and enforceable under the tests outlined above, it will be deemed “contractually valid” as that term is used in *Atlantic Marine*. At this point, the court must consider whether to grant the motion to transfer or dismiss. In almost all cases, this motion will be granted. When a contractually valid forum selection clause exists, the Supreme Court has stated that the case should be transferred or dismissed absent some “extraordinary circumstances unrelated to the convenience of the parties.”<sup>7</sup> In practice, therefore, the court’s determination as to whether a forum selection clause is “contractually valid” at step one of the analytical framework will prove outcome determinative at step two.<sup>8</sup>

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<sup>7</sup> *Id.* at 52. This statement does not mean that extraordinary circumstances must be shown to prove that a clause is *invalid*. It simply makes clear that if a clause is deemed valid, it should then be *given effect* by transferring or dismissing the case unless there are extraordinary circumstances that warrant a different result.

<sup>8</sup> As a matter of terminology, the Article refers to the two-part test set forth in *Atlantic Marine* as the “analytical framework” for evaluating whether to grant a motion to transfer or dismiss when a contract contains a forum selection clause. The first step in this framework requires the court to (1) determine whether the clause is valid as a matter of contract law, (2) interpret the clause to see if it is exclusive and applies to the claims at issue, and (3) determine whether the clause is enforceable as a matter of conflict of laws. If a clause is deemed “contractually valid” at step one of the analytical framework, the second step requires the court to apply the relevant public interest factors under Section 1404 or *forum non conveniens* to determine whether transfer or dismissal is warranted. (Arguments about the parties’ private interests will not be considered.) The consideration of the public interest factors at step two is governed by federal procedural law.

The Article's second goal is to provide an empirical assessment of federal practice with respect to clause enforcement post-*Atlantic Marine*. To this end, it draws upon an original, hand-collected dataset of 669 published and unpublished federal cases decided between 2014 and 2020 where one party challenged the enforceability of the forum selection clause. These cases reveal that federal courts upheld forum selection clauses roughly 87% of the time when one party challenged its enforceability. The cases also demonstrate noteworthy variation across states. Federal courts sitting in Florida enforced these clauses 96% of the time. Federal courts sitting in California, by comparison, enforced these clauses only 81% of the time. These findings make it possible, for the first time, to assess how rules relating to forum selection clause enforceability play out across the whole of the federal court system post-*Atlantic Marine*.

The Article's third and final contribution to the literature is to suggest a number of reforms. Over the past fifty years, the federal courts have liberalized the rules for enforcing forum selection clauses to the point that these provisions are today enforced in the overwhelming majority of cases. Indeed, these provisions frequently operate as battering rams that smash their way to enforcement in all but the most extraordinary cases. This trend clearly benefits large corporations who have the leverage to draft take-it-or-leave-it agreements that mandate litigation occur in a forum that favors them. This trend just as clearly disfavors consumers, employees, and other individuals who lack the power to push back on clauses that require them to travel great distances in order to bring a lawsuit. In an attempt to rebalance the scales, the Article advances six proposals for reform. Each of these proposals may be achieved without making any major modifications to existing doctrine, without the intervention of the U.S. Supreme Court, and without the enactment of new federal legislation. Instead, they call for the lower federal courts to take a step back, take a hard look at the legal regime they have created, and make slightly different choices at the margins. While each of these reforms may seem small, their cumulative effect would be to create a fairer and more equitable enforcement regime for forum selection clauses in federal court.

The Article proceeds as follows. Part I discusses the issue of whether a forum selection clause is valid as a matter of contract law. Part II canvasses the law relating to the proper interpretation of forum selection clauses. Part III considers the complex question of clause enforceability. It also provides a by-the-numbers empirical account of how the federal courts resolved enforceability cases between 2014 and 2020. Part IV makes the case for a number of pragmatic reforms which would, if adopted, make it marginally easier for resisting parties to persuade the court that a forum selection clause is not "contractually valid" as that term is used in *Atlantic Marine*.

## I. VALIDITY

As every first-year law student learns, determining whether a valid contract exists can be a complicated undertaking. One must first inquire as to whether the contract was properly formed via offer, acceptance, and consideration. One must then inquire as to whether there exists a viable contract defense such as minority, fraud, mutual mistake,

unconscionability, lack of capacity, or a failure to comply with the statute of frauds. If a contract was never properly formed, or if the defendant can establish the existence of a viable defense, the contract is invalid. In such circumstances, it does not matter whether the putative agreement has been breached or whether the plaintiff has suffered damages. An invalid contract is an unenforceable contract.

The same is true for forum selection clauses. An invalid clause has no legal effect. As a threshold question, therefore, a court called upon to dismiss or transfer a case on the basis of a forum selection clause must determine whether the clause is valid as a matter of contract law. This inquiry into validity is distinct and separate from the inquiry into how the contract should be interpreted or whether the clause is enforceable as a matter of conflict of laws. Issues relating to interpretation are addressed in Part II. Issues relating to enforceability are addressed in Part III. This Part is focused exclusively on the question of whether a forum selection clause is valid.

#### A. Choice of Law

When a federal court is called upon to determine whether a forum selection clause is valid, it must first determine whether to apply state or federal law to resolve the issue. Questions of validity should always be resolved under state law. There is no general federal common law of contracts.<sup>9</sup> While the U.S. Supreme Court has held that federal law governs the *enforceability* of forum selection clauses when suit is brought in federal court, it has never held that federal law governs the question of whether the clause is *valid* as a matter of contract law.<sup>10</sup> Accordingly, a federal court called upon to assess whether a forum selection clause is valid should apply state law to resolve the issue.

The next logical question is *which* state's law to apply. In cases where the contract contains an enforceable choice-of-law clause, the consensus among legal scholars is that the federal courts should apply the law of the state named in the choice-of-law clause to issues of validity.<sup>11</sup> In cases where the contract in question lacks a choice-of-law clause, the courts will sometimes reflexively apply the contract law of the forum to determine whether the

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<sup>9</sup> 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Jurisdiction and Related Matters* § 3803.1 (4th ed. 2016).

<sup>10</sup> *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 304 (5th Cir. 2016) ("If . . . the issue of a forum-selection clause's 'validity' is separate from its 'enforceability' and not determined by federal law in diversity cases, it seems that the law applicable to that determination would be the same law applicable to forum-selection clause interpretation—that is, the law selected by the forum state's choice-of-law rules."); *Kelley v. MailFinance Inc.*, 436 F. Supp. 3d 1136, 1141 (N.D. Ill. 2020) ("[D]etermining whether a forum-selection clause is part of a contract is a question of state law."); *Sorenson*, *supra* note \_\_, at 2553 ("Courts sitting in diversity should apply substantive state law in determining the answer to the validity question."); Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 46, 84-88 (2004) (arguing that the parties' chosen law should govern the issue of validity).

<sup>11</sup> *Symeon Symeonides, What Law Governs Forum Selection Clauses?* 78 LA. L. REV. 1119 (2018); *Martinez v. Bloomberg LP*, 740 F.3d 211, 217-18 (2d Cir. 2014) (observing that when a contract contains a choice-of-law clause, the interpretation of the forum-selection clause is governed by the law chosen by the parties in the choice-of-law clause); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 427 (10th Cir. 2006) ("[W]hen a court interprets a contract, as a general matter it applies the law that the parties selected in their contract . . . A forum-selection clause is part of the contract. We see no particular reason . . . why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties."); *see also* *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 185 (3d Cir. 2017); *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 308 (5th Cir. 2016); *Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643, 643 (4th Cir. 2010); *Dunne v. Libbra* 330 F.3d 1062, 1064 (8th Cir. 2003); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992).

clause is valid.<sup>12</sup> This is a mistake. The better approach is to apply the law of the jurisdiction selected after the court performs a choice-of-law analysis. Where the contract has a connection to more than one jurisdiction, a federal court should apply the choice-of-law rules of the state in which it sits to determine which state's contract law should be applied... just as it would with any other issue relating to contracts. Once this task is complete, the court should apply the contract law of the state selected pursuant to the conflict-of-laws analysis to determine whether the clause is valid.

## B. Contract Law

Over the past decade, the federal courts have held that forum selection clauses were invalid on a number of occasions. In some cases, courts held that a clause was unenforceable because the plaintiff never signed the agreement containing the clause.<sup>13</sup> In other cases, courts have held that the clause never became a part of the contract after conducting a battle-of-the-forms analysis under Uniform Commercial Code Section 2-207.<sup>14</sup> In each of these instances, the courts applied the traditional rules of contract law to determine the validity of the forum selection clause.

In other instances, the courts have applied modified version of traditional contract rules to account for the unique attributes of forum selection clauses. There are three scenarios when the courts apply these modified rules. The first scenario arises when the resisting party argues that he was fraudulently induced into signing the contract containing the forum selection clause. The second scenario arises when an enforcing party argues that it is entitled to take advantage of the forum selection clause by virtue of its status as a third-party beneficiary to the agreement. The third and final scenario arises when the resisting party argues that the forum selection clause is not binding because the agreement has been terminated. Each of these scenarios is examined below.

### 1. *Fraud*

The courts have long recognized that fraud constitutes a valid defense to a breach of contract claim. If one party persuades another to sign a contract on the basis of an intentional misrepresentation, the agreement is invalid as a matter of law. This rule operates differently, however, when it comes to forum selection clauses. It is not enough for the resisting party to

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<sup>12</sup> Symeonides, *supra* note \_\_, at 1131 ("Indeed, more often than not, courts tend to apply forum law reflexively without considering any other alternatives.").

<sup>13</sup> Avtech Capital, LLC v. C & G Engines Corp., 2020 U.S. Dist. LEXIS 212915, at \*11 (D. Utah Nov. 13, 2020); St. Aubin v. Island Hotel Co., 2017 U.S. Dist. LEXIS 37042, at \*14 (S.D. Fla. Mar. 15, 2017); Fireman's Fund Ins. Co. v. St. Paul Fire & Marine Ins. Co., 182 F. Supp. 3d 793, 806 (M.D. Tenn. 2016).

<sup>14</sup> See Wainess v. Smilemakers, Inc., 2018 U.S. Dist. LEXIS 216404, at \*9 (E.D. Mich. Dec. 27, 2018); Am. Water Heater Co. v. Taylor-Winfield Techs., Inc., 2017 U.S. Dist. LEXIS 158312, at \*17 (E.D. Tenn. Sep. 27, 2017); Duro Textiles, LLC v. Sunbelt Corp., 12 F. Supp. 3d 221, 224 (D. Mass. 2014).

show that the *contract* was induced by fraud. Instead, the resisting party must show that the *clause itself* was induced by fraud.<sup>15</sup>

The origins of this rule may be traced back to *Scherk v. Alberto-Culver Co.*, a case decided by the U.S. Supreme Court in 1975.<sup>16</sup> In *Scherk*, the Court held that an arbitration clause could only be invalidated on the basis of fraud if the clause itself was procured by fraud. The resisting party must show, in other words, that the parties specifically discussed the arbitration clause at the time of contracting and that the resisting party agreed to write it into the agreement due to fraudulent representations made by the other party. The purpose of this rule was to make it easier to enforce arbitration clauses by making it more difficult for the resisting party to escape the clause by arguing the entire contract was the product of fraud. The rule quickly migrated from arbitration clauses to forum selection clauses, thereby making it that much harder to persuade a court that a forum selection clause was invalid on the basis of fraud. A recent review of more than a thousand of recent state and federal cases turned up only a handful of instances where the resisting party succeeded in convincing a court that a clause was invalid due to fraud.<sup>17</sup> On the other side of the ledger, there were dozens of cases where the courts rejected the resisting party's argument because there was no showing that the clause itself (separate and apart from the contract) was procured by fraud.<sup>18</sup>

The upshot is that the traditional fraud defense operates differently in the context of forum selection clauses. If the defendant argues that the price term, the indemnification provision, or an express warranty is invalid because the contract was induced by fraud, it need only show that the contract as a whole was the product by the plaintiff's misrepresentations. If the defendant argues that the forum selection clause was induced by fraud, by comparison, it must prove that clause itself was fraudulently induced.

## 2. Third-Party Beneficiaries

Under ordinary circumstances, a non-party to a contract may assert rights under that agreement as a third-party beneficiary only if she comes forward with evidence showing a "clear and definite intent" on the part of the contracting parties to confer an "enforceable benefit" upon her.<sup>19</sup> Thereafter, the beneficiary may go to court to enforce the agreement notwithstanding the fact that she never signed that agreement.<sup>20</sup> In the context of forum selection clauses, executives, affiliates, and subsidiaries of a company sometimes argue that they are covered by a clause by virtue of their status as third-party beneficiaries.<sup>21</sup> These

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<sup>15</sup> John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1174 (2021).

<sup>16</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 534, 94 S. Ct. 2449, 2464 (1974).

<sup>17</sup> See, e.g., *Niemi v. Lasshofer*, 770 F.3d 1331, 1352 (10th Cir. 2014).

<sup>18</sup> See, e.g., *Brown v. Artec Glob. Media, Inc.*, 2017 U.S. Dist. LEXIS 233746, at \*13 (S.D. Cal. July 5, 2017); *Bulldog Well Testing v. V.*, 2016 U.S. Dist. LEXIS 199357, at \*5 (E.D. Okla. Mar. 7, 2016); *Armstrong v. Curves Int'l, Inc.*, 2015 U.S. Dist. LEXIS 140336, at \*39 (E.D. Mo. Oct. 15, 2015).

<sup>19</sup> Section 302 of the Restatement (Second) of Contracts provides that "a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." This rule requires a showing that the contracting parties *intended* to confer a benefit upon the non-signatory. The mere fact that a person derives an *actual benefit* from an agreement to which she is not a party is not usually enough to confer third-party beneficiary status.

<sup>20</sup> *Ramsdell v. Bowles*, 64 F.3d 5, 10 (1st Cir. 1995).

<sup>21</sup> See *Bruckner Truck Sales v. Hoist Liftruck Mfg*, 501 F. Supp. 3d 409, 426 (N.D. Tex. 2020).



claims do not always succeed. It is no easy task to persuade a court that the corporate parties to a merger agreement “clearly and definitely” intended to confer an “enforceable benefit” upon their executives, affiliates, and subsidiaries in their forum selection clause.

This state of affairs has prompted the courts to make it easier for executives, affiliates, subsidiaries, and others to take advantage of a forum selection clause.<sup>22</sup> Imagine a scenario where a company and its subsidiary are sued in Texas. The company and the subsidiary move to transfer the case to New York pursuant to a forum selection clause in the contract requiring suits to be brought in the courts of New York. If the subsidiary is not a party to the contract containing the forum selection clause, and if it is unable to establish third-party-beneficiary status, then the suit against the subsidiary will proceed in Texas while the suit against the company will be transferred to New York. This outcome is inefficient and arguably constitutes a waste of judicial resources.

In an attempt to avoid this outcome, the courts have reworked the doctrine of third-party beneficiaries to make it easier for subsidiaries and other affiliates to take advantage of forum selection clauses.<sup>23</sup> Many courts now apply a different test—the closely-related-and-foreseeable test—to determine whether a non-signatory is covered by a forum selection clause.<sup>24</sup> Under the closely-related-and-foreseeable test, there is no need to show a clear and definite intent to confer an enforceable benefit upon a non-signatory. One must simply establish that the person seeking to take advantage of the forum selection clause is so “closely related” to the signatory that it was “foreseeable” that they would be covered under the clause.<sup>25</sup> This is a far less demanding standard than the traditional test for third-party beneficiaries and serves to consolidate litigation involving related parties in a single forum. The closely-related-and-foreseeable test—like the rules for fraud discussed above—thus represents a deviation from the ordinary rules of contract law that is applied exclusively in the context of forum selection clauses.<sup>26</sup>

### 3. Termination or Cancellation

When a contract is terminated or cancelled, the future obligations of both parties to the agreement are ordinarily extinguished.<sup>27</sup> When a consultant terminates an agreement with a client, for example, the consultant is no longer obligated to provide future services to that client and the client need not pay the consultant for future work. So long as the party

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<sup>22</sup> John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. (forthcoming 2022).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> This new rule may be modified by the parties. If the contract contains a no-third-party-beneficiaries clause, for example, affiliates and subsidiaries will not be covered by the forum selection clause even if they otherwise satisfy the requirements of the closely-related-and-foreseeable test. See, e.g., *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1169 (11th Cir. 2009); *Casville Invs., Ltd. v. Kates*, 2013 WL 3465816, at \*6 (S.D.N.Y. July 8, 2013); *Bensinger v. Denbury Res. Inc.*, 2011 WL 3648277, at \*6 (E.D.N.Y. Aug. 17, 2011); *APA Excelsior III L.P. v. Premiere Techs., Inc.*, 49 F. Supp. 2d 664, 671 (S.D.N.Y. 1999). In the absence of such a clause, however, the test will generally serve to expand the range of actors entitled to invoke the forum selection clause beyond the usual cast of third-party beneficiaries.

<sup>27</sup> 13 CORBIN ON CONTRACTS § 67.2 (2021).

terminating or cancelling the agreement does so in a manner consistent with the terms of the contract, that contract will not bind the parties going forward.

This rule, like the ones discussed above, operates differently when applied to forum selection clauses. The courts have generally held that a forum selection clause will continue to bind the parties to an agreement even *after* that agreement has been terminated or cancelled.<sup>28</sup> Even though the parties have decided to extinguish most of their contractual obligations to one another, the courts have reasoned, they probably wanted to preserve the provisions in the agreement relating to dispute resolution in the event of a future dispute.<sup>29</sup> The end result is that terminating an agreement is not enough to cast off the obligations imposed by a forum selection clause. There must be a specific agreement terminating the clause itself.

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The first step in determining whether a forum selection clause is contractually valid is to ascertain whether that clause is valid as a matter of contract law. In most cases, this inquiry merely requires the court to apply traditional common law rules. In a few cases, however, the courts have modified these rules to account for the unique attributes of forum selection clauses. If the clause is deemed valid at the conclusion of this analysis, the court must then seek to ascertain the precise meaning of the specific words and phrases in the clause to determine whether the clause is exclusive and applicable. This issue is addressed in the next Part.

## II. INTERPRETATION

As is the case with other contractual provisions, questions sometimes arise relating to the intended meaning of the forum selection clause. The relative brevity of these clauses means that the same interpretive questions tend to arise over and over again. Over time, the courts have developed several interpretive rules—canons of construction, if you will—that

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<sup>28</sup> *Id.* (“[N]either termination nor cancellation affect those terms that relate to the settlement of disputes or choice of law or forum selection clauses.”)

<sup>29</sup> *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd.*, 612 F. App’x 671, 672-73 (6th Cir. 2015) (per curiam) (noting the “greater weight of authority” holds that “dispute-resolution provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract”); *Sensify United States Inc. v. Intelligent Telematics N. Am., Inc.*, No. 16-24069-Civ, 2017 U.S. Dist. LEXIS 64849, at \*4 (S.D. Fla. Apr. 28, 2017) (“[C]ourts consistently have rejected the notion that termination of an agreement necessarily extinguishes its forum-selection clause.”); *VERSAR, Inc. v. Ball*, No. Civ. A. 01-1302, 2001 WL 818354, at \*2 (E.D. Pa. July 12, 2001) (“Unless otherwise expressed, a choice of forum clause does not expire upon termination of the contract from which it derives.”); *Granite Re, Inc. v. Hutton, Inc.*, No. 19-CV-3074 (PJS/BRT), 2020 U.S. Dist. LEXIS 146271, at \*3-4 (D. Minn. Aug. 14, 2020) (“Although [n]ormally, the parties’ obligations expire when a contract terminates, . . . provisions related to the manner in which disputes are resolved generally survive the contract’s termination and continue to apply to disputes that accrued before the agreement’s termination.”); *Serv. Team of Pros., Inc. v. Folks*, No. 18-0048-CV-W-BP, 2018 U.S. Dist. LEXIS 75899, 2018 WL 2051516, at \*2 (W.D. Mo. May 2, 2018) (collecting cases); *see also Cottman Ave. PRP Grp. v. AMEC Foster Wheeler Envtl. Infrastructure Inc.*, 439 F. Supp. 3d 407, none (E.D. Pa. 2020) (concluding that forum selection clauses survive the termination of the contract, even if they are not listed among the terms in the survival clause). *But see Coffeeconnexion Co. v. Benjamin Foods, LLC*, 2020 U.S. Dist. LEXIS 94895, at \*6 (M.D. Tenn. May 29, 2020) (clause is void because the agreement was terminated); *Kamrass v. Jefferies, LLC*, 2017 U.S. Dist. LEXIS 157631, at \*3 (N.D. Ohio Sep. 25, 2017) (clause is inapplicable because contract has been terminated or expired).

seek to resolve these interpretive questions in a manner that aligns with the expectations of most contract users.

This Part provides an overview of these interpretive rules. It first briefly discusses issues relating to choice of law. It then surveys the rules that the courts apply to determine whether a clause is exclusive or non-exclusive. Finally, it discusses the rules that help the courts assess the intended scope of a forum selection clause.

#### A. Choice of Law

Most federal courts have held that state law governs the proper interpretation of a forum selection clause.<sup>30</sup> Only the Ninth Circuit has held that the interpretation of a forum selection clause is an issue governed by federal law.<sup>31</sup> The position taken by the Ninth Circuit is difficult to defend. While the U.S. Supreme Court has suggested that federal law governs the question of whether a forum selection clause is enforceable—an issue addressed in Part III—that Court has never held that federal law governs the question of how to interpret a forum selection clause. Accordingly, a federal court should apply state law to interpret the clause. In deciding which state’s law to apply, it should follow the same choice-of-law rules discussed above in the discussion of validity.<sup>32</sup>

#### B. Exclusivity

One interpretive issue that frequently arises in the context of a forum selection clause is whether the clause is exclusive or non-exclusive.<sup>33</sup> An exclusive clause provides that a dispute must be resolved in the chosen court and nowhere else.<sup>34</sup> A non-exclusive clause consents to jurisdiction or venue in the courts of the chosen jurisdiction but does not foreclose the possibility that disputes may be resolved elsewhere.<sup>35</sup> Exclusive clauses are also known as mandatory forum selection clauses.<sup>36</sup> Non-exclusive clauses are also known as permissive forum selection clauses.<sup>37</sup>

To determine whether a forum selection clause is mandatory or permissive, the courts will look to see whether the clause contains so-called “language of exclusivity” that expresses an intent to litigate in the chosen courts and nowhere else.<sup>38</sup> If a clause states that a dispute “must” be resolved in the chosen court, for example, or that a dispute may “only” be resolved in the chosen court, or that a dispute “shall” be resolved in the chosen court, then it will be deemed exclusive.<sup>39</sup> Similarly, if a clause states that the chosen court shall have

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<sup>30</sup> See *supra* note \_\_\_\_.

<sup>31</sup> See *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (“[B]ecause enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses.”).

<sup>32</sup> See *supra* Part I.A.

<sup>33</sup> John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1799-1803 (2019).

<sup>34</sup> *Id.* at 1800-1801.

<sup>35</sup> *Id.* at 1802-1803.

<sup>36</sup> *Id.* at 1802.

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

<sup>38</sup> *Id.* at 1800.

<sup>39</sup> *Id.*

“exclusive” or “sole” jurisdiction to hear the case, the clause will be deemed to possess the necessary language of exclusivity.<sup>40</sup>

If a clause is non-exclusive, the federal courts are markedly less likely to dismiss or transfer the case. This is because a non-exclusive clause lacks the all-important language of exclusivity. If a clause merely states that the parties “consent” or “submit” to jurisdiction or venue in the chosen court, for example, then the clause is likely to be deemed non-exclusive.<sup>41</sup> Similarly, if a clause states that the chosen court shall have “non-exclusive” jurisdiction, then the clause will not be interpreted to preclude litigation elsewhere.<sup>42</sup> While these clauses facilitate the bringing of a suit in the chosen jurisdiction, they cannot compel courts to refrain from hearing cases over which they otherwise possess jurisdiction. When parties bicker about the intended meaning of a forum selection clause, a common interpretive dispute relates to whether the clause is exclusive or non-exclusive.

### C. Scope

When the contracting parties write a forum selection clause into their contract, there can be little doubt that they are selecting a forum in which to resolve future claims for breach of contract. What happens, however, when one of the parties asserts a non-contract claim against the other? Are tort and statutory claims covered by the forum selection clause? Or does the clause only cover claims for breach of contract? This interpretive issue is regularly presented to the federal courts. In response, these courts have developed a number of interpretive rules to resolve the issue.<sup>43</sup>

The easiest cases are those where the clause contains language suggesting that the parties intended that it cover non-contractual claims. If a clause states that any dispute “relating to” or “arising in connection with” the agreement must be resolved in the chosen court, for example, then all courts agree that it is broad enough to cover tort and statutory claims with a connection to the contract.<sup>44</sup> If a clause does not contain such language, however, then the federal courts will apply one of several canons of construction that assign a presumptive meaning to the clause.<sup>45</sup> Unfortunately, there is considerable diversity of practice on this question.

Some federal courts take the position that tort and statutory claims are never covered by a generic forum selection clause because that such claims do not originate in the contract.<sup>46</sup> Since these claims originate in the common law of tort or the relevant statute, these courts reason, they are not covered by the clause.<sup>47</sup> This narrow approach has been rejected by other courts on the theory that it is not in keeping with the likely intent of most contracting parties.<sup>48</sup> If the parties took the time to write a forum selection clause into their

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1802.

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

<sup>43</sup> *Id.* at 1803-20.

<sup>44</sup> *Id.* at 1804.

<sup>45</sup> *Id.* at 1805.

<sup>46</sup> *Id.* at 1808-10.

<sup>47</sup> *Id.* at 1809.

<sup>48</sup> *Id.* at 1809-10.

agreement, these courts reason, it seems implausible that they would never want that clause to apply to related tort or statutory claim under any circumstances.<sup>49</sup>

Other federal courts have held that non-contractual claims come within the ambit of a generic forum selection clause if they arise out of the same operative facts as a parallel claim for breach of contract.<sup>50</sup> These courts ask whether the same facts pled in support of the contract claim could also be pled in support of the tort or statutory claim.<sup>51</sup> If so, then these courts will hold that the non-contract claim is covered by the clause.<sup>52</sup>

Still other federal courts take the position that non-contractual claims are covered by generic forum selection clauses when it is necessary to refer back to the contract in order to resolve these claims.<sup>53</sup> If a non-contractual claim cannot be resolved without first interpreting or construing the contract, for example, these courts hold that the claims are covered by a generic forum selection clause.<sup>54</sup> Similarly, if a non-contractual claim cannot be resolved without first determining whether the defendant is in compliance with the contract, these courts generally hold that the claims fall within the ambit of the clause.<sup>55</sup> Some courts have also held that a non-contractual claim is covered by a generic forum selection clause where the viability of the claim ultimately depends on the existence of a contractual relationship between the parties.<sup>56</sup>

Finally, some federal courts have adopted a hybrid approach that combines one or more of the interpretive rules set forth above.<sup>57</sup> The Eighth Circuit, for example, has taken the position that non-contractual claims are covered by a generic forum selection clause when the claim requires interpretation of the agreement *or* the claim ultimately depends on the existence of a contractual relationship *or* the claim involves the same operative facts as a parallel claim for breach of contract.<sup>58</sup> This hybrid approach makes it more likely that a generic clause will be given a broad scope because it gives the party arguing that the clause applies to non-contract claims multiple bites at the interpretive apple.<sup>59</sup>

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The second step in determining whether a forum selection clause is “contractually valid” within the meaning of *Atlantic Marine* is to interpret the clause to determine whether it is exclusive and whether it is broad enough to cover the present dispute. Even if the clause is exclusive and sufficiently broad, however, and even if the clause is valid as a matter of contract law, then it is only “contractually valid” within the meaning of *Atlantic Marine* if it is

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1810-12.

<sup>51</sup> *Id.* at 1810-11.

<sup>52</sup> *Id.* at 1812.

<sup>53</sup> *Id.* at 1812-1818.

<sup>54</sup> *Id.* at 1812-15.

<sup>55</sup> *Id.* at 1815-16.

<sup>56</sup> *Id.* at 1816-18.

<sup>57</sup> *Id.* at 1818-19.

<sup>58</sup> *Id.*

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

also enforceable as a matter of conflict-of-laws doctrine. The issue of enforceability is explored in the next Part.

### III. ENFORCEABILITY

The U.S. courts have long struggled to determine precisely when forum selection clauses should be enforced. Prior to 1972, most U.S. jurisdictions held that forum selection clauses were *per se* unenforceable.<sup>60</sup> The courts in this era were concerned that the routine enforcement of forum selection clauses would divert cases to jurisdictions where the defendant's personal, social, or political standing could affect the outcome of the case. This outcome, in the eyes of many courts, would serve to "bring the administration of justice into disrepute."<sup>61</sup> These courts also objected to forum selection clauses because they were viewed as attempts to use private agreements to "oust" the courts of jurisdiction that was otherwise granted to them by law. In the view of the U.S. Supreme Court, such "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."<sup>62</sup> In the face of such decisions, contract drafters rarely bothered to write forum selection clauses into their agreements prior to 1950.

In the second half of the twentieth century, however, the judicial hostility to forum selection clauses began to wane. In 1968, the Model Choice of Forum Act was approved by the National Conference of Commissioners on Uniform State Laws.<sup>63</sup> This Act took the position that forum selection clauses were presumptively enforceable. In 1971, the Second Restatement of Conflict of Laws similarly took the position that forum selection clauses were enforceable so long as they were "fair and reasonable."<sup>64</sup> The most momentous shift, however, occurred when the Supreme Court decided *The Bremen v. Zapata Off-Shore Co.* in 1972.<sup>65</sup>

In *The Bremen*, the Court chose to overturn more than a century of precedents relating to the enforceability of forum selection clauses. The Court held that forum selection clauses were presumptively enforceable as a matter of federal admiralty law. It further held that the party seeking to avoid the clause bore a "heavy burden of proof" to convince a court that it should not be enforced. The Court also announced two exceptions to the rule of presumptive enforceability. First, it held that forum selection clauses were not enforceable when they were contrary to public policy. Second, it held that forum selection clauses were not enforceable when they were unreasonable. The enforcement framework set forth in *The Bremen* is now widely used by federal courts in the United States to determine a forum

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<sup>60</sup> See David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008) (noting that there was some limited enforcement of forum selection clauses in the admiralty context prior to 1972).

<sup>61</sup> *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856).

<sup>62</sup> *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

<sup>63</sup> MODEL CHOICE OF FORUM ACT § 3 (UNIF. L. COMM'N 1968); see also Willis L. M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969).

<sup>64</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a (AM. L. INST. 1971).

<sup>65</sup> *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S. Ct. 1907, 1917 (1972).

selection clause should be given effect for reasons having nothing to do with its validity as a matter of contract law.

This Part provides an account of the doctrinal rules that determine when a forum selection clause is enforceable under the framework established by *The Bremen*. It first addresses the question of what law the federal courts should apply to evaluate the enforceability of a forum selection clause. It then surveys recent case law in an attempt to determine when a clause is likely to be deemed unreasonable or contrary to public policy.

#### A. Choice of Law

Although federal courts apply state law to issues of validity and interpretation, they generally apply federal law to assess whether a clause is enforceable. They typically cite *Stewart Org., Inc. v. Ricoh*, a case decided by the U.S. Supreme Court in 1988, to justify this approach.<sup>66</sup> In *Stewart*, an Alabama company entered into a dealership agreement with a company headquartered in New Jersey. That agreement contained a forum selection clause providing that any disputes had to be resolved in New York. When the business relationship soured, the Alabama company sued the New Jersey company in federal court in Alabama. The New Jersey company invoked the forum selection clause and moved to transfer the case to New York pursuant to 28 U.S.C. § 1404(a). The Alabama company sought to defeat the transfer motion by arguing that Alabama public policy—as articulated by the state’s courts as a matter of state common law—provided that the forum selection clause was unenforceable.

The decision rendered by the Eleventh Circuit in *Stewart* squarely addressed the issue of whether the enforceability of a forum selection clause was governed by state or federal law. Unfortunately, the Supreme Court did not directly address this question in its decision. Instead of analyzing the law that governed the issue of *clause enforceability*, the Court instead analyzed the law that governed the *motion to transfer*. Having framed the issue in this manner, it should come as little surprise that the Court concluded that a motion to transfer a case from one federal court to another was governed by the federal transfer statute, 28 U.S.C. § 1404(a), rather than the law of Alabama. The federal transfer statute calls upon the courts to balance a range of public- and private-interest factors to determine whether transfer is warranted “in the interest of justice.” In analyzing whether to transfer under Section 1404(a), the Court held that a forum selection clause should “receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).”<sup>67</sup> Since Section 1404(a) does not contain any express reference to forum selection clauses, these instructions provided limited guidance to lower courts.

The majority opinion in *Stewart* may be fairly read to stand for the proposition that state public policy, as expressed in state common law, does not control the outcome of a Section 1404(a) transfer analysis at step two of the two-step analytical framework set forth

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<sup>66</sup> *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

<sup>67</sup> *Id.* at 31.

in *Atlantic Marine*. The decision does not, however, address the question of whether state public policy is relevant to whether a forum selection clause is enforceable at step one of that framework.<sup>68</sup>

Nevertheless, a clear majority of federal courts of appeal have held that federal law governs the issue of enforceability at step one of the *Atlantic Marine* analysis.<sup>69</sup> These courts look to the test laid down in *The Bremen* to determine whether a clause is enforceable. These courts do not, however, agree as to how this test should be applied when the party resisting the enforcement of the forum selection clause argues that the clause is unenforceable, first, because it is contrary to public policy, and, second, because it is unreasonable.

## B. Public Policy

In *The Bremen*, the Supreme Court held that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong *public policy of the forum* in which suit is brought, whether declared by statute or by judicial decision.”<sup>70</sup> In practice, the courts rarely rely on judicial decisions as a basis for declining to enforce forum selection clauses. Where there is a statute on the books stating that these clauses shall not be given effect, however, the courts can and do invoke public policy as a basis for non-enforcement.<sup>71</sup> Some of these statutes are federal laws enacted by Congress. Others are state statutes enacted by a state legislature. We begin with the federal statutes.

### 1. *Federal Public Policy*

The federal courts rely on three types of federal statutes to invalidate forum selection clauses on public policy grounds. First, if a federal statute contains a special venue provision that requires or allows a suit to be brought in a particular place, a forum selection clause selecting the courts of another place may be deemed contrary to public policy. Second, if a

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<sup>68</sup> The concurring opinion by Justice Kennedy suggests that the enforceability of a clause should be evaluated in accordance with the standard set forth in *The Bremen*. *Id.* at 33 (Kennedy, J., concurring) (“[T]he enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system. Although our opinion in *The Bremen v. Zapata Off-Shore Co.*, involved a Federal District Court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity.”).

<sup>69</sup> See 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3803.1 (4th ed. 2016) (“A question of obvious importance in diversity of citizenship cases is what law—state or federal—shall govern on the question of whether a forum selection clause is enforceable. It seems rather clear that federal law should govern. . . . Although the Eighth Circuit appears not to have taken a position on the matter, the clear majority—including the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits—conclude that enforceability of a forum selection clause is governed by federal law. The Seventh and Tenth Circuits, in contrast, apply state law on the theory that state law governs the remaining portions of the contract.”). A number of scholars have argued that, in fact, the threshold determination of whether a clause is contractually valid should be governed by state law. *See, e.g.*, Kermit Roosevelt III & Bethan R. Jones, *Adrift on Erie: Characterizing Forum-Selection Clauses*, 52 AKRON LAW REVIEW 297, 317 (2019) (“Whether the clause confers rights under state law is a question of state substantive law, to be decided under the state law that governs the contract. The effect of those rights in federal court is a question of federal procedural law. As with a § 1404(a) motion, a federal court might decide that a valid forum-selection clause does not justify dismissal, and it might decide that an invalid clause does.”); Adam N. Steinman, *Forum Selection After Atlantic Marine: Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 797 (2014) (“*Atlantic Marine* does not mandate unflinching enforcement of forum-selection clauses without any mechanism for parties to raise legitimate concerns about the use and operation of such clauses in certain contexts. Rather, *Atlantic Marine* should be read to defer to state law on such matters.”) In his dissent in *Stewart*, Justice Scalia also argued that the enforceability issue should be governed by state law.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> The federal courts focus exclusively on statutes enacted by the *forum* in considering whether to apply the public policy exception. *See Willis v. Herriott*, No. 21-CV-487 (JMF), 2021 U.S. Dist. LEXIS 145135, at \*61 (S.D.N.Y. July 22, 2021) (“[F]ederal courts sitting in diversity in New York may refuse to enforce a contractual forum-selection provision if enforcing it would contravene New York’s public policy; the public policy of California or any other state is irrelevant.”). They do not—and should not—consider the public policy of any other state.



federal statute contains language stating that the rights conferred by the statute may not be waived, and if enforcement of the forum selection clause is likely to lead to the waiver of these rights, then enforcing the forum selection clause may be deemed contrary to public policy. Third, and finally, the courts have consistently held that forum selection clauses are not enforceable in bankruptcy court when enforcement would interfere with the policy goal of channeling claims against a debtor into a single forum.

a. Special Venue Provisions

There are no federal statutes that specifically direct the courts not to enforce forum selection clauses. There are, however, a great many federal statutes that contain special venue provisions. The Federal Employee Liability Act (FELA), for example, provides that “an action may be brought in . . . the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action.”<sup>72</sup> The Carmack Amendment states that “[a] civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.”<sup>73</sup> And the Miller Act provides that “[a] civil action brought under this subsection must be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy.”<sup>74</sup> Each of these statutes contains clear rules about the venue where a lawsuit may be brought. The question is whether these special venue provisions render forum selection clauses requiring the suit to be brought elsewhere unenforceable.

The courts have provided different answers to this question for different statutes. With respect to FELA claims, for example, the U.S. Supreme Court has held that a contractual provision that purports to limit the ability of a plaintiff to choose a forum is void as against public policy.<sup>75</sup> With respect to the Carmack Amendment, the lower federal courts have similarly held that the special venue provisions in that Act preempt any forum selection clause that purports to limit where a suit may be brought.<sup>76</sup> When a plaintiff asserts a claim under FELA or the Carmack Amendment, therefore, the federal courts will generally decline to enforce a forum selection clause selecting a court other than the one where the lawsuit was filed.

The courts have reached different conclusions with respect to claims arising under other federal statutes. With respect to the Employee Retirement Income Security Act of 1974 (ERISA), for example, most courts have held that that statute’s special venue provisions do

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<sup>72</sup> 45 U.S.C.S. § 56.

<sup>73</sup> 49 U.S.C.S. § 14706.

<sup>74</sup> 40 U.S.C.S. § 3133.

<sup>75</sup> *Boyd v. Grand T. W. R. Co.*, 338 U.S. 263, 265, 70 S. Ct. 26, 27 (1949) (“[C]ontracts limiting the choice of venue are void as conflicting with the Liability Act.”)

<sup>76</sup> See *Scotlynn United States Div., Inc. v. Singh*, No. 2:15-cv-381-FtM-29MRM, 2016 U.S. Dist. LEXIS 121950, at \*3-4 (M.D. Fla. Sep. 9, 2016) (“Courts that have addressed venue in the context of household goods have determined that ‘the Carmack Amendment essentially prohibits enforcement of forum-selection clauses and provides that suit may be brought against a carrier in a forum convenient to the shipper.’”); *Dabecca Nat. Foods, Inc. v. RD Trucking, LLC*, No. 14 C 6100, 2015 U.S. Dist. LEXIS 65680, at \*19 (N.D. Ill. May 20, 2015) (collecting cases).

not invalidate forum selection clauses written into plan documents.<sup>77</sup> Most courts have similarly held that the venue provisions in the Miller Act do not render clauses in construction contracts unenforceable.<sup>78</sup> The courts have also held that the decision by Congress in 2008 to delete the special venue provisions in the Jones Act means that forum selection clause are enforceable in cases brought under that statute.<sup>79</sup> Finally, courts have held that the special venue provisions in the American with Disabilities Act do not preclude the enforcement of forum selection clauses requiring suits arising under that statute to be litigated abroad.<sup>80</sup>

#### b. Anti-Waiver Provisions

The federal courts will also sometimes refuse to enforce foreign forum selection clauses when the applicable statute contains an anti-waiver provision stating that the rights conferred by the statute may not be waived via contract.

The Securities Act of 1933 and the Securities Exchange Act of 1934, for example, both contain anti-waiver provisions.<sup>81</sup> If the contracting parties were to write a provision into their agreement for the purchase or sale of securities waiving the protections provided by these Acts, that provision would be void under these anti-waiver provisions.<sup>82</sup> If the parties were to write a foreign choice-of-law clause selecting the laws of a foreign nation to govern their contract, and if the foreign laws lacked investor protections that were equivalent to those provided by federal securities law, then the choice-of-law clause would likewise be void.<sup>83</sup> Lastly, and most importantly for our purposes, if the parties were to write a forum selection clause selecting the courts of a foreign nation into their contract, and if a U.S. court believed that these foreign courts were likely to apply a foreign law that did not provide investor protections equivalent to those provided by federal securities law, then the foreign forum selection clause would be unenforceable enforcement would ultimately result in the waiver of non-waivable rights.<sup>84</sup> In this way, an anti-waiver provision may lead to the non-enforcement of a forum selection clause.

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<sup>77</sup> See *In re Mathias*, 867 F.3d 727, 728 (7th Cir. 2017); *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 931-34 (6th Cir. 2014), cert. denied, 136 S. Ct. 791, 193 L. Ed. 2d 708 (Jan. 11, 2016). But see *Dumont v. PepsiCo, Inc.*, 192 F. Supp. 3d 209, 223 (D. Me. 2016) (“Because ERISA has a strong public policy in favor of ready access to federal courts, enforcement of the forum selection clause against Dumont would be unreasonable.”); Christine P. Bartholomew & James A. Wooten, *The Venue Shuffle: Forum Selection Clauses and ERISA*, 66 UCLA L. REV. 862 (2019) (arguing that forum selection clauses should not be enforced in ERISA cases).

<sup>78</sup> See *United States ex rel. River Front Recycling & Aggregate, LLC v. Kallidus Techs., Inc.*, Civil Action No. 18-9141, 2019 U.S. Dist. LEXIS 80098, at \*17 (D.N.J. May 13, 2019) (Miller Act); *In re Marquette Transp. Co. Gulf-Inland, LLC*, No. 3:18-CV-00074, 2018 U.S. Dist. LEXIS 159209, at \*11 (S.D. Tex. Sep. 4, 2018) (Jones Act).

<sup>79</sup> *In re Marquette Transp. Co. Gulf-Inland, LLC*, No. 3:18-CV-00074, 2018 U.S. Dist. LEXIS 159209, at \*11 (S.D. Tex. Sep. 4, 2018) (collecting cases).

<sup>80</sup> *Martinez v. Bloomberg LP*, 740 F.3d 211, 228-29 (2d Cir. 2014).

<sup>81</sup> 15 U.S.C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this sub-chapter or of the rules and regulations of the Commission shall be void.”); 15 U.S.C. § 78cc (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.”).

<sup>82</sup> John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1174, 1198-1208 (2021).

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

<sup>84</sup> *Id.*; see also Darrell Hall, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57, 81-83 (1997).

In a series of cases decided in the 1990s, the federal courts of appeal were asked to decide whether the securities laws of England provided equivalent protection to those of the United States when Lloyd's of London sought to enforce English forum selection clauses against U.S. plaintiffs.<sup>85</sup> In each of these cases, the court held that the forum selection clause at issue was enforceable because the securities laws of England were broadly similar to the securities laws of the United States. These cases also made clear, however, that if the English choice-of-law clause and the English forum selection clause had operated in tandem to select a foreign law that provided substantially less protection to investors, the forum selection clause would have been unenforceable because enforcement would have led to the waiver of non-waivable rights under federal securities laws. The federal courts have also invoked the logic of anti-waiver in weighing whether to enforce foreign forum selection clauses in cases arising under federal civil rights laws and the Carriage of Goods by Sea Act (COGSA).<sup>86</sup>

In cases where the foreign court seems likely to apply U.S. law—or a foreign law that confers equivalent legal protections—the U.S. court will generally enforce the foreign forum selection clause.<sup>87</sup> In cases where the foreign court seems likely to apply a foreign law that would result in the deprivation of non-waivable rights, by contrast, the U.S. court may refuse to enforce a foreign forum selection clause on public policy grounds.<sup>88</sup>

### c. Bankruptcy

Bankruptcy constitutes another area where the federal courts sometimes decline to give effect to forum selection clauses on public policy grounds. The intuition underlying these cases is straightforward. The purpose of bankruptcy law is to bring all of the debtor's creditors together into a single forum for purposes of determining how to allocate the assets in the bankruptcy estate.<sup>89</sup> If the bankruptcy court were to enforce forum selection clauses redirecting certain claims to other courts, then this purpose would be thwarted. Accordingly, most federal courts have held that the public policy in favor of centralized resolution of claims provides a compelling policy reason not to enforce forum selection clauses in bankruptcy cases.<sup>90</sup>

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<sup>85</sup> See *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285, 1298 (11th Cir. 1998); *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997); *Al-len v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229–30 (6th Cir. 1995); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1364–65 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992).

<sup>86</sup> See John F. Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 U. MIAMI L. REV. 1087, 1100–1104 (2021).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jonathan C. Lipson, *Fighting Fiction With Fiction—the New Federalism in (a Tobacco Company) Bankruptcy*, 78 WASH. U. L. Q. 1271, 1279–1280 (2000) (“The Bankruptcy Code seeks to channel all claims against a debtor through a single forum - a federal bankruptcy court - and to provide a single, effective mechanism through which such claims are treated.”).

<sup>90</sup> *Walker v. Got'cha Towing & Recovery, LLC* (In re Walker), 551 B.R. 679, 690–91 (Bankr. M.D. Ga. 2016) (“Because the bankruptcy system implicates interests far broader than the private rights of the two parties to the contract in question, it is not unusual for prepetition contractual obligations, particularly those dictating forum or waiving the protections of the automatic stay, to be modified or even ignored in a bankruptcy case.”); In re John Q. Hammons Fall 2006, LLC, No. 16-21142, 2017 Bankr. LEXIS 3565, at \*18 (Bankr. D. Kan. Oct. 13, 2017) (“The Court is persuaded that in this case the strong public policy of centralized resolution of claims supports keeping the matter in bankruptcy court and not enforcing the forum selection clause in the rejected ROFR.”); *Harpole Constr., Inc. v. Medallion Midstream, LLC* (In re Harpole Constr., Inc.), Nos. 15-12630 t11, 16-1058 t, 2016 Bankr. LEXIS 4070, at \*17 (Bankr. D.N.M. Nov. 23, 2016) (“In accordance with the case law cited above, and after considering the circumstances of this case, the Court concludes that the interest in centralizing all of Harpole's disputes [in the bankruptcy court] outweighs the policy of enforcing the forum selection clause.”); see also *Kismet Acquisition, LLC v. Icenhower* (In re Icenhower), 757 F.3d 1044, 1051 (9th Cir. 2014) (concluding “the bankruptcy court properly declined to enforce the forum selection clauses” because one of the Code's “primary objectives is centralization of disputes concerning a

## 2. State Public Policy

Over the past fifty years, state legislatures across the United States have enacted more than 200 statutes that purport to invalidate forum selection clauses when written into various types of contracts.<sup>91</sup> Depending on the state, a forum selection clause may be invalid when written into a child-support contract, consumer contract, a consumer credit agreement, a consumer lease, a construction contract, an employment agreement, a foreclosure agreement, a franchise agreement, a high-cost home loan agreement, an insurance agreement, a payday lending agreement, a sales representative agreement, a student-loan agreement, a structured settlement agreement, a timeshare agreement, or a wholesaler agreement.<sup>92</sup> Several states have enacted statutes directing their courts not to enforce foreign forum selection clauses when enforcement will lead to the waiver of certain constitutional rights.<sup>93</sup> At least one state—Idaho—has enacted a statute invalidating all forum selection clauses that choose the courts of any other state.<sup>94</sup>

This tsunami of state statutes mandating non-enforcement of forum selection clauses has led to a split in federal practice. Some federal courts hold that state statutes declaring these clauses void on public policy grounds are dispositive on the issue of enforceability as a matter of federal law. These courts generally refuse to enforce a clause when a state statute invalidates it. Others federal courts have held that state statutes are merely one factor to consider in assessing the issue of enforceability as a matter of federal law. These courts generally enforce a clause even in the face of an invalidating state statute. Each approach is discussed below.

### a. Approach #1: State Statute is Dispositive

Many federal courts have held that the existence of an invalidating state statute is dispositive with respect to the issue of clause enforceability. These courts will decline to enforce a forum selection clause when a state statute directs state courts sitting in the same state not to enforce it.<sup>95</sup>

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debtor's legal obligations"); *Haigler v. Dozier* (In re Dozier Fin., Inc.), 587 B.R. 637, 651 (Bankr. D.S.C. 2018) (declining to enforce an FSC in a bankruptcy case); *Alsohaibi v. Arcapita Bank B.S.C.(c)* (In re Arcapita Bank B.S.C.(c)), 508 B.R. 814, 820 (S.D.N.Y. 2014) (same); *Argosy Capital Grp. III, L.P. v. Triangle Capital Corp.*, 2019 U.S. Dist. LEXIS 4148, at \*19 (S.D.N.Y. Jan. 9, 2019) (same).

<sup>91</sup> John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1174, 1234-40 (2021).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Idaho Code § 29-110(1)

<sup>95</sup> This happens a lot. See *Davis v. Oasis Legal Fin. Operating Co., LLC*, 936 F.3d 1174, 1179-81 (11th Cir. 2019), *Rob & Bud's Pizza, LLC v. Papa Murphy's Int'l, Inc.*, 2015 U.S. Dist. LEXIS 82927, at \*5 (W.D. Ark. June 24, 2015); *Advanced Int'l Mktg., LLC v. LXR Biotech, LLC*, 2017 U.S. Dist. LEXIS 177398, at \*7 (W.D. Ark. Oct. 23, 2017); *Weber v. Saladworks, LLC*, 2014 U.S. Dist. LEXIS 195654, at \*15 (C.D. Cal. Jan. 27, 2014); *Frango Grille USA, Inc. v. Pepe's Franchising Ltd.*, 2014 U.S. Dist. LEXIS 182207, at \*8 (C.D. Cal. July 21, 2014); *Devore v. H&R Block Tax Servs., LLC*, 2016 U.S. Dist. LEXIS 197718, at \*3 (C.D. Cal. Mar. 10, 2016); *Friedman v. Glob. Payments, Inc.*, 2019 U.S. Dist. LEXIS 67414, at \*7 (C.D. Cal. Feb. 5, 2019); *Macedonia Distrib. v. S-L Distrib. Co., LLC*, No. SACV 17-1692 JVS (KESx), 2018 U.S. Dist. LEXIS 227914, at \*8 (C.D. Cal. Aug. 7, 2018); *Depuy Synthes Sales, Inc. v. Stryker Corp.*, No. ED CV 18-1557 FMO (KKx), 2020 U.S. Dist. LEXIS 199271, at \*24 (C.D. Cal. Sep. 29, 2020); *Alabsi v. Savoya, LLC*, 2019 U.S. Dist. LEXIS 49675, at \*19 (N.D. Cal. Mar. 25, 2019); *Lyon v. Neustar, Inc.*, 2019 U.S. Dist. LEXIS 75307, at \*22 (E.D. Cal. May 3, 2019); *Karl v. Zimmer Biomet Holdings, Inc.*, 2019 U.S. Dist. LEXIS 111705, at \*16 (N.D. Cal. July 2, 2019); *Yeomans v. World Fin. Grp. Ins. Agency, Inc.*, 2019 U.S. Dist. LEXIS 193100, at \*23 (N.D. Cal. Nov. 6, 2019); *Miller-Garcia v. Avani Media, LLC*, 2020 U.S. Dist. LEXIS 3833, at \*10 (N.D. Cal. Jan. 8, 2020); *Bell v. L.P. Brown Co.*, 2015 U.S. Dist. LEXIS 12044, at \*15 (W.D. La. Feb. 2, 2015); *Waguespack v. Medtronic, Inc.*, 185 F. Supp. 3d 916, 925 (M.D. La. 2016); *Town of Jonesboro v. Pittsburg Tank & Tower Maint. Co.*, 2018 U.S. Dist. LEXIS 112760, at \*6 (W.D. La. Feb. 9, 2018); *Swank Enters., Inc. v. NGM Ins. Co.*, 2020 U.S. Dist. LEXIS 40640, at \*12 (D. Mont. Mar. 9, 2020); *Crest Furniture, Inc. v. Ashley Homestores, Ltd.*, U.S. Dist. LEXIS 202688, at \*16

The Ninth Circuit recently adopted this approach in *Gemini Technologies, Inc. v. Smith & Wesson Corporation*.<sup>96</sup> In that case, an Idaho company sued a Massachusetts company in federal court in Idaho. The Massachusetts company moved to dismiss the case on the basis of *forum non conveniens*, citing a forum selection clause in their agreement selecting the state courts of Delaware. The Idaho company sought to defeat the motion to dismiss by invoking an Idaho state statute invalidating all outbound forum selection clauses. The Idaho company lost at trial and appealed the case to the Ninth Circuit.

The Ninth Circuit began its analysis by observing that the analytical framework set forth in *Atlantic Marine* only applied when a forum selection clause was “contractually valid.” It then looked to the test set forth in *The Bremen* to determine whether the clause at issue in the case was enforceable. In the court’s words:

[The plaintiff] has identified an Idaho statute that clearly states a strong public policy. Idaho Code § 29-110(1) provides: “Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho.” . . . [S]atisfaction of *Bremen*’s public policy factor continues to suffice to render a forum-selection clause unenforceable. *Bremen* held that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.” We have found nothing in *Atlantic Marine* that compels a different rule.<sup>97</sup>

It should be emphasized that this approach treats the state statute as dispositive on the issue of clause enforceability at step one of the *Atlantic Marine* analysis. It does not address the ultimate question of whether the case should be transferred under Section 1404(a) or dismissed under *forum non conveniens* at step two of that analysis. The Ninth Circuit ultimately remanded the case for the lower court to consider whether the case should be dismissed under the usual *forum non conveniens* analysis that applies in the absence of a contractually valid forum selection clause.

Some federal courts have declined to follow this approach. As discussed below, these courts cite *Stewart* for the proposition that state statutes are not dispositive on the issue of clause enforceability and that such statutes are only one factor to be weighed in the enforceability analysis.<sup>98</sup> These courts fail to account, however, for the updated analytical framework set forth in *Atlantic Marine*.<sup>99</sup> It is important to note that when the defendant moves to dismiss a case on the basis of a forum selection clause pursuant to *forum non*

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(D.N.J. Oct. 30, 2020); *Family Wireless #1, LLC v. Auto. Techs., Inc.*, 2015 U.S. Dist. LEXIS 115810, at \*18 (E.D. Mich. Sep. 1, 2015); *Live Cryo, LLC v. CryoUSA Imp. & Sales, LLC*, 2017 U.S. Dist. LEXIS 149850, at \*13 (E.D. Mich. Sep. 15, 2017); *J. Lilly, Ltd. Liab. Co. v. Clearspan Fabric Structures, Int’l, Inc.*, 2018 U.S. Dist. LEXIS 170667, at \*9 (D. Or. Oct. 2, 2018); *Jorgenson Forge Corp. v. Ill. Union Ins. Co.*, 2014 U.S. Dist. LEXIS 193585, at \*9 (W.D. Wash. June 17, 2014).

<sup>96</sup> 931 F.3d 911, 912 (9th Cir. 2019); *see also* *Davis v. Oasis Legal Fin. Operating Co., LLC*, 936 F.3d 1174, 1177 (11th Cir. 2019) (applying state statute to invalidate outbound forum selection clause).

<sup>97</sup> *Id.* at 916.

<sup>98</sup> *Bowen Eng’g Corp. v. Pac. Indem. Co.*, 83 F. Supp. 3d 1185, 1191-93 (D. Kan. 2015) (collecting cases).

<sup>99</sup> *Pierman v. Stryker Corp.*, No. 3:19-cv-00679-BEN-MDD, 2020 U.S. Dist. LEXIS 12971, at \*8 (S.D. Cal. Jan. 23, 2020); *see also* Adam N. Steinman, *Forum Selection After Atlantic Marine: Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 796 (2015) (“Properly understood, *Atlantic Marine* opens the door for state law to play a more significant role than many anticipated in the wake of *Stewart*.”).

*conveniens*, as was the case in *Gemini*, Section 1404 does not apply and *Stewart* is inapplicable.<sup>100</sup> To the extent that federal courts read *Stewart* to require the application of federal law to the enforceability decision, that law is supplied by *The Bremen*, which directs courts not to enforce a clause when it contrary to the public policy of the forum.<sup>101</sup> Finally, the issue in *Stewart* was whether Alabama public policy as expressed in state common law was sufficient to defeat a motion to transfer. In the overwhelming majority of contemporary cases, by comparison, the relevant statement of public policy appears in a state statute.<sup>102</sup>

b. Approach #2: State Statute is One of Several Factors

Other federal courts reject the notion that state statutes—standing alone—provide a conclusive answer to the enforceability question.<sup>103</sup> These courts treat state public policy as merely one factor to consider in determining whether a forum selection clause should be enforced as a matter of federal law.<sup>104</sup>

In *Gita Sports Ltd v. SG Sensortechnik GmbH & Co. KG*, for example, a federal court in North Carolina was asked to enforce a forum selection clause which stated that all disputes had to be resolved in Germany.<sup>105</sup> The U.S.-based plaintiff argued that the clause was unenforceable because the North Carolina legislature had enacted a statute directing courts not to enforce outbound forum selection clauses. In evaluating this argument, the court did not view state public policy as positive. In the court's words:

Choice of forum . . . provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law

<sup>100</sup> *Harding Materials, Inc. v. Reliable Asphalt Prods.*, No. 1:16-cv-02681-JMS-MJD, 2017 U.S. Dist. LEXIS 16668, at \*9 (S.D. Ind. Feb. 6, 2017).

<sup>101</sup> *Kirkland v. Deluxe Small Bus. Sales, Inc.*, No. 16-73-SDD-EWD, 2016 U.S. Dist. LEXIS 194042, at \*12 (M.D. La. July 27, 2016) ("However, neither *Stewart* nor *Atlantic Marine* considered the threshold issue of whether the Forum Selection Clause is valid. That analysis, as set forth above, is dictated in this circuit by *Haynesworth* and requires consideration of whether enforcement would contravene a strong public policy of the forum state."); *Black Hills Truck & Trailer, Inc. v. Mac Trailer Mfg.*, 2014 U.S. Dist. LEXIS 157968, at \*15 (D.S.D. Nov. 6, 2014) ("Stewart makes clear that federal law, not state law, applies to a motion to transfer under 1404(a). But in situations where the court should apply *Bremen*, Stewart does not alter that approach. Therefore, Stewart does not undermine the applicability of *Bremen* . . . to the determination of the enforceability of a forum-selection clause.").

<sup>102</sup> *Nat'l Frozen Foods Corp. v. Berkley Assurance Co.*, No. C17-339 RSM, 2017 U.S. Dist. LEXIS 141002, at \*9 (W.D. Wash. Aug. 31, 2017) ("Stewart is likewise unhelpful because it dealt with Alabama's putative policy regarding forum-selection clauses, not a state law making a forum selection clause void.").

<sup>103</sup> *Yates v. Norsk Titanium US, Inc.*, No. SACV 17-01089 AG (SKx), 2017 U.S. Dist. LEXIS 222165, at \*7 (C.D. Cal. Sep. 20, 2017) ("Following the Supreme Court's decision in *Stewart*, district courts have recognized that a particular state's public policy is not dispositive as to the enforceability of a forum selection clause."); *Presidential Hosp., Ltd. Liab. Co. v. Wyndham Hotel Grp., Ltd. Liab. Co.*, 333 F. Supp. 3d 1179, 1222 (D.N.M. 2018) ("[T]he Court concludes that, under *Stewart Organization, Inc. v. Ricoh Corporation*, the Court cannot properly consider state statutes voiding forum selection clauses when a party moves for a 28 U.S.C. § 1404(a) transfer.").

<sup>104</sup> This weighing of factors also sometimes occurs as part of the broader 1404 analysis rather than the enforcement analysis. See *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 (9th Cir. 2000) ("We conclude that the public policy of the forum is not dispositive in a § 1404(a) determination but, rather, it is another factor that should be weighed in the court's § 1404(a) 'interest of justice' analysis."); *Redmond v. Sirius Int'l Ins. Corp.*, No. 12-CV-587, 2014 U.S. Dist. LEXIS 5089, at \*10 (E.D. Wis. Jan. 15, 2014) ("The court also recognizes that, although it is unenforceable under Wisconsin law, the fact that the parties agreed to a forum selection may be given some weight in the analysis under § 1404(a). However, the fact of the parties' agreement is counterbalanced by Wisconsin's strong public policy against forum selection clauses in insurance contracts; thus, the interests of justice lead to the conclusion that this fact merits negligible weight."); *Ha Thi Le v. Lease Fin. Grp., LLC*, No. 16-14867, 2017 U.S. Dist. LEXIS 111918, at \*13-14 (E.D. La. May 8, 2017) (While the Court recognizes that it still has the power to transfer to New York on the basis of the other factors identified in 28 U.S.C. § 1404(a), the Court declines to do so.).

<sup>105</sup> 560 F. Supp. 2d 432 (W.D.N.C. 2008).

may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.<sup>106</sup>

The court acknowledged that enforcing the German forum selection clause would be contrary to North Carolina public policy. It ultimately concluded, however, that this fact was not dispositive because the contract had not been induced by fraud or overreaching, the complaining party would not be deprived of its day in court, and the chosen law was not fundamentally unfair. Since three of the four factors in the balancing weighed in favor of enforcement, the court held that the clause was enforceable notwithstanding North Carolina's statute.<sup>107</sup>

There are, broadly speaking, three problems with this approach. First, there is nothing in *The Bremen* to suggest that a balancing test should be used to evaluate enforceability. In that case, the Court clearly stated that a forum selection clause was unenforceable if it was contrary to the public policy of the forum. The Court also stated that a clause was unenforceable if the clause would deprive the resisting party of its day in court, if it was induced by fraud or overreaching, or if there was another basis for deeming the clause unreasonable. Each of these bases for non-enforcement is separate and independent from all the others. To require a showing that a clause is *both* contrary to public policy *and* unreasonable due to one of the factors listed above is to erect an almost insurmountable barrier to any plaintiff seeking to avoid enforcement of the forum selection clause. This is not what *The Bremen* requires.

Second, to the extent that a balancing test frequently leads the federal courts to disregard statutes that are binding on state courts that sit in the same jurisdiction, it creates an *Erie* problem.<sup>108</sup> In *Erie Railroad Company v. Tompkins*, the U.S. Supreme Court held that the lower federal courts should seek to avoid creating situations where litigants were encouraged to forum shop between state and federal courts in the same state. If a state has enacted a statute invalidating forum selection clauses when written into a construction contract, the state courts sitting in that jurisdiction will enforce the statute as written and invalidate the clause. If the federal courts in that jurisdiction apply a balancing test that routinely leads to the clause being enforced, defendants will have a strong incentive to remove the suit to federal court so as to take advantage of a more favorable federal rule.<sup>109</sup> This is precisely the sort of forum shopping that *Erie* sought to discourage.<sup>110</sup>

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<sup>106</sup> *Id.* at 437.

<sup>107</sup> *Id.*; see also *Brand Energy Servs., LLC v. Enerfab Power & Indus., Inc.*, No. 3:15-cv-01530, 2016 U.S. Dist. LEXIS 199288, at \*12 (M.D. Tenn. Oct. 26, 2016) (“[T]his Court will consider Tenn. Code Ann. § 66-11-208(a) as one factor that weighs against enforcement of the Forum Selection Clause. To determine whether to invalidate the Clause in its entirety, the Court must also consider (1) [w]hether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring plaintiff to bring suit there would be unjust.”).

<sup>108</sup> This problem is felt even more acutely in the smattering of cases where the federal courts have held that state law is “irrelevant” to the enforceability inquiry. See, e.g., *WCC Cable, Inc. v. G4S Tech. LLC*, No. 5:17-CV-00052, 2017 U.S. Dist. LEXIS 208728, at \*18 (W.D. Va. Dec. 15, 2017).

<sup>109</sup> *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (Scalia, J., dissenting) (observing that allowing federal courts to disregard state law in determining whether a forum selection clause is enforcement “clearly encourages forum shopping”).

<sup>110</sup> Adam N. Steinman, *Forum Selection After Atlantic Marine: Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 804-10 (discussing *Erie* problems that arise when federal law governs enforceability issue).

Third, the use of a balancing test to determine enforceability is needlessly complicated. Regardless of how the enforceability inquiry is resolved, the court must then apply a *second* balancing test to decide whether the case should be transferred or dismissed. As part of a Section 1404 or *forum non conveniens* analysis, the courts will consider a range of factors to assess whether the case should be transferred or dismissed.<sup>111</sup> To stack one balancing test on top of another balancing test is stack nonsense on top of stilts.

### C. Reasonableness

The Supreme Court held in *The Bremen* that forum selection clauses are also unenforceable when “enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”<sup>112</sup> In defining an “unreasonable” clause, the Court imposed a “heavy burden” on the party resisting enforcement. Mere inconvenience, the Court held, was not enough. Instead, a clause was only unreasonable if litigation in the chosen forum was “so gravely difficult and inconvenient” that the resisting party “will for all practical purposes be deprived of his day in court.”<sup>113</sup> In imposing this standard, however, the Court noted that the clause at issue was the product of “arm’s-length negotiation by experienced and sophisticated businessmen.”<sup>114</sup> The *Bremen* Court thus left open the question of whether this same standard would apply when evaluating the enforceability of a forum selection clause in a other types of contracts.

Nineteen years later, the Supreme Court addressed the question of when a forum selection clause was “unreasonable” in consumer contracts of adhesion.<sup>115</sup> In *Carnival Cruise Lines v. Shute*, a woman living in Washington slipped and fell while on board a cruise ship. She sued the cruise company in federal court in Washington. The company sought to enforce a forum selection clause in the passenger ticket requiring all suits against it to be brought in Florida. The Court held that the clause was reasonable—and enforceable—withstanding the fact that it was written into a contract of adhesion drafted by a multinational company and required the plaintiff to travel several thousand miles to bring the lawsuit. While the *Carnival Cruise* court hinted that a clause might be unreasonable if its existence was not “reasonably communicated” to the plaintiff, the effect of the decision was to dramatically curtail the range of cases where a clause might be deemed invalid on the basis of unreasonableness.

A review of federal court cases decided after *Atlantic Marine* turned up a mere handful of cases where the federal courts declined to enforce a clause on the grounds that it was unreasonable. These cases suggest that a clause may be deemed unreasonable when (1) the chosen court lacks subject-matter jurisdiction to hear a case, (2) enforcement will result in duplicative litigation, (3) the clause was not reasonably communicated, (4) enforcement

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<sup>111</sup> In re Hulu, LLC, No. 2021-142, 2021 U.S. App. LEXIS 22723, at \*5 (Fed. Cir. Aug. 2, 2021) (listing seven factors); Research Automation, Inc. v. Schrader-Bridgeport Int’l, Inc., 626 F.3d 973, 978 (7th Cir. 2010) (listing nine factors); Strategic Power Sys. v. Sciemus, Ltd., No. 3:16-CV-859-RJC-DCK, 2017 U.S. Dist. LEXIS 124754, at \*23 (W.D.N.C. Aug. 8, 2017) (New York) (listing eleven factors); *see also* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414 (2017).

<sup>112</sup> *The Bremen*, 407 U.S. at 10.

<sup>113</sup> *Id.* at 18.

<sup>114</sup> *Id.* at 12.

<sup>115</sup> *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 590, 111 S. Ct. 1522, 1526 (1991)



would deprive the resisting party of her day in court, or (5) the clause is fundamentally unfair.

### 1. *Chosen Court Lacks Subject Matter Jurisdiction*

If the court named in the forum selection clause lacks subject-matter jurisdiction to hear the dispute, then the federal courts will decline to enforce the clause. In *Hare v. YJ Sales, Inc.*, for example, a federal district court refused to enforce a forum selection clause requiring a copyright claim to be brought in the state courts of Rhode Island because state courts do not have subject-matter jurisdiction to hear copyright claims.<sup>116</sup> In *BH Servs. v. FCE Ben. Adm'rs, Inc.*, a federal district court refused to enforce a forum selection clause requiring an ERISA suit to be brought in San Mateo County, California, because there was no federal courthouse in that county and state courts lack subject-matter jurisdiction to hear ERISA claims.<sup>117</sup> In *Alamo Masonry & Constr. Contractors, LLC v. Air Ideal, Inc.*, a federal district court hearing a claim arising under the Miller Act refused to enforce a forum selection clause calling for disputes to be resolved in Seminole County, Florida, because that county lacked a federal courthouse and state courts lack subject-matter jurisdiction hear claims arising under the Miller Act.<sup>118</sup>

### 2. *Enforcement Will Result in Duplicative Litigation*

The federal courts have also sometimes held that it is unreasonable to enforce a forum selection clause when to do so will lead to inefficient and duplicative litigation. In *Carney v. Beracha*, for example, a federal district court in Connecticut held that “enforcement of the forum selection clauses to bar this action from this court would be unreasonable, because it would require piecemeal litigation in multiple fora and, in some cases, might require multiple courts to adjudicate claims covering only portions of each transaction.”<sup>119</sup> In *Laferte v. myFootpath, LLC*, a federal court in California noted that “courts find forum selection clauses unreasonable where there is a possibility of prejudice through conflicting judgments by duplicitous litigation in multiple courts, or where refileing subordinate claims in a separate court would result in judicial inefficiency.”<sup>120</sup> And in *Idingo Ltd. Liab. Co. v. Cohen*, a federal court in New Jersey held that declined to enforce a forum selection clause because it would lead to “separate cases involving extremely similar facts and claims . . . in two court systems” and “fragmented and duplicative litigation.”<sup>121</sup>

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<sup>116</sup> 2017 U.S. Dist. LEXIS 234010, at \*9 (C.D. Cal. June 15, 2017).

<sup>117</sup> 2017 U.S. Dist. LEXIS 134973, at \*16-17 (D.S.D. Aug. 23, 2017)

<sup>118</sup> 2014 U.S. Dist. LEXIS 48157, at \*8 (S.D. Tex. Apr. 8, 2014).

<sup>119</sup> 996 F. Supp. 2d 56, 71 (D. Conn. 2014). *But see* SSAB Ala., Inc. v. Kem-Bonds, Inc., No. 17-0175-WS-C, 2017 U.S. Dist. LEXIS 204021, at \*13 (S.D. Ala. Dec. 12, 2017) (“Atlantic Marine calls for enforcement of the forum-selection clause, notwithstanding objections grounded in fears of duplicative litigation or judicial economy”).

<sup>120</sup> 2014 U.S. Dist. LEXIS 194315, at \*8 (C.D. Cal. July 18, 2014). *But see* Valspar Corp. v. E.I. DuPont de Nemours & Co., 15 F. Supp. 3d 928, 934-35 (D. Minn. 2014) (“It is always more expeditious to try related claims in one forum rather than several, but allowing efficiency and economy to rule the day would effectively swallow Atlantic Marine’s holding in every case with multiple defendants.”).

<sup>121</sup> 2017 U.S. Dist. LEXIS 1530, at \*13 (D.N.J. Jan. 4, 2017).

### 3. Clause Was Not Reasonably Communicated

In *Carnival Cruise*, the Supreme Court offered no opinion on the question of whether a forum selection might be unenforceable if it was never “reasonably communicated” to the resisting party. In the years since that case was decided, a number of lower courts have invalidated clauses on this basis. In *Azzia v. Royal Caribbean Cruises* and *Touloumes v. Kerzner Int’l Bah., Ltd.*, for example, a federal district court in Florida refused to enforce a forum selection clause in a contract between a passenger and a cruise company because the company had failed to show that an email containing contract was ever sent to the plaintiff.<sup>122</sup> In *Young v. Holland Am. Line, N.V.*, the court concluded that “a term disclosed only after a purchase is made and at a time when cancellation would cost up to 75% of the ticket price” was unenforceable.<sup>123</sup> And in *Hussein v. Coinabul, Ltd. Liab. Co.*, a federal district court in Illinois declined to enforce a forum selection clause because it was “hidden behind a hyperlink that is tucked away at the bottom of its website.”<sup>124</sup> In each of these cases, the court concluded that the existence of the forum selection clause was not reasonably communicated to the plaintiff and was therefore unenforceable.

### 4. Enforcement Will Deprive Resisting Party of Day in Court

A handful of federal courts have declined to enforce a forum selection clause on the grounds that it would deprive the resisting party of his day in court. In *Grice v. VIM Holdings Grp., LLC*, a federal district court in Massachusetts held that enforcing a forum selection clause selecting the courts of Illinois against a single mother residing in Massachusetts earning \$15.00 per hour would deprive her of her day in court and was therefore unreasonable.<sup>125</sup> In *Lieberman v. Carnival Cruise Lines*, a federal district court in New Jersey held that enforcing a Florida clause against a thirty-nine-year-old mother with four children in New Jersey undergoing chemotherapy for Stage 4 cancer would deprive her of her day in court and was therefore unreasonable.<sup>126</sup> And in *Harmon v. DynCorp Int’l, Inc.*, a federal district court in Virginia held that enforcing a United Arab Emirates (UAE) clause against a Virginia-based employee would deprive him of his day in court because of the distance and substantial difference between the laws of the United States and the UAE and because the

<sup>122</sup> *Azzia v. Royal Caribbean Cruises*, 2016 U.S. Dist. LEXIS 201484, at \*11 (S.D. Fla. Aug. 30, 2016); *Touloumes v. Kerzner Int’l Bah., Ltd.*, 2014 U.S. Dist. LEXIS 184375, at \*5 (S.D. Fla. Sep. 25, 2014). *But see* *Rivas v. Greyhound Lines, Inc.*, 2018 U.S. Dist. LEXIS 222326, at \*25 (W.D. Tex. Mar. 1, 2018) (enforcing clause notwithstanding magistrate judge’s finding that the top half of the ticket is “absolutely illegible because the font is too small. Indeed, I cannot even read it using a magnifying glass. The bottom half of Alejandro’s ticket is even more illegible, and the defendants did not even attempt a translation of it. I have no evidence before me that the plaintiffs received a legible version of the bottom half of the ticket that would have put them on notice”).

<sup>123</sup> 2016 U.S. Dist. LEXIS 179370, at \*6-7 (N.D. Cal. Dec. 28, 2016). *But see* *Santos v. Costa Cruise Lines, Inc.*, 91 F. Supp. 3d 372, 380 (E.D.N.Y. 2015) (upholding forum selection clause notwithstanding fact that plaintiffs would have had to forfeit 50% of their ticket cost to reject the terms).

<sup>124</sup> 2014 U.S. Dist. LEXIS 175333, at \*7 (N.D. Ill. Dec. 19, 2014); *see also* *Live Face on Web, LLC v. Complete Family Dentistry, P.C.*, 2016 U.S. Dist. LEXIS 187191, at \*5 (W.D. Pa. Nov. 18, 2016). *But see* *Omnibus Trading, Inc. v. Gold Creek Foods, LLC*, 2019 U.S. Dist. LEXIS 126531, at \*4-5 (N.D. Tex. July 30, 2019) (concluding that a clause was reasonably communicated when the contract contained a link to the General Terms and Conditions and the forum selection clause was contained therein).

<sup>125</sup> 280 F. Supp. 3d 258, 283 (D. Mass. 2017). *But see* *Get in Shape Franchise, Inc. v. TFL Fishers, LLC*, 167 F. Supp. 3d 173, 207 (D. Mass. 2016) (transferring to Indiana) (enforcing clause notwithstanding the fact that the plaintiff “had an annual income of \$24,500 in 2014 and \$36,000 in 2013. She also has approximately \$45,000 in unspecified “debts,” “no liquid assets other than a minor amount in a checking account,” and “does not own a home.”); *Horne v. ACD Ltd., No. 2:12-CV-1142 JCM (GWF)*, 2014 U.S. Dist. LEXIS 32657, at \*4-5 (D. Nev. Mar. 13, 2014) (enforcing clause requiring litigation to proceed in Argentina notwithstanding fact that “plaintiff describes his monthly household income as \$3,800, with his bills exceeding \$4,000 monthly” and “plaintiff addresses his physical limitations including a hernia, 24/7 pain in [his] feet, and difficulty sleeping.”).

<sup>126</sup> Civil Action No. 13-4716 (JLL)(JAD), 2014 U.S. Dist. LEXIS 109890, at \*16-17 (D.N.J. Apr. 28, 2014).

employment contract at issue was not written in Arabic and was hence invalid under the law of the UAE.<sup>127</sup>

### 5. *Clause Is Fundamentally Unfair*

In a smattering of cases, the courts held that enforcing a clause was so profoundly unfair that it crossed the line into unreasonableness on this basis alone. In one case, a federal district court in Massachusetts refused to enforce an Iowa clause due to the circumstances under which the agreement was signed.<sup>128</sup> The court noted that the plaintiff spoke only Spanish and could not read the English-language contract presented to him on a take-it-or-leave-it basis. The court pointed out that if the plaintiff had refused to sign, he would have been “stranded in Iowa without bus fare home and a debt of \$2,000.” Such a clause was, in the court’s view, unfair and hence unenforceable. In *Davila v. Adesa Utah, Ltd. Liab. Co.*, a federal district court in Utah refused to enforce an Indiana clause due to its one-sided nature.<sup>129</sup> While the plaintiff was required to bring suit against the defendant in Indiana, the clause allowed the defendant to bring suit against the plaintiff wherever it wished. In light of this disparity, and amid other concerns about negotiating power and small print, the court concluded that the clause was unfair and therefore unenforceable.

#### D. An Empirical Take on Enforceability

Legal scholars have long distinguished between the “law on the books” and the “law in action.” The law on the books is “the content of statutes, regulations, and judicial decisions,” while the law in action “refers to regularities describing how legal authorities enforce the ‘law on the books.’”<sup>130</sup> The previous two Sections surveyed the law on the books as it relates to the enforcement of forum selection clauses in federal court. This Section describes how federal courts actually apply that law in the cases that come before them.

To achieve this end, it surveys every federal case relating to the enforceability of forum selection clauses handed down between January 1, 2014, and December 31, 2020. The screening criteria used to identify these cases are set forth in the Appendix. The search produced a dataset of 669 federal cases when one party challenged the enforceability of a clause on the grounds that it was unreasonable or public policy. I then reviewed each of these cases to determine whether the federal court ultimately chose to enforce the clause.<sup>131</sup>

I found that the federal courts enforced forum selection clauses over the objections of the resisting party approximately 87% of the time. I also found that there were significant differences in enforcement practices across states. The federal courts in Florida, for

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<sup>127</sup> 2015 U.S. Dist. LEXIS 14604, at \*29-30 (E.D. Va. Feb. 6, 2015).

<sup>128</sup> *Montoya v. CRST Expedited, Inc.*, 285 F. Supp. 3d 493, 499 (D. Mass. 2018).

<sup>129</sup> 2020 U.S. Dist. LEXIS 149893, at \*4 (D. Utah Aug. 18, 2020).

<sup>130</sup> Rebecca Stone, *Legal Design for the “Good Man,”* 102 VA. L. REV. 1767, 1798 (2016) (citing Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)).

<sup>131</sup> The dataset contains cases where the court addressed the issue of whether a clause was enforceable as part of its broader inquiry into whether a clause was “contractually valid” for purposes of *Atlantic Marine* plus cases where one party argued the clause was invalid due to fraud.

example, enforce forum selection clauses 96% of the time. The federal courts in California, by comparison, enforce forum selection clauses only 81% of the time. The results for every state with at least twenty federal court decisions during the applicable time period are set forth in Table 1.

<b>TABLE 1: ENFORCEMENT RATE IN FEDERAL COURT BY STATE, 2014-2020 (MIN. 20 CASES)</b>	
<b>State (# cases)</b>	<b>Enforcement Rate</b>
Florida (50)	96%
Pennsylvania (23)	96%
New York (54)	91%
Texas (46)	91%
Illinois (20)	90%
Massachusetts (20)	89%
<b>Overall (669)</b>	<b>87%</b>
Louisiana (33)	85%
New Jersey (38)	84%
California (124)	81%

I also calculated the rate of enforcement for each federal circuit by looking to all of the federal court decisions within the circuit that addressed the issue of clause enforceability during the relevant time period. The Eleventh Circuit had the highest circuit-wide enforcement rate at 94%. The Ninth Circuit had the lowest circuit-wide enforcement rate at 81%. These results are heavily influenced by the presence of Florida in the Eleventh Circuit and the presence of California in the Ninth Circuit. (I did not include the Federal Circuit or the D.C. Circuit in the survey due to their specialized subject areas.) The results for each of the federal courts of appeal are set forth in Table 2.

<b>TABLE 2: ENFORCEMENT RATE BY FEDERAL CIRCUIT, 2014-2020</b>	
<b>Circuit (# cases)</b>	<b>Enforcement Rate</b>
Eleventh Circuit (66)	94%
Second Circuit (64)	91%
Sixth Circuit (45)	91%
Fifth Circuit (88)	90%
Third Circuit (62)	89%
Fourth Circuit (44)	89%
Seventh Circuit (30)	87%
<b>Overall (669)</b>	<b>87%</b>
First Circuit (26)	85%
Eighth Circuit (39)	85%
Tenth Circuit (35)	83%
Ninth Circuit (170)	81%

Overall, these data suggest that—regardless of circuit—that federal courts enforce forum selection clauses in the overwhelming majority of cases.<sup>132</sup>

After calculating the overall enforcement rate by state and by circuit, I turned my attention to those cases where a federal court refused to enforce a forum selection clause. I reviewed each of the non-enforcement cases and coded the reason why the court had declined to give effect to the clause. The data show that the federal courts invoke public policy as basis for non-enforcement in 9% of cases. They hold that clauses are unreasonable in 3% of cases. They hold that clauses are unenforceable because they were procured by fraud in just 1% of cases, as shown in Table 3.

<b>TABLE 3: FEDERAL CASE OUTCOMES, 2014-2020</b>	
<b>Outcome</b>	<b>Percentage</b>
<i>Enforced</i>	87%
<i>Not Enforced</i>	13%
Public Policy	9%
Unreasonable	3%
Fraud	1%

These findings highlight the reluctance of the federal courts to conclude that a clause is unreasonable. It is far more common for these courts to invalidate a clause on the basis of public policy than a lack of reasonableness.

I then reviewed each of the public policy cases to determine why the court had declined to enforce the clause. I found that while the courts invoked state public policy as a basis for non-enforcement in 6% of the cases, they invoked federal public policy as a basis for non-enforcement in only 3% of the cases, as reported in Table 4.

<b>TABLE 4: CLAUSE DEEMED UNENFORCEABLE IN FEDERAL COURT ON PUBLIC POLICY GROUNDS, 2014-2020</b>	
<b>Cited Reason for Non-Enforcement</b>	<b>Percentage</b>
<i>State Policy</i>	6%
Invalidating Statute	5%
Other State Policy	1%
<i>Federal Policy</i>	3%
Bankruptcy	1.0%
Carmack Amendment	0.8%
ERISA	0.4%
Miller Act	0.3%

<sup>132</sup> This finding provides empirical support for intuitions long voiced by scholars in this area. See Mullenix, *supra* note \_\_, at 751 (“If one sifts through the thousands of reported federal forum selection clause decisions since Zapata—and there are thousands of such decisions—one cannot help but be struck by the following fact: in virtually every case the party seeking enforcement of the clause wins, and the party seeking to invalidate the clause loses.”).

The fact that the federal courts are more likely to invoke state public policy rather than federal public policy to invalidate a clause is mildly surprising because, as discussed above, some federal courts decline to recognize state statutes as dispositive with respect to the issue of enforcement. The sheer number of state invalidating statutes, however, and the fact that many of these statutes apply to contracts that are regularly litigated in federal court, helps to explain the disparity between state and federal public policy.

I next reviewed each of the cases where a court concluded that a clause was unreasonable. I found that the most common basis for deeming a clause unreasonable was that it was not reasonably communicated to the plaintiff. The other bases for finding a clause to be unreasonable all appeared in equal numbers, as shown in Table 5.

<b>TABLE 5: CLAUSE DEEMED UNENFORCEABLE IN FEDERAL COURT FOR LACK OF REASONABLENESS, 2014-2020</b>	
	<b>Percentage</b>
Not Reasonably Communicated	1.0%
Duplicative Litigation	0.5%
Chosen Court Lacks Subject-Matter Jurisdiction	0.5%
Deprived of Day in Court	0.5%
Unfair	0.5%
<b>Total</b>	<b>3.0%</b>

The data suggest that the courts are not appreciably more likely to declare a clause unreasonable on any one particular basis.

Overall, the data derived from the cases provide important context for the doctrinal rules set forth above. While the federal courts occasionally refuse to enforce forum selection clauses on the grounds that they are contrary to public policy, such decisions are rare. It is even more uncommon for a federal court to refuse to enforce a clause on grounds that it is unreasonable. In the overwhelming majority of cases, the courts will enforce a forum selection clause over the objections of the resisting party.

#### **IV. THE SUPERCHARGED FORUM SELECTION CLAUSE**

The foregoing discussion of validity, interpretation, and enforcement inform the core inquiry as to whether a forum selection clause is “contractually valid” for purposes of *Atlantic Marine*. With this account in mind, it is now useful to take a step back to consider precisely how much has changed over the past fifty years with respect to forum selection clauses. It is also useful to consider whether these changes are normatively desirable. Each individual rule discussed above, considered in isolation, may be beneficial. Viewed as a collective, however, the accumulated weight of these rules has led to a regime where forum selection clauses have become supercharged. The clause has become a battering ram capable of

smashing its way to enforcement in virtually every case in which it is invoked. This is good for the corporations that rely on these clauses to channel litigation to their home jurisdictions. It is less good for consumers, employees, and other individuals against whom these clauses are routinely enforced.

#### A. The Rise of the Forum Selection Clause

In the nineteenth and early twentieth century, it will be recalled, forum selection clauses were *per se* unenforceable in most cases.<sup>133</sup> In 1972, the U.S. Supreme Court jettisoned this rule. Henceforth, the Court held, such provisions should be viewed as presumptively enforceable when written into international commercial agreements concluded by sophisticated parties so long as the agreement was (1) reasonable, (2) consistent with public policy of the forum, and (3) unaffected by fraud.<sup>134</sup> In adopting this framework, the Court effectively rehabilitated the forum selection clause. It brought the clause back into the contractual mainstream after years in the proverbial wilderness. This act set the stage for a dizzying array of doctrinal innovations in the years to come, each of which served to make the forum selection clause more powerful.

In 1974, the Supreme Court chose to modify the rules pertaining to fraud in the context of arbitration clauses. The Court held that it was not enough to prove that an arbitration clause was invalid because it was part of an *agreement* that had been procured by fraud.<sup>135</sup> Instead, the resisting party had to show that the *clause itself* was the object of the fraudulent inducement.<sup>136</sup> Although this decision was rendered in an arbitration case, the rule quickly migrated to cases involving forum selection clauses.<sup>137</sup> Since it is difficult for the resisting party in most cases to show that the forum selection clause itself was procured by fraud, the end result of this migration was to defang one of the exceptions to enforceability—fraud—that was specific referenced in *The Bremen*.

In 1988, the Supreme Court decided *Stewart*, which held—albeit obliquely—that federal law governed the question of whether a forum selection clause was enforceable when a federal court was sitting in diversity.<sup>138</sup> This decision served to undercut the ability of state courts and state legislatures to check the growing power of the forum selection clause.<sup>139</sup> If the federal enforcement rule was more pro-enforcement than the state enforcement rule, an out-of-state defendant could evade state law by removing the case to federal court.

In 1991, the Supreme Court further narrowed the reasonability exception in *Carnival Cruise*.<sup>140</sup> The Court held that forum selection clauses could be reasonable even when written into consumer contracts of adhesion.<sup>141</sup> The result was a significant shift in the law. Up to this point, one could plausibly argue that the legal test for enforceability was flexible enough

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<sup>133</sup> See *supra* note \_\_ & accompanying text.

<sup>134</sup> *Id.*

<sup>135</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 534, 94 S. Ct. 2449, 2464 (1974).

<sup>136</sup> See *supra* note \_\_ & accompanying text.

<sup>137</sup> See *supra* note \_\_ & accompanying text.

<sup>138</sup> See *supra* note \_\_ & accompanying text.

<sup>139</sup> See *supra* note \_\_ & accompanying text.

<sup>140</sup> See *supra* note \_\_ & accompanying text.

<sup>141</sup> See *supra* note \_\_ & accompanying text.

to account for whether the resisting party was a business or a natural person. After *Carnival Cruise*, this was no longer the case.<sup>142</sup> These clauses were now presumptively enforceable even when the resisting party was a natural person who lacked the bargaining power or the sophistication to negotiate the terms of the contract.

In the wake of the decision in *Carnival Cruise*, the federal courts began created new contract rules that applied largely or exclusively to forum selection clauses. Each of these rules made it more likely that clauses would be enforced. In the 1990s, the courts began to hold that forum selection clauses survive the termination or cancellation of the contract.<sup>143</sup> At roughly the same time, the courts took it upon themselves to modify the ordinary contract rules for third-party beneficiaries to hold that non-signatories to a contract may be bound by a forum selection clause if they are so “closely related” to a contract signatory that it was “foreseeable” that they would be bound.<sup>144</sup> Whereas before the forum selection clause had been special in that was subject to a reasonableness test (which was relaxed in *Carnival Cruise*), the clause was now special in that it (1) was subject to unique fraud rules that favored the drafter, (2) survived the termination of the contract, and (3) applied to individuals who had never signed the contract in which it appeared.

These innovations were followed by still others. In recent years, a number of courts have upheld “non-mutual” forum selection clauses that require one contracting party to sue in the chosen forum but allow the other party to sue whenever they want.<sup>145</sup> Other courts have upheld so called “floating” clauses where the identity of the chosen forum could be changed after the contract was signed.<sup>146</sup> Still others enforced clauses even when there was no possibility of recovery in the chosen jurisdiction because the statute of limitations had run there.<sup>147</sup> Finally, some courts now allow one contract party to sue the other for damages when it brings a lawsuit in a jurisdiction other than the one named in the forum selection clause.<sup>148</sup>

The willingness of the courts to adopt each of these doctrinal innovations has generally redounded to the benefit of the contract drafter in a position to dictate terms to its counterparty.<sup>149</sup> Each and every one of the doctrinal innovations from the past fifty years—

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<sup>142</sup> See *supra* note \_\_ & accompanying text.

<sup>143</sup> See Part I.B.3.

<sup>144</sup> See Part I.B.2.

<sup>145</sup> *Mao v. Sanum Invs., Ltd.*, No. 2:14-CV-00721-RCJ-PAL, 2014 U.S. Dist. LEXIS 146983, at \*6 (D. Nev. Oct. 15, 2014) (“Even though, as Mao points out, the clause permits Bridge Capital and Sanum Investments to bring suit in other jurisdictions but prohibits Mao from doing so, this does not invalidate the clause. Unequal contract terms and unequal bargaining power will not invalidate a forum-selection clause.”); *Carter’s of New Bedford, Inc. v. Nike, Inc.*, No. 13-11513-DPW, 2014 U.S. Dist. LEXIS 43410, at \*14 (D. Mass. Mar. 31, 2014), *aff’d* 790 F.3d 289, 294 (1st Cir. 2015) (“Carter’s broadest argument is that the forum selection clause is simply unfair; both in that it requires a small family-owned business from Massachusetts to litigate disputes with Nike across the country in Oregon, and in that Nike is not similarly restricted in its ability to select a forum.”).

<sup>146</sup> *Anderson Holdings, Inc. v. Cyclebar Franchising, LLC*, 2018 U.S. Dist. LEXIS 221315, at \*10 (S.D. Miss. Sep. 24, 2018)

<sup>147</sup> The fact that the statute of limitations has run in the chosen court, by comparison, does not usually provide a valid basis for declining to enforce a forum selection clause. See *Barnett v. DynCorp Int’l LLC*, Civil Action No. 4:15-cv-233-O, 2015 U.S. Dist. LEXIS 185530, at \*10 (N.D. Tex. July 13, 2015) (observing that “the vast majority of courts have found that the enforcement of foreign forum selection clauses is not unreasonable, even when the contractual forum’s statute of limitations would bar a plaintiff’s action”)

<sup>148</sup> See Tanya Monestier, *Damages for Breach of a Forum Selection Clause*, 58 AM. BUS. L.J. 271 (2021).

<sup>149</sup> John M. Doroghazi and David J. Norman, *What’s Left to Litigate About Forum Selection Clauses? Atlantic Marine Turns Four*, 36 FRANCHISE L.J. 581, 581 (2017) (“It is no secret that home turf is an advantage. Plants grow best in their native soil and climate. Sports teams win more often on their home court or field. This trope remains true in litigation. An attorney litigating in his or her home court knows the judges and can tailor litigation strategy to the assigned judge’s preferences and proclivities.”); John C. Jorgenson, *Drafting Effective Delaware Forum-Selection Clauses in the Shadow of Enforcement Uncertainty*, 102 IOWA L. REV. 353, 378 (2016) (encouraging



the rejection of the rule of *per se* invalidity, the narrowing of the fraud exception, the federalization of the enforceability inquiry, the narrowing of the reasonableness exception, the decision not to distinguish between business and consumer contracts, allowing clauses to endure beyond the end of the contract, the modification of third-party beneficiary rules to cover more non-signatories, the embrace of non-mutuality, the endorsement of floating clauses, the decision to enforce some clauses even when the statute of limitations has run in the chosen jurisdiction, and allowing suits for damage—advance the interests of the party with more negotiating power in the drafting process.<sup>150</sup> In practice, this means that the modern enforcement regime for forum selection clauses strongly favors the interests of large corporations at the expense of natural persons.<sup>151</sup> With the possible exception of its doctrinal cousin—the arbitration clause—there is no contract provision that is so uniquely favored in modern litigation.<sup>152</sup>

The only body of contemporary judicial doctrine that reliably produces victories for parties resisting a forum selection clause are rules of interpretation.<sup>153</sup> If a forum selection clause is non-exclusive, then it cannot compel a court to dismiss or transfer a case to the chosen forum. If a forum selection clause is not drafted broadly to cover non-contract claims, then these claims are not subject to the clause. The availability of these interpretive arguments is, however, ultimately dependent on the inattention or carelessness of the contract drafter. If a contract drafter is well advised, it can draft a forum selection clause that is exclusive and broad and immune to any and all interpretive arguments put forward by the resisting party. At this point, the full array of doctrinal innovations discussed above may be brought to bear against that party and the clause will, in all likelihood, be enforced.

At present, state statutes directing courts to disregard these provisions provide the most robust check on the enforceability of forum selection clause.<sup>154</sup> State legislatures have enacted statutes directing courts not to enforce outbound forum selection clauses in construction contracts, consumer leases, consumer credit agreements, employment agreements, franchise agreements, insurance contracts, student debt agreements, and timeshare contracts, among others.<sup>155</sup> These laws generally allow individuals who have entered into contracts with large corporations to sue those corporations in the plaintiff's home jurisdiction. These statutes are, however, only enforceable in federal court in those jurisdictions where the federal courts recognize state public policy as a basis for refusing to

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Delaware corporations to write exclusive forum selection clauses into their corporate bylaws so as to “achieve[] the upside of the ability to litigate selectively in a convenient forum”).

<sup>150</sup> Cara Reichard, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866, 869 (2020) (“[Forum selection clauses] can create a significant obstacle for potential litigants—particularly employees, consumers, or other relatively powerless individuals who might be wronged at the hands of a corporate entity.”).

<sup>151</sup> Mullenix, *supra* note \_\_, at 737 (“Because of the enormous strategic advantage conferred by contractual forum-selection clauses on defendants and the fundamental unfairness of the law to consumers governing such provisions, it is thought provoking to view forum-selection clauses, then, as a strategic mechanism to game the system rather than through the lens of sanctified contract principles.”).

<sup>152</sup> The uniquely favorable treatment of arbitration clauses is largely attributable to the existence of the Federal Arbitration Act. There is no comparable federal statute that governs forum selection clauses. All of the doctrinal innovations outlined above may therefore be laid at the foot of the federal judiciary rather than Congress.

<sup>153</sup> See *supra* note \_\_ & accompanying text.

<sup>154</sup> Reichard, *supra* note \_\_, at 871 (“Large corporate powers today have nearly every advantage over the individuals with whom they contract, not least because they prescribe the terms of those contracts. Anti-choice-of-forum laws, including those already adopted by many states, offer a rare opportunity to redistribute power by ensuring that, in the event of a legal claim, the forum is one that does not disadvantage the relatively powerless individual. In litigation against corporate entities, individuals already face enough challenges.”).

<sup>155</sup> Coyle & Richardson, *supra* note \_\_, at 1234.

enforce a forum selection clause. In jurisdictions where the federal courts discount the importance of state public policy, these laws are rendered toothless. This outcome is made possible by the fact that the U.S. Supreme Court federalized the enforceability rules for forum selection clauses in *Stewart*.

#### B. Recalibrating the Forum Selection Clauses

If one accepts that the pendulum has swung too far in the direction of enforcing forum selection clauses that favor large corporations at the expense of individuals, then the logical question to ask is how to establish a better equilibrium. A federal statute limiting the enforceability of forum selection clauses would certainly serve to accomplish this goal.<sup>156</sup> The prospects for enacting such a statute in the current political environment are, however, not particularly encouraging. A decision by the U.S. Supreme Court revisiting its decision in *Carnival Cruise* would likewise go a long way towards rebalancing the scales. The prospect that the current Court will issue such a decision, however, is similarly discouraging. Viewed through a purely pragmatic lens, therefore, the most viable means of recalibrating the enforcement regime is for the lower federal courts to adopt incremental changes that are allowable under existing precedent.

First, the federal courts should refuse to enforce forum selection clauses when they are contrary to the public policy of the state in which they sit as expressed in a state statute. Some federal courts of appeal have already taken this position. Other federal courts, by contrast, routinely enforce forum selection clauses even when such action is inconsistent with state public policy. As discussed above, nothing in *Stewart* or *Atlantic Marine* compels the conclusion that federal courts should ignore state statutes voiding forum selection clauses. Ignoring such statutes is, moreover, inconsistent with the lessons of *The Bremen*, which specifically provides that a clause is unenforceable if it is contrary to the public policy of the forum.

Second, the federal courts should take a broader view of reasonability in weighing whether a clause is enforceable. As things stand, it is virtually impossible for a party resisting a clause to persuade a federal court that a clause is unreasonable, no matter how aged or disabled or impoverished the resisting party is. This unflinching commitment to enforcing clauses against any and all reasonableness challenges goes well beyond what is required by *Carnival Cruise*.

Third, the federal courts should construe special venue provisions in federal statutes as preempting forum selection clauses. As things currently stand, the courts have reached different decisions on this issue depending on the federal statute. This split is particularly curious in light of the fact that the Supreme Court clearly held in *Boyd* that special venue

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<sup>156</sup> Mullenix, *supra* note \_\_, at 757-58 ("If consumers are to be afforded meaningful relief from such clauses, then federal statutory substantive law is needed to determine the validity and enforcement of a forum-selection or choice-of-law clause challenged by a plaintiff.").

provisions in the FELA trump forum selection clauses.<sup>157</sup> There is no reason why the lower federal courts should reach a different conclusion in claims arising under ERISA or the ADA.

Fourth, the federal courts should only apply the closely-related-and-foreseeable test to bind non-signatories when non-signatories in question are corporate affiliates.<sup>158</sup> The use of this test in the corporate context is unobjectionable. The use of the test to bind a non-signatory individual to an agreement executed by their spouse or relative, however, is far more troubling. The rights and obligations of third parties who are natural persons should be evaluated solely and exclusively through the lens of third-party beneficiaries and other common law doctrines. The (more relaxed) closely-related-and-foreseeable test should not be used in these cases.

Fifth, the federal courts should make more extensive use of the doctrine of *contra proferentem* when construing ambiguous forum selection clauses. When a clause is ambiguous, it should be construed to benefit the non-drafting party. There is nothing remotely controversial about this approach. Indeed, a smattering of courts have already deployed it to interpret forum selection clauses.<sup>159</sup> To date, however, the federal courts have done so only rarely. In light of the bargaining disparities that pervade the drafting of these agreements, however, a turn to *contra proferentem* is both appropriate and normatively desirable.

Sixth, and finally, the courts should decline to enforce “non-mutual” forum selection clauses that require one contracting party to sue in the chosen forum but allow the other party to sue whenever they want. What is sauce for the goose should be sauce for the gander. The courts should also decline to uphold “floating” clauses where the identity of the chosen forum could be changed after the contract was signed. If the purpose of these clauses is to promote certainty in dispute resolution, it is difficult to see how this end is furthered by leaving the identity of the chosen jurisdiction unknown until months or years after the contract is signed.

None of the foregoing proposals is revolutionary. A true revolution would require a new federal statute or a new decision by the U.S. Supreme Court. These proposals do, however, represent meaningful improvements to the status quo. If adopted, they would allow courts to undertake a more nuanced and balanced analysis of when a forum selection clause is “contractually valid” as that term is used in *Atlantic Marine*.

## CONCLUSION

In *Atlantic Marine*, the U.S. Supreme Court identified the proper procedural framework for enforcing a forum selection clause in federal court. The Court commented in a footnote that this framework was applicable whether the clause in question was

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<sup>157</sup> See *Boyd v. Grand T. W. R. Co.*, 338 U.S. 263, 265, 70 S. Ct. 26, 27 (1949) (“[C]ontracts limiting the choice of venue are void as conflicting with the Liability Act.”); see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (stating that a “substantive waiver of federally protected civil rights will not be upheld”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, (1974) (“[T]here can be no prospective waiver of an employee’s rights under Title VII.”).

<sup>158</sup> See Coyle & Effron, *supra* note \_\_.

<sup>159</sup> See Coyle, *Interpreting Forum Selection Clauses*, *supra* note \_\_ at 1796 n.12.

“contractually valid.” It did not, however, offer any guidance as to when a forum selection clause qualified as such. This Article sought to remedy this deficit by distilling the relevant doctrinal rules into a concise and readable account of how the lower courts should determine when a forum selection clause is “contractually valid.” It also surveyed several hundred recent federal cases to determine how these doctrinal rules are actually applied. These cases suggests that federal courts enforce forum selection clauses in the overwhelming majority of cases. A dizzying array of doctrinal innovations in this area have led to a world where these clauses are almost always given effect. Since most of these clauses are drafted by large corporations, the effect of this shift is to advantage the interests of these entities.

In an attempt to remedy this imbalance, the Article identified a number of pragmatic reforms that could help to rebalance the scales. First, the federal courts should deem forum selection clauses unenforceable when they are contrary to the public policy of the state in which they sit as expressed in a state statute. Second, they should adopt a broader view of what constitutes an unreasonable clause. Third, they should construe special venue provisions in federal statutes to trump forum selection clauses. Fourth, they should refrain from applying the closely-related-and-foreseeable test to non-corporate persons. Fifth, they should make more liberal use of the doctrine of *contra proferentem* when construing forum selection clauses. Sixth, and finally, the federal courts should not enforce “non-mutual” forum selection clauses or “floating” forum selection clauses. None of these proposals is a panacea. Individually, each proposal will only move the needle so much. Collectively, however, they represent a meaningful improvement on the status quo and a first step in producing a fairer set of rules to govern these increasingly ubiquitous provisions.

## APPENDIX

I collected the case data from the federal courts using the following method. First, I conducted a search in LexisAdvance under “Federal District Courts” in each state for the following terms: “choice of court clause” or “forum selection clause” or “choice of forum clause” or “consent to jurisdiction clause” or “venue selection clause.” I narrowed the timeline to the range between January 1, 2014, and December 31, 2020. I then reviewed the resulting hits for cases where (1) the forum selection clause selected a court located in another U.S. state or a foreign country, (2) the forum selection clause was mandatory, (3) the forum selection clause was broad enough to cover the dispute, (4) the court was asked to transfer the case pursuant to 28 U.S.C. 1404 or to dismiss the case pursuant to the federal doctrine of *forum non conveniens*, and (5) the resisting party argued that the motion should not be granted because the clause was unenforceable. I then repeated the process for cases decided by each federal circuit court of appeal. When my review was complete, I had a dataset of 669 federal cases. That is the dataset analyzed in the Article.

In conducting my review, I excluded a number of cases even though they presented interesting issues relating to forum selection clauses. First, I excluded cases where one party was seeking to remand the case to a state court in the same state. Second, I excluded cases where one party was seeking to transfer the case to a different federal district in the same state where the forum court was located. Third, I excluded cases where the only issue before the court related to clause interpretation and neither party challenged the enforceability of the clause. Fourth, I excluded cases involving arbitration clauses. Fifth, I excluded cases where the forum selection clause was not mandatory. Sixth, I excluded cases where the resisting party argued that the contract was unenforceable under traditional contract doctrine (e.g. lack of mutual assent). I included, however, cases where one party argued the clause was unenforceable due to fraud. Seventh, I excluded cases where the only issue before the court was whether a third party was bound by the forum selection clause. Eighth, I excluded cases where the case had already been transferred to the forum from somewhere else. Ninth, I excluded cases where the only issue before the court was whether one party had waived its right to invoke the forum selection clause. Tenth, I excluded cases where the only issue before the court was whether the clause conferred subject-matter jurisdiction upon the forum court. Finally, I excluded cases where the only issue before the court was whether the party seeking to enforce the clause had sought enforcement via the correct procedural mechanism.

I recognize that there are problems with relying on cases resulting in a published or unpublished decision to empirically assess judicial behavior. Such decisions are not representative of all cases.<sup>160</sup> A growing number of scholars have urged empiricists to look to court dockets—rather than judicial opinions—to obtain a more accurate measure of how judges behave.<sup>161</sup> These concerns notwithstanding, there are two reasons why I chose not

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<sup>160</sup> See William H. J. Hubbard, *The Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 481 (2017) (observing that cases identified through “databases of published judicial opinions” are “not representative of cases as a whole, both because published opinions are not a random sample of all judicial decisions, and because cases with judicial decisions are not a random sample of all cases”).

<sup>161</sup> See, e.g., David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 686–89 (2007).

to look to dockets in this project. First, while published and unpublished cases may not be “representative” in a statistical sense, they are “representative” in that they are for most scholars, judges, and lawyers the “full population . . . of the cases shaping perceptions of the legal system. Published opinions are all most of us ever work from.”<sup>162</sup> Second, while a docket search can tell us the ultimate disposition of a particular case—was it dismissed, transferred, or retained—it can tell us nothing about the *reasoning* employed by the court to reach that decision. To the extent that I am seeking to measure the outcomes generated by a particular doctrinal test, the only way to meaningfully do so is by a review of published and unpublished decisions.

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<sup>162</sup> Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1195 (1991).