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Forum Selection Clauses After *Atlantic Marine*

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# Forum Selection Clauses After *Atlantic Marine*

## I. INTRODUCTION—THE HOME FIELD ADVANTAGE

Maintaining “home-field advantage” in federal court just became much easier for franchisors thanks to a late-2013 unanimous U.S. Supreme Court decision. In *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas, et al.*,<sup>1</sup> the Court, at first blush, effectively shut the door on franchisees filing and keeping a franchise dispute in their home district when a contractual forum selection clause specifies another venue. As we will explore, however, the *Atlantic Marine* decision did not involve a franchise dispute, or the application of state law carrying “public policy” and “anti-waiver” provisions related to venue and choice of law. Will that matter?

But first, why do franchisors—or any commercial litigants—covet the home-field advantage so much? Simple, the percentage of victory may be greater and perhaps less costly. We see this in sports. Home teams really do have an advantage:

League	Home Games Won
MLB	53.9%
NHL	55.7%
NFL	57.3%
NBA	60.5%
MLS	69.1%

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Some of the reasons cited for this statistical advantage include better familiarity with the home field or court, crowd support, physically operating from home, and referee-bias.

On the last reason cited, the authors of *Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won*,<sup>2</sup> “found that home teams essentially get slightly preferential treatment from the officials, whether it’s a called third strike in baseball or, in soccer, a foul that results in a penalty kick. (It’s worth noting that a soccer referee has more latitude to influence a game’s outcome than officials in other sports, which helps explain why the home-

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<sup>1</sup> *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the W. District of Texas*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 568 (2013).

<sup>2</sup> Tobias J. Moskowitz and L. Jon Wertheim, *Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won* (Crown Archetype, 1st ed. 2011).

<sup>3</sup> *Id.*

field advantage is greater in soccer, around the world, than in any other pro sport.)”<sup>4</sup> While noting that bias is present, the *Scorecasting* authors believe it is involuntary. It is the simple association with the emotions of the home crowd that may influence these decision-makers. And the closer the crowd is to the action, the more the bias appears to tilt in favor of the home team.

The parties to a franchise agreement are not likely running statistical analyses to determine the chances for success in future litigation in a particular venue, but we all know that franchisors and their counsel prefer to litigate in their backyard while franchisees fancy the warm confines of home. This may be based, in part, on the hope for or knowledge of referee-bias but one would expect this bias-factor to be less than in a sporting contest.<sup>5</sup> Regardless of the real or psychological advantages the home court may offer, the Supreme Court has tipped the scales in favor of franchisors—or the party with enough leverage to contractually mandate the place where a contest may occur.

From a court-watcher’s perspective, has the Supreme Court dramatically changed the rules of the game or just sharpened what it has been saying for 40 years? For the franchise community, how does *Atlantic Marine* play out in the face of a state’s public policy against out-of-state forums?

The authors will analyze the *Atlantic Marine* decision and its historical precedents, and then explore whether any challenges remain to a contractually selected location of a dispute. Further considering the potential impact of the decision, the paper offers some practical advice for transactional lawyers and litigation counsel.

## II. THE HISTORICAL PERSPECTIVE: PRE-*ATLANTIC MARINE* HOLDINGS

Before reviewing the Supreme Court’s *Atlantic Marine* decision it is important to gain historical perspective. For, as should be the case, the rulings of the highest court in the land adhere to the principle of *stare decisis* whenever possible. In the forum selection arena, the Supreme Court had an abundance of precedence to call upon. The 40-year progression of the acceptance of forum selection clauses has gone from historically disfavored to *prima facie* valid to figuring centrally in the calculus to presumptively controlling, (barring a heavy burden of proof required to set aside the clause on grounds of inconvenience). Thus, as is demonstrated below, by the time *Atlantic Marine* came before the court, the die was cast.

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<sup>4</sup> Stephen J. Dubner, *Football Freakonomics: How Advantageous Is Home-Field Advantage? And Why?* FREAKONOMICS.COM (Dec. 18, 2011), <http://freakonomics.com/2011/12/18/football-freakonomics-how-advantageous-is-home-field-advantage-and-why/>.

<sup>5</sup> It does make one think about the process a federal judge or magistrate goes through when considering the transfer of a case where a “local” Plaintiff is faced with a clear forum-selection clause specifying another jurisdiction and concludes that the forum-selection clause will not be honored. This is exactly what occurred in the *Atlantic Marine* case when the U.S. District Court for Western District of Texas decided not to honor the contractual forum-selection clause. Referee-bias?

A. *The Bremen v. Zapata Off-Shore Company*<sup>6</sup>

Before 1972 forum selection clauses were not historically favored. Since then courts have been more likely to honor the expressed intentions of contractual parties. In *The Bremen v. Zapata Off-Shore Company*, the Supreme Court marked the beginning of the modern consideration of the enforceability of forum selection clauses, rejecting the traditional view that enforcement of contractual selection clauses interfered with a court's inherent jurisdictional power and were generally against public policy. Drawing upon changing times and the emerging global economy, the court indicated that: "in light of present-day commercial realities and expanding international trade, we conclude that the forum clause should control absent a strong showing that it should be set aside".<sup>7</sup>

A new standard emerged: forum selection clauses were "*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances"<sup>8</sup>. In essence, a stamp of approval was given to forum selection clauses provided they were freely negotiated and not the result of "fraud, undue influence, or overweening bargaining power."<sup>9</sup> But the qualifying language left the door open for "resisting parties" to mount a challenge. These challenges spawned future decisions announced by the Court. And it did not take long for the Court to address these issues in the franchise and distribution law context.

B. *Stewart Organization, Inc. v. Ricoh*<sup>10</sup>

In *Stewart Organization, Inc. v. Ricoh*<sup>11</sup>, the Supreme Court considered the effect of a forum selection clause in a copier dealership's agreement in light of the federal change of venue statute.<sup>12</sup> The *Stewart* decision would figure largely in the Court's *Atlantic Marine* decision 25 years later.

The forum selection clause indicated that "any appropriate state or federal court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising in connection with this Agreement and shall be a proper forum in which to adjudicate such case and controversy."<sup>13</sup> The dealer filed suit in the U.S. District Court for the Northern District of Alabama premised upon diversity of citizenship. Ricoh, relying

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<sup>6</sup> *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972).

<sup>7</sup> *Id.* at 407 U.S. at 15.

<sup>8</sup> *Id.* at 407 U.S. at 10.

<sup>9</sup> *Id.* at 407 U.S. at 12-13.

<sup>10</sup> *Stewart Org., Inc. v. Ricoh*, 487 U.S. 22 (1988).

<sup>11</sup> *Id.*

<sup>12</sup> 28 U.S.C. §1404(a).

<sup>13</sup> *Stewart*, 487 U.S. at 24, n.1.

upon the forum selection clause, filed a motion to transfer the case to the Southern District of New York under 28 U.S.C. §1404(a), which provides as follows:

For the convenience of the parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The district court denied the motion to transfer because of Alabama's strong state policy disfavoring contractual forum selection clauses. The Court of Appeals for the Eleventh Circuit reversed the district court on the basis of *The Bremen*, finding that venue in a federal court is a matter of federal procedural law and that the forum selection clause was enforceable as a matter of federal law. After an analysis of different federal statutes and judicial opinions, the Court of Appeals reasoned that there was a significant federal interest in matters of venue in general and in forum selection clauses specifically. Adding this to the earlier reasoning of *The Bremen*, the Court of Appeals deemed transfer appropriate.

The Supreme Court agreed with the Eleventh Circuit's result but took exception to its reasoning. The Court framed the issue as follows: "This case presents the issue whether a federal court sitting in diversity should apply state or federal law in adjudicating a motion to transfer a case to a venue provided in a contractual forum selection clause."<sup>14</sup> From there the Court indicated they believed that the issue lent itself to much easier resolution than the Court of Appeals had found and began by "underscor[ing]" a different methodological approach to the question. This marked the beginning of a slow erosion of a state's influence in forum selection matters when the case was before a federal court.

Citing *Hanna v. Plummer*<sup>15</sup> and *Prima Paint Corp. v Flood & Conklin. Mfg. Co.*<sup>16</sup>, the Court concluded that the entire matter simply boiled down to whether the federal venue transfer statute, 28 U.S.C. §1404(a), applied to the issue before the court and if so, whether its application was constitutional. The Supreme Court found that a district court sitting in diversity must apply a federal statute that controls an issue before it, that §1404(a) was the first level of inquiry, and that its application was constitutional. Instructing, the Court noted: "A motion to transfer under § 1404(a) calls on the district court to weigh in the balance a number of case-specific factors, and the presence of a forum-selection clause will figure centrally in the calculus."<sup>17</sup> But, leaving the door open for future argument, the Court stated 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>18</sup>

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<sup>14</sup> *Id.* at 24.

<sup>15</sup> *Hanna v. Plummer*, 380 U.S. 460, 471 (1965).

<sup>16</sup> *Prima Paint Corp. v Flood & Conklin. Mfg. Co.*, 388 U.S. 395, 406 (1967).

<sup>17</sup> *Stewart*, 487 U.S. at 23 (Syllabus 2(b)).

<sup>18</sup> *Id.* at 31.

C. *Carnival Cruise Lines v. Shute*<sup>19</sup>

In 1991, the Supreme Court went even further. *Carnival Cruise Lines v. Shute*<sup>20</sup> endorsed the enforcement of forum selection clauses in the previously sacrosanct field of consumer form contracts. This was devastating news for franchisees. Although only occasionally adopted by courts, franchisee-counsel often analogized the bargaining position of franchisees to that of ordinary consumers (*i.e.* unconscionable contract of adhesion) in the hope that a sympathetic court would imbue applicable legal theories with a touch of “consumerism.” *Carnival Cruise Lines* neutralized this argument, holding that even “consumers” were subject to enforcement of pre-printed, non-negotiable forum selection clauses.

Passenger tickets contained a Florida forum selection clause. An injured passenger commenced suit in a Washington Federal District Court which promptly dismissed the action because of the forum selection clause. On the basis of *The Bremen*, the Court of Appeals reversed, finding that the clause was not “freely bargained for” and that enforcement would deprive the Shutes of a fair opportunity to litigate their dispute.<sup>21</sup>

The Supreme Court reversed the intermediate court’s holding, broadening the enforcement of forum selection clauses to all manner of contracts. The Court indicated that the passenger’s argument could not prevail because she had not met the “heavy burden of proof required to set aside the clause on grounds of inconvenience.”<sup>22</sup> The only concession allowed was an indication that forum selection clauses in contracts of this nature would continue to be scrutinized for “fundamental fairness.”<sup>23</sup>

Commentators later explained that since the *Carnival Cruise Lines* decision “[f]ederal courts have subsequently distilled the decisions in *The Bremen* line of cases to a straightforward rule that presumes the validity of forum selection clauses, while imposing a heavy burden on the resisting party to demonstrate that one of the generally-recognized exceptions identified in *The Bremen* or *Carnival Cruise Lines* applies to the facts of the case. The rule is often expressed as follows: generally, a forum selection clause should control absent a strong showing that it should be set aside.”<sup>24</sup>

Thus, by 1991, it seemed that judicial enforcement of contractual choice of forum provisions in federal courts was a sure thing. So was it possible for the Supreme Court to go further? This question would be answered 22 years later.

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<sup>19</sup> *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (Syllabus).

<sup>22</sup> *Id.* at 595 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17).

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

<sup>24</sup> Levin and Morrison, *Kubis and The Changing Landscape of Forum Selection Clauses*, 16 FRANCHISE L.J. 97, 113 (Winter 1997).

#### D. Other Cases of Significance—The Federal-State Fault Line

While the U.S. Supreme Court was at work enforcing forum selection clauses, some state supreme courts were headed in the opposite direction. The 1996 New Jersey Supreme Court decision in *Kubis & Perszyk Associates v. Sun Microsystems, Inc.*<sup>25</sup> epitomized the rift. Largely ignoring the U.S. Supreme Court's developments in the venue selection area, the New Jersey court extensively reviewed the legislative history of the New Jersey Franchise Practices Act<sup>26</sup> and concluded that a California forum selection clause would not be enforced based on strong public policy. The crack in the U.S. Supreme Court's armor was the exception noted in *The Bremen*—"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 judicial decision."<sup>27</sup> Thus, the New Jersey high court stated that "such clauses are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act."<sup>28</sup>

Since *Kubis*, scores of cases have divided along this federal-state fault line. Numerous examples can be found in this Forum's "Annual Franchise and Distribution Law Developments" published over the last decade. So numerous are the cases that the authors routinely divide the topic into "Cases Enforcing Forum Selection Clauses" and "Cases Refusing to Enforce Forum Selection Clauses."<sup>29</sup> Although all of the courts in these cases work through the "private-interests" and "public-interest considerations" analysis mandated by case law and the applicable venue statutes, the determining factor, in a majority of the cases, is whether the state in which the action is initiated has an announced or perceived strong public policy disfavoring forum selection clauses. Two examples are *The Business Store, Inc. v. Mailboxes Etc.*<sup>30</sup> and *WW, LLC v. The Coffee Beanery, Ltd.*<sup>31</sup> - each relying on the strong public policies of New Jersey and Maryland, respectively, when refusing to enforce a contractual forum selection clause.

Contrast these cases with *Sebascodegan Enterprises, LLC v. Petland, Inc.*<sup>32</sup>—where the federal district court in Maine enforced an Ohio forum selection clause and dismissed a franchisee's case filed in Maine even though the franchisee asserted fraud. The court first noted that the franchise agreement contained an Ohio choice of law provision and that Maine generally enforced such clauses. Further finding that Ohio enforces forum selection clauses, the

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<sup>25</sup> *Kubis & Perszyk Associates v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996).

<sup>26</sup> N.J.S.A 56:10-1 *et seq.*

<sup>27</sup> *Kubis*, 146 N.J. at 188 (citing *The Bremen*, 407 U.S., at 15).

<sup>28</sup> *Id.* at 193.

<sup>29</sup> See Michael R. Gray and Jeffrey S. Haff, *Annual Franchise and Distribution Law Developments 2013*, ANNUAL FORUM ON FRANCHISING 194-205 (2013).

<sup>30</sup> *The Business Store, Inc. v. Mailboxes Etc.*, No. 11-3662 (FLW), 2012 WL 525966 (D. N.J. Feb. 16, 2012).

<sup>31</sup> *WW, LLC v. The Coffee Beanery, Ltd.*, No. WMN-05-3360, 2011 WL 5110267 (D. Md. October 26, 2011).

<sup>32</sup> *Sebascodegan Enterprises, LLC v. Petland, Inc.*, 647 F. Supp. 2d 71 (D. Me. 2009) (Please note that author James A. Meaney represents Petland, Inc. but was not involved as counsel in this case).

court rejected the franchisee's claim that fraud would defeat the selection of the Ohio forum. No mention was ever made of Maine having a strong public policy against forum selection clauses.

Thus, into this divide of states with strong public policies and those with none, stepped the U.S. Supreme Court in *Atlantic Marine*. But, did the Court bridge this divide in announcing its decision?

### III. THE STATUTORY FRAMEWORK AND APPLICABLE CIVIL RULES

Because *Atlantic Marine* is primarily a procedural ruling, it is first beneficial to review the statutory framework involved when forum selection is at issue. And, that review begins with the foundational statute, 28 USC §1391. (Emphasis has been added to the portions of the statutes and rules that received the particular attention of the Supreme Court)

#### A. Venue Generally - 28 USC §1391

In pertinent part, the general venue statute provides:

§ 1391. Venue generally

(a) APPLICABILITY OF SECTION.—Except as otherwise provided by law—

(1) this section shall govern the venue of *all civil actions* brought in district courts of the United States; and

(2) the proper venue for a civil action shall be determined without regard to whether the action is local or transitory in nature.

(b) VENUE IN GENERAL.—A civil action may be brought in –

(1) *a judicial district in which any defendant resides*, if all defendants are residents of the State in which the district is located;

(2) *a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred*, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

(Emphasis added)

#### B. Change of Venue—28 USC §1404

Naturally, one of the main issues that arises is how to properly seek a change of venue when an action is not filed in a district preferred by one of the parties. The answer lies in 28 USC §1404 (cited in pertinent part):

§ 1404. Change of venue

(a) For the *convenience of parties and witnesses*, in the *interest of justice*, a district court *may transfer* any civil action to any other district or division *where it might have been brought or to any district or division to which all parties have consented*.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(Emphasis added)

C. Cure or Waiver of Venue Defects - 28 USC §1406

As will be discussed when we analyze the *Atlantic Marine* holding further, litigants often seek to dismiss an action they believe has been filed in the “wrong” district, especially when a contractual forum selection clause is at play. The basis for seeking dismissal is grounded in 28 USC §1406 (cited in pertinent part):

§ 1406. Cure or waiver of defects

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

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(Emphasis added)

D. Defenses and Objections - Fed. R. Civ. P. 12(b)

Under the Federal Rules of Civil Procedure, the procedural basis to seek to dismiss or transfer venue is found in Fed. R. Civ. P. 12(b). A number of “12(b) defenses” are implicated when venue is at issue - 12(b)(1), 12(b)(3), or 12(b)(6):

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) *improper venue*;

- (4) insufficient process;
- (5) insufficient service of process;
- (6) *failure to state a claim upon which relief can be granted*; and
- (7) failure to join a party under Rule 19.

(Emphasis added)

When it comes to the application of the 12(b) defenses in regard to forum selection clauses, federal circuit courts have taken varying approaches to motions to dismiss, specifically whether such motions are properly brought under Rule 12(b)(1), 12(b)(3), or 12(b)(6).<sup>33</sup> As we will see, *Atlantic Marine* has put an end to the variance.

#### **IV. ATLANTIC MARINE CONSTRUCTION V. U.S. DISTRICT COURT**

##### **A. The Facts of *Atlantic Marine***

Atlantic Marine Construction Co., a Virginia corporation, entered into a subcontract with J-Crew Management, Inc., a Texas corporation, for work on a construction project that was located in Texas. The subcontract included a forum selection clause that indicated that all disputes between the parties “shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division.”<sup>34</sup>

When a payment dispute arose, J-Crew, based on diversity jurisdiction, sued Atlantic Marine in the U.S. District Court for Western District of Texas. Asserting the forum-selection clause, Atlantic Marine moved to dismiss the suit contending that venue in the Western District of Texas was “wrong” under § 1406(a)<sup>35</sup> and “improper” under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under § 1404(a).<sup>36</sup> J-Crew opposed these motions.

The District Court in western Texas denied Atlantic Marine’s motions.<sup>37</sup> As noted by the Supreme Court, the District Court: “... first concluded that § 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum. The District Court then held that Atlantic Marine bore the burden of establishing that a transfer would be appropriate under § 1404(a) and that the court would ‘consider a non exhaustive and nonexclusive list of public and private interest factors,’ of which the ‘forum- selection clause [was] only one such factor.’”<sup>38</sup> When the District Court applied these standards, it concluded that

<sup>33</sup> See *Lipcon v. Underwriters at Lloyd’s, London*, 148 F.3d 1285, 1289 (11th Cir.1998).

<sup>34</sup> *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the W. District of Texas*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 568, 575 (2013) (citing *In re Atlantic Marine Constr. Co.*, 701 F.3d 736, 737-738 (5th Cir. 2012)).

<sup>35</sup> 28 USC §1406(a).

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

<sup>37</sup> *United States ex rel. J-Crew Management, Inc. v. Atlantic Marine Constr. Co.*, 2012 WL 8499879, at \*5 (W.D. Tex., Apr. 6, 2012).

<sup>38</sup> *Atlantic Marine*, 134 S.Ct. at 576 (internal citation omitted).

“compulsory process will not be available for the majority of J-Crew’s witnesses” and that there would be “significant expense for those willing witnesses...” Thus, calling upon § 1404(a)’s “convenience of parties and witnesses” and “in the interest of justice” provisions, the District Court found that Atlantic Marine could not carry its burden. Atlantic Marine filed a writ of mandamus, petitioning The United States Court of Appeals for the Fifth Circuit to direct the District Court to dismiss or transfer.

Based mainly on the procedural standards and nuances applicable to writs of mandamus, the Court of Appeals affirmed the District Court ruling. Despite the forum selection clause, Atlantic Marine was stuck in Texas—at least until the Supreme Court came to the rescue, granting certiorari in 2013.<sup>39</sup>

## B. The Supreme Court’s Decision

In reversing the lower court and changing the “calculus”<sup>40</sup> yet again, the unanimous Supreme Court seemed intent on ending the 40-year procedural debate that began with *The Bremen*. First, it rejected the argument that when a forum selection clause is in the mix that outright dismissal is appropriate under § 1406(a) or Fed. R. Civ. P. 12(b)(3) - noting that dismissal is only allowed when venue is “wrong” or “improper.”<sup>41</sup> In summary, the Court indicated that a forum selection clause does not render a venue “wrong” or “improper”; rather, that determination is governed solely by the “federal venue laws.”<sup>42</sup> And, as noted by the Court, Congress codified federal venue law in 28 U.S.C. § 1391—the general venue statute. With further review, the Court determined that § 1391 makes no provision for the presence of forum selection clauses; allows actions to be commenced in a district where the defendant resides, in a district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or, if there is no district in which an action may otherwise be brought as provided in § 1391, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.<sup>43</sup> This led the Court to conclude that if an action is filed in one of the permitted venues it could never be wrong or improper and, therefore, could not be dismissed. Though never articulated by the Court, venue in western Texas was presumably correct and proper in *Atlantic Marine* because a substantial part of the events or omissions giving rise to the claim occurred in that district.

Atlantic Marine just lost the § 1406(a) battle. But it was about to win the transfer war.

Once Justice Alito, writing for the unanimous court, disposed of the dismissal argument, he turned to transfer under 28 USC §1404(a). The essence of the holding regarding transfer is highly instructive:<sup>44</sup>

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<sup>39</sup> 569 U.S. \_\_\_, 133 S.Ct. 1748, 185 L.Ed.2d 784 (2013).

<sup>40</sup> See *Stewart Org., Inc. v. Ricoh*, 487 U.S. 23 (1988) (Syllabus 2(b)).

<sup>41</sup> *Atlantic Marine*, 134 S.Ct. at 577.

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

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* at 579-584 (paraphrase of opinion).

- A plaintiff’s case should not be dismissed when it is filed in a venue other than that specified in a forum-selection clause;
- Although a forum-selection clause does not render venue in a court “wrong” or “improper” under §1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a);
- When a forum-selection clause points to a state or foreign forum, the clause may be enforced through the doctrine of *forum non conveniens*;
- When a defendant files a § 1404(a) motion, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer;
- When discussing a district court’s consideration of the “private interests of the parties and public-interest considerations,” the Court dramatically emphasized its past holdings: “...when the parties’ contract contains a valid forum-selection clause, that clause ‘represents [their] agreement as to the most proper forum,’ and should be ‘given controlling weight in all but the most exceptional cases’”,<sup>45</sup>
- The presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in three ways:
  - First, the plaintiff’s choice of forum merits no weight, and the plaintiff, as the party defying the forum-selection clause, has the burden of establishing that transfer to the forum for which the parties bargained is unwarranted;
  - Second, the court should not consider the parties’ private interests aside from those embodied in the forum-selection clause; it may consider only public interests. Because public-interest factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases;
  - Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a §1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules. This “penalty” was announced to clarify prior case law that required the application of the transferor-court’s law in the transferee-court.<sup>46</sup>

So while it seems that the Court was guided by precedence, Justice Alito has devised a new formulaic approach. Given the confusion and variance that courts have displayed since *The Bremen*’s change of course, *Atlantic Marine* may offer some welcomed stability to courts and

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<sup>45</sup> *Id.* at 574 (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

<sup>46</sup> See *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

litigants alike. For franchisees, it offers some solace ... at least actions initiated in their home district will not be dismissed.

In addition, while the Court made clear that “private interests” are no longer a factor in the calculus of transfer when a forum-selection clause is present, it did not eliminate consideration of “public-interest factors.” Indeed it indicated that “[a]s a consequence [of the new formula eliminating “private interests”], a district court may consider arguments about public-interest factors only,”<sup>47</sup> and in a footnote articulated that those factors may include “the administrative difficulties flowing from court congestion; *the local interest in having localized controversies decided at home*; [and] the interest in having the trial of a diversity case in a forum that is at home with the law. [citation omitted]”<sup>48</sup> (emphasis added)

Considering that a number of states have franchise- or business opportunity-specific laws imbued with “public policy” and “anti-waiver” provisions related to venue and choice of law, does the “public-interest factor” of “the local interest in having localized controversies decided at home” at least offer franchisees a foothold in advancing a challenge to the new *Atlantic Marine*-framework? It seems that it may. Does *Atlantic Marine* have any impact on franchisees which have the shelter of a favorable state law? Perhaps it does not.

## V. APPLICATION OF *ATLANTIC MARINE*

Immediate application of *Atlantic Marine* indicates its formulaic approach simplifies the process of deciding § 1404(a) transfer of venue motions when there is a valid forum selection clause. For example, within two weeks of the *Atlantic Marine* decision, two courts used the simplified formula to easily dispose of § 1404(a) motions to transfer venue—one granting the motion and the other denying it. In *Mfrs. & Traders Trust Co. v. Minuteman Spill Response, Inc.*,<sup>49</sup> defendants moved for a transfer of venue in the “interest of justice” even though plaintiffs brought the suit in an appropriate jurisdiction under the applicable forum selection clause.<sup>50</sup> The court, however, disregarded defendants’ private interests—all of their “interest of justice” arguments—as “irrelevant” under the *Atlantic Marine* formula.<sup>51</sup> Because defendants had not argued that enforcing the forum selection clause would violate public policy or any other extraordinary circumstances, the motion was denied.<sup>52</sup>

In *Monje v. Spin Master Inc.*,<sup>53</sup> Spin Master brought a third party action against Bureau Veritas and other entities (i.e. third party defendants) for common law and implied indemnity

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<sup>47</sup> *Atlantic Marine*, 134 S.Ct. at 581.

<sup>48</sup> *Id.* at 581 n.6.

<sup>49</sup> *Mfrs. & Traders Trust Co. v. Minuteman Spill Response, Inc.*, No. 3:13-174, 2013 U.S. Dist. LEXIS 175835 (W.D. Pa. Dec. 16, 2013).

<sup>50</sup> *Id.* at \*8-9.

<sup>51</sup> *Id.* at \*11.

<sup>52</sup> *Id.* at \*12.

<sup>53</sup> *Monje v. Spin Master Inc.*, No. CV-09-1713-PHX-GMS, 2013 U.S. Dist. LEXIS 173429 (D. Ariz. Dec. 11, 2013).

relating to the performance of toxicity testing of Aqua Dots. This is only one of the places in which Spin Master filed suits relating to Aqua Dots. Spin Master sued Bureau Veritas in Western District of New York on December 17, 2008, seeking damages for its litigation exposure and settlement costs incurred in personal injury and class action lawsuits relating to Aqua Dots. On July 13, 2009, Spin Master filed the current lawsuit in state court in Arizona, and it was later removed to the District of Arizona. Both the Arizona lawsuit and the New York lawsuit relate to allegations that Bureau Veritas failed to properly test for toxicity of Aqua Dots resulting in harm to Spin Master.

After Bureau Veritas was the only remaining third-party defendant, Bureau Veritas filed a motion to sever and transfer the third-party claims in Arizona to the Western District of New York, where the other suit filed by Spin Master was already pending.<sup>54</sup> The applicable forum selection clause in the Test Request Form states that Spin Master “agrees that any disputes arising out of this agreement . . . will be governed and settled under the applicable principles of New York Law, under jurisdiction of New York Courts and that venue in any such action shall be in the County of Erie.”<sup>55</sup> Spin Master unsuccessfully argued the actions and the claims were different in the two suits. The court, following *Atlantic Marine*, cited the forum selection clause as a decisive factor, along with the pending action in New York, and granted Bureau Veritas’ motion.<sup>56</sup> The court added with regards to public interest factors that New York has a greater interest in serving as forum because the contract and interactions between the parties occurred there, and the docket congestion does not weigh against transfer to New York.<sup>57</sup> The court added that the Arizona court had numerous judicial vacancies, weighing in favor of transfer.<sup>58</sup>

The court admonished Spin Master for trying to essentially get two bites at the apple, first filing in New York and then presumably becoming frustrated with the slow speed at which the New York litigation was moving. The Arizona lawsuit still related to the same underlying facts—accuracy of the testing of Aqua Dots by Bureau Veritas.

Other courts are beginning to utilize *Atlantic Marine*’s section 1404(a) test. For instance, in *Caribbean Restaurants, LLC v. Burger King Corp.*,<sup>59</sup> Caribbean filed suit against Burger King in federal district court in Puerto Rico alleging violations of Puerto Rico’s franchise law. The franchise agreements contained a forum and venue selection clause providing that federal court in Miami, Florida was the exclusive venue. Burger King filed a Rule 12(b)(6) motion to dismiss and, alternatively, a section 1404(a) motion to transfer venue to Miami, Florida. The court treated Burger King’s motion as only a motion to transfer, noting *Atlantic Marine*’s preference for this mechanism.<sup>60</sup> Caribbean argued that the choice-of-forum clause was null and void because

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<sup>54</sup> *Id.* at \*2-3.

<sup>55</sup> *Id.* at \*11.

<sup>56</sup> *Id.* at \*8-9.

<sup>57</sup> *Id.* at \*12.

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

<sup>59</sup> *Caribbean Restaurants, LLC v. Burger King Corp.*, NO. 14-1200, 2014 U.S. Dist. LEXIS 76352 (D.P.R. June 3, 2014).

<sup>60</sup> *Id.* at \*12-13.

it violated a Puerto Rico law providing that anything obligating a franchisee to litigate regarding its contract outside of Puerto Rico is in violation of public policy and null and void. The court, however, rejected Caribbean's argument, reasoning that the law at issue does not automatically disregard freely-negotiated contractual obligations.<sup>61</sup> And because Caribbean did not allege fraud or overreaching that could invalidate the franchise agreements, the court turned to *Atlantic Marine's* public interest factors. Using these factors, the court determined that the factors weighed in favor of transfer because: (1) Puerto Rico's court system is one of the most congested civil dockets in the federal system; (2) "home" is considered Miami, Florida (the local interest in having localized controversies decided at home) due to the choice-of-law provisions in the franchise agreements; and (3) other than Caribbean's claim under Puerto Rico's franchise law, Florida law applies to the dispute as provided in the franchise agreement.<sup>62</sup> The court therefore found that Caribbean failed to meet its burden to demonstrate transfer was unwarranted and granted Burger King's motion to transfer.<sup>63</sup>

On the "public-interest factors" aspect of *Atlantic Marine*, the chapter is yet to be written on exactly what will constitute "the most exceptional cases" to nullify enforcement of forum selection clauses as against public policy. But, some pre-*Atlantic Marine* litigation contesting whether a "non-negotiable" franchise agreement with "standard" boilerplate terms rises to the level of exceptional may be prescient. In *Fowler v. Cold Stone Creamery, Inc.*,<sup>64</sup> the Rhode Island District Court recently took up this very issue and held that the forum selection clause would stand because the franchisee could have walked away rather than enter into the franchise agreement and relationship. As we know, the reality is that most franchise agreements are *not* widely negotiable. Franchisees either sign standard agreement or they are refused a franchise. As noted, *Fowler* was decided prior to *Atlantic Marine* but is instructive on what may not constitute exceptional circumstances. The court concluded that none of the public-interest factors or private interests advanced by the franchisee (clause unconscionable, clause unreasonable, cost of litigating in Arizona, etc.) rose to the level of depriving franchisee of the franchisee's day in court.<sup>65</sup>

While *Atlantic Marine* makes it clear that the threshold determination is whether there is a valid and enforceable forum selection clause, the Western District of Wisconsin in *Rolfe v. Network Funding LP*, discussed in detail below, highlighted an issue regarding whether a federal court in a diversity case should look to federal law, state law or both when deciding whether a forum selection clause is valid.<sup>66</sup> The issue is whether the court first looks at it as a

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<sup>61</sup> *Id.* at \*20-21. *But see Frango Grille USA, Inc. v. Pepe's Franchising, Ltd.*, No. 2:14-cv-02086 (C.D. Cal. July 21, 2014) (holding that forum-selection clause was invalid because it violated strong California public policy against forum-selection clauses under California's Franchise Relations Act § 20040.5 and thus *Atlantic Marine* was inapplicable. The franchise agreement designated the application of the laws and forum of London, England.)

<sup>62</sup> *Caribbean Restaurants*, 2014 U.S. Dist. LEXIS 76352 at \*20-21.

<sup>63</sup> *Id.* at \*23-26.

<sup>64</sup> *Fowler v. Cold Stone Creamery, Inc.*, No. 13-662, 2013 U.S. Dist. LEXIS 167241, 2013 WL 6181817 (R.I. Dist. Ct. Nov. 22, 2013).

<sup>65</sup> *Id.* at \*8-9.

<sup>66</sup> *Rolfe v. Network Funding LP*, 14-cv-9-bbc, 2014 U.S. Dist. LEXIS 67476 (W.D. Wis. May 16, 2014) (noting that the Seventh Circuit has declined to resolve this question on the ground that choice of law would not have made a difference to the outcome) (internal citation omitted)).

question of validity or enforceability because the perspective the court takes may change the outcome.<sup>67</sup> On the one hand, a court determining the validity of the forum selection clause is likely to view it as a contractual provision which is a question of substantive law and, almost always, a matter of state law.<sup>68</sup> On the other hand, a court looking at enforceability of a forum selection clause is likely to view it as a venue agreement and venue is a question of federal procedural law.<sup>69</sup> This is likely an area which will be litigated further.

Another consideration is that, while *Atlantic Marine* held that § 1406(a) and Rule 12(b)(3) were *not* the proper mechanisms to enforce a forum selection clause, it expressly did not decide whether a defendant could use Rule 12(b)(6).<sup>70</sup> In what has been labeled “The Affirmative Defense Approach,” courts treat the forum selection clause as an affirmative defense and enforce it through Rules 12(b)(6), 12(c), or 56.<sup>71</sup> The reasoning is that a forum selection clause in a contract is an agreement to litigate in a particular forum and a relinquishment of the right to litigate in any other forum and is, therefore, a form of waiver.<sup>72</sup> If the clause is valid and enforceable, it is an affirmative defense, *i.e.*, “a reason to deny judgment to the plaintiff that remains valid even if all the allegations in the complaint are true.”<sup>73</sup> In most contract disputes, the contract containing the forum selection clause is attached to the complaint as an exhibit and incorporated into the complaint by reference. Under this reasoning, such a complaint may be subject to dismissal under Rule 12(b)(6) because an affirmative defense “appears on its face.”<sup>74</sup> But in a recent case discussed above, *Caribbean Restaurants, LLC v. Burger King Corp.*,<sup>75</sup> the district court followed *Atlantic Marine* by analyzing the issue under Section 1404(a) and not Rule 12(b)(6) when faced with a Rule 12(b)(6) motion premised on a forum-selection clause that was presented in the alternative to a Section 1404(a) motion to transfer. The defendant’s presentation of the section 1404(a) motion to transfer as an alternative was a factor in the court’s decision to ignore the Rule 12(b)(6) grounds, but the court also heavily relied on the suggestion in *Atlantic Marine* that section 1404(a) was the proper method for resolving a forum-selection clause issue.

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<sup>67</sup> See, e.g., Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2546-49 (2014).

<sup>68</sup> *Id.* at 2549.

<sup>69</sup> *Id.* at 2548.

<sup>70</sup> *Atlantic Marine*, 134 S. Ct. at 580 & n.4.

<sup>71</sup> Sorensen, *supra* note 67, at 2545.

<sup>72</sup> Brief of Prof. Stephen E. Sachs as Amicus Curiae in Support of Neither Party, *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568 (2013) (No. 12-929).

<sup>73</sup> *Id.* (internal quotations omitted).

<sup>74</sup> *Id.* (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

<sup>75</sup> *Caribbean Restaurants, LLC v. Burger King Corp.*, NO. 14-1200, 2014 U.S. Dist. LEXIS 76352 (D.P.R. June 3, 2014).

## VI. IMPACT OF *ATLANTIC MARINE* ON THE STATE ANTI-WAIVER PROVISIONS

### A. State franchise and business opportunity statutes governing venue and forum selection

Given that franchisors routinely include forum selection clauses in their franchise agreements to litigate on the franchisor's home turf, the Supreme Court's ruling in *Atlantic Marine* appears to have substantially closed the door on franchisees being able to litigate on their home turf. With this, franchisee counsel should consider whether any franchise specific statutes or strong public policy override a forum selection clause. *Atlantic Marine* makes clear that private interest factors are not considered where there is a valid and enforceable forum selection clause; however, the Supreme Court's protocol still requires a consideration of public interest factors. The franchise and business opportunity statutes in many states contain anti-waiver language which seeks to override any contractual language which amounts to a waiver of protection under the state statute. A detailed chart of state anti-waiver provisions is included below as Chart 1. As discussed later in the paper, most of the anti-waiver provisions prohibit franchisors from forcing franchisees to waive coverage under the state law. Most do not void a contractual provision establishing a forum outside the franchisee's home state. However, some states have venue statutes applicable to the franchise relationship which franchisees will rely upon heavily to craft some relief from the broad brush of *Atlantic Marine*. A detailed chart of venue statutes applicable in the franchise context is included below as Chart 2. The venue statutes are most useful to franchisees who wish to litigate in a forum other than the forum selected in the franchise agreement.

For example, the California venue statute provides as follows: "A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating in this state."<sup>76</sup> One reading of the statute might lead you to believe that venue selection clauses are void as against public policy, but see the discussion which follows in the next section.

While most of these statutes only provide protection to franchisees who are residents of the state, Indiana extends protection to any nonresident who operates in the state. The Indiana venue statute provides:

It is unlawful for any franchise agreement entered into between any franchisor and a franchisee who is either a resident of Indiana or a nonresident who will be operating a franchise in Indiana to contain any of the following provisions:

- (5) Requiring the franchisee to prospectively assent to a release, assignment, novation, waiver, or estoppel which purports to relieve any person from liability to be imposed by this chapter or requiring any controversy between the franchise and the franchisor to be referred to any person, if referral would be binding on the franchisee. This

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<sup>76</sup> Cal. Bus. & Prof. Code § 20040.5 (2014).

subdivision does not apply to arbitration before an independent arbitrator. . . .<sup>77</sup>

Louisiana's venue statute protects home turf only as a default. It provides: “[u]nless provisions of a business franchise agreement provide otherwise, when the business to be conducted pursuant to the agreement and the business location of the franchisee are exclusively in this state, disputes arising under a business franchise agreement shall be resolved in a forum inside this state and interpretation of the provisions of the agreement shall be governed by the laws of this state.”<sup>78</sup>

### CHART 1

<b>STATES WITH SPECIFIC ANTI-WAIVER PROVISIONS</b>		
<b>STATE</b>	<b>STATUTE</b>	<b>LANGUAGE</b>
Arkansas	Arkansas Franchise Practices Act (AFPA), Ark. Code Ann. § 4-72-206	<p>“It shall be a violation of this subchapter for any franchisor, through any officer, agent, or employee to engage directly or indirectly in any of the following practices:</p> <p>(1) To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this subchapter; . . .”</p>
California	California Franchise Investment Law (CFIL), Cal. Corp. Code § 31512	“Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is <i>void</i> .”
Connecticut	Connecticut Franchise Act (CFA), Conn. Gen. Stat. § 42-133f(f)	<p>“Any waiver of the rights of a franchisee under sections 42-133f or 42-133g which is contained in any franchise agreement entered into or amended on or after June 12, 1975, shall be <i>void</i>.”</p> <p>Note: § 42-133f: Termination, or cancellation of, or failure to renew a franchise.</p> <p>§ 42-133g: Action for violation. Right to occupy franchise premises whose lease expires upon termination of franchise. Items filed with court by franchisor seeking possession of franchise premises.</p>
Delaware		[no general anti-waiver provision]
Florida		<p>[no general anti-waiver provision]</p> <p><i>But see VoiceStream Wireless Corp. v. U.S. Comm., Inc.</i>, 912 So. 2d 34, 38 (Fla. Dist. Ct. App. 2005) (holding that a party cannot waive liability imposed by statutory provisions that are intended to protect both an individual and the public, and a</p>

<sup>77</sup> Ind. Code § 23-2-2.7-1 (2014).

<sup>78</sup> La. Rev. Stat. Ann. § 12:1042 (2014).

STATES WITH SPECIFIC ANTI-WAIVER PROVISIONS		
STATE	STATUTE	LANGUAGE
		contract may not limit the statutory damages under the Florida Franchise Act).
Hawaii	Hawaii Franchise Investment Law (HFIL), Haw. Rev. Stat. § 482E-6	<p>“Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and its franchisees: . . .</p> <p>(2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition for a franchisor or subfranchisor to: . . .</p> <p>(F) Require a franchisee at the time of entering into a franchise to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter. Any condition, stipulation or provision binding any person acquiring any franchise to waive compliance with any provision of this chapter or a rule promulgated hereunder shall be <i>void</i>. This paragraph shall not bar or affect the settlement of disputes, claims or civil suits arising or brought under this chapter. . . .”</p>
Illinois	Illinois Franchise Disclosure Act of 1987 (IFDA), Ill. Comp. Stat. 705/41.	“Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this Act or any other law of this State is <i>void</i> . This Section shall not prevent any person from entering into a settlement agreement or executing a general release regarding a potential or actual lawsuit filed under any of the provisions of this Act, nor shall it prevent the arbitration of any claim pursuant to the provisions of Title 9 of the United States Code.”
Indiana	Indiana Franchise Act (IFA), Ind. Code § 23-2-2.7-1	<p>“It is unlawful for any franchise agreement entered into between any franchisor and a franchisee who is either a resident of Indiana or a nonresident who will be operating a franchise in Indiana to contain any of the following provisions: . . .</p> <p>(5) Requiring the franchisee to prospectively assent to a release, assignment, novation, waiver, or estoppel which purports to relieve any person from liability to be imposed by this chapter or requiring any controversy between the franchise and the franchisor to be referred to any person, if referral would be binding on the franchisee. This subdivision does not apply to arbitration before an independent arbitrator. . . .</p> <p>(10) Limiting litigation brought for breach of the agreement in any manner whatsoever. . . .”</p>
Iowa	Iowa Code § 523H.4 [1992 Act applies to agreements entered into prior to July 1, 2000]	“A condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this chapter or a rule or order under this chapter is <i>void</i> . This section shall not affect the settlement of disputes, claims, or civil lawsuits arising or brought pursuant to this chapter.”
	Iowa Code § 537A.10(4) [2000 Act applies to agreements entered	“Waivers <i>Void</i> . A condition, stipulation, or provision requiring a franchisee to waive compliance with or relieving a person of a duty or liability imposed by or a right provided by this section or

STATES WITH SPECIFIC ANTI-WAIVER PROVISIONS		
STATE	STATUTE	LANGUAGE
	into on or after July 1, 2000]	a rule or order under this section is <i>void</i> . This subsection shall not affect the settlement of disputes, claims, or civil lawsuits arising or brought pursuant to this section.”
Maryland	Maryland Franchise Registration and Disclosure Law, Md. Code Ann., Bus. Reg. § 14-226	“As a condition of the sale of a franchise, a franchisor may not require a prospective franchisee to agree to a release, assignment, novation, waiver, or estoppel that would relieve a person from liability under this subtitle.”
Michigan	Michigan Franchise Investment Law (MFIL), Mich. Comp. Laws § 445.1527	“Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise: (b) A requirement that a franchisee assent to a release, assignment, novation, waiver, or estoppel which deprives a franchisee of rights and protections provided in this act. This shall not preclude a franchisee, after entering into a franchise agreement, from settling any and all claims. . . .”
Minnesota	Minnesota Franchise Act (MFA), Minn. Stat. § 80C.21	“Any condition, stipulation or provision, including any choice of law provision, purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, organized or incorporated under the laws of this state, or purporting to bind a person acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with any provision of sections 80C.01 to 80C.22 or any rule or order thereunder is <i>void</i> .”
Mississippi		[no general anti-waiver provision]
Missouri		[no general anti-waiver provision]
Nebraska	Nebraska Franchise Law, Neb. Rev. Stat. § 87-406	“It shall be a violation of sections 87-401 to 87-410 for any franchisor, directly or indirectly, through any officer, agent, or employee, to engage in any of the following practices: (1) To require a franchisee at the time of entering into a franchise arrangement to assent to a release, assignment, novation, wavier, or estoppel which would relieve any person from liability imposed by sections 87-401 to 87-410; . . . .”
New Jersey	New Jersey Franchise Practices Act, N.J. Stat. Ann. § 56:10-7	“It shall be a violation of this act for any franchisor, directly or indirectly, through any officer, agent or employee, to engage in any of the following practices: a. To require a franchisee at time of entering into a franchise arrangement to assent to a release, assignment, novation, waiver or estoppel which would relieve any person from liability imposed by this act. . . .”
New York	New York Franchise Sales Act, N.Y. Gen. Bus. Law § 687(4)-(5)	“4. Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law, or rule promulgated hereunder, shall be <i>void</i> .”  “5. It is unlawful to require a franchisee to assent to a release, assignment, novation, waiver or estoppel which would relieve a person from any duty or liability imposed by this article.”

STATES WITH SPECIFIC ANTI-WAIVER PROVISIONS		
STATE	STATUTE	LANGUAGE
North Dakota	Franchise Investment Law, N.D. Cent. Code § 51-19-16(7)	"Any condition, stipulation, or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order hereunder is <i>void</i> ."
Oregon		[no general anti-waiver provision]
Puerto Rico	The Puerto Rico Dealer's Act of 1964 (Law 75), P.R. Laws Ann. tit. 10, § 278c	"The provisions of this chapter are of a public order, and therefore the rights determined by such provisions cannot be waived. This chapter being of a remedial character should, for the most effective protection of such rights, be liberally interpreted; in the adjudgment of the claims that may arise hereunder, the courts of justice shall recognize the right in favor of who may, effectively, have at his charge the distribution of activities, notwithstanding the corporate or contractual structures or mechanisms that the principal or grantor may have created or imposed to conceal the real nature of the relationship established."
Rhode Island	Rhode Island Franchise Investment Act (RIFIA), R.I. Gen. Laws § 1928.115	"A condition, stipulation or provision requiring a franchisee to waive compliance with or relieving a person of a duty of liability imposed by or a right provided by this Act or a rule or order under this Act is <i>void</i> . An acknowledgment provision, disclaimer or integration clause or a provision having a similar effect in a franchise agreement does not negate or act to remove from judicial review any statement, misrepresentations or action that would violate this Act or a rule or order under this Act. This section shall not affect the settlement of disputes, claims or civil lawsuits arising or brought under this Act."
South Dakota		[no general anti-waiver provision]
Virginia	Retail Franchising Act, Va. Code Ann. § 13.1-571(c)	"Any condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or order thereunder shall be void; provided, however, that nothing contained herein shall bar the right of a franchisor and franchisee to agree to binding arbitration of disputes consistent with the provisions of this chapter."
Washington	Washington Franchise Investment Protection Act (FIPA), Wash. Rev. Code § 19.100.180	"Relation between franchisor and franchisee—Rights and prohibitions. Without limiting the other provisions of this chapter, the following specific rights and prohibitions shall govern the relation between the franchisor or subfranchisor and the franchisees: . . . (2) For the purposes of this chapter and without limiting its general application, it shall be an unfair or deceptive act or practice or an unfair method of competition and therefore unlawful and a violation of this chapter for any person to: . . . (g) Require franchisee to assent to a release, assignment, novation, or waiver which would relieve any person from liability imposed by this chapter, except as otherwise permitted by RCW 19.100.220. . . ."
	Washington Franchise Investment Protection Act (FIPA), Wash. Rev. Code § 19.100.220(2)	"Any agreement, condition, stipulation or provision, including a choice of law provision, purporting to bind any person to waive compliance with any provision of this chapter or any rule or order hereunder is <i>void</i> . A release or waiver executed by any

STATES WITH SPECIFIC ANTI-WAIVER PROVISIONS		
STATE	STATUTE	LANGUAGE
		person pursuant to a negotiated settlement in connection with a bona fide dispute between a franchisee and a franchisor, arising after their franchise agreement has taken effect, in which the person giving the release or waiver is represented by independent legal counsel, is not an agreement prohibited by this subsection.”
Wisconsin	Wisconsin Franchise Investment Law (WFIL), Wis. Stat. § 553.76	“Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this chapter or any rule or order under this chapter is <i>void</i> . This section does not affect the settlement of disputes, claims or civil lawsuits arising or brought under this chapter.”

## CHART 2

STATES WITH SPECIFIC FORUM/VENUE STATUTES		
STATE	STATUTE	LANGUAGE
California	Cal. Bus & Prof. Code § 20040.5	“A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state.”
Connecticut	Conn. Gen. Stat. § 42-133f(f)	“Any waiver of the rights of a franchisee under sections 42-133f [Termination, or cancellation of, or failure to renew a franchise] or 42-133g [Action for violation of CFA] which is contained in any franchise agreement entered into or amended on or after June 12, 1975, shall be void.”  <i>See Phoenix Surgicals, LLC v. Blackstone Med., Inc.</i> , No. 3:10-cv-1643 2010, U.S. Dist. LEXIS 138043, 7, 2011 WL 63992 (D. Conn. Dec. 27, 2010)
Illinois	815 ILCS 705/4	“Jurisdiction and venue. Any provision in a franchise agreement that designates jurisdiction or venue in a forum outside of this State is void, provided that a franchise agreement may provide for arbitration in a forum outside of this State.”
Indiana	Ind. Code § 23-2-2.7-1(10)	“It is unlawful for any franchise agreement entered into between any franchisor and a franchisee who is either a resident of Indiana or a nonresident who will be operating a franchise in Indiana to contain any of the following provisions: (1) Limiting litigation brought for breach of the agreement in any manner whatsoever.”
Iowa	Iowa Code § 523H.3(1)	“1. A provision in a franchise agreement restricting jurisdiction to a forum outside this state is void with respect to a claim otherwise enforceable under this chapter.  2. A civil action or proceeding arising out of a franchise may be commenced wherever jurisdiction over the parties or subject matter exists, even if the agreement limits actions or proceedings to a designated jurisdiction.”
Louisiana	La. Rev. Stat. 12 § 1042	“Unless provisions of a business franchise agreement provide otherwise, when the business to be conducted pursuant to the agreement and the business location of the franchisee are

<b>STATES WITH SPECIFIC FORUM/VENUE STATUTES</b>		
<b>STATE</b>	<b>STATUTE</b>	<b>LANGUAGE</b>
		exclusively in this state, disputes arising under a business franchise agreement shall be resolved in a forum inside this state and interpretation of the provisions of the agreement shall be governed by the laws of this state.”
Michigan	MCLS § 445.1527(f)	The following provision is void and unenforceable if contained in any documents relating to a franchise: “A provision requiring that arbitration or litigation be conducted outside this state. This shall not preclude the franchise from entering into an agreement, at the time of arbitration, to conduct arbitration at a location outside this state.”
Minnesota	Minn. R. § 2860.4400(J)	It shall be unfair and inequitable for any person to “require a franchisee to waive his or her rights to a jury trial or to waive rights to any procedure, forum, or remedies provided by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided that this part shall not bar an exclusive arbitration clause;”
North Carolina	N. C. Gen. Stat. § 22B-3	“Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.”
Rhode Island	R.I. Gen. Laws § 19-28. 1-14	“A provision in a franchise agreement restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state is void with respect to a claim otherwise enforceable under this act.”
South Dakota	S.D. Codified Laws 37-5A-51.1	Repealed by <i>SL 2008, ch 203, § 51, effective July 1, 2008.</i>

State business opportunity laws should be considered in this analysis even though some state business opportunity statutes exempt franchises from applicability by definition. Others provide for an exemption upon the franchisor filing the proper form and complying with the Amended FTC Rule. A number of state business opportunity statutes contain specific anti-waiver language or venue specific language similar to those discussed above and should be reviewed if the franchisee resides in one of these states. A list of states and relevant statutory language is included below in Chart 3.

### **CHART 3**

<b>BUSINESS OPPORTUNITY STATES* WITH ANTI-WAIVER PROVISIONS AND/OR FORUM/VENUE LANGUAGE</b>		
<b>STATE</b>	<b>STATUTE</b>	<b>LANGUAGE</b>
Alaska	Sale of Business Opportunities Law, Alaska Stat. § 45.66.170 - Waiver prohibited and void.	“A seller may not request or obtain from a buyer a waiver of the rights or defenses of the buyer under this chapter. A waiver of the rights or defenses of the buyer under this chapter is void.”  [no forum/venue provision]
Georgia	Sale of Business Opportunities	[no anti-waiver provision]

<b>BUSINESS OPPORTUNITY STATES* WITH ANTI-WAIVER PROVISIONS AND/OR FORUM/VENUE LANGUAGE</b>		
<b>STATE</b>	<b>STATUTE</b>	<b>LANGUAGE</b>
	Act, Ga. Code Ann. § 10-1-410 <i>et seq.</i>	[no forum/venue provision]
Kentucky	Sale of Business Opportunities, Ky. Rev. Stat. Ann. § 367.816(7)	“Any waiver by the consumer/investor of a business opportunity of the rights provided in this section is null and void and will not operate to relieve the offeror of any obligation placed upon him by KRS 367.801 to 367.819.”  [no forum/venue provision]
Louisiana	Business Opportunity Sellers and Agents, La. Rev. Stat. Ann. § 51:1823(7)	“No business opportunity seller or agent shall . . . include in any agreement a waiver of the purchaser's rights established by law.”  [no forum/venue provision]
Maine	Regulations of the Sale of Business Opportunities, Me. Rev. Stat. tit. 32, § 4691 <i>et seq.</i>	[no anti-waiver provision]  [no forum/venue provision]
New Hampshire	Distributorship Disclosure Act, N.H. Rev. Stat. Ann. § 358-E:1 <i>et seq.</i>	[no anti-waiver provision]  [no forum/venue provision]
North Carolina	Business Opportunity Sales Law, N.C. Gen. Stat. § 66-94 <i>et seq.</i>	[no anti-waiver provision]  [no forum/venue provision]
Ohio	Business Opportunity Plans, Ohio Rev. Code. Ann. § 1334.06(D)(2)	“In connection with the sale or lease of a business opportunity plan, no seller shall . . . Include in any agreement, any confession of judgment or any waiver of any rights to which the purchaser is entitled under sections 1334.01 to 1334.15 of the Revised Code, including specifically the right to cancel the agreement in accordance with this section and section 1334.05 of the Revised Code”
	Business Opportunity Plans, Ohio Rev. Code. Ann. § 1334.06(E)	“In connection with the sale or lease of a business opportunity plan, any provision in an agreement restricting jurisdiction or venue to a forum outside of this state, or requiring the application of laws of another state, is void with respect to a claim otherwise enforceable under sections 1334.01 to 1334.15 of the Revised Code.”
	Business Opportunity Plans, Ohio Rev. Code. Ann. § 1334.15(B)	“. . . Any waiver by a purchaser of sections 1334.01 to 1334.15 of the Revised Code or any venue or choice of law provision that deprives a purchaser who is an Ohio resident of the benefit of those sections is contrary to public policy and is void and unenforceable.”
Oklahoma	Business Opportunity Sales Act, Okla. Stat. tit. 71, § 826(C)	“Any condition, stipulation or provision binding any purchaser of a business opportunity to waive compliance with or relieving a person from any duty or liability imposed by or any right provided by the Oklahoma Business Opportunity Sales Act or any rule or order issued pursuant to the act is void.”  [no forum/venue provision]
South Carolina	Business Opportunity Sales Act, S.C. Code Ann. § 39-57-10 <i>et seq.</i>	[no anti-waiver provision]  [no forum/venue provision]
Texas	Business Opportunity Act, Tex. Bus. & Com. Code Ann. § 51.006	“A waiver of this chapter is contrary to public policy and void.”  [no forum/venue provision]
Utah	Business Opportunity Disclosure Act, Utah Code Ann. § 13-15-1	[no anti-waiver provision]  [no forum/venue provision]

\* Only states with business opportunity laws and no franchise law are listed.

B. Application of the new *Atlantic Marine*-transfer protocol to state anti-waiver provisions

At first blush, one might think that the state anti-waiver provisions act as a silver bullet for franchisees. Nevertheless, franchisees who have taken this position in the face of otherwise valid and enforceable forum selection clauses have not always been successful.

1. *Allegra Holdings, LLC v. Davis*

In *Allegra Holdings, LLC v. Davis*,<sup>79</sup> Allegra Holdings, LLC and Allegra Network, LLC (collectively referred to as “Allegra” or “franchisor”) filed suit against its franchisee, Fox Tracks, Inc. (“Fox” or “franchisee”) in the Eastern District of Michigan resulting from franchisee’s alleged continued operation of the franchised business after the expiration of the franchise agreement. Franchisor sought injunctive relief and damages under the Lanham Act, unfair competition, breach of the franchise agreement and breach of the guarantee agreement. Franchisee operated its business in Minnesota and immediately filed a motion to transfer the venue to the District Court of the District of Minnesota arguing that the franchise agreement and the Minnesota Franchise Act (“MFA”) required the parties to litigate any claims in Minnesota.

The franchise agreement contained the following forum selection clause in Section 7 of the state-mandated addendum to the Franchise Agreement (applicable because the franchise was to be operated in Minnesota):

Subject to the parties’ obligations under Section 32 [providing for binding arbitration of certain disputes], you and your Owners agree that all actions arising under this Agreement or otherwise as a result of the relationship between you and us must be commenced in the state or federal court of general jurisdiction in or nearest to Troy, Michigan. You and your Owners irrevocably submit to the jurisdiction of those courts and waive any objection or venue in those courts. *Notwithstanding the foregoing, Minn. Stat. Sec. 80C.21 and Minn. Rule 2860.4400J prohibit franchisor, except in certain specified cases, from requiring litigation to be conducted outside Minnesota. Nothing in this Agreement shall abrogate or reduce any of your rights under Minnesota Statutes Chapter 80C or your right to any procedure, forum or remedies that the laws of the jurisdiction provide.*

(Emphasis added).<sup>80</sup>

Given the language in the forum selection clause, the franchisee argued this language alone should prompt the court to transfer the case to Minnesota because the franchisor’s filing of the case in Michigan was tantamount to “requiring litigation to be conducted outside Minnesota” in violation of Section 80C.21 of the Minnesota Franchise Act and Minnesota Rule 2860.4400 (J).

Section 80C.21 of the Minnesota Franchise Act states:

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<sup>79</sup> *Allegra Holdings, LLC v. Davis*, No. 13-CV-13498, 2014 U.S. Dist. LEXIS 57086 (E.D. Mich. April 24, 2014).

<sup>80</sup> *Id.* at \*6-7.

Any condition, stipulation or provision, including any choice of law provision, purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, organized or incorporated under the laws of this state, or purporting to bind a person acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with any provision of sections 80C.01 to 80C.22 or any rule or order thereunder is void.

The court was not persuaded by franchisee's arguments. The court reasoned that nothing in the forum selection clause limited the franchisor's ability to initiate litigation in Michigan.<sup>81</sup> The court relied on *Ramada Worldwide, Int'l. v. Grand Rios Investments, LLC*<sup>82</sup> (construing a substantially similar Minnesota franchise agreement provision) in denying franchisee's motion for change of venue and finding that "[t]he Franchise Agreement does not contain any language indicating that Grand Rios or the other defendants waive any right to file suit in Minnesota."

The court reasoned that nothing in the MFA precluded a franchisee from agreeing to a forum selection clause. The franchisee argued that the anti-waiver language in the MFA precluded franchisor from being able to litigate against franchisee outside Minnesota. The court rejected this argument and again relied on *Ramada Worldwide* stating that "A plain reading of the statute's language indicates that the rule is designed to prohibit waiver of the protections afforded to franchisees under the statute."<sup>83</sup>

The franchisee argued that it was unfair and inequitable under Minnesota Rule 2860.4400 for the franchisor to require litigation outside Minnesota. Minn. R. 2960.4400 (J) provides:

It shall be unfair and inequitable for any person to:

. . .

J. require a franchisee to waive his or her rights to a jury trial or to waive rights to any procedure, forum, or remedies provided for by the laws of the jurisdiction, or to consent to liquidated damages, termination penalties, or judgment notes; provided that this part shall not bar an exclusive arbitration clause.<sup>84</sup>

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<sup>81</sup> *Id.* at \*8.

<sup>82</sup> *Id.* at \*8 (citing *Ramada Worldwide, Int'l. v. Grand Rios Investments, LLC*, 2013 U.S. Dist. LEXIS 152140, 2013 WL 5773085, at \*3 (D.N.J. Oct. 23, 2013)).

<sup>83</sup> *Id.* at \*9 (quoting *Ramada Worldwide*, 2013 U.S. Dist. LEXIS 152140, 2013 WL 5773085, at \*3); see also *Long John Silver's, Inc. v. Nickleson*, 923 F. Supp. 2d 1004, 1010 (W.D. Ky. 2013) ("The MFA's anti-waiver provision simply operates to prohibit the franchising contract from abrogating or contradicting rights afforded to Minnesota franchisees under the MFA.").

<sup>84</sup> *Id.* at \*11-12.

The court concluded that the forum selection clause was proper and valid since it did not operate as a waiver of franchisee's rights under the MFA.<sup>85</sup> Once the court made the determination that the forum selection clause was valid and enforceable, the court followed the framework laid out in *Atlantic Marine*—i.e. that courts should only consider public interest factors, not private factors such as convenience of the parties and their friendly witnesses.<sup>86</sup> The franchisee failed to advance any public interest factors or any other factors to try to dissuade the court from permitting litigation in Michigan. The franchisee seeking transfer of venue in the face of a valid and enforceable forum selection clause bears the burden to show that public interest factors overwhelmingly favor a transfer of venue.<sup>87</sup> The franchisee failed to carry this burden.

This construction in *Allegra Holdings* is not unique to the MFA. The California Franchise Relations Act ("CFRA") has been construed in a similar fashion. The California statute provides as follows: "A provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating in this state."<sup>88</sup> In *Hoodz International, LLC v. Toschiaddi*,<sup>89</sup> the Eastern District of Michigan construed the CFRA in a similar fashion. The court stated that the CFRA "does not guarantee franchisees that they will litigate disputes in California; it merely ensures they will have the opportunity to do so."<sup>90</sup>

## 2. *The Business Store, Inc. v. Mail Boxes Etc.*

Contrast the holding in *Allegra* with *The Business Store, Inc. v. Mail Boxes Etc.*,<sup>91</sup> where a forum selection clause was also included in the franchise agreement. Granted that *The Business Store* was decided prior to *Atlantic Marine*, but the interesting question is whether *The Business Store* would be decided differently post-*Atlantic Marine*? The franchisee filed suit in New Jersey relating to a franchise agreement for a store to be operated in New Jersey. A dispute arose regarding alleged underpayment of royalties by franchisee after MBE conducted an audit of franchisee's stores. Franchisees refused to pay the alleged deficient royalties claiming that the audit was erroneous. After franchisee's continued failure to pay royalties, MBE stopped providing services to franchisee. In February 2011, MBE terminated the franchise agreement.

Franchisee filed suit in the Superior Court of New Jersey, Law Division, Middlesex County asserting causes of action for breach of franchise agreement, breach of implied duty of

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<sup>85</sup> *Id.* at \*13.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at \*13-14.

<sup>88</sup> Cal. Bus. & Prof. Code § 20040.5.

<sup>89</sup> *Hoodz Int'l, LLC v. Toschiaddi*, 2012 U.S. Dist. LEXIS 34345, 2012 WL 883912 (E.D. Mich. March 14, 2012).

<sup>90</sup> *Id.* at \*5 (quoting *Big O Tires, LLC v. Felix Bros, Inc.*, 724 F. Supp. 2d 1107, 1114 (D. Colo. 2010)).

<sup>91</sup> *The Business Store, Inc. v. Mail Boxes Etc.*, 2012 U.S. Dist. LEXIS 19381, 12-20 (N.J. Dist. Ct. 2012).

good faith and fair dealing, tortious interference with franchisee's prospective economic advantage, and fraud. Franchisee contended that the termination violated the New Jersey Franchise Practices Act ("NJFPA"). MBE removed the case to the United States District Court, District of New Jersey and sought a transfer to the Southern District of California pursuant to 28 U.S.C. § 1404(a).

The court analyzed the motion to transfer under pre-*Atlantic Marine* precedent and used the balancing of factors to rule in franchisee's favor. Rather than treating the forum selection clause as the trump card, the court considered it as only one factor in the private interest analysis (along with whether the claim arose elsewhere, the convenience of the parties and witnesses, etc.). The court also considered a laundry list of public interest factors before concluding that public policy dictated denial of the motion to transfer. According to the court, "[T]he NJFPA demonstrates a strong public policy that New Jersey franchisees have a forum to litigate against franchisors in New Jersey."<sup>92</sup> A recent case from the District Court for the District of New Jersey discussed below suggests that the result is the same post-*Atlantic Marine* (if franchisee can show claim covered by NJFPA, forum selection clause presumptively invalid).

### 3. *Ocean City Express Co. v. Atlas Van Lines, Inc.*

In *Ocean City Express Co. v. Atlas Van Lines, Inc.*,<sup>93</sup> the New Jersey plaintiff (and purported franchisee) filed suit in New Jersey alleging a violation of the NJFPA and sought leave to amend its petition after the complaint was dismissed pursuant to 12(b)(6) for failure to state a claim.<sup>94</sup> The defendant (purported franchisor) opposed the motion and asserted that the case should be dismissed for failure to state a claim under NJFPA and that amendment would be futile.<sup>95</sup> The agreement between the parties contained a forum selection clause choosing the state or federal courts in Indiana.<sup>96</sup> The court noted that "If Plaintiff can plead a valid NJFPA claim, the forum-selection clause will be presumptively invalid."<sup>97</sup> Because the plaintiff could potentially show a claim under the NJFPA, the court held that venue was proper in the District of New Jersey, despite the forum selection clause dictating Indiana.<sup>98</sup> The court provided plaintiff a second opportunity to re-plead.<sup>99</sup>

The take away is that franchisees might find solace where they are able to point to either strong public policy or statutory protections where the relevant agreement contains a forum selection clause designating an out of state venue.

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<sup>92</sup> *Id.* at \*26.

<sup>93</sup> *Ocean City Express Co. v. Atlas Van Lines, Inc.*, 2014 U.S. Dist. LEXIS 20885 (D. N.J. February 19, 2014).

<sup>94</sup> *Id.* at \*1.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*21-22.

<sup>97</sup> *Id.* at \*22.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

C. What law applies to determine if forum selection clauses are valid and enforceable: state or federal?

The U.S. Supreme Court has not affirmatively stated whether courts should apply state or federal law in deciding the validity of a forum selection clause, and the Circuit Courts have not uniformly decided this issue. In 2009, the Sixth Circuit found that “six Circuits have held that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law.”<sup>100</sup> The court also found that while the First Circuit refused to decide this issue and the Fourth Circuit was divided, the Seventh and Tenth Circuits have applied state law to determine the validity of forum selection clauses.<sup>101</sup> Noting the “possibility of diverging state and federal law on an issue of great economic interest, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court,” the Sixth Circuit held in line with the majority of the Circuits.<sup>102</sup>

Since 2009, the case development in the four Circuits, not previously aligned with the majority, has cast further doubt on the likelihood that the Supreme Court will take the minority position. The First Circuit continues to refuse to decide whether the enforceability of forum selection clauses is a procedural (federal) or a substantive (state) issue.<sup>103</sup> Because several district courts within the First Circuit determine enforceability using federal common law, the First Circuit district courts maintain that it is unnecessary to take a side on the issue until the

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<sup>100</sup> *Wong v. PartyGaming, Ltd.*, 589 F.3d 821, 827-828 (6th Cir. 2009) (citing *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009) (“[E]nforcement...of the contractual forum selection clause was a federal court procedural matter governed by federal law.”); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (“We apply federal law to the interpretation of the forum selection clause.”); *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008) (“We begin with federal law, not state law, to determine the enforceability of a forum-selection clause.”); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) (“[T]he rule set out in *M/S Bremen* applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law.”); *P & S Bus. Machs. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (“Consideration of whether to enforce a forum selection clause in diversity suit is governed by federal law....”); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995) (“[T]he effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law.”)).

<sup>101</sup> See *Wong*, 589 F.3d at 827 (citing *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 16 (1st Cir. 2009) (“[W]e need not reach the unsettled issue of whether forum selection clauses are treated as substantive or procedural for Erie purposes.”)); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985) (“[T]his Court has applied [*The Bremen*] reasoning in diversity cases not involving international contracts.”); *Nutter v. New Rents, Inc.*, 1991 U.S. App. LEXIS 22952, 1991 WL 193490 at \*5 (4th Cir. 1991) (“In this diversity action, we apply the conflicts of law rules of West Virginia, the state in which the district court sits.”); *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity...of a forum selection clause...by reference to the law of the jurisdiction whose law governs the rest of the contract....”); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) (“We see no particular reason...why a forum-selection clause...should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.”)).

<sup>102</sup> *Id.*

<sup>103</sup> See *Rivera*, 575 F.3d. at 16; see also *Rafael Rodriguez Barril, Inc. v. Conbraco Indus.*, 619 F.3d 90, 92 (1st Cir. P.R. 2010) (“It remains unnecessary for us to decide the issue here because both North Carolina...and Puerto Rico ... follow the federal standard announced by the Supreme Court in *The Bremen*.”); *Huffington v. T.C. Group, Inc.*, 637 F.3d 18, 23 (1st Cir. Mass. 2011) (“[W]e can sidestep the Erie question...of whether to treat the issue of a forum selection clause’s enforceability as “procedural”...or as “substantive”...because, in determining enforceability, both Delaware and Massachusetts follow the federal common-law standard.”).

Supreme Court supplies an answer.<sup>104</sup> The Seventh Circuit, however, has retreated from its previous position that courts should apply state law.<sup>105</sup> As the federal court for the Western District of Wisconsin stated in *Rolfe*, the question of whether the court should apply state or federal law when deciding this issue in diversity cases remains an open question.<sup>106</sup>

Although the Tenth Circuit still maintains the minority position that the validity of a forum selection clause is a substantive, state law issue, district courts within the Tenth Circuit have divided on the issue.<sup>107</sup> In 2012, a Utah District Court refused to hold either way, noting the split in Circuit Courts on the issue of applicable law.<sup>108</sup> Then in 2014, a Kansas District Court held that federal law should apply, opposite the usual Tenth Circuit position, when deciding the validity of a forum selection clause in a diversity case.<sup>109</sup> In its holding, the court cited a Second Circuit case that interpreted the Supreme Court's holding in *Atlantic Marine* as making "clear that the enforceability of a forum selection clause in the federal courts is resolved under federal law".<sup>110</sup>

In 2010, the Fourth Circuit, citing *Wong*, decided to resolve the split in its lower courts and affirmatively hold in line with the majority of Circuit Courts.<sup>111</sup> The Fourth Circuit reasoned that because forum selection clauses change the default venue rules of an agreement, the clause implicates a procedural matter governed by federal law, namely proper venue.<sup>112</sup> Thus, the Fourth Circuit held that courts should apply federal law in deciding the validity of the clause "and in doing so, give effect to the parties' agreement."<sup>113</sup>

If the Supreme Court were to decide this issue today, the Court would likely side with the majority of Circuit Courts to hold that the validity of forum selection clause is a procedural issue to be determined by the application of federal law.

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<sup>104</sup> See, e.g., *Rivera*, 575 F.3d. at 16.

<sup>105</sup> See, e.g., *Rolfe v. Network Funding LP*, No. 14-cv-9-bbc, 2014 U.S. Dist. LEXIS 67476, \*2-3 (W.D. Wis. May 16, 2014).

<sup>106</sup> See *id.*

<sup>107</sup> See *Tri-Lakes Petroleum Co., LLC v. Brooks*, 2014 U.S. Dist. LEXIS 61775, 5 (N.D. Okla. May 5, 2014) (citing *Yavuz v. 61 MM, Ltd*, 465 F.3d 418, 428 (10th Cir. 2006)).

<sup>108</sup> See *Ventura & Assocs., L.L.C. v. HBH Franchise Co. LLC*, 2012 U.S. Dist. LEXIS 30881, 7, n.5 (D. Utah Mar. 6, 2012) (mem. op.) (applying both state and federal law because both sides briefed the case using Utah and 10th Circuit law).

<sup>109</sup> *Enriquez v. Seaton, LLC*, 2014 U.S. Dist. LEXIS 24902, 6 (D. Kan. Feb. 26, 2014) (mem. op.) (citing *Martinez v. Bloomberg LP*, 740 F.3d 211, 220-221 (2d Cir. N.Y. 2014)).

<sup>110</sup> *Martinez v. Bloomberg LP*, 740 F.3d 211, 220-221 (2d Cir. N.Y. 2014) (citing *Atlantic Marine*, 1344 S. Ct. at 580).

<sup>111</sup> *Albamarle Corp. v. Astrazeneca UK Ltd*, 628 F.3d 643, 650 (4th Cir. S.C. 2010) (citing *The Bremen*, 407 U.S. at 12-13; *Wong*, 589 F.3d at 828; *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. Cal. 1988)).

<sup>112</sup> *Id.*

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

D. Mechanics of Hypothetical Cases—Contractual Venue Selection in Favor of Franchisor

While *Atlantic Marine* is very formulaic in nature, knowing the steps in the analysis can make the difference. Here are some considerations in the analysis related to forum selection clauses:

(1) Should one file a motion to transfer or a motion to dismiss for *forum non conveniens*? A motion to transfer venue is proper when a federal forum is designated in the forum selection clause. If the forum selection clause designates a state forum, a motion to dismiss for *forum non conveniens* is the proper motion.

(2) Who bears the burden on a motion to transfer or motion to dismiss for *forum non conveniens*? When a forum selection clause is applicable, the party wishing to disregard the forum selection clause bears the burden.

(3) Is the threshold analysis different for a motion to transfer or motion to dismiss for *forum non conveniens*? No, the threshold analysis is similar. The difference is in the result. On a motion to transfer, the granting of the motion may result only in a transfer of the case whereas, on a motion to dismiss for *forum non conveniens* dismissal is required.

(4) Is there a strong public policy which weighs against enforcement of a forum selection clause? A movant should not spend extensive effort arguing private interest factors; instead, movant should focus on public interest factors to succeed in a motion to transfer. Based on *Atlantic Marine*, the “public interest factors” angle is the only relevant inquiry that remains—a strong public policy disfavoring forum selection clauses should figure into this inquiry to determine whether a case stays where it is filed or whether it should be transferred.

(5) When can a court consider personal interest factors? Personal interest factors are to be considered only when there is not a valid and enforceable forum selection clause. The pre-*Atlantic Marine* analysis is applicable in this situation.

(6) Which state’s choice of law rules govern after transfer? The choice of law rules of the transferee state governs when a case is initiated in the forum not designated in the contract because there is a valid and enforceable forum selection clause.<sup>114</sup> When a case is transferred in the absence of a valid and enforceable forum selection clause, the choice of law rules in the state of the transferor state governs.<sup>115</sup>

(7) Does it matter whether the forum selection clause is mandatory or permissive? Most franchise systems pride themselves on drafting mandatory forum selection clauses. These are preferable, except in the instance in which a franchisee resides in a state which permits a franchisee to file suit in its home

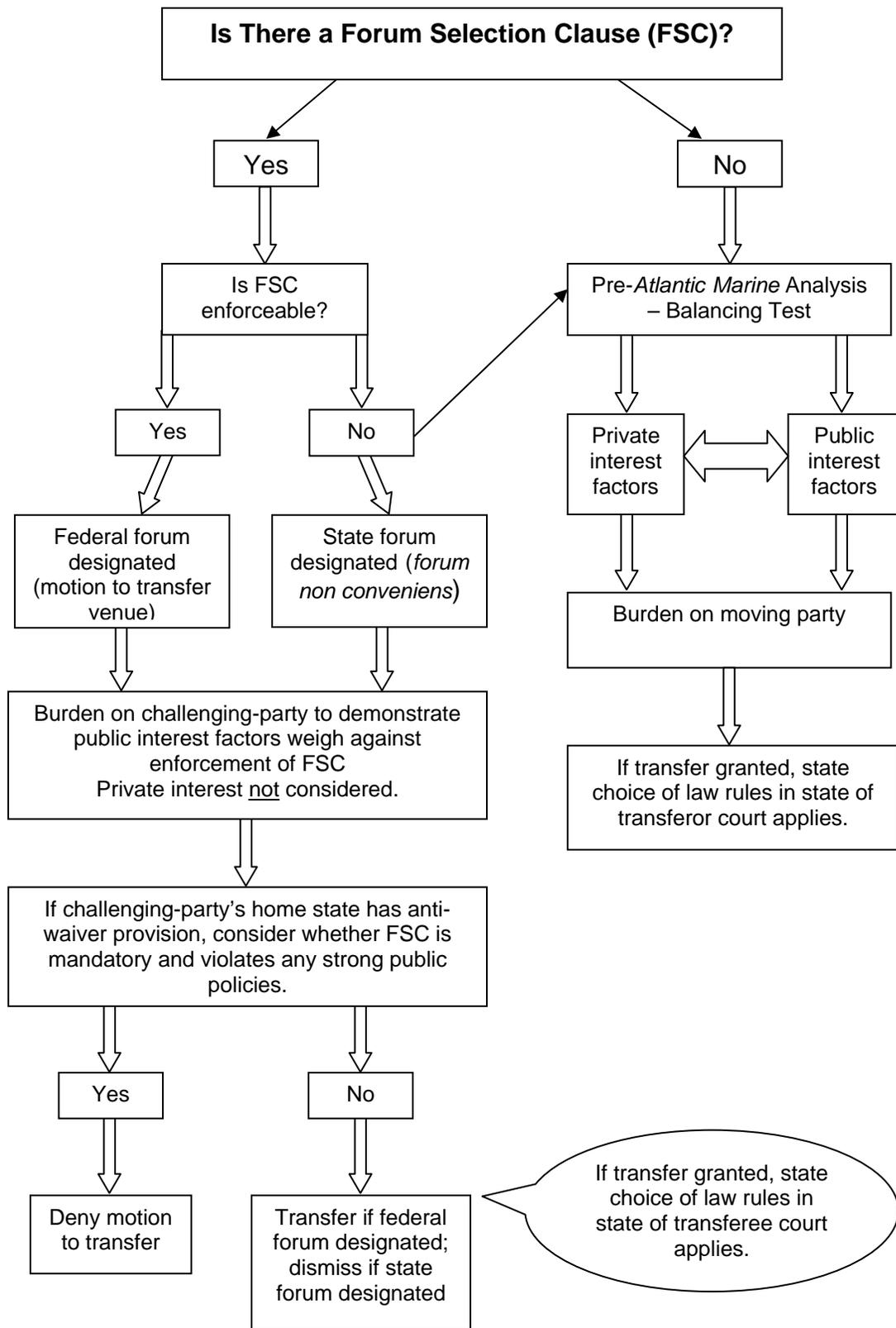
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<sup>114</sup> *Atlantic Marine*, 134 S. Ct. at 582.

<sup>115</sup> *Id.*

state. If the franchise agreement requires (as opposed to merely permits) venue outside the franchisee's home state, some recent case law indicates such a mandatory clause may be unenforceable. When the clause is merely written in such fashion so franchisees are also permitted to file in their home state, such clauses are enforceable and do not violate public policy.

The discussion tree which follows will be helpful in answering these and other questions.



1. *Suit initiated against franchisee in an out-of-state federal forum—anti-waiver provision exists in franchisee’s home state and franchisee seeks transfer to its home district*

Franchisees face an uphill battle when there is an enforceable forum selection clause in the applicable franchise agreement. In the instance where the franchisor strikes first and files in its home forum as specified in the franchise agreement and the forum selection clause is found to be valid, the franchisee is forced to try to develop public interest factors which weigh strongly against enforcement of the forum selection clause. The typical private interest factors like the cost of litigating out of state, location of witnesses and franchisee’s preference to litigate at home are disregarded under *Atlantic Marine*. If the franchisee resides in a state which has an anti-waiver provision or venue selection statute, the franchisee should try to develop public policy arguments for why the clause should not be enforced.

To date, franchisees have not been very successful at challenging the enforcement of forum selection clauses. As some of the cases discussed in this paper demonstrate, the existence of an anti-waiver provision or venue selection statute does not guarantee that a franchisee will litigate at home. So long as the forum selection clause does not prevent a franchisee from striking first and filing the case in its home state, courts have held that enforcement of the parties’ agreed upon forum may not run afoul of public policy. The interesting question is how a franchisor would fare when the forum selection is mandatory (i.e., franchisee does not have the option under the clause to file in its home state) and a franchisee is protected under a state anti-waiver provision regarding both choice of law and forum. Since a mandatory forum selection clause designating the franchisor’s home forum arguably takes away a statutory right where a state anti-waiver provision is concerned, many of the clauses may be susceptible to challenges by franchisees.

It should be noted that courts have been quick to point out that an invalid choice of law provision does not invalidate a forum selection clause.<sup>116</sup> These are often discussed together, but parties need to be careful not to mix the analysis. Many of the state anti-waiver provisions speak to protection under the law, and not protection to litigate in a certain forum.

Franchisees often attack the clause as unconscionable and argue that states have an interest in not enforcing unconscionable contracts; however, courts have been clear that the unconscionability argument must go to the forum selection clause specifically.

2. *Suit initiated against franchisor in an out-of-state federal forum—anti-waiver provision exists in franchisee’s home state and franchisor seeks transfer to its home district*

When a franchisee files suit in his home state, the franchisor should first examine the specific language in the applicable anti-waiver provision. Does the anti-waiver provision merely provide protection under the law or does it also protect the franchisee’s ability to litigate in its

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<sup>116</sup> *Allegra Holdings, LLC v. Davis*, No. 13-CV-13498, 2014 U.S. Dist. LEXIS 57086, at \*13 (E.D. Mich. April 24, 2014) (“A choice of forum is *not* tantamount to a choice of law”); see also *Robbins & Meyers, Inc. v. J.M. Huber Corp.*, 2001 U.S. Dist. LEXIS 12817, 2001 WL 967606, at \*3 (W.D.N.Y. 2001) (“A choice-of-law clause and a forum selection clause are not the same, and address different needs and concerns.”)

home state? If the forum selection clause is merely permissive, the franchisee is not required by contract to litigate in the pre-selected forum. If the forum selection clause is mandatory, and the state anti-waiver provision relates to protection of home forum as well as home law, a real question exists regarding whether the forum selection clause is valid and enforceable. If the clause is found to be valid, the franchisee bears the burden of coming forth with public interest arguments for why the forum selection clause should not be enforced. This scenario presents a franchisee's best chance of success at keeping the case in the home forum. In practice, courts in the franchisee's home forum may give more deference to "public policy" arguments in an attempt to level the playing field a bit (referee-bias)—though a court is unlikely to express this rationale.

If the franchisor is successful in the transfer motion, the franchisor receives the benefit of its home state's choice of law rules. It should be noted that the choice of law rules of the transferee state will likely point back to the law of the franchisee's home state. However, the Supreme Court developed this general rule where forum selection clauses are present to decrease the amount of gamesmanship in cherry-picking a forum.<sup>117</sup>

3. *Suit initiated against franchisee in an out-of-state state forum—anti-waiver provision exists in franchisee's home state and franchisee seeks transfer to home district (removable and non-removable)*

If franchisee wants to get a case transferred to its home state which is currently pending in another state court, the franchisee should consider removal. Removal is available under 28 U.S.C. § 1441 when there is a federal question or there is diversity of citizenship. The likely avenue for a franchisee's grounds for removal is diversity of citizenship. The requirements for diversity of citizenship are set forth in 28 U.S.C. §1332 as follows:

- (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—
  - (1) Citizens of different States;
  - (2) Citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
  - (3) Citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
  - (4) A foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

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<sup>117</sup> *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the W. District of Texas*, \_\_\_ U.S. \_\_\_, 134 S.Ct. 568, 582 (2013) (“[W]hen a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a §1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.”).

In many instances, a franchisee will be able to establish the diversity requirements; however, the amount in controversy might require a bit of work, especially where the franchisor did not specify an amount in controversy in the state court complaint. The defendant, here franchisee, bears the burden to establish the amount in controversy by a preponderance of the evidence.<sup>118</sup>

Let's assume franchisee is successful at removal. Franchisee must now file a motion to transfer venue to its home district. Franchisee's first move will likely be to challenge whether the forum selection clause is valid and enforceable; however, these challenges are generally not successful. Where there exists a valid and enforceable forum selection clause and franchisee desires the court to disregard the forum selection clause and transfer the case, the franchisee bears a heavy burden. The franchisee must demonstrate some strong public interest factor for not enforcing the forum selection clause. The strength of the language in the state anti-waiver provision and court's interpretation of the statute and pronouncements of public policy will be key. It will be irrelevant for franchisee to argue any private interest factors. If the anti-waiver provision merely provides for protection under the "law" versus a prohibition on franchisees having to litigate out of state, franchisee will not likely succeed on a motion to transfer.

4. *Suit initiated against franchisor in an out-of-state state forum—anti-waiver provision exists in franchisee's home state and franchisor seeks transfer to home district (removable and non-removable)*

Franchisees often want to strike first in their home district, especially where there is an anti-waiver provision. As the opening analogy to the professional sports leagues demonstrates, there is something to be said for being the home team. Franchisees, however, have mistakenly assumed that a successful attack on a choice of law provision wipes out an otherwise enforceable forum selection provision. In *Rolfe v. Network Funding LP*, the franchisees (Phillip Rolfe and Wayne Peterson) who were residents of Wisconsin and Florida filed suit in state court in Wisconsin alleging a number of violations of the Wisconsin Franchise Investment Law and the Wisconsin Fair Dealership Law relating to a failed business venture. The franchisor was a citizen of Texas, and the agreement contained a forum selection clause which required that claims be litigated in Texas state court.<sup>119</sup> Peterson executed a Branch Agreement with a choice of forum provision requiring litigation in Texas state court. Rolfe did not sign an agreement containing a forum selection clause. The franchisor removed the action to federal court. The franchisor incorrectly filed a motion under Fed. R. Civ. P. 12(b)(3) for inappropriate venue but later acknowledged the proper mechanism was a motion to transfer under 28 U.S.C. § 1404 or through the doctrine of *forum non conveniens*.

The court explained that the initial inquiry is whether the forum selection clause is valid.<sup>120</sup> After a determination of validity is made, the court then makes an inquiry under Section 1404 or under the *forum con conveniens doctrine*.<sup>121</sup>

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<sup>118</sup> 28 U.S.C. § 1446(c)(2)(A)-(B).

<sup>119</sup> *Rolfe v. Network Funding LP*, No. 3:14-cv-0009-bbc, 2014 U.S. Dist. LEXIS 67476, \*1 (W.D. Wis. May 16, 2014).

<sup>120</sup> *Id.* at \*2.

<sup>121</sup> *Id.*

Plaintiffs' first attack on validity was a claim that the forum selection clause should not be enforced because the agreement containing the forum selection clause was not freely negotiated.<sup>122</sup> The court found this argument to be wholly unconvincing stating that the plaintiffs provided no evidence that they were not able to negotiate the agreement. The court added that plaintiffs did not even attempt to present evidence of duress or unconscionability under state or federal law.

Plaintiffs relied on Wisconsin precedent, *Beilfuss v. Huffly Corp.*<sup>123</sup> to argue that where the choice of law provision is found to be invalid that the forum selection clause, too, is invalid.<sup>124</sup> The court distinguished *Beilfuss* by stating that *Beilfuss* involved the enforceability of a noncompetition agreement and Wisconsin's strong public policy governing covenants not to compete would be violated.<sup>125</sup>

Upon a determination of validity, the court explained the protocol when a forum selection clause designates a state court: "[I]f transfer is impossible because the forum selection clause involves a state court, the federal court should use the same standard in determining whether to dismiss the case under the doctrine of forum non conveniens."<sup>126</sup>

The court points out that a valid question remains as to whether a federal court looks at federal law only in determining validity, whether it considers state law only, or both when determining validity.<sup>127</sup> The court relied upon both state and federal law because the parties relied upon both.<sup>128</sup> The court concluded that the forum selection clause in Peterson's agreement was valid, and dismissed the case as to Peterson on *forum non conveniens* grounds given that the clause required litigation in state court in Texas. As to Rolfe's claims, dismissal was not proper since Rolfe was not bound by the forum selection clause; however, the court noted that with Peterson's claims gone, the court likely lost diversity jurisdiction as the amount in controversy used at removal by the franchisor was based upon Peterson's (not Rolfe's) alleged damages to show the amount in controversy exceeded \$75,000.<sup>129</sup> But on July 17, 2014, after receiving evidence showing that Rolfe's claims likely exceeded the \$75,000 amount-in-controversy requirement, the court determined that grounds for diversity jurisdiction existed and declined to remand the matter as to Rolfe.<sup>130</sup>

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<sup>122</sup> *Id.* at \*4.

<sup>123</sup> *Beilfuss v. Huffly Corp.*, 685 N.W.2d 373.

<sup>124</sup> *Rolfe*, 2014 U.S. Dist. LEXIS 67476, at \*7.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at \*8-9 (citing *Atlantic Marine*, 134 S. Ct. at 580 ("[C]ourts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.")).

<sup>127</sup> *Rolfe*, 2014 U.S. Dist. LEXIS 67476, at \*2-3 ("... it remains an open question in this circuit whether a federal court in a diversity case should look to federal law, state law or both when deciding whether a forum selection clause is valid.").

<sup>128</sup> *Id.* at \*3.

<sup>129</sup> *Id.* at \*10.

<sup>130</sup> *Rolfe v. Network Funding LP*, No. 3:14-cv-0009-bbc (W.D. Wis. July 17, 2014) (mem. op.).

## VII. VIEWING *ATLANTIC MARINE* FROM FOUR PERSPECTIVES

### A. Franchisor-Transactional Counsel

#### 1. *Drafting Tips*

Franchisor counsel should take time to review the forum selection clauses they may have been using in their standard agreements to see whether some modifications are warranted. The case law discussed in this paper provides some useful lessons as outlined below:

- *Applicability of forum selection clause to guarantors.* Ensure that personal guarantors are subject to forum selection clause. As the *Rolfe* case discussed above demonstrates, you want to make sure any signatories, whether on the franchise agreement, personal guarantor or other ancillary agreements are subject to the forum selection clause in the primary agreement(s).
- *Mandatory v. permissive.* Franchisors should consider explicitly stating that the forum selection clause is by no means intended to circumvent any applicable state franchise laws. The court in *Allegra Holdings* was quick to point out that the mere fact that a franchisee is compelled to litigate in the franchisor's home venue does not strip the franchisee of protections under applicable franchise laws.
- *Choice of law v. choice of forum.* Keep choice of law provision separate from choice of forum provisions in the franchise agreement. Separate provisions are useful in the instance in which the choice of law provision may be unenforceable.<sup>131</sup> A distinguishable forum selection clause may be enforced even in a situation when a choice of law provision is unenforceable.
- *Add forum selection clause question to franchise questionnaire.* Consider adding a representation in the questionnaire that franchisees typically sign on closing to ascertain their understanding of the presence and application of a choice of forum provision. Granted that while this is typically set forth in a number of places in the FDD, it might prove helpful to include it in a short document (as opposed to being lost in a 200 page disclosure document).
- *Mandatory arbitration provision.* A mandatory arbitration provision provides an avenue to avoid many uncertainties resulting from contests about the appropriate venue for litigation. The Federal Arbitration Act preempts state law allowing for enforcement of venue clauses in arbitration agreements.

#### 2. *Mandatory v. Permissive Venues*

If one follows the rationale of *Allegra Holdings*, the saving grace was that the forum selection clause did not make the franchisor's home venue the exclusive or mandatory venue for disputes. The court reasoned that the franchisee could still avail itself of protections under the Minnesota Franchise Act if franchisee chose to initiate litigation. This is likely not the intent

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<sup>131</sup> *Rolfe*, 2014 U.S. Dist. LEXIS 67476, at \*1.

of most franchisors, but this leads to a practice tip for franchise attorneys—getting to the courthouse first is still important.

## B. Franchisee-Transactional Counsel

### 1. *What to look for?*

Consider whether the forum selection clause would in fact create a huge impediment to litigation given that these provisions are usually enforceable. A prospective franchisee needs to know that it will likely have to litigate in the franchisor's home forum and bear the cost of litigating in a distant place. This might prove difficult when franchisee will suffer a true hardship in getting witnesses to the out of state forum to defend the litigation.

### 2. *Guiding the purchaser.*

Perhaps the best guidance a franchisee's counsel can provide is to help franchisees understand the implications of the franchise agreement, including any terms related to venue and jurisdiction. Franchisees should be clearly informed that they are not in a position to “negotiate” the forum selection clause in the franchise agreement and that courts will generally enforce these clauses, offering the rationale that a prospective franchisee always has the opportunity to walk away.

### 3. *What does the purchaser's state law provide?*

State law might provide some added benefits for a franchisee, but franchisees should also be notified of any negative court decisions applicable to it. A franchisee should be told that after *Atlantic Marine*, it is nearly impossible to convince a court not to enforce a forum selection clause. This potential inconvenience and cost should figure into the franchisee's decision to purchase the franchise.

## C. Franchisor-Litigation Counsel

### 1. *Who should file first?*

The cases demonstrate that first filed can still be important strategic move. In *Miller v. CareMinders Home Care, Inc.*,<sup>132</sup> franchisor was the first to file in Georgia pursuant to the forum selection clause. Because franchisee commenced operation of a competing business, the franchisor sought injunctive relief and money damages. After suit was filed, franchisee filed a demand for arbitration and maintained that the arbitration should take place in New Jersey. The arbitrator ruled that arbitration would take place in Georgia pursuant to the forum selection clause. An individual guarantor then filed suit in New Jersey asserting various claims resulting from alleged misrepresentations. The guarantor took the position that she was not subject to the forum selection clause. The franchisor moved to transfer the New Jersey action to Georgia. “When a related lawsuit is pending elsewhere, transferring the case serves the interests of justice because it eliminates the possibility of inconsistent results.”<sup>133</sup> The court granted franchisor's motion to transfer.

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<sup>132</sup> *CareMinders Home Care, Inc.*, 2014 U.S. Dist. LEXIS 59941 (D. N.J. April 30, 2014).

<sup>133</sup> *Id.* at \*14.

In addition to filing first:

- Be prepared to challenge franchisee's reliance on any private interest factors in the face of a valid and enforceable forum selection clause
- Be prepared to deal with arguments that an invalid choice of law provision invalidates the forum selection clause.
- Make sure the court puts the burden on franchisee to demonstrate why forum selection clause should not be enforced.
- Be sure to move for transfer, not dismissal.

2. *Impact of state law*

What if a venue clause specifies a state court forum? (See discussion of *Rolfe*.) Dismissal under this circumstance is proper under *Atlantic Marine*.

D. Franchisee-Litigation Counsel

1. *Any challenges to validity?*

Franchisee litigation counsel faces an uphill battle in challenging the validity of a forum selection clause; however, the door is not closed completely. The challenges cannot be based on private interest factors, but instead must focus on public interest factors. It is not clear what arguments might carry the day in this regard, but some arguments to consider are the following:

- Can franchisee make the argument that the applicable forum selection clause forces plaintiff to litigate in a forum jurisdiction when state law permits franchisee to institute litigation in its home town? In other words, the forum selection clause violates applicable state law. This argument has not carried the day in most instances but, nevertheless, it could be asserted.
- Was the agreement signed under duress?
- Are individual guarantors subject to the forum selection clause?

2. *How much can client "invest" in fighting over where case should be decided and how important is it?*

Franchisees will routinely argue that the cost of litigating in an out of state venue should render the forum selection clause unenforceable. However, courts have not been persuaded by these arguments.<sup>134</sup> Because most franchisees are unable to bear the cost of litigation or arbitration, counsel should quickly assess the client's available resources and determine whether it is worthwhile to spar over this procedural issue. Alluding to our sports analogy, the

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<sup>134</sup> See *Salehpour v. Just a Buck Licensing, Inc.*, NO. CA2013-03-028, 2013 Ohio App. LEXIS 4657, 2013 WL 5533113, Bus. Franchise Guide (CCH) ¶ 15,144 (Ohio Ct. App. Oct. 7, 2013) (mere distance and cost to litigate in out of state jurisdiction is not sufficient to invalidate the forum selection cause).

home-field advantage may increase the chance of victory by only five percent ... and that's in arena where we would like to believe it is much more subjective than a court of law.

### 3. *What advantages exist under an applicable state anti-waiver law?*

A franchisee might be able to use the state's anti-waiver provision to build a public interest argument for why the forum selection clause should not be enforced. Franchisee would likely argue that he or she has been deprived of state rights in violation of the anti-waiver provision. Make sure the argument does not go beyond the statute. This has been the case with most of the cases reviewed to date. The best argument along these lines is where a mandatory forum selection clause is at issue and the state statute provides for venue in the state. Then, franchisee, in front of the right court, might be able to argue that the mandatory forum selection is invalid and unenforceable. If a court buys this argument, the franchisee may then rely upon both private interest factors under the pre-*Atlantic Marine* analysis. For further discussion of what law applies (state or federal) to determine if forum selection clauses are valid and enforceable, see discussion in Part VI.C, above.

## VIII. THE NEXT FRONTIER - NEW STATE LEGISLATION?

Because *Atlantic Marine* has closed more doors for franchisees seeking to challenge contractual forum selection clauses, legislative action may be the only recourse. That is, franchisees and their advocates may be compelled to approach state lawmakers to demand a legislative remedy. If they do, it would seem that the strongest possible language is necessary to overcome the tendencies of an out-of-state federal court to favor enforcement of a contractual forum selection clause. Even with that, there are no guarantees that a challenge will stand given the nod towards applying “federal procedural” law rather than “state substantive” law when accessing the validity of contractual forum selection clauses in federal courts.

Nevertheless, state legislative action may be the only option and last best hope—given that no national franchise law exists and that the Federal Trade Commission is unlikely to further revise the Amended FTC Rule to address this issue.

## IX. CONCLUSION

As noted at the outset, the perception of, and perhaps the reality of, the home-field advantage is alive and well in the arena of franchise disputes. Historically, since *The Bremen*, the advantage has gone to franchisors. This, of course, has been aided by franchisors' control over the agreement and the leverage they enjoy in the marketplace and legal system.

Obviously, the *Atlantic Marine* ruling only strengthens the leverage franchisors possess and nearly nullifies any chance franchisees have to regain the home-field advantage. Unlike sporting contests, no win-loss record or other level-the-playing-field mechanism now seems available to franchisees.

Franchisee-organizations and other franchisee-advocates must pursue legislative lifelines if they have any hope of overcoming the effect of the *Atlantic Marine* ruling. For, there is little chance that a life preserver from *The Bremen-to-Atlantic Marine* line of cases will come floating by.

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