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ALERT MEMORANDUM

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Supreme Court Enforces Forum-Selection Clauses

On December 3, 2013, the U.S. Supreme Court issued *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, a unanimous opinion delivered by Justice Alito reaffirming that federal courts must enforce forum-selection clauses in all but the most exceptional cases.[1] The Supreme Court held that when parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause, and that transfer should only be denied under extraordinary circumstances unrelated to the convenience of the parties.

This decision—the Supreme Court's first discussion of forum-selection clauses in 25 years since *Stewart Organization, Inc. v. Ricoh Corporation*[2]—resolved a split among the federal circuit courts regarding the treatment and weight given to forum-selection clauses designating a federal court forum. This decision has important implications for all parties to commercial contracts, which now have further certainty that they can choose their forum in advance and their choice will be enforced absent extraordinary circumstances.

Background

Forum-selection clauses—an agreement between parties that any litigation resulting from the parties' contract will be initiated in a specific forum—are a standard feature of commercial contracts in the United States. Many transacting parties, and even commercial lawyers, assume that forum-selection clauses, which are negotiated contract terms, will be enforced unless they are unconscionable or the product of fraud. This conventional wisdom was called into question in this case, where the issues before the Supreme Court were the procedure available for enforcing a forum-selection clause and the weight that should be given to such a clause in a commercial contract.

Prior to this case reaching the Supreme Court, the Courts of Appeals were split on whether private parties could, through a forum-selection clause, render venue improper in a court in which venue would otherwise be proper under 28 U.S.C. § 1391, the general venue statute, and whether forum-selection clauses could serve as a basis for dismissal for improper venue. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits had held that forum-selection clauses may be enforced by a motion to dismiss pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure for improper venue,[3] while the Third, Fifth (in this case), and

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1 *Atlantic Marine Constr. Co. v. United States District Court for the Western District of Texas*, 571 U.S. __ (2013) (available at http://www.supremecourt.gov/opinions/13pdf/12-929_olq2.pdf).

2 *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

3 *See Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 477-79 (2d Cir. 2011); *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011); *Hillis v. Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

Sixth Circuits had held that if venue is proper under 28 U.S.C. § 1391, a motion to dismiss or transfer for improper venue is inappropriate because forum-selection clauses do not address the issue of proper venue.[4] Instead, the Third, Fifth, and Sixth Circuits held that where venue is statutorily proper, the district courts should apply the balancing test under 28 U.S.C. § 1404(a) to determine whether a case should be transferred to the district named in the forum-selection clause.[5]

The Lower Court Decisions

The case arose from a contract between a Virginia company (Atlantic Marine Construction Company, Inc. or "Atlantic Marine") and a Texas company (J-Crew Management, Inc. or "J-Crew") for construction of a child development center on a military base in Texas. The contract included a forum-selection clause providing that: "[J-Crew] agrees that all . . . disputes . . . 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. The Parties hereto expressly consent to the jurisdiction and venue of said courts." When the parties fell into dispute, J-Crew ignored the forum-selection clause and filed suit in the Western District of Texas.

Atlantic Marine promptly moved to dismiss or in the alternative to transfer the case to the U.S. District Court for the Eastern District of Virginia, but the district court denied the motion. It held that where a forum-selection clause allows the parties to file suit in a state or federal forum, as did the clause at issue in this case, a motion to transfer to the federal forum under § 1404(a),[6] as opposed to a motion under § 1406(a),[7] was the proper approach; that under the balancing test of § 1404(a), Atlantic Marine, as movant, bore the burden of establishing that a transfer would be appropriate under § 1404(a); and after considering a "nonexhaustive and nonexclusive list of public and private interest factors," Atlantic Marine had not satisfied that burden. In doing so, the District Court emphasized the convenience of the parties and witnesses—in particular the fact that most of the witnesses were in Texas and it would be inconvenient and expensive to secure witness testimony in Virginia—while finding that the parties' forum-selection clause was only one factor that was not entitled to dispositive weight.

Atlantic Marine petitioned the U.S. Court of Appeals for the Fifth Circuit for a writ of mandamus directing the District Court to dismiss the case under § 1406(a) or to transfer the case to the Eastern District of Virginia under § 1404(a). The Fifth Circuit denied Atlantic Marine's petition because Atlantic Marine had not established a "clear and indisputable" right to relief as required for the extraordinary relief of mandamus.

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4 *See In re Atlantic Marine Constr. Co.*, 701 F.3d 736, 739-41 (5th Cir. 2012); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535-36 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877-79 (3d Cir. 1995).

5 *See In re Atlantic Marine Constr. Co.*, 701 F.3d 736, 739-41 (5th Cir. 2012); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535-36 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 875, 878-79 (3d Cir. 1995).

6 28 U.S.C. § 1404(a) provides: "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."

7 28 U.S.C. § 1406(a) provides: "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."

The Supreme Court's Decision

The Supreme Court reversed and remanded. The Court rejected Atlantic Marine's primary argument that a forum-selection clause may be enforced by a motion to dismiss under § 1406(a) and Rule 12(b)(3), but accepted Atlantic Marine's alternative argument, holding that a federal forum-selection clause may be enforced by a motion to transfer under § 1404(a) *and* that when a defendant files such a motion, the forum-selection clause should be "given controlling weight in all but the most exceptional cases." The Court thus held that a district court should transfer a case to the selected forum unless "extraordinary circumstances unrelated to the convenience of the parties" clearly disfavor a transfer.

The Court noted that ordinarily, when considering a motion to transfer under § 1404(a), the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." However, that calculus radically changes when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum." The Court held that when a valid forum-selection clause is present, the plaintiff's choice of forum merits no weight, the court should not consider arguments about the parties' private interests and may consider arguments about public interest factors only, and when a party bound by a forum-selection clause files suit in a different forum, a transfer of venue under § 1404(a) will not carry with it the original venue's choice-of-law rules.

The Court also addressed the situation where the forum-selection clause chooses a state or foreign forum rather than a federal district court. Under these circumstances, § 1404(a) does not apply, because it only permits transfer from one federal district to another. However, the Court held that, in such cases, the common law doctrine of *forum non conveniens* should be applied *mutatis mutandis* to dismiss the complaint in favor of the designated forum in the same way as the Court determined that § 1404(a) should be applied when there is a valid federal forum-selection clause—*i.e.*, that the plaintiff's choice of forum in violation of the contract selection should be given no weight, and dismissal should only be denied under extraordinary circumstances.[8]

The Court's decision does not address one practical issue that follows from its holding that § 1404(a) or *forum non conveniens,* rather than a motion to dismiss for improper venue under Rule 12(b)(3), is the proper remedy for a defendant invoking a forum-selection clause, namely, the effect on the defendant's time to move or answer in response to the complaint. A § 1404(a) or *forum non conveniens* motion does not suspend that time, and without such a suspension, a defendant, absent a court order to the contrary, would be obliged to make a motion to dismiss seeking adjudication of other threshold defenses or file an answer on the merits in the very forum in which the plaintiff had no business suing in the first place. To avoid this anomaly, defendants would be well advised to couple their forum-selection clause-based

[8] Traditional *forum non conveniens* doctrine requires a threshold showing that the alternative forum is an adequate one from the standpoint of due process and basic fairness. The Court's decision does not address this requirement, but there is no reason to believe it intended to change it.

motion, whether under § 1404(a) or *forum non conveniens* with a motion to stay any other proceedings pending decision on the motion to enforce the forum-selection clause.

Conclusion

The Supreme Court's decision in *Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas* is an important precedent for businesses and other parties to commercial contracts that will provide further predictability for parties that routinely conduct interstate and international business and rely on forum-selection clauses to control litigation costs and exposure. It emphasizes the broader principle of holding parties to their commercial bargains, except where there are extremely good reasons not to do so.

Please feel free to contact any of your regular contacts at the firm or Jonathan Blackman (jblackman@cgsh.com) if you have any questions.

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