Atlantic Marine After Ten Years

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As any litigator knows, venue can substantially affect a matter—from how discovery is conducted to the outcome of the case. Franchisors anticipate this possibility and almost always include forum selection clauses in their franchise agreements that dictate where litigation related to the franchise agreement must be brought. Franchisors also include forum selection clauses to avoid the need to litigate all over the country. Despite these clauses, franchisees, for various strategic reasons, often initiate litigation in venues other than those dictated by the forum selection clause, often forcing the parties to litigate the validity and enforceability of the forum selection clause itself.[1]

The U.S. Supreme Court's 2013 decision in *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, a case involving a contractor's failure to pay for work performed, altered the landscape for litigating the enforceability of forum selection clauses in contracts generally, and ultimately impacted forum selection clauses in franchise agreements.[2] In their 2017 article, John M. Doroghazi and David J. Norman discussed issues related to *Atlantic Marine* that remained unresolved four years after the decision.[3]

Ten years have passed since *Atlantic Marine*. Building upon the Doroghazi and Norman article, this article reviews the current landscape of *Atlantic Marine* litigation and potential issues on the horizon. Part I contextualizes the Court's decision in *Atlantic Marine*. Part II outlines the framework that

1. *See* John M. Doroghazi & David J. Norman, *What's Left to Litigate About Forum Selection Clauses?* Atlantic Marine *Turns Four*, 36 Franchise L.J. 581, 581 & n.2 (2017).

2. *See generally* Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49 (2013).

3. *See generally* Doroghazi & Norman, *supra* note 1.

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resulted from the Court's decision in *Atlantic Marine*. Part III provides an update on state franchise laws related to forum selection clauses. Part IV revisits the issue addressed in the Doroghazi and Norman article of what happens when the forum selection clause applies only to some of the Plaintiff's claims. Finally, Part V outlines issues related to *Atlantic Marine* that remain unresolved.

I. Not the Wrong Venue but Misplaced

The concept of forum selection clauses is often difficult to contextualize with existing federal statutes related to forum and venue. In *Atlantic Marine*, the Court reasoned that cases filed in derogation of applicable forum selection clauses are more analogous to *forum non conveniens*, where the venue is inconvenient, than to a situation where the venue is "wrong" or "improper."[4] Section A explores this reasoning and discusses the proper remedy for a plaintiff filing suit in a venue other than the one required by the forum selection clause. Section B follows up with considerations for the franchisor and franchisee based on the remedy discussion in Section A.

A. *Defining the Appropriate Remedy*

Federal law provides two remedies when a matter is brought in the "wrong" or an "improper" venue—dismissal or transfer. 28 U.S.C. § 1406(a) provides that a federal district court in which a case is filed "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."[5] Similarly, Federal Rule of Civil Procedure 12(b)(3) provides that a party may move to dismiss an action for "improper venue."[6]

But in *Atlantic Marine*, the Court explained that venue is only "wrong" or "improper" if the case is brought in a venue that does not satisfy one of the three subsections of 28 U.S.C. § 1391(b):

> (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.[7]

The Court also specifically clarified that the parties' entering "into a contract containing a forum selection clause has no bearing on whether a case falls into one of the[se] categories," and therefore, if a case is filed in a district outside the venue stated in the enforceable forum selection clause but

4. *Atl. Marine Constr. Co., Inc.*, 571 U.S. at 60–61.
5. *See* 28 U.S.C. § 1406(a).
6. *See* Fed. R. Civ. P. 12(b)(3).
7. 28 U.S.C. § 1391(b).

otherwise satisfies § 1391, the venue is not "wrong" or "improper" under § 1406 or Rule 12(b)(3).[8] The Court explained that the "avenue for relief when seeking to enforce a forum selection clause . . . is either a motion brought pursuant to 28 U.S.C. § 1404(a) (the *forum non conveniens* doctrine), not Rule 12(b)(3)."[9] Indeed, the analysis for enforcing forum selection clauses, as explained in *Atlantic Marine*, spawns from the doctrine of *forum non conveniens*, under which a court has the discretion to order that the matter be litigated in a more convenient forum.[10]

The appropriate remedy—*i.e.*, dismissal or transfer—for franchisors to seek in enforcing a forum selection clause depends upon the transferee venue. Transfer is the appropriate remedy if the case is in a federal district court and the appropriate transferee venue is another federal district court.[11] In that instance, the motion to enforce the forum selection clause is, by another name, a motion to transfer under 28 U.S.C. § 1404(a),[12] in which Congress "codif[ied] the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with

8. *See Atl. Marine Constr. Co.*, 571 U.S. at 577 ("As a result, a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3)."); *id.* at 578 ("[F]ederal venue provisions . . . alone define whether venue exists in a given forum."). Note that this resolution may be different if the question is not between federal district courts but, instead, between federal and state courts because federal district courts cannot transfer to a state court. *See also* Earsa Jackson & Jim Meaney, *Forum Selection Clauses After Atlantic Marine*, Am. Bar Ass'n 37th Ann. Forum on Franchising, W–4, at 10 (Oct. 15–17, 2014) ("[T]he 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.").

9. Marc Jones Constr., L.L.C. v. Scariano, 2021 WL 923788, at *7 (E.D. Ark. Mar. 10, 2021) (citing *Atl. Marine Constr. Co.*, 571 U.S. at 58–59).

10. *Atl. Marine Constr. Co.*, 571 U.S. at 60–61; *see Forum non conveniens*, Legal Info. Inst., https://www.law.cornell.edu/wex/forum_non_conveniens (defining *forum non conveniens* as "[a] court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear a case").

11. Roberts v. C.R. Eng., Inc., 827 F. Supp. 2d 1078, 1087 (N.D. Cal. 2011) (granting motion to transfer from the U.S. District Court for the Northern District of California to the U.S. District Court for the District of Utah due in part to forum selection clause in franchise agreement); Deans v. Tutor Time Child Care Sys., Inc., 982 F. Supp. 1330, 1332 (S.D. Ind. 1997) (granting motion to transfer from the U.S. District Court for the Southern District of Indiana to the U.S. District Court for the Southern District of Florida under 28 U.S.C. § 1404(a), and holding that the forum-selection clause in the franchise agreement controlled); REO Sales, Inc. v. Prudential Ins. Co. of Am., 925 F. Supp. 1491, 1496 (D. Colo. 1996) (granting motion to transfer from the U.S. District Court for the District of Colorado to the U.S. District Court for the Southern District of Florida under 28 U.S.C. § 1404(a), and holding that the forum-selection clause in the franchise agreement controlled); Water Energizers Ltd. v. Water Energizers, Inc., 788 F. Supp. 208, 214 (S.D.N.Y. 1992) (granting motion to transfer from the U.S. District Court for the Southern District of New York to the U.S. District Court for the Southern District of Indiana under 28 U.S.C. § 1404(a), and holding that the forum-selection clause in the franchise agreement controlled).

12. *Atl. Marine Constr. Co.*, 571 U.S. at 580 (stating that a motion to transfer under § 1404(a) is the proper remedy for transferring a case from one federal district court to another); *see* Jackson & Meaney, *supra* note 8, at 7 (same); *id.* at 10 ("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).").

transfer."[13] Dismissal is inaccessible in that circumstance absent extraordinary circumstances.[14] Dismissal is the appropriate remedy if the appropriate transferee venue is "a nonfederal forum."[15] Following dismissal, the action must be re-filed in state court or other non-federal forum.[16]

B. *Considerations for Franchisors and Franchisees Related to Remedies*

There are advantages and disadvantages to both transfer and dismissal for both the franchisor and franchisee. Where a case is transferred between federal districts, one notable advantage to the franchisor is that the matter stays in federal court—which is often perceived to be more defense-friendly.[17] Similarly, if a matter is dismissed to be refiled in state court, the franchisee may have an advantage.[18]

In situations where delay is a consideration, transfer is likely quicker than dismissal. The delay caused by the franchisee having to re-file and re-serve the franchisor and any other defendants is likely a disadvantage to the franchisee, who typically has fewer resources and is forced to spend more time and money reasserting the same claims. The franchisee also likely has an interest in reaching a conclusion. On the flip side, while state court may not be ideal, the delay caused by dismissal could be an advantage to the franchisor. That is not to say there will not be any delay with transfer, as the new court will likely have different local procedures and scheduling—which could also cause delay from the original schedule. Of course, there is also the possibility that the new forum (with either transfer or dismissal) has a faster schedule than the original forum.

13. 28 U.S.C. § 1404(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.").

14. *Atl. Marine Constr. Co.*, 571 U.S. at 55–56 (noting that dismissal is only allowed when venue is "wrong" or "improper"); *see also* Jackson & Meaney, *supra* note 8, at 10 (explaining that the Court "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,'" and stating: "A plaintiff's case should not be dismissed when it is filed in a venue other than that specified in a forum selection clause").

15. *Atl. Marine Constr. Co.*, 571 U.S. at 54 (quoting Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430 (2007)). In that instance, "§ 1404(a) has no application, but the residual doctrine of *forum non conveniens* 'has continuing application in federal courts.'" *Id.*; *see also* Jackson & Meaney, *supra* note 8, at 11 ("When a forum selection clause points to a state or foreign forum, the clause may be enforced through the doctrine of *forum non conveniens*.").

16. *Atl. Marine Constr. Co.*, 571 U.S. at 55–56; *e.g.*, Sebascodegan Enters., LLC v. Petland, Inc., 647 F. Supp. 2d 71, 77 (D. Me. 2009) (granting motion to dismiss case for refiling in state court pursuant to parties' forum selection clause within their franchise agreement); Mead Invs., Inc. v. Garlic Jim's Fran. Corp., 2008 WL 4911911, at *5 (D. Or. Nov. 13, 2008) (same); Eisaman v. Cinema Grill Sys., Inc., 87 F. Supp. 2d 446, 452 (D. Md. 1999) (same).

17. Viktor Bystrov, *The Mall of Litigation: The Dangers and Benefits of Forum Shopping in American Jurisprudence*, Unsplash (Nov. 17, 2021), https://uclawreview.org/2021/11/17/the-mall-of-litigation-the-dangers-and-benefits-of-forum-shopping-in-american-jurisprudence (discussing various benefits that federal court provides to defendants).

18. Dismissal also raises the state specific issue of whether the statute of limitations was tolled during the pendency of the previously dismissed case and whether any grace period is left to refile. That issue is beyond the scope of this article, but, as always, practitioners should remain aware of limitations issues.

II. The Post-*Atlantic Marine* Framework

The cornerstone of the Court's opinion in *Atlantic Marine* and the test that it established is protecting and upholding parties' contractual agreements.[19] This Part reviews the *Atlantic Marine* framework and how courts have analyzed it since the Court's 2013 decision. Section A addresses how the *Atlantic Marine* analysis differs from the standard *forum non conveniens* analysis, and Section B reviews the difference between mandatory and permissive forum selection clauses, which affects the analysis.

A. *Adjusting Forum Non Conveniens to Provide for the Parties' Agreement*

Atlantic Marine, in essence, created a forum selection clause-specific version of the *forum non conveniens* standard.[20] Under the standard *forum non conveniens* analysis, the court "evaluate[s] both the convenience of the parties and various public-interest considerations," ultimately "decid[ing] whether, on balance, a transfer would serve 'the convenience of parties and witnesses' and otherwise promote 'the interest of justice.'"[21] But when a valid forum selection clause is involved, the "forum selection clause [is] given controlling weight in all but the most exceptional cases."[22] In other words, the court will enforce the forum selection clause unless doing so "would actually deprive the opposing party of his fair day in court."[23]As a result, courts must "adjust their usual § 1404(a) analysis" to accommodate the parties' contractual agreement.[24] The Court in *Atlantic Marine* identified three ways in which the analysis changes.

First, the plaintiff no longer enjoys the "choice of forum."[25] Instead, the plaintiff bears the burden of "showing why the court should not transfer the case to the forum to which the parties agreed" in the forum selection clause.[26] The party opposing enforcement of the forum selection clause must "show[] that enforcement would be '"unreasonable" under the circumstances.'"[27] Courts have identified three circumstances in which enforcement would be unreasonable: (1) "inclusion of the clause in the agreement was the product of fraud or overreaching"; (2) "the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced";

19. *See Atl. Marine Constr. Co.*, 571 U.S. at 66 ("When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations.").

20. *See id.* at 62.

21. *Id.* (quoting 28 U.S.C. § 1404(a)).

22. *Id.*

23. Marc Jones Constr., L.L.C. v. Scariano, 2021 WL 923788, at *7 (E.D. Ark. Mar. 10, 2021) (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 590–95 (1991)).

24. *Atl. Marine Constr. Co.*, 571 U.S. at 51; *see also* Jackson & Meaney, *supra* note 8, at 11 (summarizing the three ways in which district courts must "adjust their usual § 1404(a) analysis" outlined in *Atlantic Marine*).

25. *Atl. Marine Constr. Co.*, 571 U.S. at 51.

26. *Id.*

27. Minhong Inv., Inc. v. Felix Chac Chuo, 2022 WL 2189365, at *4 (C.D. Cal. Mar. 9, 2022).

and (3) "enforcement would contravene a strong public policy of the forum in which suit is brought."[28]

Second, the court must "not consider arguments about the parties' private interests."[29] By agreeing to the forum selection clause, the Court explained, the parties "waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation."[30] Thus, the court must "deem the private-interest factors to weigh entirely in favor of the preselected forum."[31] As a result, the only interests that the court can consider are public interest factors, which "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."[32] These factors "rarely defeat a transfer motion."[33] Accordingly, transfer motions are very difficult to defeat if there is an enforceable forum selection clause.[34]

Finally, the "§ 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules."[35] This is to ensure plaintiffs cannot use transfer as a work-around of any choice of law provision in the parties' agreement.[36]

Thus, in the franchise world, franchisees will almost always be forced to litigate in their franchisor's home city and state because franchisors almost always include forum selection clauses in the franchise agreement.[37] If a franchisee raises concern about the forum selection above. And, after the parties enter into the franchise agreement, *Atlantic Marine* directs that the parties' contractual agreement be upheld absent exceptional circumstances.[38]

B. *Mandatory vs. Permissive Forum Selection Clauses*

Although the United State Supreme Court "did not distinguish between different kinds of forum selection clauses" in *Atlantic Marine*, courts have since distinguished between mandatory and permissive forum selection clauses.[39] The difference between the two can be the deciding factor in the court's analysis on whether to enforce the clause.

28. *Id.* (quoting Richards v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998)).
29. *Atl. Marine Constr. Co.*, 571 U.S. at 51.
30. *Id.*
31. *Id.*
32. *Id.* at 62 n.6.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 65 ("Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship.").
37. Even if a franchisee raises the forum concern before entering into the franchise agreement, franchisors usually do not negotiate these terms.
38. *See Atl. Marine Constr. Co.*, 571 U.S. at 65.
39. Marc Jones Constr., L.L.C. v. Scariano, 2021 WL 923788, at *8 (E.D. Ark. Mar. 10, 2021) (citing Dunne v. Libra, 330 F.3d 1062,1063 (8th Cir. 2003)).

A mandatory forum selection clause *requires* a case to be brought in the specified venue.[40] Mandatory clauses generally include "specific language indicating the parties' intent to make jurisdiction exclusive" in the intended venue.[41] For example, courts usually read words such as "exclusive," "only," and "must" to "suggest exclusivity."[42] If an agreement includes a mandatory forum selection clause, no other jurisdiction is permissible.[43] Therefore, enforcing the clause means requiring that the case be brought in the specified venue.[44]

For example, in *Kava Culture Franchise Group Corp. v. Dar-Jkta Enterprises LLC*, the forum selection clause in the franchise agreement at issue said: "Jurisdiction and venue of any lawsuit between the parties hereto shall be in the Lee County Court."[45] The U.S. District Court for the Middle District of Florida found that the clause was mandatory, as it "unambiguously designates the Lee County Court, a Florida state court, as the only proper forum for . . . suit."[46]

Alternatively, a permissive forum selection clause is "nothing more than a consent to jurisdiction and venue in the named forum."[47] In that instance, the clause "do[es] not exclude jurisdiction or venue in any other forum."[48] As a result, a permissive forum selection clause does not mandate a transfer or change of venue. Thus, the *Atlantic Marine* framework usually applies "only to cases involving mandatory forum selection clauses."[49] Accordingly, in forum selection clause analyses, the court must first determine whether the clause at issue is mandatory or permissive.[50]

40. *Marc Jones*, 2021 WL 923788, at *8 (quoting High Plains Constr., Inc. v. Gay, 831 F. Supp. 2d 1089, 1102 (S.D. Iowa 2011)).

41. *Marc Jones*, 2021 WL 923788, at *8 (quoting *High Plains Constr.*, 831 F. Supp. 2d at 1102).

42. *Id.* (citing *Dunne*, 330 F.3d at 1063); *accord* Macsteel Int'l USA Corp. v. M/V Larch Arrow, 354 F. App'x 537, 540 (2d Cir. 2009) (unpublished) ("Here, the forum selection clause stipulates that 'any disputes arising under this Bill of Lading to be decided in London.' The 'to be' language makes the forum selection clause mandatory."); Am. Soda, LLP v. U.S. Filter Wastewater Grp., Inc., 428 F.3d 921 (10th Cir. 2005) (holding that contractual forum selection clause designating the state courts or arbitration as "the exclusive forum for the resolution of any disputes related to or arising out of" the contract was mandatory rather than permissive, although the clause did not specify a county or tribunal for venue); Docksider, Ltd. v. Sea Tech., Ltd., 875 F.2d 762, 764 (9th Cir. 1989) (holding that forum selection clause stating that "This agreement shall be deemed to be a contract made under the laws of the State of Virginia" was sufficient to make forum selection clause mandatory).

43. *Marc Jones*, 2021 WL 923788, at *8.

44. *See, e.g.*, *id.*

45. Kava Culture Franchise Grp. Corp. v. Dar-Jkt Enters. LLC, 2023 WL 3568598, at *1 (M.D. Fla. May 18, 2023) (emphasis omitted).

46. *Id.* at *3.

47. *Marc Jones*, 2021 WL 923788, at *8 (quoting *High Plains Constr.*, 831 F. Supp. 2d at 1102).

48. *Id.* (quoting *High Plains Constr.*, 831 F. Supp. 2d at 1102).

49. *Id.*

50. *See, e.g.*, *id.*

III. Update on State Franchise Laws

As discussed in the Doroghazi and Norman article,[51] multiple states "have fairly broad state franchise relationship laws that seem to offer an escape from *Atlantic Marine*." This Section explores the post-2017 litigation involving the effect of state franchise statutes on forum selection clauses in franchise agreements.[52]

First, California Business and Professional Code Section 20040.5 provides that "[a] provision in a franchise agreement restricting venue to a forum outside [California] is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within [California]."[53] Post-2017, some California federal district courts have held that this statute is enforceable in federal court and not preempted by federal law.[54] For example, in *Baird v. OsteoStrong Franchising, LLC*, the U.S. District Court for the Eastern District of California voided a forum selection clause and held that Section 20040.5 prohibits "enforcement of a forum selection clause that would require a franchisee to litigate matters related to the operation of a California franchise out of state."[55]

However, other district courts in the Ninth Circuit have held that Section 20040.5 is preempted by federal law and that a forum selection clause in a franchise agreement is enforceable.[56] For example, in *Postnet International Franchise Corp. v. Wu*, the U.S. District Court for the District of Colorado held that Section 20040.5 is preempted by 28 U.S.C. § 1404(a) in federal court. Similarly, in *Yiren Huang v. FutureWei Technologies, Inc.*, the U.S. District Court for the Northern District of California enforced a forum selection clause despite Section 20040.5, noting that federal law governs enforceability of a contractual forum selection clause in a diversity case. The court stated: "Under federal law, forum selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."[57]

Similarly, in *Pinnacle Foods of California, LLC v. Popeyes Louisiana Kitchen, Inc.*, the U.S. District Court for the Central District of California enforced a forum selection clause in a development agreement involving multiple franchises, notwithstanding Section 20040.5.[58] There, the court reasoned

51. Doroghazi & Norman, *supra* note 1, at 581 & n.2.

52. Notably, none of the statutes explored in Doroghazi and Norman's article has been repealed, and most have only been litigated in federal court.

53. Cal. Prof. Bus. & Prof. Code § 20040.5.

54. *See, e.g.*, Baird v. OsteoStrong Fran., LLC, 2022 WL 1063130, at *1 (E.D. Cal. Apr. 8, 2022); Aguilera v. Matco Tools Corp., 2020 WL 1188142, at *9 (S.D. Cal. Mar. 12, 2020); Pierman v. Stryker Corp., 2020 WL 406679, at *4 (S.D. Cal. Jan. 24, 2020).

55. *Baird*, 2022 WL 1063130, at *1; *see also Aguilera*, 2020 WL 1188142, at *9; *Pierman*, 2020 WL 406679, at *4.

56. Postnet Int'l Fran. Corp. v. Wu, 521 F. Supp. 3d 1087, 1094–95 (D. Colo. 2021).

57. Yiren Huang v. FutureWei Techs., Inc., 2018 WL 10593813, at *3 (N.D. Cal. Sept. 24, 2018).

58. Pinnacle Foods of Cal., LLC v. Popeyes La. Kitchen, Inc., 2021 WL 3557744, at *5 (C.D. Cal. Apr. 21, 2021).

that Section 20040.5 is narrow and merely voids forum selection clauses in a limited class of claims—namely, "claims related to the franchise agreement," and claims in that matter went beyond that.[59]

In so holding, the federal district court distinguished its holding from the Ninth Circuit's holding in *Jones v. GNC Franchising, Inc.*,[60] where the Ninth Circuit recognized that Section 20040.5 "expresses a strong public policy of the State of California to protect California franchisees from the expense, inconvenience, and possible prejudice of litigating in a non-California venue."[61] In *Jones*, the Ninth Circuit ultimately held that a provision "that requires a California franchisee to resolve claims related to the franchise agreement in a non-California court directly contravenes this strong public policy and is unenforceable."[62]

In *Pinnacle*, the court explained that the Ninth Circuit in *Jones* did not hold that forum-selection clauses are unenforceable in *any* suit by a franchisee against a franchisor.[63] Instead, *Jones* described the public policy as limited to "claims related to the franchise agreement."[64] Unlike *Jones*, a dispute about an existing franchise agreement, the franchisee in *Pinnacle* claims related a conditional right to develop future franchises to be governed by separate franchise agreements that had not been executed.[65] Therefore, the *Pinnacle* court enforced the forum selection clause despite Section 20040.5.[66]

Second, under Idaho Code Section 29-110(1):

> Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho. Nothing in this section shall affect contract provisions relating to arbitration so long as the contract does not require arbitration to be conducted outside the state of Idaho.

The Ninth Circuit has enforced this statute to override a forum selection clause in a franchise agreement, explaining that forum selection clauses contravened the strong public policy of Idaho.[67] The Ninth Circuit instructed that, on remand, the traditional Section 1404(a) factors be applied.[68]

Third, in Illinois, 815 Illinois Compiled Statutes Section 705/4 provides that "[a]ny 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." This statute has been enforced and clarified. Specifically, in *Hofbrauhaus of America, LLC v. Oak Tree Management Services, Inc.*, the U.S. District Court for

59. *Id.*
60. Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000).
61. *Id.*; *Pinnacle Foods of Cal., LLC*, 2021 WL 3557744, at *3.
62. *Jones*, 211 F.3d at 498.
63. *Pinnacle Foods of Cal., LLC*, 2021 WL 3557744, at *2.
64. *Id.* at *3.
65. *Id.*
66. *Id.*
67. Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 917 (9th Cir. 2019).
68. *Id.*

the District of Nevada transferred a case involving an injunction for various trade secret and copyright violations to the Southern District of Illinois pursuant to Section 705/4.[69] In doing so, the district court did not rule on the section's enforceability, but instead highlighted Illinois's strong public policy, articulated in its franchise act, of protecting Illinois based-franchisees and noted that the state made this interest clear by including the statutory provision voiding forum selection clauses.[70]

In *Jackson Hewitt Inc. v. O & W Taxes, Inc.*, however, the U.S. District Court for the District of New Jersey held that Section 705/4, by its plain language, voids only certain contractual provisions designating venue outside of Illinois and does not mandate venue in Illinois. The court then explained that this provision means that the court must still conduct the traditional transfer analysis once the clause is declared void.[71] Said differently, the Illinois statute, without more, does require a court to transfer the case.

Fourth, Louisiana has a statute that states:

> 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 exclusively in [Louisiana], 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 Louisiana].[72]

The U.S. District Court for the Eastern District of Louisiana interpreted this statute in 2021 as being permissive and to merely require disputes arising with a business exclusively inside the jurisdiction to be resolved in Louisiana only if the agreement does not reserve a right to sue outside of Louisiana.[73]

Fifth, Michigan Compiled Statute Section 445.1527(F) provides: "A provision requiring that arbitration or litigation be conducted outside this state [is void]. This shall not preclude the franchisee from entering into an agreement, at the time of arbitration, to conduct arbitration at a location outside this state."[74] Since 2017, federal courts' thinking about whether federal law preempts Section 445.1527(F) has evolved. In *Williams Insurance & Consulting, Inc. v. Goosehead Insurance Agency, L.L.C*, the U.S. District Court for the Eastern District of Michigan held that Michigan law did not apply to the interpretation of a forum selection clause despite Section 445.1527(F) and found that federal law applied instead.[75]

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69. Hofbrauhaus of Am., LLC v. Oak Tree Mgmt. Servs., Inc., 2023 WL 24179, at *9 (D. Nev. Jan. 3, 2023).

70. *Id.*

71. Jackson Hewitt Inc. v. O & W Taxes, Inc., 2022 WL 17466428, at *2 (D.N.J. Dec. 5, 2022).

72. La. Stat. Ann. § 12:1042.

73. Park 80 Hotels LLC v. Holiday Hosp. Fran., LLC, 2021 WL 5275793, at *5 (E.D. La. Nov. 9, 2021) ("Louisiana law permits forum selection clauses which do not reserve a right to sue in Louisiana.").

74. Mich. Comp. Stat. § 445.1527(F).

75. Williams Ins. & Consulting, Inc. v. Goosehead Ins. Agency, L.L.C., 533 F. Supp. 3d 555, 557 (E.D. Mich. 2020).

A later decision by the Sixth Circuit appears to have reached the opposition conclusion. Specifically, the Sixth Circuit enforced this statute to override a forum selection clause in a franchise agreement.[76] In *Lakeside Surfaces, Inc. v. Cambria Co., LLC*, the Sixth Circuit explained that Michigan's "forum selection-clause," specific to franchise agreements, is "a limited and targeted departure from the state's normal policies regarding forum selection clauses," which supports the enforcement of contractual, bargained-for provisions.[77] Ultimately, the Sixth Circuit determined that Section 445.1527(F) applied and negated the choice of forum provision in the franchise agreement designating Minnesota as the forum.[78] The Sixth Circuit explained that the "strong Michigan public policy" prohibiting forum selection clauses in franchise agreements overrode the forum-selection clause.

Finally, in North Carolina, under North Carolina General Statute Section 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.[79]

North Carolina state and federal courts have construed this statute narrowly, holding that the statute is just one of many factors considered in its analysis of the enforceability of a forum selection clause and noting that the statute's applicability is contingent on the contract being formed in North Carolina. Other courts have gone so far as to state the statute is outright preempted by federal law.[80]

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76. Lakeside Surfaces, Inc. v. Cambria Co., LLC, 16 F.4th 209, 220 (6th Cir. 2021).

77. *Id.*

78. *Id.* at 221; *accord id.* at 222.

79. *Id.* at 220.

80. *See* JML Energy Res., LLC, v. Ryder Truck Rental, Inc., 2021 WL 1206811, at *2 (W.D.N.C. Mar. 30, 2021) (enforcing forum selection clause despite N.C. Gen. Stat. § 22B-3); Mecum Auction, Inc. v. McKnight, 828 S.E.2d 62 (N.C. App. 2019) (finding N.C. General Statute. § 22B-3 inapplicable: "Under the plain language of this Statute, § 22B-3 nullifies a forum-selection clause requiring prosecution or arbitration in another state if the contract was 'entered into in North Carolina[.]' . . . Here, however, as we have already discussed, the contract was formed in Wisconsin. Therefore, § 22B-3 is inapplicable to the Agreement."); Sharpe v. Ally Fin., Inc., 2017 WL 5078900, at *4 (W.D.N.C. Nov. 3, 2017) (enforcing forum selection clause despite § 22B-3 and noting that "Plaintiff argues that enforcement of the forum selection clause would run afoul of the public policy of North Carolina as set forth in N.C. Gen. Stat. § 22B-3. This court has made it clear that this statute is simply one of many factors to consider when a court evaluates whether a forum selection clause is reasonable."); Strategic Power Sys., Inc. v. Sciemus, Ltd., 2017 WL 3402082, at *9 (W.D.N.C. Aug. 8, 2017) ("To the extent Plaintiff asserts that N.C. Gen. Stat. § 22B-3 requires this action to remain in North Carolina, the undersigned notes that this Court has recently held that '[c]ourts within North Carolina have enforced forum selection clauses notwithstanding this statute.'"); Tauss v. Jevremovic, 2016 WL 4374046, at *3 (W.D.N.C. Aug. 12, 2016) (citations omitted) (noting that North Carolina Courts routinely enforce forum selection clauses notwithstanding N.C. Gen. Stat. § 22B-3); AM-Rail

Other states have statutes regarding the enforceability of forum selection clauses in franchise agreements. For example, in Indiana, "[i]t 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 a . . . provision[] . . . [l]imiting litigation brought for breach of the agreement in any manner whatsoever."[81] And in Iowa, "[a] provision in a franchise agreement restricting jurisdiction to a forum outside [Iowa] is void."[82] Similarly, in Minnesota, a franchise agreement cannot "require a franchisee to waive his or her rights . . . to any procedure, forum, or remedies provided for by the laws of the jurisdiction."[83] Finally, in Rhode Island, "[a] provision of a franchise agreement restricting jurisdiction or venue to a forum outside [of Rhode Island] or requiring the application of the laws of another state is void with respect to a claim otherwise enforceable under this act."[84] However, there are no noteworthy post-2017 decisions enforcing or interpreting these state statutes.

IV. Revisiting What Happens When the Forum Selection Clause Only Partially Applies

The Doroghazi and Norman article addressed issues on the horizon in the wake of *Atlantic Marine*.[85] At that point, it was unclear "how to handle cases where the forum selection clause applies only to some of the claims or some of the parties in the case,"[86] and "courts ha[d] not reached a consensus on the appropriate approach or outcome" in those circumstances.[87] This Part provides an update on this issue. Section A addresses instances where the forum selection clause applies only to some of the claims. Section B addresses instances where the forum selection clause applies only to some of the parties in the case. Ultimately, there is still not a uniform approach to these situations.

A. *Severing Claims*

Generally, the question of whether the forum selection clause applies to all or only some of the plaintiff's claims arises when the plaintiff raises both tort claims and contract-based claims. A court must construe the scope of the forum selection clause and determine whether it applies not only to

Constr., Inc. v. A&K R.R. Materials, Inc., 2017 WL 414382, at *5 (M.D.N.C. Jan. 31, 2017) (noting that "North Carolina's policy against forum-selection clauses is just one factor in the Court's analysis, which is governed by federal, and not state, law. Further, the applicability of the North Carolina statute is contingent upon the given contract's formation in North Carolina.") (cleaned up).

81. Ind. Code § 23-2-2.7-1(10).
82. Iowa Code § 523H.3(1).
83. Minn. R § 2860.4400(J).
84. R.I. Gen. Laws § 19-28.1-14.
85. *See generally* Doroghazi & Norman, *supra* note 1.
86. *Id.* at 596.
87. *Id.*

contract-based claims, but also to tort claims. Courts still have not come to a consensus on how to handle this issue, and there is a split among the circuits on how to handle the issue.

i. The Choice-of-Law Provision

Before determining the scope of the forum selection clause, the court must determine what law applies to this analysis. In this determination, another provision of the franchise agreement may come into play—the choice-of-law provision. The court may look to the choice-of-law provision to determine what law to apply in analyzing the scope and applicability of the forum selection clause.

For example, the Fifth Circuit "has determined that to interpret the meaning and scope of a forum selection clause, a court must use the forum's choice-of-law rules to determine what substantive law governs."[88] In *CajunLand Pizza, LLC v. Marco's Franchising*, the franchise agreement had an Ohio choice-of-law provision.[89] Applying Louisiana's choice-of-law rules, which generally respect choice-of-law provisions, the U.S. District Court for the Eastern District of Louisiana held "that Ohio substantive law applie[d] to interpret the meaning and scope of the contracts and forum selection clauses" at issue.[90] Thus, practitioners should be mindful of choice-of-law provisions in the franchise agreement when litigating the scope of the forum selection clause.

ii. Reviewing the Scope of the Forum Selection Clause

Courts agree that determining the breadth of the forum selection clause is a "case-specific exercise."[91] The court must determine the parties' intent in the contract at issue.[92] To do so, courts generally look to the plain language of the forum selection clause.[93] In this analysis, courts apply general rules of contract interpretation.[94] While this is a straightforward analysis, ambiguity in the forum selection clause can cause significant difficulties in its application.

88. CajunLand Pizza, LLC v. Marco's Franchising, LLC, 2020 WL 1157613, at *6 (E.D. La. Mar. 10, 2020).

89. *Id.*

90. *Id.*

91. Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 694 (8th Cir. 1997).

92. *Id.* at 693.

93. *E.g.*, Braspetro Oil Servs. Co. v. Modec (USA), Inc., 240 F. App'x 612, 616 (5th Cir. 2007); *Terra Int'l*, 119 F.3d at 694 ("Whether tort claims are to be governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case."); Marc Jones Constr., L.L.C. v. Scariano, 2021 WL 923788, at *12 (E.D. Ark. Mar. 10, 2021) ("Whether certain claims are 'governed by forum selection provisions depends upon the intention of the parties reflected in the wording of particular clauses and the facts of each case.'" (quoting Stacks v. Bluejay Holdings, LLC, 2010 WL 3893990, at *3 (E.D. Ark. Sept. 29, 2010)); Minghong Inv., Inc. v. Felix Chac Chuo, 2022 WL 2189365, at *3 (C.D. Cal. Mar. 9, 2022) (looking to the language of the agreement to analyze "which claims fall within the scope" of the forum selection clause).

94. *E.g.*, Collins v. Mary Kay, Inc., 874 F.3d 176, 180 (3d Cir. 2017); *Minghong Inv.*, 2022 WL 2189365, at *3.

For example, the Third Circuit has applied state law when determining the scope of a forum selection clause. In a 2017 decision, the Third Circuit determined that—while the enforceability of the clause is a procedural issue to which the court applies federal law—the scope of the clause is a substantive issue of interpretation that should be reviewed under state law.[95]

Other courts disagree and have applied tests developed under federal common law to determine the clause's scope.[96] For example, the Seventh Circuit has long held that, under federal law, regardless of the theory for plaintiffs' claims, "if the duty arises from the contract, the forum selection clause governs the action."[97] In the Fifth Circuit, "[a] forum selection clause can apply to both contract and tort claims."[98] To determine whether tort claims fall within the scope of a contractual forum selection clause, district courts in the Fifth Circuit look to three factors: "(1) whether the tort claims 'ultimately depend on the existence of a contractual relationship between the parties;' (2) whether 'resolution of the claims relates to interpretation of the contract;' and (3) whether the claims 'involv[e] the same operative facts as a parallel claim for breach of contract.'"[99]

A 2019 decision from a federal district court in Texas also provided guidance on how courts will interpret the language of the forum selection clause. There, the court interpreted the term "arising" to narrow the scope of the contractual forum selection clause, holding:

> In a forum selection clause, "[t]he term 'arising' is generally interpreted as indicating a causal connection." Clauses that extend only to disputes "arising out of" a contract are construed narrowly, while clauses extending to disputes that "relate to" or "are connected with" the contract are construed broadly. The phrase "arising in connection with" has been found to reach "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract."[100]

Similar to the last factor considered by courts in the Fifth Circuit, in the Eighth Circuit, the inquiry turns on the facts underlying the claims.[101] In *Terra International, Inc. v. Mississippi Chemical Corp.*, the forum selection

95. *E.g.*, *Collins*, 874 F.3d at 181–82; *see also In re* McGraw-Hill Global Educ. Holdings LLC, 909 F.3d 48, 58 (3rd Cir. 2018) ("Our case law directs us to use state law to determine the scope of a forum selection clause—that is, "'whether the claims and parties involved in the suit are subject' to the clause." (quoting *Collins*, 874 F.3d at 180). This was not always the case in the Third Circuit. In 1983, the Third Circuit held, consistent with the Seventh Circuit, that "where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain." Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3d Cir. 1983).

96. *E.g.*, iiiTec, Ltd. v. Weatherford Tech. Holdings, LLC, 2019 WL 1430428, at *8 (S.D. Tex. Mar. 29, 2019) (citing *Braspetro Oil Servs.*, 240 F. App'x at 616).

97. *E.g.*, Brady v. Sperian Energy Corp., 2019 WL 2141968, at *2 (N.D. Ill. May 16, 2019) (quoting Hugel v. Corp. of Lloyd's, 999 F.2d 206, 209 (7th Cir. 1993)).

98. *Id.* (citing Marinechance Shipping, Ltd. v. Sebastian, 143 F.3d 216, 222 (5th Cir. 1998)).

99. *Id.* (citing AlliantGroup, L.P. v. Mols, 2017 WL 432810, at *7 (S.D. Tex. Jan. 30, 2017)).

100. *Id.* (cleaned up).

101. *See*, *e.g.*, *Terra Int'l*, 119 F. 3d at 692–93.

clause at issue was broad "but not clear regarding tort claims."[102] Canvassing the rules applied by other federal circuit courts, the Eighth Circuit identified virtually the same three factors as are applied in the Fifth Circuit:

> Generally, a forum selection clause will apply in the following cases: (1) where the tort claims ultimately depend on the existence of a contractual relationship between the parties; (2) where resolution of the tort claims relates to interpretation of the contract; or (3) where the tort claims involve the same operative facts as a parallel claim for breach of contract.[103]

Ultimately, the *Terra* court found the latter to be the "most revealing."[104] Following *Terra*, the U.S. District Court for the Eastern District of Arkansas applied this test and determined that the forum selection clause applied to all of the tort claims because they involved the same operative facts as the contract claim.[105]

iii. Applying Federal Rule of Civil Procedure 21

Where the court determines that the forum selection clause applies only to some of the plaintiff's claims, Federal Rule of Civil Procedure 21 becomes relevant.[106] Under Rule 21, the Court has discretion to sever claims.[107] The Rule 21 analysis involves "the same general factors elucidating the § 1404(a) analysis . . . ."[108] Thus, "[w]here a court is confronted with a forum selection clause that applies to some, but not all, of the claims in an action, the court may sever those claims from the others, create a new civil action, and transfer the new civil action pursuant to 28 U.S.C. § 1404(a)."[109]

B. *When the Clause Applies to Only Some Parties*

Another issue that arises is whether the forum selection clause applies to all of the parties in the case—*i.e.*, where the case includes both signatories and non-signatories to the contract that contains the forum selection clause. In both the Fifth and Eighth Circuits, a non-signatory "may be bound by a forum selection clause where the non-party is 'closely related to the dispute such that it becomes foreseeable that it will be bound.'"[110] Under this standard, the "inquiry is whether the third party reasonably should foresee being bound by the forum selection clause because of its relationship to

102. Kleiman v. Kings Point Capital Mgmt., LLC, 2018 WL 3328012, at *3 (E.D. Miss. July 6, 2018) (citing *Terra Int'l*, 119 F.3d at 694).
103. *Id.* (citing *Terra Int'l*, 119 F.3d at 694).
104. *See* Marc Jones Constr., L.L.C. v. Scariano, 2021 WL 923788, at *12 (E.D. Ark. Mar. 10, 2021).
105. *Id.*
106. *See*, *e.g.*, *id.* at *13.
107. Fed. R. Civ. P. 21.
108. *Marc Jones*, 2021 WL 923788, at *12 (quoting Valspar Corp. v. E.I. DuPont de Nemours & Co., 15 F. Supp. 3d 928, 932 (D. Minn. 2013)).
109. *Marc Jones*, 2021 WL 923788, at *12.
110. *Id.* at *10 (quoting Marano Enters. of Kan. v. Z-Teca Rests., L.P., 254 F.3d 753, 757 (8th Cir. 2001)); *accord* Franklink inc. v. BACE Servs., Inc., 50 F.4th 432, 441 (5th Cir. 2022) (quoting Hugel v. Corp. of Lloyd's, 999 F.2d 206 (7th Cir. 1993)).

the cause of action and the signatory to the forum selection clause."[111] To make this determination, "courts have looked to [the non-signatory's] common interests with the contracting party in the litigation."[112] A factor that "[m]ost courts have also relied on" in this analysis is "the fact that the non-contracting party voluntarily associated itself with the contracting party in some type of legal process."[113]

Similarly, the Third Circuit has created a four-step framework that draws much from the Fifth Circuit's approach for determining whether non-signatories are also subject to the forum selection clause.[114] Under this inquiry, "the reviewing court, whether the District Court in the first instance, or [the Third] Court on appeal, will consider" the following factors "in sequence:" "(1) the forum-selection clauses, (2) the private and public interests relevant to non-contracting parties, (3) threshold issues related to severance, and (4) which transfer decision most promotes efficiency while minimizing prejudice to non-contracting parties' private interests."[115]

The first step "mirrors the first step of the Fifth Circuit's framework."[116] "At the first step, the court assumes that *Atlantic Marine* applies to parties who agreed to forum-selection clauses and that, '[i]n all but the most unusual cases,' claims concerning those parties should be litigated in the fora designated by the clauses."[117]

In the second step, the court "performs an independent analysis of private and public interests relevant to non-contracting parties," similar to the analysis the court performs in a *forum non conveniens* context.[118] This step also "tracks the Fifth Circuit's approach."[119] If steps one and two "point to the same forum, then the court should allow the case to proceed in that forum, whether by transfer or by retaining jurisdiction over the entire case, and the transfer inquiry ends there."[120]

If steps one and two "point different ways, then the court considers severance."[121] In some cases, severance is "clearly . . . warranted," such as when it is necessary "to preserve federal diversity jurisdiction; to cure personal jurisdiction, venue, or joinder defects; or to allow for subsequent impleader under Federal Rule of Civil Procedure 14."[122] In those instances, "the court should sever and transfer claims as appropriate to remedy jurisdictional and

111. *Marc Jones*, 2021 WL 923788, at *12 (quoting Kleiman v. Kings Point Capital Mgmt., 2018 WL 3328012, at *4 (E.D. Mo. July 6, 2018)).
112. *Id.* (quoting Medtronic, Inc. v. Ernst, 182 F. Supp. 3d 925, 932 (D. Minn. 2016)).
113. *Marc Jones*, 2021 WL 923788, at *12 (quoting *Medtronic, Inc.*, 182 F. Supp. 3d at 932).
114. *See* In re: Howmedica Osteonics Corp., 867 F.3d 390, 403 (3d Cir. 2017).
115. *Id.*
116. *Id.* at 404.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

procedural defects. If only one severance and transfer outcome satisfies the constraints identified at this step, then the court adopts that outcome and the transfer inquiry ends."[123] However, "if more than one outcome satisfies the threshold severance constraints, then the court continues to" the fourth step of the inquiry.[124]

In some cases, severance is inappropriate. For example, severance seems unacceptable "when a party is indispensable under Federal Rule of Civil Procedure 19(b)."[125] In that instance, "the case must continue with all parties present in a forum where jurisdiction and venue are proper as to the indispensable party, which could be either the originating district court or the court to which transfer is sought."[126] As to where the case proceeds:

> If jurisdiction and venue are proper as to the indispensable party in only one of those courts, then the transfer inquiry ends there and the case must continue in that court. If, however, jurisdiction and venue are proper as to the indispensable party in both the originating court and the proposed transferee court, then, in deciding where the whole case should proceed, the court proceeds to Step Four.[127]

In cases where "severance is neither clearly warranted nor clearly disallowed," it is within the court's discretion.[128] In that instance, "the court goes on to select the appropriate fora based on a combination of interests addressed at the next step."[129]

Finally, in the fourth step of the analysis, which is "akin to the final step in the Fifth Circuit's framework," the court exercises its discretion "in choosing the most appropriate course of action." In doing so, the court "measures its decision against two key sets of interests": "efficiency interests in avoiding duplicative litigation" and "the non-contracting parties' private interests and any prejudice that a particular transfer decision would cause with respect to those interests."[130] Only if the court finds "that the strong public interest in upholding the contracting parties' settled expectations is 'overwhelmingly' outweighed by the countervailing interests can the court, at this fourth step, decline to enforce a valid forum-selection clause."[131] In each instance, the analysis is fact-intensive and case-specific. The court weighs the parties' unique circumstances to reach a conclusion, guided by the principle in *Atlantic Marine* "that forum-selection clauses should be enforced '[i]n all but the most unusual cases.'"[132]

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 405.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 411 (quoting *Atl. Marine*, 571 U.S. at 65).

V. Unanswered Questions

A. *State-Specific Public Policy*

The already murky water of navigating forum selection clause analyses gets even worse in states where the legislature has indicated that forum selection clauses (including, specifically, in franchise agreements) violate the public policy of the state. As discussed earlier, many states have these statutes, and the analysis in cases in those states (despite otherwise enforceable forum selection clauses and choice-of-law provisions) gets turned on its head based on the public policy issue that arises due to these statutes.[133] The underlying theory of *Atlantic Marine* altogether might be challenged in instances where there is an existing state statute because the state's public policy contravenes the idea that the parties' bargained-for provision should be enforced as is. While some case law has arisen on this point, not all of the relevant statutes have been litigated. Of the ones that have, some divergence of viewpoints has arisen among the courts. Thus, it remains to be seen whether this area of law will further develop in jurisdictions with these types of statutes.

B. *Civil Rights Litigation*

An interesting issue arises in the context of civil rights litigation due to certain special venue statutory provisions. For example, the special venue provision of Title VII provides:

> Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.[134]

In 2017, in *DeBello v. VolumeCocomo Apparel, Inc.*, the Second Circuit noted that no circuit court had squarely addressed whether the special venue provision in Title VII trumps an enforceable forum selection clause.[135] However, the court recognized that "several district courts have held forum selection clauses unenforceable where they conflict with Title VII's special venue provision."[136] Notwithstanding, the Second Circuit determined that "DeBello's public policy argument" did not defeat the Supreme Court's guidance in *Atlantic Marine* that forum selection clauses should be enforced absent exceptional circumstances.[137] The court did not find that DeBello's was "an exceptional case" and was "not persuaded . . . that the freely-bargained

133. *See supra* Part III.
134. *DeBello*, 720 F. App'x at n.1 (quoting 42 U.S.C. § 2000e-5(f)(3)); *Putnam*, 2022 WL 4480329, at *3 ("The ADA incorporates Title VII of the Civil Rights Act's special venue provision . . . .").
135. *DeBello*, 720 F. App'x at 40.
136. *Id.* at 40–41.
137. *Id.* at 41.

forum selection clause is unenforceable."[138] That being said, the court preserved "the possibility that a conflict with Title VII's special venue provision, *combined with other factors*," which were not present in *DeBello*, "may render a forum selection clause unenforceable."[139]

It does not appear that any other circuit court has addressed this issue after *DeBello*. However, district courts continue to face the issue. For example, in *Kessler v. Direct Consulting Associates LLC*, the U.S. District Court for the Eastern District of Michigan held in July 2018 that "the impact of Title VII's venue provision on the enforceability of a forum selection clause should be evaluated on a case-by-case basis."[140] There, the court found "no basis for declining to enforce the forum selection clause" in the employment agreement at issue.[141] Similarly, in July 2022, the U.S. District Court for the Eastern District of Texas followed *DeBello* and declined to hold that forum selection clauses are *per se* unenforceable in light of the ADA's special venue provision.[142]

Ultimately, it remains unclear whether forum selection clauses are valid and enforceable in civil rights litigation where a statutory special venue provision exists. For now, courts review the issue case by case, as with all other forum selection clauses.

VI. Conclusion

The Supreme Court's 2013 decision in *Atlantic Marine* greatly clarified how courts should review and analyze the applicability and enforceability of forum selection clauses—including those contained in franchise agreements. Since then, courts across the country have, through extensive litigation, applied the test from *Atlantic Marine* in various circumstances and address corollary issues that have arisen. But even ten years after the Court's seemingly definitive decision in *Atlantic Marine*, several issues related to the enforcement of forum selection clauses remain unsettled. Continued development of the case law is likely due to the frequency that venue issues arise and the importance that litigators place on venue.

138. *Id.*
139. *Id.* (emphasis added).
140. Kessler v. Direct Consulting Assocs., LLC, 2018 WL 7890862, at *2 (July 6, 2018).
141. *Id.* at *9.
142. Putnam v. Perficient, Inc., 2022 WL 4480329, at *4 (E.D. Tex. July 20, 2022).