

Five Questions After *Atlantic Marine*

STEPHEN E. SACHS*

The Supreme Court's ruling in Atlantic Marine did a lot to clear up the law of forum selection. But it also left a number of live questions in place. This Article briefly discusses five of them. When a party wants to move a case to the selected forum, what procedures can it use, other than venue transfer or forum non conveniens? When is a forum-selection clause valid and enforceable, as a matter of state or federal law? If the clause isn't valid, should a federal court still give it any weight? What happens if there are multiple parties or claims, and the clause applies to some but not others? And what do the Court's new standards mean for parties appealing a forum-selection ruling, either before or after a final judgment? Judges are already wrestling with these questions, but the answers aren't easy—and may well require another trip to the Supreme Court.

* Associate Professor, Duke University School of Law. For advice and comments, I am grateful to William Baude, Kevin Clermont, and Amanda Schwoerke, and to all of the participants in this Symposium. I am also grateful to Ethan Mann for excellent research assistance.

TABLE OF CONTENTS

INTRODUCTION.....	762
I. WHAT OTHER REMEDIES ARE OUT THERE?.....	763
II. WHEN IS A FORUM-SELECTION CLAUSE VALID?.....	766
III. WHAT IF THE CLAUSE ISN'T VALID?	769
IV. WHAT ABOUT MULTIPLE PARTIES OR CLAIMS?	771
V. WHAT HAPPENS ON APPEAL?	773
CONCLUSION	776

INTRODUCTION

The Supreme Court's ruling in *Atlantic Marine Construction Co. v. U.S. District Court* did a lot to clear up the law of forum selection.¹ As the Court explained, a private forum-selection agreement isn't a venue defect; when Congress has said that venue is proper, the parties can't make it improper by contract.² Instead, to move their case to the chosen court, the parties can seek transfer to another federal forum, such as under 28 U.S.C. § 1404;³ to get to a state or foreign court, they can try forum non conveniens.⁴ If they do, and if their agreements are valid, then their motions will probably be granted, unless there are exceptional public interests pointing the other way.⁵ And once the parties have landed in the new forum, they can litigate under the choice-of-law rules of the court they chose.⁶

At the same time, *Atlantic Marine* declined to address some significant issues facing the district courts. This Article briefly discusses five areas where the Court left live questions in place:

(1) *What other remedies are out there?* The Court approved of venue transfer and forum non conveniens, but are there other ways that parties can have their clauses enforced? In particular, can a defendant get a misfiled action dismissed—and if so, how?

(2) *When is a forum-selection clause valid?* Is forum selection an issue of state law or federal law? If it's state law, then which state? And if it's federal law, where does it come from?

1. 134 S. Ct. 568 (2013).

2. *Id.* at 575, 577 (citing 28 U.S.C. § 1406(a) (2006); FED. R. CIV. P. 12(b)(3)).

3. *Id.* at 579 (citing 28 U.S.C. § 1404(a) (2006) (permitting venue transfer to another district “[f]or the convenience of parties and witnesses” and “in the interest of justice”). Unless otherwise indicated, subsequent references in the text to U.S. Code sections are to Title 28, and subsequent references to “Rules” are to the Federal Rules of Civil Procedure.

4. *Id.* at 580; *cf.* *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (noting that courts may dismiss for forum non conveniens when a “more appropriate and convenient forum” exists elsewhere).

5. *Id.* at 581–82.

6. *Id.* at 582–83 (distinguishing *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *Van Dusen v. Barrack*, 376 U.S. 612 (1964)).

(3) *What if the clause isn't valid?* If a court finds a clause invalid, under whatever law might apply, what force does the clause have then? Should the court disregard it entirely, or does it still weigh in the balance somehow?

(4) *What about multiple parties or claims?* If the clause applies to only some parties or claims but not others, how should the court review a transfer motion? When should it sever certain claims for transfer, and when should it keep the litigation whole?

(5) *What happens on appeal?* If a court erroneously denies a transfer, do the heightened standards make it easier to get mandamus? Or does the prospect of new substantive law in the new forum mean that any error can be adequately remedied on appeal?

Many of these questions are hard ones; this Article doesn't suggest all the answers. But judges will need answers, and soon. And if they don't find them, then the problem of forum selection may be headed back to the Supreme Court.

I. WHAT OTHER REMEDIES ARE OUT THERE?

Atlantic Marine established, once and for all, that forum selection doesn't destroy proper venue.⁷ That largely eliminated one family of remedies for enforcing parties' agreements, namely dismissal under Rule 12(b)(3)⁸ or transfer to the selected forum under § 1406.⁹ The Court specifically approved two other means of enforcement: § 1404 transfer to another federal district, or forum non conveniens dismissal in favor of a state or foreign court. But it didn't describe those remedies as exclusive.

In particular, the Court left in place an existing circuit split on whether courts can dismiss misfiled cases under Rule 12(b)(6)¹⁰—or, more generally, whether violating a forum-selection agreement serves as an affirmative defense, which the defendant can plead in the answer and raise on a motion for judgment on the pleadings under Rule 12(c), on summary judgment under Rule 56, or at trial.¹¹ Because the parties in

7. *Id.* at 575, 577.

8. FED. R. CIV. P. 12(b)(3) (permitting dismissal on motion for “improper venue”).

9. 28 U.S.C. § 1406(a) (2012) (permitting dismissal or transfer when a case is filed “laying venue in the wrong division or district”).

10. FED. R. CIV. P. 12(b)(6) (permitting dismissal on motion for “failure to state a claim upon which relief can be granted”). *Compare, e.g.,* Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 933–34 (6th Cir. 2014) (holding that 12(b)(6) may be used to enforce a forum-selection agreement); Rivera v. Centro Médico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (same), and Salovaara v. Jackson Nat. Life Ins. Co., 246 F.3d 289, 298–99 (3d Cir. 2001) (same), with Sucampo Pharms., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 549 (4th Cir. 2006) (holding that it shouldn't), and Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) (same).

11. See generally Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929), <http://ssrn.com/id=2284517> [hereinafter “Sachs Brief”].

Atlantic Marine hadn't raised or briefed the issue, the Court chose not to discuss it either.¹²

This Article doesn't take a position on that split (though I have before, and do again in forthcoming work).¹³ For present purposes, though, it's worth highlighting some of the uncertainties that resulted from the Court's leaving the question unsettled.

The most obvious uncertainty is that different remedies are available in different places. For a plaintiff willing to test the clause, filing suit in the First, Third, or Sixth Circuits, say,¹⁴ runs the risk that the case will be dismissed and not just transferred. That not only involves the repeat expenses of refiling (added fees, extra motions practice, and so on), but a real risk of losing the case altogether if the limitations period lapses in the interim.¹⁵ All else being equal, a plaintiff shopping for a federal forum will have strong reasons to pick a circuit where § 1404 is the only remedy. And any plaintiff that *does* lose on a 12(b)(6) motion, especially a plaintiff now barred by the statute of limitations, can plausibly argue that the case would have come out differently in other circuits—meaning that this clear and recognized circuit split may soon be headed back to the Court.

A second uncertainty arises in circuits where 12(b)(6) dismissals are already available. How do these various types of relief work together? If the chosen forum is a state or foreign court, then there's no big problem: once the case is dismissed, the plaintiff won't really care whether the reason was 12(b)(6) or forum non conveniens, so long as it has an equal chance to refile.¹⁶ But when the chosen forum is federal, and the alternative is a § 1404 transfer, sophisticated defendants will often ask for that alternative, just in case their motion to dismiss is denied. As *Atlantic Marine* pointed out, a § 1404 transfer has certain procedural advantages for defendants: for one thing, the court, and not the jury, will decide any genuinely disputed facts.¹⁷ And the court can always grant a § 1404 transfer sua sponte, without any party having asked for one.¹⁸

12. *Atl. Marine*, 134 S. Ct. at 580 & n.4.

13. See generally Sachs Brief, *supra* note 11; Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2015).

14. See *Smith*, 769 F.3d at 933–34 (holding that 12(b)(6) may be used to enforce a forum-selection agreement); *Rivera*, 575 F.3d at 15 (same); *Salovaara*, 246 F.3d at 298–99.

15. See *Atl. Marine*, 134 S. Ct. at 583 n.8.

16. Some courts distinguish between the two, dismissing for forum non conveniens only when refiling is actually possible—for instance, by conditioning the dismissal on a waiver of limitations defenses. See, e.g., *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV*, 569 F.3d 189, 205 (4th Cir. 2009). But *Atlantic Marine* suggested that those conditions are unnecessary or even unfair, at least in the forum-selection context. 134 S. Ct. at 583 n.8.

17. *Atl. Marine*, 134 S. Ct. at 580 n.4. Compare FED. R. CIV. P. 43(c) (“When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”), with FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6)

That raises the question of whether there's any "order of battle" here, as used to apply in the Court's qualified immunity cases.¹⁹ Does a court facing alternative motions—one to dismiss and one to transfer—have to decide one before the other? If the defendant asks only for dismissal, can the court jump the gun with a sua sponte transfer? And if the court does transfer the case, will that moot any pending motion to dismiss, or will the defendant be entitled to any additional remedy for having been forced to litigate in the wrong forum?

Thus far, district courts facing these questions have gone different ways. Long before *Atlantic Marine*, the Third Circuit had described the choice between dismissal and transfer as a matter of discretion,²⁰ and some district courts still treat it that way.²¹ Other courts, though, have read *Atlantic Marine* as sufficiently "emphatic" in favor of § 1404 as to transform 12(b)(6) motions into transfer motions instead.²²

One way to handle this choice would be to follow the procedure for venue dismissals. When a case is filed "laying venue in the wrong division or district," § 1406 requires a court to "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."²³ By its terms, § 1406 doesn't apply to forum selection; a private agreement can't make a right venue into a "wrong" venue, as *Atlantic Marine* made clear.²⁴ But the statute puts a similar choice before the courts, as Congress specifically retained the option of dismissal should a transfer prove unjust.²⁵ Most of the time, courts are expected to transfer cases under § 1406, to avoid additional costs or

or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")

18. See 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3844 n.2 (4th ed. 2013). Compare 28 U.S.C. § 1404(a) (2012) ("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."), with 28 U.S.C. § 1404(b) (permitting transfers among divisions only "[u]pon motion, consent or stipulation of all parties").

19. *Pearson v. Callahan*, 555 U.S. 223, 235 (2009) (internal quotation marks omitted).

20. See *Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 299 (3d Cir. 2001).

21. See, e.g., *Fares v. Lankau*, No. CV 12-1381, 2014 WL 2754728, at *3 (D. Del. June 17, 2014); see also *Carter's of New Bedford, Inc. v. Nike, Inc.*, No. 13-11513, 2014 WL 1311750, at *2 n.5 (D. Mass. Mar. 31, 2014).

22. See *Caribbean Restaurants, LLC v. Burger King Corp.*, No. 14-1200 (PG), 2014 WL 2465133, at *4 (D.P.R. June 3, 2014); see also *KNL Constr., Inc. v. Killian Constr. Co.*, No. 3:14-cv-412-UN2, 2014 WL 1671959, at *1 n.2, *3 (M.D. Pa. Apr. 28, 2014), *reconsideration denied*, 2014 WL 4185769 (M.D. Pa. Aug. 21, 2014) (construing a "motion to dismiss . . . as a motion to transfer" based on the "thrust" of *Atlantic Marine*).

23. 28 U.S.C. § 1406(a).

24. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 577 (2013).

25. See Act of May 24, 1949, ch. 139, § 81, 63 Stat. 89, 101 (reinserting the option of dismissal into § 1406(a)).

limitations problems.²⁶ Yet they retain discretion to dismiss as an informal sanction, such as when the misfiling appears deliberate.²⁷

In theory, courts could do the same thing in forum-selection cases, transferring the action under normal circumstances (whether on motion or sua sponte) and dismissing when the plaintiff is truly in the wrong. For the moment, though, that approach is only possible in certain circuits; in others, transfer is the only remedy, no matter how deliberate or improper the plaintiff's choice of forum.

II. WHEN IS A FORUM-SELECTION CLAUSE VALID?

Atlantic Marine places enormous weight on whether a forum-selection clause is valid and enforceable. If it is, enforcement is virtually automatic; “[o]nly under extraordinary circumstances” will a plaintiff be allowed to litigate somewhere other than the chosen forum.²⁸ Yet the opinion says nothing about which clauses are valid in the first place. The Court assumed, without deciding, that the clause before it was enforceable; its analysis simply “presuppose[d] a contractually valid forum-selection clause.”²⁹ That left open a recognized circuit split on whether forum selection in federal courts, when they hear cases involving state-law claims, should be governed by federal law or by state law under *Erie Railroad Co. v. Tompkins*.³⁰ Although some courts and scholars have taken strong positions on this issue,³¹ the question is a legitimately difficult one, and there are good arguments to be made on both sides.

So far, the Court has decided plenty of forum-selection cases without identifying any governing law. The first modern cases arose in admiralty, and the Court claimed to be applying only admiralty doctrines.³² When it encountered its first land-based dispute, the Court avoided the *Erie* issue; it refused to decide “whether the forum selection clause in this case [was] unenforceable under the [admiralty] standards,”³³

26. See *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) (encouraging transfer to avoid “time-consuming and justice-defeating technicalities” (internal quotation marks omitted)).

27. See 14D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3827 (4th ed. 2013) (noting a pattern of dismissal “if the plaintiff’s attorney reasonably could have foreseen that the forum in which the suit was filed was improper and that similar conduct should be discouraged”).

28. *Atl. Marine*, 134 S. Ct. at 581.

29. *Id.* at 581 n.5.

30. 304 U.S. 64 (1938).

31. See *infra* notes 40–50 and accompanying text.

32. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991) (“[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize.”); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (“We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.”).

33. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotation marks omitted).

instead treating the clause merely as one fact in an all-things-considered § 1404 analysis.³⁴

The Court again ducked the question in *Atlantic Marine*, this time at the instance of the parties. Although the plaintiff-respondent had challenged the clause's validity in the district court, it dropped the challenge on appeal and at the certiorari stage.³⁵ At that point, the issue was waived,³⁶ allowing the Court to “presuppose[]” validity.³⁷

In other cases, though, things won't be so easy. Parties resisting a forum-selection clause regularly contest whether the clause is valid. Sometimes they rely on specific state statutes—for example, statutes restricting forum selection in construction contracts, like the one at issue in *Atlantic Marine*.³⁸ Or they cite general standards drawn from the federal admiralty cases, claiming that the clause is “unfair, unjust, or unreasonable” because of “fraud, undue influence, or overweening bargaining power.”³⁹ When the parties' claims are based on federal law, there's a strong argument that federal law should control where those claims can be heard. But when the claims arise from state law only, the circuits have long disagreed on which standards apply,⁴⁰ a split that has persisted in published opinions even after *Atlantic Marine*.⁴¹ Because the choice of law can make or break a forum-selection clause, this dispute is going to be headed back to the Court. What will happen when it gets there?

On the one hand, the argument for state law is easy to make, and it has substantial academic opinion behind it.⁴² Forum-selection clauses are part of contracts, and contract law is state law. If a claim arises under Texas law, and Texas won't let construction firms waive the right to sue at home,⁴³ then how can the federal courts do so? The choice of state or federal standards can have all-or-nothing consequences for forum

34. *Id.* at 29–32. According to a parenthetical dictum in *Ferens v. John Deere Co.*, *Stewart* endorsed the federal-law view, see 494 U.S. 516, 526 (1990), but that parenthetical rests on a misreading. See Sachs Brief, *supra* note 11, at 29 n.15; see also *infra* text accompanying notes 55–63.

35. See Sachs Brief, *supra* note 11, at 31.

36. SUP. CT. R. 15.2.

37. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 n.5 (2013).

38. *E.g.*, TEX. BUS. & COM. CODE ANN. § 272.001(b) (West 2014); cf. *United States ex rel. J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at *3 (W.D. Tex. Aug. 6, 2012) (holding the Texas statute inapplicable because the particular contract at issue involved the federal enclave at Fort Hood).

39. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 18 (1972).

40. *Compare Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) (federal law), with *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (7th Cir. 2008) (state law).

41. *Compare Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014) (federal law), with *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774 (7th Cir. 2014) (state law).

42. See, e.g., Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795 (2015).

43. See TEX. BUS. & COM. CODE ANN. § 272.001(b).

selection—including, under the Court’s new approach, changing the substantive law that’s applied in the new forum.⁴⁴ So using a different standard in federal courts, as compared to state courts, will create strong incentives for forum shopping.⁴⁵ And if the point of *Erie* is to avoid advantaging certain parties through the “accident of diversity jurisdiction,”⁴⁶ then surely state law should apply. (Though *which* state’s law is another hard question—especially when the applicable state choice-of-law rule is unclear, or when the contract itself includes a choice-of-law clause.⁴⁷)

On the other hand, most courts have held that federal law governs the parties’ choice of a federal forum, regardless of what law gives rise to the suit.⁴⁸ They reason, “[q]uestions of venue and the *enforcement* of forum selection clauses are essentially procedural, rather than substantive, in nature.”⁴⁹ Even if the state courts would hear a given case, that doesn’t necessarily control how the federal courts should manage their dockets. So, they conclude, forum selection in federal courts may well be a subject for “federal common law”—which, under the standards of *The Bremen* and its progeny, “directs courts to favor enforcement of the agreement, so long as it is not unreasonable.”⁵⁰

At the moment, it’s hard to say which side is right. Without any federal statute or authorized rule on the subject, we have to “wade into *Erie*’s murky waters”⁵¹—deciding whether a state standard would serve “the twin aims of the *Erie* rule,” namely “discouragement of forum-shopping and avoidance of inequitable administration of the laws,”⁵² or whether we need a federal standard to preserve an “essential characteristic of [the federal] system.”⁵³ That’s not an easy question to answer. I have some opinions myself, which I discuss at greater length elsewhere.⁵⁴ But as *Erie* issues go, the questions posed by forum selection are even murkier than usual.

44. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582–83 (2013).

45. *See Mullenix*, *supra* note 42, at 736–41.

46. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 751 (2012).

47. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 332–39 (1988).

48. *See Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827 (6th Cir. 2009) (describing cases from six circuits to this effect).

49. *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990); *accord Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014).

50. *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 649 (4th Cir. 2010).

51. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

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

53. *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

54. *See generally* Sachs, *supra* note 13.

III. WHAT IF THE CLAUSE ISN'T VALID?

The Court's assumption of validity in *Atlantic Marine* did more than just avoid an *Erie* problem. It also let the Court pass over a very real tension between its new rules, which treat validity as crucial, and its prior decision in *Stewart Organization v. Ricoh Corp.*, which treated validity as a nonissue.⁵⁵ The Court's partial overruling of *Stewart* leaves substantial doubt about what should happen when a clause *isn't* valid, under whatever source of law might control, and yet the defendant seeks to enforce it anyway.

In *Stewart*, the defendant tried to enforce a forum-selection clause through a venue transfer motion under § 1404.⁵⁶ As noted above, the Court deliberately declined to say “whether the forum selection clause in this case [was] unenforceable under the [admiralty] standards.”⁵⁷ Indeed, it viewed that question as irrelevant. Rather than giving the clause any independent legal effect—which would be inappropriate, of course, without first finding it valid—the Court treated the clause merely as fodder in a standard § 1404 analysis, purportedly using the same factors as are always applied under that statute.⁵⁸

To determine “the convenience of [another] forum” for § 1404 purposes, *Stewart* reasoned, we'd of course want to know “the parties' expressed preference for that venue,” as well as “the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power.”⁵⁹ In other words, according to *Stewart*, § 1404 achieves something like the admiralty standards in miniature. A clause can justify transfer even if it's wholly unenforceable under the relevant law (for missing certain formalities,⁶⁰ involving a certain subject area,⁶¹ and so on), because “the parties' private expression of their venue preferences”—again, taking “relative bargaining power” into account—is a “significant factor”⁶² in determining “the interest of justice.”⁶³ Its mere presence in an agreement signed by both parties can change the analysis, regardless of whether that agreement also carries the force of law.

Stewart's approach has a certain amount of sense to it. Suppose that state law governed enforcement, and that the relevant state required forum-selection agreements to be in writing. If we had video of the parties swearing to each other only to sue in a particular federal court,

55. 487 U.S. 22 (1988).

56. *Id.* at 24.

57. *Id.* at 29 (internal quotation marks omitted).

58. *Id.* at 29–32.

59. *Id.* at 29.

60. *Cf.* Sachs Brief, *supra* note 11, at 30 n.15 (suggesting “the signatures of seven witnesses in red ink”).

61. *E.g.*, TEX. BUS. & COM. CODE ANN. § 272.001 (West 2014) (construction).

62. *Stewart*, 487 U.S. at 29–30.

63. 28 U.S.C. § 1404(a) (2012).

that might not create any binding obligations, but it might still affect our sense of “the convenience of [the] parties” and “the interest of justice.”⁶⁴ Or suppose that all of the plaintiff’s *other* contracts choose a forum in Virginia, just not this one. That wouldn’t let courts impose the same choice here, but it still tells us something about the relative merits of a Virginia forum, and it might lead us to disbelieve the plaintiff’s later protestations of inconvenience. In § 1404’s all-things-considered analysis, these facts will carry some weight, regardless of whether they *also* carry the force of state contract law. Maybe the Court in *Stewart* wasn’t really relying on § 1404 in this way; maybe it was letting a presumption of legal enforceability sneak in the back door.⁶⁵ But *Stewart* claimed, at the very least, to be doing nothing over and above ordinary transfer analysis.

By contrast, the Court in *Atlantic Marine* is very consciously doing something new. And the linchpin of its new test is validity. Only “a *valid* forum-selection clause requires district courts to adjust their usual § 1404(a) analysis”—to disregard “the plaintiff’s choice of forum,” to ignore “arguments about the parties’ private interests,” and to discard “the original venue’s choice-of-law rules.”⁶⁶ In resting so much weight on validity, the Court didn’t base its reasoning on the majority opinion in *Stewart*, but on Justice Kennedy’s two-Justice concurrence—which had emphasized the importance of “a valid forum-selection clause.”⁶⁷ But that brief concurrence never said why validity should make a difference. After all, from the perspective of “the convenience of parties and witnesses” and “the interest of justice,”⁶⁸ a clause that’s invalid due to some contractual formality could carry just as much weight as one that’s legally binding.

Maybe there are some reasons why validity should matter. On the approach of the First, Third, and Sixth Circuits, for example, only a valid clause should serve as an affirmative defense; if the clause isn’t legally obligatory on the parties, then it shouldn’t act as a legal barrier to suit. Perhaps validity also ought to matter for choice of law; maybe only those parties with a binding obligation not to sue in a particular forum have really “waived their right” to “the law of the transferor venue.”⁶⁹ But when it comes to the standards for granting or denying transfers, § 1404 isn’t about legal constraints; it’s about convenience and justice, and it can be upset for public-interest reasons having nothing to do with the parties’

64. *Id.*

65. *See Stewart*, 487 U.S. at 34–35 (Scalia, J., dissenting) (arguing that the majority had supplemented § 1404’s forward-looking considerations with a separate, backward-looking consideration of the forum-selection clause).

66. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581–82 (2013) (emphasis added).

67. *See id.* at 581 (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

68. 28 U.S.C. § 1404(a).

69. *See Atl. Marine*, 134 S. Ct. at 583.

obligations.⁷⁰ It's hard to say why, for example, a court should have to resolve the difficult *Erie* questions above before resolving whether the interest of justice supports litigation in another forum.

This emphasis on validity also leaves courts in the dark about what to do once they conclude that a clause *isn't* valid—or, more likely, when they're not sure and would rather not have to decide. Ordinary § 1404 transfer is always available, even without the supercharged *Atlantic Marine* standards; if a case qualifies for ordinary § 1404 transfer anyway, maybe that can save courts the trouble. But what is “ordinary” § 1404 transfer in the forum-selection context, after *Atlantic Marine*? Do the somewhat heightened standards of *Stewart* survive, or do the new rules and their requirement of validity now occupy the field, rendering all other clauses wholly null and void?

And if we figure that out, it still won't save the courts any work, because the choice of law in the transferee forum now depends on *which kind* of § 1404 transfer the parties got, which in turn depends on whether the clause is valid. This is a problem to which the Court may not have adverted, because the choice-of-law issue wasn't actually briefed. While a number of parties and amici noted that regular § 1404 leaves choice of law alone,⁷¹ no one breathed a word about revising that standard before Justice Ginsburg raised the possibility at oral argument.⁷² So while these revisions to choice of law may be welcome,⁷³ they raise a number of thorny problems for the future.

IV. WHAT ABOUT MULTIPLE PARTIES OR CLAIMS?

Forum selection isn't always all or nothing. A single lawsuit can combine multiple claims against multiple parties; some of those might be committed to a particular forum, while others might not. And depending on the rules for validity, a single clause might be valid as to some claims or parties but invalid as to others. *Atlantic Marine* creates problems for these cases, because the remedy that the Court announced has a broader scope than the right it's supposed to enforce. Whether a clause applies and is valid, and thus triggers the Court's heightened standards for § 1404

70. See *id.* at 581 & n.6, 582.

71. See, e.g., Petition for Writ of Certiorari at 20–21, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 522–23 (1990)); Brief for the Petitioner at 20, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929); Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 16–17, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929); Sachs Brief, *supra* note 11, at 34 n.19.

72. Transcript of Oral Argument at 25–26, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) (“That would be taken care of simply by saying *Van Dusen v. Barrack* does not apply when a party is acting in violation of a contractual provision.”); *id.* at 42–43.

73. See Will Baude, *Professor Stephen Sachs and Atlantic Marine v. U.S. District Court*, VOLOKH CONSPIRACY (Oct. 11, 2013, 2:07 AM), <http://www.volokh.com/2013/10/11/professor-stephen-sachs-atlantic-marine-v-u-s-district-court>.

transfer, has to be determined claim by claim; but the remedy of § 1404 transfer itself can only be performed as to the action as a whole.⁷⁴ District courts are starting to wrestle with this problem, but not with much luck.⁷⁵

There are two ways to handle this potential gap between rights and remedies. One is to have a remedy that operates only on individual claims. Affirmative defenses, for example, obviously apply on a claim-by-claim basis; if you don't have a valid forum-selection clause as to a particular claim, then you don't have a forum-selection defense. Venue dismissals can also be tailored to particular causes of action; perhaps "a substantial part of the events or omissions giving rise to" Count I occurred in a certain district, but Count II arose from facts occurring elsewhere.⁷⁶ The same is true of forum non conveniens dismissals. Under the liberal joinder regime of the Federal Rules,⁷⁷ the plaintiff might join a largely domestic claim with a wholly foreign one—involving foreign facts, witnesses, evidence, and law⁷⁸—and a court could, in theory, dismiss the latter while retaining the former.

Another way to avoid the problem is to assess forum-selection clauses on standards that only apply to the action as a whole. Under *Stewart*, for example, courts could consider § 1404 motions holistically, without worrying about the precise scope of any individual forum-selection clause. If some parties in a case, but not others, had signed on to the clause—or if, by its terms, the clause applied only to certain claims—then the court could simply throw those facts in the pot with everything else, and come up with an all-things-considered judgment about the justice and convenience of transfer for everyone.

Atlantic Marine took neither of those routes. Its central remedy of § 1404 transfer applies only to the action as a whole. But its enforcement standards depend crucially on the assumption that a valid forum-selection clause will cover each individual claim.⁷⁹ Without that assumption, there may be a presumption *for* transfer as to some parties or claims,⁸⁰ but a presumption *against* transfer as to others.⁸¹ In fact, because § 1404 only permits transfers to districts where the case "might have been brought" or "to which all parties have consented,"⁸² sometimes

74. See 15 WRIGHT ET AL., *supra* note 18, § 3846 & n.20.

75. See cases cited *infra* notes 83–86.

76. See 28 U.S.C. § 1391(b)(2) (2012).

77. See FED. R. CIV. P. 18.

78. Cf. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (describing relevant factors).

79. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

80. *Id.* (shifting the burden to a plaintiff resisting the clause).

81. See *Piper*, 454 U.S. at 255 ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.").

82. 28 U.S.C. § 1404(a).

the action as a whole simply *can't* be transferred to the forum that some of the parties have selected. Courts trying to decide a single § 1404 motion, then, will have their work cut out for them.

To simplify this process, some courts have considered severing the claims to create separate actions.⁸³ Under Rule 21, district courts have broad discretion to sever claims and to add or drop parties.⁸⁴ Once a case has been divided into distinct actions, one or more of those actions can be transferred while the others are retained. But severing also carries costs; the reason why we have a liberal joinder regime is to enable courts to decide claims among the same parties, or “arising out of the same transaction [or] occurrence,” at the same time.⁸⁵ A number of district courts, finding transfer inappropriate for the action as a whole, have used their discretion to refuse to sever cases if the parties “would be forced to proceed piecemeal” in separate courts.⁸⁶

Ultimately, these are questions of discretion, which might get solved on a case-by-case basis or generate broader rules in the courts of appeals. But they're questions that courts will have to face under *Atlantic Marine*, and that might have been avoided under some other regime.

V. WHAT HAPPENS ON APPEAL?

Finally, *Atlantic Marine* creates new questions for appellate review. What happens when a party moves for § 1404 transfer (or for forum non conveniens dismissal) and the district court erroneously says no? Ordinarily, these denials are hard to challenge—except on mandamus, when *Atlantic Marine's* heightened standards may help a defendant get relief. But the changes that the Court imposed, especially to choice of law, could create new opportunities for relief on appeal after final judgment. And these opportunities, in turn, might actually backfire on parties seeking early review.

Most of the time, if a district court denies a motion under § 1404 or forum non conveniens, the movant can't easily appeal. The denial itself

83. See, e.g., *1-Stop Fin. Serv. Ctrs. of Am., LLC v. Astonish Results, LLC*, No. A-13-CA-961-SS, 2014 WL 279669, at *10 (W.D. Tex. Jan. 23, 2014); *accord Carmouche Ins., Inc. v. Astonish Results, LLC*, No. 14-00061-SDD-SCR, 2014 WL 2740464, at *7 (M.D. La. June 17, 2014); *Valspar Corp. v. E.I. DuPont de Nemours & Co.*, No. 13-3214, 2014 WL 1607584, at *2-4 (D. Minn. Apr. 21, 2014); *Excentus Corp. v. Giant Eagle, Inc.*, No. 13-178, 2014 WL 923520, at *10 (W.D. Pa. Mar. 10, 2014).

84. FED. R. CIV. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.”).

85. FED. R. CIV. P. 20(a)(2)(A).

86. *Jes Solar Co. v. Matinee Energy, Inc.*, No. cv 12-626, 2014 WL 2885476, at *2 (D. Ariz. June 25, 2014); see also, e.g., *id.* at *2-3; *In re TFT-LCD (Flat Panel) Antitrust Litig. (Acer Am. Corp. v. Hitachi, Ltd.)*, No. 13-CV-3349, 2014 WL 1477748, at *1-2 (N.D. Cal. Apr. 14, 2014); *Phi, Inc. v. Apical Indus., Inc.*, No. 6:13-CV-00015, 2014 WL 1820717, at *2, *4-5, *10 (W.D. La. Mar. 7, 2014), *adopted*, 2014 WL 1820859 (W.D. La. May 7, 2014); *cf. Aquila v. Fleetwood, R.V., Inc.*, No. 12-CV-3281, 2014 WL 1379648, at *4-5 (E.D.N.Y. Mar. 27, 2014) (applying a similar analysis to forum non conveniens).

isn't an appealable "final decision[]," since the case keeps on going in the original forum;⁸⁷ nor is it reviewable as a collateral order.⁸⁸ The district court might certify the question for discretionary appeal, but then again, it might not; many circuits find certification improper for discretionary issues as opposed to "controlling question[s] of law."⁸⁹ So the defendant may have to proceed with the suit wherever the plaintiff has filed. If the case really should have been dismissed, and if the defendant eventually loses on the merits, then this adverse final judgment can be reversed on appeal.⁹⁰ But if all the defendant wanted was a transfer, then not even final judgment will help; the harmless error rule demands proof that the case would have come out differently in a different forum, which is extremely hard to come by.⁹¹

Contesting a wrongful *grant* of transfer is even harder. While a forum non conveniens dismissal ends the case and enables appeal in the ordinary course, a § 1404 transfer keeps the litigation going, albeit in another forum. If a case is transferred into a new circuit, the new court of appeals can't review an order from a district court outside its territorial jurisdiction; the complaining party's usual remedy is to request *another* transfer back to the original court, and then to seek review if that request is denied.⁹²

As a result, many circuits fall back on the safety valve of mandamus—as the Fifth Circuit did in *Atlantic Marine*.⁹³ Among other things, mandamus requires a "clear and indisputable" right to relief,⁹⁴ and after *Atlantic Marine*, that's far easier to achieve. By shifting the

87. 28 U.S.C. § 1291 (2012) (providing appellate jurisdiction over "appeals from all final decisions of the district courts of the United States"); see *Ray Haluch Gravel Co. v. Cent. Pension Fund*, 134 S. Ct. 773, 779 (2014) ("In the ordinary course a 'final decision' is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."); accord 15 WRIGHT ET AL., *supra* note 18, § 3855 & n.1.

88. See *Buesgens v. Freeland*, 267 F. App'x 211, 212 (4th Cir. 2008) (per curiam) ("It is well-settled that transfers under [§ 1404] are not appealable final orders."); 15 WRIGHT ET AL., *supra* note 18, § 3855 & n.22 (same); cf. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–30 (1988) (same rule for forum non conveniens). See generally *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989) (denying collateral-order review of a refusal to dismiss based on a forum-selection clause).

89. 28 U.S.C. § 1292(b); see 15 WRIGHT ET AL., *supra* note 18, § 3855 & n.26 (collecting cases).

90. See *Lauro Lines*, 490 U.S. at 501 (finding "an entitlement to be sued only in a particular forum" to be "adequately vindicable" on "appeal after final judgment").

91. See FED. R. CIV. P. 61; *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318–19 (5th Cir. 2008) (en banc) (noting that appeal after final judgment is not "an adequate remedy" for transfer denial, as it requires the appellant "to show that it would have won the case had it been tried in a convenient [venue]" (alteration in original) (quoting *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003))).

92. See *Posnanski v. Gibney*, 421 F.3d 977, 980–81 (9th Cir. 2005) (collecting cases); accord 15 WRIGHT ET AL., *supra* note 18, § 3855 & nn.8–9.

93. See *In re Atl. Marine Constr. Co.*, 701 F.3d 736, 738 (5th Cir. 2012); accord *Volkswagen*, 545 F.3d at 309 ("[M]andamus is an appropriate means of testing a district court's § 1404(a) ruling."); accord 15 WRIGHT ET AL., *supra* note 18, § 3855.

94. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 394 (2004) (internal quotation marks omitted).

burden to the party resisting the forum-selection clause, and by requiring a showing of “extraordinary circumstances,”⁹⁵ the Court ensured that many more defendants will be able to claim “clear and indisputable” rights to have their forum-selection clauses enforced. Or if the plaintiff actually sues in the chosen forum and the defendant wants to litigate somewhere else,⁹⁶ it’ll be easier to resist a wrongful grant.

Yet *Atlantic Marine* may also make mandamus harder to get. Another requirement of mandamus is that the party “have no other adequate means to attain the relief he desires.”⁹⁷ *Atlantic Marine* changes that calculus through its new rules for choice of law. Under the Court’s previous cases, a § 1404 transfer—whether sought by the plaintiff or the defendant—was merely a “change of courtrooms,” with no impact on the law to be applied.⁹⁸ *Atlantic Marine* partially overruled these cases, holding that when a case is transferred to the contractually chosen forum, that forum’s choice-of-law principles should apply.⁹⁹ Sometimes that change makes all the difference in the world. For instance, in *Ferens v. John Deere Co.*, the new forum’s choice-of-law principles would have barred the plaintiff’s suit entirely, applying a different statute of limitations.¹⁰⁰

The Court’s new rule is good for defendants generally, but it mixes up their strategy for appeal. When choice of law makes a difference, the wrongful denial of a transfer will no longer be harmless error after final judgment. If the plaintiff chooses to sue in the wrong place and the district court erroneously denies a transfer, the defendant really has been injured; had the court done its job, the defendant might say, it would have sent the case to the chosen forum, where the law would have barred the plaintiff’s claim. As a result, any adverse final judgment can be directly attributed to the district court’s mistake, and so reversed on appeal.

That makes defendants’ lives easier in one respect, but much harder in another. If review after final judgment is available, then review on mandamus presumably is not. As the Court noted with respect to collateral orders, the defendant’s claim “that it may be sued only in [a particular forum], while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage,” just like “a claim that the trial court lacked personal jurisdiction over the defendant.”¹⁰¹ As a

95. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

96. *See, e.g.*, *GDG Acquisitions, LLC v. Gov’t of Belize*, 749 F.3d 1024, 1027 (11th Cir. 2014).

97. *Cheney*, 542 U.S. at 380 (internal quotation marks omitted).

98. *Van Dusen v. Barrack*, 376 U.S. 612, 637 (1964) (defendant); *accord Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990) (plaintiff).

99. 134 S. Ct. at 582–83.

100. 494 U.S. at 520–21, 526–27.

101. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989).

result, even defendants with a “clear and indisputable” right to the enforcement of a forum-selection clause will be stuck in the wrong forum, forced to litigate the entire case until they can finally take an appeal.¹⁰²

The same is true of certain wrongful grants of transfer. If the district court erroneously enforces an invalid forum-selection clause, for instance, or fails to recognize the “extraordinary circumstances” that ought to defeat transfer, then the transferee court will apply its own choice-of-law principles, which may provide for meaningful review on appeal after final judgment and prevent mandamus review beforehand. Even worse, if the different circuits take different positions on issues of validity—as discussed above¹⁰³—then a case could theoretically bounce back and forth between the districts, depending on the varying standards that each circuit applies.¹⁰⁴

These scenarios may seem unlikely or theoretical. But district courts being fallible, and parties being litigious, it’s reasonable to expect that orders enforcing or rejecting forum-selection clauses will be routinely and aggressively appealed. That means that the appellate courts, which haven’t yet had to deal with these problems, will have to face them before long.

CONCLUSION

No Supreme Court decision provides all the answers. It’s too much to ask of any opinion, much less a short and clear one like *Atlantic Marine*, to address every related question or settle every relevant dispute. But the Court’s decision didn’t just restate existing law. Instead, it went out on a limb in certain respects: creating new standards for § 1404, making validity a key factor in transfer, and changing the rules on choice of law. Those moves have created their own complications, which other courts will have to resolve. That process won’t be impossible, but it will take time—and some hard work from judges, lawyers, and academics too.

102. Perhaps an appellate court might relax the mandamus standards in such a case. The Fifth Circuit has previously granted mandamus for the denial of a forum non conveniens motion, which surely is remediable on appeal, *see In re Ford Motor Co.*, 591 F.3d 406, 415–17 (5th Cir. 2009); but that case may simply have been a mistake, as it cited and relied on inapposite precedent concerning venue transfers, *see id.* at 416.

103. *See supra* notes 40–41, 48 and accompanying text.

104. *Cf.* 15 WRIGHT ET AL., *supra* note 18, § 3846 (noting that courts often, but not always, respect the prior court’s transfer decision as law of the case).