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Choice of Forum Provisions in Federal Court: Choosing the Battlefield As an Uphill Fight for Pharmaceutical Industry Employees

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Sun Tzu, the Chinese military tactician who lived around 500 B.C., is the author of the military treatise, *The Art of War*. In his text, Sun Tzu writes:

> Whoever is first in the field and awaits the coming of the enemy, will be fresh for the fight; whoever is second in the field and has to hasten to battle will arrive exhausted. *Therefore the clever combatant imposes his will on the enemy, but does not allow the enemy's will to be imposed on him*.

Though Sun Tzu was referring to strategy on the battlefield, the same is true for strategy in the courtroom or, more specifically, choosing the *right* courtroom. Good attorneys know the jurisdictions that are most friendly to their clients' position and will seek to ''impose their will'' on the opposing party by litigating in the most advantageous of forums.

I. The Basics—Choice of Law and Choice of Forum Provisions

For a long time, employees who filed suit to, for example, invalidate their non-compete agreements or bring claims of unlawful termination had the advantage of choosing the forum in which they wanted to litigate. Granted, plaintiffs still had to satisfy the venue provisions set forth in 28 U.S.C. § 1391 and the ''minimum contacts'' requirements established in the *International Shoe* line of cases, but crafty plaintiff counsel still had their choice of a number of forums in which to file a complaint or an action for a declaratory judgment. As stated by the Supreme Court, ''Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff's venue privilege.' ''[1]

This privilege persisted even after management counsel began advising clients to include choice of forum provisions in their employment agreements. To illustrate, an employment agreement may state, ''In the event of any dispute concerning this Agreement, suit may be brought only in <*Venue*>.'' Similarly, choice of *law* provisions allow parties to decide which state's laws will govern a particular agreement. A boilerplate choice of law provision may read something like, ''This contract shall be interpreted in accordance with the laws of <*Jurisdiction*>, without regard to that forum's conflict of law principles.'' In December 2013, the Supreme Court adopted what many from our side of the aisle perceive to be a more defendant-friendly framework for analyzing how these choice of law and forum

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[1] *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013) (citing *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964)); *see also Norwood v. Kirkpatrick*, 349 U.S. 29, 35 (1955) (stating ''Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.'') (Justice Clark, dissenting).

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provisions will impact the plaintiff's so-called ''venue privilege.''

II. Overview of the Statutory Framework—Just the Basics

Before addressing how the Supreme Court has changed the battleground and forum-selection landscape, one must first have at least a passing understanding of federal venue provisions and the manner in which cases are dismissed and transferred on the basis of venue.

As alluded to above, 28 U.S.C. § 1391 sets forth the rules for determining appropriate venue. It provides that a judicial district is appropriate for venue purposes if any defendant resides in such a venue and if all defendants are residents of that state in which the district is located.[2]

Alternatively, a plaintiff may file suit in 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.''[3] Finally, if neither of these options is available, a plaintiff may file in ''any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.''[4]

When a defendant is unhappy with a plaintiff's choice of venue, she has two options: she can seek to have the case dismissed or have it transferred. The mechanics underlying transfers and dismissals depend upon whether the plaintiff originally filed suit in a proper or improper venue.

Where the plaintiff's original choice of venue was improper, the defendant can make a motion under 28 U.S.C. § 1406(a) to have the case dismissed or transferred.[5] In such a scenario, the statute *requires* the district court to either dismiss or transfer the case.[6] Where the original venue is proper (in that it meets the requirements of § 1391), the defendant must make a motion under § 1404(a).[7] The court, at its discretion, then must consider both ''public interests'' and ''private interests'' in determining whether to transfer the case. Where public interests relate primarily to the proper administration of justice and allowing ''localized controversies decided at home,'' factors relating to private interests include:

> [R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[8]

In addition and of crucial importance to understanding the analytical shift recently adopted by the Supreme Court, courts ''must also give some weight to the plaintiffs' choice of forum.''[9]

Thus, a plaintiff's choice of forum—at least where such a choice was in accordance with § 1391—is due at least some deference when faced with a defendant's motion to transfer under § 1404(a). Indeed, courts long recognized that it is the party moving for the transfer (typically the defendant) that bears the burden of establishing that a forum is inconvenient and, further, that ''the plaintiff's choice of forum should rarely be disturbed.''[10]

III. *Atlantic Marine* Disrupts the 'Plaintiff's Venue Privilege'

The Supreme Court's December 2013 opinion in *Atlantic Marine Construction Company v. U.S. District Court for the Western District of Texas* changed the way that courts analyze transfers under § 1404 when there is a choice of forum provision at issue.[11]

a. *Atlantic Marine* Background

By way of background, Atlantic Marine was a Virginia-based construction company that had entered into a contract to build a facility for the Army Corps of Engineers in the Western District of Texas. Atlantic Marine then entered into a subcontracting agreement with J-Crew Management, a Texas corporation, to assist with the construction. Included in the agreement was a choice of forum provision that established the Eastern District of Virginia as the appropriate jurisdiction should any issue between the parties require litigation. A billing dispute arose and, relying on the court's diversity jurisdiction, J-Crew sued Atlantic Marine in the Western District of Texas. Atlantic Marine then filed a motion to transfer the case, under both § 1406(a) and § 1404(a).

The district court first concluded that the Western District of Texas was a ''proper'' venue (indeed, the work had been performed within the district) and thus § 1404(a) was the appropriate mechanism for requesting a transfer. It then placed the burden on Atlantic Marine to show that a transfer was appropriate and weighed the previously discussed public and private factors that militated for or against a transfer. In so doing, the district court concluded that the ''forum-selection clause [was] only one such factor.'' *United States ex rel. J–Crew Management, Inc. v. Atlantic Marine Constr. Co.*, 2012 WL 8499879, at 5 (W.D.Tex., Apr. 6, 2012). Ultimately, the district court held that Atlantic Marine failed to meet its burden and declined to transfer the case to the Eastern District of Virginia. The Court of Appeals for the Fifth Circuit upheld the lower

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[2] *See* 28 U.S.C. § 1391(b)(1).

[3] 28 U.S.C. § 1391(b)(2).

[4] 28 U.S.C. § 1391(b)(3).

[5] Note also that such a motion may be made in conjunction with a motion to dismiss for improper venue under Federal Rule 12(b)(3). It is also important to note that, as a practical matter, courts rarely dismiss a matter under § 1406(a) that could be properly transferred.

[6] *See* 28 U.S.C. § 1406 (providing ''The district court of a district in which is filed a case laying venue in the wrong division or district *shall* dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.'') (emphasis added).

[7] A key distinction between a transfer under § 1404(a) and § 1406(a) is that under § 1404(a), the court to which the matter is transferred applies the choice of law principles from the transferring court.

[8] *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n. 6 (1981).

[9] *Atl. Marine Const. Co.*, 134 S. Ct. 568, n. 6 (citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955)).

[10] *See, e.g., Scheidt v. Klein*, 956 F. 2d 963, 965 (10th Cir. 1992); *Chrystler Credit Corp v. Country Chrysler, Inc.*, 928 F. 2d 1509 (10th Cir. 1991).

[11] *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568 (2013).

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court's determination, finding that the district court had not abused its discretion in denying the transfer.

b. Shifting the Burden and Revising the Relevant Factors

The Supreme Court granted *certiorari* and delivered its opinion in December 2013. The Court spent some time opining upon the propriety of using § 1404, § 1406, and even Rule 12(b)(3) as the appropriate means for Atlantic Marine to obtain a transfer. The meat of the opinion, however, is its focus on the parties' burdens and the factors that a court must consider when deciding whether to transfer a case under § 1404(a) where there exists a choice of forum provision.

Relying on a concurrence from Justice Kennedy in the 1988 case of *Stewart Organization, Inc. v. Ricoh, Corp.*,[12] the Court began by noting, ''a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.''[13] The Court went on to further flesh out this newly adopted standard by stating, ''*[T]he plaintiff's choice of forum merits no weight*. Rather, as the party defying the forum-selection clause, *the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.*''[14] In an attempt to square this new imposition with the long recognized ''venue privilege'' enjoyed by plaintiffs, the Court reasoned that the plaintiff, in negotiating the terms of the contract, ''effectively exercised its 'venue privilege' before a dispute arises.''[15]

The Court further held that when analyzing a § 1404(a) motion to transfer based on a choice of forum provision, courts should not consider arguments about the private interests of the parties. This is because the parties ''waive[d] the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation'' when they have agreed to a choice of forum provision.[16]

Finally, the Court concluded that ''when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.''[17]

IV. Practical Implications for You or Your Organization[18]

Pharmaceutical companies typically exist and do business in a great number of jurisdictions, and their employees—drug representatives for example—often travel from one region of the country to another. As such, there will often exist myriad forums in which venue may be appropriate. The question, therefore, is what should you—as either an employee or employer (or attorney to either!) in the pharmaceutical industry—take away from *Atlantic Marine*.

Beginning with management's perspective, you can rest assured that your choice of forum provisions are going to be given significant deference by the courts. It is unclear how far this will stretch,[19] but you should identify the federal jurisdiction(s) with bodies of law most favorable to your position and draft your choice of law and choice of forum agreements accordingly.[20]

That being said, the Supreme Court did not give defendants a golden ticket into whatever forum is identified in their agreements. Indeed, there may be ''exceptional cases'' in which a court may find that a transfer would not ''promote the interest of justice.'' If, after reviewing your employment agreement, you determine that adhering to the choice of forum or law provision would be fatal to your case, file elsewhere and argue that yours is, indeed, one of the exceptions.

There is little doubt as to the importance of choice of law and choice of forum provisions. An employee could easily find her claim on the wrong end of a motion to dismiss based on nothing more than the differences of law in one jurisdiction versus another. The use of these choice of law and forum provisions truly favors those parties (and their attorneys) who know the cross-jurisdictional legal landscape.

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[12] *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, concurring).

[13] *Atl. Marine Const. Co.*, 134 S. Ct. at 581.

[14] *Id.* (emphasis added).

[15] *Id.* at 582.

[16] *Id.*

[17] *Id.; see also,* FN vii *supra.*

[18] We could discuss at length the reasons why we think the Court got this one wrong. For example, the idea that parties in reality negotiate choice of forum provisions is, in our view, a bit suspect. Does the Court truly believe that an individual who is about to sign an employment agreement would have any idea of the importance of a choice of forum provision?

[19] Would the court uphold a choice of forum provision where that forum had absolutely no connection to the parties or litigation and was used *solely* because of the body of law in a district? In our mind, the answer is ''Probably.''

[20] Ask your in-house counsel which of those jurisdictions may be more favorable to your position. For obvious reasons, we must decline to share our opinion on the matter.