What's Left to Litigate about Forum Selection Clauses? *Atlantic Marine* Turns Four

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It is no secret that home turf is an advantage. Plants grow best in their native soil and climate. Sports teams win more often on their home court or field.[1] This trope remains true in litigation. An attorney litigating in his or her home court knows the judges and can tailor litigation strategy to the assigned judge's preferences and proclivities. The at-home attorney already knows the local procedural rules and practices, including quirks that can trip up out-of-towners. Use of home courts reduces travel, which in turn limits financial costs and lost time and energy. It minimizes the inconvenience to client employees who are witnesses. And, as an added bonus, it often creates the exact opposite burdens on the opposing party.

For some or all of these reasons, many franchisors include a forum selection clause in their franchise agreements and other standard contracts. These clauses usually provide that any litigation relating to the franchise agreement (or depending on the wording, the parties' relationship) may be brought only in a certain state or federal court. Yet, franchisees[2] often ignore forum selection clauses and bring lawsuits in their home courts. In federal court, fran-

1. Earsa Jackson & Jim Meaney, *Forum Selection Clauses After Atlantic Marine*, at 1 (presented at 37th Annual Forum on Franchising, Oct. 15–17, 2014), http://www.americanbar.org/content/dam/aba/administrative/franchising/materials2014/w4.authcheckdam.pdf.

2. Obviously, a franchisor may also sue a franchisee in an improper forum, and the franchisee can seek to enforce the forum selection clause. In the authors' experience, that is not common. Therefore, this article will focus on the usual scenario where the plaintiff-franchisee sues the defendant-franchisor in a forum different than the one chosen in the forum selection clause.

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chisors often respond by attempting to have the lawsuit transferred to the contractually selected forum under 28 U.S.C. § 1404(a), the federal venue transfer statute that allows for a transfer to a different federal venue "for the convenience of parties and witnesses, in the interest of justice." Federal courts decide § 1404(a) motions by weighing various public and private interest factors. Historically, federal courts considered a forum selection clause just one of the factors in this analysis; although it was a "significant factor," the existence of a forum selection clause was hardly dispositive. That changed four years ago. The U.S. Supreme Court's 2013 decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas* made clear that if a forum selection clause is *valid*, the case should be litigated in the contractually selected forum in all but the "most unusual of cases."[3]

Now that almost four years have passed since *Atlantic Marine* was decided, it is time to consider what forum selection clause battles still remain in the context of franchise litigation. Part I of this article will briefly recap how courts decide § 1404(a) motions generally and what impact forum selection clauses have on that analysis, both before and after *Atlantic Marine*. Part II will discuss potential arguments that franchisees may use to try and avoid a transfer pursuant to a forum selection clause. Part III will discuss the subject where there is the least consensus post-*Atlantic Marine*: what courts should do when the forum selection clause covers only some of the parties or claims. Finally, Part IV provides some thoughts on whether *Atlantic Marine* has really changed any of the incentives for franchisees to disregard forum selection clauses when filing suit and how franchisors can maximize their chances of enforcing forum selection clauses.

I. The § 1404(a) Transfer Analysis Before and After *Atlantic Marine*[4]

In most circumstances,[5] the proper procedure for seeking a transfer between two federal courts is a motion to transfer pursuant to 28 U.S.C.

3. 134 S. Ct. 568, 583 (2013).

4. This article focuses on how federal courts handle forum selection clauses. States often have their own rules regarding the treatment of forum selection clauses, but those rules are beyond this article's scope. It is also worth noting that forum selection clauses often have less strategic value in state court. If a franchisor is sued in a foreign state court, the franchisor will be able to remove the case to federal court if the case is one of financial significance. *See* 28 U.S.C. § 1332 (diversity jurisdiction requires over $75,000 at issue, among other things). Conversely, if the case cannot satisfy the diversity jurisdiction amount-in-controversy requirement, it may not be cost-effective to litigate forum selection clause issues in state court.

5. Other transfer statutes exist besides § 1404(a), but they apply in much more limited circumstances. *See* 28 U.S.C. § 1406 (providing for transfer case where venue is not proper); 28 U.S.C. § 1407 (allowing for the transfer of related cases to a single forum—regardless of whether there would otherwise be personal jurisdiction or venue—for multidistrict litigation treatment).

§ 1404(a).[6] That statute provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."[7] To obtain a § 1404(a) transfer, the franchisor must first show that the case could have been brought in the transferee district, i.e., any district where the franchisor is subject to personal jurisdiction[8] and venue would be proper.[9] Assuming these threshold requirements are met, the court then balances a number of factors to determine whether matters of convenience and the interests of justice favor the case proceeding in the transferee district. Courts articulate these factors in various ways and often divide them into the categories of private interest factors and public interest factors. The private interest factors usually include the franchisee's choice of forum, the location of non-party and party witnesses, the convenience of the parties, and the locus of operative facts.[10] The public interest factors often include judicial efficiency, obstacles to a fair trial, the advantages of having a local court determine questions of local law, and any another circumstance that impacts the interests of justice.[11] The burden is on the movant franchisor-defendant to prove that transfer is warranted,[12] and district courts have broad discretion in deciding § 1404(a) motions because the factors are applied case-by-case.[13] Due to "plaintiff's venue privilege,"[14] the franchisee's choice of forum is usually entitled to deference and courts will therefore not grant a transfer unless the franchisor makes a strong showing that the case belongs in another district.[15]

6. The proper procedure for enforcing a forum selection clause that selects venue in a state court or foreign country's court is a motion to dismiss under the doctrine of *forum non conveniens*. *See, e.g.*, *Atl. Marine*, 134 S. Ct. at 580.

7. 28 U.S.C. § 1404(a).

8. *See* Hoffman v. Blaski, 363 U.S. 335, 343–44 (1960); Sunbelt Corp. v. Noble, Denton & Assocs., Inc., 5 F.3d 28, 30–33 (3d Cir. 1993).

9. The general venue statute for civil actions is 28 U.S.C. § 1391.

10. For example, courts in the Second Circuit consider nine factors in this analysis: (1) the plaintiff's choice of forum; (2) the convenience of witnesses; (3) the location of relevant documents and relative ease of access to sources of proof; (4) the convenience of parties; (5) the locus of operative facts; (6) the availability of process to compel the attendance of unwilling witnesses; (7) the relative means of the parties; (8) the forum's familiarity with the governing law; and (9) trial efficiency and the interest of justice, based on the totality of the circumstances. *See* D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 106–07 (2d Cir. 2006). The standard is substantially similar in other circuits. *See, e.g.*, Jones v. GNC Franchising, Inc., 211 F.3d 495, 498–99 (9th Cir. 2000); Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688 (8th Cir. 1997).

11. *See, e.g.*, *In re* Volkswagen of Am., Inc., 545 F.3d 304, 315 (5th Cir. 2008); Fed. Hous. Fin. Agency v. First Tenn. Bank Nat'l Ass'n, 856 F. Supp. 2d 186, 193 (D.D.C. 2012).

12. *See, e.g.*, *In re* Ricoh Corp., 870 F.2d 570, 573 (11th Cir. 1989) (noting that "the burden is on the movant to establish that the suggested forum is more convenient").

13. *See, e.g.*, *In re* Cuyahoga Equip. Corp., 980 F.2d 110, 117 (2d Cir.1992).

14. Van Dusen v. Barrack, 376 U.S. 612, 635 (1964).

15. *See, e.g.*, Emp'rs Mut. Cas. Co. v. Bartile Roofs, 618 F.3d 1153, 1168 (10th Cir. 2010) (noting that the party seeking a transfer of venue must make a strong showing that the plaintiff's chosen forum is inconvenient); *In re Volkswagen of Am.*, 545 F.3d at 315 (stating that the party seeking transfer has the burden of showing "good cause" for transfer—that is, the party must "satisfy the statutory requirements and clearly demonstrate that a transfer is '[f]or the conve-

Moreover, if a transfer is granted, the original forum's choice of law rules follow the case to prevent a defendant from invoking § 1404(a) "to gain the benefits of the laws of another jurisdiction."[16] Absent unusual circumstances, the forum where the franchisor is headquartered is likely to be the only forum for which a franchisor can advocate in a § 1404(a) motion because that is the forum not only where personal jurisdiction and venue would otherwise be proper, but also where the locus of facts is likely to be and most witnesses will be found.[17]

Before *Atlantic Marine*, courts treated a valid and enforceable forum selection clause as a "significant factor that figures centrally in the district court's calculus," that was to be accorded "substantial" weight.[18] Under this standard, courts would often transfer a case to the contractually selected forum even when the various factors, in whole, were neutral or slightly in favor of denying transfer.[19] However, because courts retained considerable discretion, a forum selection clause was just one factor to be considered and did not guarantee that a case would be transferred.[20]

In 2013, the Supreme Court decided *Atlantic Marine*. In that case, a Virginia-based contractor entered into a subcontract with a Texas-based company. The subcontract contained a forum selection clause providing that disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or in the United States District Court for the Eastern District of Virginia, Norfolk Division."[21] But when a dispute arose, the Texas based subcontractor ignored the clause and sued in federal district court in Texas. Among other things, the contractor moved to have the case transferred under § 1404(a) to

nience of parties and witnesses, in the interest of justice'"); *In re* United States, 273 F.3d 380, 388 (3d Cir. 2001) (noting that "the burden is on the moving party to establish that a balancing of proper interests weigh in favor of the transfer," but that "the defendant is not required to show truly compelling circumstances . . . for change . . . of [venue, but rather that] all relevant things considered, the case would be better off transferred to another district" (alterations in original)).

16. *Van Dusen*, 376 U.S. at 638.

17. Wilson v. DirectBuy, Inc., 821 F. Supp. 2d 510 (D. Conn. 2011) (transferring three putative class actions to district where defendant is headquartered). Wiggin and Dana LLP was counsel to DirectBuy, Inc.

18. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988).

19. *See* Bus. Integration Tech., Inc. v. Mulesoft, Inc., No. 4:10-cv-2185 FRB, 2011 U.S. Dist. LEXIS 105406, at *23 (E.D. Mo. Sept. 16, 2011) (granting transfer motion and noting that forum selection clause "weighs 'significantly' in this Court's transfer analysis, particularly when, as here, a balance of the other factors fails to tip the scale in favor of either forum"); Griggs v. Credit Sols. of Am., Inc., No. 4:09-cv-1776 ERW, 2010 U.S. Dist. LEXIS 64443, at *14 (E.D. Mo. June 29, 2010) (transferring case when, aside from forum selection clause, all transfer factors were neutral or slightly in favor of denying transfer).

20. For example, in *Fibra-Steel, Inc. v. Astoria Industries, Inc.*, 708 F. Supp. 255, 257 (E.D. Mo. 1989), the court refused to transfer a case to the district specified in the parties' forum selection clause because "[t]he Court cannot say that the forum selection clause, without more, weighs heavily enough to tip the scales away from plaintiff's choice of forum." The *Fibra-Steel* court even castigated the parties for focusing too much of their briefing on the forum selection clause at the expense of the other factors. *See id.* ("In this case both parties have focused almost exclusively on the impact of the choice-of-forum clause and failed almost entirely to address the other factors which the court should consider.").

21. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 134 S. Ct. 568, 575 (2013).

a Virginia federal district court. Even though both parties agreed that the forum selection clause was valid, the district court, and then the Fifth Circuit, held that transfer was not appropriate in light of various public and private interest factors.[22]

Reversing the lower court, the Supreme Court unanimously held that when the parties have agreed to a valid forum selection clause, "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."[23] In reaching this conclusion, the Supreme Court explained that a "valid" forum selection clause requires an adjustment to both the § 1404(a) analysis (for transfers among federal courts) and *forum non conveniens* analysis (for dismissal in favor of a state or foreign court)[24] in three ways. First, "the plaintiff's choice of forum merits no weight," and the plaintiff, "as the party defying the forum selection clause," now "bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted."[25]

Second, in deciding the motion to transfer, the district court "must deem the private-interest factors to weigh entirely in favor of the preselected forum" because "when parties agree to a forum selection clause, they 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."[26] The result is that a district court can consider only "the public interest factors," which "will rarely defeat a transfer motion." The Supreme Court emphasized that "the practical result is that forum selection clauses should control except in unusual cases" and that cases where a court refuses to transfer despite a forum selection clause "will not be common."[27]

Finally, the Court made clear that unlike in a usual § 1404(a) transfer, the original forum's choice of law rules will not follow the case when the transfer is pursuant to a forum selection clause. The Court noted that this rule was appropriate because "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."[28]

II. Possible Ways to Escape *Atlantic Marine*

Following *Atlantic Marine*, courts have generally enforced valid forum selection clauses in franchise agreements.[29] Moreover, district courts appear to

22. *Id.* at 576–77.
23. *Id.* at 575.
24. *Id.* at 580.
25. *Id.* at 581.
26. *Id.* at 582.
27. *Id.* at 583 ("In all but the most unusual cases, therefore, 'the interests of justice' is served by holding parties to their bargains.").
28. *Id.* at 583.
29. *See, e.g.*, Hyatt Franchising, L.L.C. v. Shen Zhen New World I, LLC, No. 16 C 8306, 2017 WL 372313, at *6 (N.D. Ill. Jan. 26, 2017) (denying motion to transfer because lawsuit was filed in

be extremely hesitant to find that "extraordinary circumstances" relating to only the public interest factors override a valid forum selection clause. Of the hundreds of forum selection clause cases decided after *Atlantic Marine*, the authors located fewer than ten cases (many of which are discussed below) refusing to enforce a valid forum selection clause due to exceptional circumstances related solely to public interest factors. The clear takeaway is that the best way to avoid *Atlantic Marine* is to demonstrate that the forum selection clause is invalid or inapplicable, which will result in the traditional § 1404(a) test applying.[30] Below are four ways that a franchisee can attempt to avoid *Atlantic Marine* and, where possible, some recommendations on how franchisors can defend against these attacks.

A. *Escape Route #1: Challenge the Clause's Validity and Enforceability*

As made clear throughout this article, the enforcement of valid forum selection clauses is "virtually automatic" post-*Atlantic Marine*.[31] Of course, a litigant can make the other arguments discussed in this article, and these arguments might work once in a while. But the one surefire way to escape the *Atlantic Marine* analysis is to argue that the case does not even apply because the forum selection clause is not valid. After all, the *Atlantic Marine* court clarified that its analysis applies only where there is a *valid* forum selection clause.[32] In the franchise context, a franchisee that wants to resist a forum selection clause will often argue that the forum selection clause is invalid because it violates a state law that prohibits forum selection clauses in franchise agreements.

Atlantic Marine says nothing about what makes a forum selection clause valid or invalid; in that case, the clause's validity was uncontested and so

forum called for by franchise agreement's forum selection clause); Port of Subs, Inc. v. Tahoe Invs., Inc., No. 3: 16-CV-00411-LRH-VPC, 2016 WL 6561560, at *3 (D. Nev. Nov. 3, 2016) (same); Servpro Indus., Inc. v. JP Penn Restoration Servs., No. 3-16-0298, 2016 WL 5109947, at *4 (M.D. Tenn. Sept. 20, 2016) (refusing to dismiss for improper venue where franchisee had agreed to forum selection clause in franchise agreement); RGJP Enters., LLC v. Lele Franchising, LLC, No. 3:14-cv-01911 (MPS), 2015 U.S. Dist. Lexis 71104 (D. Conn. May 6, 2015) (transferring pursuant to forum selection clause in franchise agreement); Yummy Yogurt Indy, LLC v. Orange Leaf Licensing, LLC, No. 1:14-cv-01800-RLY-TAB, 2015 U.S. Dist. LEXIS 33135 (S.D. Ind. Mar. 18, 2015) (same).

30. Stephen A. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 766 (2015) ("*Atlantic Marine* places enormous weight on whether a forum selection clause is valid and enforceable.").

31. *Id.*

32. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 134 S. Ct. 568, 581 n.5 (2013) (noting that the court's "analysis presupposes a contractually valid forum selection clause"); *see also* Vulcan Capital Corp. v. Miller Energy Res., Inc., No. 13-cv-8751 (AJN), 2014 WL 4384159, at *2 (S.D.N.Y. Sept. 4, 2014) ("When assessing a motion to transfer on the basis of a forum selection clause, a court must first determine whether the forum selection clause is valid and enforceable."); Rolfe v. Network Funding LP, No. 14-cv-9-bbc, 2014 WL 2006756, at *1 (W.D. Wis. May 16, 2014) ("The threshold question is whether the forum selection clause in the parties' agreement is valid, which is a separate question from the analysis under 28 U.S.C. § 1404 or the forum non conveniens doctrine.").

the Supreme Court simply assumed that the clause was valid.[33] However, the Supreme Court has addressed the validity (or invalidity) of forum selection clauses, most notably in its seminal 1972 decision *M/S Bremen v. Zapata Off-Shore Company*.[34] In *Bremen*, the Supreme Court held that a "forum [selection] clause should control absent a strong showing that it should be set aside."[35] Most relevant to the franchise litigation context, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[36] *Bremen*, however, was a federal admiralty case—not a commercial matter involving state law claims.

Does the *Bremen* rule apply to ordinary commercial matters, such as the typical franchise case that involves only state law claims? Or should a federal court sitting in diversity jurisdiction apply the law of the forum state (or some other state) to determine the validity of a forum selection clause? The answer varies by circuit.[37] Most circuits have held that federal law applies when determining the validity of forum selection clauses because it is fundamentally a procedural issue, but at least one circuit—the Seventh Circuit—continues to maintain that state law applies.[38] Meanwhile, the First Circuit has noted this circuit split, but has thus far avoided taking a position either way.[39]

This issue—whether state or federal law applies when determining the validity of forum selection clauses—would make for an interesting article itself. However, in the authors' view, this issue will rarely, if ever, be outcome determinative in franchise litigation. Franchisees that wish to avoid the enforcement of a forum selection clause typically argue that enforcement violates a specific state statute or (more rarely) a state common law rule announced in judicial decisions. If federal law applies to the validity issue,

33. *Atl. Marine*, 134 S. Ct. at 581 n.5.

34. 407 U.S. 1 (1972).

35. *Id.* at 15.

36. *Id.* Additionally, a forum selection clause can be invalidated under the *Bremen* test if the party resisting enforcement can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.*

37. Sachs, *supra* note 30, at 767 & n.40–41 ("[W]hen the claims [asserted in the case] arise from state law only, the circuits have long disagreed on which standards apply, a split that has persisted in published opinions even after *Atlantic Marine*.").

38. *See*, *e.g.*, Martinez v. Bloomberg LP, 740 F.3d 211, 222 (2d Cir. 2014) (discussing "circuit split concerning whether a federal court sitting in diversity jurisdiction should apply federal or state law to determine the enforceability of a forum selection clause designating a domestic forum" and citing cases); Jackson v. Payday Fin., LLC, 764 F.3d 765, 774 (7th Cir. 2014) (reiterating the Seventh Circuit's rule post-*Atlantic Marine* that the validity of forum selection clauses is analyzed under the law designated in the parties' contractual choice-of-law clause); Black Hills Truck & Trailer, Inc. v. MAC Trailer Mfg. Inc., No. 13-4113-KES, 2014 WL 5782452, at *4 & n.3 (D.S.D. Nov. 6, 2014) (noting that majority of courts have applied federal law as discussed in *Bremen* and its progeny and citing cases).

39. *See* Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 16–17 (1st Cir. 2009); Lambert v. Kysar, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993).

the franchisee resisting the forum selection clause will argue that a state statute or common law rule constitutes a strong public policy basis for denying a motion to transfer.[40] Alternatively, if state law applies to the validity issue, the franchisee can simply make the direct argument that state law renders the clause invalid. Either way, a federal court sitting in diversity jurisdiction will consider any applicable state law concerning the validity of forum selection clauses.[41]

At least ten states—California, Connecticut, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, North Carolina, and Rhode Island—have fairly broad state franchise relationship laws that seem to offer an escape from *Atlantic Marine*.[42] In varying levels of detail, these state laws either call for venue within that state, ban forum selection clauses calling for a venue outside the state, or both. These, without more, would seem to provide protection for a franchisee that wants to litigate a dispute at home. After all, these state laws plainly evidence the state's strong public policy against requiring franchisees to litigate disputes outside the state. However, federal cases after *Atlantic Marine* have not consistently reached that conclusion. Moreover, the conclusion that the courts do reach will depend on the case's procedural posture and the precise wording of the applicable state law.

Take, for example, three cases where franchisees raised arguments concerning the California Franchise Relations Act.[43] This state law provides that "[a] provision in a franchise agreement restricting venue to a forum outside this state is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within this state."[44] In *Frango Grille USA, Inc. v. Pepe's Franchising Ltd.*, a plaintiff franchisee asserted various state law claims arising out of its franchise agreement

40. *See, e.g.*, Waguespack v. Medtronic, Inc., 185 F. Supp. 3d 916, 931 (M.D. La. 2016) ("Post-*Atlantic Marine*, courts continue to analyze whether the forum selection clause is unreasonable because its enforcement would contravene a strong public policy of the forum state.") (citing *In re* Union Elec. Co., 787 F.3d 903, 909 (8th Cir. 2015)).

41. Perhaps the only important difference lies in the burden of persuasion borne by each side. Under the *Bremen* rubric, the party resisting enforcement of a forum selection clause bears the responsibility of making a "strong showing that [the clause] should be set aside." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972). In other words, the court begins from the presumption that the forum selection clause is valid. State laws concerning the validity of forum selection clauses may not operate from the same presumption or place the burden on the party resisting enforcement. As a practical matter, this distinction is unlikely to tip the scale in most circumstances.

42. CAL. BUS. & PROF. CODE § 20040.5; CONN. GEN. STAT. § 42-133f(F); 815 ILL. COMP. STAT. 705/4; IND. CODE § 23-2-2.7-1(10); IOWA CODE § 523H.3(1); LA. REV. STAT. 12 § 1042; MICH. COMP. STAT. § 445.1527(F); MINN. R. § 2860.4400(J); N.C. GEN. STAT. § 22B-3; R.I. GEN. LAWS § 19-28.1-14. *See also* Jackson & Meany, *supra* note 1, at 21–22 (providing useful chart of these statutes). Other states have statutes that prohibit forum selection clauses in particular types of franchise agreements, such as restaurant franchise agreements (Arkansas Procedural Fairness for Restaurant Franchisees Act, ARK. CODE ANN. § 4-72-601 et seq.) or motor vehicle dealer/franchise agreements (S.D. CODIFIED LAWS § 32-6B-49.1).

43. CAL. BUS. & PROF. CODE § 20040.5.

44. CAL. BUS. & PROF. CODE § 20040.5.

with the defendant franchisor.[45] The party's franchise agreement called for any legal proceedings arising out of the agreement to be brought in London, England. The U.S District Court for the Central District of California readily concluded that the California law "invalidate[d] the forum selection clause . . . and render[ed] the *Atlantic Marine* analysis inapplicable."[46] Conversely, the California law did not have an impact on a Pennsylvania court's analysis in *Saladworks, LLC v. Sottosanto Salads, LLC*.[47] There, a plaintiff franchisor (based in Pennsylvania) sued a defendant franchisee (located in California) in Pennsylvania federal court. The parties' franchise agreements contained a forum selection clause requiring claims arising under the franchise agreement to be brought in Pennsylvania.[48] The California-based franchisee argued that the forum selection clause was invalid under the California Franchise Relations Act. The court rejected that argument without much analysis because "the plain language of the parties' agreement shows that the parties clearly contemplated suit being brought in Pennsylvania" and the franchisee could not "show that enforcement of the forum selection clause would be unreasonable."[49] The *Saladworks* court cited to a prior Pennsylvania district court decision for the proposition that "'the majority [of federal courts outside California to consider the issue] have not invalidated forum selection clauses or opted to transfer cases to California pursuant to [the California Franchise Relations Act].'"[50]

In view of *Saladworks* and other federal court decisions, franchisees should be aware that statutory provisions such the California Franchise Relations Act may not be enforced by federal courts outside the state in which the statute has been adopted.[51] And, sometimes, the Act may not be enforced even if the case is litigated in California. For example, in *Fraser v. Brightstar Franchising LLC*,[52] the U.S. District Court for the Northern District of California held that the California law could not invalidate the forum selection clause

45. No. 14-cv-2086, 2014 WL 7892164, at *1 (C.D. Cal. July 21, 2014).

46. *Id.* at *3.

47. No. 13-cv-3764, 2014 WL 2862241 (E.D. Pa. June 23, 2014).

48. *Id.* at *3.

49. *Id.*

50. *Id.* (citing Maaco Franchising, Inc. v. Tainter, No. CIV.A. 12-5500, 2013 WL 2475566, at *4 (E.D. Pa. June 10, 2013)).

51. In the view of the authors, there is a reasonable reading of the California Franchise Relations Act that supports the outcome in the *Saladworks* case (even if the court did not fully explain its reasoning). The Act prohibits "[a] provision in a franchise agreement *restricting* venue to a forum outside this state." CAL. BUS. & PROF. CODE § 20040.5 (emphasis added). By its plain terms, the law invalidates only provisions that restrict venue to a place outside California. In other words: a franchisor cannot *require* that venue for a franchise dispute lie *exclusively* outside California. Accordingly, a California-based franchisee should not be *forced* to trek to another state to file a suit against its franchisor. But the California law does not prohibit a franchisee or franchisor from *choosing* to initiate litigation in a court outside California. Accordingly, if an out-of-state franchisor chooses to sue a California-based franchisee in a courthouse outside of California, the California Franchise Relations Act should not invalidate the franchisor's choice.

52. No. 16-cv-01966, 2016 WL 4269869 (N.D. Cal. Aug. 15, 2016).

because the franchise at issue did not operate anywhere in California and the Act, by its own plain terms, applies only to "'a franchise business operating within [California]."[53] Although one of the franchise's owners was a resident of California, the franchise itself operated in Georgia; accordingly, the Act was inapplicable.

The procedural posture of the case—namely, who (franchisor or franchisee) initiates the suit—has been the key factor in cases involving Minnesota franchisees. Under Minnesota law, a franchisor may not "require a franchisee to waive his or her rights to a jury trial or to waive rights to any . . . forum."[54] In *Family Wireless #1, LLC v. Automotive Technologies, Inc.*, several Minnesota franchisees (along with franchisees from other states) filed suit against their mutual franchisor in Michigan.[55] The plaintiffs from Minnesota were all parties to franchise agreements containing a forum selection clause specifying a Connecticut forum. But the U.S. District Court for the Eastern District of Michigan held that these forum selection clauses were invalid because they required the franchisee to initiate litigation outside Minnesota.[56] In two other cases, however, federal courts reached a different conclusion where a franchisor sued a Minnesota franchisee in federal court outside Minnesota.[57] The franchisees argued that Minnesota law required that all litigation against them take place in Minnesota and moved for a transfer of venue. The courts disagreed and denied the motions to transfer because a franchisor does not run afoul of Minnesota law by choosing to sue a franchisee in a different state.[58] The crucial difference was who filed suit: franchisee or franchisor. If the franchisor gets to the courthouse first, it may well avoid the impact of the state law prohibiting forum selection clauses in franchise agreements. Thus, a franchisor should make sure to understand the intricacies of the potentially applicable statues in making decisions about litigation strategy.

In sum, franchisees that wish to escape *Atlantic Marine*'s pro-forum selection clause framework should research whether any state laws might invalidate the clause. Depending on the jurisdiction, the franchisee can argue that the state law applies to issues of validity or that the state law evidences a strong public policy against enforcement of the clause. But franchisees should be aware that state laws are likely to be construed narrowly, and their applicability may depend on the procedural posture of the case. Conversely, in states with venue provisions in their franchise relationship laws, franchisors should strongly consider "grabbing the forum" by filing a preemptive lawsuit.

53. *Id.* at *5 (quoting CAL. BUS. & PROF. CODE § 20040.5).

54. MINN. R. § 2860.4400; *see also* MINN. STAT. § 80C.21.

55. No. 15-cv-11215, 2015 WL 5142350, at *5 (E.D. Mich. Sept. 1, 2015). The authors were counsel for defendant Automotive Technologies, Inc. in this case.

56. *Id.*

57. Allegra Holdings, LLC v. Davis, No. 13-13498, 2014 WL 1652221 (E.D. Mich. Apr. 24, 2014); Ramada Worldwide, Inc. v. Grand Rios Invs. LLC, No. 13-3878, 2013 WL 5773085 (D.N.J. Oct. 23, 2013).

58. *Allegra Holdings*, 2014 WL 1652221, at *3; *Ramada Worldwide*, 2013 WL 5773085, at *2.

B. *Escape Route #2: Argue the Forum Selection Clause Is Permissive*

There are two common types of forum selection clauses: mandatory clauses and permissive clauses.[59] Mandatory clauses "contain clear language showing that jurisdiction is appropriate only in the designated forum," while permissive clauses "authorize jurisdiction in a designated forum, but do not prohibit litigation elsewhere."[60] Proving a clause is permissive instead of mandatory can make all the difference in a § 1404(a) motion because the vast majority of courts apply the *Atlantic Marine* framework only to "mandatory" forum selection clauses—not permissive ones.[61] Accordingly, when a forum selection clause is considered "permissive," courts usually hold that the traditional § 1404(a) approach controls; therefore, the court considers the whole range of pre-*Atlantic Marine* factors—plaintiff's choice of forum, location of witnesses, convenience of parties, locus of operative facts, and so forth.[62] Accordingly, a franchisee seeking to escape *Atlantic Marine*'s framework should carefully analyze and test the franchise agreement's forum selection clause to determine whether it could be deemed permissive.

59. There is another less common type of forum selection clause: the so-called "hybrid" forum selection clause. As the name implies, hybrid clauses combine elements of mandatory clauses and permissive clauses; they are initially permissive in that they allow one party to select a forum, but then become mandatory by binding the other party to that forum once the lawsuit is filed. For example, a hybrid clause might read: "Seller and Purchaser, waive any objection to the venue of any action filed in any court situated in the jurisdiction in which the property is located and waive any right to transfer any such action filed in any court to any other court." Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, LLC, 526 F.3d 1379, 1381 (11th Cir. 2008).

60. Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 321 (10th Cir. 1997); *see also* Quinones v. Swiss Bank Corp. (Overseas), S.A., 509 So. 2d 273, 274–75 (Fla. 1987) (articulating same principles).

61. Carl's Jr. Rests. LLC v. 6Points Food Servs. Ltd., No. CV 15-9827-GHK (ASX), 2016 WL 3671116, at *3–4 (C.D. Cal. July 7, 2016) (holding that *Atlantic Marine* applies only to mandatory forum selection clauses); Waste Mgmt. of La., L.L.C. v. Jefferson Parish *ex rel*. Jefferson Parish Counsel, 594 F. App'x 820, 821–22 (5th Cir. Nov. 28, 2014) (noting that the "vast majority of district courts deciding this issue have rejected *Atlantic Marine*'s application to permissive forum selection clauses" and collecting cases); Networld Commc'ns Corp. v. Croatia Airlines, D.D., No. CIV.A. 13-4770 SDW, 2014 WL 4724625, at *3 (D.N.J. Sept. 23, 2014) (applying traditional test after determining forum selection clause was permissive). Some district courts have come to the opposite conclusion. *See* FDIC v. Primelending, No. 15-cv-2480, 2016 WL 125652, at *2 n.10 (N.D. Ohio Mar. 31, 2016) (The court found that "*Atlantic Marine* applies to this case regardless of whether the forum selection clause is mandatory or permissive. It is true that the forum selection clause the Supreme Court analyzed in *Atlantic Marine* was mandatory. However, the language of the Court's discussion seems to reach *all* valid forum selection clauses, regardless of their permissiveness."); Enkema v. FTI Consulting, Inc., No. 3:15-cv-1167, 2016 WL 951012, at *3 (M.D. Tenn. Mar. 14, 2016) ("[T]he broad language of the *Atlantic Marine* Court does not indicate that there is any distinction in analysis between a mandatory clause and a permissive clause."); United Am. Healthcare Corp. v. Backs, 997 F. Supp. 2d 741 (E.D. Mich. 2014) (same).

62. In the context of hybrid clauses, courts have not been as clear. *Compare* Generation Cos., LLC v. Holiday Hosp. Franchising, LLC, No. 5:15-CV-220-FL, 2015 WL 7306448, at *8–10 (E.D.N.C. Nov. 19, 2015) (treating hybrid clause in franchise agreement like mandatory clause and applying *Atlantic Marine*) *with* Cluck-U Chicken, Inc. v. Cluck-U Corp., No. 8:15-CV-2274-T-23MAP, 2016 WL 1588677, at *2 (M.D. Fla. Apr. 20, 2016) (treating hybrid clause in franchisee's personal guaranty like permissive clause and refusing to apply *Atlantic Marine*).

Because the mandatory-permissive distinction can flip the entire analysis, it is important to understand the distinction between the two types of clauses. For example:

- A classic mandatory forum selection clause might state: "Jurisdiction shall be in the State of Colorado and venue shall lie in the County of El Paso, Colorado." By its plain terms, this clause mandates a specific forum for litigation.[63]
- A classic permissive forum selection clause might state: "An action may be maintained in the State of Kansas and the County of Wyandotte." By its plain terms, this forum selection clause permits—but does not require—litigation in a specific forum (Kansas).[64]

These examples may seem clear enough, but there are many clauses that appear, at first blush, to be mandatory that are actually construed as permissive. Take this example: "Any litigation concerning this contract shall be governed by the law of the State of Florida, with proper venue in Palm Beach County."[65] Clearly mandatory, right? After all, the clause uses a mandatory word—"shall"—and it specifies the "proper" place for the litigation: Palm Beach County, Florida. But a court did not think so. According to a Florida state appellate court, the clause is permissive because

> although the venue clause unequivocally states that Florida law shall apply to any litigation of the []contract, it lacks mandatory language or words of exclusivity to show that venue is proper *only* in Palm Beach County . . . That is to say, the clause does not unequivocally mandate that a controversy or dispute be litigated in Palm Beach County, nor does it waive any other territorial jurisdiction. The language merely allows a party to file suit in Palm Beach County.[66]

The conclusion reached by the Florida state court concerning this forum selection clause appears to be consistent with the general rule followed by federal and state courts. A review of the case law demonstrates that courts will closely scrutinize the language of the clause and will deem a clause to be mandatory only when "jurisdiction is specified with mandatory terms such as 'shall,' or exclusive terms such as 'sole,' 'only,' or 'exclusive,'" while a clause will be deemed permissive "if jurisdiction is not modified by mandatory or exclusive language."[67] In view of this rule, here are some simple edits (in italics) that make the clause just discussed a mandatory one:

63. *See* Irsik & Doll Feed Servs., Inc. v. Roberts Enter. Invs., Inc., No. 6:16-1018-EFM-GEB, 2016 WL 3405175, at *9 (D. Kan. June 21, 2016) (providing numerous examples of mandatory and permissive forum selection clauses).

64. *Id.*

65. This clause was at issue in *Regal Kitchens, Inc. v. O'Connor & Taylor Condominium Construction, Inc.*, 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005).

66. *Id.* at 291–92.

67. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 337–40 (W. Va. 2009) (citing authorities from various federal and state courts); *see also* K & V Sci. Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 499 (10th Cir. 2002) ("'[W]here venue is specified [in a forum selection clause] with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified [in a forum selection clause], the clause will gen-

- "Any litigation concerning this contract shall be governed by the law of the State of Florida, with proper venue *only* in Palm Beach County."
- "Any litigation concerning this contract shall be governed by the law of the State of Florida, *and* proper venue *shall be* in Palm Beach County."
- "Any litigation concerning this contract shall be governed by the law of the State of Florida, with proper venue *exclusively* in Palm Beach County."

To avoid providing franchisees with this potential escape hatch, franchisors should review their forum selection clauses to ensure that the clause unambiguously states that the venue and forum selected are exclusively in the federal or state courts of a particular location and that this forum selection is expressed in mandatory terms using unambiguous words such as "only," or "exclusively."

C. *Escape Route #3: Argue the Claims Asserted Are Outside the Scope of the Forum Selection Clause*

The next avenue of escape for franchisees is to assert that the forum selection clause does not apply to some or all of the claims at issue.[68] This argument is likely to be a non-starter in any franchise litigation where the franchise agreement has a broadly worded forum selection clause, i.e., one using language such as all disputes "relating to the party's relationship" or all disputes "arising out of or relating to this agreement." In that situation, courts will apply the forum selection clause "to tort and other non-contract claims that require interpretation of the contract or otherwise implicate the contract's terms."[69] That clause should cover most of the standard franchisor-

erally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive.'" (quoting Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 757 (7th Cir.1992))).

68. *See*, *e.g.*, Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 692 (8th Cir. 1997) ("Before a district court can even consider a forum selection clause in its transfer analysis, it first must decide whether the clause applies to the type of claims asserted in the lawsuit.").

69. Goddard Sys., Inc. v. Overman, No. CIV.A. 12-5368, 2013 WL 159933, at *3 (E.D. Pa. Jan. 14, 2013) (finding that forum selection clause encompassed any claims that would require inquiry into the franchise agreement containing it); *see also Terra Int'l*, 119 F.3d at 694 (setting forth three guiding principles to determine whether a forum selection clause applies to tort claims: (1) whether the tort claims ultimately depend upon the relationship created by the existence of the contract, (2) whether resolution of the tort claims relates to the interpretation of the contract, and (3) whether the tort claims involve the same operative facts); Lambert v. Kysar, 983 F.2d 1110, 1121–22 (1st Cir. 1993 ("[C]ontract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties."); Manetti–Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 514 (9th Cir. 1988) ("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract."); Generation Cos., LLC v. Holiday Hosp. Franchising, LLC, No. 5:15-CV-220-FL, 2015 WL 7306448, at *7 (E.D.N.C. Nov. 19, 2015) (example of case where court concluded that tort claims were included within the scope of a broadly worded forum selection clause in a franchise agreement); Ajax Holdings, LLC v. Comet Cleaners Franchise Grp., LLC, No. 4:15CV00494 SWW, 2015 WL 5898310, at *3 (E.D. Ark. Oct. 9, 2015) (forum selection clause in franchise agreement stating "you must file all suits against us" included allegations of fraud from before franchise agreement was executed). Wiggin and Dana represented Goddard in the *Overman* matter.

franchisee claims, such as fraudulent inducement, wrongful termination, and failure to pay fees or maintain standards.

This argument, however, becomes more promising the farther removed the tort claims are from the contract, the more narrowly the forum selection clause is drafted, or when the rights being asserted do not originate in the contract itself.[70] For example, if a franchisee alleged that a franchisor made derogatory statements about his work habits, hygiene, or personal life, those claims would likely fall outside even a broad forum selection clause because the tort does not have anything to do with the contractual relationship.[71] Another example is the recent decision in *Xiao Wei Yang Catering Linkage in Inner Mongolia Co., LTD. v. Inner Mongolia Xiao Wei Yang USA, Inc.*[72] In that case, the parties entered into a cooperation agreement in China with the purpose of bringing Xiao Wei Yang Catering, a Chinese restaurant franchise, to the United States. After entering into the agreement, the defendant held itself out as Xiao's first U.S. franchisee, traded on its reputation, and used its specialized knowledge, all without paying any fees or money to Xiao. Xiao brought suit, asserting numerous claims, including unfair competition and violation of trademark law. The "franchisee" defendant argued that the case had to be dismissed pursuant to a forum selection clause calling for any disputes to be resolved in China. The U.S. District Court for the District of Massachusetts held that that forum selection clause did not apply to Xiao's trademark-related claims because Xiao was not relying on the cooperation agreement to establish its trademark ownership rights, but on its direct rights as a trademark holder.[73] The district court also noted that to the extent the defendant would assert a right to use the trademarks under the cooperation agreement, that defense was not sufficient cause to conclude the forum selection clause applied.[74]

The takeaways here are, first, that a forum selection clause is not automatically applicable, especially as the claims become less related to the contract.

70. Relmada Therapeutics, Inc. v. Laidlaw & Co. (Uk) Ltd, No. 215-CV-02338-JCM-CWH, 2016 WL 5661927, at *2 (D. Nev. Sept. 29, 2016) ("a 'pure' tort claim that is independent of the contract will not be governed by a forum selection clause"); *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.").

71. J.R.S., Inc. v. Panduit Corp., No. 08-CV-0653-CVE-FHM, 2009 WL 37601, at *3 (N.D. Okla. Jan. 6, 2009) illustrates this situation well. There, the plaintiff claimed that the defendant had made derogatory statements about his craftsmanship to other customers and brought defamation and tortious interference claims. The defendant tried to enforce a forum selection clause in the contract between the parties. The court held that because the defamation and tortious interference claims could be resolved without considering the parties' contract, the forum selection clause did not apply.

72. 150 F. Supp. 3d 71,78–80 (D. Mass. 2015).

73. *Id.*

74. *Id.* at 80.

Second, the franchisor can try to minimize the "outside of the scope" argument by drafting the forum selection clause as broadly as reasonably possible.[75]

D. *Escape Route #4: Say a Prayer and Argue Exceptional Circumstances*

As noted above, a party seeking to avoid a forum selection clause can always argue that an exceptional circumstance exists. This argument has occasionally worked and, in the right set of circumstances, is worth trying.[76] For example, in *Credit Suisse AG v. Appaloos Investment Limited Partnership I*, the plaintiff tried to use a forum selection clause specifying the current forum to oppose transfer.[77] Even though there was a valid forum selection clause, the U.S. District Court for the Southern District of New York transferred the case because the plaintiff had filed the lawsuit in the district specified by the forum selection clause for the sole purpose of interfering with the orderly administration of a bankruptcy pending in the transferee district.[78] In that situation, ensuring the integrity of the bankruptcy process outweighed the policy of enforcing a forum selection clause.[79] In *Bollinger Shipyards Lockport, L.L.C. v. Huntington Ingalls Inc.*, the U.S. District Court for the Eastern District of Louisiana found that exceptional circumstances existed when a party, after litigating for multiple years before the court, sought a transfer pursuant to a valid forum selection clause.[80] The court held that in these circumstances, the judicial economy gained by its familiarity with the case and the issues in it outweighed the forum selection clause.[81] Other courts have reached the same conclusion, but based on the doctrine of waiver.[82]

The most surprising application of the extraordinary circumstances exception is *Silvis v. Ambit Energy, L.P.*[83] There, a Pennsylvania resident

75. In the context of an arbitration clause (which is "in effect, a specialized kind of forum selection clause," Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1976)), a district court recently refused to enforce an arbitration clause that applied to any interaction between AT&T and one of its customers, whether it took place before, during, or after the contract relationship, because it reasoned that no person could have reasonably agreed to such a clause. *See* Wexler v. AT&T Corp., 15-cv-686 (FB) (PK), 2016 WL 5678555 (E.D.N.Y. Sept. 30, 2016).

76. Although not worth a lengthy discussion here, two courts have found exceptional circumstances exist where a federal law requires a lawsuit to be brought only in a certain district. *See* Stewart v. Am. Van Lines, No. 4:12-cv-394, 2014 WL 243509 (E.D. Tex. Jan. 21, 2014) (venue provision in Carmack Amendment); Bronstein v. U.S. Customs & Border Protection, No. 15-cv-02399-JST, 2016 WL 861102 (N.D. Cal. Mar. 3, 2016) (refusing to enforce forum selection clause in passenger's cruise ticket where claim against cruise line was joined with claim against federal government under the Federal Tort Claims Act). In *Stewart*, the court also focused on the fact that a transfer would have deprived the plaintiff, an indigent consumer, from being able to litigate her claim in court.

77. No. 15-cv-3474 (SAS), 2015 WL 5257003 (S.D.N.Y. Sept. 9, 2015).

78. *Id.* at *8–12.

79. *Id.*

80. No. 08-cv-4578, 2015 WL 65298 (E.D. La. Jan. 5, 2015).

81. *Id.* at *4.

82. Kettler Int'l, Inc. v. Starbucks Corp., 55 F. Supp. 3d 839, 850–51 (E.D. Va. 2014) (holding that Starbucks waived forum selection clause in contract by joining plaintiff as a third party in related litigation).

83. 90 F. Supp. 3d 393 (E.D. Pa. 2015).

brought a putative class action against his Texas-based electricity supplier claiming that the supplier had deceptively advertised its rates. The supplier moved to have the case transferred to Texas due to a forum selection clause in the parties' supply agreements. The U.S. District Court for the Eastern District of Pennsylvania refused to enforce the clause, concluding that Pennsylvania's regulation of the energy market, the fact that the class was limited to Pennsylvania residents, and that a Pennsylvania court would be more comfortable applying Pennsylvania law warranted a departure from *Atlantic Marine*.[84] In the authors' view, the *Silvis* decision is not reconcilable with *Atlantic Marine*'s framework because these considerations do not present the type of "extraordinary circumstances" contemplated by the Supreme Court. Rather, the *Silvis* decision appears to be driven by sympathies towards the plaintiff's allegations of consumer deception. In any event, this case demonstrates that a franchisee with a strong opposition to the franchisor's chosen venue should almost always take a run at the "extraordinary circumstances" argument. A judge who is especially sympathetic to the franchisee's allegations may find that "extraordinary circumstances" exist (even when they do not).

III. What to Do When the Clause Only Partially Applies

One of the largest open questions after *Atlantic Marine* is how to handle cases where the forum selection clause applies only to some of the claims or some of the parties in the case. As seen below, courts have not reached a consensus on the appropriate approach or outcome.

When faced with this issue, some litigants have asked that the claims covered by the forum selection clause be severed from the rest of the case pursuant to Federal Rule of Civil Procedure 21[85] and transferred to the chosen forum. The Fifth Circuit examined this issue in *In re Rolls Royce Corporation*.[86] There, following a helicopter crash, the helicopter's owner filed suit in Louisiana against Rolls Royce, the manufacturer of the helicopter's engine, and two other companies. Rolls Royce's warranty contained a valid forum selection clause calling for an Indiana forum, but the contracts between the owner and the other two defendants did not have a forum selection clause. Rolls Royce moved to have the claims against it severed and transferred to Indiana,

84. *Id.* at 398–400; *contra* Pitney Bowes, Inc. v. Nat'l Presort, Inc., 33 F. Supp. 2d 130, 131–32 (D. Conn. 1998) (holding that familiarity with a forum's law should not drive transfer analysis because "[f]ederal courts are accustomed in diversity actions to applying laws foreign to the laws of their particular state"). In addition, it could be as easily argued that Texas has a significant interest in regulating businesses headquartered there. Trinity Indus. Leasing Co. v. Midwest Gas Storage, Inc., No. 1:11-CV-01579-JMS, 2013 WL 212929, at *3 (S.D. Ind. Jan. 18, 2013) ("Illinois has a strong interest in regulating companies headquartered there, and ensuring that they comply with applicable laws.").

85. "Misjoinder of parties is not a ground for dismissing an action. 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." FED. R. CIV. PROC. 21.

86. 775 F.3d 671 (5th Cir. 2014).

which the plaintiff and other defendants opposed. The U.S. District Court for the Western District of Louisiana denied the request and Rolls Royce appealed, claiming that *Atlantic Marine* required severance and transfer.[87]

Although the Fifth Circuit agreed that severance and transfer was appropriate, it nevertheless concluded that *Atlantic Marine* did not mandate that result. Rather, the Fifth Circuit held that a forum selection clause does not negate the normal severance analysis, which looks largely at issues of judicial economy.[88] The Fifth Circuit then laid out a three-part test for courts to use when deciding whether claims subject to a forum selection clause should be severed and transferred:

> First, pursuant to *Atlantic Marine*, the private factors of the parties who have signed a forum agreement must, as matter of law, cut in favor of severance and transfer to the contracted for forum. Second, the district court must consider the private factors of the parties who have *not* signed a forum selection agreement as it would under a Rule 21 severance and section 1404 transfer analysis. Finally, it must ask whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit. In so determining, the district court should consider whether there are procedural mechanisms that can reduce the costs of severance, such as common pre-trial procedures, video depositions, stipulations, etc. Such practices could echo those used by judges in cases managed pursuant to multidistrict litigation statutes.[89]

After setting out "this necessarily [ ] fact sensitive analysis," the Fifth Circuit explained that it should often result in severance and transfer.[90] To reach this conclusion, the appellate court discussed how cases centralized for multidistrict litigation treatment pursuant to 28 U.S.C. § 1407 are not subject to *Atlantic Marine* and should not be due to the large need for judicial economy and centralization.[91] The Fifth Circuit then contrasted that situation to a normal multi-party litigation to illustrate that the public interests are not usually so strong in those cases as to decline to sever and transfer the claims covered by the forum selection clause.[92]

Roll Royce was not a unanimous decision. Rather, in the concurrence, Judge Edith Jones rejected the majority's three-factor test, noting that "*Atlantic Marine* cannot be so cabined" as to apply only to two-party lawsuits.[93] After highlighting that numerous district courts had enforced forum selection clauses in multi-party litigation without any concern for a Rule 21 severance analysis, Judge Jones explained that it was myopic to think that a unanimous Supreme Court believed it was limiting *Atlantic Marine* to "simple two-party disputes" that are "near a vanishing breed of litigation."[94] The

87. *Id.* at 674–75.
88. *Id.* at 680–81.
89. *Id.* at 681.
90. *Id.* at 681–82.
91. *Id.* at 682.
92. *Id.* at 682–83.
93. *Id.* at 684 (Jones, J., concurring).
94. *Id.*

concurrence further emphasized that the majority opinion was at odds with the Supreme Court's focus on enforcing the "settled expectations" of parties that have chosen a particular forum and also created the unnecessary risk of "easy manipulation, because . . . any clever party to a lawsuit can readily join another party in an attempt to avoid the forum selection clause."[95]

The severance and transfer approach does not seem to be the most popular approach for courts and litigants, likely because it creates duplicative litigation. Instead, many courts faced with partially applicable forum selection clauses simply decide whether they will transfer the entire case. This is the approach that has been most popular in franchise cases post-*Atlantic Marine*. For example, in *Family Wireless #1, LLC v. Automotive Technologies, Inc.*, a group of more than forty plaintiffs that collectively owned more than a hundred Wireless Zone franchises located in thirteen states filed a lawsuit in the U.S. District Court for the Eastern District of Michigan alleging that their franchisor had breached the franchise agreement and committed various torts.[96] Twenty-four of the plaintiffs had signed at least one (and in many cases multiple) forum selection clause calling for litigation in Connecticut, where the franchisor was headquartered. Of the remaining seventeen plaintiffs, only ten were located in Michigan.

The franchisor moved to transfer the entire case to Connecticut. The district court agreed and transferred the entire case. The court reasoned that it had to weigh the § 1404(a) factors for the two groups of plaintiffs (those bound by a forum selection clause and those that were not).[97] It first found that the private interest factors all weighed in favor of transfer for the forum selection clause plaintiffs.[98] It next held that for the non-forum selection clause plaintiffs, the private interest factors largely favored transfer because, except for the ten Michigan plaintiffs, none of the other plaintiffs was located in Michigan and therefore had no connection to the forum. The court also emphasized that the locus of operative facts was in Connecticut where the franchisor was headquartered and that most of the relevant witnesses were found there.[99] Finally, the court analyzed the public interest factors and found that the best way to "reconcile" the two important interests of judicial economy and enforcing forum selection clauses in this case was to transfer the entire case to Connecticut.[100]

Bent v. Zounds Hearing Franchising, LLC[101] is another franchise case where the district court decided to transfer the entire action even though the forum selection clause applied only to some of the parties. There, the plaintiff

95. *Id.*
96. No. 15-cv-11215, 2015 WL 5142350 (E.D. Mich. Sept. 1, 2015). The authors were counsel for the defendant in that case.
97. *Id.* at *6.
98. *Id.*
99. *Id.* at *7.
100. *Id.*
101. No. 15-cv-6555 (PAE), 2016 WL 153092 (S.D.N.Y. Jan. 2, 2016).

franchisee claimed that the franchisor, its owner, and a franchise consulting service violated the New York Franchise Sales Act and committed other torts.[102] Pursuant to a forum selection clause in the franchise agreement, the franchisor and its owner successfully moved for a transfer of the claims against them to Arizona. The consulting service then requested a transfer as well. The U.S. District Court for the Southern District of New York determined that it should transfer the remaining claims because most of the § 1404(a) factors favored transfer, including that the operative events and witnesses were largely in Arizona, and having the entire case proceed in one forum was the most logical outcome.[103] Indeed, in rejecting the plaintiff's severance argument, the court concluded that severance would "hinder—not serve—the interests of justice and judicial efficiency."[104]

The case law, however, does not uniformly favor transferring the entire case to the forum selected by only some of the parties.[105] A good example in the franchise context is *Get in Shape Franchise, Inc. v. TFL Fishers, LLC*.[106] There, a fitness studio franchisor brought suit in Massachusetts after its Indiana-based franchisee stopped operating, failed to fully de-identify, and sold the franchise's assets to a family member. Following the asset sale, the

102. *Id.* at *1.

103. *Id.* at *9; *see also* Fraser v. Brightstar Franchising LLC, No. 16-cv-01966, 2016 WL 4269869, at *6–7 (N.D. Cal. Aug. 15, 2016) (transferring claims against franchisor pursuant to forum selection clause and then transferring claims against other defendants because having "identical claims" proceed in one forum "alone warrant[ed] transfer," and the private interest factors favored transfer as well); TK Prods., LLC v. Buckley, No. 3:16-cv-803-SI, 2016 WL 7013470 (D. Or. Nov. 29, 2016) (transferring entire case, including claims and defendants not subject to forum selection clause, because transfer would prevent duplicative litigation); Kresser v. Advanced Tactical Armament Concepts, LLC, No. 3:16-cv-255 (E.D. Tenn. Sept. 16, 2016) (transferring case even though not all parties were subject to forum selection clause).

104. *Bent*, 2016 WL 153092, at *9.

105. For example, many district courts have refused to transfer the entire case to the forum selected by the forum selection clause where the clause only covers a small percentage of the total claims at issue. *See* Eastcott v. McGraw-Hill Global Educ. Holdings, LLC, No. 16-cv-904, 2016 WL 3959076 (E.D. Pa. July 22, 2016) (refusing to transfer pursuant to forum selection clauses where the clauses applied in only seven percent of claims at issue in case); Axis Oilfield Rentals, LLC v. Mining, Rock, Excavation & Constr., LLC, No. 15-cv-1627, 2015 WL 5774801 (E.D. La. Sept. 30, 2015) (deciding that transferring pursuant to forum selection clause was not warranted where clauses applied in only eleven percent of the purchase orders at issue).

106. 167 F. Supp. 3d 173 (D. Mass. 2016). A similar case is *Howmedia Osteonics Corp. v. Sarkasia*, No. 14-cv-3449 (CCC), 2015 WL 1780941 (D.N.J. Apr. 20, 2015). There, the plaintiff alleged that the defendants, a group of its former employees, had been improperly soliciting customers in California. The defendants, each residents of California, moved to dismiss on personal jurisdiction grounds and, in the alternative, moved to transfer. The plaintiff argued that the court should deny transfer because some of the defendants signed forum selection clauses selecting New Jersey. The district sided with the defendants, finding that New Jersey had no connection to the suit; that at least one of the defendants was subject to a Michigan forum selection clause while others were not subject to a forum selection clause; that at least one defendant was not subject to personal jurisdiction in New Jersey; and that the most important witnesses in the case, seven non-parties who were purportedly solicited, all lived in California. Against this backdrop, the court concluded that it would make no sense to create three cases about the same set of fact scattered throughout the country and that the case belonged where it could be tried all at once—in California.

family member proceeded to operate a fitness studio in the former franchise location with the former franchisee "volunteering" her services.[107] The franchise agreement contained a Massachusetts forum selection clause. After determining that a preliminary injunction should enter against the franchisee, the U.S. District Court for the District of Massachusetts noted that it did not have personal jurisdiction over the other defendants (the franchisee's family and the new entity operating in the franchise location) and that those claims had to be transferred to the jurisdiction where the fitness studio was located. The court then decided that it should transfer the entire case, including the claims subject to the forum selection clause, to that jurisdiction because the need to avoid duplicative litigation and the transferee state's interest in regulating its citizens[108] outweighed the forum selection clause.[109]

The takeaway from these cases is that in most franchise litigation where only some of the parties or claims are covered by forum selection clauses, the best approach is typically to seek a transfer of the entire case and emphasize (as was done in *Family Wireless*) that the only way to satisfy the twin interests of advancing judicial economy and enforcing forum selection clauses is to transfer the entire matter. Absent unusual circumstances such as those in *Get in Shape*, that should result in a franchisor receiving its chosen forum while preventing competing lawsuits. The takeaway for franchisees is that they should carefully consider which parties to join in a particular lawsuit.

IV. Should *Atlantic Marine* Actually Impact a Franchisee's Strategic and Tactical Decisions?

Although *Atlantic Marine* has undoubtedly made transfer pursuant to a forum selection clause much easier and more likely, there is still no guarantee that a forum selection clause will always result in a transfer to the contractually selected forum. Therefore, the most important conclusion four years removed from *Atlantic Marine* is that franchisees still have a strategic incentive to ignore a forum selection clause and file the lawsuit wherever they wish. There is no real downside for a franchisee to lose a venue battle, other than the attendant cost and potentially a claim for prevailing party attorney fees. If the franchisor does everything right and the case is transferred, the franchisee is just litigating where the case was supposed to be anyway. Unlike making a weak argument on a substantive issue, there is no real risk to the franchisee's credibility because transfer is a procedural issue decided by a judge who, if the case is transferred, will never think about it

107. *Get In Shape Franchise*, 167 F. Supp. 3d at 186–87.

108. The fact that the franchisee was representing herself and could not afford to litigate in two forums at once also seemed to influence the district court's decision. *Id.* at 206.

109. *Id.* at 206–07; *see also In re* LMI Legacy Holdings, Inc., 553 B.R. 235, 258 (D. Del. 2016) (refusing to sever and transfer portion of case that was subject to forum selection clause because that would result in an "inefficient use of judicial resources, prejudic[e] to the other Defendants, and create a risk of inconsistent and conflicting adjudications.").

again. Conversely, the upside of defeating a transfer motion is considerable. Aside from the obvious practical advantages (less expensive to litigate, familiar courts, friendlier jury pool, etc.), there could be a substantive advantage due to how choice of law rules work. A federal court sitting in diversity applies the choice of law principles of the forum state.[110] Some states consider statutes of limitation as procedural rules and, under choice of law principles, will apply the forum state's limitations periods even if there is a choice of law clause.[111] Thus, a franchisee may sue in a forum for the purpose of achieving more favorable statutes of limitation, and if a forum selection clause is defeated, can rely on those statutes of limitation.

The question then becomes: what, if anything, can the franchisor do to maximize the likelihood that the forum selection clause is enforced? First, the franchisor should conduct a careful analysis of its forum selection clause to make sure it is mandatory and broadly worded to apply to any claim related to the parties' relationship. Second, the franchisor must raise the forum selection clause at the very beginning of the litigation. Third, the franchisor should consider placing other provisions, such as a contractual limitations period, in the franchise agreement that lessen the incentives for ignoring the forum selection clause.[112] Finally, the franchisor can attempt to recover attorney fees for breach of a forum selection clause under a general prevailing parties' fee provision,[113] or, for added protection, include an attorney fee provision related specifically to enforcing the forum selection clause. While these steps will not guarantee that a franchisee will file in the contractually selected venue or that a court will enforce the parties' forum selection clauses, they will maximize the chances of the litigation occurring in the selected court.

110. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

111. *See, e.g.*, ABF Capital Corp. v. McLauchlan, 167 F. Supp. 2d 1011, 1014 (N.D. Ill. 2001) (Under Illinois choice of law principles, the Illinois statute of limitations applies even where contract called for New York law.).

112. *See, e.g.*, Air Brake Sys., Inc. v. TUV Rheinland of N. Am., Inc., 699 F. Supp. 2d 462, 470 (D. Conn. 2010) (collecting cases for the proposition that Connecticut and federal "jurisprudence has recognized that parties to a contract may require a specific period of time within which to assert their respective claims, and that longer statutes of limitation do not prevent such agreements as a matter of principle").

113. *See, e.g.*, LesCare Kitchens, Inc. v. Home Depot U.S.A., Inc., No. 3:98CV1354 (GLG), 1998 WL 720536, at *4 (D. Conn. Sept. 29, 1998) ("Because this agreement gave defendant the right to insist upon this action being litigated in Georgia, which right it sought to enforce through the instant motion, the Court finds that reasonable attorney's fees are appropriate."); John Wiley & Sons, Inc. v. Book Dog Books, LLC, No. 13 CIV. 816 WHP GWG, 2015 WL 4154112, at *10 (S.D.N.Y. July 10, 2015) (discussing split in New York law regarding whether attorney fees associated with enforcing forum selection clause are recoverable under prevailing party attorney fee provision).