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A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie A Second Chanc

Kelly A. Blair
University of Georgia School of Law

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A JUDICIAL SOLUTION TO THE FORUM-SELECTION CLAUSE ENFORCEMENT CIRCUIT SPLIT: GIVING *ERIE* A SECOND CHANCE

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I. INTRODUCTION

In 1968, a German deep-sea tugboat called the *Bremen* began its voyage from Louisiana to Italy in a trip that would forever alter the way that United States courts approach contractual forum-selection clauses.[1] The American corporation, Zapata, contracted the German tugboat to tow Zapata's "ocean-going, self-elevating drilling rig," the *Chaparral*, from Venice, Louisiana, to Ravenna, Italy.[2] Just four days after the tugboat's departure, a severe storm arose in the international waters of the Gulf of Mexico.[3] The rough water caused the *Chaparral*'s "elevator legs, which had been raised for the voyage, to break off and fall into the sea," damaging the rig.[4] Zapata then instructed the German tugboat to tow the damaged rig to the nearest port in Tampa, Florida.[5]

The German corporation and Zapata had entered into an international towage agreement containing a forum-selection clause that selected an English court as the venue to govern any contractual disputes.[6] Nonetheless, Zapata brought suit in admiralty in a United States District Court in Florida against the German corporation.[7] After some complicated procedural wrangling, the Supreme Court confronted the issue of the enforceability of this forum-selection clause.[8] The Supreme Court began by noting the "expansion of overseas commercial activities by business enterprises based in the United States" over the past two decades.[9] In determining that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts,"[10]

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[1] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 3 (1972); *see also* 7 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 15:15 (4th ed. 2010) (noting that the "modern trend is to respect the enforceability of contracts containing clauses limiting judicial jurisdiction, if there is nothing unfair or unreasonable about them" and that "[t]his trend is directly traceable to the landmark case of [*The Bremen*]").

[2] *The Bremen*, 407 U.S. at 2–3.

[3] *Id.* at 3.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 3–4.

[7] *Id.*

[8] *Id.* at 8.

[9] *Id.*

[10] *Id.* at 9.

the Court chose to enforce the forum-selection clause, holding that "the forum clause should control absent a strong showing that it should be set aside."[11]

Before *The Bremen v. Zapata Off-Shore Co.*, federal and state courts, as a rule, refused to enforce forum-selection clauses.[12] Courts "jealously guarded" the "right of an injured party to legal redress"[13] and struck down forum-selection clauses for three main reasons. First, courts declined to enforce these clauses because "an agreement between parties cannot diminish the jurisdiction of the courts which has been established by law."[14] Second, many courts rejected forum-selection clauses on the grounds that they "ousted" a court of its legal right to jurisdiction.[15] Third, many courts reasoned that forum-selection clauses concern the law of remedies, which was the "law of the forum," and which could not be altered by private contract.[16]

The argument that forum-selection clauses "oust" courts of their jurisdiction is generally no longer accepted, and most courts hold that it fails because jurisdiction is statutorily granted and cannot be "abrogated or diminished" by private contract.[17] This "ouster"

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[11] *Id.* at 15.

[12] *See, e.g.*, Mut. Reserve Fund Life Ass'n v. Cleveland Woolen Mills, 82 F. 508, 510 (6th Cir. 1897) (holding a forum-selection clause invalid as a "provision intended to oust the jurisdiction of all state courts"); *accord* Parker v. Krauss Co., 284 N.Y.S. 478, 480 (N.Y. App. Div. 1935) ("Any stipulation between contracting parties by which it is attempted to confer exclusive jurisdiction upon a particular court and to oust other courts of jurisdiction provided by law is contrary to public policy."); *see also* Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 666 (1997) ("Until the mid-twentieth century, federal as well as state courts generally refused to enforce forum selection clauses and entertained cases brought in violation of such clauses.").

[13] 7 WILLISTON, *supra* note 1, § 15:15.

[14] Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 139 (1982); *see also* Meacham v. Jamestown, F. & C.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (Cardozo, J., concurring) ("If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned, it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action." (citation omitted)).

[15] *See* Gruson, *supra* note 14, at 139 n.17 (citing Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874)).

[16] *Meacham*, 105 N.E. at 655; *see also* Gruson, *supra* note 14, at 139 (observing that this reasoning was also seen in the "juridical attitude that led to the unenforceability of arbitration clauses and governing-law clauses").

[17] Gruson, *supra* note 14, at 140.

argument constitutes a fallacy because if a suit is brought in a non-contractual forum, "the agreement is legally effective only if and to the extent that the forum enforces it by declining to exercise its jurisdiction."[18] Indeed, the Supreme Court in *The Bremen* described this argument against the enforceability of forum-selection clauses as "hardly more than a vestigial legal fiction."[19]

Today, most state and federal courts have adopted the Supreme Court's approach in *The Bremen* of enforcing forum-selection clauses as presumptively reasonable so long as the clause comports with a multi-factor analysis.[20] The factors of this analysis include: (1) the clause not being affected by "fraud, undue influence, or overweening bargaining power"; (2) the clause not containing a violation of some "strong public policy of the forum in which suit is brought"; and (3) the clause not designating a forum that is "*seriously* inconvenient," such as a "remote alien forum" to govern "essentially local disputes."[21]

Despite this growing trend of judicial receptivity in favor of forum-selection clauses, a sharp divide has developed between the federal circuit courts about *how* and *when* courts should enforce forum-selection clauses.[22] This Note will address the causes of the

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[18] *Id.*

[19] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

[20] *See* 7 WILLISTON, *supra* note 1, § 15:15 (stating that the modern trend of enforcing forum-selection clauses if they are not unfair or unreasonable is "directly traceable" to *The Bremen*); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) ("The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."). *But see, e.g.*, N.C. GEN. STAT. § 22B-3 (2011). North Carolina statutory law provides that

> [e]xcept as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action . . . that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action . . . that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

Id. Similarly, in South Carolina, S.C. CODE ANN. § 15-7-120(A) (1976) provides that a cause of action arising under a forum-selection clause may be alternatively brought in South Carolina.

[21] *The Bremen*, 401 U.S. at 12–17; *accord* 7 WILLISTON, *supra* note 1, § 15:15 (listing the unreasonableness factors that can affect the enforceability of forum-selection clauses).

[22] *See* discussion *infra* Part II.B.*1–2.*

circuit split in the federal appellate courts following the Supreme Court's holding in *Stewart Organization, Inc. v. Ricoh Corp.*,[23] where the Court held that a defendant could use 28 U.S.C. § 1404(a), the federal transfer statute, to enforce a forum-selection clause.[24] This circuit split is multi-dimensional, with the federal courts divided on the proper use of either state or federal law when defendants use a procedural motion other than the federal transfer statute, as well as a split regarding the proper procedural motion for the enforcement of forum-selection clauses.

Part II of this Note addresses the development of this circuit split, including a summary of *The Bremen* and *Stewart*, as well as an in-depth discussion of the circuit split arising out of these cases. Part III will begin by conducting a revised *Erie* analysis for the conflict between state laws that disfavor forum-selection clauses and federal law that presumptively enforces forum-selection clauses, resolving the choice of law circuit split. It will then address the various procedural motions available to defendants for enforcing forum-selection clauses and conclude that Rule 12(b)(6) is the proper motion to solve the proper-motion circuit split. Finally, this Note addresses why a legislative solution, a commonly proposed resolution to this circuit split, is not a practicable answer for this division among the federal courts.

II. BACKGROUND

A. THE SUPREME COURT AND FORUM-SELECTION CLAUSES

1. The Legacy of The Bremen. American courts historically disfavored forum-selection clauses, presuming that a contractual provision designating venue would "oust of its jurisdiction a court in which venue properly lay."[25] But in 1972, the Court addressed the enforceability of a forum-selection clause in *The Bremen*. The

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[23] 487 U.S. 22 (1988).

[24] *Id.* at 32.

[25] Doe v. Seacamp Ass'n, 276 F. Supp. 2d 222, 225 (D. Mass. 2003); *see also The Bremen*, 407 U.S. at 9 ("Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court.").

Supreme Court held that the "correct approach" was to "enforce the forum clause specifically unless Zapata [(the American corporation disputing the clause)] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[26]

The Bremen represented an important shift in judicial willingness to enforce forum-selection clauses;[27] however, the case was decided in admiralty jurisdiction,[28] and thus is not binding in other federal common law courts.[29] Another limit on the reach of *The Bremen* is its narrow factual context—an international contract governing international trade.[30]

Despite the unique admiralty jurisdiction and international commerce context of *The Bremen*, the Court, in support of its newly adopted rule, cited several cases that were not limited to these two narrow situations.[31] As a result, many lower federal courts began to apply this doctrine more generally, including in diversity cases.[32] It was over a decade before the Supreme Court, in *Stewart Organization Inc. v. Ricoh Corp.*,[33] first took the opportunity to address and reject the use of *The Bremen* standard for enforcing reasonable forum-selection clauses.

2. Stewart Organization, Inc. v. Ricoh Corp. *and Forum-Selection Clauses in Diversity Cases.* While finding *The Bremen* "instructive" in resolving a forum-selection clause dispute between parties sitting in diversity, the Supreme Court rejected the doctrine from *The Bremen* as controlling when it first squarely addressed the enforceability of forum-selection clauses in federal

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[26] *The Bremen*, 407 U.S. at 15.

[27] *See* Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 429 (1991) (stating that in *The Bremen* the Supreme Court recognized the "fallacy, at least in the context of international commerce," of treating forum-selection clauses as "limit[ing] the subject matter jurisdiction of courts").

[28] *The Bremen*, 407 U.S. at 3.

[29] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988) (noting that *The Bremen* "may prove 'instructive' in resolving" diversity suits (citation omitted)).

[30] *The Bremen*, 407 U.S. at 12–13.

[31] *Id.* at 10 n.11.

[32] *See, e.g.*, C. Pappas Co. v. E. & J. Gallo Winery, 565 F. Supp. 1015, 1017 (D. Mass. 1983) (quoting *The Bremen* and finding that the case "was an admiralty dispute, but [that] the same analysis applies to other contract actions").

[33] 487 U.S. 22.

diversity cases in *Stewart*. In *Stewart*, an Alabama corporation entered into a dealership agreement with a New Jersey copier products manufacturer.[34] The agreement contained a forum-selection clause designating a court in Manhattan as the proper venue to litigate any potential dispute.[35] Business relations "soured" between the parties,[36] and the Alabama corporation filed suit in the United States District Court for the Northern District of Alabama, a court sitting in a state that "looks unfavorably upon contractual forum-selection clauses."[37] The New Jersey corporation, relying on the forum-selection clause, moved to either transfer the case to the Southern District of New York under 28 U.S.C. § 1404(a) or to dismiss the case for improper venue under 28 U.S.C. § 1406.[38] The district court denied both motions based on Alabama law disfavoring forum-selection clauses.[39] The appellate court, taking a complex procedural route, reversed the district court and applied the standard from *The Bremen*, instructing that the claim be transferred to New York.[40]

a. The Supreme Court's Erie *Analysis.* The Supreme Court granted certiorari in *Stewart* and rejected the Eleventh Circuit's approach of determining whether the forum-selection clause was

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[34] *Id.* at 24.

[35] *Id.*

[36] *Id.*

[37] *Id.* It should be noted, however, that the Supreme Court of Alabama has since shifted positions on this issue:

> Because we no longer consider 'outbound' forum selection clauses to be void per se as against public policy, and because we conclude that § 6-3-1, Ala.Code 1975, does not operate as a statutory prohibition against their enforcement, we now adopt the majority rule that a forum selection clause should be enforced so long as enforcing it is neither unfair nor unreasonable under the circumstances.

Prof'l Ins. Corp. v. Sutherland, 700 So. 2d 347, 351 (Ala. 1997).

[38] *Stewart*, 487 U.S. at 24. When venue in the original forum is proper, 28 U.S.C. § 1404 is the appropriate transfer statute. *See* 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2007) (noting that the First, Second, and Third Circuits enforce forum-selection clauses with § 1404(a) because "a forum selection clause does not render venue improper in an otherwise proper forum"). When a case is filed in an improper venue, 28 U.S.C. § 1406 is the appropriate transfer statute. *Id.* (noting that the Seventh, Ninth, Tenth, and Eleventh Circuits enforce forum-selection clauses with § 1406(a) because these courts hold that a "forum selection clause can render venue in the original forum improper").

[39] *Stewart*, 487 U.S. at 24.

[40] *Id.* at 25.

unenforceable under the standards set forth in *The Bremen*.[41] Rather, the Court applied a straight *Erie* analysis[42] to determine whether the federal transfer statute or the Alabama state law controlled the New Jersey corporation's request to enforce the parties' forum-selection clause.[43] Because the applicable federal law was a congressional statute, the first question in the Court's *Erie* analysis was "whether the statute is 'sufficiently broad to control the issue before the Court.' "[44] This step requires a "straightforward" determination of whether the federal statute " 'occupies [a state rule's] field of operation.' "[45] Next, the Court considered whether "Congress intended to reach the issue before the district court" and "whether the statute represents a valid exercise of Congress'[s] authority under the Constitution."[46] If these two conditions are satisfied, the federal statute controls.[47]

Applying this analysis in *Stewart*, the Court found § 1404(a) sufficiently broad to govern the district court's decision of "whether to give effect to the parties' forum-selection clause and transfer th[e] case to a court in Manhattan."[48] The Court noted that § 1404(a) and Alabama's policy disfavoring forum-selection clauses were "not perfectly coextensive" because the transfer statute takes into account public interest factors not considered within the "parties' private ordering of their affairs."[49] Nonetheless, the Court held that forum-selection clauses should be given due consideration but that courts should also consider relevant "case-specific factors," such as the convenience of the selected forum, the fairness of the transfer, and "the parties' relative bargaining power."[50] Thus, the Court determined that § 1404(a) is, as a procedural rule, adaptable and

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[41] *Id.* at 28–29.

[42] In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 76, 78 (1938), the Supreme Court rejected the notion of federal common law that allowed persons "to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction."

[43] *Stewart*, 487 U.S. at 29–31.

[44] *Id.* at 26 (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980)).

[45] *Id.* at 26–27 (citing Burlington N. Rail Co. v. Woods, 480 U.S. 1, 7 (1987)).

[46] *Id.* at 27.

[47] *Id.*

[48] *Id.* at 32.

[49] *Id.* at 30.

[50] *Id.* at 29.

sufficiently broad to account for the parties' contractual venue preferences[51] and to govern the parties' venue dispute.[52]

The *Stewart* Court provided that lower courts should use a § 1404(a) balancing test, considering the convenience and fairness of the selected forum and the presence of the forum-selection clause.[53] This conclusion effectively upheld the enforceability of forum-selection clauses in federal diversity cases without relying on *The Bremen* with its admiralty jurisdiction limitations.[54] Notably, *The Bremen* provides that a federal court sitting in admiralty jurisdiction should enforce a forum-selection clause if reasonable, whereas under the *Stewart* rule, a federal court sitting in diversity or federal question jurisdiction should simply take the forum-selection clause into account as one of many factors.[55]

b. Scalia's Dissent. Justice Scalia's dissenting opinion in *Stewart* claimed that the validity of a contractual forum-selection clause does not fall within the scope of 28 U.S.C. § 1404(a).[56] This argument contrasts with the majority's holding that the real issue was whether the forum-selection clause should be enforced under the federal transfer statute and consequently federal law.[57]

Justice Scalia pointed out that the language of § 1404(a) is decidedly forward-looking, stating that the statute focuses on "what is likely to be just in the future, when the case is tried."[58] Therefore, by imposing upon the statute the consideration of the "validity between the parties of a forum-selection clause," the Court added "a new *retrospective* element into the court's deliberations," which

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[51] *Id.* at 29–30.

[52] *Id.* at 28.

[53] *Id.* at 30–31.

[54] Lee, *supra* note 12, at 671.

[55] 14D WRIGHT, MILLER & COOPER, *supra* note 38, § 3803.1.

[56] *Stewart*, 487 U.S. at 33 (Scalia, J., dissenting).

[57] *Id.* at 32 (majority opinion); *see also* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 838 (1993) (noting that while the majority framed the proper inquiry as whether the clause should compel the transfer of the action, Scalia framed the issue as "what law should be applied to determine the 'validity' of the clause in question"). This distinction Professor Taylor discusses is significant because "[u]nder *The Bremen*'s view of forum selection clauses, in most instances, validity compels transfer because parties are able to privately order procedure with little or no interference by the courts." *Id.* In contrast, "enforcement does not necessarily follow" under the *Stewart* approach "because the other § 1404(a) factors are also considered, possibly preventing enforcement." *Id.*

[58] *Stewart*, 487 U.S. at 34 (Scalia, J., dissenting).

includes such factors as the parties' comparative "bargaining power" and "the presence or absence of overreaching" during contract formation.[59] Justice Scalia also stated that in framing the issue as "how much *weight* a district court should give a forum-selection clause as against other factors," the Court avoided the real issue of "what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties" because the question of how much "weight should be given the forum-selection clause can be reached only if as a preliminary matter federal law controls the issue of the validity of the clause."[60] Justice Scalia then argued that a contract's validity is an issue "traditionally . . . governed by state law."[61] In contrast, § 1404(a) is "simply a venue provision" that does not concern the validity of certain contracts or agreements.[62]

As a result of his conclusion that § 1404(a) fails to govern the validity of forum-selection clauses, Justice Scalia concluded that the majority's new "judge-made rule" failed the "twin-aims test" of *Erie* because it would promote forum shopping and produce "inequitable administration of the laws" between noncitizens and citizens of the forum state.[63] Under the majority's rule, forum shopping would occur when plaintiffs seeking to avoid the effect of a forum-selection clause would bring suit in state court with laws unfavorable to validity and defendants would be encouraged to remove the suit to federal court to take advantage of federal common law favorable toward validity.[64] Justice Scalia found an inequitable administration of laws in the fact that the "validity of a contractual forum-selection provision" would "turn on the accident of diversity of citizenship"[65]—a result explicitly prohibited

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[59] *Id.* at 34–35.

[60] *Id.* at 35.

[61] *Id.* at 41.

[62] *Id.* at 37.

[63] *Id.* at 39–40.

[64] *Id.* at 40.

[65] *Id.* This "accident" being that a party could take advantage of more favorable federal common law by removing to federal court under diversity jurisdiction. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 76–77 (1938).

by *Erie*.[66] Thus, Justice Scalia determined that state law should control the issue of the validity of forum-selection clauses.[67]

B. AFTER *STEWART*: THE CIRCUITS SPLIT

1. Circuit Split over Federal or State Law. After *Stewart*, the Court's misguided *Erie* analysis reared its head with a circuit split over whether a court should apply state or federal law when enforcing forum-selection clauses under a defendant's motion to dismiss.[68] This split results from the Supreme Court's failure to address the enforcement of forum-selection clauses outside the § 1404(a) transfer context and its *Erie* analysis in *Stewart*.[69] The Second, Fifth, Ninth, and Eleventh Circuits follow the federal policy of holding forum-selection clauses prima facie valid,[70] while the Third and Eighth Circuits deviate from this approach.[71] The

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[66] *See Erie*, 304 U.S. at 76–78 (holding unconstitutional the ability of persons to avail themselves of the federal rule by resort to the diversity of citizenship jurisdiction).

[67] *Stewart*, 487 U.S. at 39 (Scalia, J., dissenting).

[68] *See, e.g.*, Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 49–50 (1st Cir. 1990) (applying principles of federal law in deciding the applicability of a forum-selection clause); Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc., 806 F.2d 848, 852 (8th Cir. 1986), *abrogated by* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) (noting the "close relationship between substance and procedure" in deciding the applicability of forum-selection clauses and holding that due consideration should have been given to the public policy of Missouri).

[69] *See* discussion *supra* Part II.A.*2.a*; *see also* Lederman, *supra* note 27, at 459 ("[C]ourts must still confront the *Erie* question that arises when a defendant makes a motion to enforce a forum-selection clause under a provision other than section 1404(a).").

[70] *See* Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) (finding "unpersuasive" plaintiff's argument that with regard to the enforceability of the forum-selection clause, state law, rather than the federal rule in *The Bremen*, should control); Alliance Health Grp., LLC v. Bridging Health Options, LLC, 553 F.3d 397, 399 (5th Cir. 2008) ("Federal law applies to determine the enforceability of forum selection clauses in both diversity and federal question cases." (citation and internal quotation marks omitted)); Spradlin v. Lear Siegler Mgmt. Servs. Co., 926 F.2d 865, 867 (9th Cir. 1991) ("Federal law governs the validity of the forum selection clause."); Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1068 (11th Cir. 1987), *aff'd*, 487 U.S. 22 (holding that forum-selection clauses and venue are matters of federal procedural law).

[71] *See* Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356 (3d Cir. 1986) ("We must correct the assumption that federal courts are bound as a matter of federal common law to apply *The Bremen* standard to forum selection clauses. The construction of contracts is usually a matter of state, not federal, common law."); *Farmland Indus.*, 806 F.2d at 852 (holding, with reference to the forum-selection clause, that "[b]ecause of the close relationship between substance and procedure . . . consideration should have been given to the public policy of Missouri").

circuits applying federal law when a defendant seeks to enforce a forum-selection clause with a motion to dismiss do not use the balancing standard found in *Stewart*, which only addressed a defendant seeking to enforce a forum-selection clause under the federal transfer statute.[72] Rather, these circuits use the standard from *The Bremen* in which the forum-selection clause is presumed valid so long as it is not unreasonable.[73]

Other federal circuits have refused to decide whether state or federal law controls the validity and interpretation of forum-selection clauses, claiming that there is no material difference between state and federal law.[74] This purposeful avoidance of the federal or state law issue is understandable given the fact that most states have adopted the standard set forth in *The Bremen* for enforcing forum-selection clauses when faced with a motion to dismiss.[75] Ultimately, the effect of this discord is that a plaintiff bringing suit in a state that has a strong policy disfavoring forum-selection clauses can benefit from that state's law, while a defendant facing suit in a state applying federal law can benefit from the favorable federal standard in *The Bremen* of enforcing the forum-selection clause so long as the provision is fair and reasonable.[76] An additional problem underlying this circuit split is that "[t]hese uncertainties bring instability to international agreements" because, "depending upon where the plaintiff sues, the forum selection clause may or may not be honored."[77]

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[72] *See, e.g.*, *Jones*, 901 F.2d at 19 (applying *The Bremen*'s analysis).

[73] *Id.*

[74] *See, e.g.*, Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320, 321 (10th Cir. 1997) (finding "no material discrepancies between Colorado law and federal common law" regarding the enforceability of forum-selection clauses and, therefore, declining to decide the choice of law issue).

[75] *See, e.g.*, IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 437 F.3d 606, 611 (7th Cir. 2006) ("Illinois law concerning the validity of forum selection clauses is materially the same as federal law."); Sec. Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 375 (6th Cir. 1999) ("Tennessee law is consistent with the rule of [*The Bremen*].").

[76] *See* Int'l Software Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 115 (5th Cir. 1996) (explaining that federal circuit courts apply *The Bremen*'s reasonableness standard when the case involves a motion to dismiss rather than the venue statute because no federal rule is directly on point and, consequently, the *Stewart* analysis is inapplicable).

[77] Lee, *supra* note 12, at 679.

2. Circuit Split over Which Rule 12 Motion Is the Proper Motion for Forum-Selection Clause Enforcement. In addition to the circuit split regarding the proper choice of law, another split has arisen in the federal courts regarding the proper motion to enforce these forum-selection clauses. Because the defendant in *Stewart* did not pursue a motion to dismiss in enforcing the forum-selection clause, the *Stewart* Court did not address this procedural vehicle for enforcement and did not provide guidance as to which Federal Rule of Civil Procedure is the proper mode of enforcement.[78] As a result, in addition to the § 1404(a) transfer assessed in *Stewart*, defendants now employ a variety of other motions and procedural tools unanticipated by the *Stewart* Court to enforce forum-selection clauses.[79] While attempting to enforce forum-selection clauses, defendants have used § 1406(a),[80] the common law doctrine of forum non conveniens,[81] and a variety of Rule 12 dismissal motions.[82] The use of these numerous procedural tools

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[78] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n.8 (1988).

[79] *See* Lederman, *supra* note 27, at 433 ("[D]efense attorneys have had to invoke an assortment of rules and concepts that were not designed with forum-selection clauses in mind.").

[80] *See* Moretti & Perlow Law Offices v. Aleet Assocs., 668 F. Supp. 103, 104, 107 (D.R.I. 1987) (granting defendant's motion to transfer pursuant to § 1406(a), which is the federal venue transfer statute used when a case is filed in an improper venue).

[81] *See* Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 52–53 (1st Cir. 1990) (granting defendant's motion for forum non conveniens pursuant to a forum-selection clause designating a foreign venue). Forum non conveniens involves a balancing of public and private interests, including " 'the relative 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 . . .; and all other practical problems that make trial of a case easy, expeditious and inexpensive,' " as well as the public interest factors of " '[a]dministrative difficulties,' " the burden of jury duty, and the " 'local interest in having localized controversies decided at home.' " *Id.* at 52 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947)). The Supreme Court has held, however, that the plaintiff's choice of a home forum " 'may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.' " *Id.* (quoting Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981)). This Note, however, does not focus on the use of forum non conveniens because, as a common law doctrine, it is not applied consistently in all jurisdictions. *See* Harry S. Peterson Co. v. Nat'l Union Fire Ins. Co., 434 S.E.2d 778, 783 (Ga. Ct. App. 1993) ("[U]nder Georgia law, a trial court would abuse its discretion by dismissing a case on the grounds of forum non conveniens.").

[82] *See, e.g.*, Rivera v. Centro Médico de Turabo, Inc., 575 F.3d 10, 15 (1st Cir. 2009) (Rule 12(b)(6)); Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1196–97 (4th Cir. 1985) (Rule 12(b)(1)); ADT Sec. Servs., Inc. v. Apex Alarm, LLC, 430 F. Supp. 2d 1199, 1204 (D. Colo. 2006) (Rule 12(b)(3)).

in the enforcement of forum-selection clauses creates a much more complex judicial framework than that envisioned by the *Stewart* Court.

Defendants' use of these various tools for enforcing forum-selection clauses provides the backdrop for the federal circuit split regarding the proper avenue for relief.[83] The Rule 12 motions to dismiss are perhaps the most important vehicles of enforcement at the center of this circuit split.[84] The Ninth, Eleventh, and District of Columbia Circuits have held that a defendant can enforce a forum-selection clause through a Rule 12(b)(3) motion to dismiss for improper venue on the basis that the forum-selection clause makes venue in a non-designated forum improper.[85] Even so, defendants in the First, Third, and Sixth Circuits may move to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.[86] The theory behind this motion is that "bringing suit the in the agreed-upon forum is a necessary element to sustain the cause of action."[87] Finally, the Fourth Circuit has applied Rule 12(b)(1), the motion to dismiss for improper subject matter jurisdiction, to enforce forum-selection clauses.[88] Some

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[83] *See* Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1332 (11th Cir. 2011) ("Our sister circuits disagree regarding the appropriate vehicle for enforcing forum-selection clauses.").

[84] *See* FED. R. CIV. P. 12 cmt. (describing the reasons for using the different Rule 12 motions in enforcing a forum-selection clause).

[85] *See, e.g.*, Richards v. Lloyd's of London, 135 F.3d 1289, 1292, 1297 (9th Cir. 1998) (granting a 12(b)(3) motion where there was a designated forum); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998) (holding "that motions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to [Rule] 12(b)(3)"); Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, 867 F.2d 697, 698, 700 (D.C. Cir. 1989) (granting a 12(b)(3) motion where there was a designated forum).

[86] *See, e.g.*, Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 387 (1st Cir. 2001) ("[A] motion to dismiss based upon a forum-selection clause is treated as one alleging the failure to state a claim for which relief can be granted under [Rule] 12(b)(6)."); Instrumentation Assocs. v. Madsen Elects. (Canada) Ltd., 859 F.2d 4, 6 n.4, 9 (3d Cir. 1988) (reversing the district court's denial of defendant's 12(b)(6) motion to enforce the parties' forum-selection clause); Langley v. Prudential Mortg. Capital Co., 546 F.3d 365, 366 (6th Cir. 2008) ("[W]e vacate and remand for the district court to entertain a motion to enforce the forum selection clause under [Rule] 12(b)(6).").

[87] Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1923–24 (2009).

[88] Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1196–97 (4th Cir. 1985) (affirming the district court's grant of the defendant's 12(b)(1) motion based on the parties' forum-selection clause).

courts have even gone beyond these subsection-specific analyses and granted any motion to dismiss for improper forum regardless of which particular Rule 12 subsection the defendant used.[89]

The motion to dismiss to enforce forum-selection clauses has become a ubiquitous tool used by defendants in federal diversity actions, evidenced by the various federal circuits that endorse this practice.[90] The motion to dismiss is a key mechanism for enforcing forum-selection clauses because if the contract designates a nonfederal court, the federal transfer statute is unavailable to the defendant; parties can only use the federal transfer statute to move a suit from one federal court to another.[91] Consequently, in situations where the contract designates a state court or international forum, the defendant must use a motion to dismiss to enforce the contractual provision.[92] Further, a defendant may prefer to use a motion to dismiss because the defendant can take advantage of the new forum's choice of law, whereas with a § 1404(a) transfer, the state law from the original forum follows the suit.[93] The circuit split regarding the proper motion, however, beleaguers the advantages of these Rule 12 motions, and this division creates fairness concerns and economic implications for parties litigating forum-selection clauses.[94]

3. Implications of These Circuit Splits for Defendants. The Court's narrow holding in *Stewart* presents a unique set of implications for plaintiffs and defendants. For example, if a contractual forum-selection clause designates New York as the

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[89] *See* LFC Lessors, Inc. v. Pac. Sewer Maint. Corp., 739 F.2d 4, 7 (1st Cir. 1984) (holding that the "uncertainty" with regard to the district court judge's approach to defendants' motions to dismiss "matters not").

[90] *See* Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1332 (11th Cir. 2011) (Rule 12(b)(3) motion); Lambert v. Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993) (Rule 12(b)(6) motion); *Bryant Elec.*, 762 F.2d at 1196–97 (Rule 12(b)(1) motion).

[91] *See* 28 U.S.C. § 1404(a) (2006) ("[A] district court may transfer any civil action to any other district or division where it might have been brought.").

[92] While forum non conveniens is another possible vehicle of enforcement in this situation, the defendant could remove the case to federal court, and the court must then decide whether to apply federal or state doctrine regarding forum non conveniens. *See* Lee, *supra* note 12, at 686–87. Moreover, forum non conveniens is a discretionary doctrine. *Id.* at 688.

[93] *See* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (concluding that in cases "where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue").

[94] *See* discussion *infra* Part III.B.

proper venue for any legal disputes and the plaintiff instead brings suit against a defendant in federal court in a state like South Carolina, which arguably has a policy disfavoring such clauses,[95] the defendant faces the choice of whether to file a transfer motion under § 1404(a) or a motion to dismiss. If the defendant files the transfer motion, the South Carolina federal court will apply federal law in accordance with *Stewart* and will likely transfer the suit to the New York forum.[96]

If the defendant instead files a motion to dismiss, the South Carolina court will face the choice of whether to apply federal or state law and will likely deny the motion in line with South Carolina's policy disfavoring forum-selection clauses.[97] As a result, the court would allow the plaintiff to continue the lawsuit in this forum despite the forum-selection clause. Thus, depending on which procedural motion the defendant chooses to enforce the forum-selection clause, the contractual provision may actually be enforced.

This example has additional implications. The defendant will likely prefer to use the motion to dismiss because New York law—the choice of law of the designated forum—will apply once the suit is refiled in New York.[98] However, in cases in which this motion will likely be denied—as in the example here—the defendant will

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[95] *See* Consol. Insured Benefits, Inc. v. Conseco Med. Ins. Co., 370 F. Supp. 2d 397, 401–02 (D.S.C. 2004) (declining to dismiss the case on the grounds that there is a strong public policy in South Carolina against out-of-state forum-selection clauses). This issue of whether South Carolina actually disfavors forum-selection clauses as a matter of public policy was addressed in *Atlantic Floor Servs., Inc. v. Wal-Mart Stores, Inc.*, 334 F. Supp. 2d 875, 879–80 (D.S.C. 2004), in which the court found that "South Carolina's appellate courts have recognized the validity of forum selection clauses in a variety of contexts" such that "a finding that such clauses violate the 'strong public policy' of South Carolina is not supported by decisions of its State Courts."

[96] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988) (stating that federal law governs the venue dispute).

[97] *See Consol. Insured Benefits*, 370 F. Supp. 2d at 401–02 (D.S.C. 2004) (denying the defendant's motion to dismiss on the grounds that there is a strong public policy in South Carolina against forum-selection clauses).

[98] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n.8 (1981) ("Under *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941), a court ordinarily must apply the choice-of-law rules of the State in which it sits.").

then move to transfer the suit under § 1404(a), resulting in South Carolina choice of law rules applying in the New York forum.[99]

This circuit split could lead to another problematic situation if the forum-selection clause designates a state court. In this hypothetical, if the plaintiff brings suit in state court in South Carolina, the defendant must file a motion to dismiss because the federal transfer statute can only transfer the suit to other federal courts.[100] South Carolina will then apply state law and deny the motion to dismiss,[101] forcing the defendant to defend the suit in South Carolina rather than the designated forum simply because the selected forum is a state court. The parties' contractually agreed upon forum-selection clause fails as a result of this conflict between the proper motion and the federal and state law issues. These *Erie* and proper-procedure issues arise because the *Stewart* Court conducted a misguided *Erie* analysis and failed to address these possibilities.

The Supreme Court could alleviate the problematic *Erie* tensions between state and federal courts by revisiting its holding in *Stewart* and directing lower courts to apply state law (in line with Scalia's dissent in *Stewart*) when a defendant files a motion to dismiss. This approach would require the Court to revise its *Erie* analysis in *Stewart* to determine whether the scope of Rule 12 and § 1404(a) are sufficiently broad to control the validity of parties' forum-selection clauses.[102] This analysis will apply the post-*Erie* decisions of *Hanna v. Plumer*[103] and *Byrd v. Blue Rural Ridge Electric Cooperative, Inc.*[104] to demonstrate that state law should control the enforcement of forum-selection clauses.

Next, the Supreme Court could relieve this circuit conflict regarding the proper Rule 12 motion by addressing the prevalent

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[99] *See* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) ("[W]here the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.").

[100] *See* 28 U.S.C. § 1404(a) (2006) ("[A] district court may transfer any civil action to any other district or division where it might have been brought.").

[101] *Consol. Insured Benefits*, 370 F. Supp. 2d at 401.

[102] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 34 (1988) (Scalia, J., dissenting) (concluding that § 1404(a) is not "sufficiently broad to cause a direct collision with state law or implicitly to control the issue before the Court").

[103] 380 U.S. 460 (1965).

[104] 356 U.S. 525 (1958).

use of these motions to dismiss, an issue not reached by the *Stewart* Court.[105] The lower circuits would benefit from Supreme Court guidance on which motion to dismiss is proper for forum-selection clause enforcement.

III. ANALYSIS

The choice of law circuit split calls on the Court to revise the *Stewart* Court's *Erie* analysis to demonstrate that under *Byrd v. Blue Rural Ridge Electric Cooperative, Inc.*,[106] state law—not the federal standard applied in *The Bremen*—should direct the enforcement of forum-selection clauses. *Byrd* controls the analysis because contrary to the *Stewart* majority's holding, there is no federal rule directly on point regarding forum-selection clause enforcement, making the application of *Hanna v. Plumer*[107] inappropriate. Under *Byrd*, the outcome-determinative nature of the conflict between federal versus state law and the absence of any overwhelming federal policies on point dictate that, in line with the goals of *Erie*, state law controls the enforcement of forum-selection clauses.

Next, the Supreme Court should resolve the proper-motion circuit split by designating Rule 12(b)(6) as the proper procedural motion that defendants should use to enforce forum-selection clauses. Rule 12(b)(6) is the best Rule 12 motion to resolve this circuit split for three reasons. First, the failure to raise a 12(b)(6) motion does not result in a defendant waiving his or her right to raise this motion, which allows for the parties to give more latitude and effect to their contractual agreements.[108] Second, the 12(b)(6) motion complies with the Supreme Court's holding in

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[105] *See supra* note 78 and accompanying text.

[106] 356 U.S. 525.

[107] 380 U.S. 460.

[108] *See* FED. R. CIV. P. 12(b) (providing that venue objections are waivable defenses unless raised in responsive pleading or by motion under Rule 12); *see also* 28 U.S.C. § 1406(b) (2006) ("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to venue."); Steward v. Up N. Plastics, Inc., 177 F. Supp. 2d 953, 958 (D. Minn. 2001) ("Even if the Court were inclined to consider defendants' motion under § 1406 or otherwise treat the motion as one under Rule 12(b)(3), the Court would find that defendants have waived their objection to venue . . . [since] venue objections must be made in a timely fashion.").

Stewart because, in contrast to the 12(b)(3) motion, the 12(b)(6) motion does not imply that venue in the original forum is improper due to the forum-selection clause.[109] And third, a 12(b)(6) motion does not require the imposition of a legislative overhaul of forum-selection enforcement that would necessarily accompany any new federal statute designed for this purpose. While other commentators have proposed such a legislative solution,[110] the expediency of a judicial solution weighs in favor of the Supreme Court simply adopting the 12(b)(6) motion as the proper motion to use in enforcing forum-selection clauses when the federal transfer motion is an unavailable procedural vehicle.[111]

A. A REVISED *ERIE* ANALYSIS

1. A New Suit, a New Erie *Analysis.* Whereas a legislative solution to the circuit split over the proper choice of law and proper motion would necessarily require a federal law controlling the enforceability of forum-selection clauses,[112] a judicial solution has the ability to reset the framework of *Stewart* and its *Erie*-based inequities. To revise its *Erie* analysis, the Supreme Court must grant certiorari in a diversity case originating in a state with a

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[109] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 n.8 (1988) (selecting the § 1404 transfer statute, which transfers a case when venue is proper, over the § 1406 statute, which transfers a case when venue is improper). One commentator has presented a judicial solution to the proper-motion circuit split that selects Rule 12(b)(3) and § 1406(a) as the proper rules for enforcement of forum-selection clauses. Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1652 (2011). However, Wright focuses on how forcing the defendant to move under 12(b)(3) would "promote judicial economy," whereas this Note and Rule 12(b)(6) emphasize giving effect to the parties' contractual agreements. *See id.* at 1653. Moreover, Wright dismisses the *Stewart* Court's choice of § 1404(a) over § 1406(a) as nonbinding "dicta." *See id.* at 1638.

[110] *See, e.g.*, Holt, *supra* note 87, at 1945–50 (arguing for the creation of a new Federal Rule of Civil Procedure for the specific purpose of enforcing forum-selection clauses); Lee, *supra* note 12, at 691–95 (arguing for a new federal statute similar to the Federal Arbitration Act that would mandate the enforcement of forum-selection clauses in interstate and international commercial agreements).

[111] *See* discussion *infra* Part III.C.

[112] Under the legislative solution proposal, federal law is required because these choice of law and proper-motion problems are "plaguing . . . federal courts." Holt, *supra* note 87, at 1945.

strong policy disfavoring forum-selection clauses and thereby allow the choice of law conflict between state and federal law to emerge.

For instance, suppose a small, family-owned landscaping business in North Carolina entered into a contract with a large lawnmower manufacturer whose principal place of business is in New York. Their contract contains a forum-selection clause designating a New York federal court as the proper venue to govern any disputes between the parties. The New York lawnmower company sells the North Carolina landscaping business three defective lawnmowers without blades. The landscaping business cannot cut the grass in ten of its regular subdivisions and loses those customers. In response, the landscaping business brings a claim for damages in North Carolina state court against the New York company, intending to take advantage of North Carolina's policy against the enforcement of forum-selection clauses.[113] The New York manufacturer will likely remove the suit to North Carolina federal court[114] and attempt to transfer the suit to New York under the contractual forum-selection clause using § 1404(a). Applying the standard enunciated in *Stewart*, the North Carolina federal court will "weigh in the balance a number of case-specific factors" under § 1404(a)[115] and will typically enforce the forum-selection clause. This result directly contradicts North Carolina's state policy against enforcing forum-selection clauses.[116] The North Carolina landscaping business will likely appeal, and under similar circumstances as the procedural history in *Stewart*,[117] the suit could eventually come before the Supreme Court. The Court could then revise its *Erie* analysis to prevent the inequitable result of the North Carolina plaintiff not being able to take advantage of its home state's policy against forum-selection clauses merely because of the New York defendant's status as a diverse party.

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[113] *See* N.C. GEN. STAT. § 22B-3 (2011) (providing the North Carolina policy against the enforceability of forum-selection clauses).

[114] Under § 1441(a), a defendant can remove a suit originally filed in state court to the federal court encompassing the original state venue if the suit could have originally been brought in federal court. 28 U.S.C. § 1441(a) (2006).

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

[116] N.C. GEN. STAT. § 22B-3 (2011).

[117] *See Stewart*, 487 U.S. at 24–25.

2. Hanna v. Plumer *as the Starting Point.* In revising the *Stewart* Court's *Erie* analysis, the Court should begin with *Hanna v. Plumer*.[118] In that case, Hanna, an Ohio resident, filed suit in federal court claiming injuries resulting from an accident caused by the negligence of Louise Plumer Osgood, a resident of Massachusetts who died before the time of filing.[119] Osgood's executor, Plumer, was named as defendant.[120] Complying with the Federal Rules, Hanna served Plumer by leaving copies of the summons and complaint with his wife at his residence.[121] Federal Rule of Civil Procedure 4(d) allows substitute service if that plaintiff has made reasonable efforts to serve the defendant and failed, so under this federal law, a plaintiff can serve an adult residing at the defendant's house.[122] Massachusetts's rules, however, do not allow for substitute service in cases against the executor of a person's estate.[123] Plumer filed an answer claiming that service was in violation of Massachusetts's law.[124] The Supreme Court faced the *Erie* question of whether to apply the federal law of allowing substitute service or the state law of not allowing substitute service, which would allow Plumer to prevail.[125]

The Supreme Court's analysis began by finding a "direct collision" between Rule 4(d) and the Massachusetts's law regarding substitute service.[126] With Rule 4(d) directly on point, the Court found that the federal rule was valid under the Rules Enabling Act,[127] meaning that the rule did not "abridge, enlarge, or modify any substantive right."[128] The *Hanna* Court reached this conclusion by reasoning that "[p]rescribing the manner in which a defendant is to be notified that a suit has been instituted

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[118] 380 U.S. 460 (1965).
[119] *Id.* at 461.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 461–62.
[124] *Id.*
[125] *Id.* at 461.
[126] *Id.* at 470, 472.
[127] *Id.* at 463–64.
[128] 28 U.S.C. § 2072(b) (2006).

against him" is related "to the 'practice and procedure of the district courts.' "[129]

Next, the Court found that Rule 4(d) had not "transgressed constitutional bounds"[130] because the congressional authority to create the Federal Rules of Civil Procedure is found in the Constitution and bolstered by the Necessary and Proper Clause.[131] The *Hanna* Court also rejected *Erie* as controlling the validity and applicability of a Federal Rule of Civil Procedure.[132] Rather, the Court observed that an " '[o]utcome-determination' analysis was never intended to serve as a talisman."[133] Thus, whether application of a federal law versus a state law will affect the outcome of the litigation is just one factor to weigh in the balance; it is not dispositive.[134] The Court also addressed the concern with forum shopping, finding that if a federal rule will only affect the outcome of the litigation in retrospect, but will not affect a litigant's choice of forum at the front end, then forum shopping is not a concern and the federal rule is not outcome-determinative.[135]

3. Hanna *Applied.* Returning to the North Carolina landscaping company and its claim for damages,[136] the starting point for the Supreme Court will be the *Erie* analysis provided in *Hanna.* First, the Court must determine whether there is a direct collision between § 1404(a) and the North Carolina statute on point providing that forum-selection clauses are "void and unenforceable."[137] The Court should find that the federal transfer statute does not sufficiently intersect with the North Carolina statute to cause a "direct collision." Justice Scalia found that

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[129] *Hanna*, 380 U.S. at 464.

[130] *Id.*

[131] *Id.* at 472.

[132] *Id.* at 469–70.

[133] *Id.* at 466–67.

[134] *See id.* at 467 ("[C]hoices between state and federal law are to be made not by application or any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule.").

[135] *See id.* at 469 (applying the federal rule because although the "choice of the federal or state rule [would] at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would [have] . . . scant, if any, relevance to the choice of a forum").

[136] *See supra* Part III.A.*1.*

[137] N.C. GEN. STAT. § 22B-3 (2011).

§ 1404(a) was not "sufficiently broad to cause a direct collision with state law,"[138] but a more fitting analysis is that the minimalistic federal transfer statute simply does not concern the same legal or policy issues as the North Carolina statute. This notion underlies the arguments of many of the proposals suggesting a legislative solution to the choice of law circuit split.[139]

Support for this argument that the federal transfer statute does not directly collide with state law is found in one commentator's proposal of a new Federal Rule of Civil Procedure specifically geared towards forum-selection clause enforcement.[140] In rejecting the federal transfer statute as the proper mode of enforcement, the commentator stated: "Nothing in the language of the transfer statute mentions forum selection clauses," and the "primary clause" of § 1404(a) "requires the decision [of transfer] to be based on which forum is more convenient for the parties and witnesses."[141] The federal transfer statute focuses on the "convenience of parties and witnesses" and the "interest of justice,"[142] which is essentially a vague set of policy considerations to guide a party's voluntary request and a judge's discretionary grant of venue change. In contrast, the North Carolina statute's primary purpose is the disapproval of forum-selection clauses and the preservation of jurisdiction in the home forum.[143] The separate legal and policy considerations that these two laws address contrast with the federal and state laws in *Hanna*, which both concerned the pointed legal issue of who could receive a service of summons and complaint.[144] Thus, the Supreme Court's *Erie* analysis should begin with a determination that the federal

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[138] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 34 (1988) (Scalia, J., dissenting).

[139] *See* Lederman, *supra* note 27, at 453 ("Somehow the Court found that section 1404(a) is broad enough to occupy the field in which the state law operates . . . Even less apparent is how section 1404(a) analysis controls the treatment of forum-selection clauses when the statute never addresses them.").

[140] *See* Holt, *supra* note 87, at 1945–51 (proposing creation of a "single Federal Rule that would be defendants' only available means to enforce forum selection clauses in federal court").

[141] *Id.* at 1932.

[142] 28 U.S.C. § 1404(a) (2006).

[143] N.C. GEN. STAT. § 22B-3 (2011).

[144] Hanna v. Plumer, 380 U.S. 460, 461 (1965).

transfer statute is not directly on point for the issue of forum-selection clause enforcement.

4. The Entrance of Byrd v. Blue Rural Ridge Electric Cooperative, Inc. Without a federal rule directly on point, the Supreme Court's analysis will follow the line of reasoning found in *Byrd*.[145] The analysis in *Byrd* controls when a federal rule does not directly conflict with the state law at issue.[146] The *Byrd* Court addressed the question of whether a court in a federal diversity action should apply South Carolina state law—which would provide a judge's determination of employer statutory immunity—or whether the plaintiff was entitled, pursuant to federal law, to a jury trial under the Seventh Amendment.[147]

Under *Byrd*, the first question was whether the state law on a judge's determination of immunity was "bound up" in "state-created rights and obligations," in which case state law applied, or whether it was a mere "form and mode" of enforcement *and* outcome-determinative.[148] If the state law is a mere form and mode of enforcement but not outcome-determinative, or if federal policies outweigh the application of state law, then federal law applies.[149] The Court found that the South Carolina law allowing for a judge's determination of immunity was "merely a form and mode of enforcing the immunity" and "not a rule intended to be bound up with the definition of the rights and obligations of the parties."[150] Because the state rule was not bound up, the Court turned to the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."[151] In light of this federal interest, the Court held that federal law and the Seventh Amendment right to a jury trial controlled.[152]

In the context of our lawnmower litigation, the North Carolina law declining to enforce forum-selection clauses is more aptly

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[145] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

[146] *See id.* at 535, 537 (analyzing the *Erie* question with regards to the South Carolina Workmen's Compensation Act and the Seventh Amendment right to jury trial).

[147] *Id.* at 533–34, 537.

[148] *Id.* at 535–36.

[149] *Id.* at 535–38.

[150] *Id.* at 536.

[151] *Id.* at 538.

[152] *Id.* at 538–39.

described as a "form and mode" of enforcement as opposed to a rule "bound up with the definition of the rights and obligations of the parties."[153] Parties look to the rule for the procedural purpose of maintaining control of the venue despite the forum-selection clause. The parties are not *guaranteed* any sort of substantive victory by the statute's prevention of forum-selection clause enforcement. Thus, while the rule has some substantive properties, it is more properly categorized as procedural and a form and mode of enforcement of the parties' substantive rights because it determines which venue will adjudicate these substantive rights.[154]

Though the state rule is most likely a form and mode of enforcement, it still controls if it is outcome-determinative—meaning that it affects whether the litigants prefer state or federal court unless pertinent federal policies tip the balance in favor of the federal law.[155] In contrast to the state and federal rules in *Byrd*, which merely concerned whether a judge or a jury would decide the issue of immunity and, thus, would not have a significant impact on a litigant's choice of state or federal court,[156] the North Carolina statute would clearly affect the forum—federal or state—in which the North Carolina landscaping business would file suit. If the North Carolina company knows that by filing in state court it can take advantage of the state statute that will prevent the court from transferring the suit to New York and litigate on its home turf, this state law is outcome-determinative in that it affects a litigant's choice of venue at the front-end.[157]

The final element of the *Byrd* analysis weighs the competing federal and state policies posed by the conflicting federal and state

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[153] *Id.* at 536.

[154] *See* Richard D. Freer & Thomas C. Arthur, *The Irrepressible Influence of* Byrd, 44 CREIGHTON L. REV. 61, 64 (2010) (noting that a procedural tool "may be designed—for substantive policy reasons—to make it easier in a close case for one side to prevail").

[155] *Byrd*, 356 U.S. at 536–40.

[156] *See id.* at 540 ("We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome.").

[157] *See* Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for* Erie *Purposes*, 89 COLUM. L. REV. 1068, 1079 (1989) (discussing how under Justice Harlan's approach, if "primary behavior" is affected by the state rule, then the state rule is "substantive and state law controls").

rules.[158] Under *Byrd*, the state law in our hypothetical case is most likely procedural, but considering the strong outcome-determinative nature of the conflicting state and federal laws, as well as the lack of any overwhelming federal policies in favor of the federal rule, there does not appear to be a risk of the balance tipping in favor of federal law. In *Stewart*, the Court instructs lower courts facing a motion to transfer under § 1404(a) to conduct a balancing test weighing "a number of case-specific factors" with the "presence of a forum-selection clause" being just one aspect of judicial consideration.[159] These instructions are a far cry from a hypothetical definitive federal policy in favor of forum-selection clauses, especially compared with the federal policy delineating the respective roles of judges and juries at issue in *Byrd*. Also, while *The Bremen* seeks to enforce forum-selection clauses so long as they are not deemed unjust or unreasonable,[160] the case's admiralty jurisdiction and international context[161] severely limit any broad applicability. In the absence of a strong, general federal policy favoring the enforcement of forum-selection clauses, this revised *Erie* analysis suggests that the Court's *Erie* analysis in *Stewart* reached the wrong result in applying federal law due to the significant risk of forum shopping and the inequitable outcome-determinative effect of state versus federal law.

Under this revised *Erie* analysis, the North Carolina federal court in our hypothetical case will apply state law disfavoring forum-selection clauses when the defendant manufacturer moves to enforce the forum-selection clause with a Rule 12 motion to dismiss. Thus, the result of the litigation will no longer depend on the fortuity of diversity that allows access to the federal courts. With state law and federal practice aligned, the *Erie* problems and the inequitable administration of laws arising out of *Stewart* will become legal relics.

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[158] *Byrd*, 356 U.S. at 538–40.

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

[160] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

[161] *Id.* at 3–4.

B. A JUDICIAL SOLUTION TO THE PROPER-MOTION CIRCUIT SPLIT

A revised *Erie* analysis selecting state law for forum-selection clause enforcement will resolve the proper choice of law circuit split, but the issue of which Rule 12 motion to dismiss is proper for forum-selection clause enforcement remains.[162] To solve the split among the federal circuits with a judicial solution, the Supreme Court will need to grant certiorari in a case like the one involving the North Carolina landscaping business and address which motion is the preferable vehicle for enforcement.

While at first glance the implications of the proper-motion circuit split seem relatively minor when compared to the inequitable *Erie*-based outcomes involved in the choice of law circuit split, the proper-motion problem does have significant repercussions for litigants. For example, a lack of uniformity among the federal circuits regarding the proper motion for forum-selection clause enforcement brings uncertainty and instability to international commercial agreements.[163] Also, if the circuit is unclear on which federal rule is the proper motion, a litigant who unknowingly moves under the wrong procedural vehicle—such as Rule 12(b)(6) rather than Rule 12(b)(3), which a party can unwittingly waive[164]—can inadvertently waive the enforcement of the forum-selection clause. Moreover, the current "federal system" surrounding forum-selection clause enforcement "completely undermines one of the central purposes of forum-selection clauses—to provide predictability, stability, and foreseeability to a contractual relationship."[165] Thus, certainty among the federal circuits serves the important purpose of providing uniformity, confidence, and the opportunity for satisfaction of the contracting parties' legitimate expectations.

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[162] *See* discussion *supra* Part II.B.2.

[163] *See* Lee, *supra* note 12, at 690–91 (noting that the various "procedural measures" currently available to defendants do not "uniformly and with certainty" give effect to forum-selection clauses).

[164] *See* FED. R. CIV. P. 12(h)(1) (noting the ways in which a party can waive defenses found in Rules 12(b)(2)–(5)).

[165] Wright, *supra* note 109, at 1627.

1. Rule 12(b)(6) as the Proper Motion for Forum-Selection Clause Enforcement. The Supreme Court should adopt the Rule 12(b)(6) motion as the proper motion for enforcement of forum-selection clauses. Although only three federal circuits seem to have shown support for the Rule 12(b)(6) dismissal motion in enforcing forum-selection clauses,[166] important legal and policy considerations weigh in favor of the Court adopting this Rule 12 motion as the proper vehicle to resolve this circuit split.

First, Rule 12(b)(6) makes the most legal sense because unlike the Rule 12(b)(3) motion, it does not suggest that venue in the non-contractually designated forum is improper.[167] In relying on § 1404(a) (the discretionary motion to transfer), rather than § 1406 (the motion to transfer when venue is improper), the Supreme Court in *Stewart* implied that a forum-selection clause does not render venue in the plaintiff's chosen forum improper.[168]

Moreover, a Rule 12(b)(6) motion is the more logical choice over 12(b)(3) because parties cannot privately contract around the statutory grant of venue.[169] In fact, the *Stewart* Court gave credence to this proposition, stating that "the District Court properly denied the motion to dismiss the case for improper venue under . . . § 1406(a) because respondent [New Jersey corporation] apparently does business in the Northern District of Alabama."[170] This dicta from the Court indicates that parties cannot contract around the jurisdiction they have forged through their own personal contacts and business activity.

Further, there are distinct "practical implications for the question of waiver of a venue objection" with regard to the 12(b)(6) motion.[171] An objection to improper venue under Rule 12(b)(3) or

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[166] *See supra* note 86 and accompanying text.

[167] *See* FED. R. CIV. P. 12(b)(3) (motion to dismiss for improper venue).

[168] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988) ("We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause . . . .").

[169] *See* 14D WRIGHT, MILLER & COOPER, *supra* note 38, § 3803.1 (arguing that the *Stewart* Court "strongly implies that Congress' determination of where venue lies cannot be trumped by private contract").

[170] *Stewart*, 487 U.S. at 28 n.8.

[171] 14D WRIGHT, MILLER & COOPER, *supra* note 38, § 3803.1.

§ 1406(a) is waived if not timely asserted,[172] but defendants using Rule 12(b)(6) and § 1404(a) are not threatened by waiver limitations.[173] This allows the parties to give maximum effect to their contractual forum-selection clauses. Thus, these waiver restrictions also provide support for the adoption of the 12(b)(6) motion as the proper vehicle for enforcement rather than the 12(b)(3) motion.

A Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction is similarly inappropriate because subject-matter jurisdiction depends on whether a court has authority, either by statute[174] or from the Constitution,[175] to hear a claim. In contrast to Rule 12(b)(6), which looks to the particular parties and their unique claims of relief, Rule 12(b)(1) is a creature of federal statutory and constitutional law independent from the parties' individual case.

Further, Rule 12(b)(6) is the more desirable solution because it does not require legislative action. The congressional climate today seems to lend itself more readily to judicial solutions rather than new legislative initiatives. Thus, the 12(b)(6) motion stands out as the proper motion among the Rule 12 motions and as a viable alternative to enforce forum-selection clauses when § 1404(a) is not available or not a preferable procedural vehicle for defendants.

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[172] *See* 28 U.S.C. § 1406(b) (2006) ("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."); FED. R. CIV. P. 12(h)(1) (providing that venue objections are waivable defenses unless raised in responsive pleading or by motion under Rule 12); *see also* Steward v. Up N. Plastics, Inc., 177 F. Supp. 2d 953, 958 (D. Minn. 2001) ("Even if the Court were inclined to consider defendants' motion under § 1406 or otherwise treat the motion as one under Rule 12(b)(3), the Court would find that defendants have waived their objection to venue. It is well-established that venue objections must be made in a timely fashion.").

[173] *See* Stoffels *ex rel.* SBC Concession Plan v. SBC Commc'ns, Inc., 430 F. Supp. 2d 642, 649 (W.D. Tex. 2006) (observing that "the Rule 12(b)(6) defense is so basic that it cannot be waived").

[174] *See* 28 U.S.C. §§ 1331, 1332(a) (2006) (granting federal courts subject-matter jurisdiction over questions of federal law and diversity cases).

[175] Article III of the Constitution defines the various categories in which federal subject-matter jurisdiction is constitutional. U.S. CONST. art. III, § 2(1)–(2).

2. Rule 12(b)(6) and the Hypothetical Jurisdiction Problem. One criticism of the Rule 12(b)(6) motion as the solution to the proper-motion circuit split is that after the Court's decision in *Steel Co. v. Citizens for a Better Environment*,[176] enforcing a forum-selection clause with a 12(b)(6) motion would amount to an exercise of the repudiated practice of "hypothetical jurisdiction."[177] Under the doctrine of hypothetical jurisdiction, courts would "proceed immediately to the merits question, despite jurisdictional objections, at least where (1) the merit question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied."[178] *Steel Co.* rejected the doctrine of hypothetical jurisdiction, which had the effect of denouncing common practices in the lower courts like "assum[ing] jurisdiction and then dismiss[ing] a case on 12(b)(6) grounds."[179] This practice was considered to reach the merits before addressing the necessary prerequisite of Article III jurisdiction, an issue separate from the merits.[180] Thus, an argument exists that the Rule 12(b)(1) or Rule 12(b)(3) motions to dismiss, as jurisdictional defenses, are more appropriate than Rule 12(b)(6) for forum-selection clause enforcement in light of the Supreme Court's pronouncement on "decisional sequencing."[181] Within the limited context of forum-selection clause enforcement, however, the Rule 12(b)(6) motion remains a viable option as a solution to this proper-motion circuit split, even in the post-hypothetical jurisdiction world.

In cases following its decision in *Steel Co.*, the Court has left discretion to the district courts to rule on non-merits issues in the order they see fit. The Court held in *Ruhrgas AG v. Marathon Oil Co.*[182] that in federal court "there is no unyielding jurisdictional hierarchy" and a court can resolve personal jurisdiction before

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176 523 U.S. 83 (1998).

177 *Id.* at 93–94.

178 *Id.* at 94.

179 Peter B. Rutledge, *Decisional Sequencing*, 62 ALA. L. REV. 1, 5 (2010).

180 *Steel Co.*, 523 U.S. at 94.

181 *See* Rutledge, *supra* note 179, at 1 ("Decisional sequencing concerns the extent to which legal rules constrain—and do not constrain—the order in which judges and other quasi-judicial actors (like arbitrators) decide matters before them.").

182 526 U.S. 574, 578 (1999).

subject-matter jurisdiction.[183] In the same vein, the Court held in *Sinochem International Co. v. Malaysia International Shipping Corp.*[184] that "a district court has discretion to respond at once to a defendant's forum non conveniens plea" and can do so before responding to jurisdictional matters.[185] These cases demonstrate that *Steel Co.* can be read narrowly to allow for a judge's discretion in deciding procedural motions concerning non-merits issues before jurisdictional issues.[186] After *Sinochem*, a court can grant a motion for forum non conveniens before deciding jurisdictional matters, so a logical progression implies that a court can, as a preliminary matter, also grant a Rule 12(b)(6) motion to enforce a forum-selection clause because this motion concerns a similar non-merits determination.

Support for the conclusion that a 12(b)(6) motion to enforce a forum-selection clause concerns a procedural, non-merits determination follows from the Supreme Court's decision in *Scherck v. Alberto-Culver Co.*[187] There, the Court found that an arbitration agreement contained within a larger contract is actually "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[188] This idea that an arbitration agreement is a procedural contract contained within a separate contract is called the doctrine of separability.[189] The doctrine of separability "divides the agreement into two distinct bargains: the arbitration agreement and the rest of the agreement."[190] The "rest of the agreement" represents the substantive aspect of the parties' agreement, while the arbitration agreement is the procedural, non-merits aspect of the parties' agreement. Applying this arbitration principle to forum-selection clauses more generally, a 12(b)(6) motion to enforce a forum-selection clause would implicate only

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[183] *Id.*

[184] 549 U.S. 422 (2007).

[185] *Id.* at 425 (emphasis omitted).

[186] *See* Rutledge, *supra* note 179, at 5 (noting that *Ruhrgas* and *Sinochem* both demonstrate this broad grant of discretion to district courts).

[187] 417 U.S. 506 (1974).

[188] *Id.* at 519.

[189] Steven Walt, *Decision by Division: The Contractarian Structure of Commercial Arbitration*, 51 RUTGERS L. REV. 369, 381 (1999).

[190] *Id.*

the procedural and separable provision of the parties' contractual dispute. Thus, the use of a Rule 12(b)(6) motion to make this limited determination would not transgress into an exercise of hypothetical jurisdiction and, consequently, squares with the Court's pronouncement in *Steel Co.*

C. PROBLEMS ASSOCIATED WITH A LEGISLATIVE SOLUTION

One type of proposed solution to the forum-selection clause enforcement circuit split is a federal legislative enactment specifically designed to function as a vehicle for forum-selection clause enforcement.[191] Each of these legislative solutions, however, assumes that federal law controls the issue of forum-selection clause enforcement. The reliance of these proposals on federal law is based on the Supreme Court's holdings in *Stewart* with respect to § 1404(a)[192] and in *The Bremen* with respect to motions to dismiss.[193] However, as argued by Justice Scalia in his dissenting opinion in *Stewart*[194] and at least one other commentator,[195] the Supreme Court's *Erie* analysis in *Stewart* is misguided in concluding that currently-enacted federal law,

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[191] *See* Taylor, *supra* note 57, at 791 (advocating amendments to Title 28 of the United States Code); Holt, *supra* note 87, at 1945 (arguing for a new Federal Rule of Civil Procedure that would extend and modify *The Bremen*'s standard for enforcement); Lee, *supra* note 12, at 691 (advocating a federal statute mandating enforcement).

[192] *See, e.g.*, Taylor, *supra* note 57, at 791 (proposing a "mechanism for reform" for forum-selection clause enforcement based on *Stewart*'s treatment of § 1404(a)); Holt, *supra* note 87, at 1945–46 (stating that the "ideal solution" to forum-selection clause enforcement is a new Federal Rule of Civil Procedure tailored to forum-selection clauses based on the framework from *The Bremen*).

[193] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

[194] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 39 (1988) ("Under the twin-aims test, I believe state law controls the question of the validity of a forum-selection clause between the parties.").

[195] *See* de By, *supra* note 157, at 1068, 1084 (advocating that the enforcement of forum-selection clauses under 12(b)(3) is a substantive question for purposes of an *Erie* analysis and, consequently, that state law should control the issue of whether a court should enforce the clauses). The analysis in de By's Note in many ways tracks this Note's argument concerning the *Erie* question; however, de By did not address the proper-motion split and focused his Rule 12 analysis solely on Rule 12(b)(3). *Id.* at 1070. This may be because his Note was published just one year after *Stewart*, so the lower courts had not yet reacted to the decision and the split did not yet exist. *Id.* at 1068. Now, more than twenty years later, the forum-selection clause issue still plagues the courts, and the need for a clearer standard is evident.

specifically § 1404(a), sufficiently governs the issue of forum-selection clause enforcement through the decision whether to transfer venue.[196]

A congressional act to resolve the proper-motion and proper choice of law circuit splits would result in federal law controlling how courts resolve the issue of forum-selection clause enforcement; however, a legislative solution would still have to resolve the same choice of law conflicts that currently beleaguer the lower courts.[197] Thus, the Court should conduct a revised review of the *Erie* analysis found in the *Stewart* majority opinion to provide guidance on the preferred choice of law rule.

A judicial solution to the proper choice of law circuit split is more desirable than a legislative solution for two additional reasons. First, a solution involving carefully crafted federal legislation that, in an effort to cure the choice of law conflict between state and federal courts, considers the possibility of state law opposing forum-selection clauses would not always bypass the *Erie* problem. For example, a new Federal Rule of Civil Procedure designed specifically for forum-selection clause enforcement could attempt to ameliorate the current *Erie* problem by calling for federal courts to refuse enforcement of a forum-selection clause if "the state in which the court resides has declared an unambiguous policy against the enforcement of such clauses."[198] The *Erie* problem, however, would persist in states like South Carolina, where in 2004 two different federal judges sitting on the bench in the District Court of South Carolina reached opposite conclusions as to whether South Carolina maintains a policy against the enforcement of forum-selection clauses.[199] Thus, despite South Carolina maintaining a policy, albeit weak, against forum-selection clause enforcement, this proposed legislative solution might cause a different result in federal court versus state court in South Carolina based merely on the "accident of diversity."[200]

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[196] *Stewart*, 487 U.S. at 32.

[197] *See* discussion *supra* Part II.B.*1*.

[198] Holt, *supra* note 87, at 1946.

[199] *See supra* note 95 and accompanying text.

[200] *See* Holt, *supra* note 87, at 1949 (discussing the weaknesses of his legislative solution).

Second, a legislative solution is less desirable than a judicial solution because the legislative impetus that would be required to draft legislation dealing with a nuanced issue like forum-selection clauses is highly unlikely in this age of congressional gridlock.[201] The current congressional climate is defined by this legislative stalemate, with the second half of President Obama's first term dubbed the "politics of paralysis" concerning everything from "jobs and debt" to "healthcare and education."[202] Thus, a judicial solution is preferable to a legislative solution considering the significant momentum required to garner enough congressional approval to enact legislation in today's political environment.

IV. CONCLUSION

The circuit split among the federal courts concerning the issue of forum-selection clause enforcement is multi-dimensional. First, the circuits are split regarding the proper choice of law when enforcing a forum-selection clause in federal court due to the *Erie* tensions that arise when a state policy against enforcing forum-selection clauses contradicts federal law, creating inequitable results based on the happenstance of diversity. Second, the circuits are in disagreement regarding the proper motion for defendants to employ when seeking enforcement of forum-selection clauses. The Supreme Court should resolve these circuit splits in light of the need for predictability in litigation and horizontal uniformity among the federal courts.[203]

A judicial solution would attack the source of this circuit split: the Court's misguided *Erie* analysis in *Stewart*. Not only did the

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[201] *See* SARAH A. BINDER, STALEMATE: CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK 2 (2003) ("In many ways, stalemate, a frequent consequence of separated institutions sharing and competing for power, seems endemic to American politics.").

[202] Peter Baker, *Standstill Nation*, N.Y. TIMES, June 19, 2011, at WK1.

[203] *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 226 (8th ed. 2002) ("The Supreme Court often, *but not necessarily*, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of *federal* law . . . One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals. Hence a square and irreconcilable conflict of this nature *ordinarily* should be enough to secure review, assuming that the underlying question has substantial practical importance." (emphasis and citation omitted)).

Supreme Court err in concluding that federal law controls the enforcement of forum-selection clauses under § 1404(a), but because the Court did not address the use of Rule 12 motions to enforce forum-selection clauses, the lower courts are left without guidance concerning the proper motion for enforcement. The Supreme Court's revised *Erie* analysis directing that state law regarding forum-selection clause enforcement control would resolve the clash between federal enforcement of forum-selection clauses and some states' policies declining enforcement. Moreover, guidance from the Court regarding its approval of Rule 12(b)(6) would create intra-circuit uniformity when defendants seek enforcement of forum-selection clauses through means other than the federal transfer statute.

Kelly Amanda Blair