by Arturo V. Bauermeister

Are Rule 12(B)(6) Motions Still Appropriate Mechanisms for Enforcing Forum-Selection Clauses?

Judge Richard A. Posner, who has decried the growing "internal complexity" of federal jurisprudence,[1] might agree that the procedure for enforcing a forum-selection clause in federal court could be simpler. The courts of appeals once disagreed over the correct mechanism to enforce forum-selection clauses. Most appellate courts had held that Federal Rule of Civil Procedure 12(b)(3), which regulates dismissal for improper venue, controlled the enforcement of forum-selection clauses.[2] The minority view, spearheaded by the First Circuit and followed by the Third Circuit, had treated such dismissal requests as alleging the failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).[3]

Last term, the U.S. Supreme Court simplified matters, holding in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*[4] that an action cannot be dismissed for improper venue—whether under Rule 12(b)(3) or 28 U.S.C. § 1406(a), which is used to transfer venue within the federal system if the chosen venue is "wrong"—based on a forum-selection clause.[5] This prohibition applies to all forum-selection clauses, regardless of whether they point to a particular federal district or a state or foreign tribunal. "Whether venue is wrong or improper," Justice Samuel Alito wrote for a unanimous Court, "depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause."[6] *Atlantic Marine* thus overruled the majority view, which, as noted, had equated enforcement of forum-selection clauses with the propriety (or not) of venue.

From now on, the Court held, a motion to transfer under 28 U.S.C. § 1404(a) supplies the "mechanism for enforcement of forum-selection clauses that point to a particular federal district."[7] Confronting the more complicated question of whether forum-selection clauses pointing to a nonfederal forum could also be enforced through section 1404(a), the Court then clarified that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens"[8]—through a motion to dismiss for forum non conveniens.

Atlantic Marine left unanswered, however, the question of whether a defendant may also use Rule 12(b)(6) to enforce a forum-selection clause. Professor Stephen E. Sachs, as amicus, pressed the Court on this point, arguing that "a defendant in a breach-of-contract action should be able to obtain dismissal under Rule 12(b)(6) if the plaintiff files suit in a district other than the one specified in a valid forum-selection clause."[9] But because neither party had invoked Rule 12(b)(6), the Court sidestepped the issue. The Court nonetheless hastened to add, in a footnote, that Rule 12(b)(6) motions, contrary to section 1404(a) motions or the forum non conveniens doctrine, "may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise."[10] So "[e]ven if Professor Sachs is ultimately correct," the Court stated, a defendant "would have sensible reasons to invoke § 1404(a) or the forum non conveniens doctrine in addition to Rule 12(b)(6)."[11]

Rule 12(b)(6) poses other procedural difficulties that complicate this area of federal procedure. For one thing, "[u]nder the Supreme Court's standard for resolving motions to dismiss based on a forum-selection clause, the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis."[12] For another, this rule limits the documents that a district court may permissibly consider.[13] And because a Rule 12(b)(6)motion "may be raised at any time in the proceedings before disposition on the merits,"[14] it can lead to gamesmanship.[15]

Be that as it may, the good news is that courts of appeals will henceforth evaluate forum-selection clauses under both section 1404(a) and the forum non conveniens doctrine, eschewing the Rule 12(b) analysis.[16] Yet the same does not hold true for the First and Third circuits, for they may continue to sanction the use of Rule 12(b)(6) to evaluate forum-selection clauses—at least for now. Last December, the First Circuit Court of Appeals did just that: "[A]bsent a clear statement from the Supreme Court to the contrary," it reasoned, "the use of Rule 12(b)(6) … is still permissible in this Circuit, and we will not decline to review or enforce a valid … clause simply

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because a defendant brought a motion under 12(b)(6) as opposed to under § 1404 or forum non conveniens."[17] The Third Circuit Court of Appeals has not yet taken a stance on this point, but its districts have employed different methods for applying forum-selection clauses. At least one district court has gone as far as characterizing a 12(b)(6) motion as one to transfer under section 1404(a), another has continued applying Rule 12(b)(6), and a third one took the conservative approach of applying both 12(b)(6) and the forum non conveniens doctrine.[18]

The upshot is that federal practitioners, especially those who litigate in the First and Third circuits, should take note of the continued vitality of using Rule 12(b)(6) motions to evaluate forum-selection clauses. Although the use of Rule 12(b)(6) motions creates unnecessary complications, perhaps the safest approach might be to move under section 1404(a) or forum non conveniens and, in the alternative, under 12(b)(6). ⊙

Endnotes

[1]Richard A. Posner, Reflections on Judging 1-17 (2013).

[2]Edward S. Sledge, IV, Christopher S. Randolph, Jr., *Maneuvering to Terrain: Enforcement of Forum-Selection Clauses After Atlantic Marine*, 75 Ala. Law. 228, 230 n. 18 (2014) (collecting circuit case law on this point).

[3]*Silva v. Encyclopedia Britannica Inc.,* 239 F.3d 385, 387 (1st Cir. 2001); *Salovaara v. Jackson Nat. Life Ins. Co.,* 246 F.3d 289, 298 (3d Cir. 2001).

[4]134 S. Ct. 568 (2013).

[5]*Id.* at 580 (internal quotation marks omitted).

[6]*Id.* at 577.

[7]*Id.* at 579.

[8]*Id.* at 580.

[9]*Id.*

[10]*Id.* at 580 n. 4.

[11]*Id.*

[12]*Argueta v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996).

[13]*See, e.g.*, *Rivera v. Centro Medico de Turabo Inc.,* 575 F.3d 10, 15 (1st Cir. 2009) (so holding in the forum-selection clause context).

[14]*Silva*, 239 F.3d at 388.

[15]*See, e.g.*, *Sucampo Pharm. Inc. v. Astellas Pharma Inc.,* 471 F.3d 544, 549 (4th Cir. 2006) ("Allowing this strategy could result in a waste of judicial resources and allow defendants to 'test the waters' of the plaintiff's chosen forum, before invoking their rights under the forum-selection clause.").

[16]*See Martinez v. Bloomberg LP*, 740 F.3d 211, 216 (2d Cir. 2014) (noting that *Atlantic Marine* "held that generally 'the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens,' rather than Rule 12(b)." (quoting *Atlantic Marine*, 134 S.Ct. at 580)) *see also Pappas v. Kerzner Int'l Bahamas Ltd.*, 585 F. App'x 962, 964 (11th Cir. 2014).

[17]*Claudio-De Leon v. Sistema Universitario Ana G. Mendez*, 775 F.3d 41, 46 n. 3 (1st Cir. 2014).

[18]*Lieberman v. Carnival Cruise Lines*, No. CIV. A. 13-4716 JLL, 2014 WL 3906066, at *1 (D.N.J. Aug. 7, 2014); *Wolfe v. TBG Ltd.*, No. 13-3315, 2014 WL 325637, at **1-2 (E.D. Pa. Jan. 28, 2014); *Mark IV Transp. & Logistics Inc. v. Nat'l Indep. Contractor Ass'n*, No. 2:13-02614 WJM, 2014 WL 69890, at **2-5 (D.N.J. Jan. 9, 2014).

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percentage of clients. With a universal representation model, success is gauged by increasing the number of individuals with counsel, which also leads to an increase in grant rates given data that shows higher approval rates for detainees who have representation.

At the same time, detainees who are not eligible to remain in the United States will receive accurate information about their cases, support in the steps they need to take to prepare to leave the United States, and representation before the Immigration Court and U.S. Immigration and Customs Enforcement (ICE). In this way, they will spend shorter periods of time in detention and will better understand their options.

Like NYIFUP, FRINJ is currently in pilot format and will be limited in scope, with a plan to grow with additional funding and possibly partnering with other organizations. Prior to the pilot, AFSC represented approximately 60 detained clients (15 clients per year) before the detained court in Elizabeth, with a similar number before the detained court in Newark. In 2015, AFSC expects to represent at least 200 immigrants before the Elizabeth Immigration Court. These cases include clients with short hearings to accept deportation orders or voluntary departure as well as clients with longer, more intensive cases who are seeking relief including asylum, cancellation of removal, and so on.

These innovative new programs may represent the future of immigration defense before detained courts nationwide. They not only ensure fairness for those they affect by providing free, high-quality legal representation and in many cases preventing deportation, but they also expose the staggering financial incentives in providing counsel. It costs the U.S. government roughly $164 a day to detain noncitizens.[4] Where parents and spouses of U.S. citizens are deported, those who remain struggle financially and often rely on public benefits for basic needs to be met, and the emotional impact on families and their communities is felt for years after the deportation.

NYIFUP and FRINJ will certainly serve as models for the rest of the country to follow. Providing counsel to indigent detained respondents not only makes financial sense for the government but is the fair and equitable thing to do. Universal representation is critical to protecting the rights of uniquely vulnerable populations and promotes the integrity of the immigration system. ⊙

Endnotes

[1]*Padilla v. Kentucky,* 559 U.S. 356, 365 (2010).

[2]*Id.* at 373 (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 390–91 (1947)).

[3]Steering Committee of the New York Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 393 (2011) (*available at* www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf).

[4]Detention Watch Network, *About the U.S. Detention and Deportation System* (*available at* www.detentionwatchnetwork.org/resources).