

## FIDELITY AND SURETY

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### IN THIS ISSUE

*G. Steven Ruprecht and Diane Hastings Lewis review the Supreme Court's recent ruling on the enforceability and method of enforcement of forum selection clauses in federal court, and the case's impact on sureties thus far.*

## ENFORCING FORUM SELECTION CLAUSES AFTER *ATLANTIC MARINE*

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Forum-selection and choice of law clauses have long been important components of construction contracts, as projects frequently involve owners, contractors, subcontractors and suppliers from jurisdictions beyond the location of the project. And, while the site of the project may provide key evidence to the case and the on-site workers may be the main witnesses, parties who operate nationwide are often hesitant to risk litigation far from home. Hence owners, contractors, subcontractors, and suppliers may include contractual terms requiring disputes arising out of the project to be resolved in their home jurisdiction, regardless of how far away from the project that may be.

Contractual forum-selection has required federal courts to adapt existing rules regarding venue and transfers when lawsuits are filed outside of the selected forum. The uncertainty in applying these rules has resulted in different results in different jurisdictions. Jason Lien provided an excellent and comprehensive analysis of these issues in anticipation of the United States Supreme Court's review of *Atlantic Marine* in his Summer 2013 article *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of Atlantic Marine*.<sup>1</sup> Mr. Lien addressed many of the uncertainties associated with forum-selection clauses and choice of law issues, and explained how state law affects enforcement of forum-selection clauses. He concluded in outlining the issues before the United States Supreme Court in *Atlantic Marine*,<sup>2</sup> a case out

of the United States Court of Appeals for the Fifth Circuit which involved forum-selection clause enforcement. The Supreme Court was poised to resolve several issues regarding the enforceability of forum-selection clauses and the procedure for enforcement.

The Supreme Court has now issued its opinion in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,<sup>3</sup> on December 3, 2013. The decision provides certainty that forum-selection clauses will be enforced in federal courts, and underscores the importance of being aware of forum-selection clauses when entering into a contract should that contract place venue in a distant jurisdiction.

## I. Background

In *Atlantic Marine*, J-Crew Management, Inc., a Texas corporation, entered into a subcontract with Atlantic Marine Construction Co., a Virginia corporation, to perform work on a child-development center at Fort Hood in Killeen, Texas.<sup>4</sup> The parties' contract—drafted by Atlantic Marine—placed venue in the Circuit Court for the City of Norfolk, Virginia or in the United States District Court for the Eastern District of Virginia. After a payment dispute arose, J-Crew Management filed a lawsuit against Atlantic Marine in the United States District Court for the Western District of Texas, relying on diversity between the parties as the grounds for federal court jurisdiction.

<sup>1</sup> Vol. 33, *The Construction Lawyer*, Summer 2013, at 27.

<sup>2</sup> *In re Atl. Marine Constr. Co., Inc.*, 701 F.3d 736 (5th Cir. 2012), cert. granted, 133 S. Ct. 1748, 185 L. Ed. 2d 784 (U.S. 2013) and *rev'd sub nom. Atl. Marine*

*Const. Co., Inc. v. U.S. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (U.S. 2013).

<sup>3</sup> 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013).

<sup>4</sup> *U.S. ex rel. J-Crew Mgmt., Inc. v. Atl. Marine Const. Co., Inc.*, A-12-CV-228-LY, 2012 WL 8499879 (W.D. Tex. Aug. 6, 2012).

Pointing to the forum-selection clause in the parties' subcontract, Atlantic Marine moved to dismiss the action under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a).<sup>5</sup> In the alternative, Atlantic Marine requested that the court transfer the case to the United States District Court for the Eastern District of Virginia, Norfolk Division under 28 U.S.C. § 1404(a). The district court determined that Atlantic Marine's sole mechanism for enforcing the forum-selection clause was § 1404(a), which permits "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it may have been brought or to any district or division to which all parties have consented."<sup>6</sup> But, it concluded that the forum-selection clauses was only one of many considerations and not determinative. The court burdened Atlantic Marine with establishing that transfer to Virginia was proper.<sup>7</sup>

The district court proceeded to analyze the private and public interest factors favoring jurisdiction in Texas or Virginia. The location of the project and witnesses in Texas were counted in favor of the court retaining jurisdiction in Texas, while only the parties' forum-selection clause and Atlantic Marine's books and records located in Virginia weighed in favor of transfer. The court also considered that under § 1404(a), Texas law would apply regardless whether the case was heard in Virginia or Texas, and concluded that federal courts in Texas were better equipped to apply Texas law.<sup>8</sup> Weighing the inconvenience and expense imposed on witnesses who would be forced to travel to Virginia, the location of the project in Texas, and the application of Texas law against the

parties' forum-selection clause, the district court concluded that Atlantic Marine had not met its burden and transfer was not warranted. Atlantic Marine's motion to transfer was thus denied.<sup>9</sup> The Fifth Circuit Court of Appeals denied Atlantic Marine's petition for writ of mandamus to direct the district court to transfer or dismiss the case, and Atlantic Marine petitioned the United States Supreme Court for certiorari.<sup>10</sup> The Supreme Court granted review.<sup>11</sup>

## II. Supreme Court Review

On appeal, the Supreme Court rejected Atlantic Marine's argument that venue was "wrong" or "improper" under 28 U.S.C. § 1406 or Fed. R. Civ. P. 12(b)(3), noting that whether venue is proper is statutory and not subject to change by private contract.<sup>12</sup> This was particularly a concern because such an interpretation could leave some cases with no proper venue, for example cases where forum-selection clauses designated a state or foreign venue. Thus, the Court held that forum-selection clauses are enforced under § 1404(a) to transfer cases to another federal district.<sup>13</sup>

Although traditional application of § 1404(a) required the weighing of private and public interests, the Court concluded that the analysis changes in three ways in cases where the parties have contractually designated a forum, noting that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."<sup>14</sup> First, the plaintiff's choice of forum when filing the lawsuit is not considered, as the parties are

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<sup>5</sup> *Id.* at \*1.

<sup>6</sup> *Id.* at \*5.

<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Id.* at \*6-7.

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<sup>9</sup> *Id.* at \*9.

<sup>10</sup> *In re Atl. Marine Const. Co., Inc.*, 701 F.3d 736.

<sup>11</sup> *Atl. Marine*, 133 S. Ct. 1748.

<sup>12</sup> *Id.* at 578.

<sup>13</sup> *Id.* at 579.

<sup>14</sup> *Id.* at 581-582.

deemed to have chosen their forum at the time they entered into the contract. Second, the forum-selection clause is likewise viewed to have resolved any private interest considerations between the parties, leaving only public interest factors for the court to weigh. Public-interest factors will “rarely defeat a transfer motion” under §1404(a).<sup>15</sup> In this regard, the plaintiff who filed in the non-designated venue bears the burden of proving that the venue chosen in the parties’ contract is somehow inappropriate.

Finally, unlike a typical § 1404(a) transfer of venue, a transfer to enforce a forum-selection clause does not carry with it the law of the court where the case was initially filed.<sup>16</sup> Indeed, the considerations that prompted the original rule that a §1404(a) transfer takes the law of the original forum are simply not present in forum-selection clause cases. Where the law typically follows the case to discourage a defendant from seeking a transfer to secure the benefits of laws of a different jurisdiction, the law does not follow the case in forum-selection clause transfers in order to discourage plaintiffs from deliberately filing in a court other than one authorized by the contract in order to obtain benefits greater than those originally bargained for.<sup>17</sup>

Section 1404(a) only applies to transfers from one federal court to another. If the parties’ agreed-upon venue is a state or foreign court, a party seeking to enforce a forum-selection clause must do so through the doctrine of *forum non conveniens*. As § 1404(a) is merely the codified version of *forum non conveniens*, the same balancing-of-interests standard is applicable in evaluating a motion to transfer

to a non-federal forum pursuant to a forum-selection clause.<sup>18</sup>

### III. Application to Sureties

The principles set forth in *Atlantic Marine* are already making appearances in surety cases. For example, in *Quality Custom Rail & Metal, LLC v. Travelers Cas. & Sur. Co. of Am.*,<sup>19</sup> the United States District Court for the Northern District of Texas applied *Atlantic Marine* and enforced a forum-selection clause contained in a surety bond against a non-signatory that was making a claim under the bond. In *Quality Custom Rail*, Travelers Casualty and Surety Company of America (“Travelers”) issued a surety bond for a construction project in New Orleans, Louisiana. The bond required that lawsuits under the bond be filed in the jurisdiction where the project was located. However, when Quality Custom Rail & Metal, LLC (“Quality Custom”), a subcontractor on the project, made a claim that it was not paid for labor, materials, and equipment supplied to the project, it sued Travelers in Texas state court instead of Louisiana.<sup>20</sup>

Travelers removed the suit to federal court based on diversity jurisdiction, and then filed a motion to transfer based on the forum selection clause contained in the bond. Quality Custom objected to the application of *Atlantic Marine*, arguing that the case was not applicable because Quality Custom had not agreed to the forum-selection clause contained in the bond.<sup>21</sup> The district court concluded that Quality Custom was bound by

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 583.

<sup>18</sup> *Id.* at 580 (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007)).

<sup>19</sup> 3:13-CV-3587-D, 2014 WL 840046 (N.D. Tex. Mar. 4, 2014).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*3.

the forum-selection clause contained in the bond under the direct-benefits estoppel doctrine, noting that the doctrine applies to non-signatories who have benefited from a contract but then attempt to repudiate portions of the contract when disputes arise.<sup>22</sup> Finding a valid forum-selection clause, the court thus declined to weigh the convenience of the parties and granted Travelers' motion to transfer the action to the Eastern District of Louisiana.<sup>23</sup> Additional applications of *Atlantic Marine* to surety cases will certainly follow.

In sum, a valid forum-selection clause may be enforced through a motion to transfer venue to another federal court pursuant to 28 U.S.C. § 1404(a), and the case will then adopt the law of the new forum. Owners and general contractors can have confidence that their forum-selection clauses will be enforced in federal courts, and subcontractors and suppliers must carefully consider the full import of agreeing to venue in a far-flung jurisdiction. With the additional assurance that forum-selection clauses will be enforced, sureties must be aware of these clauses in all contracts, and also be aware of the mechanism for enforcing these provisions in their contracts.

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<sup>22</sup> *Id.* at \*3-4 (citing *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517-18 (5th Cir. 2006)).

<sup>23</sup> *Quality Custom Rail*, 2014 WL 840046, \*4.



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