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A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts

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A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts

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I. INTRODUCTION: THE TALE OF STEWART, RICOH, AND CAROL

In the early 1980s, a successful and ambitious Alabama businessman named Walter H. Stewart purchased a failing local copying business. Through the Stewart Organization, a corporation he controlled, Stewart sought to steer this troubled business to the realm of profitability. To do so, he entered into a dealership contract with Ricoh Corporation, a national manufacturer of copy machines that conducted its operations in New York. Unfortunately, their relationship soured. Stewart sued Ricoh in an Alabama federal district court, basing jurisdiction on diversity of citizenship.¹

Ricoh did not want to litigate in Alabama, and the original dealership contract seemed to provide a way out. That contract included a forum selection clause stating that any litigation arising out of the agreement had to be filed in a state or federal court located in Manhattan.² Ricoh had two basic options for attempting to enforce this clause. It could move for the case to be transferred under the federal transfer statute³ to the federal district court in Manhattan.⁴ Alternatively, it could ask the court to enforce the clause by dismissing the Alabama suit.⁵ Ricoh chose to do both, but the district court, applying Alabama law to both motions, refused to enforce the clause.⁶ Ricoh preferred the application of federal law, which generally

1. *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 644–45 (11th Cir. 1985).

2. The exact language of that clause was that “[A]ny appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement” *Id.* at 645 n.2.

3. 28 U.S.C. § 1404(a) (2008).

4. The federal transfer statute only allows transfer to another federal forum, so a New York state court in Manhattan would not be a transfer option. *See infra* note 17 and accompanying text.

5. After dismissal, Ricoh could file its own complaint (or await a complaint from the North Carolina company) in either the federal or state court located in Manhattan. How exactly Ricoh should identify this motion to dismiss is a major aspect of this Note. *See infra* Part II.B.

6. *Stewart Org.*, 779 F.2d at 645.

avored enforcing forum selection clauses,⁷ and it litigated the choice-of-law issue all the way to the U.S. Supreme Court. The Court sided with Ricoh, holding that the decision to transfer is governed by federal rather than state law.⁸ Thus, in the end, Ricoh from New York prevailed over Stewart from Alabama in selecting the forum for litigation.

Notably, the Court did not address the proper choice of law for motions to dismiss, because Ricoh abandoned that particular issue after losing at the district court level.⁹ The Eleventh Circuit, nonetheless, provided guidance on this issue, suggesting in broad dicta that federal law not only determines whether forum selection clauses should be enforced through a motion to transfer, but also a motion to dismiss.¹⁰ Thus, a defendant seeking to enforce a forum selection clause through a motion to dismiss in the Eleventh Circuit would likely benefit from the application of favorable federal law, rather than state law.

Yet if this exact situation were to recur in a state located in a different federal circuit, a federal court considering a forum selection clause's enforceability could reach a dramatically different result. Assume the following scenario. Carol from North Carolina enters into a contract with Ricoh from New York, and their contract contains a forum selection clause identical to the one in *Stewart Organization, Inc. v. Ricoh Corp.* The deal falls apart, and Carol files suit in federal district court in North Carolina.¹¹ Ricoh again seeks to enforce the clause and bring the litigation home to New York. Nonetheless, Ricoh still faces the choice of bringing a motion to dismiss or a motion to transfer. If Ricoh files a motion to transfer, the North Carolina federal

7. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that forum selection clauses are "prima facie valid and should be enforced unless . . . [they are] 'unreasonable' under the circumstances").

8. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988) (requiring the application of federal law); see also *infra* notes 39–42 and accompanying text. While this holding was, in a sense, a victory for Ricoh, its attempt to move the litigation to New York was not fully successful until it obtained a writ of mandamus from the court of appeals over the recalcitrant Alabama district court. See *In re Ricoh Corp.*, 870 F.2d 570, 573–74 (11th Cir. 1989) (holding that the district court had "clearly abused its discretion" in its determination that the forum selection clause should not be enforced under federal law, and granting a writ of mandamus to transfer to New York).

9. See *id.* at 28 n.8 (noting that "the parties do not dispute that the District Court properly denied the motion to dismiss the case").

10. See *Stewart Org.*, 779 F.2d at 647 ("[V]enue in a diversity case is manifestly within the province of federal law.").

11. It is also possible that Carol could file in North Carolina state court, but that would not substantially affect the progression of litigation, because Ricoh could satisfy the federal diversity statute, 28 U.S.C. § 1332, and remove to federal court automatically under 28 U.S.C. § 1441.

court would follow *Stewart* and apply federal law in determining whether the case should be transferred.¹² As a practical matter, this would likely result in the clause being enforced through transfer to the New York federal court.¹³ However, if Ricoh files a motion to dismiss, the district court—lacking any guidance from *Stewart* on choice-of-law as to motions to dismiss—would likely apply state law in its determination as to dismissal.¹⁴ The district court would therefore apply North Carolina law,¹⁵ which disfavors forum selection clauses as a matter of public policy.¹⁶ The motion to dismiss would accordingly be denied, and the litigation would continue in North Carolina. Thus, whether Ricoh would be successful in moving litigation from North Carolina to New York would turn on the procedural device it employed to enforce the clause. Unlike *Stewart* from Alabama, Carol from North Carolina could keep the litigation in her home state, so long as Ricoh did not realize the surprising legal significance of bringing a motion to transfer instead of a motion to dismiss.

For a final variation, suppose that the forum selection clause in Carol and Ricoh's contract required litigation to be brought in a New York *state* court. The federal venue transfer statute does not allow federal courts to transfer to state courts,¹⁷ so Ricoh would have only one option under this variation: a motion to dismiss.¹⁸ However, as previously shown, the North Carolina federal district court would apply state law to a motion to dismiss the case due to the forum selection clause.¹⁹ The motion to dismiss would likely be denied, and the litigation would again remain in North Carolina. Thus, simply

12. See *Stewart Org.*, 487 U.S. at 28 (requiring the application of federal law).

13. Though the presence of the clause is not dispositive in the federal transfer analysis, it is a significant factor to be considered. *Id.* at 31; see also *infra* notes 43–46 and accompanying text.

14. See *Nutter v. New Rents, Inc.*, No. 90-2493, 1991 WL 193490, at *5–7 (4th Cir. Oct. 1, 1991) (applying state law in the analysis of a motion to dismiss to enforce a forum selection clause in a diversity case). Because North Carolina sits in the Fourth Circuit, this case is controlling precedent over the North Carolina district court.

15. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (requiring the application of the forum state's choice-of-law rules). Assume additionally that these choice-of-law rules would determine that North Carolina law would apply (perhaps because it was the place of contracting or the place of performance). Assume further that the agreement did not contain an enforceable choice-of-law clause selecting the laws of another state.

16. See *Map Supply, Inc. v. Integrated Inventory Solutions, LLC*, No. 07-733, 2008 WL 2096791, at *3 (N.C. Ct. App. May 20, 2008) (table opinion) (citing N.C. GEN. STAT. § 22B-3 (2007)).

17. See 28 U.S.C. § 1404 (allowing only for transfer to “any other district [court] or division”).

18. This motion to dismiss could specifically seek to enforce the forum selection clause, or it could similarly argue that the court should exercise its discretion to dismiss under the doctrine of *forum non conveniens*.

19. See *supra* notes 15–16 and accompanying text.

because the parties selected a state court rather than a federal one as their forum for any future litigation, Ricoh would have no means to enforce the clause at all. Carol from North Carolina would prevail in selecting the forum.

A comparison of the situations of real-life Stewart and hypothetical Carol illustrates the incoherence of forum selection clause jurisprudence. In each scenario, two diverse parties enter into a contract with a forum selection clause, and one of the parties brings suit in a contractually improper forum. However, Stewart could not depend on state law and therefore could not retain litigation in Alabama, while Carol could rely on her state's law and keep litigation in North Carolina. This inconsistency is the result of a circuit split in which some circuits—such as the Fourth Circuit that presides over Carol's litigation in North Carolina—apply state law to motions to dismiss on account of forum selection clauses, while others apply federal law in that determination.²⁰

Although illustrated here by a hypothetical, this inconsistency affects the administration of real justice on a grand scale. Empirical studies show that plaintiffs in federal civil cases are half as likely to be successful once their case has been transferred to a new forum.²¹ Additionally, the ever-increasing use of forum selection clauses in contracts implies that the determination of clause enforcement affects a growing universe of litigants.²² The combination of the increasing prevalence of these clauses and their significance in outcome determination underscores the importance of uniformity, which is currently lacking in the law.

Instead of a relying on a uniform standard, whether a federal court will enforce a forum selection clause depends on the basis of jurisdiction,²³ the fortuity of the federal circuit in which the parties are located,²⁴ the selection of a federal rather than a state (or

20. See *infra* Part II.C.

21. E.g., Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 124 (2002) (conducting multiple regression analysis to conclude that “[p]laintiffs’ win rate in federal civil cases drops from 58% in cases in which there is no transfer to 29% in transferred cases”).

22. Exact numbers are difficult to obtain, but a series of Westlaw searches for “forum selection clause” in all federal court opinions indicates a strong trend underscoring the increasing importance of forum selection clauses in federal litigation: 12 (1980); 49 (1985); 112 (1990); 148 (1995); 203 (2000); 258 (2004); 382 (2005); 536 (2006); 581 (2007).

23. As more fully explained *supra* in Part II.A, courts apply different analysis to forum selection clauses when their jurisdiction is grounded in diversity rather than in admiralty or questions of federal law.

24. See *infra* Part II.C.

international) forum,²⁵ and the procedural device the defendant employs to enforce it.²⁶ As the law currently stands, these factors may be dispositive even though they lack intuitive appeal as the proper determinants.²⁷ Worse still, an additional circuit split exists as to which of several potentially proper dismissal motions defendants should employ when seeking to enforce these clauses through dismissal rather than transfer.²⁸

This Note demonstrates that the current circuit splits on the issues of choice of law and proper dismissal motion for forum selection clauses in federal courts could both be resolved by a single, uniform approach. Part II details the creation and protraction of these circuit splits and identifies how their persistence is due to the collision of two fundamental legal principles. Part III explains how forum selection clause jurisprudence has created a logical tangle such that no judicial decision alone could fully unknot the problem. It further argues that the possibility of using either a motion to dismiss or a motion to transfer to enforce forum selection clauses has bifurcated the analysis and obscured the underlying issues. As a solution, Part IV argues for the creation of a single Federal Rule of Civil Procedure containing a uniform standard for enforcing forum selection clauses so that all federal courts use the same analysis for this important determination.

II. BACKGROUND: HISTORICAL AND THEORETICAL FOUNDATIONS OF THE CIRCUIT SPLITS

A. The Development of Federal Law on the Enforceability of Forum Selection Clauses

Although state and federal law disfavored forum selection clauses throughout much of the twentieth century,²⁹ the Supreme Court's 1972 decision in *M/S Bremen v. Zapata Off-Shore Co.*

25. When no federal forum is selected, transfer cannot be used to enforce the clause. See *supra* note 17 and accompanying text.

26. The defendant can seek to enforce it through transfer or dismissal. See *infra* Part II.B.

27. See, e.g., David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1032–34 (2008) (explaining that a “host of problems bedevil [forum selection] clause enforcement in the lower federal courts”).

28. See *infra* Part II.B.

29. E.g., 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 refused to enforce forum selection clauses and entertained cases brought in violation of such clauses. The courts’ reluctance to recognize forum selection clauses lay in the notion that parties may not diminish or oust the jurisdiction of a court through contractual agreements.”).

announced a strong federal policy in favor of enforcing such clauses.³⁰ *Zapata* involved a dispute between American and German corporations over damages that occurred to a drilling rig while it was being towed from Louisiana to the Adriatic Sea.³¹ Although the contract between the two corporations contained a forum selection clause requiring any disputes to be brought in English courts, the American corporation sued the German corporation in a U.S. district court sitting in admiralty jurisdiction.³² The German defendant moved for dismissal because of the clause.³³ Reversing the lower courts' denial of this motion,³⁴ the Supreme Court held that the forum selection clause should be enforced, declaring that "such clauses are prima facie valid and should be enforced unless . . . [they are] 'unreasonable' under the circumstances."³⁵

Two years after *Zapata*, the Court reiterated its new policy in favor of enforcing forum selection clauses. In *Scherk v. Alberto-Culver Co.*, it held that an arbitration clause must be enforced under the terms of the U.S. Arbitration Act.³⁶ In doing so, the Court cited the *Zapata* standard for federal courts' exercise of federal question jurisdiction.³⁷ Thus, in admiralty and federal question cases, forum selection clauses are generally enforceable.

This emerging trend of enforcing reasonable forum selection clauses in federal courts came to an abrupt halt in *Stewart Org., Inc. v. Ricoh Corp.*³⁸ As discussed previously, Ricoh sought to enforce the forum selection clause by filing in federal district court motions to dismiss and to transfer.³⁹ The district court denied both motions based on a state-law policy against such clauses, but the Eleventh Circuit reversed and held that federal law applied to the transfer motion.⁴⁰

30. 407 U.S. 1, 8–9 (1972).

31. *Id.* at 2–3.

32. *Id.* at 3.

33. *Id.* at 4.

34. *Id.* at 6–7.

35. *Id.* at 10. The Court acknowledged the expanding global economy, the need for American businesses to make enforceable concessions on forum, the general desire for freedom of contract, and the fact that such clauses dispense with costly uncertainties regarding where suit may be brought. *Id.* at 11–14.

36. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974) (citing 9 U.S.C. § 201).

37. *Id.* at 518–19 (explaining, in the context of a suit brought under the federal securities laws, that "an agreement to arbitrate . . . is, in effect, a specialized kind of forum-selection clause" and therefore referring to the *Zapata* standard of enforcing forum selection).

38. 487 U.S. 22, 28 (1988).

39. *Id.* at 24. The defendant moved to transfer under 28 U.S.C. § 1404(a) and moved to dismiss under 28 U.S.C. § 1406 due to improper venue.

40. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (per curiam) (en banc), *aff'd on other grounds*, 487 U.S. 22. While *Zapata* constituted a symbolic change in favor of

Because Ricoh had not appealed the denial of the motion to dismiss,⁴¹ the Eleventh Circuit and the Supreme Court analyzed only the motion to transfer. Affirming the Eleventh Circuit's decision, the Supreme Court held that federal law applies to a motion to transfer to the contractually agreed-upon forum under 28 U.S.C. § 1404(a).⁴²

In *Stewart*, the Court delineated a federal standard for considering motions to transfer that differed from the standard announced in *Zapata* and *Scherk*. Under the new *Stewart* standard, when a defendant in a diversity case seeks to enforce a forum selection clause by moving to transfer to the contractually agreed-upon federal forum, the court first looks to 28 U.S.C. § 1404(a) to determine the propriety of the transfer. That statute instructs that a court "may" transfer any civil action to a district where it might have been brought "[f]or the convenience of the parties and witnesses, in the interest of justice."⁴³ While the focus is on "convenience" and "justice," the court must also give due consideration to the existence of the clause:⁴⁴ it should enforce the clause only if the agreed-upon forum is convenient and fair in light of the parties' relative bargaining power.⁴⁵ The existence of the clause is therefore a significant, but not dispositive, factor.⁴⁶ By giving the clause only limited weight, the Court created a more nuanced standard for motions to transfer in diversity jurisdiction than the strong presumption of enforceability it had laid out for courts exercising admiralty or federal question jurisdiction.

enforcing such clauses in the federal system, it was brought in admiralty jurisdiction and was not binding precedent for federal courts generally. 407 U.S. at 3; cf. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641–42 (1981) (explaining that federal common law developed under admiralty jurisdiction is not freely transferable to other settings). Although some of *Zapata's* reasoning relied on considerations of international commerce that were perhaps more peculiar to admiralty, much of its analysis appeared to apply in non-admiralty settings. For example, the considerations of dispensing with costly uncertainties of where suit might be brought and of the general desire for freedom of contract appear quite important in the wholly-domestic setting, as well. Cf. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) (explaining that the reasoning of *Zapata* "applies with much force to federal courts sitting in diversity").

41. *Stewart Org.*, 487 U.S. at 28 n.8.

42. *Id.* at 28 (holding, under the analysis of *Hanna v. Plumer*, 380 U.S. 460 (1965), that § 1404(a) was both a sufficiently broad federal statute to control the matter and a valid exercise of congressional authority).

43. 28 U.S.C. § 1404(a) (2006).

44. See *Stewart Org.*, 487 U.S. at 29–30 ("The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.").

45. *Id.* at 29.

46. See *id.* at 31 ("The forum selection clause . . . should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).").

Justice Kennedy concurred in the *Stewart* decision, while Justice Scalia dissented. Justice Kennedy urged that the *Zapata* standard of enforcing forum selection clauses should apply in diversity cases as in admiralty and federal question cases, despite the fact that the federal transfer statute contained its own factors for consideration.⁴⁷ Meanwhile, Justice Scalia insisted that federal courts sitting in diversity should apply state law when analyzing attempts to enforce forum selection clauses through motions to transfer.⁴⁸ He first argued that § 1404(a) was not broad enough to cover what should have properly been considered a state-law contract issue.⁴⁹ Finding no direct collision between state and federal law, Justice Scalia turned to the twin aims of *Erie Railroad v. Tompkins*,⁵⁰ the seminal choice-of-law case, and argued that courts should not apply federal judge-made law.⁵¹

What no Justice addressed, however, was the possibility that a defendant might attempt to enforce a forum selection clause through a motion to dismiss rather than a motion to transfer. Because Ricoh did not pursue its attempt to enforce the clause through dismissal, the *Stewart* Court did not determine whether state or federal law should apply in diversity cases to motions to dismiss based on forum selection clauses.⁵² Nor did the *Stewart* Court provide any insight as to which of several potentially applicable foundations for a motion to dismiss under the Federal Rules of Civil Procedure is proper to enforce such a clause. Since *Stewart*, the Court has only revisited its forum selection clause jurisprudence once and only to reiterate its strong presumption of enforcing such clauses in the context of federal courts in admiralty

47. See *id.* at 33 (Kennedy, J., concurring) (explaining that the reasoning of *Zapata* “applies with much force to federal courts sitting in diversity” and arguing that its standard presuming enforceability should apply in that setting as well).

48. *Id.* at 39 (Scalia, J., dissenting).

49. *Id.* at 34–38 (Scalia, J., dissenting).

50. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

51. *Stewart Org.*, 487 U.S. at 39–40 (Scalia, J., dissenting) (arguing that the application of federal law would potentially cause both forum shopping and the inequitable administration of the laws (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965))).

52. See, e.g., Phoebe Kornfeld, Note, *The Enforceability of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA L. REV. 175, 191 (1989) (“*Stewart* addressed only the narrow issue of dealing with a motion to transfer based on a forum-selection clause; little guidance is provided in *Stewart* on how a forum-selection clause should influence a decision when the motion is for dismissal rather than transfer.”); Lee, *supra* note 29, at 671 (“The *Ricoh* court did not decide whether district courts sitting in diversity should accept forum selection clauses as *prima facie* valid . . .”).

jurisdiction.⁵³ Simply put, the Court's failure to anticipate the common scenario of an attempt to enforce a forum selection clause through a motion to dismiss has left the law in a state of disarray.

The gaps in these holdings have resulted in federal courts' application of different standards to determine the enforceability of forum selection clauses when a court's jurisdiction is grounded in diversity, rather than admiralty or a federal question. For courts sitting in admiralty or federal question jurisdiction, such clauses must be enforced unless they are unreasonable.⁵⁴ Courts sitting in diversity, however, must perform the § 1404(a) analysis when the defendant moves to enforce the clause through transfer.⁵⁵ These courts do not start with a presumption of reasonableness but rather determine, in their discretion, whether transfer is "convenient" for the parties and "in the interests of justice."⁵⁶ When the defendant moves to enforce the clause through dismissal, courts sitting in diversity are split as to which standard should apply.⁵⁷ As forum selection clauses and disputes between diverse parties have become more ubiquitous, these inconsistencies, open questions, and their resulting interactions have resulted in a tangled and confusing area of the law.

B. The Proper Motion Problem: How Should the Defendant Enforce the Clause by Dismissal?

The federal circuit courts are also split on the question of which Federal Rule of Civil Procedure a defendant must use to enforce a forum selection clause when moving to dismiss.⁵⁸ Motions to dismiss are a vital alternative to motions to transfer for defendants seeking to enforce these clauses for two reasons. First, when a forum selection clause does not select a federal forum, a motion to dismiss is a defendant's only option for enforcement because the federal transfer statute only allows for transfers to other federal courts.⁵⁹ Second, even

53. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991) (holding in the context of admiralty jurisdiction that forum selection clauses on cruise ship tickets selecting Florida, the cruise company's principal place of business, were reasonable and enforceable).

54. See *id.* at 595; see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 518–21 (1974) (explaining that the *Zapata* presumption applies in the federal question setting).

55. See *Stewart Org.*, 487 U.S. at 28 (requiring the application of the § 1404(a) standard).

56. See 28 U.S.C. § 1404(a) (2006).

57. See *infra* Part II.C.

58. See, e.g., *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 534–35 (6th Cir. 2002) (reviewing differing outcomes as to whether a 12(b)(3) motion could be used to remove the case); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 388 n.3 (1st Cir. 2001) (explaining that there are "variegated views" among the circuits on this issue and thoroughly documenting the split).

59. See *supra* note 17 and accompanying text.

when a clause selects a federal forum, a defendant often will prefer a motion to dismiss to a motion to transfer because of the choice-of-law implications in the continuing litigation: transfer will cause the choice-of-law rules of the plaintiff's initial forum to apply to the continuing litigation, while dismissal will not.⁶⁰ Accordingly, if the plaintiff files suit in a jurisdiction with highly unfavorable choice-of-law rules for the defendant, a defendant's motion to transfer will not escape the damaging effects of those rules.

Despite the importance of motions to dismiss as a mechanism to enforce forum selection clauses, the Federal Rules are silent as to whether a motion to dismiss can be used to enforce these clauses.⁶¹ Instead, there are currently three different types of motions that defendants have employed to seek dismissal on the basis of a forum selection clause.⁶² First, defendants have moved for dismissal under Rule 12(b)(3) on the theory that the clause makes venue in the initial forum improper.⁶³ Second, defendants have sought dismissal under Rule 12(b)(6) on the theory that bringing the suit in the agreed-upon

60. See *infra* notes 104–106 and accompanying text.

61. See, e.g., *In re Millennium Studios, Inc.*, 286 B.R. 300, 306 (D. Md. 2002) (“There is currently no procedural mechanism specifically tailored to handle a motion to dismiss based on a forum selection clause.”). While the federal rules do not provide a limited list of enumerated motions, cf. FED. R. CIV. P. 7(b)(1) (explaining that “a request for a court order must be made by motion” but not limiting the types of motions as with the types of pleadings), several available grounds for motions to dismiss are listed in FED. R. CIV. P. 12(b).

62. It should be noted that limited authority exists for a fourth alternative motion to seek dismissal due to a forum selection clause: the defendant could file a motion to specifically enforce the terms of the forum selection clause. See, e.g., *Kerobo*, 285 F.3d at 540 (Bertelsman, J., dissenting) (asserting that courts should view a motion to enforce a forum selection clause as “one to specifically enforce the clause”); see also *Langley v. Prudential Mortgage Capital Co.*, 546 F.3d 365, 372 (6th Cir. 2008) (Merritt, J., dissenting) (arguing that forum selection clauses should be “support[ed],” even though the defendant had not yet filed any motion to enforce the clause, in order to prevent unnecessary, time-consuming litigation); Leandra man, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 466 (1991) (explaining that a defendant might “make a ‘motion to dismiss based on the forum-selection clause’”). In theory, by bringing suit in a forum other than the one contractually agreed upon, the plaintiff has breached the agreement, and the court should be able to provide a remedy by specifically enforcing that aspect of the agreement. While not grounded in a Rule 12(b) motion to dismiss, this approach has the advantage of being more closely aligned with the reality of the situation. Indeed, the defendant seeking to enforce the clause is in actuality not seeking dismissal because the initial venue is improper or because the plaintiff failed to state all the necessary elements of its cause of action, but rather because that defendant desires to enforce the terms of its agreement. While this approach may be theoretically appealing, it has not gained traction with courts or litigants.

63. See, e.g., *Commerce Consultants Int'l v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697, 699–700 (D.C. Cir. 1989) (finding that defendant's choice of a Rule 12(b)(3) motion to dismiss due to a forum selection clause was proper). A rule 12(b)(3) motion seeks dismissal on the basis of “improper venue.” FED. R. CIV. P. 12(b)(3).

forum is a necessary element to sustain the cause of action.⁶⁴ Third, defendants have moved for dismissal under Rule 12(b)(1) on the theory that the forum selection clause eliminates the subject-matter jurisdiction of the initial forum.⁶⁵ Most circuit courts have selected either Rule 12(b)(3) or Rule 12(b)(6) as the exclusive legal foundation for a defendant moving to dismiss due to a forum selection clause.⁶⁶ Some courts have gone so far as to disregard the specific Rule 12(b) subsection cited by the defendant and instead interpret any motion to dismiss for improper forum as grounded in the correct subsection.⁶⁷

The Fourth, Ninth, Eleventh, and District of Columbia Circuits have held that a defendant seeking to enforce a forum selection clause through dismissal must utilize Rule 12(b)(3) and move to dismiss for improper venue.⁶⁸ These circuits assert that the use of a Rule 12(b)(6) motion is problematic because it both is inconsistent with the pleading standard required by the Court in *Zapata*⁶⁹ and creates timing concerns by allowing defendants to "hold back" forum selection clause objections until late in the litigation process.⁷⁰ Additionally, the Rule

64. See, e.g., *Lambert v. Kysar*, 983 F.2d 1110, 1122 (1st Cir. 1993) (finding that defendant's Rule 12(b)(6) motion to dismiss due to a forum selection clause was properly granted). A rule 12(b)(6) motion seeks dismissal due to the plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

65. See *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 156 (2d Cir. 1984) (analyzing the defendant's Rule 12(b)(1) motion to dismiss grounded in part on a forum selection clause). A rule 12(b)(1) motion seeks dismissal due to the "lack of subject-matter jurisdiction" of the court. FED. R. CIV. P. 12(b)(1).

66. See, e.g., *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 388 n.3 (1st Cir. 2001) (citing several cases that held these motions should be brought under Rule 12(b)(3) or 12(b)(6) but only one case that held they should be brought under Rule 12(b)(1)). The only case of which the author is aware holding that Rule 12(b)(1) is the proper foundation for a motion to dismiss due to a forum selection clause is *AVC Nederland*, 740 F.2d at 156.

67. See, e.g., *Lambert*, 983 F.2d at 1112 n.1 (quoting *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984)) (explaining that the court is "not bound by the label below," and therefore may ignore any error in the district court granting a motion to dismiss the defendant nominally brought under both Rule 12(b)(3) and instead of only under Rule 12(b)(6)).

68. See, e.g., *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (11th Cir. 1998); *Arguenda v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996); *Commerce Consultants*, 867 F.2d at 698.

69. While Rule 12(b)(6) requires a court to accept the pleadings as true, the *Zapata* standard does not accept the truth of the pleadings. *Sucampo Pharms.*, 471 F.3d at 549. Thus, courts are unable to conduct analysis consistent with both the mandates of Rule 12(b)(6) and the instructions of the Court in *Zapata*. *Id.* On the contrary, Rule 12(b)(3) motions do not require the pleadings to be accepted as true.

70. Because Rule 12(b)(6) motions may be raised at any time in the proceedings before disposition on the merits, see FED. R. CIV. P. 12(h) (allowing a party to bring a motion to dismiss for failure to state a claim at any point in the litigation up through trial), defendants can wait to spring the clause until after litigation begins to unfold unfavorably for them, thereby wasting judicial resources and undermining the efficiency and convenience created by those forum

12(b)(3) proponents reason that their approach is more consistent with the Supreme Court's holding in *Stewart*.⁷¹

However, the First and Sixth Circuits have held instead that a Rule 12(b)(6) motion is the proper device.⁷² These courts counter that, if venue is proper under the federal venue statute,⁷³ a Rule 12(b)(3) motion to dismiss for improper venue is not the appropriate method to address the validity of a forum selection clause.⁷⁴ The circuits adopting this view rely on language from a footnote in *Stewart* in which the Supreme Court explained that the motion to dismiss under 28 U.S.C. § 1406(a) for improper venue was properly denied because the parties satisfied the requirements of the federal venue statute.⁷⁵ Because a motion to dismiss for improper venue due to a forum selection clause was not proper in that case, the proponents of Rule 12(b)(6) reason that it is never a valid motion to enforce a forum selection clause.⁷⁶ While arguments exist for either alternative, no clearly preferable option has emerged.

While the choice of the proper basis for a motion to dismiss may appear at first to be a mere semantic matter, this choice can have real and significant ramifications for the rights of the parties. The court's determination of the proper motion will determine whether the defendant's attempt to enforce the clause will be waived if not

selection clauses. *Sucampo Pharms.*, 471 F.3d at 549. The proponents of Rule 12(b)(3) explain that this problem would not arise under that motion, because it is waived if not raised in the first responsive pleading. *Id.* at 549.

71. Because the *Stewart* Court relied upon the federal venue transfer statute to enforce a forum selection clause, these courts argue that such clauses are properly considered a matter of venue, and that a Rule 12(b)(3) motion for improper venue should therefore apply. *Lipcon*, 148 F.3d at 1290.

72. See, e.g., *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535–36 (6th Cir. 2002); *LFC Lessors, Inc. v. Pac. Sewer Maint.*, 739 F.2d 4, 6–7 (1st Cir. 1984). Additionally, the Second and Fourth Circuits have dismissed cases due to forum selection clauses when the defendant filed a Rule 12(b)(1) motion. *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196–97 (4th Cir. 1985); *AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 156 (2d Cir. 1984). While Rule 12(b)(1) motions have been entertained for this purpose in the past, the bulk of the controversy amounts to whether a Rule 12(b)(3) motion or a Rule 12(b)(6) motion is preferable.

73. 28 U.S.C. § 1391 (2000). This statute sets requirements for venue to be proper in any particular federal court.

74. See, e.g., *LFC Lessors, Inc.*, 739 F.2d at 7 (holding that venue was proper such that a motion to dismiss based upon Rule 12(b)(3) was inapposite because that case satisfied the venue requirements of 28 U.S.C. § 1391). In other words, because only Congress, and not the parties, has the authority to confer proper venue upon the federal courts, the mere fact that the parties agreed ex ante to another forum does not affect proper venue.

75. See *Kerobo*, 285 F.3d at 536 (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 n.8 (1988)) (reasoning that the Court's holding in *Stewart* "is a clear signal that if venue is proper under the statute, a motion to transfer for improper venue will not lie").

76. *Id.*

introduced early in the litigation.⁷⁷ Additionally, when the proper motion is neither intuitive nor the majority rule, the probability increases that unwary practitioners might accidentally waive their only opportunity to enforce the clause for their clients. Moreover, this choice of motion affects whether the court must initially determine issues such as subject-matter jurisdiction and personal jurisdiction before confronting the issue of the forum selection clause.⁷⁸ For all these reasons, the choice of proper motion is indeed an important one, and the variation from circuit to circuit serves as a trap for unwary litigants.

C. The Choice-of-Law Problem: Should Courts Apply State or Federal Law to Motions to Dismiss?

In addition to the proper-motion problem, another daunting question plagues defendants seeking to enforce forum selection clauses in diversity cases: Does federal or state law apply in determining whether the motion to dismiss should be granted? This question, left open by the Supreme Court in *Stewart*, has resulted in a second circuit split.⁷⁹ A majority of the circuits that have confronted this question directly has determined that federal law must apply,⁸⁰ while a minority has held that state law controls the issue.⁸¹ Meanwhile, a few other circuits have acknowledged this uncertainty but have punted, instead finding temporary means to sidestep the problem.⁸² Thus, depending on the initial federal forum, a defendant seeking dismissal might benefit from the application of a strong

77. See *supra* note 70 and accompanying text. See generally Jonathan L. Corsico, Comment, *Forum Non Conveniens: A Vehicle for Federal Court Enforcement of Forum Selection Clauses That Name Non-Federal Forums as Proper*, 97 NW. U. L. REV. 1853, 1873–75 (2003) (explaining the role of waiver as to each potential procedural device that may be used to enforce a forum selection clause in federal courts).

78. If a court considers forum selection clause enforcement dismissal motions to be made under Rule 12(b)(6), then it is first required to determine if both its personal and subject-matter jurisdiction are proper. See *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 548 (4th Cir. 2006) (explaining that the court must resolve whether a motion to dismiss based on a forum selection clause should be based on Rule 12(b)(6) or a different rule in order to determine whether the district court should have first considered a motion to dismiss for lack of personal jurisdiction).

79. See, e.g., *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 (8th Cir. 1999) (acknowledging that there is “some disagreement among the circuits regarding” whether the analysis of motions to enforce a forum selection clause through dismissal in a diversity case is governed by federal or state law).

80. See *infra* note 83 and accompanying text.

81. See *infra* note 88 and accompanying text.

82. See *infra* notes 94–95 and accompanying text.

federal law presumption in favor of clause enforcement or might instead be confronted with a state-law policy disfavoring such clauses.

The Second, Fifth, Ninth, and Eleventh Circuits have held that motions to dismiss on the basis of a forum selection clause must be analyzed under federal law.⁸³ The federal standard that these circuits apply is not the more nuanced standard from *Stewart* for defendants seeking to enforce the clause through transfer under § 1404(a), but rather the *Zapata* presumption of enforcing reasonable clauses.⁸⁴ However, while these circuits have agreed that federal law (and the *Zapata* standard) must be applied, they have proffered a wide range of justifications for this common conclusion: federal law should apply because (1) venue is a procedural matter,⁸⁵ (2) federal interests in the matter outweigh state interests,⁸⁶ and (3) the reasoning behind *Zapata's* admiralty holding is equally applicable to diversity cases.⁸⁷

While most circuits that have directly confronted the question have applied federal law, the Third, Fourth, and Eighth Circuits have applied state law in their analyses of whether a forum selection clause should be enforced through a motion to dismiss.⁸⁸ These courts have also justified their holdings through diverse reasoning. One court

83. See, e.g., *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 115 (5th Cir. 1996); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512–13 (9th Cir. 1988); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987) (per curiam) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988).

84. See, e.g., *Int'l Software Sys.*, 77 F.3d at 115 (explaining that several federal circuits had decided to “continue to apply [*Zapata*] to motions to dismiss based on a forum selection clause” and determining to do the same even though the court “prefer[red] to apply . . . *Stewart* balancing [of § 1404(a)]”).

85. See *Stewart Org.*, 810 F.2d at 1067–69 (reasoning through *Hanna v. Plumer*, 380 U.S. 460 (1965), that federal law on venue is controlling and thereby implying that federal law controls regardless of whether the defendant seeks to enforce a clause through dismissal or transfer).

86. See *Manetti-Farrow*, 858 F.2d at 513 (citing *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958)) (reasoning that “[t]he *Erie* choice is best accomplished by balancing the federal and state interests”).

87. See *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 510 n.10 (2d Cir. 1998). Moreover, at least one circuit court has held that federal law should apply simply because holding otherwise would “further complicate this area of the law.” *Int'l Software Sys.*, 77 F.3d at 115.

88. See, e.g., *Nutter v. New Rents, Inc.*, No. 90-2493, 1991 WL 193490, at *5–7 (4th Cir. Oct. 1, 1991); *Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356–57 (3d Cir. 1986). Indeed, one could argue that an intra-circuit split exists on the Eighth Circuit, in which one panel of judges held that state law applied and another panel held that federal law applies. Compare *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068–69 (8th Cir. 1986) (concluding in dicta that forum selection clauses involve venue issues and are therefore procedural clauses governed by federal law), with *Farmland Indus.*, 806 F.2d at 852 (choosing to apply state law to forum selection clauses and distinguishing *Sun World* as involving admiralty law). This conflict is noted by the court in *Manetti-Farrow*. 858 F.2d at 513 n.3.

explained that questions of contract are usually matters of state law;⁸⁹ another determined that a choice-of-law clause selecting a particular state's laws was enforceable;⁹⁰ and a final court merely cited another court's determination with approval.⁹¹ While each of these cases is arguably distinguishable from the typical forum selection clause scenario,⁹² other notable judges have also shown support for the state-law-controls position. Justice Antonin Scalia and Judge Gerard E. Lynch of the Second Circuit have both expressed support for the minority position that state—rather than federal—law should apply to forum selection clauses.⁹³

The most common approach by courts, however, is to avoid making a determination between state and federal law at all by finding a temporary solution. Because many states have adopted the

89. *Gen. Eng'g Corp.*, 783 F.2d at 356 ("The construction of contracts is usually a matter of state, not federal, common law.").

90. *See Nutter*, 1991 WL 193490, at *6 (beginning its analysis of the enforceability of the clause by determining, under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), that the law of the forum state should be applied in the diversity setting, and deciding that the law of the forum state, West Virginia, would uphold the choice-of-law clause selecting Louisiana law in the contract).

91. *See Farmland Indus.*, 806 F.2d at 852 (citing *Gen. Eng'g Corp.*, 783 F.2d 352) (explaining in three sentences that "[w]hether a contractual forum selection clause is substantive or procedural is a difficult question" and holding that "consideration should have been given to the public policy of [the forum state]" because of "the close relationship between substance and procedure in this case").

92. All three of the cases present their own unique circumstances. In *General Engineering Corp.*, federal jurisdiction was not grounded in 28 U.S.C. § 1332 but rather was based upon a local Virgin Islands statute which "vest[ed] original jurisdiction in the District Court of the Virgin Islands in civil suits when the amount in controversy exceed[ed] \$200,000." 783 F.2d at 357 (citing V.I. CODE ANN. tit. 4, § 76(a) (1984)). *But see id.* at 357 n.4 (explaining that, although its opinion "d[id] not directly control district courts sitting in diversity, [its] discussion of the issues involved in applying federal common law indicates that these courts should apply the choice-of-law rule of the state in which they sit"). Moreover, in *Farmland Industries*, the court appeared to be sitting in federal question jurisdiction, rather than diversity jurisdiction, though it did not clearly indicate this in its analysis. *See* 806 F.2d at 849, 852 (indicating that one of the claims plaintiff had filed in district court was a violation of the Securities Act of 1933, but still citing to *General Engineering* in making its determination that state law should apply in the analysis of the forum selection clause). Finally, in *Nutter*, the Fourth Circuit chose not to publish its opinion, and—even though it came to the conclusion that Louisiana state law should apply—it held that Louisiana law was the same as the federal *Zapata* standard. *Nutter*, 1991 WL193490, at *5–7.

93. *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) ("Under the twin-aims test, I believe state law controls the question of the validity of a forum-selection clause between the parties."); *Licensed Practical Nurses, Technicians, & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 398 (S.D.N.Y. 2000) ("It is strongly arguable that in a diversity case, the validity of such clauses should be determined by state law, which generally governs substantive questions involving the making and enforcement of contracts."). Judge Lynch moved from the U.S. District Court for the Southern District of New York to the U.S. Court of Appeals for the Second Circuit in September of 2009.

Zapata standard as their own policies favoring the enforcement of forum selection clauses, several circuits have decided that the application of either federal or applicable state law would lead to the same conclusion as to enforceability.⁹⁴ Additionally, at least two courts have chosen to apply the *Zapata* standard due to the express preferences of the litigants.⁹⁵ In short, the choice-of-law question for forum selection clauses has widely divided the circuit courts. A consistent, universal standard would serve as welcome relief for both puzzled practitioners and a fractured judiciary.

III. WHY COURTS ALONE CANNOT FULLY SOLVE THE PROBLEM

The proper-motion and choice-of-law problems have persisted in large part due to fundamental theoretical issues that have remained largely unexplored. Courts have been unable to reach a consensus on the correct procedural mechanism for enforcing forum selection clauses because the two devices they have used, Rule 12(b) motions and the federal transfer statute, are improper in the first place. Similarly, courts have divided over whether state or federal law governs these issues because, in essence, two core legal principles are at odds. Moreover, both of these circuit splits stem from two common sources of confusion that need to be addressed—a lack of foresight in the Federal Rules and the Supreme Court’s decision in *Stewart*. Because the solutions proposed to both circuit splits thus far have not fully contemplated these theoretical issues, the current solutions have proven inadequate.

94. The First, Third, Sixth, Seventh, and Tenth Circuits have all utilized this approach. See, e.g., *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 611 (7th Cir. 2006) (Posner, J.) (applying the *Zapata* standard because “Illinois law concerning the validity of forum selection clauses is materially the same as federal law”); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386 n.1 (1st Cir. 2001) (applying the *Zapata* standard because both Puerto Rico and federal law applied that standard); *Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999) (applying the *Zapata* standard because “Tennessee law is consistent with the rule of *Zapata*”); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997) (applying the *Zapata* standard due to finding of “no material discrepancies between Colorado law and federal common law”); *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir. 1993) (applying the *Zapata* standard due to determination of “no material discrepancy between Washington state law and federal law” on that matter); *Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 7 (3d Cir. 1988) (applying the *Zapata* standard because Pennsylvania, Canadian, and federal law “look favorably on forum selection clauses”).

95. *M.B. Rests., Inc. v. CKE Rests., Inc.*, 183 F.3d 750, 752 (8th Cir. 1999) (applying the *Zapata* standard because neither party disputed that both federal and state law were the same as to enforceability of forum selection clauses); *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 379 (7th Cir. 1990) (Posner, J.) (applying *Zapata* standard where parties stipulated to its application, and suggesting that the application of federal law was “probably . . . correct” but that the court “need not decide this”).

A. The Federal Transfer Statute and All Rule 12(b) Motions Are Improper, Ad Hoc Devices to Enforce a Forum Selection Clause

The underlying reason for the proper-motion problem is that the federal procedural devices used to enforce forum selection clauses—including the three potentially applicable Rule 12(b) motions and the federal transfer statute—were conceived at a time when those clauses did not have the ubiquitous presence that they have today.⁹⁶ Because no single motion was created with forum selection clauses in mind, these procedural devices have arisen as ad hoc mechanisms to enforce these clauses in federal courts.⁹⁷ As such, Rule 12(b) motions do not satisfy the need for a procedural device to enforce the clauses—and the federal courts have recognized this by documenting the inadequacies of each subsection of the rule.⁹⁸ These inadequacies thus demonstrate why Rule 12(b) motions are improper mechanisms for enforcing forum selection clauses.

Moreover, the federal transfer statute is perhaps an even less adequate mechanism to enforce forum selection clauses. First, the transfer statute, codified at 28 U.S.C. § 1404, cannot be used to enforce forum selection clauses specifying a state or international court as the forum for litigation.⁹⁹ If parties have a general right to select their own forum for litigation *ex ante* and to have that forum honored by a court, it seems odd to employ a procedural mechanism that automatically cuts out the majority of potential forums in the country. Even assuming that Rule 12(b) motions to dismiss remain an alternative avenue for clause enforcement, defendants specifying a state or international forum are at a disadvantage in having one fewer

96. The Federal Rules of Civil Procedure were first promulgated by the Supreme Court in 1938, and “the Rules and their vision of American litigation remain pretty much intact.” THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, *CIVIL PROCEDURE* 17–18 (2d ed. 2004). On the contrary, forum selection clauses did not become a standard part of contracts until the latter part of the twentieth century. This is likely due to “wider embrace of the enforceable forum selection clauses at this time.” Marcus, *supra* note 27, at 1005.

97. See *supra* notes 61–65 and accompanying text.

98. See *supra* Part II.B; *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 540 (6th Cir. 2002) (Bertelsman, J., dissenting) (explaining how the Rule 12(b)(1), 12(b)(3), and 12(b)(6) motions are all flawed as clause enforcement devices and arguing that “the proper approach is to regard a motion raising a forum selection clause, however labeled, as one to specifically enforce the clause”); see also Lederman, *supra* note 62, at 433–47 (demonstrating how “the use of make-shift motions for the enforcement of forum-selection clauses is fraught with problems”).

99. So long as some forum selection clauses select non-federal forums, another mechanism aside from § 1404(a) is necessary to allow for clause enforcement in those circumstances where § 1404(a) cannot be invoked. While the doctrine of forum non conveniens allows courts to dismiss cases under what is essentially the same standard as § 1404(a), the use of that doctrine is problematic for other reasons. See *infra* notes 154–158 and accompanying text.

mechanism for enforcement—such defendants get one less bite at the apple of enforceability.¹⁰⁰

Second, using both § 1404 and Rule 12(b) motions to dismiss in order to enforce forum selection clauses unnecessarily bifurcates the analysis by forcing a court to apply two different standards. A court first must apply the motion-to-dismiss standard, which will depend on whether the jurisdiction applies state or federal law to the question.¹⁰¹ If a court determines that dismissal is not appropriate, it still must go on and determine whether transfer is, under the standard enunciated by § 1404, “[f]or the convenience of parties and witnesses” and “in the interest of justice.”¹⁰² By introducing a separate standard to the analysis, the federal transfer statute creates more administrative work both for judges, who must analyze and issue rulings on both transfer and dismissal, and the parties, who must conduct more research and lengthen their briefs.¹⁰³ It also obscures the real issue, which is not whether justice or convenience would be better served by litigation in a different forum—the criteria specified by the statute—but simply whether the parties’ contractual choice of a forum should be enforced.

The third reason the federal transfer statute is problematic is because it allows the plaintiff to benefit from the choice-of-law rules of the initial forum. When a federal court transfers a case under § 1404, the case must proceed under the choice-of-law rules of the transferor forum.¹⁰⁴ Thus, a court that enforces the clause by transferring the case is likely giving the plaintiff a benefit that was not bargained for.¹⁰⁵ On the contrary, when the initial court enforces the clause

100. This practice of filing both motions does, indeed, appear to be the most common approach used by practitioners today seeking to enforce a clause selecting another federal forum. *Cf.*, e.g., *Kerobo*, 285 F.3d at 533 (recounting that the defendant filed both a Rule 12(b)(3) motion to dismiss and a motion to transfer).

101. *See supra* Part II.C.

102. 28 U.S.C. § 1404(a) (2006).

103. Moreover, the bifurcation of the analysis causes a complication for judges in situations where the defendant seeks to invoke the forum selection clause on appeal but did not expressly move to enforce the clause through transfer or dismissal at lower court. *See Langley v. Prudential Mortgage Capital Co.*, 546 F.3d 365, 372 (6th Cir. 2008) (Merritt, J. dissenting) (arguing, in a case in which the three-judge panel resulted in one majority opinion, one concurrence, and one dissenting opinion, that remanding the case back to the district court so the defendant could file a motion “further prolong[s] and protract[s] the litigation by sending it back to the same alien courtroom for unnecessary motions, delay and wasted litigation costs”).

104. *See Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (holding that the transferee court must apply the state law that the transferor court would have applied when a case is transferred under § 1404(a)).

105. Indeed, the policy justification behind the decision that the choice-of-law rules of the transferor court should follow the litigation to the transferee forum does not appear to apply in such situations where the plaintiff filed in a venue in contravention of its agreement. *See id.* at

through dismissal, the choice-of-law rules of the agreed-upon forum will control once the case is eventually filed in that forum.¹⁰⁶

Finally, and perhaps most fundamentally, an analysis of both the language and the history of the federal transfer statute indicates that it is simply not a proper means to enforce forum selection clauses. Nothing in the language of the transfer statute mentions forum selection clauses. Additionally, the primary clause of § 1404(a), which instructs the court on what to consider in its determination, requires the decision to be based on which forum is more convenient for the parties and witnesses.¹⁰⁷ Though forum selection clauses may reflect at least one party's belief about convenience at the time of the agreement, they are not necessarily relevant as to which venue is actually convenient for both parties and witnesses at the time of litigation.¹⁰⁸ Moreover, the purpose of § 1404(a) was to codify the common-law standard of forum non conveniens,¹⁰⁹ and that standard

633-34 (explaining that its holding was motivated by the desire to protect the advantages that may accrue to plaintiffs "who have chosen a forum which, although it was inconvenient, was a proper venue").

106. Of course, many contemporary contracts contain choice-of-law clauses that would undermine the importance of this distinction. However, these clauses are not bulletproof, so this risk could remain even despite the existence of such a clause in the contract. See, e.g., *Kipin Indus., Inc. v. Van Deilen Int'l, Inc.*, 182 F.3d 490, 496 (6th Cir. 1999) (holding choice-of-law clause to be unenforceable as to a particular provision on the theory that the parties were mistaken to include that clause); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (discussing circumstances under which choice-of-law clauses should not be enforced).

107. See David E. Pearson, Comment, *Transfer of Venue under 28 U.S.C. § 1404(A): All Things to All People, Or, Cracking Under the Weight of the Forum Selection Clause*, 75 TEMP. L. REV. 925, 949-50 (2002) (arguing as a matter of statutory construction that § 1404(a) "permits transfer to only a more convenient forum" such that a transfer granted "in the interest of justice, without any added net convenience for the parties and the witnesses, is clearly not sanctioned by the statute," and citing to the Reviser's Note to § 1404 for support). It is true that the language "in the interest of justice" in § 1404(a) arguably can be conceived as presenting an additional consideration for the court (i.e., the first two clauses are disjunctive or conjunctive, rather than the second clause modifying "may transfer" such that a court may only transfer in the interest of justice when the forum is not convenient), and it would arguably be in the interest of justice to enforce such a clause. However, the fact that § 1404(a) was meant to codify forum non conveniens and that doctrine did not contemplate forum selection clauses still weighs against the use of § 1404(a), even under such a reading.

108. Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 34-35 (1988) (Scalia, J., dissenting) (arguing that § 1404(a), which "looks to the present and future," is not consistent with "retrospective" determinations that must be made regarding the enforceability of forum selection clauses, including bargaining power and overreaching at the time the contract was made).

109. See Eric Fahlman, Note, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?*—*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239 (1988), 64 WASH. L. REV. 439, 441-42 (1989) (explaining that the federal transfer statute "was enacted in 1948 in accordance with the general principles of the doctrine of forum non conveniens").

neither contemplated nor was frequently used in enforcing forum selection clauses.¹¹⁰

As clearly shown, the motion to transfer under § 1404(a) is a deeply flawed mechanism to enforce forum selection clauses. The fundamental flaws with using either the federal transfer statute or the Rule 12(b) motions to enforce forum selection clauses have prevented courts from solving the proper-motion problem.

B. Tensions between the Erie and Trans-Procedural Principles

The choice-of-law problem has also proven intractable thus far due to the collision of two fundamental legal principles. Under the first principle, the fortuity of diversity of citizenship between parties should not cause fundamentally different results in litigation.¹¹¹ This principle was the driving force behind the Supreme Court's analysis in *Erie*¹¹² and its progeny.¹¹³ Under the second principle, the use of different procedural mechanisms by the parties should not affect the analysis of those parties' underlying substantive rights.¹¹⁴ As the law currently stands, either one or both of these principles will be violated in every instance where a defendant seeks to enforce a forum selection clause in a diversity case.¹¹⁵

110. See *id.* at 448–49 (arguing that none of the relevant factors a district court must consider when contemplating a dismissal due to forum non conveniens, set out by the Supreme Court in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947), indicates that the doctrine relates to forum selection clauses). Furthermore, the Court's presumption “in favor of plaintiff's choice of forum” implies that a court applying that doctrine “would not enforce such clauses because they would interfere with the presumptive right of the plaintiff to choose the forum.” *Id.* at 449.

111. See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)) (explaining that *Erie*'s policy, “that touches vitally the proper distribution of judicial power between State and federal courts,” is that, for all cases in federal court due to diversity, “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court”).

112. See *Erie*, 304 U.S. at 75–78.

113. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) (observing that “the *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court”); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (noting that *Erie* was a response to the “accident” whereby “diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side”).

114. See, e.g., Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 515–27 (2006) (explaining that Roscoe Pound's criticism of the traditional civil justice system, which “spark[ed]” the development of the formulation of the Federal Rules of Civil Procedure, was founded in large part upon the principle of the “resolution of cases on their substantive merits”).

115. Cf. *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 609 (7th Cir. 2006) (Posner, J.) (reasoning that, due to the state of the law, an “arbitrary difference” will

1. The *Erie* Principle

Since 1938, it has been black-letter law that federal courts in diversity cases should apply state substantive law and federal procedural law. Because the distinction between substance and procedure is often not easily ascertainable in practice,¹¹⁶ the Supreme Court has instructed that this choice-of-law determination must be made in a way that promotes the so-called “twin aims” of *Erie*: discouraging forum shopping and preventing an inequitable administration of the laws.¹¹⁷ Underlying *Erie* is the basic principle that a controversy’s mere satisfaction of the diversity jurisdiction requirements in federal courts should not cause substantially different results in the outcomes of litigation.¹¹⁸

Litigation involving forum selection clauses necessarily implicates the *Erie* principle. Imagine four companies: A, B, X, and Y. All the companies but company Y reside in the state of Parochialand, which has a general policy disfavoring the enforcement of these clauses. Company Y, however, resides in the state of Freedomland, which favors these clauses. Company A enters into a contract with company B, and company X enters into a contract with company Y. Both contracts contain forum selection clauses selecting the favored forums of companies B and Y—their respective states of residency.¹¹⁹ Alleged breaches of each contract occur, and companies A and X file suit in a Parochialand court. In the A-B dispute, the court will apply its state policy disfavoring forum selection clauses; accordingly, litigation will continue in Parochialand. In the X-Y dispute, however, company Y will have the option of removing to federal court due to diversity of citizenship.¹²⁰ If the federal court applies federal law,

inevitably be created between either “a federal and a state litigation” or “a dismissal . . . and a transfer” depending on the court’s decision as to choice of law).

116. See, e.g., *Gasperini v. Ctr. For the Humanities, Inc.*, 518 U.S. 415, 426–27 (1996) (observing that “[c]lassification of a law as ‘substantive’ or ‘procedural’ . . . is sometimes a challenging endeavor” and reasoning that a New York state statute capping damages was in certain senses both substantive and procedural).

117. See, e.g., *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752–53 (1980).

118. Cf. John Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 695 (1974) (explaining that, in the standard account of the *Erie* doctrine, “*Erie* is by no means simply a case” and that it is inadequate “to call it a rule or even a principle, for it implicates, indeed perhaps it is, the very essence of our federalism”).

119. Of course, as companies A and B are located in the same state, their agreement would not likely specify the forum of a different state, but it might very well specify as the forum a state court located within a county nearest to company B at the opposing end of their common state.

120. Assuming the amount in dispute is greater than seventy-five thousand dollars, the parties fulfill the requirements of the federal diversity statute. See 28 U.S.C. § 1332 (2006)

which views forum selection clauses more favorably than Parochialland, it will likely enforce the clause. As a result, company X will be forced to continue litigation in a federal forum in Freedomland. Thus, the application of federal law to the X-Y dispute would cause both forum shopping—because company Y will seek removal to federal court specifically to obtain the benefit of that more favorable federal law¹²¹—and the inequitable administration of the laws, as one (identically situated) pair of parties will litigate in the plaintiff-preferred forum and the other pair will litigate in the defendant-preferred forum.

Despite the fact that applying federal law in such a situation appears to violate both of the twin aims of *Erie*, the Supreme Court in *Stewart* held that federal law must be applied when a defendant seeks to enforce a forum selection clause by transfer under § 1404(a).¹²² Thus, so long as the defendant may enforce the clause through transfer and not solely through dismissal,¹²³ the *Erie* problem persists. However, in cases where the clause exclusively selects a state or international forum and the federal transfer motion is therefore unavailable, the defendant's only option to enforce the clause is a motion to dismiss. In such cases, the *Erie* problem could arguably be resolved by requiring the application of state law to analyze the enforceability of forum selection clauses.¹²⁴ If federal courts applied state law to motions to dismiss, the defendant would have no incentive to forum shop by removing to federal court because the federal court would apply the same state-law policy. Similarly, no inequitable administration of the laws would occur because the same result would be achieved regardless of whether the parties had access to the federal forum. Nevertheless, this approach is no silver bullet. While it would

(requiring for diversity jurisdiction that the amount in controversy exceed “the sum or value of \$75,000, exclusive of interest and costs”).

121. While removal from state to federal court may not constitute the type of vertical forum shopping that is typically considered in *Erie* analysis, because it is forum shopping conducted by the defendant rather than by the plaintiff in the first instance, authority exists that such second-instance forum shopping is a concern of *Erie*. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) (arguing that the fact that “nonresident defendants will be encouraged to shop for more favorable law by removing to federal court” is a “significant encouragement to forum shopping [that] is alone sufficient to warrant application of state law”).

122. *Id.* at 28.

123. This is the case so long as the forum selection clause at least arguably selects a federal forum such that the transfer statute may be invoked. See 28 U.S.C. § 1404(a) (allowing for transfer to “any other district [court] or division,” but not to state courts).

124. See, e.g., Robert A. de By, Comment, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068, 1068 (1989) (arguing that “*Erie* requires the application of state law” in this situation).

alleviate the *Erie* problem, it would also cause direct tension with the other fundamental principle involved: the trans-procedural principle.

2. The Trans-Procedural Principle

Further complicating forum selection clause jurisprudence is the other fundamental principle that a party's choice of procedural mechanism to enforce a substantive right should not affect the analysis of that underlying right.¹²⁵ In other words, cases should be decided on the merits, not on procedural technicalities. Support for this principle ranges from comments by the original drafters of the Federal Rules of Civil Procedure¹²⁶ to a recent Supreme Court decision.¹²⁷ For the purpose of brevity, this Note will refer in shorthand to this concept as the "trans-procedural" principle. This term derives its name from the trans-substantive principle—a well-known, analogous concept that procedural rules should not vary based on the substantive law invoked in the dispute.¹²⁸

Because of the current status of the law, the analysis of the enforceability of forum selection clauses implicates the trans-procedural principle. Currently, when a defendant in a diversity case desires to enforce its alleged substantive rights under a forum selection clause, it can (sometimes) utilize either a motion to dismiss¹²⁹ or a motion to transfer¹³⁰ to effectuate those rights. *Stewart* commands that the federal standard of § 1404(a) be applied to motions

125. See, e.g., Tidmarsh, *supra* note 114, at 515 (explaining that a foundational principle of the Federal Rules of Civil Procedure is that, for any particular case, "[t]he substantive merits [sh]ould determine the outcome").

126. See Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938) (observing the importance of deciding cases on their merits and cautioning against the tendency of procedural rules "to assume a too obtrusive place in the attentions of judges and lawyers"); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 557 (2002) ("[T]he Rules were designed to encourage determination on the merits."); cf. Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 2-3 (1988) (recounting that the Rules were motivated in part by a desire for "courts [to] render judgments based on facts not form").

127. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (reasoning that the simplified pleading system "was adopted to focus litigation on the merits of a claim").

128. The trans-substantive principle requires that "procedure [be] generalized across substantive lines" such that it is not just "confined to cases of [a] particular description." Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718, 725 (1975) (quoting *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 295 (1813) (Marshall, J.)).

129. More precisely, the defendant can utilize one of various motions to dismiss. See *supra* Part II.B.

130. Recall that the defendant can only employ the motion to transfer to enforce the forum selection clause under 28 U.S.C. § 1404(a) if the clause at least arguably selects a federal forum. See *supra* note 123.

to transfer.¹³¹ However, the federal circuits are split over how to analyze a motion to dismiss—different jurisdictions will apply either the federal *Zapata* standard or an applicable state-law policy.¹³² Thus, contrary to the trans-procedural principle, the procedural mechanism employed will indeed affect whether the underlying substantive right will be enforced.

3. The Current Tension Between the *Erie* and Trans-Procedural Principles

Since *Stewart*, no judicial decision can simultaneously satisfy both the *Erie* and trans-procedural principles.¹³³ Federal law must be applied when a defendant seeks to enforce the forum selection clause through transfer in federal court.¹³⁴ State law must be applied when the defendant seeks to enforce such a clause in state court, regardless of the procedural device employed. However, an open question exists as to which type of law should apply when the defendant seeks to enforce the clause through dismissal in a federal court sitting in diversity. If federal law is applied in that instance, then the principle that a party's choice of procedural device should not affect its substantive rights is *mostly* satisfied:¹³⁵ federal law will apply in the defendant's attempt to enforce the forum selection clause in federal court, regardless of whether the defendant seeks to enforce this right through a motion to dismiss or a motion to transfer. However, in such a situation the *Erie* principle is completely violated. Courts will apply federal law regardless of the defendant's choice of transfer or dismissal, and the plaintiff might lose the protection of its state's laws due simply to the happenstance of diversity.¹³⁶

On the other hand, suppose that the court applies state law when the defendant seeks to enforce the forum selection clause through dismissal in a federal court sitting in diversity. This selection

131. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28–30 (1988).

132. *See supra* Part II.C.

133. *Cf. IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 609 (7th Cir. 2006) (Posner, J.) (reasoning that, due to the state of the law, an “arbitrary difference” will inevitably be created between either “a federal and a state litigation” or “a dismissal . . . and a transfer” depending on the court's decision as to choice of law).

134. *Stewart Org.*, 487 U.S. at 28–30.

135. Note, though, that a limited problem still exists as to this trans-procedural principle, because the defendant's choice of motion changes the applicable federal standard to be applied: *Zapata* or § 1404(a), which differ somewhat in their ability to enforce that right. *See supra* Part II.C (observing that courts have applied different federal standards depending on defendant's choice of motion).

136. *See supra* Part III.B (discussing tensions between *Erie* and trans-procedural principles and implications for *Erie* twin-aims resulting from current state of the law).

minimizes the potential *Erie* problems because now the plaintiff can rely on its rights under state law, despite the existence of a diverse party.¹³⁷ However, this selection violates the principle that the choice of procedure should not alter substantive rights: the enforcement of the forum selection clause will be analyzed under vastly different laws depending on whether the defendant seeks to enforce its rights through a motion to dismiss rather than a motion to transfer.¹³⁸ This example illustrates the continuing tension between these two principles in forum-selection-clause federal jurisprudence. Because federal law must be applied to motions to transfer in federal courts and state law is applied in state courts, the choice of law governing dismissal in federal courts cannot simultaneously satisfy both the *Erie* and trans-procedural principles.

C. The Interconnectivity of the Proper Motion and Choice-of-Law Problems

While these two circuit splits may at first appear only tenuously related, they are actually manifestations of the same core problem: regardless of how they are stretched and manipulated by judges and the parties, an outdated set of procedural rules cannot properly cover the modern issue of the enforcement of forum selection clauses. The proper-motion problem arises because all of the procedural devices that have been employed to enforce forum selection clauses are ad hoc devices not properly suited to achieve that end.¹³⁹ The choice-of-law problem traces its origins to *Stewart*, where the Supreme Court failed to confront the fact that two fundamentally different procedural devices appeared appropriate to enforce a forum selection clause.¹⁴⁰ Thus, both the choice-of-law and proper-motion problems find their geneses in the fact that neither the procedural rules nor the Supreme Court in *Stewart* contemplated the full breadth of the modern situation posed by forum selection clauses.

137. This will be true at least insofar as the defendant is unwilling or unable to bring a motion to transfer, which would still be analyzed under federal law due to the accident of diverse parties because of the Court's holding in *Stewart*.

138. That is, the court would apply state law as to the enforceability of the clause if the defendant filed a motion to dismiss, and it would apply federal law on that question if the defendant filed a motion to transfer. See *supra* Part III.B.ii.

139. See *supra* Part III.A.

140. See *supra* notes 43–48 and accompanying text (discussing *Stewart* and the Court's failure there to consider all possible procedural devices for enforcing forum selection clauses).

D. A Survey of Potential Judicial Solutions and Their Pitfalls

Though courts and several commentators have proffered potential solutions to these problems that rely only upon the powers of the courts, none of these solutions are fully adequate. First, as already discussed, many courts avoid the choice-of-law problem by reasoning that no conflict exists because both federal and state law would find the clause enforceable.¹⁴¹ Second, one commentator has recently proposed that federal courts in diversity cases should always analyze forum selection clauses selecting other federal forums under § 1404(a), but should analyze clauses selecting state or international forums under the doctrine of forum non conveniens.¹⁴² Third, several judges and at least one other commentator have implied that *Stewart* was wrongly decided and should be overruled so that state law will be applied whenever a defendant seeks to enforce a forum selection clause in a diversity case.¹⁴³ Despite each proposal's unique advantages, none of these proposals provide a satisfactory solution.

1. A Deferred Judicial Determination

The first potential solution—and the one that has been most commonly employed by the federal circuit courts to date—is a judicial determination that the clause would be enforced under either state or federal law.¹⁴⁴ Thus, because there is no conflict, a determination on which law should be applied need not be made. This approach is obviously best when there is, in fact, no conflict between federal and state law.¹⁴⁵ Indeed, it has likely been employed so frequently because of a belief that state-law policies on forum selection clauses are converging towards the federal *Zapata* standard.¹⁴⁶ However, there

141. See *supra* note 94 and accompanying text.

142. Marcus, *supra* note 27, at 1038.

143. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39–40 (1988) (Scalia, J., dissenting) (arguing that state law should apply in the analysis of forum selection clauses raised through motions to transfer); *Licensed Practical Nurses, Technicians, & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 396 (S.D.N.Y. 2000) (“It is strongly arguable that in a diversity case, the validity of such clauses should be determined by state law . . .”); cf. de By, *supra* note 124, at 104 (arguing that *Erie* requires the application of state law in the analysis of the attempt to enforce a forum selection clause under a Rule 12(b)(3) motion to dismiss).

144. See *supra* note 94 and accompanying text.

145. Such an approach is in alignment with the principle that courts should not decide more than is necessary to resolve the dispute before them.

146. See, e.g., Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1095–96 (1989) (explaining, in 1989, that “a clear majority of state courts, many influenced by [*Zapata*], has adopted this modern theory of party autonomy”).

are two problems with this approach. First, there remain many states whose policies on forum selection clauses are not substantially identical to federal law,¹⁴⁷ and there is no reason to believe that all of those states will adopt the federal policy anytime soon. Thus, merely avoiding the problem by finding “no conflict” is simply not an option in these states. Judges applying those states’ laws would be intellectually dishonest if they were to gloss over the actual contours of state law and assume that they reflected the federal standard. Second, this approach utterly fails to address the interrelated problem of which motion should be used to enforce a forum selection clause. It thus not only allows, but also facilitates, the proper-motion circuit split and the resulting variations of the rights of the parties.

2. Professor David Marcus’s Approach

A second potential solution suggests that federal courts sitting in diversity conduct their analysis in one of two ways, depending on whether the forum selection clause at least arguably selects a federal court.¹⁴⁸ For courts asked to enforce clauses selecting federal courts, Professor David Marcus’s approach advocates that they perform the analysis set forth in § 1404(a) and enforce the clause through transfer, regardless of whether the defendant attempted to enforce the clause through a motion to dismiss or a motion to transfer.¹⁴⁹ Because substantial authority exists that a federal district court may transfer to another appropriate district court *sua sponte*,¹⁵⁰ courts could

147. See, e.g., MICH. COMP. LAWS ANN. § 600.745(3) (West 2009) (governing when forum selection clauses are enforced in Michigan); *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730 (Iowa 1995) (“Generally under Iowa law, choice of forum provisions that would deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa, but Iowa courts will consider them as one factor when determining whether to exercise jurisdiction.”); *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1243 (Mont. 1998) (holding that Montana statutes create “strong public policy considerations . . . for voiding choice of forum provisions”); *Map Supply, Inc. v. Integrated Inventory Solutions, LLC*, 661 S.E.2d 789 (Table), No. COA07-733, 2008 WL 2096971, at *3 (N.C. Ct. App. 2008) (citing N.C. GEN. STAT. § 22B-3 (2007), which governs the enforceability of forum selection clauses in North Carolina); see also Freer, *supra* note 146, at 1096 (explaining, in 1989, that “[a]t least a dozen states cling to the traditional view that [forum selection] clauses are invalid per se,” that “[t]hese states encompass major commercial centers, such as Atlanta, Birmingham, Boston, Chicago, Dallas, Houston, Kansas City, and St. Louis,” and that, “[w]hile the precedent in some of these states predates the modern movement, several have recently reaffirmed the traditional approach, expressly rejecting [*Zapata*] and embracing the older doctrine”).

148. Marcus, *supra* note 27, at 1038.

149. See *id.*

150. See, e.g., *Carver v. Knox County, Tenn.*, 887 F.2d 1287, 1291 (6th Cir. 1989) (explaining that a district court may transfer a case *sua sponte* under § 1404(a)); *In re Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983) (“The broad language of section 1404(a) would seem to permit a court to order transfer on its own motion.”); *Lead Indus. Ass’n, Inc. v. OSHA*, 610 F.2d 70, 79 n.17 (2d

perform this analysis even if the defendant only filed a motion to dismiss.¹⁵¹ The same analysis could therefore be used whenever a defendant sought to enforce a clause that selects a federal forum.

For courts that are asked to enforce clauses selecting state or international forums, this approach advocates that they should instead analyze whether the clause should be enforced under the common-law doctrine of *forum non conveniens*.¹⁵² If a court determines that the clause should be enforced under that standard, it should accordingly dismiss the case. Because the § 1404(a) and *forum non conveniens* standards are quite similar, this approach allows courts to conduct the same analysis regardless of which procedural device is employed by the defendant seeking to enforce the clause.¹⁵³ It also eliminates the proper-motion problem, as the court merely looks upon any attempt to enforce the forum selection clause as a trigger to perform the foregoing analysis.

While this proposal is elegant in its simplicity, fundamental problems remain. Perhaps most significantly, there does not appear to be any good reason—aside from the mere existence of the transfer statute—that the applicable choice-of-law should turn on whether the forum selection clause chooses a federal court. Under this approach, when a clause selecting a federal court is enforced, the case will be transferred to the federal forum, and the choice-of-law rules of the transferor forum will be applied in the continuing litigation.¹⁵⁴ However, when a clause selecting a state or international court is

Cir. 1979) (noting that § 1404(a) must allow for *sua sponte* transfer because, “[w]hile § 1404(b) contains the proviso that transfer may be ordered ‘(u)pon motion, consent or stipulation of all parties,’ there is no such limitation in § 1404(a)”).

151. Indeed, several district courts have suggested or utilized this approach of transferring *sua sponte* despite the fact that the defendant had sought to enforce the clause through a motion to dismiss, perhaps in attempt to circumvent all the problems in this area of the law. *See, e.g.*, *Licensed Practical Nurses, Technicians, & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 407 (S.D.N.Y. 2000) (“[T]ransfer pursuant to § 1404(a) may be an appropriate remedy for effectuating a forum selection clause even when the defendant does not seek that remedy, but argues for dismissal instead.”); *Haskel v. FPR Registry, Inc.*, 862 F. Supp. 909, 915–17 (E.D.N.Y. 1994) (transferring from New York to Maryland district court *sua sponte* after defendant filed a Rule 12(b)(3) motion to enforce the clause); *Page Constr. Co. v. Perini Constr.*, 712 F. Supp. 9, 10–11 (D. R.I. 1989) (deciding to transfer the case from Rhode Island to Massachusetts district court, even though the defendant moved to dismiss under 12(b)(6)).

152. *See Marcus, supra* note 27, at 1038 (arguing that courts should apply the procedural mechanism of *forum non conveniens* in the analysis of clauses designating state or foreign courts in nonadmiralty cases); *see also Corsico, supra* note 77, at 1856 (arguing that federal courts should analyze the enforcement of all forum selection clauses that select non-federal forums under the doctrine of *forum non conveniens*).

153. *See Corsico, supra* note 77, at 1877 (reasoning that “the same core doctrine would be used” if the defendant filed a motion to transfer as if it had filed a motion to dismiss).

154. *See Van Dusen v. Barrack*, 376 U.S. 612, 639–40 (1964) (holding that the transferee court must apply the state law of the transferor court when a case is transferred).

enforced, the case will be dismissed, and any suit that is refiled in the agreed-upon forum will use the new forum's choice-of-law rules. It seems neither fair nor appropriate that a determination as crucial to the parties' rights as anticipating applicable choice-of-law rules should be determined by whether the parties' forum selection clause selects a federal forum.¹⁵⁵

Other problems undermine this approach as well. As previously discussed, § 1404(a) fundamentally does not appear to be an appropriate vehicle to enforce forum selection clauses.¹⁵⁶ For similar reasons, the application of forum non conveniens to those clauses selecting state or international forums is no improvement.¹⁵⁷ Additionally, both § 1404(a) and forum non conveniens are discretionary,¹⁵⁸ so their applicability rests in the determination of the trial judge. However, whether a forum selection clause should be enforced appears to be more properly considered a mandatory issue.¹⁵⁹ Moreover, because there is no mandate for judges to adopt this proposal aside from the persuasive force of its argument, it is unlikely that it would be uniformly adopted in the federal courts. To the extent that some courts but not others adopt this proposal, uniformity will be

155. It is very unlikely that, in making the choice of federal or state court in (or the precise language of) the forum selection clause, the parties realized the potential import of this decision as to choice of law.

156. See *supra* Part III.A. The language of § 1404(a) primarily contemplates the convenience of the parties and witnesses, which is not really relevant to the consideration of these clauses. Also, it is arguably a codification of forum non conveniens, which also did not contemplate these clauses.

157. The analysis of whether to dismiss on the grounds of forum non conveniens goes through factors such as access to sources of proof, availability of compulsory process, and cost of obtaining witnesses, among others. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947). There is no necessary relationship between the satisfaction of these factors and the presence of a forum selection clause. Moreover, a plaintiff's choice of forum should "rarely be disturbed" under forum non conveniens "unless the balance is strongly in favor of the defendant." *Id.* at 508. But courts clearly believe that forum selection clauses play some significant—if not dispositive—role in the analysis. See *supra* Part II.A.

158. Section § 1404(a) states with precatory language that "a district court *may* transfer," 28 U.S.C. § 1404(a) (emphasis added), and dismissal on grounds of forum non conveniens is likewise only discretionary, see *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (explaining that "[a] federal court *has discretion* to dismiss a case on the ground of forum non conveniens" (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)) (emphasis added)).

159. It does not seem that judicial discretion should determine, in instances free from fraud or overreaching, whether a clause in a contract should be enforced. Similarly, the use of § 1404(a) transfer to enforce such clauses can affect the availability of appellate review on that determination of clause enforcement. See *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 608–09 (7th Cir. 2006) (Posner, J.) (explaining that "[d]ismissal is appealable, transfer not"). See generally 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3846 (3d ed. 2009) ("The transfer order is not subject to anything in the nature of direct review by the transferee court or its court of appeals.").

undermined, and the circuit splits will persist. Finally, this proposal requires courts to apply the § 1404(a) standard when analyzing attempts to enforce forum selection clauses through motions to dismiss,¹⁶⁰ but the vast majority of circuits that have directly confronted the question have applied either the federal *Zapata* standard or state law.¹⁶¹ Thus, this proposal would require these courts to substantially alter their mode of analysis, thereby abandoning *stare decisis*.

3. Overruling *Stewart*: A Judicial Determination That State Law Applies to Both Motions to Transfer and Motions to Dismiss

A third potential solution would be for the Supreme Court to overrule *Stewart* as incorrect in its holding that diversity courts should apply federal rather than state law to motions to transfer.¹⁶² For consistency across motions, this proposal would also require the judicial determination that state law should apply when a defendant seeks to enforce a forum selection clause through a motion to dismiss. This approach would therefore ease the tension between the *Erie* and trans-procedural principles: because state law would apply in both state and federal courts, there would be no incentive for forum shopping and no potential for an inequitable administration of the laws.¹⁶³ Additionally, because the enforceability of forum selection clauses would be determined under the same analysis regardless of whether the defendant filed a motion to dismiss or a motion to transfer, the parties' underlying substantive rights would not be determined by the procedural device employed.

This approach, though it would resolve these significant concerns, has several glaring weaknesses. While overruling *Stewart*

160. More precisely, this approach requires the application of § 1404(a) for motions to dismiss when the clause selects a federal forum, and it requires the application of the quite-similar *forum non conveniens* standard for motions to dismiss when the clause selects a state or international forum.

161. See *supra* Part II.C. It should be noted, though, that some district courts have conducted the *sua sponte* transfer. See *supra* notes 150–151 and accompanying text.

162. Though no commentator or court has directly advocated overruling *Stewart*, the implication of a dissenting Supreme Court Justice and one prominent district court is that *Stewart* was wrongly decided. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) (“Under the twin-aims test, I believe state law controls the question of the validity of a forum-selection clause between the parties.”); *Licensed Practical Nurses, Technicians, & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 398 (S.D.N.Y. 2000) (“It is strongly arguable that in a diversity case, the validity of such clauses should be determined by state law, which generally governs substantive questions involving the making and enforcement of contracts.”).

163. Cf. *supra* Part III.B.

would ease the trans-procedural tension insofar as the same law would be applied regardless of whether the defendant filed a motion to dismiss or a motion to transfer,¹⁶⁴ it would do nothing to alleviate the proper-motion problem.¹⁶⁵ If the parties had specified a non-federal forum (so the defendant could not move for transfer under § 1404), that defendant would have to determine which motion to dismiss should be brought. The circuit split would persist. Additionally, this approach would continue to allow plaintiffs choice-of-law benefits they had not bargained for. A defendant who successfully transferred the litigation would find herself subject to the choice-of-law rules of the plaintiff's initial forum rather than those of the agreed-upon forum.¹⁶⁶

This approach would also require overcoming *stare decisis*: it would require the Supreme Court to overrule its own holding in *Stewart*. Moreover, because this approach would require a determination by either the Supreme Court or the circuit courts that state law should apply in the analysis of motions to dismiss, it would force a substantial change from the current plurality of the circuits that has held that the federal standard of *Zapata* must apply to motions to dismiss.¹⁶⁷ Finally, this approach would widen the gap between diversity cases and federal question or admiralty cases involving forum selection clauses.

Due to the collision of the *Erie* and trans-procedural principles and the lack of any appropriate procedural device for clause enforcement, courts alone cannot remedy this doctrinal tangle. It is therefore necessary to look to the legislative branch and the Supreme Court in its rulemaking capacity for an alternative, more uniform approach to reconcile this area of the law and solidify the doctrine of forum selection clause enforcement in federal courts.

164. *Cf. supra* Part III.B.ii.

165. *Cf. supra* Part II.B.

166. *See supra* notes 104–06 and accompanying text. While a sophisticated defendant would likely bring a motion to dismiss rather than a motion to transfer in this situation—under this state-law approach, each will be equally likely to be granted, and the motion to dismiss would prevent the initial forum's choice-of-law rules from carrying into the continuing litigation—the fundamental problem remains that this inequity *could* occur, and it likely would occur to less sophisticated defendants.

167. *See supra* Part II.C.

IV. THE UNIFORM SOLUTION: A SINGLE FEDERAL RULE AND FEDERAL STANDARD

A. *A Modified Zapata Approach for Dismissal*

The ideal solution to the problems plaguing the law of forum selection clause enforcement in federal courts is for the Supreme Court to create a new Federal Rule of Civil Procedure¹⁶⁸ that is specifically tailored to enforcing forum selection clauses.¹⁶⁹ As outdated procedural devices were the geneses of both the proper-motion and choice-of-law problems,¹⁷⁰ the optimal way to eliminate *both* doctrinal problems is to create a single Federal Rule that would be defendants' only available means to enforce forum selection clauses in federal court. This Rule should include language instructing courts to apply the standard from *Zapata* with a slight modification.¹⁷¹ To ensure that defendants cease attempts to invoke the federal transfer statute as well, Congress should simultaneously amend that statute to indicate that courts must not consider the presence of a forum selection clause in their transfer analysis.¹⁷² The combined new Federal Rule of Civil Procedure and amended federal transfer statute will be referred to hereinafter as the "Modified *Zapata* Approach."¹⁷³

168. Congress delegated the authority to promulgate the Federal Rules of Civil Procedure to the Supreme Court. 28 U.S.C. § 2072(a) (2006).

169. At least a few other commentators have recommended a statutory or rule-based solution to this problem, though none advocate an approach that as thoroughly addresses each of the problems as does the approach advanced here. See Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 93–111 (1992) (proposing a broad federal statute and even including a draft of the proposed reform); Lederman, *supra* note 62, at 426 (proposing a codified motion for the specific use of enforcing forum selection clauses); Lee, *supra* note 29, at 690 (proposing a broad federal statute with its basis in the Federal Arbitration Act).

170. See *supra* Part III.B.

171. This language would be included in the text of the Rule itself, and the Advisory Committee Notes could include a discussion indicating that purpose of the language is to codify the standard of *Zapata* and end once-and-for-all the circuit splits involving choice of law and proper motion.

172. While the Rule itself could instruct that it is the sole means available to enforce a forum selection clause, a possible conflict could occur between this Rule and the transfer statute. This conflict would not likely arise quickly—defendants would generally appear to prefer using this Rule over motions to transfer because its modified *Zapata* standard would result in clause enforcement more often than the more plaintiff-friendly transfer analysis. However, the potential for conflict implies that to be prudent the Court should make clear in the transfer statute itself that it no longer allows consideration of forum selection clauses.

173. Cf. Lederman, *supra* note 62, at 447 (arguing for the adoption of a "*Zapata* motion," which is in some sense comparable to the Modified *Zapata* Approach but not elaborated upon in depth).

The first prong of this approach is a new Federal Rule itself, referred to as the "modified *Zapata* Rule." That Rule would provide a defendant seeking to enforce a forum selection clause with a clear basis in the Federal Rules for filing a motion to dismiss. It would be stated as follows:

A party may assert the following defense by motion: failure to bring a lawsuit relating to the parties' agreement in the forum required by a forum selection clause existing in that agreement. A court should enforce a forum selection clause by dismissal unless the resisting party shows it to be unreasonable under the circumstances, provided that a court should not enforce a forum selection clause if (1) the court's jurisdiction is grounded in diversity and (2) the state in which the court resides has declared an unambiguous policy against the enforcement of such clauses.¹⁷⁴

The Rule would thus instruct the court to enforce the clause so long as the clause was not unreasonable.¹⁷⁵ A key exception would instruct the court to ignore the clause if the court's jurisdiction was grounded in diversity, and the state where the court was located had declared an unambiguous policy against the enforcement of such clauses.¹⁷⁶ Finally, the Federal Rules would require the defendant to bring its motion to dismiss in its first responsive pleading to avoid waiving its right to contest the forum.¹⁷⁷ The standard for enforceability would therefore mimic *Zapata*,¹⁷⁸ with the exception that a clearly pronounced state policy would prevent clause enforcement in diversity cases. As part of the Federal Rules, it would be available to defendants regardless of whether federal jurisdiction was grounded in diversity, federal question, admiralty, or otherwise.

The second prong is amending the federal transfer statute to prevent its improper use as an alternative mechanism to enforce forum selection clauses. To accomplish this effect, 28 U.S.C. § 1404 would be amended to include a subsection (e), which would read:

The district court shall not consider the existence of a forum selection clause in a contract between the parties in its determination of whether transfer is proper.

174. The Modified *Zapata* Rule could be codified at Rule 12(b)(8) of the Federal Rules of Civil Procedure to fit in with the other, already-existing motions to dismiss. Indeed, the wording used in this example would allow it to fit easily into Rule 12(b).

175. This is, of course, the standard of *Zapata*. See 407 U.S. 1, 10 (1972) ("[S]uch clauses are prima facie valid and should be enforced unless . . . [they are] unreasonable under the circumstances.").

176. This exception is necessary both to alleviate the *Erie* problem—to ensure that plaintiffs can benefit from firm state policies regardless of diversity of citizenship—and to prevent tension with the Rules Enabling Act, which provides that federal procedural rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

177. This aspect of the rule would likely require an update to Rule 12(h), the waiver rule, to include Rule 12(b)(8). See FED. R. CIV. P. 12(h) (pertaining to waiving and preserving certain defenses).

178. 407 U.S. at 10.

This language would make clear both to judges and practitioners that transfer under 28 U.S.C. § 1404 is no longer a viable procedural device to enforce a forum selection clause. Instead, the modified *Zapata* Rule would be the one and only enforcement mechanism.

The Modified *Zapata* Approach solves all of the doctrinal problems prevalent today in the law of forum selection clause enforcement in federal courts. First, this approach would end the circuit split on the proper-motion problem.¹⁷⁹ Because it creates a single motion that would uniformly be employed to enforce forum selection clauses, it makes clear which motion must be brought to enforce these clauses. The Modified *Zapata* Approach therefore eliminates the confusion to litigants and courts and the corresponding administrative costs of determining the proper motion. This motion would not suffer from the theoretical weaknesses of all the previously utilized procedural devices.¹⁸⁰ Also, because the motion would be waived unless introduced by defendants in their first responsive pleadings, the Modified *Zapata* Approach would not allow defendants to spring it upon plaintiffs late in the course of litigation.

Additionally, the Modified *Zapata* Approach, by its connection to a single standard of federal law, would end the circuit split over the choice-of-law problem.¹⁸¹ Under *Hanna*, the Federal Rule has precedence over any state-law policies regarding forum selection clauses,¹⁸² thereby making clear that federal law must apply. Furthermore, because the federal transfer statute would no longer remain as a means for a defendant to enforce a forum selection clause, there would not be a need to choose between the federal standard contained in that statute and the federal standard of *Zapata*. A single, uniform federal standard would apply in nearly all instances in which a defendant seeks to enforce a forum selection clause.¹⁸³

The second virtue of the Modified *Zapata* Approach is that it would ease the tension that currently exists between the trans-procedural and *Erie* principles. The trans-procedural principle would be satisfied because there would only be one motion that parties could use to enforce forum selection clauses. As a result, different

179. See *supra* Part II.B.

180. Cf. *supra* notes 65–73 and accompanying text.

181. See *supra* Part II.C.

182. See *Hanna v. Plumer*, 380 U.S. 460, 473–74 (1965) (holding that, when a Federal Rule of Civil Procedure is in direct collision with a state-law policy, the functioning of the federal rule must prevail such that federal law must be applied).

183. The limitation to this statement is that, because state law would apply where the state has declared an unambiguous policy against forum selection clauses, some instances would arise where the federal standard would not be applied.

substantive results could not be reached due to the defendant's mundane selection of a procedural device. The *Erie* principle would also be mostly satisfied due to the inclusion of the language that a forum selection clause must not be enforced when the state in which the diversity court sits has declared a strong policy against such clauses. Because of this modification, if the plaintiff resides in a state with a clearly declared policy against these clauses, courts will not enforce the clause regardless of whether the case proceeds in state or federal court. Thus, the accident of diversity would not affect the enforcement of this fundamental right, and neither forum shopping nor the inequitable administration of the laws would result.

The third beneficial result of the application of the Modified *Zapata* Approach is that it avoids many of the problems that arise from utilization of the federal transfer statute in enforcing forum selection clauses.¹⁸⁴ This approach would prevent defendants and courts from using § 1404(a) inappropriately to enforce forum selection clauses. By doing so, the Modified *Zapata* Approach eliminates the bifurcation of the analysis of clause enforcement, the unfairness resulting from how only some defendants may employ a motion to transfer as a second bite at the apple, and the risk that plaintiffs could benefit from the choice-of-law rules of a forum other than that agreed upon.¹⁸⁵ This approach also prevents inconsequential matters—such as the procedural device employed by the defendant to enforce the clause and whether the clause arguably selected a federal forum—from being determinative of the choice-of-law rules to be applied if the clause is enforced and litigation is moved to the agreed-upon forum. The Modified *Zapata* Approach avoids this arbitrary result by eliminating the availability of transfer as a means to enforce forum selection clauses.

The fourth strength of the Modified *Zapata* Approach is that its legal standard generally reflects the current state of the law in the majority of the federal circuits. Like the current majority of the circuits,¹⁸⁶ the Modified *Zapata* Approach employs the *Zapata* standard—a presumption that such clauses are enforceable unless they are unreasonable—as its default standard. Thus, this approach would allow the vast majority of courts to continue employing a

184. See *supra* Part III.A.

185. Cf. *supra* Part III.A.

186. See *supra* Part II.C.

familiar mode of analysis and would therefore result in a relatively easy transition.¹⁸⁷

While the Modified *Zapata* Approach does provide a mostly uniform system for the enforcement of forum selection clauses in federal courts and eliminates many of the current doctrinal problems, it does have its own shortcomings. Because this approach involves the creation of a new Federal Rule of Civil Procedure and the amendment of the federal transfer statute, two institutions—the Supreme Court and Congress—must act in order for this approach to become reality. As the intrinsic complexities of the legislative process can deter congressional action even in areas of significant importance, an approach that would depend only on the inner-workings of the judicial system for its application would be more efficient, all else equal.¹⁸⁸ But the congressional action needed here is quite simple: the approach is boiled down to a few sentences of legislation. Furthermore, the accomplishment of such quick legislative action would result in significant decreases in the administrative costs to both the judicial system and its litigants, so any temporary cost of legislative action appears outweighed by long-term benefits.

Perhaps the most significant weakness of the Modified *Zapata* Approach is that at least a glimmer of the *Erie* problem remains. Consider a plaintiff who resides or files in a state with a policy weakly opposing forum selection clauses. Such a policy would not be sufficiently unambiguous as to invoke the modified *Zapata* Rule exception. Thus, a federal court would not enforce the clause even if a state court might have enforced it. In this instance, the accident of diversity could still cause differing results. This unlikely scenario¹⁸⁹ may invoke some of the concerns of *Erie*, but it is an inevitable byproduct of the modified *Zapata* Rule exception that successfully alleviates *Erie* problems in most instances.

187. While the *Zapata* standard would indeed be modified to require a consideration of state-law policies and most circuits have not relied upon state law, this would not present too much of an upheaval because most states do indeed have policies similar enough to *Zapata*, see *supra* note 146 and accompanying text, such that this component of the analysis would not frequently be invoked.

188. See Corsico, *supra* note 77, at 1857 n.13 (“Given that many of the problems surrounding forum selection clauses, including the one addressed in this Comment, have existed for roughly thirty years, it seems unlikely that either Congress or the Supreme Court will act in the near future.”).

189. Most states have adopted the *Zapata* presumption of enforceability, and many of the states with policies opposing forum selection clauses have unambiguous policies against enforcement. Thus, the state with an ambiguous policy against forum selection clauses appears to be a rare one. See *supra* notes 146–47 and accompanying text.

A final shortcoming of the Modified *Zapata* Approach results from the need for a judicial determination as to whether the relevant state-law policy against enforcement of forum selection clauses is unambiguous. Whether a state has declared such an unambiguous policy may not always be a simple one. States that either disfavor forum selection clauses only in certain scenarios or that maintain a lukewarm policy against such clauses present a grey area that could potentially result in increased litigation over whether the *Zapata* modification applies.¹⁹⁰ However, such states appear rare.¹⁹¹ Additionally, any change to the status quo—whether legislative or judicial—will result in litigation, but the threat of that alone should not deter action. Despite these minor weaknesses, the Modified *Zapata* Approach is the optimal way to reconcile all of the problems in this area of the law.

B. The Modified Zapata Approach Applied

Having explained the mechanics, theoretical foundations, and strengths and weaknesses of the Modified *Zapata* Approach, it is next useful to illustrate how the application of this rule would work in practice through a few hypothetical scenarios. First, consider again the hypothetical posed in the Introduction. Carol from North Carolina had filed suit for breach of contract in North Carolina state court, and Ricoh desired to enforce the forum selection clause to bring the litigation to New York. Recall that North Carolina has a strong policy against such clauses.¹⁹² While the parties satisfy the diversity statute such that removal to federal court would be proper, Ricoh would not seek removal merely due to a desire to enforce the clause. This is because Ricoh would have no greater rights to enforce the clause in federal court than in state court: it could no longer seek to have the case transferred to another federal court, and the court would likely deny its modified *Zapata* Rule motion because of North Carolina's unambiguous policy against forum selection clauses.¹⁹³ Regardless of whether the defendant chose to remove to federal court for other

190. Additionally, it is possible that the adoption of such a rule could encourage a type of race-to-the-bottom behavior, in which all states adopt the same or similar policies disfavoring forum selection clauses so that their residents would have the same advantages as residents of states that already have such policies.

191. See *supra* note 189.

192. See *supra* note 16 and accompanying text.

193. Whether North Carolina has such an unambiguous policy might be the subject of litigation itself under this approach; thus, it is conceivable that the defendant would remove to federal court so that it could litigate that exact point in district court and (potentially) upon appeal.

reasons,¹⁹⁴ the clause would provide no incentive to remove and would not be enforced. In this situation, where the current law of forum selection clause enforcement would create both *Erie* and trans-procedural problems,¹⁹⁵ neither forum shopping nor the inequitable administration of the laws would occur, and the result would not turn on the procedural device employed.

Consider as well the typical scenario¹⁹⁶ in which the plaintiff files suit for breach of contract in a state court—other than the court contractually agreed upon—in a state that does not have a general policy against forum selection clauses.¹⁹⁷ In this situation, the defendant seeking to enforce the forum selection clause must first consider whether it should remove the case to federal court. However, in either federal or state court, the same result will be achieved: the clause will be enforced through dismissal. There is therefore no incentive for the defendant to forum shop. If the defendant chooses to remove to federal court and still desires to enforce the clause, it must then file the modified *Zapata* Rule motion as its first action in that court. Neither the court nor the defendant has to struggle with the question of which Rule 12(b) or § 1404(a) motion is appropriate in this jurisdiction. Similarly, the court will know which standard applies and whether the motion has been waived, and it will not face the additional possibility of having to apply both the § 1404(a) and motion to dismiss standards just to dispose of a single issue. Whether the clause selected federal, state, or international courts will affect neither the analysis of whether the clause should be enforced nor the choice-of-law rules applied to the continuing litigation. In sum, as these scenarios illustrate, the Modified *Zapata* Approach presents the best solution to the problem of forum selection clause enforcement in federal courts.

V. CONCLUSION

Despite the increasing prevalence of forum selection clauses and their outcome-determinative impact on litigation, the current

194. Of course, there are many reasons other than forum selection clauses why a defendant might remove to federal court. However, removal based on those reasons does not implicate the forum shopping concerns raised in *Erie*.

195. See *supra* Part III.B.

196. This scenario is most typical, because as noted *supra*, most states do not currently have a policy against the enforcement of forum selection clauses. But see *supra* note 147 and accompanying text.

197. Continue to assume that the federal diversity statute is satisfied; that is, the parties are completely diverse and the amount in controversy exceeds seventy-five thousand dollars. 28 U.S.C. § 1332 (2006).

state of the law of forum selection clause enforcement in federal courts sitting in diversity contains two circuit splits and numerous other doctrinal shortcomings. All of these problems stem from a single source: the use of unsuited and outdated procedural devices and rules to enforce clauses that only recently have become ubiquitous. Because no judicial alternative can remedy all of these issues simultaneously, the law must look to the Supreme Court and Congress for a uniform approach to forum selection clause enforcement in federal courts.

The creation of a modified *Zapata* Rule—a new Federal Rule of Civil Procedure specifically tailored to the pervasive problem of forum selection clause enforcement—and the amendment of the federal transfer statute to eliminate its use as a backdoor means for clause enforcement would result in a much-needed uniform approach. This approach would be theoretically sound, would eliminate the ongoing circuit split over which motion is proper to enforce a clause through dismissal, would eliminate the other circuit split as to whether state or federal law should apply in this situation, would alleviate existing *Erie* problems, and would avoid promoting the procedural mechanisms used over the parties' substantive rights. Until such action is taken, the law will continue to create different and arbitrary results between the Stewarts from Alabama and Carols from North Carolina on a matter as critical as choice of forum.

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