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12(b) What? *Slater* and Enforcing Forum Selection Clauses Through Dismissal

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12(B) WHAT? *SLATER* AND ENFORCING FORUM SELECTION CLAUSES THROUGH DISMISSAL

Abstract: On March 8, 2011, the U.S. Court of Appeals for the Eleventh Circuit held in *Slater v. Energy Services Group International, Inc.* that Rule 12(b)(3) governs motions to dismiss under a forum selection clause, whereas 28 U.S.C. § 1404(a) governs motions to transfer under a forum selection clause. In doing so, the Eleventh Circuit further weighed in on the disagreement among the circuit courts of appeal over the proper mechanism to enforce a forum selection clause through dismissal. This Comment argues that although the Eleventh Circuit's holding in *Slater* is inconsistent with the Supreme Court's holding in *Stewart Organization, Inc. v. Ricoh Corp.*, the holding furthers sentiments implicit in the Supreme Court's holding and furthers principles behind forum selection clauses more broadly.

Introduction

In 1988, in *Stewart Organization, Inc. v. Ricoh Corp.*, the Supreme Court was presented with the question of whether federal law or state law controls when transferring cases pursuant to a forum selection clause.[1] The Court, finding 28 U.S.C. § 1404(a) to be sufficiently broad to cover this dispute, held that section 1404(a) governs the transfer of cases pursuant to forum selection clauses.[2] Although *Stewart* determined the proper mechanism to enforce forum selection clauses through transfer, it left undetermined the proper vehicle to enforce a forum selection clause through dismissal.[3] Against this backdrop of uncertainty, the U.S. Court of Appeals for the Eleventh Circuit, in its 2011 decision *Slater v. Energy Services Group International, Inc.*, held that dismissal pursuant to a forum selection clause was properly brought as a

[1] 487 U.S. 22, 24 (1988).

[2] *Id.* at 26–28; *see also* Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 534 (6th Cir. 2002) (noting that in *Stewart,* the Supreme Court "held that the issue of whether the forum-selection clause should be given effect was governed by federal law, specifically 28 U.S.C. § 1404(a)").

[3] Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289–90 (11th Cir. 1998) (noting the uncertainty as to the appropriate motion to enforce forum selection clauses).

motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3).[4]

This Comment evaluates the Eleventh Circuit's holding in *Slater* in light of the Supreme Court's holding in *Stewart* and the principles behind forum selection clauses.[5] Part I outlines the facts and procedural history of *Slater*.[6] Part II then discusses the venue statutes and the circuits' various approaches to enforcing forum selection clauses through dismissal.[7] Finally, Part III argues that although the Eleventh Circuit's decision in *Slater* is facially inconsistent with the Supreme Court's decision in *Stewart,* it furthers notions implicit in *Stewart* and principles behind forum selection clauses.[8]

I. The Eleventh Circuit's Decision in *Slater*

On May 14, 2006, the plaintiff, Mindy Slater, signed an employment agreement with Energy Services Group International, Inc. ("ESGI"), which contained a forum selection clause.[9] The clause stated: "The parties agree that all claims or causes of action relating to or arising from this Agreement shall be brought in a court in the City of Richmond, Virginia."[10] Slater was eventually terminated from ESGI.[11]

Slater brought an action against ESGI (and other defendants) in the U.S. District Court for the Middle District of Florida.[12] Slater contended that ESGI violated Title VII, the Florida Civil Rights Act, and the Florida Whistleblower Act.[13] Specifically, she argued that ESGI discriminated against her for being pregnant and retaliated against her because she refused to engage in illegal employment practices.[14] In response, ESGI filed a motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3).[15] The district court granted ESGI's motion to dismiss, and Slater appealed.[16]

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[4] 634 F.3d 1326, 1333 (11th Cir. 2011).

[5] *See infra* notes 9–75 and accompanying text.

[6] *See infra* notes 9–21 and accompanying text.

[7] *See infra* notes 22–56 and accompanying text.

[8] *See infra* notes 57–75 and accompanying text.

[9] *Slater,* 634 F.3d at 1328–29.

[10] *Id.*

[11] *Id.* at 1329.

[12] *Id.*

[13] *Id.*

[14] Slater v. Energy Servs. Grp. Int'l, Inc., No. 8:09-cv-208-T-24-EAJ, 2009 WL 1010951, at *1 (M.D. Fla. Apr. 15, 2009), *aff'd,* 634 F.3d 1326 (11th Cir. 2011).

[15] *Slater,* 634 F.3d at 1329.

[16] *Id.*

On appeal, the Eleventh Circuit considered whether the District Court had erred in dismissing the case under Rule 12(b)(3) instead of performing a transfer analysis under 28 U.S.C. § 1404(a).[17] In holding that Rule 12(b)(3) was the proper mechanism for requesting dismissal under a forum selection clause, the Eleventh Circuit relied on its 1998 decision, *Lipcon v. Underwriters at Lloyd's, London.*[18] Further, the Eleventh Circuit noted that its conclusion was supported by *Stewart,* in which the Supreme Court held that federal transfer of venue statutes apply to forum selection clauses.[19]

Ultimately, in *Slater,* the Eleventh Circuit held that section 1404(a) is the proper mechanism for enforcing forum selection clauses through transfer.[20] Conversely, when a party is seeking to enforce a forum selection clause through dismissal, Rule 12(b)(3) is the appropriate procedural device.[21]

II. Mechanisms for Enforcing Forum Selection Clauses

In 1988, in *Stewart Organization, Inc. v. Ricoh Corp.*, the Supreme Court held that 28 U.S.C. § 1404(a) governs the transfer of a case based on diversity jurisdiction under a forum selection clause.[22] It did not determine, however, the proper mechanism for dismissal.[23] Section A of this Part discusses the statutes that govern venue in federal district court.[24] Section B summarizes the different approaches the circuits have used to enforce forum selection clauses through dismissal.[25]

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[17] *Id.* at 1330. There were two other issues on appeal. *Id.* First, the plaintiff argued that the district court had erred in finding that her discrimination claims against her employer were within the scope of the forum selection clause. *Id.* Second, the plaintiff contended that the district court had erred by enforcing the forum selection clause despite policy interests against its enforcement. *Id.* The Eleventh Circuit upheld the district court's decision on both of these issues. *Id.* at 1330–32.

[18] *Id.* at 1333; *Lipcon,* 148 F.3d at 1290 ("We hold that motions to dismiss upon the basis of choice-of-forum and choice-of-law clauses are properly brought pursuant to Fed. R. Civ. P. 12(b)(3) as motions to dismiss for improper venue.").

[19] *Slater,* 634 F.3d at 1333 (quoting *Lipcon,* 148 F.3d at 1290).

[20] *Id.*

[21] *Id.*

[22] *See* 487 U.S. 22, 24, 28 (1988).

[23] *See id.* at 28.

[24] *See infra* notes 26–35 and accompanying text.

[25] *See infra* notes 36–56 and accompanying text.

A. *The Venue Statutes Deconstructed*

In *Stewart,* the Supreme Court held that 28 U.S.C. § 1404(a) is the appropriate procedural mechanism to enforce forum selection clauses through transfer.[26] Section 1404(a) is the domestic transfer of venue statute, which allows a district court to transfer a case to any other district within the United States where the case could have been brought.[27] Transfers under section 1404(a) are entirely discretionary and require the court to determine whether it is convenient for the witnesses and in the interest of justice.[28] The procedural limitation of section 1404(a), however, is that it only applies to cases in which venue is proper.[29]

In contrast, 28 U.S.C. § 1406(a) applies to cases in which venue is improper.[30] When venue is improper, the district court may either dismiss the case outright or transfer the case to any district where the case could have originally been brought.[31] There are two statutes that determine where venue is procedurally proper—28 U.S.C. §§ 1391 and 1441.[32] Section 1391 determines where venue is proper when a case is originally filed in federal district court.[33] Section 1441 applies to cases

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[26] 487 U.S. at 28.

[27] 28 U.S.C. § 1404(a) (2006), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, §§ 202, 204, 125 Stat. 758, 763–64. Specifically, section 1404(a) provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.* On December 7, 2011, President Obama signed into law the Federal Courts Jurisdiction and Venue Clarification Act of 2011. Pub. L. No. 112-63, § 204, 125 Stat. 758, 764 (to be codified at 28 U.S.C. § 1404). The Act, effective on January 6, 2012, amended 28 U.S.C. § 1404(a) to provide that a court may grant the transfer of a case to any district to which the parties consent. *Id.* §§ 204–205, 725 Stat. at 764–65 (codified at 28 U.S.C. §§ 1404, 1390 note).

[28] 28 U.S.C. § 1404(a).

[29] *Id. But see id.* § 1406(a) (2006) (outlining the procedure for curing improper venue).

[30] *Id.*

[31] *Id.*

[32] *Id.* §§ 1391, 1441.

[33] *Id.* § 1391. Section 1391(a) dictates proper venue in diversity cases; section 1391(b) applies to cases where jurisdiction is not based solely on diversity. *Id.* § 1391(a), (b). Under section 1391(a), venue is proper: (1) in any district in which any of the defendants reside if all defendants reside in the same state, and (2) in any district where a substantial part of the events occurred or the property is located. *Id.* The fallback provision provides that venue is proper in any district in which a defendant is subject to personal jurisdiction at the time the action commenced. *Id.* § 1391(a). Like section 1391(a), venue is proper under section 1391(b) in any district in which any of the defendants reside if all defendants reside in the same state and in any district where a substantial part of the events occurred or the property is located. *Id.* § 1391(b). Its fallback provision allows for venue in any district where any defendant may be found. *Id.*

The amendments to 28 U.S.C. § 1391 under the Federal Courts Jurisdiction and Venue Clarification Act of 2011 eliminated the distinction between venue for diversity

that have been removed from state court to federal court.[34] Further, section 1441 only permits one venue: the federal district that encompasses the area where the state court proceedings are pending.[35]

B. *The Various Circuits' Approaches to Enforcing Forum Selection Clauses Through Dismissal*

After *Stewart,* the proper procedural mechanism to enforce a forum selection clause through dismissal remained unclear.[36] As a result, four different procedures for enforcing forum selection clauses through dismissal emerged among the circuits: (1) motion to transfer venue under 28 U.S.C. § 1404(a); (2) failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6); (3) improper venue under Rule 12(b)(3); and (4) lack of subject matter jurisdiction under Rule 12(b)(1).[37]

Following the first approach, the U.S. Court of Appeals for the Sixth Circuit applies 28 U.S.C. § 1404(a) as the proper mechanism for enforcing forum selection clauses.[38] That approach was laid out in 2002 in *Kerobo v. Southwestern Clean Fuels, Corp.*, in which the Sixth Circuit ad-

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cases and other cases. Pub. L. No. 112-63, § 202, 125 Stat. at 763. Under the new amendments, venue is proper: (1) in any district in which any of the defendants reside if all defendants reside in the same state; (2) in any district where a substantial part of the events or property is located; or (3) if there is no district under either of the first two, any judicial district in which any defendant is subject to personal jurisdiction. *Id.*

Additionally, under section 1391(c), venue against a corporation is proper in any district where the corporation is subject to personal jurisdiction. 28 U.S.C. § 1391(c). Accordingly, in *Slater,* venue was governed by section 1391(c). 634 F.3d at 1328–29; *see* 28 U.S.C. § 1391(c). Furthermore, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 created a distinction in venue for corporations depending on whether the corporate entity is a defendant or a plaintiff. Pub. L. No. 112-63, § 202, 125 Stat. at 763. When a corporation is a defendant, it resides in any district in which it is subject to personal jurisdiction. *Id.* In contrast, when a corporation is a plaintiff, it resides in the judicial district where it maintains its principal place of business. *Id.*

[34] 28 U.S.C. § 1441.

[35] *Id.* § 1441(a).

[36] *E.g., Slater,* 634 F.3d at 1332; Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289–90 (11th Cir. 1998).

[37] *E.g., Slater,* 634 F.3d at 1332 (recognizing the various approaches taken by the circuits); Kerobo v. Sw. Clean Fuels, Corp., 285 F.3d 531, 534–39 (6th Cir. 2002); AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 152–53 (2d Cir. 1984); LFC Lessors, Inc. v. Pac. Sewer Maint. Corp., 739 F.2d 4, 6–7 (1st Cir. 1984); *see also* Sacha Dyson & Kevin D. Johnson, *My Sandbox or Yours? Enforcement of Forum-Selection Clauses in Employment Agreements,* FED. LAW., Nov.–Dec. 2011, at 19, 20 (emphasizing that there is no consistency or agreement among the lower federal courts as to the proper mechanism for enforcing forum selection clauses).

[38] *Kerobo,* 285 F.3d at 534–39.

dressed whether a contract for forum could render a statutorily proper venue improper.[39] The Sixth Circuit concluded that because venue was authorized under 28 U.S.C. § 1391, a motion to dismiss under Rule 12(b)(3) for improper venue was erroneous.[40] Instead, it found that in light of the Supreme Court's holding in *Stewart,* enforcement of a forum selection clause should be analyzed under section 1404(a).[41]

In contrast, following the second approach, the U.S. Court of Appeals for the First Circuit has held that dismissals are proper under Rule 12(b)(6).[42] The First Circuit established that approach in 1984, in *LFC Lessors, Inc. v. Pacific Sewer Maintenance Corp.*, when it concluded that dismissal based on a forum selection clause was inappropriate under both Rule 12(b)(1) and Rule 12(b)(3).[43] Specifically, the First Circuit stated that a forum selection clause does not strip a federal district court of jurisdiction.[44] Instead, the court held that it is merely a stipulation by the parties asking the court to abstain from exercising its jurisdiction.[45] Therefore, using Rule 12(b)(1) for lack of subject matter jurisdiction to enforce a forum selection clause through dismissal was improper.[46] In addition, the court held that dismissal under Rule 12(b)(3) was improper because venue would be statutorily proper under 28 U.S.C. § 1391.[47] Accordingly, it held that dismissal for failure to state a claim upon which relief can be granted under Rule 12(b)(6) is the correct procedural mechanism.[48]

Following the third approach, the U.S. Court of Appeals for the Fourth, Seventh, Ninth, Eleventh, and District of Columbia Circuits have found that Rule 12(b)(3) is the proper mechanism for dismissing cases under a forum selection clause.[49] These courts have determined

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[39] *Id.* at 535.

[40] *Id.* at 534–36.

[41] *Id.* at 538–39. In *Kerobo,* the Sixth Circuit noted that other circuits have subscribed to different methods for dismissal—Rule 12(b)(3) and Rule 12(b)(6). *Id.* at 534–35. Although the court stated its disagreement with dismissal under Rule 12(b)(3), it did not formally endorse Rule 12(b)(6) as the proper mechanism. *Id.* at 535.

[42] *E.g.*, Lambert v. Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993). The Third Circuit has stated, in dicta, that Rule 12(b)(6) would be an appropriate dismissal mechanism. *See* Salovaara v. Jackson Nat'l Life Ins. Co., 246 F.3d 289, 298 (3d Cir. 2001).

[43] 739 F.2d at 6–7.

[44] *Id.* at 6.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 7.

[48] *Id.*

[49] *See, e.g.*, Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 550 (4th Cir. 2006); Muzumdar v. Wellness Int'l Network, Ltd., 438 F.3d 759, 760–61 (7th Cir. 2006);

that dismissal under Rule 12(b)(6) is inappropriate because the analysis under that mechanism is at odds with the Supreme Court's standard for resolving motions to dismiss based on a forum selection clause.[50] These courts also note that, from a policy perspective, dismissal under Rule 12(b)(6) would undesirably enable defendants to wait to bring their motions to enforce forum selection clauses until late in the litigation process.[51]

Finally, the U.S. Court of Appeals for the Second Circuit has inconsistently articulated the appropriate mechanism to enforce forum selection clauses through dismissal.[52] First, in *AVC Nederland B.V. v. Atrium Investment Partnership,* decided in 1984, the Second Circuit found that a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) was the proper way to resolve forum selection clauses.[53] Yet, in 1997, in *New Moon Shipping Co. v. MAN B & W Diesel AG,* the court noted that early cases, such as *AVC Nederland B.V.*, mischaracterize the vehicle to decline jurisdiction.[54] Furthermore, in 1998, in *Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V.*, the Second Circuit signaled its agreement with the First Circuit, and held that Rule 12(b)(6) is the proper mechanism.[55] Currently, the Second Circuit en-

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Lipcon, 148 F.3d at 1290; Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996); Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.A., 867 F.2d 697, 698 (D.C. Cir. 1989).

[50] *E.g.*, *Sucampo,* 471 F.3d at 549; *Argueta,* 87 F.3d at 324. A motion to dismiss under Rule 12(b)(6) requires the court to accept the pleadings as true; in contrast, the *Zapata* standard, articulated in the 1972 Supreme Court decision *M/S Bremen v. Zapata Off-Shore Co.*, does not require the court to accept the pleadings as true. *Sucampo,* 471 F.3d at 549 (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972)); *see also* Ryan Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts,* 62 VAND. L. REV. 1913, 1924 n.69 (2009); Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform,* 44 LOY. L.A. L. REV. 1625, 1645 (2011).

[51] *Sucampo,* 471 F.3d at 549. Rule 12(h)(2) allows any party to bring a motion to dismiss under Rule 12(b)(6) until the end of trial. FED. R. CIV. P. 12(h). Therefore, defendants would wait until litigation was not trending in their favor before asserting enforcement of their forum selection clauses. *Sucampo,* 471 F.3d at 549; *see also* Holt, *supra* note 50, at 1924 & n.70. Because a motion to dismiss under Rule 12(b)(3) is waived if not raised in the first responsive pleading under Rule 12(h)(1), 12(b)(3) motions do not raise the same timing concerns. FED. R. CIV. P. 12(h)(1); *Sucampo,* 471 F.3d at 549; *see also* Holt, *supra* note 50, at 1924 & n.70.

[52] *Compare* Evolution Online Sys., Inc. v. Koinklijke PTT Nederland N.V., 145 F.3d 505, 508 n.6 (2d Cir. 1998) (stating that dismissal was under Rule 12(b)(6)), *with AVC Nederland B.V.*, 740 F.2d at 152–53 (stating that dismissal was under Rule 12(b)(1)).

[53] 740 F.2d at 152–53 (determining this in the context of an international agreement).

[54] New Moon Shipping Co. v. MAN B & W Diesel AG, 121 F.3d 24, 28 (2d Cir. 1997); *see AVC Nederland B.V.*, 740 F.2d at 152–53.

[55] 145 F.3d at 508 n.6.

forces forum selection clauses through Rule 12(b)(1), 12(b)(3), and 12(b)(6).[56]

III. *Slater* and *Stewart* Compared

Although the Eleventh Circuit's holding in *Slater* is facially inconsistent with the Supreme Court's holding in *Stewart,* it nevertheless furthers sentiments implicit in *Stewart* and principles behind forum selection clauses generally.[57] In *Stewart,* the Court held that 28 U.S.C. § 1404(a) controls transfers pursuant to a forum selection clause, thereby assuming that the pre-transfer venue is proper.[58] Even though venue is not contractually proper, it is statutorily proper.[59] As such, the Supreme Court implied that there is a distinction between procedurally proper venue—that is, venue authorized by statute—and contractually proper venue.[60]

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[56] TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 475 (2d Cir. 2011).

[57] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 & n.8 (1988) (implying that because venue was statutorily authorized, it was procedurally proper); Slater v. Energy Servs. Grp. Int'l, Inc., 634 F.3d 1326, 1333 (11th Cir. 2011) ("[W]e conclude that § 1404(a) is the proper avenue of relief where a party seeks the transfer of a case to enforce a forum-selection clause, while Rule 12(b)(3) is the proper avenue for a party's request for dismissal based on a forum-selection clause."); Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 549 (4th Cir. 2006) (noting the disjunction between the presence of a forum selection clause and the ability of defendants to raise it during trial); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1290 (11th Cir. 1998) (emphasizing that the Supreme Court in *Stewart* stated that forum selection clauses affect venue).

[58] *See Stewart,* 487 U.S. at 28. *But see* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts,* 66 Temp. L. Rev. 785, 842–49 (1993) (noting that in *Carnival Cruise Lines, Inc. v. Shute,* the Supreme Court implicitly allowed a defendant to enforce a forum selection clause through 28 U.S.C. § 1406(a) (2006), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, §§ 202, 204, 125 Stat. 758, 763–64)); Wright, *supra* note 50, at 1639 (stating that the Supreme Court in *Carnival Cruise Lines, Inc. v. Shute* arguably overruled *Stewart* and endorsed 28 U.S.C. § 1406(a)).

[59] 28 U.S.C. § 1391(c) (2006), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763; *see Stewart,* 487 U.S. at 28. In *Stewart,* the Supreme Court praised the parties for not contesting the district court's denial of the motion to dismiss for improper venue. *Stewart,* 487 U.S. at 28 n.8; *see also* Holt, *supra* note 50, at 1925 & n.75. Further, the Supreme Court noted that venue was proper in that case because 28 U.S.C. § 1391(c) authorizes venue in a judicial district in which a corporation is doing business. *Stewart,* 487 U.S. at 28 n.8. It should be noted, however, that the parties originally brought the dismissal for improper venue under 28 U.S.C. § 1406(a) rather than Rule 12(b)(3). *See id.* In *Slater,* because ESGI does business in Crystal River, Florida, venue was statutorily proper in the Middle District of Florida pursuant to 28 U.S.C. § 1391(c). *See* 28 U.S.C. § 1391(c); *Slater,* 634 F.3d at 1328–29.

[60] *See Stewart,* 487 U.S. at 28 n.8. In *Kerobo v. Southwest Clean Fuels, Corp.*, the court highlighted that:

> the [*Stewart*] Court footnoted with apparent approval the parties' agreement that the district court had properly denied the motion to dismiss for improper venue because the case had been filed in the venue prescribed by 28

Had the Supreme Court found that venue was improper in these cases, it would have endorsed the use of 28 U.S.C. § 1406(a) rather than section 1404(a).[61] Therefore, because the Supreme Court stated in *Stewart* that whether a venue is statutorily authorized controls for forum selection clauses, the Eleventh Circuit's holding in *Slater*—that dismissals should be brought under a Rule 12(b)(3) motion for improper venue—is inconsistent with that holding.[62]

The juxtaposition between *Stewart* and *Slater* highlights the inconsistency.[63] *Slater* explicitly held that a motion for transfer of venue where venue is proper—28 U.S.C. § 1404(a)—applies for transfers under a forum selection clause.[64] In contrast, *Slater* held that enforcement of a forum selection clause through dismissal is properly brought as a motion to dismiss for improper venue—Rule 12(b)(3).[65] Yet, whether a forum selection clause is enforced through dismissal or transfer should not affect whether a particular venue is proper.[66]

Even though the Eleventh Circuit's holding in *Slater* is inconsistent with the decision in *Stewart,* it is in line with other aspects of the Supreme Court's decision and furthers specific principles behind forum selection clauses.[67] First, the Eleventh Circuit rightly recognized the Supreme Court's connection between forum selection clauses and venue.[68] By holding that a transfer of venue statute applies when par-

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> U.S.C. § 1391, the statute governing venue for cases filed directly in federal court. We think this is a clear signal that if venue is proper under the statute, a motion to transfer for improper venue will not lie.

285 F.3d 531, 536 (6th Cir. 2002) (citations omitted); *see also* Stanley E. Cox, *Case One: Choice of Forum Clauses,* 29 New Eng. L. Rev. 517, 561 (1995) ("[In *Stewart*], the forum selection clause did not render defective an otherwise appropriate venue. That statement should logically preclude all motions predicated on the theory that the original court lacks jurisdiction or venue by virtue of the forum selection clause."); Holt, *supra* note 50, at 1925.

[61] *See* 28 U.S.C. §§ 1404(a), 1406(a).

[62] *See Stewart,* 487 U.S. at 28. *But see Slater,* 634 F.3d at 1333 (noting that because *Stewart* dealt procedurally with transfer of *venue,* the Eleventh Circuit's holding that Rule 12(b)(3) governs enforcing forum selection clauses through dismissal is not inconsistent with *Stewart*).

[63] *See Stewart,* 487 U.S. at 28; *Slater,* 634 F.3d at 1333.

[64] 28 U.S.C. § 1404(a); *Slater,* 634 F.3d at 1333.

[65] *Slater,* 634 F.3d at 1333.

[66] *See id.*; *see also* Fed. R. Civ. P. 12(b)(3); *supra* notes 27–31 and accompanying text.

[67] *See, e.g.*, *Lipcon,* 148 F.3d at 1290.

[68] *See Stewart,* 487 U.S. at 28. The Eleventh Circuit has noted this very fact in supporting its use of Rule 12(b)(3). *See Lipcon,* 148 F.3d at 1290; *see also* Holt, *supra* note 50, at 1924–25 & n.71; Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure,* 25 Cornell Int'l L.J. 51, 51–52 (1992). In *Lipcon,* the court stated that the Supreme Court's decision that a transfer of venue statute controls for enforcing forum selection clauses through transfer provides ample support for their decision that Rule 12(b)(3) is the proper 12(b) motion to bring. 148 F.3d at 1290; *accord Slater,* 634 F.3d at 1332–33.

ties seek to enforce forum selection clauses through transfer, the Supreme Court implied that forum selection clauses affect venue.[69]

Moreover, 12(b)(3) motions are consistent with the purposes of forum selection clauses.[70] At the time that parties to an agreement sign a contract, they are both put on notice that they have endorsed a particular forum for suit.[71] Therefore, like other motions that fall within the purview of Rule 12(h)(1), enforcement of a forum selection clause should be raised at the start of litigation or be deemed waived.[72] Because all of the other proposed mechanisms for enforcing forum selection clauses through dismissal—28 U.S.C. § 1404(a), Rule 12(b)(1), and Rule 12(b)(6)—fall outside Rule 12(h)(1), they can be raised at any point in the litigation.[73] This essentially gives parties two bites at the apple; parties can begin by pursuing litigation in the non-contracted forum and, when it appears that litigation is not going in their favor, dismiss the case.[74] To endorse such a procedure severely prejudices the plaintiff.[75]

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[69] *See, e.g.*, *Lipcon*, 148 F.3d at 1290. *But see* 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, 1872 (2003) (emphasizing that there is a difference between the concept of inconvenient forum and statutorily improper venue).

[70] *See* Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 549 (4th Cir. 2006); Solimine, *supra* note 68, at 51–52.

[71] *See* Solimine, *supra* note 68, at 51–52; *see also* Wright, *supra* note 50, at 1645–46. Forum selection clauses are a way for parties to privatize procedure. *See* Solimine, *supra* note 68, at 51–52. They "permit parties to select a desirable, perhaps neutral, forum in which to litigate disputes. Such planning permits orderliness and predictability in contractual relationships, obviating a potentially costly struggle at the outset of litigation over jurisdiction and venue." *Id.* Although the parties, in theory, may be on notice that they have agreed to a selected forum for litigation, often the parties have unequal bargaining power. *Id.* at 52.

[72] *See Sucampo*, 471 F.3d at 549.

[73] Fed. R. Civ. P. 12(b)(2)–(5), 12(h)(1); *see also* Wright, *supra* note 50, at 1646. Rule 12(h)(1) states that a party waives its right to raise the defenses under Rule 12(b)(2)–(5) by failing to raise any of them in the party's first motion under Rule 12(b) or by failing to raise it in a motion or in a responsive pleading. Fed. R. Civ. P. 12(h)(1). The defenses subject to Rule 12(h)(1) are: lack of personal jurisdiction (Rule 12(b)(2)); improper venue (Rule 12(b)(3)); insufficient process (Rule 12(b)(4)); and insufficient service of process (Rule 12(b)(5)). Fed. R. Civ. P. 12(b)(2)–(5), 12(h)(1).

[74] *E.g.*, *Sucampo*, 471 F.3d at 549–50; *see also* Holt, *supra* note 50, at 1924 & n.70; Corsico, *supra* note 69, at 1874–75 (comparing the advantages and disadvantages of waiver-resistant mechanisms, such as Rule 12(b)(1) and Rule 12(b)(6)); Wright, *supra* note 50, at 1646 (discussing that litigants for motions under Rule 12(b)(6) can withhold their objections until late into litigation, thereby wasting judicial resources).

[75] *See Sucampo*, 471 F.3d at 549–50. *But see* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1251 (2007) (noting that the Supreme Court favored plaintiffs by holding against immediate appeal of a refusal to dismiss based on a contractual forum selection clause (citing Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 296 (1989))).

Conclusion

The Eleventh Circuit's decision in *Slater* is inconsistent with the Supreme Court's decision in *Stewart*. The Supreme Court, by holding that 28 U.S.C. § 1404(a) controls, has implied that when a case is brought in a statutorily authorized venue, venue is procedurally proper. Yet, because the Supreme Court stated in *Stewart* that a forum selection clause does not make a procedurally proper venue improper, *Slater*'s holding—that dismissal for improper venue under Rule 12(b)(3) is the proper mechanism to enforce forum selection clauses—is in opposition to *Stewart*.

Even though the Eleventh Circuit's decision in *Slater* is inconsistent with the Supreme Court's holding in *Stewart,* it furthers the policies behind the Supreme Court's decision and forum selection clauses more broadly. By holding that 28 U.S.C. § 1404(a) controls when moving to transfer under a forum selection clause, the Supreme Court demonstrated that forum selection clauses directly affect venue. Furthermore, because both parties are on notice that a particular forum is designated for litigation, the defense of a forum selection clause should be required to be raised or waived. Rule 12(b)(3) is the only proposed mechanism that falls into Rule 12(h)(1)'s purview.

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