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A Tie that Binds: Forum Selection Clause Enforceability in West Virginia

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I. INTRODUCTION

In civil procedure courses across the United States, first-year law students often face with unease the complex subject of jurisdiction. Broadly defined as the power of a court to hear and decide cases, jurisdiction functions as the essential wellspring from which the legitimacy of a court's authority flows. Indeed, a court's power over a specific person or party plays a key role in understanding jurisdiction generally. And although this principle provides a vital

protection for the unwary litigant,[1] the safeguard of personal jurisdiction is often waived in today's commercially-driven world.[2] Enter the forum selection clause.[3]

A forum selection clause in a contract "designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship."[4] Firmly rooted in the principles of contract law, forum selection clauses serve many functions: they may reduce uncertainty as to where a potential plaintiff will file suit,[5] constrain otherwise high litigation-related expenses,[6] and curtail a plaintiff's tactical litigation decisions.[7] As the United States Supreme Court noted in its landmark decision on forum selection clause enforceability, *M/S Bremen v. Zapata Off-Shore Co.*,[8] "[t]he elimination of . . . uncertainties by agreeing in advance on a forum ac-

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1 Personal jurisdiction restricts the territorial reach of a court's authority. The minimum contacts analysis of *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny are likewise well-known by students of civil procedure.

2 *See* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) (stating that "neither personal jurisdiction nor venue is fundamentally preliminary in the sense that subject matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties"); *see also* Ins. Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (stating that personal jurisdiction, as an individual right, can be waived by express or implied consent); Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964) (stating that "parties to a contract may agree in advance to submit to the jurisdiction of a given court").

3 Some courts and litigators refer to these as "venue selection clauses," but I chose to adopt the majority usage in designating such provisions "forum selection clauses." Still others call them "choice-of-forum provisions" or simply "forum clauses." *See* Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 136 n.4 (1982).

4 17A AM. JUR. 2D *Contracts* § 259 (2004) (citation omitted).

5 *See, e.g.*, Gordonsville Indus., Inc. v. Am. Artos Corp., 549 F. Supp. 200, 205 (W.D. Va. 1982) ("By including [the forum selection clause] in the contract, the two parties eliminated the uncertainties and great inconveniences that both parties could confront by being forced to adjudicate the contract in a forum [un]familiar to both parties."); *see also* Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the* Erie *Doctrine and Federal Common Law:* Steward Organization v. Ricoh Corporation, 72 MINN. L. REV. 1090, 1092 (1988).

6 *See, e.g.*, Stephen R. Buckingham, Comment, Stewart Organization v. Ricoh Corp.*: Judicial Discretion in Forum Selection*, 41 RUTGERS L. REV. 1379, 1382 n.13 (1989) (stating that prior agreement on forum for litigation is a cost-control measure); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 51–52 (1992) (stating that forum selection clauses "have many virtues," such as the "orderliness and predictability in contractual relationships," and "obviat[e] a potentially costly struggle" over jurisdiction and venue).

7 *See* Gruson, *supra* note 3, at 133 ("The forum selected by a plaintiff may be very inconvenient for the defendant, and the freedom of the plaintiff to select a forum creates uncertainty and unpredictability for the defendant."); *cf.* Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 783 (1985) ("The choice of forum has . . . become a key strategic battle fought to increase the chances of prevailing on the merits.").

8 407 U.S. 1, 13–14 (1972).

ceptable to both parties is an indispensable element in international trade, commerce, and contracting."[9]

This Note offers a primer on forum selection clause law generally with a particular focus on the recent West Virginia Supreme Court of Appeals' decision in *Caperton v. A.T. Massey Coal Co.*[10] To begin, Part II surveys the treatment of forum selection clauses by American courts, including the early days in which such clauses were disfavored. Additionally, Part II traces the recent favorable treatment by the federal courts following *Bremen*,[11] provides examples of the varied treatment under state laws, and finally briefly highlights pre-*Caperton* West Virginia law. Part III breaks down the *Caperton* decision by outlining the requirements to enforce a forum selection clause under current West Virginia law. Throughout Part III, this Note addresses variables not present in *Caperton* that could alter the forum selection clause enforceability analysis with a particular focus on resisting enforcement. Ultimately, this Note is intended to serve as a practitioner's guide to forum selection clause enforceability in West Virginia following the *Caperton* decision.

II. BACKGROUND: A CONSENSUS EMERGES

A. *The Early Days: A Historical Aversion*

Historically, American courts greeted forum selection clauses with near-unanimous disapproval.[12] Based on the well-settled principle that private individuals have "no power to alter the rules of judicial jurisdiction"—commonly-known as "ousting" a court's jurisdiction[13]—many courts invalidated clauses that attempted to exclude the jurisdiction of courts other than those articulated in the clause.[14] Leading to this judicial suspicion of forum selection clauses was

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9 *Id. See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) ("[Forum selection clauses are] an almost indispensable precondition to the achievement of the orderliness and predictability essential to any international business transaction."); *see generally* Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 CHI. J. INT'L L. 301, 310–12 (2002) (discussing the costs and benefits of forum selection clauses).

10 690 S.E.2d 322 (W. Va. 2009).

11 407 U.S. 1.

12 *Bremen*, 407 U.S. at 9 ("Forum[]selection clauses have historically not been favored by American courts."). Nary a court in these early days enforced forum selection clauses. *See* William E. Syke, Comment, *Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. L. REV. 293 (1950).

13 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a (1971). For a historical discussion of ouster and early forum selection clause jurisprudence, see David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 794–99 (1993).

14 *See, e.g.*, Home Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (stating that "agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void"); Parker, Peebles & Knox v. El Saieh, 141 A. 884 (1928); Huntley v. Alejandre, 139 So. 2d 911 (Fla. Dist. Ct. App. 1962); Fid. & Deposit Co. v. Gainesville Iron Works, Inc., 189 S.E.2d 130 (Ga. Ct. App. 1972); Johnson v. Royal Motor Car Ins. Ass'n, 226 Ill. App. Ct. 147 (1922); Nasha River Paper

the misguided fear that a party employing such a clause was seeking to remove a court's subject matter jurisdiction by contract, thus effecting a true ouster of the court's authority.[15] Explaining this fear, one commentator notes that forum selection clauses "pose a characterization problem since such clauses may waive a party's personal jurisdiction objection . . . or offer a reason relevant to *forum non conveniens* analysis to favor the contractual forum over other possible forums."[16]

B. *The* Bremen *Revolution: Federal Courts Lead the Way*

Despite this long history of unfavorable treatment, the United States Supreme Court recognized the "ouster" fears as erroneous and outmoded, and held that forum selection clauses are prima facie valid absent a showing by the resisting party that enforcement would be unreasonable or unjust under the circumstances, or that the clause is invalid due to other contractual infirmity.[17] While it remains true that no private individual has the power to oust a court's subject matter jurisdiction, the effect of enforcing a forum selection clause is not so bold. Chief Justice Burger explained in *Bremen*:

> The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals.[18]

Therefore, under the standard set forth in *Bremen*, a forum selection clause may be enforced even when the chosen forum lacks a relationship to the parties or transaction. The supporting rationale is the court's respect for the "legitimate expectations of the parties, [as] manifested in their freely negotiated agreement . . . ."[19] Indeed, "[a] freely negotiated private . . . agreement, unaf-

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Co. v. Hammermill Paper Co., 111 N.E. 678 (Mass. 1916); Gooseneck Trailer Mfg. Co. v. Barker, 619 S.W.2d 928 (Mo. Ct. App. 1981); Int'l Travelers' Ass'n v. Branum, 212 S.W. 630 (Tex. 1919); Savage v. People's Bldg., Loan & Sav. Ass'n, 31 S.E. 991 (W. Va. 1898).

[15] It is axiomatic that "[p]arties cannot create subject matter jurisdiction by agreement and thus cannot waive a subject matter jurisdiction objection." Leandra Lederman, *Viva* Zapata*!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 427 n.29 (1991) [hereinafter *Viva Zapata!*].

[16] *Id.* at 428 (emphasis added) (citation omitted). Lederman traces the possible reasons for the persistence of this early position. *See id.* at 428 n.40.

[17] *Id.* at 430; *Bremen*, 407 U.S. at 15.

[18] *Bremen*, 407 U.S. at 12.

[19] *Id.*

fected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."[20] Regarding the problem of ouster after *Bremen*, courts no longer treated a forum selection clause as having effected an ouster; rather, courts give the clause effect by *declining* jurisdiction in favor of the agreed-upon forum.[21] Even though *Bremen* was decided by the Supreme Court in admiralty, both federal and state courts across the country quickly began to adopt its forum selection clause enforceability analysis in all civil cases.[22]

The Supreme Court expanded the reach of *Bremen* in *Carnival Cruise Lines v. Shute*.[23] In *Shute*, the high court found that a forum selection clause located in small print on a cruise line ticket "contract" was valid even though it was not freely bargained-for between the two parties.[24] Taking note of the "realities of form passage contracts"[25] and the "special interest" a cruise line has in "limiting the fora in which it [may be amenable] to suit," the *Shute* court found that the resisting party failed to meet the "heavy burden" of showing sufficient inconvenience to set aside the clause as unreasonable under *Bremen*.[26] While *Shute* undoubtedly increased the already heavy burden on a party resisting forum selection clause enforcement, the Court stated that "[i]t bears emphasis that forum[]selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."[27] The seemingly harsh application of *Bremen* in *Shute* has engendered substantial criticism,[28] and some courts have scrutinized form passage contracts for fundamental fairness and found their forum selection clauses invalid.[29] Despite the waves made by Ms. Shute's

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20 *Id.* at 13 (footnote omitted).

21 *See, e.g.*, Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp., 696 F.2d 315, 317 (4th Cir. 1982) ("If the specification of a particular forum is reasonable, another court should not consider it an affront to its judicial power, but should respect the provision as the responsible expression of the parties' intent.").

22 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:15 (4th ed. 1993).

23 499 U.S. 585 (1991).

24 *Id.* at 593.

25 In the case of a cruise line, a form passage contract is the basic agreement between a traveling tourist and cruise line company. It is most often found as part of the passenger's ticket and related ticketing documents.

26 *Id.* at 593–95.

27 *Id.* at 595. "[W]hile the particular clause [in *Shute*] was upheld, the Court recognized that ultimately, the validity of such a clause should depend on the reasonableness of the clause under the particular circumstances and the 'fundamental fairness' of both the basis for the clause and its effect." 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:15 (4th ed. 1993).

28 *See, e.g.*, Edward A. Purcell, *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 425 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 370 (1992).

29 *See, e.g.*, Effron v. Sun Line Cruises, Inc., 857 F. Supp. 1079 (S.D.N.Y. 1994), *rev'd in part*, 67 F.3d 7 (2d Cir. 1995) (refusing to enforce forum selection clause contained in ticket for

cruise to the high court, the basic *Bremen* rubric and presumption of enforceability has remained substantially unchanged.

C. State Courts

Most state courts responded to *Bremen* and its progeny by discarding their previously-held positions of invalidity by ouster[30] and have adopted the federal presumption of enforceability.[31] For the states that have directly addressed the issue of forum selection clause enforceability,[32] the enforceability requirements may be framed somewhat differently; however, most have adopted by judicial decision the basic rubric first set down in *Bremen*.[33] Still others, such as Nebraska, have adopted the Model Uniform Choice of Forum Act, which essentially codifies the *Bremen* framework in statute.[34] In a separate vein, some states have statutorily-specified limitations on the general presumption of enforceability. For instance, the New Jersey Franchise Practices Act recognizes forum selection clauses in franchise agreements as presumptively invalid.[35] In sum, however, only a few states still look upon forum selection clauses with disfavor, although the law in these few states is in flux.[36]

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passage on a Greek-owned ship designating Greece as the forum where plaintiff was a Florida citizen who dealt only with a New York corporation and was injured during South American cruise; because plaintiff would suffer great difficulty in litigating such a claim in Greece, effect of enforcement was to deprive her of her day in court, and thus requiring her to do so would be fundamentally unfair).

30 *See supra* Part II.A.

31 *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404 §§ 2, 4.5, 4.7 (1984); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1971); *see generally* Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 366-72 (1993).

32 For example, West Virginia had not directly addressed the issue until *Caperton* even though the Supreme Court of Appeals had, in dicta, acknowledged a presumption of enforceability for the first time in *General Elec. Co. v. Keyser*, 275 S.E.2d 289, 292 n.2 (W. Va. 1981); *see infra*, Part II.D.

33 *See, e.g.*, Titan Indem. Co. v. Hood, 895 So. 2d 138, 146–47 (Miss. 2004); *see generally* Dougherty, *supra* note 31 at § 4[a] (Supp.).

34 *See* NEB. REV. STAT. § 25–415 (1969).

35 *See* N.J. STAT. ANN. § 56:10–7.3(a)(2), (b) (West 2010); *see also* Kubis & Perszyk Assocs. v. Sun Microsystems, Inc., 680 A.2d 618 (N.J. 1996).

36 For example, some South Carolina courts have found a strong public policy against the enforcement of outgoing forum selection clauses (outgoing clauses refer to those provisions that operate to force a litigant to leave the state court jurisdiction in order to bring suit). *See, e.g.*, Johnson v. Key Equip. Fin., 627 S.E.2d 740, 741–42 (S.C. 2006). *See also* Ins. Prod. Mktg., Inc. v. Indianapolis Life Ins. Co., 176 F. Supp. 2d 544, 549–50 (D.S.C. 2001) (holding that under S.C. Code Ann. § 15-7-120, "the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect"). For a discussion of the general disfavor in South Carolina, see *Consolidated Insured Benefits, Inc. v. Conseco Medical Ins. Co.*, 370 F. Supp. 2d 397, 401 (D.S.C. 2004). *Contra*

D. *Pre-*Caperton *West Virginia Law*

Prior to *Caperton*, the West Virginia Supreme Court of Appeals had not directly addressed the substantive issues raised by forum selection clause enforceability,[37] in contrast to most states.[38] In 1981, the Supreme Court of Appeals noted for the first time, in dicta, that forum selection clauses were presumptively valid:

> Unquestionably, forum selection clauses are not contrary to public policy in and of themselves for they are sanctioned in commercial sales agreements under W. VA. CODE § 46-1-105(2). Although an early case in our jurisprudence held void a clause in a stock certificate requiring that shareholders bring suit in New York, later cases have sanctioned, at least implicitly, forum selection clauses . . . . As the Federal court observed, West Virginia appears not to subscribe to the rule that choice of forum clauses are void per se. "Rather, the rule of most jurisdictions and the rule that this Court believes that West Virginia should and would adopt is that such clauses will be enforced only when found to be reasonable and just."[39]

III. FORUM SELECTION ENFORCEABILITY IN WEST VIRGINIA: *CAPERTON V. A.T. MASSEY COAL CO.*

A. *The Case That Became a Saga*

It might be an understatement to describe the legal narrative of coal operator Hugh M. Caperton as one of the most heavily-litigated matters to have come before both the West Virginia Supreme Court of Appeals and the United States Supreme Court.[40] Without question, the case is now seared into popular

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Atl. Floor Servs., Inc., v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875, 878–79 (D.S.C. 2004) (explicitly declining to follow *Indianapolis Life*). For a discussion of favorable treatment by South Carolina courts, see *id.* at 879–80. Only recently has Alabama adopted the majority position as to the enforceability of outgoing forum selection clauses. *See* Prof'l Ins. Corp. v. Sutherland, 700 So. 2d 347 (Ala. 1997) (expressly overruling *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554 (Ala. 1980) and its progeny).

[37] Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 335 (W. Va. 2009) ("This case presents the first opportunity for this Court to address substantive issues involving forum[]selection clauses.").

[38] *See supra* note 31.

[39] *Caperton*, 690 S.E.2d at 335 (quoting Gen. Elec. Co. v. Keyser, 275 S.E.2d 289, 292 n.2 (W. Va. 1981)) (internal citations omitted).

[40] Writing for the Court in *Caperton*, Acting Chief Justice Robin J. Davis recounts the somewhat convoluted procedural history of the case in Part II of the Opinion of the Court. *Id.* at 331–33. The case was argued three separate times, and three written opinions were issued. One opinion was vacated by the court after two justices voluntarily disqualified themselves while another

legal history *not* for its groundbreaking forum selection jurisprudence, but, rather, for the constitutionally-mandated judicial recusal standard, as created by the United States Supreme Court.[41] To be clear, the United States Supreme Court did not address the substantive issues of the decision below—namely, forum selection enforceability and res judicata—but only the constitutional issue of judicial recusal.[42]

B. *Brief Factual Background*

As is often the case between sophisticated commercial parties, the dispute between Hugh M. Caperton (Mr. Caperton), Harman Development Corporation and its subsidiaries (Harman Development), and A.T. Massey Coal Company and its subsidiaries (Massey) arose out of a complex business relationship rooted in a contract—in this case, a coal supply agreement.[43]

In 1993, the plaintiff, Mr. Caperton, formed Harman Development, which later that same year purchased three subsidiaries: Harman Mining Corporation (Harman Mining), Sovereign Coal Sales, Inc. (Sovereign), and Southern Kentucky Energy Company (Southern).[44] Harman Development, Harman Mining, and Sovereign (the Harman Companies) were also plaintiffs in this action.[45] Through the acquisition of these three subsidiaries, Harman Development became the owner of Harman Mine, an underground mine located in Buchanan County, Virginia, which produced high-quality metallurgical coal.[46]

Based upon a coal supply agreement signed only a year earlier (1992 CSA), Wellmore Coal Corporation (Wellmore) agreed to purchase approximately 750,000 tons of coal per year for a period of ten years from Sovereign and Southern, then-owners of Harman Mine.[47] From the point where the Harman Companies took ownership of the Harman Mine until 1997, all Harman Mine

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was vacated by the United States Supreme Court. *Id.*; *see* Caperton v. A.T. Massey Coal Co., __ U.S. __, 129 S. Ct. 2252 (2009). Upon its third rehearing, the case was ultimately decided by an entirely new court save the author of each opinion, Acting Chief Justice Robin Davis. *Caperton*, 690 S.E.2d at 333. Massey prevailed on each hearing before the West Virginia high court. *Id.*

41 *See, e.g.*, Adam Liptak, *Justices Issue a Rule of Recusal In Cases of Judges' Big Donors*, N.Y. TIMES, June 8, 2009, at A1.; Tony Mauro, *Supreme Court Issues Landmark Ruling on Judicial Recusal*, THE NAT'L L.J., June 8, 2009, *available at* http://www.law.com/jsp/article.jsp?id=1202431300835.

42 Caperton v. A.T. Massey Coal Co., __ U.S.__, 129 S. Ct. 2252 (holding in a 5–4 decision that the Fourteenth Amendment Due Process Clause mandates judicial recusal in cases where there is a serious risk of actual bias). The majority opinion provoked two strident dissents from Chief Justice John G. Roberts and Associate Justice Antonin Scalia. *See id.* at 2267–76.

43 Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 329 (W. Va. 2009).

44 *Id.* at 328–29.

45 *Id.*

46 *Id.* at 328.

47 *Id.*

coal was purchased by Wellmore under the 1992 CSA.[48] A new coal supply agreement (1997 CSA) with a higher price per ton was agreed to between Sovereign, Harman Mining, and Wellmore, commencing January 1, 1997.[49] Notably, the 1997 CSA included a *force majeure* clause[50] and a forum selection clause, the latter of which stated that "[a]ll actions brought in connection with this Agreement shall be filed in and decided by the Circuit Court of Buchanan County, Virginia."[51]

During the period of the 1992 CSA and at the time the 1997 CSA was executed, Wellmore sold nearly two-thirds of the coal it purchased from the Harman Companies to LTV Steel's (LTV) coke plant in Pittsburgh, Pennsylvania.[52] However, on July 19, 1997, LTV announced that it would shutter its Pittsburgh coke plant due to a change in federal emissions standards.[53] Meanwhile, Massey had been attempting to sell its West Virginia-mined coal to LTV with no success.[54] Massey acquired LTV's supplier, Wellmore, on July 31, 1997. Thereafter, Massey's conduct, including an attempt to substitute its own coal for Harman Mine coal that Wellmore had been supplying to the steelmaker, led LTV to discontinue its purchase of coal from Wellmore.[55] On August 5, 1997, Wellmore notified the Harman Companies that if LTV did close its coke plant, Wellmore expected a pro rata reduction in tonnage of coal under the *force majeure* clause of the 1997 CSA.[56]

Following these events, Massey negotiated the purchase of the Harman Mine from the Harman Companies, and plaintiffs alleged that during that time, defendant Massey became aware of certain confidential business information that it later used to destroy the Harman Companies.[57] On December 1, 1997, Wellmore declared *force majeure* based on LTV's plant closure, and notified the Harman Companies that it would purchase only 205,707 tons of the 573,000 minimum tons of coal required under the 1997 CSA.[58] According to the Harman Companies' allegations, Massey thereafter continued to undermine the

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48 *Id.* at 329.

49 *Caperton*, 690 S.E.2d at 329.

50 A *force majeure* clause is "a contractual provision allocating the risk if performance becomes impossible or impractical, esp[ecially] as a result of an event or effect that the parties could not have anticipated or controlled." BLACK'S LAW DICTIONARY 673 (8th ed. 2004).

51 The 1992 CSA contained an identical forum selection clause. *See Caperton*, 690 S.E.2d at 329 n.9.

52 *Id.* at 329–30.

53 *Id.* at 330.

54 *Id.*

55 *Id.*

56 *Id.*

57 *Caperton*, 690 S.E.2d at 330.

58 *Id.*

financial integrity of the Harman Companies and Mr. Caperton until the Harman Companies were shortly thereafter forced into bankruptcy.[59]

In May 1998, Harman Mining and Sovereign brought several causes of action relating to Wellmore's declaration of *force majeure* against Wellmore in the Circuit Court of Buchanan County, Virginia.[60] On the plaintiffs' contract claim, the jury returned a verdict for Harman Mining and Sovereign and awarded six million dollars in damages.[61] However, in October 1998, Harman Development, Harman Mining, Sovereign, and Mr. Caperton filed the action at issue in the Circuit Court of Boone County, West Virginia, against A.T. Massey Coal Co. and five of its subsidiaries.[62] Three theories of liability—tortious interference, fraudulent misrepresentation, and fraudulent concealment—were presented to the jury, but not before the defendants moved for a dismissal based on the forum selection clause found in the 1997 CSA, which named Buchanan County, Virginia, as the exclusive forum for litigation.[63] The motion was denied, and the action proceeded to verdict. The plaintiffs were awarded over fifty million dollars in punitive damages.[64] Three separate hearings and three written opinions later, including a remand from the United States Supreme Court, the West Virginia Supreme Court of Appeals finally addressed the issue of forum selection clause enforcement as appealed by the Massey defendants.[65]

C. *Initial Procedure and Standard of Review*

Because the rules of civil procedure—state and federal—were not created with forum selection clause enforceability in mind, litigators have turned to the varied and conventional rules of dismissal or transfer when attempting to enforce forum selection clauses.[66] In federal court, parties have attempted to enforce forum selection clauses under 28 U.S.C. § 1404(a),[67] 28 U.S.C. § 1406(a),[68] the common law doctrine of *forum non conveniens*,[69] and under an

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[59] The particular instances of conduct alleged by the Harman Companies are outlined in the Opinion of the Court. *See id.* at 331.

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 332.

[64] *Id.*

[65] *Caperton*, 690 S.E.2d at 332.

[66] *Viva Zapata!*, *supra* note 15, at 433.

[67] "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." 28 U.S.C. § 1404(a) (2006). *See also Viva Zapata!*, *supra* note 15, at 435–40 (describing the transfer mechanism of § 1404(a) in relation to forum selection clause enforcement).

[68] "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (2006). *See also Viva Zapata!*,

assortment of Federal Rules of Civil Procedure, including Rule 12(b)(1) (lack of subject matter jurisdiction),[70] Rule 12(b)(2) (lack of personal jurisdiction),[71] Rule 12(b)(3) (improper venue),[72] Rule 12(b)(6) (failure to state a claim upon which relief may be granted),[73] and Rule 56 (summary judgment).[74] One commentator has called for the creation of a "*Zapata* motion," which would be a unique motion created specifically for forum selection clause enforcement in federal court.[75] While several federal circuit courts have considered such motions under specific Federal Rules of Civil Procedure, including Rule 12(b)(1), (3), or (6),[76] the Fourth Circuit has adopted the position that a motion to dismiss based on a forum selection clause should be treated as a motion to dismiss for improper venue under Rule 12(b)(3).[77]

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supra note 15, at 440–43 (describing the dismissal and transfer mechanism of § 1406(a) in relation to forum selection clause enforcement).

69 This well-known doctrine provides that

> where [a] plaintiff has a choice of forum, a court may, in the exercise of sound discretion, decline to exercise its jurisdiction over an action if it determines that the case may more conveniently, yet justly, proceed in another court before which the plaintiff may bring it after refusal of the exercise of jurisdiction by the court in which the action was first brought.

20 AM. JUR. 2D *Courts* § 115 (2010) (internal footnote omitted); *see also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). *See, e.g.*, *Viva Zapata!*, *supra* note 15, at 443–45 (describing the common law dismissal doctrine in relation to forum selection clause enforcement); Royal Bed & Spring Co. v. Famossul Indus., 906 F.2d 45, 52–53 (1st Cir. 1990) (affirming district court's dismissal rooted in doctrine of *forum non conveniens* to enforce forum selection clause).

70 *See, e.g.*, Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1196 (4th Cir. 1985).

71 *See, e.g.*, Richardson Greenshields Sec. v. Metz, 566 F. Supp. 131, 132 (S.D.N.Y. 1983).

72 *See, e.g.*, Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718, 719 (2d Cir. 1982).

73 *See, e.g.*, Instrumentation Ass'n v. Madsen Elec., 859 F.2d 4, 6 n.4 (3d Cir. 1988).

74 *See, e.g.*, Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986). *See generally* Mercury West A.G., Inc. v. R.J. Reynolds Tobacco Co., 2004 WL 421793 at *2 (S.D.N.Y. 2004) ("Motions to enforce forum selection clauses have been brought pursuant to each of Rules 12(b)(1), 12(b)(3), 12(b)(6) and § 1406(a). Each provides a logical basis for supporting such a motion, but none provide a perfect fit for a party seeking to enforce a forum selection clause.").

75 *Viva Zapata!*, *supra* note 15, at 433.

76 *See, e.g.*, Silva v. Encyclopedia Britannica Inc., 239 F.3d 385 (1st Cir. 2001) (holding a motion to dismiss based on a forum selection clause as a Rule 12(b)(6) motion to dismiss); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285 (11th Cir. 1998) (holding such a motion should be analyzed under Rule 12(b)(3)); AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148 (2d Cir. 1984) (affirming forum selection clause dismissal under Rule 12(b)(1)). *See generally* New Moon Shipping Co. v. Man B & W Diesel, AG, 121 F.3d 24, 28 (2d Cir. 1997) (describing the lack of consensus among the circuits as to the proper procedural mechanism for seeking dismissal based on a forum selection clause).

77 *See* Sucampo Pharm., Inc. v. Astellas Pharma, Inc., 471 F.3d 544, 548–50 (4th Cir. 2006) (treating a motion to dismiss based on a forum selection clause as a motion to dismiss for improper venue under Rule 12(b)(3) would result in a more efficient disposition of the case, as the forum selection clause issue would have to be raised in the initial responsive pleading).

Similarly, West Virginia "[c]ourts generally consider a motion to dismiss, based upon a forum selection clause, as a motion to dismiss for improper venue."[78] On appeal, the West Virginia Supreme Court of Appeals reviews a trial court's decision on a motion to dismiss for improper venue for abuse of discretion.[79] More importantly, however, a newly-created syllabus point holds that "review of the applicability and enforceability of a forum[]selection clause is de novo."[80] By announcing a de novo standard of review for forum selection clause applicability and enforceability, the high court cleared away any remaining doubt about the deference given to the lower court in this area of the law. As the Court ultimately held in *Caperton*,[81] a lower court's denial of a motion to dismiss based on a misapplication of a forum selection clause will most likely always constitute an abuse of discretion by the lower court.

D. The Caperton *Enforceability Rubric: A Four-Part Analysis*

Finding "no impediment to the enforcement of forum[]selection clauses in general" under West Virginia law,[82] the *Caperton* court adopted a four-part test from the United States Court of Appeals for the Second Circuit[83] "for determining whether a claim should be dismissed based upon a forum[]selection clause." Syllabus point four describes the test:

> The first inquiry is [1] whether the clause was reasonably communicated to the party resisting enforcement. The second step requires [2] classification of the clause as mandatory or permissive, *i.e.*, whether the parties are *required* to bring any dispute to the designated forum or are simply *permitted* to do so. The third query asks [3] whether the claims and parties involved in the suit are subject to the forum[]selection clause. If the forum[]selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved

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78 Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 333 (W. Va. 2009) (quoting FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 376 (2d ed. 2006) [hereinafter LITIGATION HANDBOOK]). *See generally* W. VA. R. CIV. P. 12(b)(3).

79 Syl. pt. 1, *Caperton*, 690 S.E.2d at 327 (quoting Syl. pt. 1, United Bank, Inc. v. Blosser, 624 S.E.2d 815 (W. Va. 2005)).

80 Syl. pt. 2, *Caperton*, 690 S.E.2d 327 (quoting Hugel v. Corp. of Lloyd's, 999 F.2d 206, 207 (7th Cir. 1993)); *see also* Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992). The *Caperton* court also noted support from Syllabus point 1, *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W. Va. 1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review.").

81 *Caperton*, 690 S.E.2d at 349.

82 *Id.* at 336; *see supra* Part II.D.

83 Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007).

> in the dispute, it is presumptively enforceable. The fourth, and final, step is to ascertain [4] whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.[84]

1. Was the Clause Reasonably Communicated to the Party Resisting Enforcement?

The inquiry as to whether the forum selection clause was reasonably communicated is an essential preliminary question because "the legal effect of a forum[]selection clause depends in the first instance upon whether its existence was reasonably communicated to the plaintiff . . . ."[85]

Early on, the eminent Judge Henry Friendly of the Second Circuit Court of Appeals defined this test in terms of whether the drafting party had "done all it reasonably could to warn the [other party] that the terms and conditions were important matters of contract affecting his legal rights."[86] In yet another form passage contract dispute, the First Circuit employed a two-part test, which involves "an analysis of the overall circumstances on a case-by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake."[87] This two-part test of reasonable communication has been adopted by most federal circuit courts and some state high courts.[88] The Third

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[84] Syl. pt. 4, Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 327 (W. Va. 2009) (emphasis in original).

[85] *Id.* at 327 (quoting Electroplated Metal Solutions, Inc. v. Am. Servs., Inc., 500 F. Supp. 2d 974, 976 (N.D. Ill. 2007)). "A forum selection clause is unenforceable as to a plaintiff who did not have sufficient notice of the forum selection clause prior to entering the contract." *Id.* (quoting 17A C.J.S. *Contracts* § 237, at 211 (1999)).

[86] Silvestri v. Italia Societa Per Azioni Di Navigazione, 388 F.2d 11, 17 (2d Cir. 1968).

[87] Shankles v. Costa Armatori, S.P.A., 722 F.2d 861, 866 (1st Cir. 1983); *see also* Lousararian v. Royal Caribbean Corp., 951 F.2d 7, 8–9 (1st Cir. 1991). Applications of this test vary. *See, e.g.*, Gomez v. Royal Caribbean Cruise Lines, 964 F. Supp. 47, 50 (D.P.R. 1997) (terms and conditions of ticket contract reasonably communicated are enforceable whether or not the passenger actually read them); Marek v. Marpan Two, Inc., 817 F.2d 242, 247 (3d Cir. 1987) (notice of the terms and conditions contained in a form passage contract can be imputed to a passenger who has not personally received the ticket); *cf.* Hoekstra v. Caribbean Cruises, Ltd., 360 F. Supp. 2d 362 (D.P.R. 2005) (declining to enforce a forum selection clause where passengers could not have had prior knowledge of the clause given that they did not receive any documentation before arriving at the pier).

[88] *See, e.g.*, Krenkel v. Kerzner Int'l Hotels, Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009) ("A useful two-part test of 'reasonable communicativeness' takes into account the clause's physical characteristics and whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms."); *see also* Wallis v. Princess Cruises, Inc., 306 F.3d 827, 835–37 (9th Cir. 2002); Ward v. Cross Sound Ferry, 273 F.3d 520, 523–24 (2d Cir. 2001); Dillon v. Admiral Cruises, Inc., 960 F.2d 743, 744–45 (8th Cir. 1992); *Shankles*, 722 F.2d at 866. For state

Circuit recently characterized this test as a "liberal examination of the provision for clarity, physical placement, and ease of understanding."[89] While the form passage contract cases brought by passengers challenging forum selection clauses provide instructive examples of the "reasonably communicated" requirement,[90] similarly-grounded forum selection challenges between sophisticated individuals or businesses elicit less sympathy from the courts.[91]

The first prong was not disputed in *Caperton*.[92] The Court made clear that even had the plaintiffs denied that the clause was reasonably communicated to them, two plaintiffs, Sovereign and Harman Mining, were parties to the actual 1997 CSA contract wherein the forum selection clause was contained, and Mr. Caperton had signed the contract in his capacity as president of Sovereign.[93] Thus, "these parties [could not] claim ignorance of the plainly[-]worded forum[]selection clause . . . ."[94] And even though Harman Development, the parent company of Sovereign and Harman Mining, was not a party to the 1997 CSA, Mr. Caperton was the sole owner of Harman Development. The Court found that because Mr. Caperton had knowledge of the clause by virtue of his signature as president of Sovereign, Harman Development was "deemed to have knowledge of the clause."[95]

The lesson to be drawn from this particular requirement is fairly clear. It is axiomatic that in the absence of contractual infirmity such as fraud or mistake,[96] parties to a contract are deemed to have knowledge of its contents, and

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application of this two-part test, see *Oltman v. Holland Am. Line USA, Inc.*, 178 P.3d 981, 991–93 (Wash. 2008).

89 Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 130 (3d Cir. 2002); *see Marek*, 817 F.2d at 245 (focusing on the "adequacy of so-called 'warning language,' often found on the front cover of a cruise ticket, directing a passenger to read the particular terms inside the ticket," as well as "the ticket terms themselves," including the "physical characteristics [such] as the location of the terms within the ticket, the size of the typeface in which they are printed, and the simplicity of the language they employ").

90 Even in cases where passengers challenge the forum selection clause found on their ticket as not having been reasonably communicated, courts are loath to invalidate the agreement. *See, e.g.*, Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9 (2d. Cir. 1995) (explaining that despite being in fine print, a forum selection clause stated in clear and unambiguous language is considered reasonably communicated to the plaintiff in determining its enforceability and thus does not violate notions of fundamental fairness).

91 *See infra* note 206 and accompanying text.

92 Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 337 (W. Va. 2009).

93 *Id.*

94 *Id. See* Klotz v. Xerox Corp., 519 F. Supp. 2d 430, 433 (S.D.N.Y. 2007).

95 *Caperton*, 690 S.E.2d at 337. *See* Clark v. Milam, 452 S.E.2d 714, 718 (W. Va. 1994) ("Generally, a corporation 'knows,' or 'discovers,' what its offers and directors know.").

96 An attack on a forum selection clause due to a contractual infirmity is discussed, *infra*, Part III.D.4.

those contents may contain a forum selection clause.[97] Reasonable prudence on the part of the drafting party to ensure this requirement is fulfilled will only strengthen its defense should the validity of the forum selection clause be attacked. A party resisting enforcement on this element may claim the subject clause was hidden, written in fine print, or somehow buried in the text of the agreement, although courts are rarely persuaded by such arguments,[98] especially when proffered by sophisticated parties.[99]

2. Is the Clause Mandatory or Permissive?

The second step of the enforceability analysis asks whether the forum selection clause at issue is mandatory or permissive in its operative effect.[100] Syllabus point five provides: "There are two types of forum[]selection clauses: mandatory and permissive. A mandatory forum[]selection clause contains clear language indicating that jurisdiction is appropriate only in a designated forum. A permissive forum[]selection clause authorizes litigation in a designated forum, but does not prohibit litigation elsewhere."[101] Syllabus point six elaborates on the dichotomy:

> The determination of whether a forum[]selection clause is mandatory or permissive requires an examination of the particular language contained therein. If jurisdiction is specified with mandatory terms such as "shall," or exclusive terms such as

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97 *See infra* note 207 and accompanying text. *See, e.g.*, D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006) (holding forum selection clause was reasonably communicated to investor-plaintiffs because the clause was "plainly printed on the Cash Account Agreements").

98 *See, e.g.*, Sheldon v. Hart, No. 5:09CV51, 2010 WL 114007, at *3 (N.D. W. Va. Jan. 8, 2010) (rejecting a challenge to a forum selection clause as not reasonably communicated where even though the drafting party "allegedly 'shoved th[e] document under Ms. Sheldon's nose,'" the drafting party did not "attempt to hide" the clause); Heinz v. Grand Circle Travel, 329 F. Supp. 2d 896, 902–03 (W.D. Ky. 2004) (where forum selection clause notice was placed in all capitals and was in easily readable font, such characteristics were sufficient to give passenger reasonable notice of clause).

99 *See infra* note 206 and accompanying text.

100 Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 337 (W. Va. 2009).

101 Syl. pt. 5, Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 327 (W. Va. 2009) (quoting LITIGATION HANDBOOK, *supra* note 78, at 376). *See also* Weisser v. PNC Bank, N.A., 967 So. 2d 327, 330 (Fla. Dist. Ct. App. 2007) ("'Permissive forum selection clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in any other forum.' . . . In contrast, mandatory forum selection clauses provide 'for a mandatory and exclusive place for future litigation.'" (citations omitted)); Great N. Ins. Co. v. Constab Polymer-Chemie GmbH & Co., No. 5:01-CV-0882, 2007 WL 2891981, at *8 (N.D.N.Y. Sept. 28, 2007) ("A mandatory forum selection clause grants exclusive jurisdiction to a selected forum and should control absent a strong showing that it should be set aside . . . . In contrast, a 'permissive forum selection clause indicates the contracting parties' consent to resolve their dispute in a given forum, but does not require the dispute to be resolved in that forum . . . .'" (internal citations omitted)).

> "sole," "only," or "exclusive," the clause will be enforced as a mandatory forum[]selection clause. However, if jurisdiction is not modified by mandatory or exclusive language, the clause will be deemed permissive only.[102]

The clause language in *Caperton* clearly employed mandatory language. The provision stated that "[a]ll actions brought in connection with this Agreement *shall* be filed in and decided by the Circuit Court of Buchanan County, Virginia."[103] Notwithstanding the ease with which the clause within the 1997 CSA was found to be mandatory, the Court discussed a handful of example cases to illustrate how the differences in language employed can lead to a forum selection clause being classified as either mandatory or permissive.[104]

For instance, a forum selection clause in dispute in a Florida state court read that "[a]ny litigation concerning this contract shall be governed by the law of the State of Florida, with proper venue in Palm Beach County."[105] While the Florida court found that the choice of law clause was mandatory in effect, the forum selection was permissive because the clause "lack[ed] mandatory language or words of exclusivity to show that venue [was] proper *only* in Palm Beach County. . . . The language merely allow[ed] a party to file suit in Palm Beach County."[106] From this, the *Caperton* court observed that it is not enough for a forum selection clause to "simply mention or list" a jurisdiction.[107] Rather, mandatory language or any other language indicating the parties' intent to make jurisdiction exclusive is necessary.[108]

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[102] Syl. pt. 6, *Caperton*, 690 S.E.2d at 327.

[103] *Id.* at 329 (emphasis in original). *See also Ex parte* Bad Toys Holdings, Inc., 958 So. 2d 852, 856 (Ala. 2006) ("The forum[]selection clause in the purchase agreement provides that '[v]enue for any legal action which may be brought hereunder *shall* be deemed to lie in Sullivan County, Tennessee' (emphasis added). The . . . use of the word 'shall' in the forum[]selection clause makes the clause mandatory, not permissive."); Town of Homer v. United Healthcare of La., Inc., 948 So. 2d 1163, 1167 (La. Ct. App. 2007) ("We find the forum selection clause at issue to be clear and explicit. The clause expressly states that the proper venue for ***any legal action shall*** be East Baton Rouge Parish. There is no ambiguity in this mandatory provision.") (emphasis in original); Gen. Elec. Co. v. G. Siempelkamp GmbH & Co., 29 F.3d 1095, 1099 (6th Cir. 1994) ("Because the clause states that 'all' disputes 'shall' be at Siempelkamp's principal place of business, it selects German court jurisdiction exclusively and is mandatory.").

[104] *Caperton*, 690 S.E.2d at 338–39; *see generally* Marjorie A. Shields, Annotation, *Permissive or Mandatory Nature of Forum Selection Clauses under State Law*, 32 A.L.R. 6th 419 (2008).

[105] Regal Kitchens, Inc. v. O'Connor & Taylor Condo. Constr., Inc., 894 So. 2d 288, 290 (Fla. Dist. Ct. App. 2005).

[106] *Id.* at 291–92 (emphasis added).

[107] Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 338 (W. Va. 2009).

[108] *Id. See also* John Boutari & Sons, Wine & Spirits, S.A. v. Attiki Imp. & Distribs., Inc., 22 F.3d 51, 52 (2d Cir. 1994) ("The general rule in cases containing forum selection clauses is that '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.'" (quoting Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989))).

In *Golf Scoring Systems Unlimited, Inc. v. Remedio*, a Florida appellate decision, the court found that even though a forum selection clause did not contain any words of exclusivity, it was mandatory rather than permissive because of other limiting language.[109] The clause read: "The parties hereto consent to Broward County, Florida, as the proper venue for all actions that may be brought pursuant hereto."[110] The *Remedio* court observed that while the clause did not contain the "magic words" of exclusivity, such as "shall" or "must,"[111] the language "clearly indicate[ed] that it [was] mandatory in nature."[112] The reasoning here was that the word "the" before the phrase "proper venue" restricted venue to only Broward County "to the exclusion of all others."[113]

Likewise, in a more recent Florida[114] appellate decision, *Celistics, LLC v. Gonzales*, the court held a forum selection clause mandatory after examining the nature of the language rather than simply relying on the presence or absence of "magic words."[115] The clause read: "[T]he parties agree to select the venue and jurisdiction of the Courts and Tribunals of the city of Madrid."[116] The court reasoned that because the words "agree" and "select" connote exclusivity, the clause was mandatory.[117]

An Ohio appellate court came to a similar conclusion in *Bohl v. Hauke*.[118] The forum selection clause at issue provided that "jurisdiction and venue is *fixed* in Harris County, Texas."[119] Noting that to be mandatory, a forum selection clause "must clearly display the intent of the contracting parties to choose a particular forum to the exclusion of all others," the court held that "fixed" is a "word of exclusivity," and therefore the clause was mandatory.[120]

In some cases, permissive language is employed in the forum selection clause, but one party may have contracted to give the other party discretion to choose a particular forum to the exclusion of all others. In *Ramsay v. Texas Trading Co.*,[121] the party resisting enforcement, an investor, claimed that the

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109 877 So. 2d 827 (Fla. Dist. Ct. App. 2004).

110 *Id.* at 828.

111 *See, e.g.*, Mueller v. Sample, 93 P.3d 769, 773 (N.M. Ct. App. 2004) (holding mandatory a clause that stated that "any causes of action or suits related to this agreement must be filed" in a particular judicial district).

112 *Remedio*, 877 So. 2d at 829.

113 *Id.*

114 I chose cases from Florida state courts because the *Caperton* court cited several Florida decisions as persuasive authority.

115 22 So. 3d 824, 826 (Fla. Dist. Ct. App. 2009).

116 *Id.*

117 *Id.*

118 906 N.E. 2d 450 (Ohio Ct. App. 2009).

119 *Id.* at 453.

120 *Id.* at 456.

121 254 S.W.3d 620 (Tex. App. 2008).

forum selection clause was invalid because not only did the clause fail to provide for exclusive jurisdiction in a particular court, but the clause also purported to vest discretion in the investment company defendant as to which forum plaintiff's case would have to proceed.[122] Essentially, the plaintiff claimed that because the clause was not mandatory as to both parties under all circumstances, it was unenforceable.[123] The clause stated that "[a]ll actions or proceedings . . . shall be governed by the law of Illinois and may, at the discretion and election of [the investment company], be litigated in a court . . . within Illinois."[124] Finding that "the parties' bargained-for agreement merits judicial respect," the court held as enforceable clauses that give one party the discretion to choose the forum.[125] Once the party has made its choice, the forum is mandatory; otherwise, the words granting discretion would be meaningless.[126]

Beyond the permissive or mandatory dichotomy, some courts have recognized a so-called "hybrid" forum selection clause. One such version of this hybrid forum selection clause "provides for permissive jurisdiction in one forum that becomes mandatory upon the party sued."[127] For example, an Eleventh Circuit decision enforced such a clause where the first part of the provision merely *permitted* jurisdiction in Orange County, Florida, "but if a suit is initiated there, the defendant's consent to venue in Orange County is contractually provided."[128] The second part waived the parties' rights to transfer the suit to "any other court" once the suit was filed, making the chosen forum effectively mandatory to both parties.[129]

In contrast, the Fifth Circuit found a forum selection clause permissive that read as follows: "[t]he undersigned Contractor does further hereby consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor."[130] The court reasoned that "[a] party's consent to jurisdiction in one forum does not necessarily waive its right to have an action heard in another."[131] It is worth emphasizing once again that for a forum selection clause to be exclusive, "it must do more than establish that

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122 *Id.* at 626.

123 *Id.* at 453.

124 *Id.*

125 *Id.* at 631.

126 *Id.*

127 Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, 526 F.3d 1379, 1381 (11th Cir. 2008); *see also* Snapper, Inc. v. Redan, 171 F.3d 1249, 1262 (11th Cir. 1999).

128 *Ocwen*, 526 F.3d at 1381.

129 *Id.*

130 City of New Orleans v. Mun. Admin. Servs., Inc., 376 F.3d 501, 504 (5th Cir. 2004).

131 *Id.*

one forum will have jurisdiction."[132] In other words, the parties must clearly show their intent to make one (or multiple) jurisdictions *exclusive*.[133]

In similar fashion, an earlier Fifth Circuit decision found a forum selection clause permissive that read as follows: "This agreement shall be construed and enforceable according to the law of the State of New York and the parties submit to the jurisdiction of the courts of New York."[134] Here, the court found that the clause's language yielded "two opposing, yet reasonable, interpretations," but reasoned that the conventional contract doctrine commanded that in such a case, the clause is interpreted against its drafter.[135] Other courts have likewise struggled to interpret seemingly contradictory and otherwise ambiguous forum selection clauses as either mandatory or permissive.[136]

The most typical clause language indicating a permissive rather than mandatory clause is language which holds that party *submits* or *consents* to the jurisdiction of a certain court or courts, but which also lacks language of exclusivity.[137] For example, a Georgia appellate court held that a clause in a student loan promissory note was permissive because the borrower stated that he "*consent[ed]* to the jurisdiction of Massachusetts courts and to the placement of venue in Boston."[138] The court reasoned that the clause "simply permits suit to be brought in a place where jurisdiction and venue might not otherwise be proper, but it does not dictate the forum."[139] In a similar vein, a forum selection clause

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132 *Id.*

133 *Id.*

134 Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974).

135 *Id.* at 957. Mississippi courts have found Fifth Circuit law persuasive. *See, e.g.*, Long Beach Auto Auction, Inc. v. United Sec. Alliance, Inc., 936 So. 2d 351, 355–56 (Miss. 2006) (holding as mandatory a clause that stated that any dispute between the parties "shall be the subject matter jurisdiction" of Florida courts, and that venue "shall be proper solely in Hillsborough County"); Titan Indem. Co. v. Hood, 895 So. 2d 138, 146 (Miss. 2004) (holding as mandatory a clause stating that the parties consented to the "exclusive" jurisdiction and venue in Bexar County, Texas); Fair v. Lighthouse Carwash Sys., LLC, 961 So. 2d 60, 65 (Miss. Ct. App. 2007) (holding as permissive a clause that failed to "include clear, unequivocal language expressly prohibiting litigation in forums other than the one(s) designated in the clause").

136 *See, e.g.*, W. Ref. Yorktown, Inc. v. BP Corp. N. Am., Inc., 618 F. Supp. 2d 513, 518–23 (E.D. Va. 2009) (applying Illinois law) (holding that under Illinois law, a forum selection clause that included both the mandatory language "shall be filed in," and the permissive language "may be properly venued in" and "on a non-exclusive basis," was permissive); Weisser v. PNC Bank, N.A., 967 So. 2d 327, 331–32 (Fla. Dist. Ct. App. 2007) (finding that a mandatory clause in loan application and in later agreement between borrower and lender selected different states as the exclusive forum for litigation did not create ambiguity rendering forum selection clauses permissive because later agreement provided that nothing in it could modify the loan application; therefore, second conflicting clause was unenforceable and first clause held mandatory).

137 *See generally* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404 (1984).

138 Murray v. Educ. Res. Inst., Inc., 612 S.E.2d 23, 24 (Ga. Ct. App. 2005) (emphasis added).

139 *Id.* (quoting Carbo v. Colonial Pac. Leasing Corp., 592 S.E.2d 445, 447 (Ga. Ct. App. 2003)).

may also permit action in either federal or state court if the parties submit to the jurisdiction of either.[140]

As the cases illustrated above indicate, there are no special "magic words"[141] which make a forum selection clause mandatory or permissive in its effect. The particular language employed in such clauses may vary, but to find a clause mandatory, courts require a clear intent to make the designated forum *exclusive* as to all others. Words such as "shall," "must" "only," or "sole," are the most common words of limitation utilized to ensure a mandatory effect. Of course, practitioners must also note that courts apply the well-known canons of contract construction when interpreting forum selection clauses.[142]

3. Are the Claims and Parties Involved in the Suit Governed by the Forum Selection Clause?

The *Caperton* court addressed this two-part inquiry separately: first, the Court asked whether the claims asserted in present litigation are subject to the forum selection clause.[143]

Syllabus point seven holds that "[t]o determine whether certain claims fall within the scope of a mandatory forum[]selection clause, the deciding court must base its determination on the language of the clause and the nature of the claims that are allegedly subject to the clause."[144] Moreover, "[w]hen ascertaining the applicability of a contractual provision to particular claims, [the court] examine[s] the substance of those claims, shorn of their labels."[145]

Applied in *Caperton*, the Court construed the clause language pursuant to Virginia law, as required by the choice of law provision.[146] The pertinent language stated that the clause applied to "[a]ll actions brought in connection

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[140] *See* J.P. Morgan Chase Bank, N.A. v. Reijtenbagh, 611 F. Supp. 2d 389, 391 (S.D.N.Y. 2009).

[141] *Remedio*, 877 So. 2d at 829.

[142] For a helpful guide in drafting effective forum selection clauses in commercial agreements, including the problems of mandatory versus permissive language, see *Planning for Forum Selection in Commercial Transactions*, a publication of the New York State Bar Journal. John G. Powers, *Planning for Forum Selection in Commercial Transactions*, 78 N.Y. ST. B.J. 2, 22 (Feb. 2006).

[143] Caperton v. A.T. Massey Coal Co., 690 S.E.2d 322, 340 (W. Va. 2009). However, before addressing the substantive issue, the Court noted that it was limited to the claims and parties as were asserted as part of the complaint below because the present review was based on the defendants' motion to dismiss. *Id.* at n.29. *See also* Powderidge Unit Owners Ass'n v. Highland Props., Ltd., 474 S.E.2d 872, 880 (W. Va. 1996) ("To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling.").

[144] Syl. pt. 7, *Caperton*, 690 S.E.2d at 327 (citing Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc., 234 S.W.3d 679, 687–88 (Tex. App. 2007)).

[145] *Id.* at 340 (quoting Phillips v. Audio Active Ltd., 494 F.3d 378, 388 (2d Cir. 2007)).

[146] *Id.*

with this Agreement."[147] First, the Court conducted a plain language analysis and found that the phrase "all actions" evinced no intent to restrict the type of actions to which the clause applies.[148] Therefore, as the Court noted, the clause would "apply equally to contract claims, tort claims, and statutory claims so long as such claims are 'brought in connection with' the 1997 CSA."[149]

Next, the Court determined that the phrase "in connection with" should be construed broadly under Virginia law, which commands that words and phrases be given their "usual, ordinary, and popular meaning."[150] In referencing three popular dictionary definitions of the word "connection,"[151] the Court held that "so long as the claims asserted in [the] action bear a logical relationship to the 1997 CSA, they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law."[152]

In support of this broad construction, the Court again referenced the *Phillips* decision,[153] the case from which the *Caperton* court adopted its enforceability rubric. The *Phillips* court held that the phrase "in connection with" was broader than the language "arise out of,"[154] while an earlier Second Circuit decision actually found "no substantive difference . . . between the phrases 'relating to,' 'in connection with,' or 'arising from.'" The *Phillips* court ultimately rejected an argument that only contractual violations fell within the scope of the forum selection clause.[155] The *Caperton* court found the reasoning of a Third Circuit case, among other federal and state decisions, similarly persuasive.[156]

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147 *Id.* at 341

148 *Id.*

149 *Id.*

150 *Caperton*, 690 S.E.2d at 341 (quoting Heron v. Transp. Cas. Ins. Co., 650 S.E.2d 699, 702 (Va. 2007)).

151 *Id.* The court cited definitions from THE OXFORD ENGLISH DICTIONARY II, 838–39 (1970 reissue); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY, 431–32 (2d ed. 1998); and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 481 (1993).

152 *Caperton*, 690 S.E.2d at 341.

153 Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007).

154 *Caperton*, 690 S.E.2d at 341 (quoting *Phillips*, 494 F.3d at 389).

155 *Id.* (quoting Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1361 (2d Cir. 1993)).

156 *Id.* at 342 ("The ordinary meaning of the phrase 'arising in relation to' is simple. To say that a dispute 'arise[s] . . . in relation to' the 1990 Agreement is to say that the origin of the dispute is related to that agreement, i.e., that the origin of the dispute has some 'logical or causal connection' to the 1990 Agreement." (quoting John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1074 (3d Cir. 1997))). The *Caperton* court also cites *Klotz v. Xerox Corp.*, 519 F. Supp. 2d 430, 434 n.4 (S.D.N.Y. 2007) ("Plaintiff's state law tort and contract claims are also part of an 'action in connection with the Plan' and are covered by the clause."); *Doe v. Seacamp Ass'n Inc.*, 276 F. Supp. 2d 222, 227 (D. Mass. 2003) ("A review of the case law leads me to conclude that the tort claims, too, are covered by the forum selection clause. The forum selection clause was worded to indicate that it governed any claim related to or arising from a contract, the subject of which were the terms and conditions of John Doe's enrollment at Seacamp."); and *Dexter Axle Co. v. Baan U.S.A., Inc.*, 833 N.E.2d 43, 49 (Ind. Ct. App. 2005) (stating that claims sounding in tort and under statute were subject to the forum selection clause).

In determining whether the allegations in *Caperton* came within the purview of the forum selection clause, the Court considered three of the claims, all of which sound in tort:[157] [1] tortious interference, [2] fraudulent misrepresentation, and [3] fraudulent concealment.[158] The Court found that the injuries alleged in connection with the three tort claims "flow directly from [the] declaration of *force majeure*, an event that is inextricably connected to the 1997 CSA."[159] Indeed, the Court makes clear that without the declaration of *force majeure* (as provided for within the 1997 CSA) none of the three tort claims would be cognizable. Thus, "these claims are all 'brought in connection with' the 1997 CSA and, as a consequence, are within the scope of the forum[]selection clause contained therein."[160] The Court, however, took note of adverse authority in some jurisdictions which holds that "a forum selection clause is applicable to tort claims only where the resolution of the claim requires interpretation of the contract."[161]

The next inquiry is whether the *parties* involved in the suit are subject to the forum selection clause.[162] Syllabus point eight instructs:

> A range of transaction participants, signatories and non-signatories, may benefit from and be subject to a forum selection clause. In order for a non-signatory to benefit from or be subject to a forum selection clause, the non-signatory must be closely related to the dispute such that it becomes foreseeable that the non-signatory may benefit from or be subject to the forum selection clause.[163]

In *Caperton*, the Harman Companies and Mr. Caperton claimed that as "strangers to the 1997 CSA," the defendants were "precluded from enforcing its

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157 The Court notes here that "only three of the claims asserted in the amended complaint were ultimately presented to the jury for a verdict, indicating that there was insufficient evidence to support the remaining claims." *Caperton*, 690 S.E.2d at 342. The Court thus restricted its review to only those which "ultimately went to the jury." *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 343 n.31 ("Whether a forum selection clause applies to tort claims depends on whether resolution of the claims relates to interpretation of the contract." (citing Manetti Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 514 (9th Cir. 1988))); *see also* Clinton v. Janger, 583 F. Supp. 284, 288 (N.D. Ill. 1984). The *Caperton* court declined to adopt this proposition in light of the broadly constructed forum selection clause found in the case, but noted that even if it did adopt such a position, "insofar as the claims asserted in this action all flow from the allegedly wrongful declaration of *force majeure*, they would require interpretation of the contract to determine whether the declaration was indeed wrongful." *Caperton*, 690 S.E.2d at 343 n.31.; Berrett v. Life Ins. Co., 623 F. Supp. 946, 948–49 (D. Utah 1985).

162 *Caperton*, 690 S.E.2d at 343.

163 Syl. pt. 8, *Caperton*, 690 S.E.2d at 327.

terms as they [were] not third-party beneficiaries of the contract."[164] They also claimed that two of the plaintiffs, Harman Development and Mr. Caperton, were not signatories to the same agreement and thus "may not be bound by its terms."[165] The Court disagreed.[166]

The Court advanced two federal circuit court decisions as persuasive authority.[167] First, in *Manetti-Farrow, Inc. v. Gucci America, Inc.*,[168] "the Ninth Circuit found that a forum[]selection clause was applicable to 'a range of transaction participants' who were 'closely related to the contractual relationship . . . .'"[169] Second, in *Hugel v. Corporation of Lloyd's*,[170] the Seventh Circuit held that "[i]n order to bind a non-party to a forum selection clause, the party must be 'closely related' to the dispute such that it becomes 'foreseeable' that it will be bound."[171] The *Caperton* court also adopted an additional finding from *Hugel*, which held that "a non-party to a contract need not be a third-party beneficiary in order for the forum[]selection clause to be binding against such non-party."[172]

In *Caperton*, plaintiffs Sovereign, Mr. Caperton (as president of Sovereign), and Harman Mining were all signatories to the 1997 CSA, though plaintiffs Harman Development and Mr. Caperton (in his individual capacity), did not sign the agreement.[173] Even so, the Court noted that Sovereign and Harman Mining were, at the time of the decision, wholly-owned subsidiaries of Harman Development.[174] Moreover, Mr. Caperton was, at that time, the sole owner of Harman Development.[175] "Under these facts," the Court concluded, "Mr. Caperton and Harman Development were closely connected to the 1997 CSA such that it was foreseeable that they would be subject to the forum[]selection clause

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164 *Id.* at 343.

165 *Id.*

166 *Id.*

167 *Id.*

168 858 F.2d 509 (9th Cir. 1988).

169 *Caperton*, 690 S.E.2d at 343 (quoting *Manetti-Farrow*, 858 F.2d at 514 n.5). Further quoting *Mannetti-Farrow*, the *Caperton* Court notes that "a range of transaction participants, parties, and non-parties, should benefit from and be subject to forum selection clauses." *Id.*

170 999 F.2d 206 (7th Cir. 1993).

171 *Caperton*, 690 S.E.2d at 344 (quoting *Hugel*, 999 F.2d at 209).

172 *Id.* The Court quotes *Hugel*:

> Plaintiffs argue that the court must make a threshold finding that a non-party to a contract is a third-party beneficiary before binding him to a forum selection clause. While it may be true that third-party beneficiaries of a contract would, by definition, satisfy the "closely related" and "foreseeability" requirements, *a third-party beneficiary status is not required.*

Caperton, 690 S.E.2d at 344.

173 *Id.* at 348.

174 *Id.*

175 *Id.*

contained therein."[176] Therefore, the Court held that even though Harman Development and Mr. Caperton individually were not signatories to the 1997 CSA, both were necessarily bound by it.[177]

While none of the Massey defendants were signatories to the 1997 CSA, Massey Coal later became the parent of signatory Wellmore.[178] Furthermore, Wellmore was a subsidiary of Massey at the time it declared *force majeure*. On these bases, the Court held that the Massey defendants were "closely connected to the 1997 CSA such that it was foreseeable that they should benefit from the enforcement of the forum[]selection clause contained therein."[179] As this particular conclusion was fervently disputed by the lone dissenting justice,[180] the Court cited or quoted approximately thirty-one federal and state cases in its survey of supporting authority.[181]

4. Rebutting the Presumption of Enforceability

Stating that "[m]andatory choice of forum clauses will be enforced unless they are 'unreasonable,'"[182] the *Caperton* court adopted a four-part reasonableness test from the Fourth Circuit:

> "Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party will for all practical purposes be deprived of his day in court because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state."[183]

In applying this test, the court must remember that "[a] party trying to defeat a mandatory choice of forum clause bears a 'heavy burden.'"[184] Because the plaintiffs in *Caperton* did not advance any argument challenging the forum

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176 *Id.*

177 *Id.*

178 *Caperton*, 690 S.E.2d at 348.

179 *Id.*

180 Justice Margaret Workman issued a strident dissent. *See id.* (Workman, J., dissenting).

181 *See id.* at 343–47.

182 *Id.* at 348 (quoting Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631 (D. Md. 2006)) (footnotes omitted).

183 *Id.* (quoting *Belfiore*, 452 F. Supp. 2d at 631–32).

184 *Id.* (quoting *Belfiore*, 452 F. Supp. 2d at 631 n.1). As an example, the court quotes *Sarmiento v. B.M.G. Entm't*, 326 F. Supp. 2d 1108, 1111 (C.D. Cal. 2003), which found that "if the resisting party fails to come forward with anything beyond general and conclusory allegations of fraud and inconvenience, the court must uphold the agreement." *Id.* at 348–49.

selection clause as unreasonable or unjust *at the time of the defendants' motion to dismiss*,[185] the Court ultimately held that "the forum[]selection clause should have been enforced by the circuit court, and that court's failure to grant the Massey Defendants' motion to dismiss based upon the forum[]selection clause was an abuse of discretion."[186] Even though the *Caperton* court did not address any argument attempting to rebut the presumptive enforceability of the forum selection clause at issue in the case, the various avenues of attack in this area of forum selection clause jurisprudence are legion. Using the Fourth Circuit's four-part test as adopted by the *Caperton* court as the basis for discussion, the remainder of this section will address the possible lines of attack on a forum selection clause.

a. Invalid Due to Fraud or Overreaching

As a provision whose validity is always subject to the existence of any number of contractual infirmities, a forum selection clause may be set aside if it is affected by fraud or overreaching.[187] First, under West Virginia law,

> [t]he essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; [(3)]that plaintiff relied on it and was justified under the circumstances in relying upon it; and [(4)] that he was damaged because he relied on it.[188]

However, the critical question in such cases, is whether the *specific* forum selection clause was affected by fraud. The majority position, in both state and federal courts, is that a party resisting enforcement based upon an allegation of fraud must allege that the specific forum selection clause was procured by

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185 *See Caperton*, 690 S.E.2d at 349 n.37.

186 *Id.* at 349. And ultimately, the Court observed:

> We would be remiss if we did not acknowledge that the motivating factor for the Harman Companies and Mr. Caperton to bring the tort claims in West Virginia may have been due to the fact that Virginia has a cap on punitive damages and West Virginia does not. *See* VA. CODE § 8.01-38.1 (1987) ("In no event shall the total amount awarded for punitive damages exceed $350,000.00."). Virginia also does not allow punitive damages for contract claims.

Id. at 349 n.38.

187 *See* Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

188 Syl. pt. 3, Cordial v. Ernst & Young, 483 S.E.2d 248, 250 (W. Va. 1996).

fraud—as opposed to the contract as a whole.[189] As the Supreme Court noted in an early post-*Bremen* decision, *Scherk v. Alberto-Culver Co.*, the federal law fraud exception for forum selection clause enforceability

> does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that an arbitration or forum[]selection clause in a contract is not enforceable *if the inclusion of that clause in the contract was the product of fraud or coercion.*[190]

The rationale behind this position is to prevent resisting parties from escaping forum selection enforcement through artful pleading. A federal district court in Colorado explained the underlying policy justification:

> If a forum clause were to be rejected whenever a plaintiff asserted a generic claim of fraud in the inducement . . . then forum clauses would be rendered essentially meaningless. That is, whenever a plaintiff had a breach of contract claim, it could defeat an otherwise clear, detailed, and comprehensive forum selection clause by simply alleging fraud as well. Such a holding would denigrate the Supreme Court's overriding mantra expressed in [*Bremen*] and *Stewart* that forum selection clauses should not be dismissed lightly.[191]

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[189] *See, e.g.*, Bohl v. Hauke, 906 N.E.2d 450, 457 (Ohio Ct. App. 2009) ("To invalidate a forum[]selection clause, alleged wrongdoing 'must relate directly to the negotiation or acceptance of the forum selection clause itself, and not just to the contract generally.'"); *Ex parte* Leasecomm Corp., 879 So. 2d 1156, 1159 (Ala. 2003) ("[T]he proper inquiry is whether the forum[]selection clause is the result of fraud in the inducement in the negotiation or inclusion in the agreement of the forum[]selection clause itself. If the forum[]selection clause is the result of fraud in the inducement, then the fraud exception to the enforceability of the clause applies. However, if the claim of fraud in the inducement is directed toward the entire contract, the fraud exception to enforcement of the forum[]selection clause does not apply."); Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1296 (11th Cir. 1998) ("By requiring the plaintiff specifically to allege that the choice clause itself was included in the contract due to fraud in order to succeed in a claim that the choice is unenforceable, courts may ensure that more general claims of fraud will be litigated *in the chosen forum*, in accordance with the contractual expectations of the parties.") (emphasis in original).

[190] Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974) (emphasis added); *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (arbitration clause was enforceable despite allegation of fraud in the inducement of the contract because there was no claim that the arbitration clause itself was induced by fraud). *See, e.g.*, Stephens v. Entre Computer Centers, Inc., 696 F. Supp. 636, 641 (N.D. Ga. 1988) ("Plaintiffs' allegations of fraud in the inducement of the agreement concern misrepresentations of projected sales and profits and have no connection to the inclusion of the clause.").

[191] REO Sales, Inc. v. Prudential Ins. Co. of Am., 925 F. Supp. 1491, 1495 (D. Colo. 1996).

Many courts have adopted this position. For example, in one Texas appellate decision, a franchisee brought an action for breach of contract and fraud in the inducement against the franchisor.[192] The trial court enforced the forum selection clause located within the breached franchise agreement which purported to name San Francisco, California, as the exclusive forum.[193] The plaintiff-franchisee attempted to escape the operation of the forum selection clause by pleading fraud in the inducement of the entire agreement.[194] Based on the authority discussed above, the Texas court held that "simply alleging fraud in the inducement of a contract is not sufficient to make a forum selection clause unenforceable."[195]

Relying on *Scherk*, the Fifth Circuit in *Haynsworth v. The Corporation*[196] likewise refused to invalidate a forum selection clause based on allegations of fraud or overreaching aimed at aspects of the agreement other than the forum selection clause, as those "allegations are irrelevant to [forum selection] enforceability."[197]

The Sixth Circuit has similarly held that "there must be a well-founded claim of fraud in the inducement of the clause itself, *standing apart from the whole agreement* to render a [forum selection] clause unenforceable."[198] Indeed, "[w]hen pled generally, claims of fraud, deceit and misrepresentation do not relate to a forum selection clause."[199]

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192 My Café-CCC, Ltd. v. Lunchstop, Inc., 107 S.W.3d 860, 860 (Tex. App. 2003).

193 *Id.* at 862–63.

194 *Id.* at 864.

195 *Id.* at 867. *See also* A.I. Credit Corp. v. Liebman, 791 F. Supp. 427, 430 (S.D.N.Y. 1992) (by failing to show that the forum selection clause was itself made a part of the contract by means of fraud, defendant failed to rebut presumption of enforceability as unreasonable under the circumstances).

196 Haynsworth v. The Corp., 121 F.3d 956 (5th Cir. 1997). The Eighth Circuit has also adopted this position. *See* Marano Enter. of Kansas v. Z-Teca Rest., L.P. 254 F.3d 753, 757 (8th Cir. 2001) ("[The] complaint does not even remotely suggest that the clauses were inserted into the agreements as the result of fraud, and the brief on appeal offers no specifics concerning what the fraud might have been or how it was perpetrated. The general allegation by [plaintiff] that it was induced by fraud to enter into the franchise and development agreements is insufficient to raise an issue that the forum[]selection clauses within those agreements may be unenforceable because of fraud, and so [plaintiff's] argument must fail.").

197 *Haynsworth*, 121 F.3d at 963. *See also* Afram Carriers, Inc. v. Moeykens, 145 F.3d 298, 301 (5th Cir. 1998) (holding that "[a]llegations that the entire contract was procured as the result of fraud . . . are 'inapposite to our [forum selection clause] enforceability determination'").

198 Moses v. Bus. Card Express, Inc., 929 F.2d 1131, 1138 (6th Cir. 1991) (citing Arnold v. Arnold Corp., 920 F.2d 1269, 1278 (6th Cir. 1990)) (emphasis in original). *See generally* Garten v. Kurth, 265 F.3d 136 (2d Cir. 2001); Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 160 (7th Cir. 1993); Am. Fin. Serv. Grp. v. Technimar Indus., Inc., No. 97 CIV. 9067, 1998 WL 684589 (S.D.N.Y. Sept. 30, 1998).

199 *Moses*, 929 F.2d at 1138. *But cf.* Great Earth Cos., Inc. v. Simons, 288 F.3d 878, 890 (6th Cir. 2002) (granting a motion to compel arbitration in Michigan by holding misrepresentation went only to the arbitration location and not to the actual agreement to arbitrate).

Despite the majority rule, a few state cases have held forum selection clauses unenforceable where the entire agreement was affected by fraud.[200] For instance, New York state courts have found that where "the record is replete with allegations indicating that the entire Agreement was permeated with fraud," the forum selection clause contained therein is unenforceable.[201]

Like allegations of fraud, well-aimed claims of overreaching may also vitiate a forum selection clause. The *Haynsworth* court defined overreaching as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties."[202] Beyond a disparity in bargaining power, a lack of negotiation or unfair surprise may also support a claim of overreaching.[203] So-called "boilerplate" forum selection clauses in contracts of adhesion[204] are frequent targets of attack.[205] Because forum selection clause litigation frequently involves commercial parties—commonly referred to as *sophisticated* individuals and businesses—claims of overreaching or a lack of bargaining between such entities often fail.[206] Of course, the party resisting enforcement must not forget the well-

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200 *See, e.g.*, Johnson v. Key Equip. Fin., 627 S.E.2d 740, 741–42 (S.C. 2006) ("Generally, when wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply.").

201 Studebaker-Worthington Leasing Corp. v. New Concepts Realty, Inc., 887 N.Y.S.2d 752, 756 (N.Y. App. Term 2009) (quoting DeSola Group v. Coors Brewing Co., 605 N.Y.S.2d 83, 84 (N.Y. App. Div. 1993)).

202 *Haynsworth*, 121 F.3d at 965 n.17 (quoting BLACK'S LAW DICTIONARY 1104 (6th ed. 1990)). *Black's Law Dictionary*, 8th edition, defines overreaching as "[t]he act or an instance of taking unfair commercial advantage of another, especially by fraudulent means."

203 *See* 71 AM. JUR. 2d *Specific Performance* § 63; *see, e.g*, Chudner v. TransUnion Interactive, Inc., 626 F. Supp. 2d 1084, 1089 (D. Or. 2009).

204 "'Adhesion contracts' include all 'form contracts' submitted by one party on the basis of this or nothing. Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable. Instead courts engage in a process of judicial review. Finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." Clites v. Clawges, 685 S.E.2d 693, 700 (W. Va. 2009) (quoting Dunlap v. Berger, 567 S.E.2d 265, 273 (W. Va. 2002)); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (Rev. 1988).

205 *See, e.g.*, Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 19–20 (1st Cir. 2009); Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 389 (1st Cir. 2001); Fireman's Fund Insur. Co. v. M.V. DSR Atl., 131 F.3d 1336, 1339 (9th Cir. 1997); Medicap Pharmacies, Inc. v. Faidley, 416 F. Supp. 2d 678, 684–85 (S.D. Iowa 2006); Bohl v. Hauke, 906 N.E.2d 450, 455–56 (Ohio App. 2009).

206 For example, in *Republic Mortg. Ins. Co. v. Brightware, Inc.*, 35 F. Supp. 2d 482, 484 (M.D.N.C. 1999), the court wrote:

> [The plaintiff] emphasizes that "no negotiations," "no bargaining," and "no discussions" took place over either the forum[]selection clause . . . . However, [plaintiff] cannot now avoid a provision of a freely-entered contract because it did not consider the provision carefully at the time the Agreements were negotiated. Despite [plaintiff's] implication to the contrary, the Agreements were

known legal maxim that a party who signs a written document is assumed to have knowledge of its contents.[207]

The best example of an overreaching-type attack on a forum selection clause is found in *Shute*.[208] As noted in Section II.B above, the United States Supreme Court held as valid a forum selection clause located on a form passage contract—in this case, the cruise line ticket. The passenger resisted enforcement based primarily on the argument that the clause in question was not the result of negotiation.[209] The high court flatly rejected this position.[210] Basing its reasoning on the particular business context,[211] the *Shute* Court found that

> it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum[]selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket

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far from an adhesion contract in which these provisions were forced upon an unsuspecting consumer. Rather, these Agreements were negotiated between two sophisticated business entities.

See e.g., Hartash Constr., Inc. v. Drury Inns, Inc., No. 00-31120, 2001 WL 361109, *3 (5th Cir. 2001) ("[T]his case concerns two sophisticated parties negotiating a $1.26 million contract at arms length . . . . [Plaintiff's] conclusory assertion that the contract as a whole is one sided does not satisfy its burden."); Int'l Software Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 116 (5th Cir. 1996) (notwithstanding the smaller relative size of the plaintiff's business, the court found that the plaintiff was "a fairly sophisticated business with experience in negotiating complex government and private contracts" and that the plaintiff's "David versus Goliath argument [was] not persuasive"); Karl Koch Erecting Co., Inc. v. N.Y. Convention Ctr. Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988) (the absence of negotiation over the terms of a contract does to render a forum selection clause unenforceable); Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1197 (4th Cir. 1985) ("There is nothing in the record to suggest that Bryant is an unsophisticated entity lacking sufficient commercial expertise to be able to decide whether to enter into a given contract."); MaxEn Capital, LLC v. Sutherland, Civ. Action No. H-08-3590, 2009 WL 936895 at *8 (S.D. Tex. Apr. 3, 2009) (holding that the parties were "sophisticated individuals and businesses" and that "[t]here is no allegation of any inability to negotiate freely");

207 *See* Sedlock v. Moyle, 668 S.E.2d 176, 180 (W. Va. 2008) ("[I]n the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms." (quoting Reddy v. Cmty. Health Found. of Man, 298 S.E.2d 906, 910 (W. Va. 1982))); *see also* Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel Corp., 696 F.2d 315, 318 (4th Cir. 1982); Pepe v. GNC Franchising, Inc., 750 A.2d 1167, 1169 (Conn. Super. Ct. 2000) ("The general rule is that where a person of mature years and who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so . . . ." (quoting Ursini v. Goldman, 173 A.789 (Conn. 1934))); R.D. Johnson Milling Co. v. Read, 85 S.E. 726, 730 (W. Va. 1915).

208 *See supra* notes 23–27 and accompanying text.

209 Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 589 (1991). The Respondents second argument was that enforcement of the clause would effectively deprive them of their day in court. *Id.*

210 *Id.*

211 *See supra* note 26 and accompanying text.

> of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.[212]

The Court determined that the enormous disparity of bargaining power which existed between the passenger and Carnival Cruise Lines was not so unreasonable to void the forum selection clause because the cruise line company had a strong interest in limiting the fora in which it would be amenable to suit. Indeed, "a cruise ship typically carries passengers from many locales[;] it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora."[213]

In what amounts to a refocus on the economic policy justifications for forum selection clauses,[214] the Court noted that the predictability and associated cost-savings of litigating in a single, exclusive forum should ultimately help maintain lower ticket prices for passengers.[215] More than any other, the *Shute* decision emphasizes the point that even an enormous disparity in bargaining power coupled with a total lack of negotiation will *not necessarily* void a forum selection clause found within a contract of adhesion.[216] However, the Court noted that in cases of form passage contracts, the clause at issue would be subject to a fundamental fairness analysis.[217]

West Virginia law recognizes adhesion contracts as a modern commercial reality; thus, they are not prima facie invalid.[218] Even so, a court should conduct a fundamental fairness analysis[219] that inquires whether the provision is "unconscionable or was thrust upon [the resisting party] because [it] was unwary and taken advantage of."[220] Indeed, a recent federal district court decision

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212 *Shute*, 499 U.S. at 593.

213 *Id.*

214 *See supra* notes 5–9 and accompanying text.

215 *Shute*, 499 U.S. at 594.

216 *See, e.g.*, Mercury West A.G., Inc. v. R.J. Reynolds Tobacco Co., No. 03 Civ. 5262(JFK), 2004 WL 421793 at *5 (S.D.N.Y. Mar. 5, 2004) ("A forum selection clause included in a non-negotiated form contract has the power to bind parties.").

217 *Id.* at 595. In determining the fundamental fairness of such a clause, the court should consider whether the plaintiff's had notice of the clause; whether the defendant chose its corporate location to avoid litigation; whether the clause names a "remote alien forum;" and whether the defendant acted in bad faith in obtaining plaintiff's consent to the offending clause. *Id.* at 594–95; *see also* Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 9–10 (2d Cir. 1995); Carron v. Holland Am. Line-Westours Inc., 51 F. Supp. 2d 322, 325 (E.D.N.Y. 1999).

218 *See* Clites v. Clawges, 685 S.E.2d 693, 700–1(W. Va. 2009).

219 This is not unlike what the United States Supreme Court in *Shute* held when it determined that provisions within form passage contracts, while prima facie valid, are "subject to judicial scrutiny for fundamental fairness." *See supra* note 27 and accompanying text.

220 *Clites*, 685 S.E.2d at 700 (quoting Bd. of Educ. of Berkeley Cnty. v. W. Harley Miller, Inc., 236 S.E.2d 439, 441 (W. Va. 1977)). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

applying West Virginia law reached a similar conclusion when it rejected a paving company's claim that a forum selection clause was invalid because the contract was a one of adhesion.[221]

Inequality of bargaining alone does not make a contractual provision unconscionable; rather, "gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, . . . to the unfair terms."[222] Thus, a determination of unconscionability "must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and the 'existence of unfair terms in the contract.'"[223]

In a recent West Virginia Supreme Court of Appeals decision that addressed and rejected an unconscionability attack on an arbitration agreement,[224] the court noted in dicta that "[a] forum selection clause in an employment contract, contained in a contract of adhesion, which requires an employee to arbitrate or litigate his or her employment claims in *far-away jurisdictions, remotely removed from the employee's actual place of employment or residence*, would be troubling to this Court."[225]

Claims of overreaching in regards to a forum selection clause are not always unsuccessful.[226] In *Eads v. Woodmen of the World Life Insurance Society*,[227] an Oklahoma appellate court held as unenforceable a forum selection clause contained within a contract that plaintiff "was forced to sign in order to retain his job as a field representative. Rather than voluntary negotiation at arm's length, [plaintiff] was given no 'meaningful choice.'"[228]

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221 *See* Blacktop Indus., Inc. v. Cleveland Constr., Inc., 2009 WL 1140020 *2–4 (S.D.W. Va. 2009) (applying West Virginia law).

222 *Id.* at *2 (quoting Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co., 413 S.E.2d 670, 674–75 (W. Va. 1992)).

223 *Id.* (quoting Syl. pt. 4, *Art's Flower Shop*, 413 S.E.2d 671). *See also* Syl. pt. 4, *Clites*, 685 S.E.2d at 695.

224 *Clites*, 685 S.E.2d 693. The same court in *Saylor v. Wilkes*, 613 S.E.2d 914, 922–23 (W. Va. 2005), held an arbitration agreement unenforceable as an unconscionable contract of adhesion where the defendant's actions "demonstrate[d] a flagrant disparity in bargaining power, confirm[ed] a lack of meaningful alternatives available to [the] Petitioner and establish[ed] the omission of critical terms and conditions in the arbitration document."

225 *Clites*, 685 S.E.2d at 701 n.4 (emphasis added). *See also* Am. Gen. Life and Accident Ins. Co. v. Wood, 429 F.3d 83, 88–89 (4th Cir. 2005) (discussing West Virginia law on adhesion contracts regarding challenge to arbitration clause). Both *Clites* and *Wood* provide highly instructive discussions of unconscionability under West Virginia law.

226 *See, e.g.*, Weidner Commc'n, Inc. v. H.R.H. Prince Bandar Al Faisal, 859 F.2d 1302 (7th Cir. 1988) (discussion of overwhelming bargaining power based on intimidation by foreign leader).

227 Eads v. Woodmen of the World Life Ins., 785 P.2d 328 (Ok. App. 1989).

228 *Id.* at 331.

Taken together, the aforementioned West Virginia Supreme Court of Appeals dictum and related case law from other jurisdictions indicate that forum selection clauses in employment contracts may be vulnerable to claims of overreaching, especially when the designated forum is a relatively long distance from the site of employment or the employee's residence.

b. Grave Inconvenience or Unfairness

Beyond fraud or overreaching, a forum selection clause is unreasonable if "the complaining party will for all practical purposes be deprived of his [or her] day in court because of the grave inconvenience or unfairness of the selected forum."[229]

However, "where it can be said with reasonable assurance that at the time [of the making of] the contract, the parties . . . *contemplated the claimed inconvenience*," such inconvenience will not typically invalidate the forum selection clause.[230] Essentially, in analyzing an inconvenience claim, courts focus on whether the burdens claimed by the resisting party were foreseeable at the time the resisting party ratified the agreement.[231] Unsurprisingly, most inconvenience claims rest on the claimed *high expense* of litigating in the selected forum and focus chiefly on travel costs.

If a court determines that the claimed inconvenience was not foreseeable, the likelihood of success under this line of attack depends upon whether the expense of litigating in a distant forum would all but close the courthouse doors to the suit. Of course, generalized allegations of financial difficulty will not invalidate a forum selection clause,[232] and the resisting party bears a "heavy burden" to prove the unreasonableness of the presumptively valid forum selection clause.[233]

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229 Caperton v. A. T. Massey Coal Co., 690 S.E.2d 322, 348 (W. Va. 2009) (quoting Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631 (D. Md. 2006)); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

230 *Id.* at 16 (emphasis added).

231 *Cf.* Paper Express, Ltd. v. Pfankuch Maschinen GmbH, 972 F.2d 753, 758 (7th Cir. 1992) (explaining that the great expense of litigating in a distant forum will not invalidate a forum selection clause because plaintiff "was presumably compensated for this burden by way of the consideration it received under the contract"); *see, e.g.*, Long v. Dart Int'l, Inc., 173 F. Supp. 2d 774, 778 (W.D. Tenn. 2001) (rejecting an inconvenience challenge to a forum selection clause on foreseeability grounds even though the plaintiff would need to travel 1046 miles).

232 *See, e.g.*, Mercury W. A.G. v. R.J. Reynolds Tobacco Co., No. 03 Civ. 5262(JFK), 2004 WL 421793, at *4 (S.D.N.Y. 2004) ("Simply claiming financial distress does not warrant setting aside a valid forum selection clause."); Price v. Leasecomm Corp., No. 1:03CV685, 2004 WL 727028, at *5 (M.D.N.C. 2004) (stating that despite plaintiff's unemployment and financial difficulties, forum selection clause naming Massachusetts as exclusive forum is enforceable); Envirolite Enter., Inc. v. Glastechnishe Industrie Peter Lisec Gesechaft M.B.H., 53 B.R. 1007, 1012–13 (S.D.N.Y. 1985) (rejecting a challenge to forum selection clause reasonableness based on plaintiff's bankruptcy).

233 *Shute*, 499 U.S. at 592.

Beyond expense, a resisting party may also claim that the selected forum is inconvenient because the party's witnesses or physical evidence are located too great a distance from the selected forum; however, some courts have said that location and convenience of witnesses are generally not considered a serious or grave inconvenience.[234] In such cases, courts point to the fact that deposition testimony can be utilized by those parties whose witnesses cannot travel to the chosen forum.[235] Quoting a Second Circuit decision, the Fifth Circuit recently noted that "with modern conveniences of electronic filing and videoconferencing, '[a] plaintiff may have his [or her] day in court without ever setting foot in a courtroom.'"[236]

Even if a resisting party's witnesses are located a great distance from the designated forum, the inconvenience will not typically support invalidation of the forum selection clause where the court determines that the inconvenience was foreseeable at the time the agreement was ratified.[237] In a separate vein, at least one court has recognized that "[t]he enforcement of a forum[]selection clause creates a serious inconvenience if it would result in two lawsuits involving similar claims or issues being tried in separate courts."[238]

Only cases with extreme facts seem to necessitate the invalidation of forum selection clauses on grounds of grave inconvenience. For instance, a federal district court in Texas found an otherwise valid forum selection clause in a wrongful termination case unreasonable where the resisting plaintiff alleged sufficient "personal and economic hardship" such that enforcing the clause

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234 *See, e.g.*, Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp, 696 F.2d 315, 317–18 (stating that the inconvenience of witnesses having to travel from West Virginia to New York was not sufficiently grave to void forum selection clause); Alpha Sys. Integration, Inc. v. Silicon Graphics, Inc., 646 N.W.2d 904, 909 (Minn. Ct. App. 2002); *In re* Kyocera Wireless Corp., 162 S.W.3d 758, 767 (Tex. App. 2005) (stating that "[e]ssentially bare allegations of inconvenience are insufficient to satisfy its burden").

235 *See, e.g.*, Interfund Corp. v. O'Byrne, 462 N.W.2d 86, 88 (Minn. Ct. App. 1990) (citing Hauen Bermeister, Inc. v. Met-Fab Indus., Inc., 320 N.W.2d 886, 890 (Minn. 1982)); Ira C. Wolpert, *Overcoming Presumptive Validity of a Forum-Selection Clause*, 37 MD. B.J. 55, 57 (2004) (stating that in order to overcome this presumption, a resisting party should provide an "explanation why their testimony could not be provided by deposition or video deposition").

236 Calix-Chacon v. Global Int'l Marine, Inc., 493 F.3d 507, 515 (5th Cir. 2007) (quoting Effron v. Sun Line Cruises, Inc., 67 F.3d 7, 11 (2d Cir. 1995)).

237 *See, e.g.*, Brock v. Entre Computer Ctrs., Inc., 933 F.2d 1253, 1258 (4th Cir. 1991) ("No matter which forum is selected, one side or the other will be burdened with bringing themselves and their witnesses from [another state]."); Scotland Mem.'l Hosp., Inc. v. Integrated Informatics, Inc., No. Civ. 1:02CV00796, 2003 WL 151852, at *5 (M.D.N.C. 2003) ("Simply put, the 'great hardship' which Plaintiff claims it would suffer due to its 'essential personnel' being absent 'for an extended period of time' is insufficient to establish the grave inconvenience essentially depriving Plaintiff of its day in court."); *Ex parte* Soprema, Inc., 949 So. 2d 907, 914 (Ala. 2006) (designating as valid a forum selection clause naming Ohio as the exclusive forum, even though most witnesses were located in Alabama, because "[plaintiff] was aware of the potential inconvenience of conducting litigation in a location difference from its corporate headquarters or job site before it executed the agreement").

238 Alpha Sys. Integration v. Silicon Graphics, Inc., 646 N.W.2d at 909.

would effectively deprive him of his day in court.[239] There, the plaintiff showed to the satisfaction of the court that his diagnosis of multiple sclerosis would make it "difficult for him to travel [interstate], because he uses a walker . . . ."[240] The court also rested its decision on the plaintiff's inability to "afford to travel to Indiana or to hire local counsel in Indiana," by relying on estimates of such costs in comparison to plaintiff's W-2 Wage and Tax Statement.[241] In sum, a claim that an otherwise valid forum selection clause is unreasonable due to serious or grave inconvenience must be based on *particularly extraordinary facts* showing that the resisting party will most assuredly be deprived of his or her day in court.

c. Chosen Law Would Deprive Plaintiff of a Remedy

The third factor to consider under the *Allen* unreasonableness test is whether the "fundamental unfairness of the chosen law may deprive plaintiff of a remedy."[242] Of course, this factor concerns the choice of law provision rather than the forum selection clause. Once again, the resisting party has a heavy burden in showing that the chosen law is so fundamentally unfair that it may deprive it of a remedy. An example of such a challenge may prove instructive.

A federal district court in North Carolina recently addressed this issue in a case where the resisting party attempted to show that the Colorado forum (and its law) was fundamentally unfair because it would deprive the party of its right to sue under North Carolina's Unfair and Deceptive Trade Practices Act,[243] and while, at the same time, the party would lack standing to bring a similar claim under Colorado's Consumer Protection Act.[244] The court responded:

> Colorado law does provide remedies that are similar to those [p]laintiff seeks against [defendant] in this action, such as declaratory judgment, breach of contract remedies, remedies under the uniform commercial code, and civil conspiracy. The remedies afforded by the laws of the chosen forum need not be identical to those in North Carolina in order for the choice of law and choice of forum clauses to be fundamentally fair. Plaintiff's argument that its remedies are "more fulsome" under North Carolina law misstates the standard.[245]

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239 Dominguez v. Finish Line, Inc., 439 F. Supp. 2d 688, 691 (W.D. Tex. 2006).

240 *Id.* at 690–91.

241 *Id.* at 691.

242 Allen v. Lloyds of London, 94 F.3d 923, 928 (4th Cir. 1996).

243 N.C. GEN. STAT. § 75-1.1 *et seq.* (1977).

244 Bassett Seamless Guttering, Inc. v. Gutterguard, LLC, No. Civ. 1:05CV00184, 2006 WL 156874 at *6 n.10 (M.D.N.C.); *see also* COLO. REV. STAT. § 6-1-101 *et seq.* (2004).

245 *Bassett*, 2006 WL 156874 at *6.

The "fundamentally unfair" standard is, then, a high bar that most resisting parties are unlikely to overcome, especially when a party is resisting enforcement of a forum selection or choice of law clause that names a different state or federal court as the exclusive forum or source of law.[246] This particular prong of the *Allen* reasonableness test becomes more germane where a forum selection or choice of law clause names a foreign jurisdiction as the source of law.[247] Even so,

> [t]he third prong . . . requires a showing of more than a less favorable outcome in the foreign court. "The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair."[248]

As globalization continues apace, forum selection and choice of law clauses are as important as ever before in the international marketplace. American courts will likely continue the trend of extending more deference to the ability of foreign courts to handle even the most complex business litigation by enforcing such clauses.[249] This may well mean enforcing forum selection and choice of law clauses even where the chosen forum's law differs substantially from domestic sources. The burden of proving fundamental unfairness, of course, remains with the party resisting enforcement.

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[246] *See, e.g.*, Atl. Floor Servs., Inc. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875, 878 (D.S.C. 2004) ("Arkansas courts are equipped to evaluate and adjudicate a common law breach of contract claim under the state's law . . . .").

[247] Calix-Chacon v. Global Intern. Marine, Inc., 493 F.3d 507, 514 (5th Cir. 2007) (requiring remand for a district court determination of a question of remedy under Honduran law).

[248] Sheldon v. Hart, No. 5:09CV51, 2010 WL 114007, at *7 (N.D. W. Va. Jan. 8, 2010) (quoting Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992)).

[249] *See, e.g.*, *Sheldon*, 2010 WL 114007, at *7 ("[T]his court has been shown nothing to suggest that a German court would not be fair in this case."); *see generally* The Hague Convention on Private International Law, Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98; Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on* Forum Non Conveniens, *Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013, 1014 (2010) (examining the impact of the Convention on forum selection clause enforceability, *inter alia*, and noting that the Convention "will preempt state and federal laws in some significant areas"); M.H. Adler & M.C. Zarychta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band*, 27 NW. J. INT'L L. & BUS. 1 (2007).

d. Contravention of a Strong Public Policy of the Forum State

Finally, an otherwise valid forum selection clause may be deemed unreasonable where enforcement of the clause contravenes a strong public policy of the forum in which the action is commenced.[250] Relevant public policy considerations may be found embodied in a legislative enactment or judicial decision. Like the fundamental unfairness analysis above, an analysis under this factor of the *Allen* reasonableness test depends upon not only the specific claims and remedies sought by the resisting party, but also on the policy of the state in which the action is brought. Thus, this is a highly fact-dependent analysis requiring in-depth research into a range of public policy considerations that may be in play in a given case.

Often, this point of attack requires courts to focus on whether the enforcement of the clause would contravene a state or federal statute, such as a consumer protection and insurance statute.[251] Some states have enacted statutes that prohibit the enforcement of forum selection clauses in certain situations.[252] For instance, federal district courts have split over the interpretation of a South Carolina statute that purports to express a public policy position against enforcement of forum selection clauses.[253] A recent California appellate decision[254] provides an instructive example of a state court refusing to enforce a forum selection clause that purported to designate Virginia state courts (and thus Virginia law) as the exclusive forum, based on what the California court found

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250 Caperton v. A.T. Massey Coal Co., Inc., 690 S.E.2d 322, 322 (W. Va. 2009) (quoting Belfiore v. Summit Fed. Credit Union, 452 F. Supp. 2d 629, 631 (D. Md. 2006)); Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

251 *See* Ira C. Wolpert, *Overcoming Presumptive Validity of a Forum-Selection Clause*, 37 MD. B.J. 55, 56–57 (2004).

252 *See, e.g.*, N.C. GEN. STAT. ANN. § 22B-3 (West 1995). The statute states that

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

Id.

Of course, such state provisions may be preempted by federal law. *See* Aspen Spa Props. v. Int'l Design Concepts, 527 F. Supp. 2d 469 (E.D.N.C. 2007) (finding that a federal Arbitration Act provision requiring enforcement of contractual arbitration provisions preempted North Carolina statute). Another example is a Louisiana statute that declares that forum selection clauses in contracts between contractors and subcontractors involving a Louisiana company doing business in-state violate state public policy. *See* LA. REV. STAT. ANN. § 9:2779(A) (2000); *see also* Hartash Const. Inc. v. Drury Inns, Inc., 2000 WL 1140498 at *3 (E.D. La.) (finding statute inapplicable).

253 *See supra* note 36 and accompanying text.

254 Am. Online, Inc. v. Superior Court, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001).

were the inadequate and even "hostile" consumer protection remedies of Virginia in contrast to California.[255]

In one of the first federal court decisions applying the *Caperton* rubric to a forum selection challenge, the United States District Court for the Northern District of West Virginia, in *Sheldon v. Hart*, rejected a claim that the forum selection clause at issue was unreasonable due to West Virginia public policy.[256] In that case, the plaintiff resisted enforcement of a clause that purported to name the courts of Germany as the exclusive forum by claiming that West Virginia's interest in trying plaintiff's case in its courts is paramount due to "'the severe and permanent injuries caused to a West Virginia resident.'"[257] The *Sheldon* court swiftly rejected the plaintiff's challenge, stating that "[e]ven if this court accepted plaintiff's contention that West Virginia's interest is greater than Germany's in the outcome of the litigation, that is not what the court looks to in deciding the public policy prong of the unreasonableness test."[258]

Despite the import of this particular part of the *Allen* reasonableness test, the Supreme Court of the United States has said that when federal courts address forum selection clause enforceability, a forum state's disfavor toward clause enforcement is not in itself dispositive when attempting to "rebut the strong federal policy in favor of forum selection clauses."[259] Even so, courts may decline to enforce a forum selection clause where doing so would in some way conflict or contravene the public policy of the forum state in which the action was first filed.

IV. CONCLUSION

The *Caperton* decision illustrates that West Virginia law now unquestionably reflects the current majority position in forum selection clause jurisprudence embedded in modern American law. Now that the basic requirements for forum selection clause enforceability have been set forth under state law, individuals and businesses that engage in commercial activity have more certainty

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255 *Id.* at 712 ("In contrast to Virginia consumer law's ostensible hostility to class actions, the right to seek clause action relief in consumer cases has been extolled by California courts . . . . [Moreover], neither punitive damages, nor enhanced remedies . . . are recoverable under Virginia's law.").

256 Sheldon v. Hart, No. 5:09CV51, 2010 WL 114007, at *7 (N.D. W. Va. Jan. 8, 2010).

257 *Id.*

258 *Id.* Indeed, the public policy "prong" is probably better thought of as an "exception" to enforceability. And as several courts have observed, this exception is to be applied narrowly. *See e.g.*, Southwest Livestock and Trucking Co. v. Ramon, 169 F.3d 317, 321 (5th Cir. 1999); Ackermann v. Levin, 788 F.2d 830, 841 (2d Cir. 1986); Soc'y of Lloyd's v. Mullin, 255 F. Supp. 2d 468, 475 (E.D. Pa. 2003).

259 Atl. Floor Servs. v. Wal-Mart Stores, Inc., 334 F. Supp. 2d 875, 878–79 (D.S.C. 2004) (citing Stewart Org. v. Ricoh Corp., 487 U.S. 22, 31 (1988)). The *Stewart* court applied the strong federal presumption of validity in the face of Alabama decisions which found forum selection clause enforceability counter to state public policy. *See Stewart*, 487 U.S. at 30–31.

as to the operative effect of their contractual arrangements. And like the vast majority of states, West Virginia's adoption of the federal standard for forum selection clause enforceability represents a significant step, albeit small, toward providing a predictable, uniform, and reasonable set of legal standards under which individuals and businesses may commercially flourish.

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