

## Only You Can Prevent Forum Shopping

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Recently, the Supreme Court unanimously held that the best time for forum shopping is *before* a dispute. The Supreme Court frowns on parties seeking to shop for a forum once a dispute develops but recognizes parties' right to agree to a forum prior to any dispute. In light of the Supreme Court's decision in *Broadcom* and *Atlantic Marine*, valid forum-selection clauses will be fully enforced by courts, unless there are extraordinary circumstances.

Broadcom and other technology companies, as members of the Bluetooth Special Interest Group (BSIG), had each signed a standard license agreement granting to each other a license to practice any patent of another member necessary to implement the Bluetooth wireless technology standard for others in the BSIG. All members of the BSIG, by signing the license agreement containing a forum-selection clause, agreed that "all disputes arising in any way out of this License shall be heard exclusively in...the state and federal courts of New York."

One of the licensed patents, U.S. Patent No. 7,756,129 (the '129 patent), owned by a member company of the group, was ultimately assigned to Tri-County Excelsior Foundation who, exclusively licensed the patent to Azure Networks. Azure and Tri-County, alleging that Broadcom and other members of the BSIG were infringing the '129 patent, brought a patent infringement suit in the Eastern District of Texas,<sup>1</sup> instead of New York as agreed to in the license agreement. The District Court denied Broadcom's motion to transfer the case to New York, finding that the case had little connection to New York, and that the defendants made little, if any, attempt to show that New York was more convenient, despite their burden to do so. On appeal, the U.S. Court of Appeals for the Federal Circuit upheld the District Court's ruling. Dissatisfied, Broadcom appealed to the Supreme Court and urged the high court to clarify the standards governing enforcement of a forum-selection clause. On December 9, 2013, the Supreme Court vacated the ruling of the Federal Circuit and remanded the Broadcom case for further consideration<sup>2</sup> in light of *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,<sup>3</sup> a decision it rendered only a week before.

As in *Broadcom*, for dispute resolution, the parties in *Atlantic Marine* had included in their agreement a specific forum, but the plaintiff had ignored the clause and instead had filed suit in a different federal district. The central issue in *Atlantic Marine*, as well as *Broadcom*, related to the effect of a valid forum-selection clause in a contract. In *Atlantic Marine*, the Supreme Court pointed to the fact that in the absence of a forum-selection clause, a district court, when considering a case transfer to another forum, should evaluate the "convenience of the parties and various public-interest considerations."<sup>4</sup> When parties have actually agreed to a valid forum-selection clause, a party trying to avoid the clause must prove that the contractually-agreed forum is inappropriate. According to the Supreme Court, "when parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the

parties' settled expectations. A forum selection clause, after all, may ... have been a critical factor in their agreement to do business together in the first place."<sup>5</sup>

In summary, for those who sometimes overlook the practical importance and consequences of a forum-selection clause, which – too often – appears to be a mere boilerplate provision at the very end of a lengthy contract, beware! You will rarely manage to avoid a valid forum-selection clause which will be read by the courts as the most faithful representation of the parties' expectations – so think twice. Negotiating and selecting a specific forum in a contract is not just about filling the blank in the hope of shopping for a better forum later

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<sup>1</sup> Complaint, *Azure Networks, LLC v. CSR plc* (E.D. Tex. Mar. 22, 2011) (6:11-cv-00139).

<sup>2</sup> *Broadcom Corp. v. United States Dist. Ct. of the Eastern Dist. of Tex.*, No.12-1475, 2013 WL 6388807 (2013)

<sup>3</sup> *Atlantic Marine Constr. Co. v. United States Dist. Ct. for the Western Dist. of Tex.*, U.S., 134 S. Ct. 568 (2013).

<sup>4</sup> *Id.* at 581.

<sup>5</sup> *Id.* at 583.