



# PALM BEACH COUNTY BAR ASSOCIATION

# BULLETIN

[www.palmbeachbar.org](http://www.palmbeachbar.org)

April 2014

Statements being mailed out next week

## Dues Statements Mailed

Annual membership dues statements have been mailed to all PBCBA members for fiscal year 2014-2015, which begins July 1. If you do not receive a bill, contact Shoshanah at the Bar Office (687-2800) or [sspence@palmbeachbar.org](mailto:sspence@palmbeachbar.org)

## Note from the Executive Director

We would like to remind our members that our Bar events (including events for the North County and Young Lawyers Sections) are restricted to members of the PBCBA or attorneys who are not yet members. They are not open to vendors or business associates, other than the paid sponsors that have been obtained for each specific event. If you have a business associate that is interested in marketing to our members, please have them contact Lynne Poirier at [lpoirier@palmbeachbar.org](mailto:lpoirier@palmbeachbar.org) or by calling her at 687-2800. Thank you for your cooperation.

## Mark your calendar for upcoming Membership Events

### April 22:

Law Day Luncheon with guest speaker Former FL Supreme Court Chief Justice Charles Wells

### April 29:

Annual Judicial Reception

### May 9:

Young Lawyers Section End of the Year Luncheon

### May 15:

North County Section's Jurist of the Year Dinner

### June 7:

Annual Installation Banquet



## Former Florida Supreme Court Chief Justice Charles Wells to Speak

Join us for our annual Law Day Luncheon on Tuesday, April 22 at the Marriott Hotel in West Palm Beach. Lunch begins at 11:45 a.m. and ends at 1:00 p.m. We promise you'll be out the door and on the road on time!

This year's keynote speaker will be Former Florida Supreme Court Chief

Justice Charles T. Wells. Wells was a member of the Florida Supreme Court from 1994 until 2009. He is perhaps most noted for presiding over appeals brought to the Court as part of the dispute over Florida's electoral votes in the U.S. presidential election of 2000. In 2013, he authored a book called *Inside Bush v. Gore*. Wells will talk about the lessons learned during this time.

Join us by registering online at [www.palmbeachbar.org](http://www.palmbeachbar.org). Lunch sponsored by Sabadell United Bank, Rock Legal Service and Investigations, Bob Greenberg, CLTC MetLife Insurance Services and Searcy Denney Scarola Barnhart & Shipley.



## Banquet June 7 Save the date!

Our annual Installation Banquet will be held on Saturday, June 7 at The Breakers Hotel in Palm Beach. Please join us for the induction of our Board of Directors including Theo Kypreos as president and Grier Pressly as president-elect. The evening includes a reception beginning at 7:00 p.m. followed by dinner and dancing. Invitations will be mailed at the end of the month. Thank you to our gracious underwriters from Jones Foster Johnston and Stubbs; Sabadell United Bank; Lesser Lesser Landy & Smith; Searcy Denney Scarola Barnhart & Shipley; Daily Business Review; Phipps Reporting; Rock Legal Services and Investigations; Fox Rothschild; USI Affinity; Joel M. Weissman and Pressly & Pressly, P.A.

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## Enforcing A Forum-Selection Clause

By Matt Triggs and Jonathan Galler

Your new client has been sued in federal court for breach of contract. The CEO informs you that the contract contains a bulletproof forum-selection clause (the parties had negotiated over the clause endlessly) and that the lawsuit is in the wrong jurisdiction.

The client instructs you: “Take care of this. If I have to travel for this case, we’re going to do it in warm, sunny Florida, not Fargo, North Dakota.”

Suffice it to say that you’d better know how to enforce that clause. *Correctly.*

It’s not as simple as it may seem. Fortunately, the U.S. Supreme Court issued an opinion a few months ago that provides something of a roadmap. *Atlantic Marine Constr. Co. v. United States District Court for Western District of Texas*, 134 S.Ct. 569 (2013). In the three months after the *Atlantic Marine* opinion was issued, it was cited by other courts no less than forty-six times.

A brief look at the menu of potential options demonstrates why a roadmap is helpful.

- Federal Rule 12(b)(3) – provides for dismissal of a case based on improper venue;
- 28 U.S. C. § 1406(a) – provides for dismissal or transfer of a case laying venue in the wrong division or district;
- 28 U.S. C. § 1404(a) – provides for transfer of a case to any other district or division where it might have been brought or to any district or division to which all parties have consented; and
- The doctrine of *forum non conveniens* provides that a court may dismiss or stay an action when an adequate alternative forum is available and the balancing of various private and public interests weigh in favor of dismissing or staying the action.

How’s a lawyer supposed to choose?

As you would expect, the Supreme Court’s opinion provides an exhaustive and thoughtful analysis. But we’ll skip straight to the answers.

Rule 12(b)(3) and section 1406(a) are to be employed only when the case has been commenced in a federal district that is “improper” or “wrong.” The analysis of whether the forum is improper is controlled

by 28 U.S.C. § 1391, which governs venue for all federal civil actions. Critically, the existence of a forum-selection clause does not make an alternative forum improper or wrong as those terms are used in Rule 12(b)(3) and section 1406(a). So the presence of a forum-selection clause does not trigger the availability of those options.

Section 1404(a) is different. That statute may be employed without regard to whether the case is in the “wrong” forum. In other words, a transfer under section 1404(a) is available even when the case is in a proper forum, so long as the transfer is for the convenience of the parties and witnesses and is in the interests of justice. Where the parties have contractually agreed to an alternative forum, that agreement is to be given controlling weight in all but the most exceptional circumstances. *Atlantic Marine*, 134 S.Ct. at 579.

The opinion goes on to explain that [t]he presence of a valid forum-selection clause requires the district court to adjust their usual section 1404(a) analysis in three ways. *Atlantic Marine*, 134 S.Ct. at 581. First, the plaintiff’s choice of forum in commencing the lawsuit is to be given no deference. Second, arguments regarding the balancing of the parties private interests should not be considered. And third, an action that is transferred under section 1404(a) due to a plaintiff’s decision to ignore a valid forum-selection clause will not carry with it the original venue’s choice-of-law rules. In most other transfers under section 1404(a), the original venue’s choice-of-law rules (which, in diversity cases, means the choice-of-law rules of the state in which it sits) continue to govern so as to preclude defendants from using the statute to benefit from the state law of another jurisdiction.

But what about a forum-selection clause in which the selected forum is not a federal district court but, rather, a state court or the court of a foreign country? In that instance, even section 1404(a) would not be available to the parties because it provides only for a transfer to a different federal district or division. Instead, the way to enforce a



forum-selection clause of that nature is through the doctrine of *forum non conveniens*. In fact, as the Supreme Court opinion explains, section 1404(a) is simply a codification and revamping of the doctrine of *forum non conveniens* for the limited subset of cases in which the transferee court is within the federal court system. The difference with respect to that subset is that section 1404(a) provides for a transfer of the action rather than a dismissal or stay.<sup>1</sup>

So choose from the options wisely & and be sure to tell your client to pack a bathing suit.

*Matt Triggs is a partner in the litigation department of Proskauer Rose LLP and the head of the department in Boca Raton. Jonathan Galler is a senior counsel in the department. Both concentrate their practices in commercial and probate litigation.*

<sup>1</sup> Florida Rules of Civil Procedure 1.060 and 1.061 address transfers of action and/or dismissals for forum non conveniens in our state court system.

## Do You Need a Mentor?



The Palm Beach County Bar Association’s Mentor Program is designed to provide members with a quick and simple way to obtain advice, ideas, suggestions, or general information from an attorney that is more experienced in a particular area of law. The mentors provide a ten-to-fifteen-minute telephone consultation with a fellow attorney, at no fee. Any member of the Palm Beach County Bar, whether newly admitted or an experienced practitioner, can use the program. Call the Bar office at 687-2800, if you need a Mentor.