Data on Choice-of-Court Clause Enforcement in US

The United States legal system is immensely complex. There are state courts and federal courts, state statutes and federal statutes, state common law and federal common law. When I imagine a foreign lawyer trying to explain this system to a foreign client, my heart fills with pity.

This feeling of pity is compounded when I imagine this same lawyer trying to advise her client as to whether a choice-of-court clause will be enforced by a court in the United States. The law on this subject is complicated. It is, moreover, not easy to determine how it is applied in practice. Are there differences in clause enforcement rates across the states? Across federal circuits? Do state courts enforce these clauses at the same rate as federal courts? Until recently, there was no data that would allow a foreign lawyer – or a U.S. lawyer, for that matter – to answer any of these questions.

Over the past several years, I have authored or co-authored several empirical articles that seek to answer the questions posed above. This post provides a summary of the data gathered for these articles. All of the cases referenced involve outbound choice-of-court clauses, i.e. clauses that select a jurisdiction other than the one where the suit was filed. Readers interested in the data collection process, the caveats to which the data is subject, or other methodological issues should consult the articles and their appendices. This post first describes state court practice. It then describes federal court practice. It concludes with a brief discussion comparing the two.

State Courts

Most state courts have held that choice-of-court clauses are presumptively enforceable. These courts will not, however, enforce a clause when it is unreasonable or contrary to public policy. A clause may be deemed unreasonable when enforcement would result in duplicative litigation, when the plaintiff cannot obtain relief in the chosen forum, when the plaintiff was never provided with

notice of the clause, when the chosen forum lacks any relationship to the parties, or when litigation in the chosen forum would be so gravely difficult and inconvenient that the plaintiff would be deprived of her day in court. A clause is contrary to public policy when a statute or a judicial decision declares that enforcement is inconsistent with the policy of the state.

The chart below lists the enforcement rate in state courts with at least fifteen judicial decisions between 1972 and 2019 and at least ten judicial decisions between 2010 and 2020. These rates were calculated by dividing (1) the total number of cases where a clause was enforced by (2) the total number of cases where the court considered the issue of enforceability.

State	Enforcement Rate 1972-2019	Enforcement Rate 2010-2020
California	80%	78%
Connecticut	71%	88%
Delaware	89%	100%
Florida	78%	100%
Georgia	67%	54%
Illinois	74%	83%
Louisiana	78%	70%
Michigan	78%	82%
New Jersey	63%	64%
New York	79%	76%
Ohio	78%	73%
All States	**77%**	**79%**

Between 1972 and 2019, state courts enforced choice-of-court clauses in 77% of cases. Between 2010 and 2020, they enforced them in 79% of cases. The state courts in Florida and Connecticut have become more likely to enforce in recent years. The state courts in Georgia have become less likely to enforce in recent years. The state courts in California, New Jersey, and New York have been

relatively consistent in their enforcement practice over time.

These data indicate that while there are significant differences in enforcement rates in state court across the United States, choice-of-court clauses are given effect in most cases.

Federal Courts

Like state courts, federal courts take the position that choice-of-court clauses are presumptively enforceable. Like state courts, federal courts will not enforce these clauses when they are unreasonable or contrary to public policy. Unlike state courts, federal courts do not apply state law to decide the issue of enforceability. They apply federal common law. This means that the federal courts are free to adopt their own view of whether a clause is unreasonable or contrary to public policy without considering prior state court decisions.

In theory, the fact that the federal courts apply federal common law to this question should produce uniform results across the nation. In fact, there are notable variations in enforcement rates across federal district courts sitting in different circuits, as shown in the chart below.

Circuit	Enforcement Rate All Federal Cases 2014-2020
Eleventh Circuit	95%
Third Circuit	92%
Second Circuit	91%
Sixth Circuit	91%
Fifth Circuit	90%
Fourth Circuit	90%
All Circuits	**88%**
Seventh Circuit	87%
First Circuit	84%

Eighth Circuit	85%
Tenth Circuit	83%
Ninth Circuit	81%

The federal district courts sitting in the Eleventh Circuit, which includes Florida, have the highest enforcement rate. The federal district courts sitting in the Ninth Circuit, which includes California, have the lowest enforcement rate. On the whole, a plaintiff arguing that a choice-of-court clause is unenforceable would rather be in federal court in California than in Florida. Even in California, however, these clauses are still enforced by federal courts in the overwhelming majority of cases.

Comparing State and Federal Courts

Federal courts sitting in diversity enforce choice-of-court clauses at a rate that is equal to or greater than the rate of geographically proximate state courts in every federal circuit. In the Fourth and Eighth Circuits, the enforcement gap is particularly large, as shown in the chart below.

Circuit	**Enforcement Rate State Cases (2010-2020)**	**Enforcement Rate Federal Diversity Cases (2014-2020)**	**Difference**
Fourth Circuit	67%	96%	29%
Eighth Circuit	64%	88%	24%
Sixth Circuit	73%	93%	20%
Third Circuit	76%	95%	19%
Eleventh Circuit	78%	96%	18%

Second Circuit	78%	94%	16%
First Circuit	79%	94%	15%
Overall	**79%**	**90%**	**11%**
Ninth Circuit	78%	85%	7%
Tenth Circuit	86%	91%	5%
Fifth Circuit	90%	90%	0%
Seventh Circuit	85%	85%	0%

These data suggest that a defendant seeking to enforce a choice-of-court clause should try to remove the case to federal court. These courts are, on average, more likely to enforce a clause than their state counterparts. The data further suggest that plaintiffs seeking to invalidate a choice-of-court clause should strive to keep the case in state court. These courts are, on average, less likely to enforce a clause than their federal counterparts. The incentives for forum shopping as between state and federal court when it comes to choice-of-court clauses raise serious concerns under the U.S. Supreme Court's decision in *Erie Railroad Company v. Tompkins,* as discussed at greater length here,

There are two main reasons why the enforcement rate is higher in federal court. First, some federal courts applying federal law refuse to give effect to state statutes that invalidate choice-of-court clauses. When these invalidating statutes are applied by state courts and ignored by federal courts, the result is a sizable enforcement gap. The Supreme Court recently denied cert in a case that would have resolved the question of whether federal courts should give effect to state statutes that invalidate choice-of-court clauses.

Second, federal courts applying federal law are less willing than state courts applying state law to conclude that a clause is unreasonable. Over many cases decided over many years, state court judges have shown themselves to be more sympathetic to plaintiffs seeking to avoid choice-of-court clauses. Federal courts,

by comparison, have enforced clauses in a number of instances where state courts probably would have refused on unreasonableness grounds.

Conclusion

The law of choice-of-court clauses in the United States is sprawling and complicated. Until recently, there were no empirical studies addressing how the courts applied this law in practice. The information presented above is the product of hundreds of hours of work reading thousands of state and federal cases in an attempt to identify patterns and trends.

Readers interested in learning more about state court practice should look here and here. Readers interested in learning more about federal court practice should look here. Readers interested in learning more about the differences between state and federal practice – and the *Erie* problems generated by these differences – should look here.

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