

IN THE INTERESTS OF JUSTICE

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Protecting Oregon Consumers Against Abusive Practices in American Jurisprudence

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### **Abstract**

This research provides an overview of the impact of forum non conveniens on consumer protection laws in Oregon. It includes a hypothetical case where a consumer cannot seek justice in their home state due to a forum selection clause and the application of the forum non conveniens doctrine. The report discusses the jurisdictional requirements of Oregon courts, the Oregon Unlawful Trade Practices Act (OR UTPA), and the private cause of action, which allows individuals to seek justice when the government cannot provide it. The report also examines the federal and Oregon standards for applying the forum non conveniens doctrine. It proposes solutions to prevent abuses related to forum selection clauses, ensuring that the doctrine is used fairly and aligns with legislative intent.

*Keywords:* Consumer Protection, Oregon Unlawful Trade Practices Act, OR UTPA, Forum Non Conveniens, Forum Selection Clause, Public Policy, Jurisdiction, Venue, Torts, Civil Action, Judicial Discretion, Digital Economy, Clickwrap Agreements, Technology

### **In the Interests of Justice**

Imagine you are an Oregonian who has lived in the state your whole life and has yet to venture out of the state's borders. You recently purchased a litter of puppies online for \$15,001.00. You are not in the business of buying and selling puppies. It is just that it has been your lifelong aspiration to have a litter of adorable puppies to call your own. After weeks of waiting, you grow anxious that you have not received your litter of puppies. You send messages to the company that sold you the puppies, but they make excuses for the delay while assuring you that the puppies are on the way. Weeks turn into months, and you never receive your puppies. You discover that you have been scammed. You try calling your bank, but they tell you it is too late to get back the money you sent. Feeling angry, frustrated, and betrayed, you search for legal representation to help you navigate this complicated situation. You quickly realize that finding an affordable lawyer is no easy feat. Fortunately, your friend's sister is a lawyer and agrees to assist you. She explains that you have a case under Oregon's Unlawful Trade Practices Act (OR UTPA) law, which prohibits unfair and deceptive trade practices against consumers.

With her help, you file a case and seek justice in court. Upon filing your lawsuit, the other side refuses to accept responsibility. Their position is that you signed a contract with important provisions regarding your legal remedies, but you don't recall ever signing anything. The other side files motion after motion forcing your lawyer to respond, and you quickly rack up attorney's fees. The other side alleges that you checked a box when logging into their website, and, in doing so, you agreed to a "forum selection clause." You have never heard of a forum selection clause and do not know what it means. You believed the box you checked was just another website "cookies" banner, similar to the ones on dozens of other websites. Your lawyer informs you that a forum selection clause mandates that you litigate your case in a specified venue. This means a judge can only hear your case in one specific state and county. Essentially, you have agreed to be subject to the jurisdiction of a particular place, which in this situation is

New York, located three thousand miles away, where the other side's legal headquarters are located. You question how you can be obligated to seek justice at a location you have never visited and have no connection with. The other side contends that you consented to personal jurisdiction in New York by accepting the company's online terms of use. When a court has personal jurisdiction, it has the power to make decisions on the law and facts of a case and enforce those decisions against all the parties. During pre-trial motions, the other side formally requests that the judge dismiss your case on forum non conveniens grounds. Their lawyers argue that a trial in your home state is not an option because you agreed to the forum selection clause before purchasing the litter of puppies, waiving your right to have your day in court in your home state. Even though you have never been to New York and finding a lawyer there may be nearly impossible, the judge determines that the forum selection clause binds you to litigate there. The court justifies its decision by claiming it is "in the interests of justice."

The difficulties you face are not only geographical but also legal and practical. The laws of the alternate forum may differ significantly from those of your home state, making it harder to present your case effectively. Unfortunately, this situation occurs more often than one might think.<sup>1</sup> On these occasions, consumer protection laws like the OR UTPA are powerless to stop it. "Justice delayed is justice denied" is a legal maxim emphasizing the critical importance of timely legal recourse or equitable relief for injured parties. Justice would be denied even before a single argument was heard in an Oregon trial court when applied to this situation. These kinds of pre-trial legal procedural maneuvers can be particularly harmful to consumers. This article examines the legal strategy of using forum selection clauses in online contracts to benefit from

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<sup>1</sup> See, e.g., *Chudner v. TransUnion Interactive, Inc.*, 626 F. Supp. 2d 1084 (D. Or. 2009) (consumer plaintiff brought an action under the OR UTPA. The court held that a forum selection clause in the contract between the parties, which stated that any legal disputes should occur in Delaware, was valid and enforceable); *Wolfe v. The RV Factory LLC*, Not Reported in Fed. Supp. (D. Or., 2016) (consumer plaintiff filed a lawsuit under the OR UTPA, alleging they were misled into buying a 2016 Weekend Warrior trailer through false statements. Defendant moved to transfer the case to the United States District Court for the Northern District of Indiana, citing the forum selection clause of the Buyer's Agreement and the Limited Warranty. The court granted the motion to transfer venue).

the forum non conveniens doctrine to the detriment of consumers. This centuries-old doctrine allows defendants to request the dismissal of cases by claiming that a different venue would be more appropriate. In modern digital finance cases, applying this doctrine can lead to considerable delays, higher legal expenses, and render consumer protection laws ineffective.

This study aims to find solutions to prevent abuses caused by forum selection clauses that use the forum non conveniens doctrine to prevent Oregon consumers from filing lawsuits in their home state against parties that have caused them harm. It also shines a light on the court's ability to exercise discretion in implementing this doctrine, leading to unequal outcomes. Legislators must act to either eliminate or significantly restrict the court's ability to apply the forum non conveniens doctrine in cases involving state residents. This move will help ensure that private citizens who have been harmed can retain access to the courts in their home state. This research proposes measures to safeguard against the use of digital platforms to entice consumers to give up their rights, something forum non conveniens was never intended for. One such measure involves altering how digital contracts which purport to waive significant rights, also known as "clickwrap agreements," are presented to consumers. These recommendations will ensure that the forum non conveniens doctrine is used properly—in line with legislative intent and traditional notions of fair play and substantial justice.

### **The OR UTPA**

In the United States, every state has implemented Unfair and Deceptive Acts and Practices (UDAP) laws to protect consumers from harmful business practices during their daily transactions. While each state has its own unique set of laws, the common goal is to prevent businesses from engaging in unfair or deceptive practices in the marketplace. The OR UTPA is the UDAP statute in Oregon that aims to protect consumers from illegal trade practices.<sup>2</sup> The law prohibits various deceptive and unfair practices, such as false advertising, misleading

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<sup>2</sup> State *ex rel.* Redden v. Discount Fabrics, 289 Or. 375, 382, 615 P.2d 1034 (1980).

statements, bait-and-switch tactics, pyramid schemes, and other forms of consumer fraud. It covers multiple industries and business activities, including retail, services, housing, real estate, and financial transactions. The OR UTPA is enforced by the Oregon Attorney General's Office, which empowers both the Attorney General and private individuals to take legal action. This means that both the state and private citizens can initiate legal proceedings against those who engage in unfair and deceptive business practices.

To this end, the OR UTPA allows for a private cause of action effectively enlisting citizens as private attorneys general.<sup>3</sup> The OR UTPA private cause of action has displaced common law fraud as the remedy of choice for deceptive practices for consumers.<sup>4</sup> One reason is that the OR UTPA simplifies and streamlines the process for consumers to substantiate their claims in court. When consumers file claims under the OR UTPA, they face better odds because they only need to prove the statutory elements of their claims, as opposed to the stricter requirements of proving common law fraud.<sup>5</sup> Within a private cause of action, any private citizen who suffers any ascertainable loss of money or property due to willful use of an unlawful practice may recover actual damages or \$200, whichever is greater, plus attorney's fees.<sup>6</sup> If a private citizen files a lawsuit and the court finds it appropriate, they may seek punitive damages as part of the award.

In addition, the private cause of action enables regular people to pursue justice when the apparatus of the state is too overwhelmed to offer it, incapable of delivering it, or unwilling to pursue it. State agencies often struggle to provide justice for individual consumers unless

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<sup>3</sup> Pridgen, *Consumer Protection and the Law* ch. 2 (1994) note 2, § 2:9; Ralph J. Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 *Or. L. Rev.* 117, 127-28 (1975); cf. West's Ann. Cal. Labor Code § 2698, CA LABOR § 2698 (in California, the Private Attorneys General Act (PAGA) authorizes aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations).

<sup>4</sup> Steven W. Bender, *Oregon Consumer Protection: Outfitting Private Attorneys General for the Lean Years Ahead*, 73 *Or. L. Rev.* 639, 642 (1994).

<sup>5</sup> *Wolverton v. Stanwood*, 278 *Or.* 709, 713, 565 P.2d 755 (1977); *Raudebaugh v. Action Pest Control, Inc.*, 59 *Or.App.* 166, 171, 650 P.2d 1006 (1982) ("Had the legislature intended that a consumer prove all the elements of common [-] law fraud in order to recover damages, it would have been unnecessary to create a cause of action by statute.").

<sup>6</sup> *Or. Rev. Stat. Ann.* § 646.638 (West).

numerous victims are affected by the same fraudulent practice.<sup>7</sup> In cases where a business has deceived multiple consumers, the state may only have the ability to focus on the general elements of the company's practices rather than the particular variations.<sup>8</sup> Also, state agencies typically do not have the resources to pursue cases requiring extensive evidence of how a particular consumer was cheated.<sup>9</sup> Amidst this backdrop, having a private cause of action is imperative in safeguarding the public interest and ensuring businesses operate fairly and ethically. It is crucial to protect this mechanism and close any exploitable loopholes. Without it, the government's ability to provide justice to individuals would be hindered, leaving them with no means of seeking recourse. The private cause of action is the starting point for this research.

### **Forum Selection Clauses**

A forum selection clause is a provision in a contract that dictates a particular state, county, or court as the appropriate venue for litigating any future disputes regarding the parties' contractual relationship. When a contract specifies a state or foreign forum, the proper way to enforce a forum selection clause is through common law *forum non conveniens*. This centuries-old doctrine grants a court discretionary power to decline jurisdiction over a case brought before it in favor of a more suitable forum, whether that case is brought in federal or state court. Traditionally, the *forum non conveniens* doctrine has been a measure of last resort. It does not obligate plaintiffs to select the optimal forum for their claim. Its purpose is to rectify the selection of an inconvenient forum only when proceeding in the chosen forum would harm the interests of fundamental fairness and reasonable and efficient judicial administration.<sup>10</sup> *Forum non conveniens* is applicable when the interests of justice demand it, such as when the selected venue has little or no connection to the cause of action. The dismissal of a case for

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<sup>7</sup> Carolyn Carter, Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Laws* (Mar. 2018), at [https://www.nclc.org/images/pdf/car\\_sales/UDAP\\_Report\\_Feb09.pdf](https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 (R.I. 2008).

forum non conveniens presumes that the trial court has jurisdiction but defers its jurisdiction in favor of another court's jurisdiction.<sup>11</sup> Thus, forum selection clauses are, by their nature, powerful instruments because they open the door to forum non conveniens. With great power comes great responsibility. When judges enforce a forum selection clause through forum non conveniens, they take away the plaintiff's right to choose the location of their legal proceedings. This move forces the plaintiff to seek justice in a faraway or foreign location. This is the interest of justice at stake in the hypothetical scenario of the puppy purchaser.

### **The Supreme Court Stance**

The Supreme Court has rejected the argument that a forum selection clause in federal cases may be enforced by a motion to dismiss under 28 U.S.C. § 1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure.<sup>12</sup> Instead, the Supreme Court has held that a forum selection clause in federal cases may be enforced by a motion to transfer under § 1404(a).<sup>13</sup> This provision permits a district court to transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented for the convenience of parties and in the interests of justice. The Supreme Court has also addressed issues of consent-only jurisdiction raised by forum selection clauses in *Carnival Cruise Lines, Inc. v. Shute*. It held that federal law governs the scope and enforceability of a forum selection clause in federal cases.<sup>14</sup> In *M/S Bremen v. Zapata Off-Shore Co.*, the Supreme Court held that a forum selection clause should be enforced unless it is unreasonable, unjust, or invalid for reasons such as fraud.<sup>15</sup> Relatedly, in *Atlantic Marine Construction Co. v. Texas*, the Supreme Court, in deciding to enforce a forum selection clause, relied on the rationale that courts should

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<sup>11</sup> *Maricich v. Lacoss*, 204 Or.App. 61, 65–66, 129 P.3d 193 (2006).

<sup>12</sup> *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 52, 134 S. Ct. 568, 575, 187 L. Ed. 2d 487 (2013).

<sup>13</sup> *Id.*

<sup>14</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590, 111 S. Ct. 1522, 1523, 113 L. Ed. 2d 622 (1991).

<sup>15</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).



not interfere with parties' settled expectations when they have agreed in advance to resolve disputes in a particular forum.<sup>16</sup>

### **The Ninth Circuit Stance**

In the Ninth Circuit, which covers Oregon, federal law governs the enforcement of forum selection clauses, similar to how federal law governs forum non conveniens in the state.<sup>17</sup> Oregon courts are bound by the decisions made by the Ninth Circuit because when a federal circuit renders a verdict, its precedential value applies to all federal courts in that circuit. As Oregon falls under the jurisdiction of the Ninth Circuit, it must abide by any rulings made by that circuit. The Ninth Circuit has established that policy analysis for cases involving forum selection clauses should give deference to a forum selection clause unless there is no recourse in the transferee forum. Thus, a forum selection clause will be considered unreasonable only if it goes against a venue-related policy. Throughout the Ninth Circuit, courts have consistently adhered to this analysis, dismissing policy arguments unrelated to venue when there is no foreclosure of remedy in the transferee forum.<sup>18</sup> Therefore, when a case involving a forum selection clause is presented to an Oregon court, the presiding judge must use their discretion to determine whether to enforce it. This decision can impact the case's outcome even before it is heard on its merits.

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<sup>16</sup> *Atl. Marine Const. Co.*, 571 U.S. 49, at 134, S.Ct. 568 at 187.

<sup>17</sup> See *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).

<sup>18</sup> See *E. Bay Women's Health, Inc. v. gloStream, Inc.*, No. C 14-00712 WHA, 2014 WL 1618382, at \*3 (N.D. Cal. April 21, 2014) (rejecting consideration of California's public policy against deceptive business practices under the Unfair Competition Act because "the transferee court may decide to apply the substantive law sought by plaintiffs" and plaintiffs "failed to identify a fundamental policy underlying California's Unfair Competition Act that relates to venue.") (emphasis in original); *Voicemail Club, Inc. v. Enhanced Servs. Billing, Inc.*, No. C 1202189 SI, 2012 WL 4837697, at \*3-4 (N.D. Cal. Oct. 10, 2012) (rejecting plaintiff's arguments based on California policies under California Civil Code sections 1542, 1668, and 1717 because "the Court only examines public policy as it relates to venue."); *Hegwer v. Am. Hearing & Assocs.*, No. C 11-04942 SBA, 2012 WL 629145, at \*3 (N.D. Cal. Feb. 27, 2012) (rejecting the plaintiff's argument because the plaintiff failed to identify a specific California policy and concluding that any such policy must be related to the forum selection clause itself given that no foreclosure of remedy would exist in the transferee forum).

### **Forum Non Conveniens**

In any legal case, the court must provide a suitable venue for the trial so that all parties are treated fairly, and the proceedings are conducted efficiently.<sup>19</sup> To bring a lawsuit to court, the plaintiff must first fulfill the prerequisites of personal jurisdiction and venue.<sup>20</sup> Personal jurisdiction refers to a court's authority to try a defendant. Venue determines where the court can exercise that power. In Oregon, there are thirty-six trial courts making up twenty-seven judicial districts. When initiating a legal proceeding, the plaintiff is responsible for choosing the court to preside over the case. Generally, this decision is left to the plaintiff, which is referred to as their venue privilege. The forum non conveniens doctrine comes into play as a last-resort measure used when another court at an alternate location would be better equipped to administer the proceedings. It allows a court to decline a case even if they have the jurisdiction to hear it.<sup>21</sup> This interplay ensures the legal process is fair and efficient, meaning neither side has a disproportionate advantage during legal proceedings.

### **The Federal Standard**

In federal courts, the forum non conveniens doctrine allows a court to dismiss a case when the chosen forum would seriously inconvenience one side, and a more convenient forum is available elsewhere for resolving the dispute.<sup>22</sup> In *Gulf Oil Corp. v. Gilbert*, the Supreme Court concluded that the power to dismiss cases based on forum non conveniens is inherent in federal courts.<sup>23</sup> However, the Supreme Court has also affirmed the right of states to develop their standalone versions of the forum non conveniens doctrine.<sup>24</sup> In Oregon, the Oregon Supreme Court has formally adopted the federal standard for applying the doctrine of forum non

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<sup>19</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

<sup>20</sup> *Id.*

<sup>21</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507, 67 S. Ct. 839, 842, 91 L. Ed. 1055 (1947).

<sup>22</sup> Rules Civ.Proc., Rule 98(f).

<sup>23</sup> *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 504, 67 S. Ct. at 841.

<sup>24</sup> See *Broderick v. Rosner*, 294 U.S. 629, 642-43 (1935) (“A State may adopt such system of courts and form of remedy as it sees fit.”).

conveniens to determine the appropriate venue for legal action in these instances.<sup>25</sup> The Oregon Supreme Court has held that an action should be stayed or dismissed for forum non conveniens only in the interests of justice:

.... [W]e conclude that in Oregon, a trial court may dismiss or stay an action for forum non conveniens only when the moving party demonstrates that there is an adequate alternative forum available and that the relevant private- and public-interest considerations weigh so heavily in favor of litigating in that alternative forum that it would be contrary to the ends of justice to allow the action to proceed in the plaintiff's chosen forum.<sup>26</sup>

Notwithstanding this standard, it is a widely accepted principle that if a plaintiff can establish personal jurisdiction and the venue is appropriate, they can seek legal recourse in any available forum. When faced with various choices, the plaintiff is free to pick whichever option they desire if they meet the criteria of personal jurisdiction.

### **Private and Public Interest Factors**

For jurisdictions like Oregon that rely on the federal approach, the Supreme Court has established a balancing test that considers various “private interest” and “public interest” factors to determine whether a case should be dismissed based on the doctrine.<sup>27</sup> Although this test originated in a federal case, *Gulf Oil*, the factors are applied in state cases.<sup>28</sup> The Supreme Court has emphasized that no single factor in the balancing test is dispositive, and a plaintiff's choice of forum should not be disturbed unless the balance of factors strongly favors the defendant.

The *Gulf Oil* test involves two stages. In the first stage, the court determines whether there is an

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<sup>25</sup> See, e.g., *Myers v. Brickwedel*, 259 Or. 457, 464–65, 486 P.2d 1286 (1971); *Reeves v. Chem Industrial Co.*, 262 Or. 95, 100, 495 P.2d 729 (1972).

<sup>26</sup> *Espinoza v. Evergreen Helicopters, Inc.*, 359 Or. 63, 102, 376 P.3d 960, 985 (2016).

<sup>27</sup> *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 67 S. Ct. 828, 91 L.Ed. 1067 (1947).

<sup>28</sup> Cf. *Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp.*, 660 F.2d 712 (8th Cir. 1981) (noting that the Missouri criteria for dismissal are the same as the federal factors).

alternative forum in which the action can be tried.<sup>29</sup> The moving party is typically required to establish, as a threshold issue, the availability of an alternative forum that can provide relief.<sup>30</sup> In the second stage of the test, the court's discretion is guided by balancing the public and private interests involved.

When balancing these interests, the court considers the relative advantages and obstacles to a fair trial. Factors relating to the parties' private interests include: "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."<sup>31</sup> Public-interest factors may include: "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law."<sup>32</sup> When a party moves to dismiss or stay an action based on forum non conveniens grounds, the court may grant the motion if the party shows that an alternative forum is available and the relevant private and public interest considerations weigh heavily in favor of dismissal or stay, such that allowing the litigation to proceed would be unjust.<sup>33</sup> In *Espinoza v. Evergreen Helicopters*, the Oregon Supreme Court referenced the long-standing presence of forum non conveniens in common law.<sup>34</sup> It noted that no legislative changes or repeals had been made to the doctrine, making it a part of Oregon law.<sup>35</sup> Despite this, the Oregon Supreme Court added a crucial caveat. It noted that an action should only be halted or dismissed if it is in the

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<sup>29</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 504, 67 S. Ct. at 841.

<sup>30</sup> *Id.*

<sup>31</sup> *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, n. 6, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) (internal quotation marks omitted).

<sup>32</sup> *Id.* (internal quotation marks omitted).

<sup>33</sup> *Espinoza*, 359 Or. 63 at 376, P.3d at 985.

<sup>34</sup> *Id.*, 359 Or. 63 at 376, P.3d at 981.

<sup>35</sup> *Id.*

interests of justice. Likewise, the Ninth Circuit Court of Appeals recognized that the doctrine should be used sparingly and with restraint.

Courts take a markedly different approach to deciding *forum non conveniens* when a forum selection clause is present. Private interest factors are wholly disregarded, and the presiding judge only considers public interest factors. In jurisdictions that follow the federal approach, the Supreme Court has indicated the most probable result:

The presence of a valid forum selection clause requires district courts to adjust their usual § 1404(a) analysis in three ways. First, the plaintiff's choice of forum merits no weight, and the plaintiff, as the party defying the forum selection clause, has the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. Second, the court should not consider the parties' private interests aside from those embodied in the forum selection clause; it may consider only public interests. Because public-interest factors will rarely defeat a transfer motion, the practical result is that forum selection clauses should control except in unusual cases.<sup>36</sup>

Consumers are seriously disadvantaged in this discretionary process, as judges are not permitted to consider the consumer's financial constraints, access to legal resources, or ability to litigate at a faraway location. For instance, in consumer cases such as the hypothetical scenario of the puppy purchaser, where a forum selection clause exists, only public interest factors are considered, and private interest factors are not considered under the federal standard. The presiding judge cannot factor in the puppy purchaser's hardship in traveling to New York to resolve their case effectively. Thus, under the federal standard, Oregon consumers are deprived of having their case heard in their home state for lack of this consideration. In this respect, the discretionary process undermines laws that aim to protect consumers, such as the OR UTPA.

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<sup>36</sup> *Atl. Marine Const. Co.*, 571 U.S. 49, at 134, S.Ct. 568 at 187.

### **Issues with Forum Selection Clauses**

Every state has a distinct method of enforcing forum selection clauses piggybacked onto forum non conveniens. Oregon follows the federal standard, emphasizing the right to contract above all other considerations. Despite the Oregon Supreme Court considering forum non conveniens an “extraordinary equitable remedy” and admitting deference is owed to every plaintiff’s forum choice, the Oregon Supreme Court has held that a trial court may dismiss or stay an action based on the doctrine. This is a determination that the trial court has the power to make on a case-by-case basis.<sup>37</sup>

States like Louisiana and Colorado have taken a diametrically different approach. These states have codified provisions into their consumer protection statutes and state rules of civil procedure that specifically address the issue of forum non conveniens. These actions reflect an understanding that the application of forum non conveniens is often inconsistent and, at worst, used too frequently and for illegitimate and even discriminatory reasons.<sup>38</sup> In practical terms, forum non conveniens is often used to engage in “reverse forum shopping.” Defendants have become aware of the strategy of seeking dismissal on the grounds of forum non conveniens, not for the forum’s benefit, but to compel the plaintiff to file the lawsuit again in a more advantageous location regarding substantive and procedural benefits. Thus, forum non conveniens can pose multiple challenges and opportunities for misuse, particularly when triggered by forum selection clauses.

### **Deception Through Technology**

Forum selection clauses triggering forum non conveniens present a vulnerability that can be exploited on the world wide web. By inserting a forum selection clause into a clickwrap agreement, wily actors can compel a state resident to litigate in a distant location, causing significant inconvenience and frustration for consumers who wish to make purchases

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<sup>37</sup> *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011).

<sup>38</sup> See, e.g., Pamela Bookman, *Litigation Isolationism*, 67 *Stan. L. Rev.* 1081, 1095 (2015).

confidently online. A clickwrap agreement is a scrolling statement that appears on a webpage and requires that a user consent to any terms or conditions by clicking on a dialog box on the screen to proceed with the internet transaction.<sup>39</sup> Many online entities utilize clickwrap agreements to display their website's terms and conditions. Though not all entities that use these contracts have bad intentions, it is evident how they can be exploited to mislead customers. Including just one clause in a long scrolling text can lead to a consumer giving up important rights, as with the puppy buyer scenario. In today's digital economy, consumer contracts are overwhelmingly presented exclusively online or through mobile applications using small print, technical language, and hard-to-read fonts. Consequently, consumers will likely accept the standard terms and conditions without fully comprehending them. According to a recent survey on Oregon residents' reading and comprehension habits, two-thirds of participants admitted to only sometimes or never reading and understanding online agreements or terms and conditions when they sign up for accounts, pay for services, or make purchases.<sup>40</sup> If this loophole is not addressed, wily actors could exploit it to bypass consumer protection laws.

### **Contravention of the OR UTPA**

Certain companies may insert forum selection clauses in their consumer contracts for valid reasons. Nevertheless, such clauses contradict the essence and legislative intent of the OR UTPA's private cause of action. By specifying a particular location for consumers to bring their grievances, companies can avoid legal proceedings in all areas where their products or services are offered, which saves them money. Companies contend that this approach ultimately benefits consumers by reducing costs. If the companies were required to engage in legal proceedings in every location where they operate, it would increase their operating expenses. However, consumer protection laws like the OR UTPA were envisioned to empower consumers to act as

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<sup>39</sup> Feldman v. Google, Inc., 513 F.Supp.2d 229 (E.D.Pa.2007).

<sup>40</sup> O. C. J. (2023, August 1). *Online Agreements and Terms and Conditions Survey*. LinkedIn. Retrieved August 11, 2023, from [https://www.linkedin.com/posts/oregon-consumer-justice\\_onlineagreements-termsandconditions-consumerbehavior-activity-7090805797986697216-78pD](https://www.linkedin.com/posts/oregon-consumer-justice_onlineagreements-termsandconditions-consumerbehavior-activity-7090805797986697216-78pD)

private attorneys general to vindicate their rights when no other option is available.<sup>41</sup> This means that consumers should be entitled to the same privileges as the state attorney general in pursuing justice. For example, when a corporate interest has harmed a consumer, the state attorney general, acting in an official capacity, can bring a legal action in court without being limited by forum selection clauses. Similarly, private citizens who act on their own behalf when government channels cannot assist them should have the right to initiate legal proceedings without being restricted. Courts that limit the ability of consumers to file lawsuits in their home state due to forum selection clauses strip away the rights that the Legislature intended to give them under the OR UTPA.

Furthermore, holding consumers accountable for a forum selection clause that heavily favors one party's outcome is not in the interests of justice. Even if both parties technically agree to a clause limiting personal jurisdiction and venue modifications, upholding a one-sided, outcome-determinative clause goes against public policy. In such situations, the power dynamic is skewed towards those who can afford to hire skilled lawyers to draft contracts. It is no secret that the typical consumer lacks the extensive legal resources available to large, publicly traded companies or even moderate and mid-sized companies. Common law forum non conveniens was never intended to be applied in this context. In these situations, forum non conveniens is a sharp blade best kept sheathed. Instead, the doctrine was designed to prevent plaintiffs from abusing broad jurisdiction and venue laws to harass defendants.<sup>42</sup> In rare instances where both parties are non-residents, dismissing a case using forum non conveniens, may be appropriate. For example, Florida has appropriately used the doctrine to prevent international litigants from using the state as a global court.<sup>43</sup>

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<sup>41</sup> Pridgen, *supra* note 2, § 2:9; Ralph J. Mooney, *The Attorney General As Counsel for the Consumer: The Oregon Experience*, 54 Or. L. Rev. 117, 127-28 (1975).

<sup>42</sup> *Carijano*, 643 F.3d at 1224.

<sup>43</sup> *Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996).



### **Misapplication of Judicial Discretion**

Forum selection clauses raise questions about whether a court may abuse its discretion by applying forum non conveniens too liberally to transfer or dismiss state resident cases. Judicial discretion refers to judges' ability to administer justice by making prudent decisions that require choosing among several legally correct outcomes.<sup>44</sup> Conversely, the abuse of discretion occurs when a decision is made despite the proper application of the law and sufficient evidence to support factual findings.<sup>45</sup> In such cases, a trial court would be deemed to have abused its discretion if its ruling is unsupported by reason and evidence. If the use of forum non conveniens goes against the public policy and legislative intent behind the OR UTPA, it would still be considered abuse, even if the court strictly adheres to the law. In this way, the courts' knee-jerk reaction to enforce forum non conveniens in forum selection clause cases following the lead set by the Supreme Court has compromised the spirit and intended purpose of laws like the OR UTPA. To prevent the foreclosure of the OR UTPA's private cause of action, Oregon courts will need to recalibrate their approach to forum non conveniens.

### **Prototypical Cases in Oregon**

In a recent Oregon case, *Beard v. PayPal, Inc.*, the plaintiff, a state resident, brought an action against a well-known publicly traded digital services provider, PayPal, Inc. The plaintiff alleged conversion, similar to the puppy purchaser's allegations. Analogous to the puppy purchaser, in *Beard*, a state resident lost money at the hands of a corporation doing business in Oregon through the world wide web. Upon signing up for the defendant's online service, the plaintiff in *Beard* was obligated to accept and abide by the terms of use. In that case, the terms of use were displayed as a clickwrap agreement. After allegedly converting the plaintiff's funds, the defendant used a forum selection clause to trigger forum non conveniens and get the case

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<sup>44</sup> State v. Romero, 236 Or.App. 640, 643-44, 237 P.3d 894 (2010).

<sup>45</sup> Carijano, 643 F.3d at 1224 ("In forum non conveniens, a 'district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors.'" (Quoting Ravelo Monegro v. Rosa, 211 F.3d 509, 511 (9th Cir.2000), cert. den., 531 U.S. 1112, 121 S.Ct. 857, 148 L.Ed.2d 771 (2001).)).

ousted from an Oregon trial court. The Oregon resident sought compensation for damages amounting to more than \$300,000—beyond the maximum amount allowed by the consumer statute—similar to the predicament experienced by the puppy purchaser.

The Oregon District Court applied federal law to decide the forum selection clause's enforceability.<sup>46</sup> The court relied on the rule from *M/S Bremen* that the forum selection clause was presumptively valid, and the plaintiff bore the heavy burden to show that the clause was unenforceable.<sup>47</sup> According to the court, the Oregon resident failed to demonstrate that the forum selection clause was unjust or unreasonable or that he was not given enough notice. Ultimately, the defendant was able to get away with crafting a one-sided forum selection clause that left the defendant free to sue an Oregon resident anywhere the defendant desired but required an Oregon resident to bring claims only in the courts of Santa Clara County, California, or Omaha, Nebraska. The Oregon District Court acknowledged the contract's apparent bias towards the defendant. Despite this, it ruled that the plaintiff could not meet their heavy burden of establishing that the forum selection clause was the product of the defendant's overreaching, nor could the plaintiff demonstrate fraud, duress, or overweening bargaining power.<sup>48</sup> This pre-trial legal maneuvering is fundamentally unfair to state residents and emblematic of the problem with forum selection clauses. Although an Oregon resident pleaded significant losses in court, the judge exercised his discretionary authority to transfer the case to California anyway. In a legal system where courts must accept the plaintiff's claims as valid on their face, ignoring the significant financial losses suffered by a state resident seems unjust. Requiring a victim of fraud to incur additional expenses and pursue legal action in a distant place goes against

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<sup>46</sup> Beard v. PayPal, Inc., No. CIV.A. 09-1339-JO, 2010 WL 654390, at \*2 (D. Or. Feb. 19, 2010).

<sup>47</sup> *Id.* (“Forum selection clause should be enforced unless the non-moving party “could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” (Quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972).)).

<sup>48</sup> Beard v. PayPal, Inc., at \*2.

fairness and justice. Moreover, it can chill future Oregon residents from coming forward with their consumer claims.

In *Chudner v. TransUnion Interactive, Inc.*, an Oregon consumer plaintiff brought a class action lawsuit under the OR UTPA for breach of contract, breach of duty of good faith and fair dealing, and for equitable relief arising from unjust enrichment.<sup>49</sup> The defendant moved to dismiss or transfer based on improper venue.<sup>50</sup> In that case, the Oregon District Court held that a forum selection clause in the contract, specifying a Delaware forum, was enforceable and transferred the case to the District of Delaware.<sup>51</sup>

Similarly, in *Wolfe v. The RV Factory LLC*, the consumer plaintiff alleged that the defendant induced him to purchase a 2016 Weekend Warrior trailer through false and misleading representations of material facts.<sup>52</sup> In that case, the defendant moved the court to transfer the case to Indiana based on a forum selection clause in the terms of the Buyer's Agreement and the Limited Warranty that the plaintiff allegedly signed.<sup>53</sup> The motion to transfer venue was granted by the court, which prevented the consumer plaintiff from vindicating his rights in his home state.<sup>54</sup> The court used the balancing test of public and private interest factors to determine if the forum selection clause should be enforced against the Oregon consumer. Not surprisingly, the consumer was once again on the losing end:

To summarize, the Court finds that the administrative difficulties flowing from court congestion and the local interest in resolving the controversy at home weigh in favor of maintaining the action in Oregon, and the other public-interest factors are neutral.

Because only two public-interest factors weigh against granting the motion to transfer venue, and one of those does so only slightly, Wolfe has not met his "burden of showing

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<sup>49</sup> *Chudner v. TransUnion Interactive, Inc.*, 626 F. Supp. 2d 1084 (D. Or. 2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Wolfe v. The RV Factory LLC*, No. 3:15-CV-02424-SI, 2016 WL 1117425, at \*1 (D. Or. Mar. 22, 2016).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

that public-interest factors overwhelmingly disfavor a transfer.” *Atl. Marine*, 134 S. Ct. at 583 (emphasis added).<sup>55</sup>

### **Available Options for Oregon Consumers**

Oregon consumers have limited options to defend against a forum non conveniens motion used to enforce a forum selection clause. The first pathway for consumers is through the newly codified § 81.150, which regulates the revocation of choice of forum provisions in consumer contracts. Despite its good intentions, this statute lacks the necessary strength and falls short of genuinely safeguarding Oregon consumers. The recently codified Oregon statute defines a consumer as someone who purchases goods or services for personal, family, or household purposes.<sup>56</sup> It also establishes a consumer contract as a contract entered into by a consumer to purchase goods or services for personal, family, or household purposes, in which the total purchase cost is \$15,000 or less.<sup>57</sup> The statute, as written, would not be helpful for the state resident who bought the litter of puppies since their purchase goes beyond the set limit in the definition of a consumer. Setting the consumer limit at \$15,000 appears to be arbitrary and inadequate. In addition, this extremely limited statute states that a consumer may revoke a provision in a consumer contract that requires the consumer to assert a claim against the other party to the agreement or respond to a claim by the other party to the contract in an outside forum. However, the consumer must notify the other party within a “reasonable time.” The phrase “reasonable time” is tenuous and subject to interpretation. Due to this requirement, consumers unfamiliar with their legal rights may encounter obstacles in obtaining justice. In addition, the statute does not protect individuals within the state who conduct financial transactions using digital methods such as money transfer services and popular cryptocurrencies for personal use. In these instances, the amount a consumer transfers may well exceed \$15,000. As a result, these services remain vulnerable under the current framework.

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<sup>55</sup> *Wolfe v. The RV Factory LLC*, at \*4.

<sup>56</sup> Or. Rev. Stat. Ann. § 81.150 (West).

<sup>57</sup> *Id.*

Another possibility is to invoke Article I, § 10 of the Oregon Constitution, which provides: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.” According to this provision, every resident of Oregon has the right to present their case in an Oregon court. However, courts in Oregon have not been inclined to accept this constitutional provision as a proper defense against forum non conveniens. They consider it an untested constitutional argument that is unlikely to succeed. In *Espinoza*, the Oregon Supreme Court noted that Article I, § 10 of the Oregon State Constitution does not prohibit dismissing a case based upon forum non conveniens.<sup>58</sup> So this clause, alone, renders little aid to private state residents who seek to keep their cases in Oregon.

The next option pertains to retail installment contracts, which are subject to waiver clauses regulated by Or. Rev. Stat. Ann. § 83.160. This statute ensures that Oregon residents can access a fair resolution process for grievances relating to retail installment contracts. The law prohibits any retail buyer from waiving the provisions of ORS 83.010 to 83.190 or any other legal remedies when signing a retail installment contract or purchase agreement.<sup>59</sup> Whether this law can be applied to consumers protected by the OR UTPA who encounter forum selection clauses is unclear. The Oregon Legislature enacted this statute to protect consumers with existing retail installment contracts from being coerced by large corporations and to address the knowledge imbalance between contracting parties.<sup>60</sup> In the puppy purchaser example, the consumer paid one lump sum. Therefore, although the law offers some protection, it is limited and does not cover all consumer contracts and one-time purchases.

A final recourse is Oregon § 14.110, which deals with the transfer of cases to different venues. While this law does not explicitly mention forum non conveniens or forum selection

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<sup>58</sup> *Espinoza v. Evergreen Helicopters, Inc.*, 266 Or. App. 24, 37, 337 P.3d 169, 178 (2014), aff'd, 359 Or. 63, 376 P.3d 960 (2016).

<sup>59</sup> Or. Rev. Stat. Ann. § 83.160 (West).

<sup>60</sup> Cf. 19 Mont.L.R. 165, at 166-67. *Rose v. Etling*, 255 Or. 395, 399, 467 P.2d 633, 635 (1970).

clauses, it permits legal proceedings to be moved to a more convenient location for the witnesses and parties involved. However, this provision is not typically helpful for consumers facing motions to dismiss based on forum non conveniens and forum selection clauses. Consequently, courts have inferred that the Oregon Legislature has granted them considerable discretion in determining forum selection matters.<sup>61</sup>

### **Odds Against Oregon Consumers**

If history is any guide, Oregon residents have a low chance of success in challenging a forum selection clause, no matter which option they choose to defend themselves. The courts in Oregon have not been reliable in safeguarding the interests of residents who wish to challenge pre-trial contractual agreements. In *State ex rel. Kahn v. Tazwell*, the Oregon Supreme Court ruled that contractual clauses that impose exclusive forums in adhesion contracts, agreements that result from unequal bargaining power between parties, were void as against public policy.<sup>62</sup> However, the Oregon Supreme Court later replaced this per se rule with the modern rule that forum selection clauses are generally valid and enforceable.<sup>63</sup> In *Reeves v. Chem Indus. Co.*, the Oregon Supreme Court held that a forum selection clause was enforceable in Oregon as part of the courts' already recognized inherent power to decline jurisdiction in appropriate cases through the doctrine of forum non conveniens.<sup>64</sup> In that case, the Oregon Supreme Court determined that the Oregon plaintiff could not demonstrate that traveling to a far-off place for litigation was an unreasonable provision.<sup>65</sup> It held that in the absence of evidence that the forum selection clause of the contract between an Oregon plaintiff and a defendant agreeing upon the courts of a distant location as a place for litigation over the agreement is unfair or that enforcement would be unreasonable, the clause was valid and would be enforced.<sup>66</sup> Justice

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<sup>61</sup> Or. Rev. Stat. Ann. § 14.110 (West).

<sup>62</sup> *State ex rel. Kahn v. Tazwell*, 125 Or. 528, 543, 266 P. 238, 243 (1928).

<sup>63</sup> *Reeves v. Chem Indus. Co.*, 262 Or. 95, 101, 495 P.2d 729 (1972).

<sup>64</sup> *Reeves v. Chem Indus. Co.*, 262 Or. 95, 100, 495 P.2d 729, 732 (1972).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Tongue emphasized the unfairness of the decision in his dissent. He wrote that a forum selection clause requiring a private citizen of Oregon to travel over two thousand miles to Ohio to litigate a claim against a corporation was undoubtedly unjust and unreasonable.<sup>67</sup> The *Reeves* case and the puppy purchaser example are similar in that they both involve an Oregon resident compelled to litigate in a distant location because of a forum selection clause. Despite the apparent unconscionable nature of the forum selection clause, the courts did not perceive it that way.

### **Paradigm and Cautionary Tale**

#### **The Colorado Standard**

In Colorado, applying the forum non conveniens doctrine has been subject to strict limitations due to Colo. Const. art. II, § 6, which stipulates that all courts must be open to everyone. This constitutional provision limits the discretionary power of judges to exclude resident plaintiffs from the Colorado court system if jurisdiction has been appropriately established. It is not dissimilar to Oregon's constitutional provision, which mandates that courts should be accessible to all residents. However, courts in Colorado interpret this provision differently than Oregon courts. In Colorado, a resident's choice of forum is typically respected unless there are exceptional circumstances.<sup>68</sup> Colorado courts have taken the position that the forum non conveniens doctrine has a limited application within the state. Specifically, when the plaintiff is a Colorado resident at the time of filing, and no unusual circumstances exist that would deprive them of access to their own state's court system, the factors of inconvenience and expense of the defendant considered by the trial court are insufficient to oust a resident plaintiff from their chosen forum. Even in cases where another state's law is applicable, Colorado courts have held that they will not dismiss the case of a resident plaintiff. These restrictions ensure that Colorado courts preserve a resident plaintiff's right to file a lawsuit in their chosen forum. Colorado's application of the forum non conveniens doctrine properly aligns with the state's

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<sup>67</sup> *Id.* 262 Or. at 103, 495 P.2d at 733.

<sup>68</sup> *Crane ex rel. Cook v. Mekelburg*, 691 P.2d 756 (Colo.App.1984).

constitutional framework and public policy statements protecting the interests of residents seeking justice. This approach rightly prioritizes the consumer and looks toward the future.

### **The Louisiana Standard**

The Louisiana Legislature has stated that forum selection clauses go against the state's public policy. A provision of the Louisiana Unfair Trade Practices Act UTPA (LA UTPA) declares that “no provision of any contract which purports to waive the provisions of venue, or to waive or select venue or jurisdiction in advance of the filing of any civil action, may be enforced against any plaintiff in an action brought in these courts.”<sup>69</sup> Allowing for a contractual venue selection or jurisdiction would directly conflict with the Louisiana Code of Civil Procedure (LA CCP) provisions and is against the state's public policy. In *Thompson Tree*, the Third Circuit concluded that forum selection clauses are generally unenforceable in Louisiana based on the rationale that the Legislature, by La. C.C.P. art. 44(A), has declared a firm public policy against forum selection clauses.<sup>70</sup> The pertinent clause states that parties cannot waive their right to challenge the forum at the pre-trial stage. It reads in part, “An objection to the venue may not be waived before the institution of the action.” The Third Circuit pointed to La. R.S. 9:2779, where the Louisiana Legislature states that forum selection clauses are inequitable and against the state's public policy. In addition, La. R.S. 23:921 is another example of the Louisiana Legislature voicing a general prohibition against choice of forum clauses.

The Third Circuit reasoned that none of the federal cases upholding forum selection clauses examined Louisiana's primary source of law and instead relied on pronouncements from the United States Supreme Court.<sup>71</sup> The Third Circuit's ruling is in keeping with the Supreme Court's position on forum non conveniens generally. The Supreme Court has established that, under federal law, forum selection clauses are prima facie valid and should be enforced unless

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<sup>69</sup> La. R.S. 51:1407.

<sup>70</sup> *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

<sup>71</sup> *Id.*



“enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.”<sup>72</sup> The Supreme Court has recognized that some states may have strong public policies against forum selection clauses. Therefore, before enforcing a forum selection clause, a federal court must first consider the state law where the lawsuit is filed to determine if that state has a firm public policy against forum selection clauses. Louisiana’s strong public policy against forum selection clauses means that enforcing the forum selection clause would be inappropriate.

In *Shelter Mut. Ins. Co v. Rimkus Consulting Group, Inc.* Of Louisiana, the Louisiana Supreme Court made an abrupt about-face. The case involved a terms and conditions document with a forum selection clause that required any suits arising from the contract to be filed in Texas. The Louisiana Supreme Court overruled its previous state precedent of banning pre-trial waiver of forum selection, which it had followed under *Thompson Tree*. This unfortunate departure from the *Thompson Tree* precedent is significant. The Louisiana Supreme Court held that forum selection clauses are generally enforceable and are not, per se, violative of public policy in Louisiana. The Louisiana Supreme Court determined that the lower courts made a mistake by relying on a flawed interpretation of Article 44(A). Instead, like its Oregon counterpart, the Louisiana Supreme Court adopted the federal standard of prioritizing freedom of contract over consumer rights, going against the Legislature's actions.

### **Recommendations**

A multi-pronged approach is necessary to prevent the misuse of forum selection clauses to evade consumer protection laws and hinder state residents from seeking justice in state court. Firstly, Oregon should adopt the Colorado and Louisiana legislative models for forum non conveniens, which prohibit any waiver of forum before a cause of action is initiated. However, Oregon should take it a step further. As the cautionary example of Louisiana demonstrates, the

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<sup>72</sup> *Id.*

policy statement should be worded broadly to ensure that courts do not misinterpret the statute or blunt its edges over time. This move will strengthen the OR UTPA by ensuring that cases are not transferred or dismissed before being heard on the merits. Lawmakers should also explore developing a method for analyzing the broader context of a disputed contract to determine whether the consumer had any meaningful choice in accepting the terms. This process could entail examining factors such as the relative bargaining power of the parties and the extent to which the consumer had access to legal advice or other resources to help them understand the agreement's implications. Another possible approach is to consider the specific language of the contractual provision itself. For example, the Legislature may mandate evaluating whether a contractual provision purporting to waive important rights is written in plain language or if it includes complicated legal jargon that might result in confusion or misinterpretation.

### **Impose Limits on Judicial Discretion**

Codifying a consumer-oriented approach into law would limit the discretionary authority of judges, preventing the unfair enforcement of one-sided forum selection clauses. This move would lead to more equitable and consistent adjudication of cases as opposed to the current framework, which places undue reliance on judicial discretion. Given that a court's decision to grant or deny a motion to dismiss or transfer on the grounds of forum non conveniens can only be overturned in cases of clear abuse of discretion, it is difficult for consumers to obtain justice once the presiding judge has made a flawed decision.<sup>73</sup> A consumer-oriented approach ensures that the law is applied uniformly and not subject to interpretation or the whims of individual judges. This way, justice would be more fairly and consistently administered across the board, regardless of the parties' financial status or legal expertise. Additionally, the centuries-old forum non conveniens doctrine would retain fidelity to its common law origins while eliminating the negative trend of seeking out shrewd lawyers to manipulate the doctrine through forum

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<sup>73</sup> Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981).

selection clauses. Finally, judges would benefit from this solution as they could avoid a no-win situation. They would no longer have to choose between enforcing the right to contract and safeguarding the rights of consumers.

### **Develop Guidelines for Digital Contracts**

Oregon should require contracts to clearly and prominently state any provisions that purport to waive important rights, and consumers should have a reasonable opportunity to negotiate these terms. This move would ensure that consumers fully understand the clauses they agree to and have a fair chance to negotiate favorable terms. Additionally, Oregon should impose stricter regulations for website and digital platform terms and conditions, given the increasing use of digital media in consumer transactions. The length of legal contracts has been known to pose accessibility problems, particularly on mobile devices. The issue worsens when digital agreements are written with excessive legal jargon. Furthermore, contracts that contain "gotcha" clauses may be used by wily actors to bypass the law. Even when there is no ill intent, such tactics are still unfair to consumers. Informed consent is necessary for it to truly be considered consent. Therefore, it is essential to establish more stringent guidelines for digital legal notices. These guidelines should outline requirements for the smallest acceptable font size and the largest permissible word count for contracts on mobile devices. They should also require clear explanations of information using plain language. When it comes to the law, the language used can be specialized and recondite. Just as election voting materials are made available in multiple languages to support a fair and democratic system, it is important to provide clear and straightforward translations of legal contracts. Making digital legal notices more accessible will help level the playing field and promote ethical business practices.

### **Enforce Consequences for Misconduct**

It is in the public interest to hold wily actors accountable for any attempt to mislead or manipulate consumers into waiving important rights. Presently, wily actors have free rein to use pre-trial procedural maneuvers such as forum selection clauses and the centuries-old forum non

conveniens doctrine to steer litigation in a direction that serves their interests while contravening efforts at safeguarding consumers. To crack down on this one-sided game of legal chess, Oregon should impose civil penalties on those who willfully engage in such maneuvers. By the same token, Oregon should pass legislation prohibiting the use of boilerplate language that denies consumers their rights in a wholesale manner. In this way, by taking away the arrows, there is nothing left in the quiver. While wily actors will always try to find new ways to target consumers, implementing these measures will serve as a powerful deterrent to those seeking to take advantage of gaps in the law for personal gain.

### **Conclusion**

Closing the forum non conveniens and forum selection clause loopholes in Oregon is an essential step toward ensuring adequate consumer protection and ending the use of carefully planned legal maneuvers against consumers in the state. Although the motives behind each situation may vary, the outcome remains consistent: residents of Oregon are deprived of their right to have their cases heard in the state's court system. Oregon should codify a statute demonstrating a robust public policy against enforcing forum selection clauses weaponizing forum non conveniens against consumers. These legal loopholes have led some judges to abuse their discretion "in the interests of justice" and deny state residents access to the courts. Although technically legal, these maneuvers contravene public policy and undermine the foundation of our justice system. It is also unacceptable that boilerplate language and lengthy legal jargon are used with impunity in clickwrap agreements in the digital realm, where Oregonians conduct daily transactions. Passing the proposed legislation in Oregon will send a loud and clear message of the state's ability to adapt to novel and asymmetrical lines of attack against the consumer. This action will ensure that Oregon remains updated with the constantly evolving digital landscape. Moreover, this legislation can serve as a beneficial example for other states, promoting a just and fair marketplace for all consumers throughout the United States.