

Confusion and Dissension Surrounding the Venue Transfer Statutes¹

I. INTRODUCTION

Within the past decade, the number of federal cases involving a transfer of venue has steadily increased.² As the various scenarios under which a transfer may be requested have come to light, district courts have discovered a dearth of authority in certain crucial areas. In an effort to compensate, the courts have embarked on a collision course of convoluted reasoning only to discover that, in venue transfer matters, compliance with certain legal concepts entails clashing with others. Two recent Supreme Court cases illustrate the conflicts between venue laws and other firmly established legal doctrines. In *Stewart Organization, Inc. v. Ricoh Corp.*³ the motion for transfer of venue appeared in the context of a contractual forum selection clause. The Court questioned whether the case should be decided under substantive contract law or federal procedural venue law. The Court in *Ferens v. John Deere Co.*,⁴ on the other hand, found difficulty in dealing with post-transfer choice of law issues. In each of these situations, and in many others, the courts have tried to inject some measure of flexibility into the venue transfer statutes; they have encountered an uninformative legislative history, and they have struggled, unsuccessfully, to reconcile well-established legal doctrines with conflicting venue transfer practices.

This Note suggests that there are inherent defects in the venue transfer system, causing courts an inordinate amount of difficulty in their efforts to work within the current framework. Part II examines the legislative history of the relevant statutes. Part III looks at the venue transfer statutes in operation in diversity cases, focusing on unsatisfactorily-resolved pre-transfer and post-transfer issues. This part includes analyses of both *Stewart* and *Ferens*. Part IV will evaluate solutions offered by commentators in the past and will propose changes in the venue statutes designed to eliminate the difficulties experienced by the courts in transfer of venue cases.

¹ 28 U.S.C. §§ 1404(a) 1406(A) (1988).

² Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984).

³ 487 U.S. 22 (1988).

⁴ 494 U.S. 516 (1990).

II. LEGISLATIVE HISTORY OF THE VENUE TRANSFER STATUTES⁵

The venue transfer statutes were adopted as part of the Judicial Code of 1948.⁶ Prior to their existence, a district court would dismiss an action brought in an inconvenient forum, under the doctrine of *forum non conveniens*, whether or not that forum was technically proper.⁷ A “proper” forum was defined in the general venue statute, section 1391:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose. . . .⁸

Section 1404(a) enabled the court to transfer the case to a more convenient forum if the forum chosen initially was proper. The text of this section reads as follows: “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.”⁹

Section 1406(a), as originally enacted in 1948, provided only for transfer in a diversity case filed in an improper venue.¹⁰ In 1949, the statute was amended to read: “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.”¹¹ Thus, if venue was not in compliance with section 1391, courts would have the choice whether to dismiss the action or to transfer the case, if to do so would be “in the interest of justice.”¹²

Unfortunately, legislative guidance in such sticky matters as choice of law after transfer and citizens’ ability to “contract out” venue rights is completely, perhaps conspicuously, missing from the historical background of the venue

⁵ See *Special Pamphlet on PL-773*, June 25, 1948, c.646, 62 Stat. 937, U.S. CODE & CONG. SERV., 80th Cong., 2d Sess. 695 (1948).

⁶ 15 CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3841 (2d ed. 1986) [hereinafter FEDERAL PRACTICE].

⁷ *Id.*

⁸ 28 U.S.C. § 1391 (1988). The Judicial Improvements Act of 1990 prescribed changes in § 1391. See *infra* notes 111-14 and accompanying text.

⁹ 28 U.S.C. § 1404(a) (1988); see *infra* notes 81-82 and accompanying text.

¹⁰ FEDERAL PRACTICE, *supra* note 6, § 3827, at 261.

¹¹ 28 U.S.C. § 1406(a) (1988) (emphasis added).

¹² FEDERAL PRACTICE, *supra* note 6, § 3841, at 320.

transfer statutes.¹³ In the absence of direction, many courts, in analyzing section 1404, have focused on the statute's relation to forum non conveniens.¹⁴ The Reviser's Note commenting on this states, in part: "Subsection (a) was drafted *in accordance with* the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper."¹⁵ Some courts reasoned that, if the section were construed to be "in accordance" with the doctrine of forum non conveniens, then the federal courts would have the power to deprive plaintiffs of the whole law of their initial chosen forum when transferring venue.¹⁶ Others asserted that section 1404 was merely a codification of the doctrine.¹⁷ In *Norwood v. Kirkpatrick*,¹⁸ however, the Supreme Court held that section 1404(a) was not intended to be a codification of forum non conveniens, but was intended to be a revision thereof, designed only to promote convenience.¹⁹ This gives no insight as to how to solve the problems that courts face today when dealing with the venue transfer statutes.

Without guidance from the legislative history of the venue transfer statutes on issues such as choice of law and forum selection clauses, we can only infer that the drafting legislators did not even consider these issues. Thus, modern judges must draw bits and pieces from relevant cases, molding the statute to the circumstances of the case at hand. Lack of coherence and rampant confusion are the inevitable result.²⁰

¹³ Note, *Choice of Law After Transfer of Venue*, 75 YALE L.J. 90, 94 (1965).

¹⁴ See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir. 1983); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956); see also FEDERAL PRACTICE, *supra* note 6, § 3841, at 319, § 3846, at 367.

¹⁵ 28 U.S.C. § 1404, Reviser's Note (1958) (emphasis added); see also FEDERAL PRACTICE, *supra* note 6, § 3841, at 319, § 3846, at 367.

¹⁶ Note, *supra* note 13, at 94 (citing Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 457 (1955)).

¹⁷ *Id.* at 94 (citing *Brown v. Insurograph, Inc.*, 85 F. Supp. 328 (D. Del. 1949), *Cinema Amusements v. Loews, Inc.*, 85 F. Supp. 310 (D. Del. 1949), and *Kansas City Shippers Ass'n v. Pennsylvania R.R.*, 182 F. Supp. 42 (W.D. Mo. 1960)).

¹⁸ 349 U.S. 29 (1955).

¹⁹ *Id.* at 31-32.

²⁰ See Richard D. Freer, *Erie's Mid-Life Crisis*, 63 TUL. L. REV. 1087 (1989); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988).

III. VENUE TRANSFER STATUTES IN OPERATION

Although the venue transfer statutes apply to federal question cases,²¹ most of the recent problems have arisen in diversity of citizenship cases,²² where choice of law is an issue.²³

In an ordinary diversity case, a federal district court must apply the law²⁴ of the state in which it sits.²⁵ Frequently, parties will choose a particular forum, or else contract in advance to have disputes settled in a forum, that will apply favorable law to their situation. Although the venue transfer statutes dictate where, and if, a case may be moved, the statutes themselves do not address which state's law will apply after transfer. Nor do the statutes offer any guidance as to whether or not parties' contractual selection of forum supersedes the venue statutes. These issues have been left to the courts to decide. Partly because of the lack of historical guidance, and partly because of inherent defects in the venue transfer statutes, cases decided under the current framework are often confused, labored attempts to resolve impossible conflicts with issues arising both pre- and post-transfer.

A. Pre-Transfer Issues

Institution of a lawsuit begins with the plaintiff's choice of forum; plaintiffs have a right to choose, within certain bounds, where a case will be tried.²⁶ Most courts would hold that plaintiff's good faith choice should be upheld.²⁷

²¹ A federal question is a "civil [action] arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

²² Diversity of citizenship arises when the "matter in controversy exceeds the sum or value of \$50,000 . . . [and] is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States." 28 U.S.C. § 1332 (1988).

²³ See generally, Marcus, *supra* note 2.

²⁴ Although a district court must apply the "substantive" law of the forum state, it may apply federal procedural law. *Hanna v. Plumer*, 380 U.S. 460 (1965). Although there has been ongoing discussion regarding what constitutes substantive law for purposes of conflict of laws problems, see, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1989), a basic definition is "[t]hat which creates duties, rights and obligations" as opposed to procedural law which "prescribes methods of enforcement of rights or obtaining redress." BLACK'S LAW DICTIONARY 1429 (6th ed. 1990).

²⁵ *Klaxon Co. v. Stentor Elec. Mfg.*, 313 U.S. 487 (1941); see also *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (enforcing rule of *Klaxon*).

²⁶ 28 U.S.C. § 1391 (1988); see *supra* text accompanying note 7.

²⁷ See, e.g., *Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305 (10th Cir. 1950); *H.L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1950) (cited with approval in *Van Dusen v. Barrack*, 376 U.S. 612, 630-33 (1964)). *But cf.* *Heller Fin., Inc. v. Riverdale*

Among the issues that complicate the choice of forum concept is whether forum selection clauses in contracts are binding on both parties in light of the venue limitations imposed by section 1391 and the venue transfer statutes. A look at the *Stewart* case, mentioned above, is most instructive in analyzing this issue.

1. Stewart Organization, Inc. v. Ricoh Corp.²⁸

In this case, Stewart, an Alabama corporation, entered into a contract to sell the copier products of Ricoh Corporation, a nationwide manufacturer with its principal place of business in New Jersey.²⁹ The contract contained a forum selection clause providing that any dispute arising out of the contract be litigated in New York City.³⁰ Stewart filed a diversity suit for breach of contract in the federal court in Alabama.³¹ Relying on the forum-selection clause instead of traditional notions of convenience, Ricoh moved to transfer the case under section 1404(a) to the federal court in New York City.³² The district court denied the motion, reasoning that the transfer motion was controlled by Alabama law, which looks unfavorably on forum selection clauses in contracts.³³ On appeal, the Eleventh Circuit decided that questions of venue in diversity actions are governed by federal law, and that panel reversed the district court and remanded with instructions to enforce the forum selection clause and to transfer the case.³⁴ The Supreme Court granted certiorari,³⁵ and then held that the forum selection clause raised a procedural venue issue, controlled by section 1404(a), rather than a substantive contract issue governed by Alabama law.³⁶ In so holding, the Court had to distinguish its decision in a prior case, *The Bremen v. Zapata*.³⁷

Auto Parts, 713 F. Supp. 1125 (N.D. Ill. 1989); *Viaggio v. Field*, 177 F. Supp. 643 (D. Md. 1959).

²⁸ 487 U.S. 22 (1988).

²⁹ *Id.* at 24.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Stewart Org., Inc. v. Ricoh Corp.*, Civ. Action No. 84-AR-2460-S (D. Ala. Jan. 29, 1985).

³⁴ 779 F.2d 643 (11th Cir. 1986).

³⁵ 484 U.S. 894 (1987).

³⁶ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). Many commentators criticize the Court's holding under principles of jurisdiction, *see, e.g.*, Mullenix, *supra* note 20, at 366, and under federalism ideals, *see, e.g.*, Freer, *supra* note 20, at 1136.

³⁷ 407 U.S. 1 (1972).

a. *The Bremen v. Zapata and the Concept of Consensual Adjudicatory Procedure*.³⁸

In *The Bremen*, the Court held that federal courts sitting in admiralty generally should enforce forum selection clauses absent a showing that to do so "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."³⁹ *The Bremen* gave birth to the doctrine of consensual adjudicatory procedure, which was contrary to 100 years of prohibition "against party autonomy in procedural matters."⁴⁰ After *The Bremen*, the Supreme Court reinforced that decision by holding, in several cases, that parties could waive certain litigation rights, such as the right to a convenient venue or the right to be heard in a judicial forum.⁴¹ The concept of waiver grew to be widely accepted. It was said to be efficient as to time and money spent on litigation, flexible, and effective as a bargaining chip in contract negotiation.⁴²

The *Stewart* Court held that, where forum selection clauses conflict with federal venue transfer statutes, section 1404(a) is controlling.⁴³ In thus limiting *The Bremen*, the Court also limited parties' rights to contract for venue, and, by analogy, limited their ability to waive litigation rights.⁴⁴

Instead of recognizing the waiver right, the Court held that the forum selection clause was only one of several factors to be considered before a transfer of venue would be ordered.⁴⁵ Other factors include: (1) the private interest of the litigant, (2) relative ease of access to sources of proof, (3) availability of compulsory process for attendance of unwilling witnesses, (4) possibility of view of the premises, if appropriate to the action, and

³⁸ *Id.*; see also Mullenix, *supra* note 20.

³⁹ *The Bremen*, 407 U.S. at 15.

⁴⁰ Mullenix, *supra* note 20, at 294.

⁴¹ See *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (arbitration agreement); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (choice-of-law provision); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (arbitration agreement); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (waiver of objection to personal jurisdiction as discovery sanction); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (arbitration agreement); see also Willis L.M. Reese, *The Supreme Court Supports Enforcement of Choice of Forum Clauses*, 7 INT'L LAW. 530, 535 (1973).

⁴² Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 488-89 (1981).

⁴³ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988).

⁴⁴ Freer, *supra* note 20, at 1115.

⁴⁵ *Stewart*, 487 U.S. at 29-30.

(5) practical considerations, that make the trial of a case easy, expeditious, and inexpensive.⁴⁶

Justice Kennedy, in his concurrence, stated that forum selection clauses should be given "controlling weight" when considering a transfer motion "in all but the most exceptional cases."⁴⁷ After the decision in *Stewart*, however, many lower courts have ignored Justice Kennedy's advice, as well as the majority's, and have given virtually no weight to the clauses.⁴⁸ Thus, parties to a contract cannot rely on a forum selection clause at all.

It is important to note that the Court did not hold that the suit had been brought in an improper forum. If it had recognized the parties' unconditional right to bind each other via the forum selection clause, the Court would have ordered the matter governed by section 1406(a), rather than section 1404(a), since that statute dictates procedure as to cases brought in an improper venue.⁴⁹ The *Stewart* decision, thus, was not based on an analysis of the differences between sections 1404 and 1406, even though earlier lower courts, in analyzing this same issue, had held that the proper basis for transfer was section 1406(a).⁵⁰ The court in *Hoffman v. Burroughs Corp.* discussed the importance of the choice between the different statutes:

The statutory selection may be more than academic. The statutory basis for transfer in a diversity of citizenship case may determine what the applicable law is, including whether the choice of law rules of the state of the transferee court or the transferor court apply. . . . [T]he choice of law rules of the transferor court's state would apply in a section 1404(a) transfer, while the choice of law rules of the transferee court's state would apply in a section 1406(a) transfer for improper venue. . . .⁵¹

Given the importance of the issue, the lack of analysis on the *Stewart* Court's part is a glaring example of how courts in general ignore the ramifications of the conflicts between venue transfer statutes and other legal doctrines.

In the absence of direct analysis of this particular question, we can only infer that the *Stewart* Court rejected the idea that forum selection clauses are

⁴⁶ *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); see also 7B MOORE'S FEDERAL PRACTICE § 87-1 (1990) (stating that the *Gulf Oil* factors continue to be valid).

⁴⁷ Freer, *supra* note 20, at 1116 (citing *Stewart*, 487 U.S. at 21 (Kennedy, J., concurring)).

⁴⁸ See, e.g., *Standard v. Ricoh*, 742 F. Supp. 534 (W.D. Ark. 1990); *Dobris v. Format*, 1989 U.S. Dist. LEXIS 13568 (1989). But cf. *Northwestern Nat'l Ins. Co. v. Dennehy*, 739 F. Supp. 1303 (E.D. Wis. 1990); *National Union Fire Ins. Co. of Pittsburgh v. Fanelli*, 1990 U.S. Dist. LEXIS 11877 (S.D.N.Y. Sept. 12, 1990).

⁴⁹ See *supra* text accompanying note 10.

⁵⁰ *D'Antuono v. CCH Computax*, 570 F. Supp. 708 (D. R.I. 1983); *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545 (N.D. Tex. 1982).

⁵¹ *Hoffman*, 571 F. Supp. at 550.

binding. The Court might have drawn an analogy between arbitration clauses, which have been held to be binding,⁵² and it might have looked at the fact that objections to venue choice can be waived.⁵³ Instead, the Court avoided analysis, ensuring confusion where forum selection clauses are involved. Contracting parties cannot know how much weight such a clause will carry as a mere "factor" in the evaluation of a transfer motion, should they try to enforce the clause. Further, the Court may have indirectly encouraged breach of contract.⁵⁴ Given the proper set of circumstances,⁵⁵ a breaching party could be well rewarded by forum shopping instead of holding to the forum selection clause,⁵⁶ since after a section 1404(a) transfer, the law of the transferor forum would apply, no matter which party transferred the case.⁵⁷

B. *Post-Transfer Issues*

Noticeably absent from the venue transfer statute's legislative history is any sort of direction concerning which state's law will apply after transfer of a case. The *Stewart* Court did not discuss the choice of law problems that result from a section 1404(a) transfer after a party disregards the dictates of a forum selection clause. More recently, however, the Supreme Court, in *Ferens v. John Deere Co.*⁵⁸ held that, after a section 1404(a) transfer, the law of the transferor forum will always apply. Unfortunately, the Court did not deal effectively with the complex problems resulting from its decision. It is necessary to examine the Court's analysis in order to illustrate the need for change in the venue transfer statutes.

1. *Ferens v. John Deere Co.*⁵⁹

In *Ferens v. John Deere Co.*,⁶⁰ the plaintiff, properly asserting diversity jurisdiction, filed a tort claim in a Mississippi district court for a cause of action that arose in Pennsylvania, because the claim was barred under the Pennsylvania statute of limitations.⁶¹ If the case had been tried in Mississippi,

⁵² *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987).

⁵³ 28 U.S.C. Rule 12(h)(1) (1988).

⁵⁴ *Freer*, *supra* note 20, at 1128.

⁵⁵ If, for example, the statute of limitations had run in the forum state designated by the forum selection clause, the breaching party could, as a result of forum shopping, find another forum that would be proper under § 1391 where the statute had not run.

⁵⁶ *See Freer*, *supra* note 20, at 1128.

⁵⁷ *Ferens v. John Deere Co.*, 494 U.S. 516 (1990).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 520-21.

the district court, applying Mississippi's choice of law rules, would have applied Pennsylvania substantive law but would have applied its own, longer, statute of limitations.⁶² Under the rule of *Van Dusen v. Barrack*,⁶³ the same laws would apply if the defendant transferred the case to another forum under section 1404(a). In this case, however, the plaintiff transferred the case to Pennsylvania and then argued that the *Van Dusen* rule should be extended to include plaintiff-initiated transfers. The Pennsylvania district court rejected that argument,⁶⁴ as did the Third Circuit Court of Appeals,⁶⁵ but the Supreme Court held that the transferee court is required to apply the law of the transferor court, regardless of which party initiated transfer.⁶⁶ Since, in its analysis the *Ferens* Court relied heavily on the reasoning and decision in *Van Dusen*, a close look at that decision is warranted.

a. *Van Dusen v. Barrack*⁶⁷

The *Van Dusen* dispute arose from an airplane crash in Massachusetts. Plaintiffs filed wrongful death actions in Pennsylvania, believing that they did not have status to sue in Massachusetts,⁶⁸ but the defendants moved to transfer to Massachusetts.⁶⁹ In its efforts to protect the plaintiffs' legitimate choice of forum and law from the defendant's manipulation of the transfer statute, the Court held that, after defendant-initiated transfers under section 1404(a), the

⁶² *Id.* This point was conceded after the Supreme Court remanded the case to the court of appeals for consideration in light of the Court's decision in *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), that it was not unconstitutional for a Kansas federal court to apply its own statute of limitations to a case which would be governed, according to Kansas choice of law rules, by another state's substantive law.

⁶³ 376 U.S. 612 (1964) (held that after a defendant-initiated transfer under § 1404(a), the law of transferor forum would apply).

⁶⁴ 639 F. Supp. 1484 (W.D. Pa. 1986), *aff'd*, 819 F.2d 423 (3d Cir. 1987), *rev'd*, 494 U.S. 516 (1990) (held that to apply the law of the transferor forum would transform § 1404(a) into a device which would enable plaintiffs to forum shop for a favorable limitation period, and, thus, would not be in the "interest of justice").

⁶⁵ 819 F.2d 423 (3d Cir. 1987), *rev'd*, 494 U.S. 516 (1990) (held that because Mississippi had only insignificant contacts with the parties and the lawsuit, the application of its law to the case would be arbitrary, fundamentally unfair, and therefore unconstitutional. Since Mississippi could not apply its own law to the case, there would be no question of choice of law after transfer).

⁶⁶ *Ferens v. John Deere Co.*, 494 U.S. 516, 531-32 (1990).

⁶⁷ 376 U.S. 612 (1964).

⁶⁸ *Id.* at 616. (Plaintiffs, qualified to bring suit as personal representatives under Pennsylvania law, had not obtained the appointments requisite to initiate such actions in Massachusetts.)

⁶⁹ *Id.* at 614.

law of the transferor forum would apply.⁷⁰ The *Van Dusen* Court sought justification for its decision in the *Erie* Doctrine.⁷¹

Two interrelated principles of *Erie* are central to the Court's decision: the importance of uniformity between federal and state courts, and the prohibition against forum shopping. These policies, as they apply to choice of laws rules, were clarified in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,⁷² which held that federal courts must follow conflict of laws rules prevailing in the states in which they sit.⁷³ The *Van Dusen* Court said that *Klaxon* required uniformity of law within a state only "if the [action] had been commenced there,"⁷⁴ and so, since a transfer under section 1404(a) was really "but a change of courtrooms,"⁷⁵ "the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed."⁷⁶ In departing from the normal reading of *Erie* and *Klaxon*, the *Van Dusen* Court, and thereafter the *Ferens* Court, ignored the rationale behind the *Erie* Doctrine.

The goal of *Erie* and *Klaxon* in prescribing uniformity between federal and state courts within a state was to prevent forum shopping between those courts.⁷⁷ If the transfer of a case under section 1404(a) results in the federal and state courts within a single state having to apply different laws, then knowing that difference will arise will influence plaintiffs' decisions whether to sue in the federal or state court—the very concept prohibited by those earlier

⁷⁰ *Id.* at 636–37.

⁷¹ *Id.* at 637–39 (referring to the principles of law handed down by the Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that in an action in a federal court, except as to matters governed by the U.S. Constitution and Acts of Congress, the law to be applied in any case is the law of the state in which the federal court is situated).

⁷² 313 U.S. 487 (1941).

⁷³ *Id.* *Klaxon* was reaffirmed in *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

⁷⁴ *Van Dusen*, 376 U.S. at 628; see also *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). Interestingly, the *Ferens* majority offers *Klaxon* as the reason why Mississippi would apply its law to the case were it heard in the federal court in that state, but avoids discussion of the *Klaxon* rule in its decision that § 1404(a) requires the Pennsylvania federal court to apply Mississippi choice of law. *Id.*

⁷⁵ *Id.* at 639. But cf. FEDERAL PRACTICE, *supra* note 6, § 3846, at 366. "A transfer under § 1404(a) must be complete. The transferor court cannot transfer the case for some purposes while retaining jurisdiction over the same aspects of the case for some other purpose. As one court put it, § 1404(a) 'contemplates a plenary transfer, and so far as we know a transfer for purposes of trial only is an animal unknown to the law.'" *Id.* at 363.

⁷⁶ *Van Dusen*, 376 U.S. at 639.

⁷⁷ *Ferens*, 494 U.S. at 534 (Scalia, J., dissenting). This type of forum shopping is to be distinguished from permissible forum shopping, which occurs when the plaintiff's initial choice of federal forum is not influenced by the different laws applied in the federal and state courts within a single state.

decisions. Thus, it appears that there can be no reconciliation between the dictates of *Erie* and the effects of transfer under section 1404(a).

The drafters of section 1404(a) intended only that it be used to increase availability of convenient forums and never contemplated the issue of what state's law would apply after venue transfer.⁷⁸ As we have seen, however, "[venue] is . . . inextricably intertwined with choice of law problems. . . ."⁷⁹ *Van Dusen* attempted to skirt the choice of law issue by overruling *Hoffman v. Blaski*.⁸⁰ That case held that the language in section 1404(a) that a case can only be transferred to another forum "where it might have been brought" meant that the transferee forum had to be one where the plaintiff had an unequivocal right to bring the suit at the time the action was filed.⁸¹ *Van Dusen* held that the statute referred only to where venue was proper.⁸² *Ferens*, too, avoided the choice of law problem when it held that "the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law."⁸³ As we have seen, however, neither Court successfully avoided the problem; *Van Dusen* had to circumvent three important decisions to justify its own, and *Ferens* refused to deal with the issue at all, relying instead on *Van Dusen*.

b. Lower Court Decisions Interpreting *Ferens*

Although the *Ferens* decision purports to resolve venue transfer difficulties, it has become increasingly apparent that lower courts are reluctant to follow the *Ferens* holding, distinguishing essentially identical fact patterns to avoid an unjust outcome. In *Frazier v. Commercial Credit*,⁸⁴ for example, plaintiff filed suit in the Mississippi Circuit Court in order to take advantage of the longer statute of limitations. As in *Ferens*, plaintiff then moved to transfer to West Virginia, where plaintiff resided, where the cause of action took place, and where, as in *Ferens*, the statute of limitations had run. If the court had adhered to the *Ferens* holding, it would have transferred the case and the Mississippi

⁷⁸ *Id.* at 521.

⁷⁹ FEDERAL PRACTICE, *supra* note 6, § 3827 at 267 n.17 (citing *Manley v. Engram*, 755 F.2d 1463 (11th Cir. 1985)).

⁸⁰ 363 U.S. 335 (1960).

⁸¹ If *Hoffman* were still good law, the plaintiffs in *Ferens* would not have been able to transfer their case to Pennsylvania. Since the statute of limitations had run at the time the action was filed, they would not have been able to bring the action there originally.

⁸² *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964) (the Court considered the statutory context of the transfer section, its remedial purpose, and the consequences of its interpretation in coming to its decision).

⁸³ *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990).

⁸⁴ 755 F. Supp. 163 (S.D. Miss. 1991).

statute of limitations would have applied.⁸⁵ Instead, the court focused on “the issue left *unaddressed* by the *Ferens* decision, namely, whether the interests of justice are served by allowing plaintiffs . . . to file suit in Mississippi solely for the purpose of capturing its longer statute of limitations. . . .”⁸⁶ The court denied the motion to transfer on the grounds that the plaintiff had not met the burden of proving that the transfer was in the interest of justice.⁸⁷

Another interesting venue transfer situation appeared in *Moore v. Emons*.⁸⁸ Defendant Emons appealed from a decision denying dismissal of the case and granting a motion to transfer the case from the District of Columbia, where the statute of limitations had run, to New York, where it had not.⁸⁹ The court noted that the choice of law problem would be especially harmful to Emons, who had planned to establish a statute of limitations defense.⁹⁰ Without justifying its decision, the court transferred the case under section 1406(a),⁹¹ apparently for the sole purpose of ensuring that the law of the transferor forum would apply, and that defendant would not be prejudiced as to his defense. This stands in complete contradiction of *Ferens*, which held that “the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.”⁹²

C. Consequences of the Stewart & Ferens Decisions

Though the *Stewart* and *Ferens* Courts dealt with different sub-issues concerning the venue transfer statutes, it is clear that the statutes, as they are, have engendered a great deal of confusion within the courts. It seems as though the statutes just do not “fit” well with other, well-settled legal concepts. In order to achieve even a superficial harmony, the courts must engage in much convoluted analysis. Yet, engaging the courts in “intellectual gymnastics” is the least worrisome of the consequences involved. More problematic is the message that the courts are sending to plaintiffs and plaintiffs’ attorneys.

It is now considered proper form for plaintiffs to file a claim in an inconvenient forum where they have no intention of litigating, for the purpose of transferring both the case and that forum’s more favorable law back to the

⁸⁵ *Ferens*, 494 U.S. at 531–32.

⁸⁶ *Frazier*, 755 F. Supp. at 166 (emphasis added). The *Frazier* Court refers to the following passage in *Ferens*: “No one has contested the justice of transferring this particular case, but the option remains open to defendants in future cases.” *Id.*

⁸⁷ *Id.* at 169; see also FEDERAL PRACTICE, *supra* note 6, § 3854, at 439.

⁸⁸ 1990 U.S. Dist. LEXIS 14024.

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

⁹¹ *Id.* at 5.

⁹² *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990).

court where they intended to try the case.⁹³ Further, courts have encouraged parties to breach contracts in which they agreed to have disputes heard in a certain forum.⁹⁴ Courts are fully aware that the cases may never be transferred at all or that, if they are, they will carry with them the laws of the state where the parties brought suit originally. Parties can thus have the benefit of their bargain at the inception of the agreement, and also the option of violating the agreement in the end, with the courts' blessings.

Though plaintiffs' attorneys may look forward to being able to employ the "tricks of the trade,"⁹⁵ limited only by their creativity and their client-base, they should be wary of the new standards that are being set for pre-trial preparation. If it is possible to manipulate the venue transfer statutes to the benefit of a client, then choosing not to do so, whether out of a sense of fairness, time restrictions, or lack of knowledge of the laws of distant forums, could expose the attorney to malpractice liability. Such an attorney could be faced with a disciplinary suit for failing to zealously represent the client.⁹⁶

Nor do recent venue transfer decisions promote judicial economy. Over two thousand cases are transferred under section 1404(a) each year.⁹⁷ As the new advantages accompanying manipulation of the venue transfer statutes become obvious to more and more litigants, this number of transfers bound to increase drastically. Transfer motions will involve the courts in endless matters "peripheral to the merits, . . . postpone the day of trial,"⁹⁸ and crowd federal court dockets beyond their capacity to handle the overload.

From the courts' point of view, trying a case could also get very complicated. As Justice Scalia noted in his dissent in *Ferens*, the "file-and-transfer ploy" will enable plaintiffs to "bring home to the desired state of litigation [not only a more favorable statute of limitations but also] all sorts of favorable choice-of-law rules regarding substantive liability in an era when the diversity among the States in choice-of-law principles has become kaleidoscopic."⁹⁹ In fact, *Ferens* and *Stewart* have formidable implications for mass tort cases or multi-party agreements.¹⁰⁰ A court may have to interpret the

⁹³ Daniel J. Capra, *Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice*, 50 MD. L. REV. 632, 697 (1991).

⁹⁴ *Id.*

⁹⁵ See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

⁹⁶ *Id.* at 1690 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1980)).

⁹⁷ Marcus, *supra* note 2, at 678.

⁹⁸ Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 101 (1965).

⁹⁹ *Ferens v. John Deere Co.*, 494 U.S. 516, 538 (1990) (Scalia, J., dissenting).

¹⁰⁰ Barbara Ann Atwood, *The Choice-of-Law Dilemma in Mass Tort Litigation: Kicking Around Erie, Klaxon, and Van Dusen*, 19 CONN. L. REV. 9 (1986).

choice of law rules of many states in order to resolve one case. As one commentator noted:

The elements of the "nightmare" are several: the accurate identification and application of a particular state's choice-of-law methodology are often difficult, if not impossible; and the continued adherence by numerous states to traditional territorial rules of choice of law can produce results that may offend a federal court's sense of justice.¹⁰¹

The higher costs of litigating these cases, with their inevitable "mini-trials," the increase in attorneys' fees resulting from the need to further investigate litigation possibilities, and possible travel expenses, will detract from the cost-saving measures, such as those employed in tort reform, that legislators have fought long and hard to institute. If the venue transfer statutes were designed "to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for . . . proceedings in costly and inconvenient forums,"¹⁰² then the courts' decisions have failed miserably in their attempts to remain true to the purpose of those statutes.

IV. SOLUTIONS

Many commentators have offered suggestions on how to resolve problems inherent in the venue provisions. Some of the most insightful ideas have focused on ensuring that the law governing a case would be the law of the state with the greatest policy interests in the case. One author, for example, proposed the use of an independent federal choice of law.¹⁰³ This idea, however, is arguably in conflict with the principles of federalism. As established in *Klaxon*, "[i]t is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."¹⁰⁴ Judge Seitz, in dissent of the *Ferens* majority at the appellate court level, offered his assessment of the situation: "There may be . . . good reasons to prevent clever plaintiffs from taking advantage of the transfer provisions . . . [but] whether there should be restrictions on plaintiff-initiated transfers under section 1404(a), . . . is an issue that is best left to

¹⁰¹ *Id.* at 27.

¹⁰² *Ferens*, 494 U.S. at 525 (citing *Continental Grain Co. v. Barge*, 364 U.S. 19, 27 (1960)).

¹⁰³ Note, *supra* note 13, at 125-26; see also RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 607, 609-10 (3d ed. 1986).

¹⁰⁴ Note, *supra* note 13, at 132 (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

Congress.”¹⁰⁵ In fact, the legislature has amended statutes in order to prevent manipulation of them to achieve diversity jurisdiction: “A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”¹⁰⁶ Since the courts’ efforts to resolve the problems inherent in the transfer statutes have been in vain, there may, indeed, be no other solution than to turn to the legislature.

Although there has been much resistance to the idea of restricting plaintiffs’ venue choices,¹⁰⁷ there has been some support for the idea of revising the forum selection statute, 28 U.S.C. § 1391. Professor Robert Lusardi noted that, “[s]ince the provisions [of section 1391(a)] are arbitrary they may allow for suit in a highly inconvenient place while not allowing it in a convenient one.”¹⁰⁸ Professors Estreicher and Sexton hypothesized that it would be possible to use transfer and venue rules to minimize forum shopping in conflicts of law situations. They recommend restricting federal venue to the district or circuit where the claim or action arose.¹⁰⁹ In addition to reducing opportunities for forum shopping, this approach would allow parties to “know with certainty the law that would govern their affairs.”¹¹⁰ Although it is true that in most situations the place where the action arose is also the most convenient forum, it is conceivable that this idea would require litigation of a case in an inconvenient forum. This would be an undesirable result.

A. *Judicial Improvements Act of 1990*¹¹¹

In response to problems of cost and delay in civil litigation in the district courts, Congress, in December 1990, passed the Judicial Improvements Act of 1990.¹¹² In part, the Act codifies supplemental jurisdiction¹¹³ in new section 1367. The Act also revises the general venue statute, section 1391. The amended text of section 1391 reads as follows:

¹⁰⁵ *Ferens v. John Deere Co.*, 819 F.2d 423, 429 (3d Cir. 1987) (Seitz, J., dissenting), 494 U.S. 516 (1990).

¹⁰⁶ 28 U.S.C. § 1359 (1982).

¹⁰⁷ *Van Dusen v. Barrack*, 376 U.S. 612, 621 (1964).

¹⁰⁸ Robert A. Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 VILL. L. REV. 1, 35 n.164 (1988).

¹⁰⁹ Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 804–05 (1984).

¹¹⁰ *Id.* at 805.

¹¹¹ Pub. L. No. 101-650, 104 Stat. 5089 (1990).

¹¹² *Id.*

¹¹³ The term “supplemental jurisdiction” refers to jurisdiction given to the federal court by way of pendant jurisdiction (i.e. pendant party jurisdiction, and ancillary jurisdiction). See Thomas M. Mengler, et al., *Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213 (1991).

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, *if all defendants reside in the same State*, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.¹¹⁴

The changes restrict, somewhat, plaintiffs' initial choice of forum:

This section also eliminates the century-old anomaly, now codified in the venue statute, providing for venue in diversity but not federal question cases: "in the judicial district where all plaintiffs . . . reside." There is no good historical or functional reason for this distinction, which perversely favors home-state plaintiffs in diversity cases.¹¹⁵

Further, the changes appear to push for litigation in a forum that has a substantial connection with the case. Thus, from a fairness standpoint, the changes appear to be good. We must wait, however, to see how the courts construe these changes before we can determine their effectiveness in reducing problems of cost and delay in district court dockets. It is interesting to note that one of Congress' findings places an affirmative duty on litigants and their attorneys to make "significant contributions" to the "solutions to problems of cost and delay."¹¹⁶ Such a duty does not mesh with manipulation of the venue transfer statutes, as the latter leads to unnecessarily crowded court dockets and high costs of litigating.¹¹⁷ On the surface, however, the changes do not appear to address what this author believes to be the most serious problems inherent in the venue transfer statutes. In addition, it may well be that plaintiffs will have to bear an inordinate amount of the financial burden for bringing suit; since they are no longer able to bring suit where they reside (unless, of course, that place also happens to have a substantial connection with the cause of action), plaintiffs may be forced to bring suit in a forum inconvenient to them. If this results in fewer lawsuits being filed, the federal court dockets certainly will be less crowded, but plaintiffs may complain of a failure of substantive due process or equal protection.

¹¹⁴ Pub. L. No. 101-650, § 311, 104 Stat. 5089 (1990) (emphasis added). The Act also prescribes changes for § 1391(b) (federal question cases) but this Note is limited to the discussion of diversity cases.

¹¹⁵ 136 CONG. REC. S17,570 and S17,581 (daily ed. Oct. 27, 1990).

¹¹⁶ *Id.* at 517, 570.

¹¹⁷ See *supra* text accompanying notes 97-98.

B. *Other Suggestions*

In order to deal effectively with these and other problems, section 1404(a) could be incorporated into the forum selection statute, while making some provision for parties to waive objections to agreed-upon forums for disputes. Thus, in section 1391(a) a "proper forum" would be redefined as one to which the parties have previously agreed in a valid contract, or which is "convenient to the parties and witnesses, in the interest of justice" and which satisfies any of the following: (1) where any defendant resides, if all defendants reside in the same State, (2) where a substantial part of the events or omissions in the cause of action occurred, or a substantial part of the property that is the subject of the action is situated, or (3) where defendants are subject to personal jurisdiction at the time the action is commenced.

To illustrate, assume that X and Y have drafted a forum selection clause within a valid contract to which they are parties. The clause provides that any dispute over the contract will be heard in the District Court of State A. The State A District Court, thus, would be deemed the *only* proper venue, and a "convenient" forum that satisfied conditions (1), (2), or (3) of the statute would be improper. If the case were transferred, it would be to the forum designated by contract. No party would get both the benefit of the bargain and the benefit of breach of contract, and courts would no longer be in the position of actually encouraging such a breach. Further, allowing parties to draft contracts with valid forum-selection clauses is in line with the trend toward approval of "consensual adjudicatory procedure"¹¹⁸ evidenced by the upholding of arbitration clauses and increases options for plaintiff's choice of forum.

Second, imagine a scenario in which plaintiff brings suit in a forum that satisfies conditions (1), (2), or (3), but which is not convenient to the parties and witnesses. The forum would be deemed improper. Imposing the requirement of convenience at the outset in situations in which there is no contractual forum selection clause will reduce the necessity for "remedial"¹¹⁹ transfer and will promote judicial economy. This "restriction" on plaintiff's initial choice of forum would serve not only to reduce opportunities for forum shopping, but would also serve to promote litigation in a convenient forum. Meanwhile, the essence of the plaintiff's forum selection privilege would be retained and defendants would be fairly protected.

Transfer of venue of a cause of action brought in an improper forum would be possible under section 1406(a). Providing there is no valid forum selection clause, defendant could move for transfer upon a showing that hardship would result from litigation in the plaintiff's chosen forum. This would give due deference to plaintiff's initial choice of forum while allowing for some

¹¹⁸ Mullenix, *supra* note 20.

¹¹⁹ Van Dusen v. Barrack, 376 U.S. 612, 622 (1964).

flexibility where needed. If the motion were successful, the transferee forum would apply its own choice of law rules. This "change of law" is in accord with current procedure under section 1406(a), since under this section the law of the transferee forum always applies.¹²⁰ Only the plaintiff's initial choice of forum would be given deference, but if plaintiff could show that circumstances had changed and that the forum chosen initially was no longer proper, plaintiff, too, could move for transfer.¹²¹ As in the case of a defendant-initiated transfer, the law of the transferee forum would apply.

Since the federal court in which the case was tried would be applying the law of the state in which it sits, compliance with the dictates of *Erie* and *Klaxon* would be maintained, and it would no longer be impossible to reconcile the plaintiff's choice of forum privilege with the requirements of federalism principles. Thus, there would be no need for the type of convoluted reasoning exhibited by the courts in their efforts to "force a fit" with these principles.

V. CONCLUSION

The lower courts' reactions to the cases involving the venue transfer statutes indicate a high degree of dissatisfaction with the Supreme Court's analyses in both *Stewart* and *Ferens*. Those who are most concerned with justice have exhibited a general feeling of unease concerning the obvious manipulation of the venue transfer statutes.

In conclusion it appears that the time has come for legislators to decide whether they want to encourage confusion and "slick lawyering tactics." If Congress were to redraft the ambiguous venue transfer statutes, only minimally restricting the choices of venue currently available, it would strike a blow for the integrity of the legal system and for the sanity of those who must operate within it.

Maryellen Corna

¹²⁰ FEDERAL PRACTICE, *supra* note 6, § 3827, at 267.

¹²¹ See *James v. Daley & Lewis*, 406 F. Supp. 645 (D. Del. 1976); *Harry Rich Corp. v. Curtiss-Wright Corp.*, 308 F. Supp. 1114 (S.D.N.Y. 1969).