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Conflict of Laws

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did violence to the English language by attributing meanings to the provisions in total disregard for the words of the provisions. It seems that the Pennsylvania Supreme Court was more interested in upholding traditional political science principles in regards to stable constitutions, than in construing the constitution. Therefore, the case was properly settled by the court in ruling the Reapportionment Act of 1964 unconstitutional. The court should have gone no farther. Consideration of the Pennsylvania Constitution was wholly unwarranted in view of the well-established doctrine of avoiding constitutional issues whenever possible. Furthermore, the court, after assuming this unnecessary task, came to an unreasonable conclusion. If the court had to decide the validity of these sections of the Pennsylvania Constitution, it should have ruled them unconstitutional under any reasonable interpretation of the English language.

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CONFLICT OF LAWS—Transfer under section 1404(a) of Judicial Code, a 1404(a) transfer from one federal court in one jurisdiction to federal court in another jurisdiction is a mere change of courtrooms, with law to be applied by what the first federal court would apply.

Van Dusen v. Barrach, 376 U.S. 612 (1964).

The Supreme Court in the case of *Van Dusen v. Barrach*[1] was presented with the problem of interpreting section 1404(a) of the Judicial Code.[2] The personal representatives of victims of a Massachusetts airplane crash instituted wrongful death actions in the Federal Court in the Eastern District of Pennsylvania. The defendants moved to transfer the action under section 1404(a) to the Federal Court in the District of Massachusetts. The Pennsylvania District Court granted the motion, even though the personal representatives had not qualified to sue in Massachusetts. This Court held that the transfer was justified irrespective of which state's substantive and conflict of law rules would control.[3] Plaintiffs sought a writ of

1. 376 U.S. 612 (1964).

2. 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. 28 U.S.C. 1404(a).

3. Popkin v. Eastern Air Lines, 204 F. Supp. 426 (1962).

mandamus restraining the transfer.[4] The Court of Appeals for the Third Circuit held that the Pennsylvania District Court was without jurisdiction to transfer. The Court of Appeals stated that Federal Rules of Civil Procedure 17(b) required that the capacity of representatives to sue shall be determined by the law of the state in which the district court is held.[5] The Court of Appeals for the Third Circuit refused to grant a section 1404(a) transfer since plaintiff had not qualified to sue in Massachusetts and therefore Massachusetts was not a district where the action might have been brought. The Supreme Court in a unanimous opinion by Mr. Justice Goldberg reversed, defining the phrase "where it might have been brought" in section 1404(a) as applicable only to federal law, not the law of the transferee state.[6] Interpreting Federal Rules of Civil Procedure 17(b) the Court held the law of the transferor forum is the applicable law in order to meet the "interest of justice" requirement of section 1404(a).[7] The case was then remanded to the Pennsylvania District Court so that the court could reconsider whether the transfer was justified under the additional guidelines laid down by the Supreme Court.

The first portion of the Court's opinion defines and limits the preexisting law as formulated in *Hoffman v. Blaski.*[8] *Hoffman* refused a section 1404(a) transfer because the requirement of venue and personal jurisdiction could not be met in the transferee district and therefore such district was not one where the action *might have been brought. Hoffman* left unanswered whether the transferee state laws would affect transfer which *Van Dusen* answered. The Court held that federal laws delimiting the district in which an action may be brought shall be the factor considered in determining whether the action *might have been brought* and other factors having refer-

4. Barrach v. Van Dusen, 309 F.2d 953 (1962).

5. Rule 17(b) Federal Rules of Civil Procedure 28 U.S.C.: "Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. *In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held,* except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28 U.S.C. Section 754 and 959(a)." [Emphasis supplied]

6. Van Dusen v. Barrach, *supra* note 1 at 624.

7. *Id.* at 625.

8. 363 U.S. 335 (1960).

ence to transferee state law,[9] such as lack of capacity to sue or failure to qualify to do business. Therefore, inability to bring suit in the transferee district shall not affect a court's determination in regard to that limiting phrase of section 1404(a). This view seems consistent with the purpose of section 1404(a) which is to prevent waste of time, energy and money and still obtain a just result.[10] Under this holding the range of available transferee forums is widened and therefore the possibility of reducing time, money and energy increased.

The second portion of the Court's opinion concerning the state law applicable when transfer is granted is limited to the factual circumstances in *Van Dusen*. The Court specifically exempts from consideration the problem of choice of law when the plaintiff makes the motion to transfer, where the transferor state would have applied the doctrine of forum non conveniens[11] or where there are constitutional problems involved in applying a different state's law.[12] The Court's holding that when the defendants seek transfer, the transferee court is obligated to apply the law of the transferor forum reduces a section 1404(a) transfer to a change of courtroom from an inconvenient to a convenient location.[13] This is true because the forum which plaintiff originally chose is the forum whose conflict laws will determine what substantive law is applicable. The Court states that while the *Erie*[14] doctrine requires the federal courts to apply the state law of the forum in which it is sitting, this is not to be interpreted literally.[15] What *Erie* sought was a substantial identity or uniformity between federal and state court results and the fact that in most instances this result could be achieved by directing federal courts to apply the laws of the state "in which it sits"

9. Van Dusen v. Barrach, *supra* note 1.

10. Continental Grain v. Barge FBL-585, 364 U.S. 19 (1960).

11. Van Dusen v. Barrach, *supra* note 1 at 639-40. "In so ruling, however, we do not and need not consider whether in all cases Section 1404(a) would require the application of the law of the transferor, as opposed to the transferee state. We do not attempt to determine whether, for example, the same considerations would be given if a plaintiff sought a transfer under Section 1404(a) or if it was contended that the transferor state would simply have dismissed the action on the grounds of forum non conveniens."

12. *Id.* at 639, n. 41. We do not suggest that the application of transferor state law is free from constitutional limitations. See note 20 *infra*.

13. *Id.* at 639.

14. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

15. Van Dusen v. Barrack, *supra* note 1 at 638. The Court quotes Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).

"Erie R.R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts . . . ."

should not obscure the fact that when applying this reasoning to a section 1404(a) transfer, the critical identity to be maintained is between the federal district court which decides the case and the courts of the states in which the action was filed.[16]

In regard to the three areas previously mentioned, which the Court excludes from the application of *Van Dusen,* each area presents problems which the Court will have to resolve in subsequent litigation.

In the first unanswered area, *i.e.,* where the plaintiff makes the motion to transfer, the Court seems to imply that the plaintiff may not be allowed to choose an inconvenient forum, for the sole purpose of gaining a choice of law advantage and then after the action is commenced move for a section 1404(a) transfer and still retain the advantage gained by his initial selection. The rationale behind such a ruling might be that while a defendant ought not to be able to resort to the transfer device to frustrate any choice of law advantage which plaintiff might gain from the choice of forum the plaintiff in turn ought not to retain the advantage when he requests transfer since the transfer would be limited to a district in which plaintiff could have originally instituted the action.[17] In such circumstances the Court should consider why the action was not commenced in the proposed transferee forum and if plaintiff cannot show an honest mistake in selection, he should not be allowed to retain whatever advantage he acquired. If transfer is granted then the law of the transferee forum should apply.[18]

The rationale for such a holding could well be that plaintiff in making the motion to transfer wants the action tried in the transferee forum. Since he could have originally instituted the action in that forum, for purposes of determining the applicable law, it could be assumed that he did initiate the action there. Such a holding would not be contra to the *Erie* doctrine since *Erie* does not determine what state law a federal court has to apply. *Erie* was a formulation of a policy that the federal courts are not to apply and formulate their own substantive law.

What law is applicable if the transferor's law cannot apply due to a constitutional limitation?[19] The problem usually arises when the

16. *Id.* at 639.

17. The American Law Institute — *Study of the Division of Jurisdiction Between State and Federal Courts* — Tentative Draft No. 2, p. 98 (1964).

18. Law of the transferee forum includes that forum conflict of law rules so that the transferee's substantive law may or may not apply.

19. See Hartford Accident and Indemnity Co. v. Delta and Pine Land Co., 292 U.S. 143 (1934) where the court held that it was a violation of due process

transferor forum state has only slight contact with the litigation and if its substantive law were applied such application would be contrary to the due process and/or full faith and credit clause of the constitution.[20] When the forum law of the transferor cannot be applied, the applicable law should be the transferee state law since the transferee state would have substantial contacts with the litigation in order to qualify for the transfer. Therefore, there would be no constitutional bar in the latter forum to the application of its laws.

The final unanswered area is what law is applicable if the transferor state would have dismissed the action if brought in the state court on the basis of forum non conveniens. The Supreme Court has held "that a prior state court dismissal on the grounds of forum non conveniens can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under section 1404(a).[21] This holding could be interpreted to mean that a federal court can never dismiss an action since Congress has provided a different remedy.[22] If that interpretation is followed, adherence to the principle of *Erie* would require that the transferee state law apply. This is true because if the state court would have dismissed the action, the plaintiff would have to begin again in a convenient forum with its law applying. In order to adhere to the similarity of result which *Erie* requires, the law of the transferee state must be the applicable law. If not, a different result could be reached in a federal court than in a state court a block away.[23]

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for Mississippi to apply its law to alter the terms of a Tennessee insurance contract when Mississippi's activities in connection with the contract were "slight" and "casual", also Watson v. Employer's Liability Assurance Corp. Ltd., 348 U.S. 66 (1954); Hughes v. Fetter, 341 U.S. 609 (1951); Pacific Employers Insurance Co. v. Industrial Accident Company, 306 U.S. 493 (1939); Alaska Packers Association v. Industrial Accident Company, 294 U.S. 532 (1935); Home Insurance Co. v. Dick, 281 U.S. 397 (1930).

20. It is interesting to note here that defendants contended that the full faith and credit clause required Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act including Massachusetts limitation on recovery. 376 U.S. at 629 n. 24. Although the Supreme Court did not express an opinion on this contention the Supreme Court of Pennsylvania in Griffith v. United Air Lines, 203 A.2d 796 (1964) held that Pennsylvania was not required by the Constitution to recognize Massachusetts' $20,000 limit on damage. See also Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 211 N.Y.S. 2d 133 (1961).

21. Parsons v. Chesapeake and Ohio R.R., 375 U.S. 71, 73-74 (1963).

22. Collins v. American Automobile Ins. Co., 230 F.2d 416, 418 (1956).

23. 60 YALE L. J., 537 (1951).

Van Dusen explains some of the problems involved in section 1404(a) but due to the infrequent litigation in the area, it may be in the far distant future before these remaining problems are answered.

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CONSTITUTIONAL LAW—Civil Rights—Public Accommodations Under the Civil Rights Act of 1964.

Heart of Atlanta Motel, Inc. v. United States, 85 Sup. Ct. 348 (1964).

On June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was:

> . . . to promote the general welfare, by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the Fourteenth and Fifteenth Amendments, to regulate commerce among the several states, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.[1]

After a year of deliberation, Congress enacted the Civil Rights Act of 1964.[2]

TITLE II OF THE ACT — INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION[3] was attacked by the Heart of Atlanta Motel, Inc., as being unconstitutional. Plaintiff was seeking a declaratory judgment and injunctive relief. The United States counterclaimed for the Act's enforcement. The District Court[4] upheld the constitutionality of the public accommodations section and issued a permanent injunction on the counterclaim. The case came

1. Heart of Atlanta Motel, Inc. v. United States, 85 Sup. Ct. 348, 351 (1964).

2. P.L. 88-352; 78 Stat. 241.

3. 42 U.S.C.A. §§ 2000a to 2000a-6.

4. Heart of Atlanta Motel, Inc. v. United States, 231 F. Supp. 393 (N.D. Ga. 1964); under § 206(b) of the Act, the Attorney General made a request that a court of three judges be convened to hear and determine the case.