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28 U. S. C. 1406(a) Transfer of Time-Barred Claims

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THE 28 U.S.C. § 1406(a) TRANSFER OF TIME-BARRED CLAIMS

A plaintiff may often choose among several forums in deciding where to file a claim.[1] On the basis of current choice-of-law rules, federal courts in each of these forums will often apply different statutes of limitations to the same claim.[2] As a result, federal courts are sometimes confronted with limitations-barred claims that, at the time of filing, could have been timely filed in another district court. Some courts, rather than dismiss these claims, have invoked 28 U.S.C. § 1406[3] to transfer these claims to district courts in which the claims might have been brought.[4] As applied by these courts, this federal transfer statute allows time-barred claims to be transferred to forums in which the original filing satisfies the applicable statute of limitations.[5]

Cases transferred to avoid a statute of limitations defense are of two types: those whose only defect in the transferor court is the limitations bar[6] and those marked by both a time-bar and a defect in venue,

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1 This choice is generally limited by personal jurisdiction and venue constraints. Personal jurisdiction, which is subject to constitutional due process limitations, concerns the authority of the sovereign to exercise control over the defendant. Venue is based on the convenience of the forum, and is generally governed by statute. *See generally* CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS, § 42 (4th ed. 1983); Kevin M. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 430-43 (1983) (describing the evolving relationship between personal jurisdiction and venue).

2 Federal courts sitting in diversity will generally apply the choice of law rules of the state in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). State choice of law rules may provide for application of the forum state's statute of limitations to an action arising under the substantive law of another state. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (holding that the Constitution does not bar application of the forum state's statute of limitations to claims governed by the substantive law of a different state). As a result, federal courts sitting in different states may apply different statutes of limitations to the same cause of action.

3 28 U.S.C. § 1406 (1988). The principal federal transfer provisions, 28 U.S.C. §§ 1404(a) and 1406(a), are discussed *infra*, notes 8-27 and accompanying text.

4 *See infra* notes 6 and 7 (cases transferred to cure statute of limitations defenses).

5 Transfer of venue preserves the time of filing in the original forum as the time of commencement of the suit, thereby tolling any applicable statute of limitations. *See* Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978) (noting that transfer allows plaintiff to benefit from tolling of statute of limitations).

6 *See, e.g.*, Porter v. Groat, 840 F.2d 255 (4th Cir. 1988) (allowing transfer of venue under 28 U.S.C. § 1406 to defeat statute of limitations defense); Young v. Cuddington, 470 F. Supp. 935 (M.D. Pa. 1979) (same). *But see, e.g.*, Spar, Inc. v. Information Resources, Inc., 956 F.2d 392 (2d Cir. 1992) (holding that transfer to save time-barred claim was not in the "interest of justice"); Murphy v. Klein Tools, Inc., 693 F. Supp. 982 (D. Kan. 1988) (rejecting the use of § 1406(a) to save a limitations-barred claim).

personal jurisdiction or both.[7] This Note argues that in either case the transfer of time-barred claims is beyond the scope of the federal transfer provisions. This Note suggests that decisions authorizing such transfer are inconsistent with the place-of-suit and choice-of-law matrix that governs the allocation of cases within the federal court system. District courts should not transfer claims that do not meet the statute of limitations of the forum in which they sit, whether or not that forum meets the venue or personal jurisdiction requirements necessary to try the claim.

INTRODUCTION

The successful transfer of a time-barred claim must do more than preserve the original time of filing. The success of the transfer will depend upon the law applied after the case is transferred. If the transferee court applies transferor law, the limitations period applicable to the claim will not change and the transferee court will dismiss the action. If, however, the transferee court applies its own law, the claim may be saved by the longer transferee statute of limitations.

Courts seeking to transfer a time-barred claim to a venue in which it may proceed thus face two related obstacles. First, the court must have the authority to transfer a claim filed late in the transferor court. Second, the transfer must proceed in a way that allows the post-transfer application of the transferee statute of limitations.

Part I of this Note introduces the reader to the two principal transfer provisions that might be used to order the transfer of a limitations-barred claim: 28 U.S.C. §§ 1404(a) and 1406(a). Part I concludes that, given the post-transfer choice-of-law rules that have evolved around each section, only section 1406 may be used to transfer a time-barred claim.

Part II analyzes the application of section 1406(a) to limitations-barred claims. Section A examines the use of section 1406 where the only defect in the transferor court is a statute of limitations defense. Section B shows that the transfer of time-barred claims from forums that are otherwise proper as to venue and personal jurisdiction is in-

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7 Reported cases of this type seem to be extraordinarily rare. *See* John D. Currivan, Note, *Choice of Law in Federal Court After Transfer of Venue*, 63 CORNELL L. REV. 149, 162 (1977) (citing Ferguson v. Kwik-Chek, 308 F. Supp. 78 (D.V.I. 1970) as "the only reported case of this type").

There are at least two conflicting explanations for the apparent scarcity of reported cases of this type. First, courts may decide on the transfer without considering the statute of limitations issue. *See* Lau v. Change, 415 F. Supp. 627, 629 n.2 (E.D. Pa. 1976) ("Since the Court believes that it lacks personal jurisdiction over defendant, the statute of limitations issue need not be reached."). Alternatively, courts may deny transfer of claims filed late in an improper forum that lacks either venue, personal jurisidction, or both. In either case, the court implicitly decides on the availablity of transfer: allowing transfer in the former and denying it in the latter.

consistent with the current federal choice-of-law regime. Sections A and B conclude that section 1406 should not be used to cure defects in limitations law. Section C suggests that section 1406 is best understood to contain a federal timely filing requirement that prohibits the transfer of claims filed beyond the statute of limitations of the transferor forum.

I
BACKGROUND: THE FEDERAL TRANSFER STATUTES

Courts have struggled with the application of the federal transfer of venue statutes since their enactment in 1948.[8] Simply worded and widely invoked,[9] these provisions have proved difficult to interpret less for what they say than for what they omit.[10] The resulting case law has, in the words of one judge, produced a "nearly hopeless muddle of conflicting reasoning and precedent."[11]

Interpretative difficulties with the federal transfer provisions have generally been of two types: pre-transfer and post-transfer.[12] Pre-transfer issues focus on the conditions necessary for transfer pursuant to a particular statutory section.[13] Post-transfer issues involve the choice-of-law rules that should be applied once transfer occurs.[14] Because the application of federal transfer law to limitations-barred claims lies at the intersection of this framework, it is necessary to examine both pre- and post-transfer issues in detail.

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8 Judicial Code of 1948, ch. 646, 62 Stat. 937 (1948) (codified at 28 U.S.C. §§ 1404, 1406 (1988)). *See infra* notes 45-48 and accompanying text.

9 More than 2000 claims were transferred under § 1404(a) alone in 1982. Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 680 n.16 (1984).

10 Section 1406(a) makes no mention of the law to be applied once transfer has occurred. Moreover, the statute does not detail the precise jurisdictional requirements of either the transferee or transferor courts. Professor Wright has identified § 1404(a) as the source of a "veritable flood of litigation." WRIGHT, *supra* note 1, at 260.

11 Ellis v. Great S.W. Corp., 646 F.2d 1099, 1106 (5th Cir. 1981).

12 *See* Maryellen Corna, *Confusion and Dissension Surrounding the Venue Transfer Statutes*, 53 OHIO ST. L.J. 319, 322 (1992) (distinguishing pre- and post-transfer issues in federal transfer of venue).

A third interpretative difficulty with the federal transfer provisions concerns the requirement that the transferee court be one in which the claim "might have been brought." This question, addressed by the Supreme Court in Hoffman v. Blaski, 363 U.S. 335 (1960), is beyond the scope of this Note.

13 Corna, *supra* note 12, at 322.

14 *Id.* at 326.

A. The Pre-Transfer Realms of Sections 1404 and 1406

Congress wrote the federal transfer provisions against the backdrop of the ancient doctrine of forum non conveniens,[15] which allowed courts to decline to exercise jurisdiction over claims filed in an inconvenient forum.[16] The resulting dismissal, if it occurred after the running of the statute of limitations in the more convenient forum, could result in the loss of the claim.[17] Designed to improve upon the doctrine of forum non conveniens, section 1404 allowed courts to transfer, rather than to dismiss, claims filed in proper but inconvenient forums.[18] Section 1404(a) provides:

> For the convenience of the 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.[19]

Section 1406(a), referred to as a "legislative sibling"[20] of section 1404(a), states:

> 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

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15 The leading case on the doctrine of forum non conveniens is Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (stating factors relevant to rulings on forum non conveniens motions).

16 Although *Gulf Oil* was decided before the promulgation of the new Judicial Code in 1948, Professor Stein suggests that the language of § 1404 actually predated *Gulf Oil*, and that the revisor's note suggesting that § 1404 was meant to codify *Gulf Oil* was "a creative bit of retroactive legislative history." Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 807 (1985).

17 Forum non conveniens dismissal was often made contingent upon the defendant's waiver of any statute of limitations defense that would preclude pursuit of the claim in a more convenient forum. *See* 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 3828, at 288 n.34 (1986 & Supp. 1994) (listing cases in which dismissal was made contingent upon consent to jurisdiction and waiver of statute of limitations defense in alternative forum); *see, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242 (1981) (noting that defendants seeking forum non conveniens dismissal had consented to the jurisdiction of an alternative forum).

18 The relationship between forum non conveniens and the new transfer statutes is described in JAMES WM. MOORE, MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE ¶ 0.03(28), at 199-202 (1949). *See also* Norwood v. Kirkpatrick, 349 U.S. 29, 31-32 (1955) (describing the relationship between transfer statutes and forum non conveniens doctrine); WRIGHT ET AL., *supra* note 17, at 278 (discussing the "limited continuing vitality [of forum non conveniens] in federal courts"); WRIGHT, *supra* note 1, at 259-60 (noting that forum non conveniens has "largely been superseded" by § 1404(a)). Forum non conveniens nonetheless retains some vitality with respect to actions more properly heard in state courts or foreign countries. *See id.*; *see, e.g.*, *Piper Aircraft*, 454 U.S. at 239 (granting forum non conveniens dismissal where alternative forum is in foreign country).

19 28 U.S.C. § 1404(a) (1988).

20 Goldlawr Inc. v. Heiman, 288 F.2d 579, 583 (2d Cir. 1961), *rev'd*, 396 U.S. 463 (1962).

> of justice, transfer such case to any district or division in which it could have been brought.[21]

Section 1406 was apparently designed to protect plaintiffs from the dismissal of claims filed in the wrong venue by allowing claims to be transferred to a forum where venue is proper.[22] This provision served to save claims which would otherwise be lost to the intervening running of the applicable statute of limitations in the proper court.[23]

Generally, courts have assigned sections 1404 and 1406 exclusive areas of operation.[24] Section 1404(a) has been interpreted as a device to move properly filed claims among courts having personal jurisdiction over the action. Section 1406(a) has been interpreted as a means of saving claims marked by defects in venue or personal jurisdiction[25] that do not warrant dismissal.[26] The perceived differences in each statute's area of applicability have proven instrumental in shaping the debate over the choice-of-law rules that should follow transfer.[27]

B. Post-Transfer Choice-of-Law

The successful transfer of a limitations-barred claim depends upon the application of transferee statute of limitations to the transferred claim.[28] The plaintiff must seek a transfer that guarantees the

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21 28 U.S.C. § 1406(a) (1988). As originally promulgated in 1948, § 1406(a) required transfer of improperly venued cases. It was amended a year later to allow courts discretion in dismissing claims when transfer was not in the interest of justice.

22 The legislative history of § 1406 does not reveal a stated purpose for the section. *See infra* notes 45-48 and accompanying text.

In Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), the Supreme Court characterized the statute as a measure aimed at "avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn." *Id.* at 466.

23 *See* 15 WRIGHT ET AL., *supra* note 17, § 3827. Wright concluded that "[t]he reasons for [transfer] are especially compelling if the statute of limitations has run, so that dismissal would prevent a new suit by plaintiff." *Id.* § 3827, at 269.

24 *See, e.g.*, Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1147 (5th Cir. 1984), ("[s]ections 1404(a) and 1406(a) are both short, apparently clear, and seemingly mutually exclusive"); Martin v. Stokes, 623 F.2d 469, 471 (6th Cir. 1980) (noting exclusive spheres of operation for §§ 1404 and 1406); 15 WRIGHT ET AL., supra note 17, § 3827, at 264 (citing Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140 (5th Cir. 1984)).

25 The extension of § 1406 to defects in personal jurisdiction, once subject to some debate, was settled in *Goldlawr.* 369 U.S. 463. *See infra* notes 51-65 and accompanying text (discussing *Goldlawr* in greater detail).

26 *See Martin,* 623 F.2d at 471. *See also* WRIGHT, *supra* note 1, at 257 ("[s]ection 1404(a) . . . permitted transfer to a more convenient forum, while § 1406(a) provided transfer, as an alternative to dismissal, where the case is brought at an improper venue.").

27 *See* Currivan, *supra* note 7, at 151 (analyzing transfer according to the propriety of the forum); Ferens v. John Deere, 494 U.S. 516 (1990) (same).

28 *See supra* note 1 and accompanying text. The use of forum state choice-of-law rules will often result in the application of forum statute of limitations. Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Practical considerations, recoguized by the Supreme Court in Van Dusen v. Barrack, 376 U.S. 612 (1964), require that this rnle be modified in the con-

use of transferee law once transfer is had. Although sections 1404(a) and 1406(a) do not specify the law to be applied after transfer, the Supreme Court has developed a set of wooden rules governing choice-of-law after transfer of venue. These rules call for application of transferor law after all section 1404(a) transfers[29] and thus make section 1404(a) ineffective in circumventing a statute of limitations bar.

The basic analysis of post-transfer choice-of-law was developed in *Van Dusen v. Barrack*,[30] a 1964 Supreme Court decision. The Court, in authorizing a transfer to a forum that might have applied law less favorable to the plaintiff, held that a section 1404(a) transfer requested by a defendant should not result in a change of applicable law.[31] Limiting its decision to defendant-initiated transfers, the Court examined the legislative history of section 1404(a) and found no evidence that Congress intended transfers under section 1404(a) to produce changes in the applicable substantive law.[32] Section 1404(a), the Court concluded, "should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended . . . simply to authorize a change of courtrooms."[33]

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text of cases transferred under § 1404(a). In holding that the transferee court should apply the choice of law of the state in which the transferor court sat, the Court noted that "the critical identity to be maintained is between the federal district which decides the case and the courts of the State in which the action was filed." *Id.* at 639. As an example of the anomalous results that might accompany blanket application of forum state choice of law, the *Van Dusen* Court noted that a claim transferred "purely for reasons of convenience" might be dismissed by a transferee court whose choice of law rules called for the application of a shorter statute of limitations. *Id.* at 630, n.25 (citing Note, 64 HARV. L. REV. 1347, 1354-55 (1951)).

29 *Ferens*, 494 U.S. at 531.

30 376 U.S. 612 (1964). *Van Dusen* involved litigation arising out of a commercial airline crash in Massachusetts. The defendants, seeking to consolidate litigation in Massachusetts, moved under § 1404(a) to have claims filed in Pennsylvania district court transferred to Massachusetts. Van Dusen, a plaintiff in one of the Pennsylvania actions, opposed the transfer on the grounds that the applicable law in Massachusetts was less favorable to her claim.

31 *Id.* at 639.

32 *Id.* at 635.

33 *Id.* at 636-37 (citation omitted).

In addition to the legislative history of the section, the Court offered two policy reasons for applying transferor law after a § 1404 transfer. First, the Court expressed concern for the forum shopping implications of a rule that would allow changes in substantive law to accompany transfer of venue. *Id.* at 636. Second, the Court concluded that the application of transferor law to a claim transferred under § 1404(a) was consistent with the choice of law principles laid out in Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Court reasoned that a change in substantive law would be available to a litigant in federal court but not in state court, violating the principle that the " 'accident' of federal diversity" not produce different results in two courtrooms a block apart. *Van Dusen*, 376 U.S. at 638 (citing Guaranty Trust v. York, 326 U.S. 99, 109 (1945)).

The *Van Dusen* Court limited its holding to cases involving defendant-initiated transfers.[34] The question of whose law to apply after a plaintiff-initiated transfer reached the Supreme Court in *Ferens v. John Deere Co.*[35] The *Ferens* Court, relying heavily on the reasoning that motivated the *Van Dusen* decision, extended the applicability of transferor law to plaintiff-initiated transfers.[36] Recognizing that the application of transferor law after a plaintiff-initiated transfer would deprive the defendant of some tactical advantages,[37] the Court nonetheless held that transferor law should "apply regardless of who initiates the transfer. A transfer under section 1404(a), in other words, does not change the law applicable to a diversity case."[38]

The holding that transferor law should apply after a section 1404(a) transfer makes transfer under that section the equivalent of dismissal for a time-barred claim. The transferee court, upon receiving the claim, would apply transferor law, including the transferor statute of limitations. The claim would be dismissed from the trans-

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34 *Id.* at 640 ("We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under 1404(a). . . .").

35 494 U.S. 516 (1990). The plaintiffs in *Ferens* filed suit in Mississippi, where the defendant did business, for a tort alleged to have occurred in Pennsylvania. The plaintiffs' claim, time barred in Pennsylvania, was within Mississippi's unusually long statute of limitations. *Id.* at 520. The plaintiffs then moved for transfer under § 1404(a), assuming that Mississippi choice of law rules would continue to govern after transfer to a more convenient forum. The Ferens' motion was granted, and the claim was transferred to the Western District of Pennsylvania. The Pennsylvania court, however, refused to apply Mississippi's longer statute of limitations and dismissed the claim on the basis of Pennsylvania's much shorter statute of limitations. Ferens v. Deere & Co., 639 F. Supp. 1484 (W.D. Pa. 1986). The Third Circuit affirmed, holding that transferee choice of law should govern after a plaintiff-initiated transfer. *Ferens*, 494 U.S. at 521.

36 *Ferens*, 494 U.S. at 519. Noting that the reasoning behind the *Van Dusen* decision applied with equal force to plaintiff initiated transfer, the *Ferens* Court wrote:

> First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, 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.

Id. at 523.

37 *Id.* at 525 ("[D]efendant may lose a nonlegal advantage. Deere, for example, would lose whatever advantage inheres in not having to litigate in Pennsylvania, or, put another way, in forcing the Ferenses to litigate in Mississippi or not at all."). The Court concluded that the disadvantage to the defendant of allowing transferor law to be applied in the transferee court was preferable to the unfairness that would result from the application of transferee law to transferred claims. The Court also noted that, as a practical matter, the opposite rule would not necessarily be helpful to defendants. Even if transferee law were applied after plaintiff initiated transfers, plaintiffs could either opt to pursue the claim in the inconvenient forum or wait for the defendant to initiate transfer (in which case the resulting choice of law would be governed by *Van Dusen*). *Id.* at 526-27 (citing Currivan, *supra* note 7, at 156).

38 *Id.* at 523.

feree court just as it would have been dismissed from the transferor court.

The time-barred plaintiff, precluded from the use of section 1404(a) by the *Ferens* rule, must rely on section 1406(a). Section 1406(a), unlike section 1404(a), allows the post-transfer application of transferee law,[39] thereby enabling the plaintiff to take advantage of a longer limitations period in the transferee forum. Section 1406(a), however, was historically reserved for instances in which the original filing was defective as to venue, personal jurisdiction, or both.[40]

Recognizing that only a section 1406(a) transfer could save a time-barred claim, some courts have seized upon the expansive language contained in early interpretations of section 1406(a). These courts have argued that a limitations bar, like defects in venue or personal jurisdiction, make the original district "wrong" for section 1406 purposes, bringing the claim within the curative sphere of the statute. The balance of this Note argues that section 1406 should not be so construed.

II

SECTION 1406(a) AND LIMITATIONS-BARRED CLAIMS

Section 1406, which by its terms addresses only defects in venue, has been interpreted broadly to cover defects in personal jurisdiction as well. Courts have used this broad interpretation to suggest that the statute should be read to cover other defects, including statute of limitations defenses.

Section A of this analysis examines both the legislative history of the statute and early interpretations of section 1406 that extended its effects to defects in personal jurisdiction. This section concludes that the extension of section 1406 to defects in personal jurisdiction is best understood as a product of the unique relationship between venue and personal jurisdiction, and that the same reasoning cannot be used to extend section 1406 to defects in limitations law. Section B concludes that the transfer of these claims is inconsistent with the choice-of-law framework developed for federal courts. Section C suggests that section 1406 is best read to contain a timely filing requirement that precludes the transfer of claims filed late in the transferor court.

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39 *See, e.g.*, Martin v. Stokes, 623 F.2d 469, 473 (6th Cir. 1980) ("[i]f an action is transferred under § 1406(a), the state law of the transferee district court should be applied.").

40 *See supra* notes 24-27 and accompanying text.

A. Applying Section 1406 to Defects Other than Venue

Section 1406(a) authorizes transfer of venue, and tolling of the limitations period,[41] for cases filed in the "wrong division or district."[42] The crucial question in determining the scope of the statute thus becomes what exactly makes a division or district "wrong." If, as at least one court has argued,[43] a district can be considered "wrong" because of a limitations bar, the statute can be used to authorize transfer of time-barred claims.[44]

1. *The Legislative History of Section 1406*

Commentators have argued that the legislative history of section 1406 indicates a congressional intent to limit the section's application to claims filed in districts that do not meet venue requirements.[45] The legislative history of section 1406(a) supports this conclusion. A committee report refers to section 1406(a) as providing "statutory sanction for transfer instead of dismissal, where venue is improperly laid."[46] Professor Moore, testifying before a congressional subcommittee, similarly referred to the section as desigued to address defects in venue.[47] There is no indication that section 1406(a) was desigued to

41 Burnett v. New York Cent. R.R. Co., 380 U.S. 424, 430 n.7 (1964) (citing cases).

42 28 U.S.C. § 1406(a) (1988).

43 *See* Porter v. Groat, 840 F.2d 255 (4th Cir. 1988).

44 *Id. Porter* involved a medical malpractice action brought in the Eastern District of Virginia. The claim, based upon an allegedly negligent operation performed in North Carolina three years earlier, had previously been filed and voluntarily dismissed in the Eastern District of North Carolina. Defendant, arguing that the claim was governed by Virginia law, moved for dismissal under Virginia's two year statute of limitations for medical malpractice actions. Plaintiffs responded with a motion to transfer to North Carolina, where a "savings statute" would have allowed the plaintiffs to refile within a year of their voluntary dismissal. More than a year having passed between the voluntary dismissal and the motion to dismiss in Virginia, the Porters were not in a position to simply refile the claim in North Carolina. The tolling provision of § 1406(a) was required to save the claim. The district court, finding venue proper in Virginia, denied the motion to transfer and ordered the case dismissed on the basis of the Virginia statute of limitations. Relying on an expansive interpretation of what makes a district "improper" for the purposes of § 1406, the Fourth Circuit found that § 1406(a) could be invoked to transfer a limitations-barred claim from an otherwise proper venue. *Id.* at 258 ("[W]e read § 1406(a) to authorize the transfer to the Eastern District of North Carolina when the statute of limitations would bar adjudication on the merits in the Eastern District of Virginia but not in the Eastern District of North Carolina.").

45 *See, e.g.*, 15 WRIGHT ET AL., *supra* note 17, at 263 ("A prerequisite to invoking § 1406(a) is that the venue must be improper.").

46 COMMITTEE ON REVISION OF THE LAWS, U.S. CONGRESS, REVISION OF TITLE 28, U.S.C., A128 (1946).

47 *Revision of Titles 18 and 28 of the United States Code: Hearings Before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2055*, 80th Cong., 2d Sess. 29 (1947) (statement of James William Moore, Professor of Law, Yale University) ("Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue.").

address defects other than venue.[48] Were it not for subsequent interpretations of the statute, the use of section 1406(a) to transfer claims filed in a proper venue would be beyond the authority conferred by the statute. Legislative history notwithstanding, the curative role of section 1406(a) has been expanded beyond defects in venue to include defects in personal jurisdiction.

2. *Section 1406 and Defects in Personal Jurisdiction*

In the years immediately following the Judiciary Act of 1948, questions arose as to a federal court's authority to order section 1406(a) transfers of claims over which it lacked either personal or subject matter jurisdiction. Whereas a uniform rule emerged requiring a court to have subject matter jurisdiction before it could order a transfer,[49] the federal courts reached conflicting conclusions regarding a court's authority to order the transfer of a claim over which it lacked personal jurisdiction.[50]

Illustrative of the debate among the circuits is *Goldlawr v. Heiman*,[51] eventually used by the Supreme Court to resolve the issue. *Goldlawr* involved a private antitrust action brought against multiple defendants in the United States District Court for the Eastern District of Pennsylvania.[52] The defendants, claiming improper venue and lack of personal jurisdiction, moved for dismissal.[53] The district court, agreeing with the defendants that venue was improper and that personal jurisdiction was lacking, nevertheless refused to dismiss.[54] Instead, the court invoked section 1406(a) and ordered the case transferred to the Southern District of New York.[55] The defendants

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48 The *Porter* court itself recognized that the plain language of the statute seemed to limit its applicability to defects of venue. Porter v. Groat, 840 F.2d 255 at 257. The Court noted:

> The district court read the statute to permit a transfer only where the impediment to a decision on the merits by the court in which the case was filed was an absence of venue. . . . If we were applying the statute as a matter of first impression, we would agree that the district court correctly interpreted it.

Id.

49 First Nat'l Bank of Chicago v. United Air Lines, 190 F.2d 493 (7th Cir. 1951), *rev'd on other grounds*, 342 U.S. 396 (1952).

50 *See* Timothy C. Frautschi, Comment, *Personal Jurisdiction Requirements Under Federal Change of Venue Statutes*, 1962 WISC. L. REV. 342, 342 n.5 (1962) (listing cases supporting and rejecting transfer without personal jurisdiction); Comment, *Transfer in the Federal Courts in the Absence of Personal Jurisdiction*, 61 COLUM. L. REV. 902, 906-10 (1961) (summarizing the rationales advanced in early decisions for and against the transfer of cases over which the court lacked personal jurisdiction).

51 369 U.S. 463 (1962).

52 *Id.* at 464.

53 *Id.*

54 *Id.*

55 *Id.*

appeared in the Southern District and moved for dismissal, claiming that the Pennsylvania district court's lack of personal jurisdiction over the defendants precluded its use of section 1406(a).[56] The New York district court granted the motion and dismissed the claim.[57]

On appeal, a divided Second Circuit held that transfers from courts that lacked personal jurisdiction over the defendant were beyond the authority granted by the statute:[58]

> Section 1406(a) provides for the transfer of cases when venue is improper. It does not mention jurisdictional defects. Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect, impliedly provides for a transfer to cure a more basic jurisdictional defect. The lesser does not by implication include the greater.[59]

The Supreme Court reversed.[60] In holding that section 1406(a) transfers did not require that the transferor court obtain personal jurisdiction over the defendant, the Court explicitly endorsed a broad reading of the section: "The language of 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not."[61] In so doing, the Court referred to a general congressional policy of "removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies."[62]

The Supreme Court also noted the significance of a plaintiff's timely filing, regardless of the propriety of the forum in which the claim was filed.[63] The Court argued that Congress, in passing section 1406(a), recognized that the "interest of justice" required that certain claims be transferred to escape "time consuming and justice defeating

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56 *Id.*

57 *Id.* at 465.

58 Goldlawr, Inc. v. Heiman, 288 F.2d 579 (2d Cir. 1961), *rev'd*, 369 U.S. 463 (1962). *See* Comment, *Transfer in the Federal Courts in the Absence of Personal Jurisdiction*, *supra* note 50, at 912 (discussing *Goldlawr* decision).

59 288 F.2d at 582.

60 Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962).

61 *Id.* at 466.

62 *Id.*

63 *Id.* at 467. The Court observed:

> When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitations were intended to insure.

Id.

technicalities,"[64] and that interpreting section 1406(a) to require dismissal where the plaintiff has made a mistake would "at least partially frustrate this enlightened congressional objective."[65] As courts continued to struggle to find the exact parameters of their authority to authorize section 1406(a) transfers, the broad language of the *Goldlawr* decision proved very powerful in extending the statute's reach.[66]

Goldlawr held that section 1406 could be used to transfer claims defective as to both personal jurisdiction and venue. It did not address the applicability of section 1406 to claims defective only as to personal jurisdiction. Courts confronted with claims that met venue requirements but fell outside their territorial jurisdiction thus faced a dilemma. They could have remained faithful to the language of section 1406 and refused to transfer a claim filed in a proper venue. This, however, would have placed the plaintiff who had erred as to both personal jurisdiction and venue in a better position than the plaintiff who had erred only as to personal jurisdiction.[67] Unwilling to sanction this obvious injustice, courts universally rejected this approach.[68]

Instead, courts resorted to various interpretations of both transfer provisions to reach the result desired.[69] Many courts relied on what

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64 *Id.* at 467 (quoting Internatio-Rotterdam, Inc. v. Thomson, 218 F.2d 514, 517 (4th Cir. 1955)).

65 *Id.*

66 Several courts have argued that Congress has intervened to obviate the need for an expansive reading of § 1406(a). Ross v. Colorado Outward Bound Sch., Inc., 822 F.2d 1524, 1526-27 (10th Cir. 1987) (citing 28 U.S.C. § 1631 (1988)); Murphy v. Klein Tools, Inc., 693 F. Supp. 982, 986 (D. Kan. 1988) (same). Both *Ross* and *Murphy* cite 28 U.S.C. § 1631 as an expression of Congress' desire to clear up confusion surrounding transfer of cases over which a federal court lacks jurisdiction.

While courts have applied § 1631 to cases over which the court lacked personal jurisdiction, the legislative history of the statute indicates that Congress' objective in passing § 1631 was primarily to cure defects in subject matter jurisdiction associated with the creation of the new federal circuit. *See* 15 WRIGHT ET AL., *supra* note 17, at 262 n. 5 ("The suggestion by one author that the 1982 [federal transfer] statute may have something to do with venue or personal jurisdiction . . . flies in the face of the language and the legislative history of the statute."); Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. § 1631*, 29 S. TEX. L.J. 189, 224 (1987) (noting that the legislative history of the section makes no reference to lack of personal jurisdiction).

67 Justices Harlan and Stewart, dismissing the possibility that § 1406 could apply to properly venued claims, dissented from the *Goldlawr* majority's broad reading of § 1406 for precisely this reason. *Goldlawr*, 369 U.S. at 468 (Harlan, J., dissenting). Harlan noted:

> it is incongruous to consider, as the Court's holding would seem to imply, that in the 'interest of justice' Congress sought § 1406(a) to deal with the transfer of cases where both venue and jurisdiction are lacking in the district where the action is commenced, while neglecting to provide any comparative alleviative measure for the plaintiff who selects a district where venue is proper but where personal jurisdiction cannot be obtained.

Id.

68 *See* Martin v. Stokes, 623 F.2d 469, 473 (6th Cir. 1980).

69 *See id.* at 473-74 (discussing the several bases for transfer of claims filed in a correct venue but over which the court lacks personal jurisdiction).

has been referred to as a "broad reading" of section 1406,[70] one which allows the transfer of claims filed in a proper venue if personal jurisdiction is lacking. Although perhaps inconsistent with a statute phrased in terms of defects in venue, this result eliminates prejudice toward plaintiffs who, in choosing a proper venue, are mistaken only as to personal jurisdiction. This position was first expressed by the Fifth Circuit in *Dubin v. United States.*[71]

Dubin presented the dilemma hypothesized by the *Goldlawr* dissent: a claim that met venue requirements but fell outside the personal jurisdiction of the district court.[72] The Fifth Circuit, citing

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Courts have resorted to some creative statutory interpretation in their efforts to resolve the apparent inconsistency created by the statute's venue-specific language. In Corke v. Sameiet Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978), the Second Circuit authorized transfer by collapsing §§ 1404 and 1406.

The Fifth Circuit, agreeing with the conclusion that claims over which a court lacks personal jurisdiction could be transferred despite proper venue, adopted a slightly different reasoning: "In this circuit, we achieve the same result by invoking either section, not by reading the two together." Liaw Su Teng v. Skaarup Shipping Corp., 743 F.2d 1140, 1148 (5th Cir. 1984). The court concluded that "a transfer to a district in which personal jurisdiction over the defendant can be obtained may properly be made under either section 1404(a) or section 1406(a)." *Id.* at 1148 (quoting Ellis v. Great S.W. Corp., 646 F.2d 1099, 1106 (1981)).

Commentators and courts have criticized the failure to properly distinguish §§ 1404(a) and 1406(a). *See, e.g.*, 15 WRIGHT ET AL., *supra* note 17, at 262-64. Wright, Miller and Cooper, agreeing that a claim lacking personal jurisdiction should be transferable from a district in which venue is proper, argue that this result should be obtained through § 1404(a), not § 1406(a). *Id.* This solution would preserve the reading of § 1406 as a statute directed only at venue and eliminate the need for a broad reading of § 1406:

> A number of cases have held that § 1406(a) applies, even though venue is proper in the district, if personal jurisdiction cannot be obtained over the defendant in that district. The result is entirely sound. If, as Goldlawr holds, transfer can be ordered of a case from a district where both venue and personal jurisdiction are lacking, it should follow a fortiori that there can be transfer if venue is proper and only personal jurisdiction is lacking. But the correct way to achieve this result is to apply the Goldlawr principle by analogy to transfers under 28 U.S.C.A. § 1404(a), the statute that allows transfer from one proper venue to another. The end result is the same, and very few litigants will care whether the court purports to proceed under 1404(a) or 1406(a) in transferring to a district where service can be made. Thus it is hardly surprisiug that many courts say that either statute can be used. But such statements as "venue is 'wrong' in this district in the sense that litigation may not proceed because of absence of personal jurisdiction over the defendant" blur the very different concepts of venue and personal jurisdiction.

Id. at 264-66 (footnotes omitted).

70 *See* Manley v. Engram, 755 F.2d 1463, 1467 n.8 (11th Cir. 1985); Sinclair v. Kleindienst, 711 F.2d 291, 293-94 (D.C. Cir. 1983); Taylor v. Love, 415 F.2d 1118, 1120 (6th Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967); Dubin v. United States, 380 F.2d 813 (5th Cir. 1967); 15 WRIGHT ET AL., *supra* note 17, § 3827, at 264 n.11 (listing cases in accord with *Dubin*).

71 380 F.2d 813.

72 *Id.*

Goldlawr extensively,[73] adopted a broad view of what made venue improper for the purpose of the statute. Noting that the language of the statute did not speak to " 'wrong' venue but rather to venue laid in a 'wrong division or district,' "[74] the court held that the transferor court's lack of personal jurisdiction made the district improper for the purposes of section 1406 transfer.

The *Dubin* court's reading of section 1406(a), generally accepted by other circuits,[75] paved the way for subsequent attempts to apply section 1406 to limitations-barred claims. By allowing section 1406(a) to apply to claims filed in a proper venue, the *Dubin* court divorced section 1406(a) of any improper venue requirement and recast the section as a general device aimed at the removal of vaguely defined "obstacles" to adjudication.[76]

3. *Distinguishing Statutes of Limitations and Place-of-Suit*

The extension of section 1406 to defects in personal jurisdiction is best understood as a product of the unique relationship between personal jurisdiction and venue.[77] If, as some commentators suggest, the concepts of venue and personal jurisdiction in federal court are properly conceived of as two sides of a single coin, there is no reason to treat the two concepts separately in deciding how to allocate claims among federal courts. A provision designed to protect plaintiffs from complicated venue statutes would serve the same interests when applied to defects in personal jurisdiction.[78]

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73 *Id., passim.* Almost half of *Dubin* consists of a quotation from *Goldlawr.* More than half of *Goldlawr* is reprinted in *Dubin.*

74 *Id.* at 815.

75 *See supra* note 70 (cases in accord with *Dubin*).

76 *Dubin*, 380 F.2d at 815 ("We conclude that a district is 'wrong' within the meaning of § 1406 whenever there exists an 'obstacle [to] * * * an expeditious and orderly adjudication' on the merits. Inability to perfect service of process on a defendant in an otherwise correct venue is such an obstacle.").

The *Dubin* court did not suggest a list of "obstacles" that might justify transfer under § 1406. In fact, the opinion contains contradictory language with respect to obstacles that might qualify as grounds for transfer. In discussing the differences between §§ 1404(a) and 1406(a), the *Dubin* court notes that § 1406(a) applies "when there exists an obstacle—either incorrect venue, absence of personal jurisdiction, or both . . . ." 380 F.2d at 816. This language suggests that the "obstacles" justifying transfer are limited to defects in venue, personal jurisdiction, or both. Later in the same paragraph, however, the court notes that § 1406(a) applies "in cases where the first forum chosen is improper in the sense that litigation may not proceed there," a much broader categorization. *Id.*

77 *See* Clermont, *supra* note 1, at 430-37 (describing the concepts of personal jurisdiction and venue as sharing "common history," "similar purposes," and "parallel structure").

78 Objections to the extension of the statute stemmed mainly from the idea that a venue statute should not be read to cure defects in personal jurisdiction because "the lesser does not by implication include the greater." Goldlawr, Inc. v. Heiman, 288 F.2d 579, 582 (2d Cir. 1961), *rev'd*, 369 U.S. 463 (1962). If, however, one accepts the argument that federal court limitations on territorial jurisdiction are, like venue, primarily non-con-

The *Goldlawr* Court relied heavily on the common characteristics of venue and personal jurisdiction in interpreting the scope of section 1406:

> Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact * * * business' in the Eastern District of Pennsylvania. The language and history of § 1406(a) . . . show a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.[79]

By alluding to the language of the venue statute applicable to the case,[80] the *Goldlawr* Court recognized the similar conceptual framework that underlies venue and personal jurisdiction.[81] Perhaps more importantly, the Court noted that transfer serves the same "congressional objective" whether the defect is in personal jurisdiction or venue.[82]

Within the federal system, both venue and personal jurisdiction relate almost exclusively to place-of-suit. The limits on a district court's territorial authority to adjudicate are not defined directly by the Constitution.[83] Within the broad constraints of the constitutional "forum reasonableness" provisions, Congress could extend the personal jurisdiction of federal courts to encompass virtually any diversity action.[84] Instead, through the Federal Rules of Civil Procedure, Con-

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stitutional place-of-suit provisions, it makes little sense to define personal jurisdiction as "greater than" venue.

79 *Goldlawr*, 369 U.S. at 466 (footuotes omitted).

80 *Id.* at 464 n.7 (citing 15 U.S.C. § 22 (1988)).

81 *Id.* at 466 n.11 (referring to "the difficulties which may arise in determining where corporations can be found or transact business").

82 *Id.* at 467.

83 Constitutional limits on territorial authority to adjudicate in federal court are defined by the Due Process Clause of the Fifth Amendment of the United States Constitution, and are determined by the defendant's minimum contacts with the United States as a whole, and by an element of "forum-reasonableness." *See* Clermont, *supra* note 1, at 427 & n.82.

84 Edward L. Barrett, Jr., *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 629-30 (1954) ("In the federal courts . . . there is no constitutional impediment to Congress treating the entire country as a single jurisdiction and permitting service of process anywhere within it.") (citation omitted). *See also* Clermont, *supra* note 1, at 427 n.82 (discussing Congress' power to confer nationwide jurisdiction on federal courts).

Professor Barrett may overstate Congress' power to confer territorial jurisdiction on the federal courts. The Supreme Court has read the Due Process Clause of the Fifth Amendment to include an element of "forum reasonableness," which would circumscribe Congress' authority to authorize nationwide service of process. *See* Clermont, *supra* note 1, at 427 n.82 (reading the Fifth Amendment to impose venue restrictions on federal courts' exercise of jurisdiction).

gress has limited the reach of a district court's personal jurisdiction with place-of-suit provisions determined by an interaction of federal statute and state law.[85] In this respect, limitations on territorial authority to adjudicate in diversity actions are similar to venue restrictions, which are simply statutory rules without constitutional dimension. Given the similar nature of these place-of-suit provisions, it is reasonable to attribute to Congress a desire to treat the two consistently.

Statutes of limitations are qualitatively different, in that they are in no sense related to place-of-suit.[86] Whereas the "correction" of place-of-suit errors provided for by section 1406 involves the modification of federal place-of-suit provisions embodied in venue and personal jurisdiction restraints, the modification of statutes of limitations deals with interests created by and defined by the states.[87]

Combined with a court's authority to transfer claims over which it has no personal jurisdiction, the authority to transfer limitations-

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85 The jurisdictional reach of federal courts sitting in diversity is defined by a combination of federal statutes, federal rules of civil procedure and state law made applicable to the federal courts through the operation of the *Erie* doctrine. These boundaries to district court jurisdiction are best seen as self-imposed, non-constitutional limitations. *See* Clermont, *supra* note 1, at 427 n.84.

86 Statutes of limitations protect two interests, those of the defendant and those of the forum. The defendant has an interest in having a definite period of time after which she is free of the risk of liability. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' " (quoting Order of R.R. Tels. v. Railway Express Agency, Inc. 321 U.S. 342, 348-49 (1944)); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 325-26 (1990). The forum has an interest in not deciding cases on the basis of "stale evidence" and in "allocating judicial resources to more recent cases." Kramer, *supra*, at 326 (citing Guaranty Trust Co. v. York, 326 U.S. 99 (1945)).

87 *See* Kramer, *supra* note 86, at 325-26.

In Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), the Supreme Court, per Justice Scalia, refused to recharacterize statute of limitations as substantive rather than procedural. 486 U.S. at 726. In so doing, the Court relied on the historical notion that statutes of limitations are best seen as protecting the interests of the state, not the defendant. "The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interests and convenience." *Id.* at 726 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 462-63 (2d ed. 1832) (internal quotation marks omitted)).

Justice Brennan undertook a more complex treatment of the interests contained in a statute of limitations in a concurring opinion. 486 U.S. 736 (Brennan, J., concurring). Justice Brennan also characterized statutes of limitations as a reflection of a series of state interests:

> The statute of limitations a State enacts represents a balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law.

Id.

barred claims would effectively create a national filing system for federal courts. Filing in any federal court, regardless of whether the district is proper as to venue, personal jurisdiction, or limitations law, would serve to toll any applicable statute of limitations. Having tolled the applicable limitations period, the plaintiff could then search for a proper district in which to pursue his claim.

Congress could provide for a national filing system were it so inclined. This might be accomplished in two ways. Congress could enact a national tolling provision for actions filed in federal court. Statutes of limitations in federal courts have repeatedly been characterized as procedural,[88] and thus subject to the control of Congress acting pursuant to Article III.[89] Alternatively, Congress could provide for federal choice-of-law rules that would allow for the application of the longer transferee court statute of limitations.[90] In either case the first filing of the action would remain operative for statutes of limitations purposes, regardless of the propriety of the district in which the claim was filed.

Congress' broad authority notwithstanding, there is no indication that Congress intended to exercise its power to create a national filing system when it promulgated the transfer statutes.[91] There is, rather, reason to believe that Congress intended the transfer statutes to function within the choice-of-law framework established for federal courts in *Klaxon v. Stentor*.[92]

B. Choice-of-Law

In *Klaxon v. Stentor* the Supreme Court extended the *Erie* doctrine to state choice-of-law rules.[93] Federal district courts were instructed to apply the choice-of-law rules of the states in which they sat. Although subjected to periodic attack,[94] *Klaxon* has been left undisturbed for half a century.

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88 *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) (characterizing statutes of limitations as procedural for choice of law purposes).

89 U.S. CONST. art. III. *See, e.g.*, 28 U.S.C. § 2072 (1988) (Congress exercising its authority to regulate procedure in federal courts).

90 *See* Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 401-02 (1964).

91 *See supra* Part II.A.1. (discussing legislative history of transfer statutes).

92 Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

93 *Id.* at 496.

94 *See, e.g.*, PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 794-800 (3d ed. 1988) (questioning and criticizing *Klaxon*); Daniel C.K. Chow, *Limiting* Erie *in a New Age of International Law*, 74 IOWA L. REV. 165, 179 n.69 (1988) (summarizing criticism of *Klaxon*); Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1078 n.8 (1987) (listing commentators critical of *Klaxon*).

Klaxon instructs federal courts to apply state choice-of-law rules to claims filed in a proper federal forum. The choice-of-law rules for section 1404 transfer developed in *Ferens v. John Deere Co.* preserve this framework by providing for post-transfer application of these same rules.[95] Transfers under section 1406 are similarly in tune with the *Klaxon* choice-of-law scheme. The choice-of-law scheme of a particular state does not attach to a claim filed in an improper federal forum. Accordingly, these choice-of-law rules do not follow the transferred claim.

Attempts to extend section 1406 to defects in limitations law undermine this choice-of-law framework. By providing for the application of transferee choice-of-law rules following a filing in a proper forum, these decisions destroy the symmetry that characterizes the interplay between the transfer statutes and the *Klaxon* choice-of-law regime.[96]

The application of transferee law following transfer from a proper venue allows courts to bypass *Klaxon* by escaping forum state choice-of-law rules. This bypass undermines the very purposes of the *Klaxon* rule. *Klaxon* was based primarily on the desire to align federal and state court proceedings within a single state, so that "the accident of diversity" would not lead to different outcomes in adjacent courthouses.[97] The application of section 1406 to time-barred claims leads to the opposite result, in that the claim properly filed in federal court will eventually be governed by the choice-of-law rules of the transferee court.

Absent congressional indication to the contrary, federal courts should observe the choice-of-law rules of the states in which they sit. Transfers designed to evade statutes of limitations defenses are instances of federal choice-of-law not contemplated by the current diversity framework. Although Congress would be free, within broad limits, to provide for federal choice-of-law rules, there is no indication that Congress intended the federal transfer statutes to authorize a departure from the *Klaxon* regime.

C. *The Timely Filing Requirement*

The analysis thus far suggests that section 1406 is best read to contain a timely filing requirement that prohibits transfer of claims that are not filed within the statute of limitations of the transferor court. As applied to claims filed in a proper venue with jurisdiction over the action, the timely filing requirement ensures that transfer will

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95 *See supra* notes 30-38 and accompanying text.

96 *See generally* Currivan, *supra* note 7, *passim* (interplay of transfer of venue and choice of law rules); Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980) (same).

97 *Klaxon*, 313 U.S at 496.

not upset the *Klaxon* choice-of-law regime.[98] This timely filing requirement ought to extend to all section 1406 transfers, whether or not the transferor court sits in a district that is "wrong" for the purposes of the section.[99] This would ensure that the plaintiff who files late in an improper forum is not given a remedy withheld from a plaintiff who files late in a proper court.[100] The diligence of the plaintiff should be measured only by the statute of limitations of the court in which the plaintiff chose to file his claim.[101]

Where transfer occurs from a forum that lacks either proper venue or jurisdiction over the action, the subordination of the transferee statute of limitations may at first seem odd. In these cases, the transferee court sits in the only forum that retains an interest in the action. The transferor court, lacking proper venue or personal jurisdiction, has no interest in the adjudication of the claim. The transferee court, on the other hand, will have proper venue and personal jurisdiction with respect to the claim, and thus, presumably, an interest in its adjudication.[102] One might argue that the transferee forum should be free to retain choice-of-law rules that toll their own statute of limitations with respect to claims mistakenly filed in other forums and that the federal transfer statute should not be used to cut short the transferee statute of limitations.

The tolling effect of the federal transfer statutes, however, is itself a matter of federal law,[103] in that the tolling authorized by the statute operates independently of the tolling provisions of the transferee

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98 *See supra* part II.B.

99 Ferguson v. Kwik-Chek, 308 F. Supp. 78 (D.V.I. 1970), cited by Currivan, *supra* note 7, at 162 & n.65, as "the only reported case of this type," held otherwise.

100 The opposite conclusion would encourage defendants to consent to jurisdiction and venue in the transferor court by failing to raise them as defenses. *See* FED. R. CIV. P. 12 (h)(1). Consent to venue and jurisdiction would make the transferor district proper for the purpose of the transfer statutes, precluding application of transferee law once transfer is had and forcing the dismissal of the plaintiff's claims.

101 *See* Currivan, *supra* note 7, at 163 ("[O]nly a timely filing in the first forum should toll the statute of limitations of the second.").

102 *See infra* note 22 and accompanying text (requirement that transferee court have proper venue and personal jurisdiction with respect to the transferred claim).

103 PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 1140 & n.10 (2d ed. 1973).

In removed cases, federal law will in turn call for application of the state statute of limitations and the state law of commencement. This will ordinarily be the case whether or not the cause of action is based on state law, and whether or not the applicable statute of limitations arises from state law. *See* Herb v. Pitcairn, 324 U.S. 117, 120 (1945) (whether case is pending in state court for the purpose of tolling a federal statute of limitations is determined by state law); Winkels v. George A. Hormel & Co., 874 F.2d 567, 570 (8th Cir. 1989) ("[A] federal court must honor state court rules governing commencement of civil actions when an action is first brought in state court and then removed to federal court."); McConnell v. Thomson Newspapers, Inc., 802 F. Supp. 1484, 1498 (E.D. Tex. 1992) (same); Dravo Corp. v. White Consol. Indus., 602 F. Supp. 1136, 1139 (W.D. Pa. 1985) (same).

state. Federal interests embodied in the statutory sections likewise legitimize the subordination of transferee statute of limitations in favor of a federal timely filing requirement. This federal timely filing requirement should require that all transferred claims be filed within the statute of limitations of the transferor court.

CONCLUSION

Transfer of venue in the federal court system is inexorably tied to choice-of-law. Fairness to the litigants, respect for state interests, and doctrinal consistency require that transfer of venue and choice-of-law rules be aligned to accommodate both the place-of-suit provisions of the federal courts and the substantive concerns embodied in state law. The extension of section 1406 to time-barred claims undermines this matrix by allowing federal courts to circumvent state choice-of-law rules. Section 1406 is best read to contain a blanket rule that makes the availability of transfer dependent upon commencement of the action within the applicable limitations period in the transferor court.

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