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CHOICE OF LAW IN FEDERAL COURT AFTER TRANSFER OF VENUE

After a transfer of venue from one federal court to another under 28 U.S.C. § 1404(a),¹ § 1406(a),² or § 1407(a),³ the first question confronting the new forum is often whether to apply its own law or that of the transferor court.⁴ Prior to 1964, the courts had split over the proper resolution of this problem.⁵ Then, in Van Dusen v. Barrack,⁶ the United States Supreme Court provided a partial answer. Van Dusen held that when a defendant obtains a

¹ 28 U.S.C. § 1404(a) (1970) provides: "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."

² 28 U.S.C. § 1406(a) (1970) provides: "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."

³ 28 U.S.C. § 1407(a) (1970) provides in part: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."

⁴ The problem of choice of law after transfer of venue can arise with respect to both state and federal law. A federal court in a diversity case normally follows the conflict-of-law rules of the state in which it sits. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Consequently, after a transfer of venue, a choice-of-law problem exists if the courts of the transferee and transferor states, under their respective conflict-of-law rules, would apply different laws. Similar problems can arise even in a non-diversity case, where the claim arises under federal law, since some issues, such as the statute of limitations, may be governed by state law. See, e.g., Sargent v. Genesco, Inc., 492 F.2d 750 (5th Cir. 1974); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D.W. Va. 1973); Lamb v. United Sec. Life Co., 59 F.R.D. 44 (S.D. Iowa 1973). A choice-of-law problem concerning federal law will arise after transfer only if the transferee court's interpretation of federal law differs from that prevailing in the transferor court. Problems of this sort typically come up in multidistrict litigation after transfer under § 1407. See note 27 infra.⁷


transfer under section 1404(a), the transferee court is "obligated to apply the state law that would have been applied if there had been no change of venue."\textsuperscript{7} The \textit{Van Dusen} opinion, however, did not purport to be exhaustive.\textsuperscript{8} For example, the Court expressly left open the question of choice of law where plaintiffs seek transfer,\textsuperscript{9} and did not address the problem of applicable law after transfers under sections 1406(a) and 1407(a).

Two principal factors provide an analytic framework for examining the choice-of-law issue that arises after a transfer of venue: (1) the propriety of the initial forum under federal law with respect to venue and personal jurisdiction,\textsuperscript{10} and (2) the identity of the party seeking transfer. The American Law Institute (ALI), in its proposed revision of the Judicial Code,\textsuperscript{11} suggests that the choice of law should depend entirely on which party moved for transfer.\textsuperscript{12}

\textsuperscript{7} Id. at 639.
\textsuperscript{8} "[W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferee, as opposed to the transferor, State." Id.
\textsuperscript{9} Id. at 640. The Court also left open the choice-of-law issue in cases where the courts of the state in which the transferor court was located would have dismissed the action on the ground of forum non conveniens. Id. See note 27 infra.
\textsuperscript{10} The distinction between transfers from proper and improper forums is analogous to the distinction between the two principal transfer statutes—§§ 1404(a) and 1406(a). These statutes are set out in notes 1 & 2 supra. Although § 1406(a) refers to cases "laying venue in the wrong division or district," § 1404(a) makes no such distinction; some courts have therefore stated that § 1404(a) should be used when venue is proper, and that § 1406(a) should be used when venue is improper. See, e.g., Van Dusen v. Barrack, 376 U.S. 612, 634 (1964). Many courts, however, have blurred this distinction. Some have permitted transfers under § 1406(a) where venue in the first forum was proper but personal jurisdiction was lacking. E.g., Dubin v. United States, 380 F.2d 813, 815 (5th Cir. 1967); Ferguson v. Kwik-Chek, Winn-Dixie Stores, Inc., 308 F. Supp. 78, 80 (D.V.I. 1970). A few courts have permitted transfers under § 1404(a) where venue in the first forum was improper. E.g., Patin v. Sioux City and New Orleans Barge Lines, Inc., 253 F. Supp. 984, 986-87 (W.D. La. 1966).


\textsuperscript{12} Section 1305 of the proposed revision deals with transfers on motion of the defendant, and provides:

To the extent that the court ordering the transfer would have been obliged to apply the law of a particular State, including rules with respect to refusal to adjudicate the merits of the controversy and rules for selecting the applicable rules
The ALI Study codifies the Van Dusen rule for cases transferred upon defendants' motions, but applies the law of the transferee court to plaintiff-transferred actions. This Note examines judicial treatment of the issue since Van Dusen, demonstrates that the ALI Study has oversimplified the problem, and proposes a rule based solely on the propriety of the initial forum.

I

TRANSFER FROM A PROPER FORUM

Cases in which the transferor forum was proper under federal law with respect to both venue and personal jurisdiction divide into three categories: (1) cases in which the defendant moved for transfer, (2) cases in which the plaintiff moved for transfer, and (3) cases in which both parties or the court itself initiated transfer.

A. Transfer on Defendant's Motion

When a defendant moves for transfer of venue, the case falls within the rule of Van Dusen v. Barrack. Van Dusen arose out of the crash of a commercial airliner in Massachusetts. Although most of the plaintiffs in the resulting personal injury and wrongful death actions brought suit in that state, many plaintiffs, including Barrack, sued in federal court in Pennsylvania. The defendants moved under section 1404(a) for a transfer of venue to the federal district court in Massachusetts. The plaintiffs argued, however, that a transfer to Massachusetts could subject them to a prejudicial
change of applicable state law, since Pennsylvania's conflict-of-law rules might require the application of Pennsylvania law.

In determining whether the Massachusetts district court would be bound by Pennsylvania's conflict rules, the Supreme Court pursued three lines of analysis. First, the legislative history of section 1404(a) showed that the statute's purpose was to promote convenience; Congress designed section 1404(a) to be "a federal judicial housekeeping measure," not a vehicle for effecting changes in applicable substantive law. Second, the possibility of a change of law could turn the transfer device into a "forum-shopping instrument." Finally, because of the policies underlying Erie R.R. v. Tompkins, "the 'accident' of federal diversity jurisdiction [should] not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." The Court con-

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17 376 U.S. at 626. Under Massachusetts law, damages for wrongful death were based on the degree of the defendant's culpability and were limited to $20,000. Under Pennsylvania law, damages were based on the principle of compensation rather than on culpability and were not limited in amount. Id. at 627.
18 Id. at 628-29.

The district court granted the defendant's motion, and ordered the actions transferred to the District of Massachusetts. Popkin v. Eastern Air Lines, Inc., 204 F. Supp. 426, 428 (E.D. Pa. 1962). The plaintiffs then sought a writ of mandamus to compel the district judge to vacate his order. The Third Circuit granted the writ on the ground that, since the plaintiffs had not qualified under Massachusetts law to sue as personal representatives of the decedents, the transferee district was not one where the action "might have been brought" within the meaning of § 1404(a). Barrack v. Van Dusen, 309 F.2d 953, 957-58 (3d Cir. 1962). The Supreme Court held, however, that the phrase "where it might have been brought" must be construed according to federal law; a state law concerning capacity to sue could not prevent transfer of venue. 376 U.S. at 624-25.
19 The Court determined that [c]ongress, in passing § 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one.
   . . . This legislative background supports the view that [the purpose of § 1404(a)] was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.
20 Id. at 634-35 (emphasis added).
21 Id. at 636.
22 Id.
23 304 U.S. 64 (1938). The Van Dusen Court viewed uniformity of results between federal and state courts as the principal policy underlying Erie: "[F]or the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." 376 U.S. at 638 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)).
23 376 U.S. at 638. "[T]he 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." Id. at 699.
cluded that a transfer under section 1404(a) should not defeat the state-law advantages that a plaintiff may obtain through his choice of forum, and that litigants should not receive "a change of law as a bonus for a change of venue." Therefore, "where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."26

The Supreme Court thus settled the question of choice of law after transfer from a proper forum on defendant's motion. Courts subsequently facing the problem have uniformly followed Van Dusen, applying the law of the transferor forum.27

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24 Id. at 635.
26 376 U.S. at 639. The Court nevertheless held that the transferee court "may apply its own rules governing the conduct and dispatch of cases in its court." Id. at 639 n.40. See Ryer v. Harrisburg Kohl Bros., Inc., 53 F.R.D. 404, 408 (M.D. Pa. 1971) (transferee court need not follow transferor's local pleading rules).
B. **Transfer on Plaintiff’s Motion**

When a plaintiff who has filed suit in a proper forum moves for a transfer of venue, the choice-of-law problem becomes more difficult. The *Van Dusen* Court expressly left this issue open, and the lower courts have divided over its proper resolution. The transferor court required the transferee court to apply the law of a foreign country. See *Quandt v. Beech Aircraft Corp.*, 317 F. Supp. 1009, 1013 (D. Del. 1970) (negligence).

Courts have extended the *Van Dusen* principle to cover transfers under section 1407(a) designed to coordinate or consolidate related actions pending in different districts. See 28 U.S.C. § 1407(a) (1970), set out in note 3 supra. See, e.g., *In re Paris Air Crash*, 399 F. Supp. 732, 749 (C.D. Cal. 1975); *In re Air Crash Disaster Near Hanover, N.H.*, 314 F. Supp. 62, 63 (J.P.M.D.L. 1970). The *Van Dusen* rule has also been applied where the courts of the transferor state would have dismissed on the ground of *forum non conveniens*. In *In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106 (D. Mass. 1975), the court held that the law of the transferor state governed, although a court of the transferor state had in fact dismissed plaintiff’s action on the ground of *forum non conveniens*. *Id.* at 1122. See *Caffrey, The Role of the Transferee Judge in Multi-district Litigation*, 69 F.R.D. 289, 294-97 (1976).


The question of applicability of the *Van Dusen* principle to transfers under § 1406 generally will not arise in the proper-forum context since § 1406, by its own terms, applies only to transfer from improper forums. See note 2 supra. But see note 10 supra.

28 376 U.S. at 640.


*Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184, 185 (4th Cir. 1972), is the only reported case in which a plaintiff moved for transfer from a proper forum for reasons other than the statute of limitations. The *Kline* court, in applying transferor law on tort liability of an absent automobile owner, merely cited *Van Dusen*, apparently overlooking the distinc-
ALI proposes that the law of the transferee forum should govern after a transfer on plaintiff’s motion, regardless of whether the initial forum was proper. Under this proposal, the solution to the choice-of-law problem depends entirely upon whether the plaintiff or the defendant initiated the transfer. The purpose of this distinction is to prevent plaintiffs from using transfers to carry favorable law from one forum to another. Thus the ALI, like the Van Dusen Court, wishes to prevent forum shopping. Unfortunately, although applying the law of the transferee makes sense after a transfer from an improper forum, the ALI rule will not prevent forum shopping where the plaintiff’s original choice of forum was proper.

Analysis of the ALI rule requires a close look at the meaning of “forum shopping.” Plaintiffs engage in the simplest kind of forum shopping when they initially select forums with favorable laws. The Van Dusen Court did not intend to proscribe this practice; indeed, the Court sought to protect advantages obtained by the plaintiff through his choice of forum, even if that forum was inconvenient. The Court in Van Dusen sought to prevent only forum shopping accomplished by transfer of venue. Parties can use transfer of venue as a forum-shopping device in two ways. First, a party dissatisfied with the law of the original forum may attempt to achieve a favorable change of law by transferring to another forum, and hoping that the law of the transferee will govern. Van Dusen prevents use of this tactic by defendants. Second, a party may intentionally select a forum with favorable law in the hope of transporting that law to a more convenient forum. The
ALI rule seeks to prevent plaintiffs from using this tactic by applying the law of the transferee.\(^3^7\)

The ALI thus bases its rule on two assumptions: first, that plaintiffs will attempt to use the second tactic rather than the first—transporting, rather than changing, the applicable law; and second, that application of the law of the transferee will prevent plaintiffs from transporting favorable law to more convenient forums.\(^3^8\) Both of these assumptions are questionable. The first envisions a clever plaintiff who, with premeditated cunning, plans to file in the most favorable forum and then to transfer to the most convenient one; it overlooks the blundering plaintiff who chooses a forum with unfavorable law and hopes to use the transfer to rectify his error. If this assumption were correct, plaintiffs would presumably argue for the law of the transferor. In the few reported cases where plaintiffs moved for transfer from proper forums, however, the defendants argued for the law of the transferor.\(^3^9\) This suggests that plaintiff-transferors often blunder in selecting an initial forum. In these cases, the ALI rule would encourage use of the transfer as a forum-shopping device. The ALI's second assumption is even more questionable; application of the law of the transferee will seldom prevent the clever plaintiff from transporting favorable law to a more convenient forum. The plaintiff can achieve this goal by filing his action in a favorable but inconvenient forum, and then waiting for the defendant to move for transfer.\(^4^0\) The plaintiff can be reasonably certain that the defendant will make such a motion, since transfer will deprive the defendant of nothing, but will provide him with a more convenient courthouse.\(^4^1\)

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\(^{37}\) See note 32 supra.

\(^{38}\) Because the outcome under the ALI rule turns on whether the plaintiff or the defendant initiated the transfer, a third assumption implicit in the rule is that in each case only one party will move for transfer. At times, however, both parties, or the court itself, may initiate a transfer. See text accompanying notes 49-54 infra.

\(^{39}\) See note 29 supra.

\(^{40}\) Burger King Corp. v. Continental Ins. Co., 359 F. Supp. 184 (W.D. Pa. 1973), illustrates the use of this strategy. In Burger King, an insurance contract covering a Pennsylvania restaurant contained a clause purporting to bar suits commenced more than one year after a loss. This clause would have been valid under Pennsylvania law, but was invalid under Florida law. Eighteen months after the restaurant was damaged, plaintiff, a Florida corporation, commenced an action in a Florida state court. The defendant removed the action to federal court, transferred venue to the Western District of Pennsylvania under § 1404(a), and moved for summary judgment on the basis of the one-year limitation clause. The court held that the conflict rule of the transferor court governed. Since Florida courts would apply Florida law, the clause was invalid. Id. at 186-88.

\(^{41}\) See In re Air Crash Disaster at Boston, Mass., 399 F. Supp. 1106, 1122 (D. Mass. 1975). It is possible, of course, that a transferee forum convenient for the plaintiff will be
In lieu of adopting the ALI proposal, courts should extend the *Van Dusen* holding to transfers by plaintiffs from proper forums. This solution would require the transferee court to apply the law of the forum first chosen by the plaintiff. The rule would not encourage forum shopping; it would merely enable plaintiffs wishing to transport favorable law to do directly what they can now accomplish indirectly. The rule would also prevent the blundering plaintiff who hoped to effect a favorable change of law from using the transfer as a forum-shopping device.

Moreover, applying the law of the transferor conforms with the other policies expressed in *Van Dusen*. Section 1404(a) was intended to promote the convenience of parties and not to affect substantive law. When a plaintiff chooses a proper forum with favorable law, he gains an advantage to which he is entitled. If he is permitted to transport that law to a more convenient forum, his use of the transfer merely promotes convenience without affecting substantive law. When a plaintiff attempts to use the transfer to effect a favorable change in substantive law, applying the law of the transferor will prevent him from obtaining "a change of law as a bonus for a change of venue." This solution also reflects the policies of *Erie* emphasized in *Van Dusen*; the plaintiff is unable to achieve "a result in federal court which could not have been

inconvenient for the defendant. One might argue that because the plaintiff cannot rely on the defendant to move for transfer to such a forum, the application of transferee law under the ALI rule does prevent the plaintiff from transporting favorable law to a forum that is convenient only for him, and that the application of transferor law would therefore encourage forum shopping. The language of § 1404(a), however, indicates that transfer is granted not merely for the convenience of the moving party, but for the convenience of "parties and witnesses." 28 U.S.C. § 1404(a) (1970). In such a case, therefore, the transferor court would probably not grant the plaintiff's motion for transfer. Thus, the cases in which a plaintiff cannot rely on the defendant to move for transfer are likely to be cases where the plaintiff's own transfer motion would fail. Exceptional situations may arise in which a defendant may decide, for reasons other than convenience, not to move for transfer to a more convenient forum. For example, if a poor plaintiff sues a rich defendant in an inconvenient forum with favorable law, the defendant may wish to remain in that forum in the hope that the expense of litigation will encourage the plaintiff to settle for a small sum. In such a case the second ALI assumption is realistic: the application of transferee law will prevent the poor plaintiff from transporting favorable law to the more convenient forum. On the other hand, the ALI rule, by effectively preventing transfer by the plaintiff, tends to frustrate the purpose of § 1404(a) by allowing the defendant to take advantage of his wealth at the expense of the convenience of parties and witnesses.

42 See text accompanying notes 19-20 supra.

43 See text accompanying note 34 supra.


45 For a discussion of these policies, see notes 22-23 and accompanying text supra.
achieved in the courts of the State where the action was filed."

Where a clever plaintiff wishes to transport favorable law to a convenient forum, application of the law of the transferor would produce the same result as a suit prosecuted in the courts of the transferor state. The blundering plaintiff wishing to effect a favorable change of law would be unable to use the transfer to obtain an advantage he could not have obtained in the courts of the transferor state. In the spirit of Erie, this solution thus maintains the "critical identity ... between the federal district court which decides the case and the courts of the State in which the action was filed."  

C. Transfer Initiated by Both Parties or by the Court

Not all transfers of venue are initiated by the motion of one party. The parties may make a joint motion for a transfer, or may stipulate to a change of locale; sometimes the court itself may initiate or suggest a transfer. In all these cases courts have uniformly applied the law of the transferor.

The ALI rule, under which the outcome depends on the identity of the moving party, does not solve the choice-of-law problem

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376 U.S. at 638.

The plaintiff's opportunity to rectify an error in forum selection by means other than transfer also corresponds to the opportunity available to plaintiffs in state court systems. If the statute of limitations of the second state has not yet run, the plaintiff can take advantage of the second state's more favorable law by filing a new action in federal court in that state.

Van Dusen v. Barrack, 376 U.S. at 639.


28 U.S.C. § 1407(c) (1970) provides in part: "Proceedings for the transfer of an action under this section may be initiated by—(i) the judicial panel on multidistrict litigation upon its own initiative . . . ." Unlike § 1407, § 1404 does not explicitly authorize a court to transfer venue without the motion of a party. See note 1 supra. The court in Stanley Works v. Globemaster, Inc., 400 F. Supp. 1325, 1338 (D. Mass. 1975), nevertheless construed § 1404(a) to permit such a transfer. Cf. I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361, 363 (8th Cir. 1965) (dictum) (unlike § 1404(b), § 1404(a) contains no language limiting district court's power to transfer).


See notes 11-14 and accompanying text supra.
CHOICE OF LAW

posed by these cases. Nonetheless, the ALI rule would seriously affect the number of requests—both individual and mutual—for transfer of venue. Consider the case in which the plaintiff chooses a forum with favorable law in the hope of transporting that law to a more convenient forum. Under the ALI rule, if the plaintiff moves for transfer, the law applied in the second forum will benefit the defendant; if the defendant moves for transfer, the law applied in the second forum will benefit the plaintiff. Thus, each party will have an incentive to wait for the other to move. This state of affairs would do little to promote the goal of “convenience of parties and witnesses.”\(^5\) The ALI proposal raises an even more serious problem when the plaintiff chooses a forum with unfavorable law, and later wants to correct his error. Under the ALI rule, if the plaintiff moves for transfer and the defendant does not, the law applied in the second forum will benefit the plaintiff; if the defendant moves for transfer and the plaintiff does not, the law applied in the second forum will benefit the defendant. Thus, if only one party moves, that party will gain a choice-of-law advantage. Consequently, both parties will move for transfer. The ALI rule therefore encourages the parties to create a situation for which it provides no solution.

In short, the ALI rule creates more problems than it solves. A more sensible approach would be to apply the law of the transferor regardless of who initiated the transfer. A party would then have no incentive to refrain from moving in the hope that his opponent would move; nor would any party be compelled to move in order to prevent his opponent from gaining a choice-of-law advantage. Convenience, rather than a desire to manipulate substantive law, would constitute the sole incentive for motions to transfer from proper forums. Moreover, court-ordered transfers would pose no special problems. Such transfers are not covered by the ALI's party-based proposal, but they fit neatly into a choice-of-law rule looking solely to the propriety of the initial forum.

II

TRANSFER FROM AN IMPROPER FORUM

When a plaintiff files an action in a forum in which venue is improper or in which the defendant is not subject to personal

jurisdiction, transfer is necessary to avoid dismissal, and is generally initiated by the plaintiff under section 1406(a). Consequently, under the ALI rule, the law of the transferee would govern after transfer. This result is desirable in this context for two reasons. First, it prevents plaintiffs from achieving choice-of-law advantages to which they would not be entitled without a transfer. Second, it prevents the unlimited forum shopping that the opposite rule would encourage. If the law of the transferor applied, plaintiffs could commence actions in any jurisdiction with favorable laws, and then transport those laws to proper forums. Unlike plaintiffs who have sought out and sued in proper forums with favorable laws, plaintiffs in improper forums cannot simply wait for defendants to move for transfer to more convenient forums; defendants will move for dismissal instead.

Most cases dealing with this problem have involved disputes over the applicable statute of limitations. The cases fall into three categories: (1) actions filed before the statute of limitations has run in the first forum, but after the statute has run in the second forum; (2) actions filed when neither statute has run, but where the second statute runs before the action is transferred; and (3) actions filed after the statute in the first forum has run but before the statute in the second forum has run, and in which a party seeks a transfer after the running of both statutes.

Cases of the first type present the simplest situation, because the choice-of-law issue alone is dispositive. Plaintiffs can maintain their actions in the transferee forum only if the statute of limitations of the transferor governs. These cases also present the clearest examples of attempts to use the transfer device for forum shopping. By filing in improper forums, plaintiffs seek to accompl-
plish what they could not have accomplished by suing at the outset in proper forums. Most courts have correctly held that the applicable statute of limitations after transfer is that of the transferee.59

The second type of case is complicated by the question of whether filing in the first forum tolls the statute of limitations of the second. Under the Federal Rules of Civil Procedure, an action commences at the time of filing.60 If tolling is governed by federal law, plaintiffs' actions will not be barred regardless of which statute of limitations applies. If tolling is governed by state law, then courts may reach the choice-of-law question with respect to the applicable period of limitations. In other contexts this tolling issue has divided the courts,61 but in transfer cases the prevailing view is that federal law governs, and that filing within the limitation periods of both statutes therefore tolls the statute of the second forum.62 Consequently, the choice-of-law issue becomes irrelevant.63


60 Fed. R. Civ. P. 3 provides: "A civil action is commenced by filing a complaint with the court."

61 In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949), a case not involving transfer of venue, the Supreme Court held that, under the Erie doctrine, state law dictates when an action is commenced for the purpose of tolling the state's statute of limitations. In Hanna v. Plumer, 380 U.S. 460, 469-70 (1965), however, the Court held that the Erie doctrine was not the appropriate test for determining the applicability of a federal rule. Even where a federal rule "alters the mode of enforcing state-created rights" (id. at 473), federal courts must apply the rule unless it represents an abuse of the rulemaking power. Id. at 471. Nevertheless, Hanna did not expressly overrule Ragan, and the issue remains unresolved. The Second Circuit, for example, has declined to follow Ragan. Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 606 (2d Cir. 1968). The Eighth Circuit found Ragan still authoritative in Groninger v. Davison, 364 F.2d 638, 642 (8th Cir. 1966), but subsequently limited its application in Prashar v. Volkswagen of America, Inc., 480 F.2d 947, 953 (8th Cir. 1973), cert. denied, 415 U.S. 994 (1974).


63 However, if a court decides on the basis of either federal or state law that filing in the first forum does not toll the statute of the second forum, it would then face the choice-of-law issue with regard to the applicable statute of limitations. In this situation, there is
The most difficult problems stem from the third type of case, since both choice-of-law and tolling issues come into play. Plaintiffs can maintain their actions only if the statute of limitations of the transferee applies and the filing in the first forum tolled that statute. In *Ferguson v. Kwik-Chek, Winn-Dixie Stores, Inc.*, the only reported case of this type, a Virgin Islands district court resolved the choice-of-law issue in favor of the plaintiff, and assumed that the transferee statute was tolled by the original filing. The court relied primarily on *Goldlawr, Inc. v. Heiman*, in which, as in *Ferguson*, the transfer of venue was from an improper forum. In *Goldlawr*, however, the plaintiff filed the action in the first forum within the applicable period of limitations, and the Supreme Court emphasized the plaintiff's diligence in filing. Where such diligence is lacking, as in *Ferguson*, the use of section 1406(a) to save the plaintiff's case is beyond the intent of that section. Unlike section 1404(a), which deals with the "convenience of parties and witnesses," section 1406(a) is designed to prevent dismissal in cases where the plaintiff has made errors related to venue and personal

some support for applying the law of the transferee. See Sargent v. Genesco, Inc., 492 F.2d 750, 758-59 (5th Cir. 1974) (dictum); Dewey v. Farchone, 460 F.2d 1338, 1339-40 (7th Cir. 1972) (by implication). But see Mayo Clinic v. Kaiser, 383 F.2d 653, 656 (8th Cir. 1967) (dictum). In Mayo, the court did not have to decide which statute of limitations applied, because the limitation periods were identical. *Id.* at 656.


*65* *Id.* at 81. In *Ferguson*, a resident of the Virgin Islands filed an action in the Virgin Islands federal court against a Florida corporation for injuries sustained in Florida. The action was filed after the running of the Virgin Islands statute of limitations, but two weeks before the running of the Florida statute. Facing dismissal for lack of personal jurisdiction, the plaintiff sought transfer to Florida under § 1404(a) after the running of the Florida statute. The defendant opposed the transfer on the grounds of lack of personal jurisdiction and the running of the Virgin Islands statute of limitations. The court, treating the motion as if it had been brought under § 1404(a) because of the lack of personal jurisdiction, held that the plaintiff was entitled to transfer: "[T]he fact that the Virgin Islands statute of limitations had fully run is of no moment, the case having been commenced within the period of the Florida statute." *Id.*

*66* 369 U.S. 463 (1962). *Goldlawr* holds that § 1406(a) permits transfer from a forum that is improper with respect to both venue and personal jurisdiction. *Id.* at 465-67.

"The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." *Id.* at 467.

*68* Section 1406, as originally enacted, ... was mandatory and required transfer without any consideration of the reason why a case was filed in the wrong district. By act of May 24, 1949, c. 139, § 81, 63 Stat. 101, the section was amended to provide transfer in lieu of dismissal only "if it be in the interest of justice." ... It is obviously not "in the interest of justice" to allow this section to be used to aid a non-diligent plaintiff who knowingly files a case in the wrong district.

Dubin v. United States, 380 F.2d 813, 816 n.5 (5th Cir. 1967).

jurisdiction. Expansion of this list to include errors related to the statute of limitations is a change best left to Congress. Moreover, such an interpretation of section 1406(a) would produce the anomalous result of placing non-diligent plaintiffs who file in improper forums in a better position than non-diligent plaintiffs who file in proper forums. A preferable rule in cases of this type would provide that filing in an improper forum after its period of limitations should not toll the statute of any other forum. This solution moots the choice-of-law issue, avoids inconsistency with cases involving proper forums, and carries out the policies behind section 1406(a).

The foregoing analysis suggests that the law of the transferee should apply after transfers from improper forums. In addition, only a timely filing in the first forum should toll the statute of limitations of the second.

**Conclusion**

Transfer of venue often requires the transferee court to decide whether it must apply the law that the transferor court would have applied. The American Law Institute has proposed that the law of the transferor should govern after a transfer on defendant’s motion and that the law of the transferee should govern after a transfer on plaintiff’s motion. Instead, determination of the applicable law should be based on the propriety of venue and personal jurisdiction in the initial forum. Where the initial forum is proper, the law of the transferor should govern; where the initial forum is improper, the transferee court should be free to apply its own law.

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