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ALLOCATION OF JURISDICTION BETWEEN THE STATE AND FEDERAL COURTS FOR PRIVATE REMEDIES UNDER THE FEDERAL SECURITIES LAWS

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The federal securities laws have varied provisions for allocating jurisdiction over private actions between federal and state courts. The securities acts differ with regard to whether concurrent state jurisdiction exists and, if so, whether removal to federal court is available. In this Article, Professor Hazen examines the diverse approaches of the securities laws in allocating jurisdiction and uses these approaches as a vehicle for a broader study of the allocation of jurisdiction to decide federal questions. In analyzing the various approaches, he considers such factors as uniformity of law, federal expertise, the hostility of state courts to federal actions, the overcrowding of the federal courts and the importance of providing a remedy for the small investor. Professor Hazen concludes that exclusive federal jurisdiction should largely be eliminated and that serious consideration should be given to banning removal.

I. INTRODUCTION

The six federal securities laws present diverse approaches to allocating jurisdiction over private actions between federal and state courts. Jurisdictional provisions for enforcement of statutory regulation can have substantial impact on the substantive thrust of the applicable legislative scheme, especially when the jurisdictional issue is the appropriate allocation between the state and federal judicial systems.[1] Questions of jurisdictional allocation in private civil suits raise a number of issues concerning federalism as well as specific statutory schemes. A poignant example of the magnitude of these issues is found within the sphere of the securities laws, where the scope of the regulation has far-ranging impact upon federal and state law. At a time when

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1. See generally Cullison, State Courts, State Law, and Concurrent Jurisdiction of Federal Questions, 48 Iowa L. Rev. 230 (1963); Fischer, Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts, 34 U. Miami L. Rev. 175 (1980); Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977); Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311 (1976); Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity, 64 Calif. L. Rev. 943 (1976); Symposium, State Courts and Federalism in the 1980s, 22 Wm. & Mary L. Rev. 599 (1981). See also Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 Wash. L. Rev. 633 (1971).

the backlog in federal dockets continues to expand, delay in dispute resolution necessarily acts against effective enforcement.

The federal securities laws[2] play a tremendously large role in the regulation of corporate conduct, a matter that traditionally has been relegated to state control.[3] In recent years the United States Supreme Court has grappled with federal/state tensions in an attempt to determine the respective roles of federal and state law in establishing the proper norms for internal corporate governance matters.[4] Most of the concern to date has revolved around the interrelationship between the investor-protection thrust of the federal securities laws and the corporate-chartering function of the states' corporate enabling statutes.[5] These substantive law disputes have spilled over into what may be termed quasi-procedural questions. For example, this tension has surfaced in the recently hotly contested issue of corporate directors' power to terminate shareholder derivative suits that have been brought to redress violations of federal law.[6] Federal/state tensions have not been limited to internal governance questions but have extended to the overlap between federal securities regulation and state "blue sky" securities acts.[7] Another area of recent federal/state conflict has arisen in the context of implying remedies from federal statutes, in which one of the determinative questions is whether the coverage of the asserted remedy is one that traditionally has been within the domain of state law.[8] Notwithstanding the magnitude of the clashes between

2. The federal securities laws in chronological order are: Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1976); Securities Exchange Act of 1934, id. §§ 78a-78kk; Public Utility Holding Company Act of 1935, id. §§ 79a to 79z-z6; Trust Indenture Act of 1939, id. §§ 77aaa-77bbbb; Investment Company Act of 1940, id. §§ 80a-1 to -52; Investment Advisers Act of 1940, id. §§ 80b-1 to -21.

3. The rules regarding internal corporate governance are derived from state legislation enabling the granting of corporate charters. See, e.g., ABA-ALI Model Bus. Corp. Act Ann. (2d ed. 1971).

4. See Santa Fe Indus. v. Green, 430 U.S. 462 (1977). See generally Ferrara & Steinberg, A Reappraisal of *Santa Fe*: Rule 10b-5 and The New Federalism, 129 U. Pa. L. Rev. 263 (1980); Hazen, Corporate Mismanagement and The Federal Securities Act's Antifraud Provisions: A Familiar Path With Some New Detours, 20 B.C.L. Rev. 819 (1979).

5. See generally Cary, Federalism and Corporate Law: Reflections Upon Delaware, 83 Yale L.J. 663 (1974); Fleischer, "Federal Corporation Law": An Assessment, 78 Harv. L. Rev. 1146 (1965); Hazen, Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability, 1978 Wis. L. Rev. 391 [hereinafter cited as Hazen, Corporate Chartering].

6. See Burks v. Lasker, 441 U.S. 471 (1979); Lewis v. S.L. & E., Inc., 629 F.2d 764 (2d Cir. 1980); Clark v. Lomas & Nettleton Fin. Corp., 625 F.2d 49 (5th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); Abbey v. Control Data Corp., 603 F.2d 724 (8th Cir. 1979), cert. denied, 444 U.S. 1017 (1980); Cramer v. General Tel. & Elecs. Corp., 582 F.2d 259 (3d Cir. 1978), cert. denied, 439 U.S. 1129 (1979); Maldonado v. Flynn, 485 F. Supp. 274 (S.D.N.Y. 1980). See also Zapata Corp. v. Maldanado, 430 A.2d 779 (Del. 1981); Auerbach v. Bennett, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). See generally Buxbaum, Conflict-of-Interests Statutes and the Need for a Demand on Directors in Derivative Actions, 68 Calif. L. Rev. 1122 (1980); Dent, The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit? 75 Nw. U.L. Rev. 96 (1980); Steinberg, The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits, 35 U. Miami L. Rev. 1 (1980).

7. The question of this overlap recently has arisen in the context of the extent to which state statutes governing tender offers are preempted by the federal legislation on point. See, e.g., Leroy v. Great W. United Corp., 443 U.S. 173 (1979); Mite Corp. v. Dixon, 633 F.2d 486 (7th Cir. 1980), probable jurisdiction noted sub nom. Edgar v. Mite Corp., 451 U.S. 968 (1981).

8. See Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co.

state and federal law with regard to securities and corporate regulation, relatively little attention has been given to the more basic question of the allocation of jurisdiction between state and federal forums. In view of the great concern about the general overloading of federal dockets,[9] this allocation issue takes on even greater signficance. Although some changes in the present scheme have been suggested, there has been little if any movement on this front.

In the face of the aforementioned federal/state tensions, the various federal securities statutes collectively present three approaches to jurisdiction over private suits to enforce the acts' respective prohibitions. The acts provide for (1) exclusive federal jurisdiction, (2) concurrent federal and state jurisdiction, subject to the right of removal from state court, and (3) concurrent state jurisdiction with no right of removal to federal court. The variety in approach belies any claim of a consistently strong policy of federal uniformity and, in light of the absence of legislative history to explain the differences, may be nothing more than the result of unfortunate legislative apathy or inattention. It is time that this jurisdictional scheme be reconsidered seriously. Even if none of the changes discussed below is adopted, there is much to be learned from an analysis of the current law. For example, many injured investors might be well advised to pursue their federal claims in state court and to fashion their pleadings accordingly.

The various jurisdictional provisions under the securities laws give rise to a number of questions, the most significant of which may be whether there is any reason for their lack of consistency. Additionally, there are further, more general questions regarding the appropriate interplay between state and federal courts in federal question cases.[10] Some suggestions for change have been made. For example, the American Law Institute's study concerning the separation of jurisdiction between state and federal courts generally disfavors exclusive jurisdiction and recommends that all actions be freely removable when there is concurrent jurisdiction.[11] The Federal Securities Code, which the ABA and ALI approve, would adopt the same view.[12] At the other extreme, it has been suggested that exclusive federal jurisdiction be expanded as part of a

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v. Redington, 442 U.S. 560 (1979); Davis v. Passman, 442 U.S. 228 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Cort v. Ash, 422 U.S. 66 (1975); Hazen, Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium—Civil Rights, Securities Regulation, and Beyond, 33 Vand. L. Rev. 1333 (1980) [hereinafter cited as Hazen, Implied Private Remedies].

9. The general question has been given considerable attention by the American Law Institute, but to date there has been no legislative response. ALI, Study of the Division of Jurisdiction Between State and Federal Courts (1969) [hereinafter cited as ALI Study]. See section III, notes 142-250 infra.

10. For example, what is the effect of recent recognition of the offensive use of collateral estoppel in the absence of mutuality? See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979); text accompanying notes 120-41 infra.

11. ALI Study, supra note 9, at 185-87.

12. 2 ALI Fed. Sec. Code §§ 1711(a), 1822(a)(2) & accompanying comments (1980). See also ALI Fed. Sec. Code § 1409, comment 3, at 124 (tent. draft no. 2, 1973).

proposed federal corporate-chartering law.[13] This Article will examine these suggested changes as well.

The securities laws in their current version provide a convenient vehicle for the study of the allocation of jurisdiction to decide federal questions of extreme importance. This Article will examine the application and implications of the present securities laws, justifications for the alternative jurisdictional provisions, the advisability of the changes proposed by the Federal Securities Code[14] and a suggested solution that respects both the goals and the practicalities of the regulatory framework.

II. THE VARIOUS AND VARIED JURISDICTIONAL PROVISIONS OF THE FEDERAL SECURITIES LAWS

A. The Statutory Scheme

Five of the six federal securities acts provide for concurrent federal and state jurisdiction over private civil actions while granting exclusive federal jurisdiction over criminal proceedings and enforcement actions by the Securities and Exchange Commission (SEC).[15] The Securities Act of 1933[16] and the Trust Indenture Act of 1939[17] further provide that private suits brought in state courts are not removable to federal courts. These nonremoval provisions, which generally are said to be limited to statutes that involve strong local interests,[18] are especially surprising in light of the strong federalism strains that permeate securities regulation.[19] One justification for the 1933 and 1939 Acts' grant of concurrent jurisdiction with a ban on removal is to serve injured plaintiffs who, because of the small size of their claims, do not want to face the

13. See Young, Federal Corporate Law, Federalism, and the Federal Courts, 41 Law & Contemp. Prob. 146 (Summer 1977).

14. 2 ALI Fed. Sec. Code (1980). Although passage of the proposed code by Congress seems doubtful (see Proposed Securities Code Faces Long, Uphill Struggle, 65 A.B.A.J. 1159 (1979); Securities Reform Is All but Dead, Bus. Week, Dec. 1, 1980, at 103; Marcus, ALI Securities Proposal Hits 10th Year, Nat'l L.J., Nov. 5, 1979, at 10; Plan to Revise Securities Code Lies Dormant, Wall St. J., Oct. 8, 1981, at 31, col. 3), the proposed jurisdictional provision provides a good basis for comparison to the current motley scheme.

15. In chronological order of their passage: Securities Act of 1933, § 22(a), 15 U.S.C. § 77v(a) (1976); Public Utility Holding Company Act of 1935, § 25, 15 U.S.C. § 79y (1976); Trust Indenture Act of 1939, § 322(b), 15 U.S.C. § 77vvv (1976); Investment Company Act of 1940, § 44, 15 U.S.C. § 80a-43 (1976); Investment Advisers Act of 1940, § 214, 15 U.S.C. § 80b-14 (1976). But see Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976) (exclusive federal jurisdiction for all suits).

16. 15 U.S.C. § 77v(a) (1976).

17. Id. § 77vvv.

18. E.g., Federal Employers' Liability Act (FELA), 28 id. § 1445(a). See, e.g., McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934); Mondou v. New York, N.H. & H.R.R., 223 U.S. 1 (1911). Cf. Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950) (upholding the state court's right to invoke *forum non conveniens* as a basis for dismissal).

Other examples of nonremovable federal causes of action brought in state court include the Jones Act, 46 U.S.C. § 688 (1976); Magnuson-Moss Federal Warranty Act, 15 id. § 2310(d) (class action suits with less than $50,000 in controversy).

19. See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978) (holding state tender offer statute unconstitutional and preempted by federal regulation), rev'd on other grounds, 443 U.S. 173 (1979).

added expense that may attach to a federal suit.[20] On the other hand, this dual enforcement system may be said to work against uniformity of result. It is also a departure from parallel and companion legislation providing either for the right of removal to federal court or for exclusive federal jurisdiction. However, as will be developed more fully below, uniformity is not automatically achieved in the federal courts either; the circuits are in unresolved conflict over a number of important issus in the securities area.[21] Furthermore, state courts are bound to follow the prevailing federal law in federal question cases,[22] and state court rulings, like those of the federal courts of appeals, are subject to review by the Supreme Court.[23]

Nevertheless, the importance of uniform treatment must not be minimized. Since there are now twelve circuits[24] as opposed to fifty states, some greater degree of uniformity may be achieved by federal determination. Although a state court deciding federal law is bound to follow federal precedent, the absence of unequivocally uniform federal decisions often permits state courts to follow their own course.[25] This variance in state holdings, in turn, only further compounds the lack of uniformity that may exist among the federal circuits. Also, there have been instances of divergence between federal and state rulings. The splits of authority that have arisen under the Securities Act of 1933 have contributed to the uncertain state of the law that exists in many other areas of federal securities regulation. This divergence further may provide a significant impetus for a plaintiff to select a state forum. For example, federal court decisions are inconclusive as to the existence of an implied remedy under the 1933 Securities Act's general antifraud provision, section 17(a), but every state decision on point has recognized such an implied remedy.[26] Similarly, the federal courts uniformly have denied punitive damages

20. See text accompanying notes 240-49 infra for comment on the Acts' ban on removal.

21. Compare, e.g., Friedrich v. Bradford, 542 F.2d 307 (6th Cir. 1976) (defendants not liable for § 10(b) violation when their trading on open market did not influence price of stock or plaintiffs' decisions to sell), cert. denied, 429 U.S. 1053 (1977), with Shapiro v. Merrill Lynch, 495 F.2d 228 (2d Cir. 1974) (defendant liable to traders who purchased stock on open market without knowledge of inside information divulged by defendant in violation of § 10(b); causation found in plaintiffs' allegations that they would have refrained from trading if they had had the inside information). See section III, notes 142-250 infra.

22. See Testa v. Katt, 330 U.S. 386, 391 (1947); C. Wright, Handbook on the Law of Federal Courts § 45 (1976); Redish & Muench, supra note 1, at 314.

23. 28 U.S.C. § 1257 (1976). See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 439-662 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]; Stolz, supra note 1.

24. In 1980 the Fifth Circuit was split into the new Fifth Circuit (covering the District of the Canal Zone, Louisiana, Mississippi and Texas) and the Eleventh Circuit (encompassing Alabama, Florida and Georgia). Act of Oct. 14, 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994 (to be codified at 28 U.S.C. § 41).

25. See, e.g., United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971), noted in 24 Vand. L. Rev. 627 (1971); Cullison, supra note 1; Note, The State Courts and The Federal Common Law, 27 Alb. L. Rev. 73 (1963). Also see text accompanying notes 201-16 infra.

26. See Hazen, A Look Beyond the Pruning of Rule 10b-5: Implied Remedies and Section 17(a) of the Securities Act of 1933, 64 Va. L. Rev. 641 (1978) [hereinafter cited as Hazen, Pruning Rule 10b-5]; Horton, Section 17(a) of the 1933 Securities Act—The Wrong Place for a Private Right, 68 Nw. U.L. Rev. 44 (1973). See also Securities Act of 1933, § 17(a), 15 U.S.C. 77q(a) (1976).

under the securities acts[27] while one state court recently has ruled to the contrary.[28] These are but examples of the lack of uniformity that invites plaintiffs to engage in forum shopping. Another negative aspect of the 1933 Act's current allocation of private enforcement jurisdiction is the difficulty of establishing predictability of result. The securities laws provide guides in structuring transactions. Any resultant lack of uniformity necessarily inhibits certainty in planning, a value that has become increasingly important in recent years.[29] Accordingly, in considering the benefits to be gained by allowing state court jurisdiction, one must be mindful of the foregoing potential drawbacks. As will be seen below, notwithstanding these disadvantages, the 1933 Act's allocation formula has a great deal to commend it.

With the 1933 Act's concurrent, nonremovable state jurisdiction at one extreme, the Securities Exchange Act of 1934, with its grant of exclusive federal jurisdiction over all actions, lies at the other end of the spectrum.[30] The 1934 Act has the broadest coverage of the securities acts. It provides for regulation of the corporate proxy system[31] and of insider trading.[32] It also regulates the security markets, including national exchanges, and the brokerage industry.[33] The 1934 Act further has provided the most expansive panoply of private remedies, both express and implied. Its absence of concurrent jurisdiction, which contrasts with the provisions of the other federal securities laws, is most signficant. A major problem with exclusivity is that it may impede the combination of state and federal claims arising from the same transaction. Although the doctrine of pendent jurisdiction gives the federal court discretion to hear the state claim, exercise of the doctrine is far from mandatory and does not apply when the state law provides the primary basis of the suit.[34] Furthermore, a few state courts have held that a federal securities violation cannot be raised as a defense to a state law contract claim.[35] This position detracts significantly from the statutory declaration that all contracts in violation of the

27. E.g., Carras v. Burns, 516 F.2d 251 (4th Cir. 1975); Globus v. Law Res. Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).

28. Anvil Inv. Ltd. Partnership v. Thornhill Condominiums, Ltd., 85 Ill. App. 3d 1108, 407 N.E.2d 645 (1980).

29. See, e.g., the "safe harbor" rules that were promulgated by the Securities and Exchange Commission (SEC) in response to the securities bar's clamor for guides in structuring transactions in which the risk of noncompliance opens up a host of momentous ramifications. 17 C.F.R. §§ 230.146, .147 (1981).

30. See 15 U.S.C. § 78aa (1976).

31. Id. § 78n. See E. Aranow & H. Einhorn, Proxy Contests for Corporate Control (2d ed. 1968); 2 L. Loss, Securities Regulation 857-1036 (2d ed. 1961).

32. 15 U.S.C. § 78p(b) (1976). See 2 L. Loss, supra note 31, at 1037-1126; Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 322 (1979); Dooley, Enforcement of Insider Trading Restrictions, 66 Va. L. Rev. 1 (1980); Hazen, The New Pragmatism Under Section 16(b) of the Securities Exchange Act, 54 N.C.L. Rev. 1 (1975) [hereinafter cited as Hazen, New Pragmatism].

33. 15 U.S.C. §§ 78f, 78o, 78s (1976).

34. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

35. E.g., Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 238-89, 48 A.2d 501, 508-09 (1946), aff'd, 29 Del. Ch. 593, 606, 51 A.2d 572, 579 (1947); Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 92 A.2d 862 (1952), aff'd per curiam, 12 N.J. 467, 97 A.2d 437 (1953). See text accompanying notes 109-19 infra.

Act are void.[36] Finally, it is far from clear that the justifications for exclusive jurisdiction warrant the hardships that it may bring.[37]

The remaining securities acts' jurisdictional provisions follow the more common pattern of concurrent state and federal jurisdiction, subject to the right of removal. Although this approach is favored by the American Law Institute (ALI),[38] it too is not without its problems.

B. The Current Federal Securities Jurisdictional Provisions in Operation

From the comments to the proposed Federal Securities Code, it appears that a substantial factor behind the decision to abolish the grant of exclusive federal jurisdiction under the Exchange Act of 1934 was the prediction that "resort to the state courts will be relatively infrequent."[39] Although this Article agrees with the proposed Code in taking the position that federal exclusivity should be eliminated, the impact of so expanding state court jurisdiction should not be underestimated. The ALI's prediction may well be based on an improper evaluation of the litigation to date. While it is true that a small percentage of private federal securities claims are brought in state courts, the number is low largely because the overwhelming majority of private suits contain claims arising out of the 1934 Act, claims that cannot be raised in state court. Until recently a plaintiff had no reason to attempt to formulate a securities claim without the inclusion of a 1934 Act remedy. However, the Supreme Court has now reduced the scope of implied remedies under SEC rule 10b-5,[40] under the proxy rules[41] and under the tender offer provisions[42] as well as the scope of the express prohibition against insider short-swing profits.[43]

Recent Supreme Court decisions thus have made the climate less conducive to 1934 Act claims and relatively more receptive to claims under the Securities Act of 1933.[44] For example, the 1933 Act's express liability provisions for misstatements and omissions[45] allow recovery without a showing of scien-

36. 15 U.S.C. § 78cc(b) (1976).

37. See 2 ALI Fed. Sec. Code § 1822 (1980).

38. ALI Study, note 9 supra; 2 ALI Fed. Sec. Code § 1822(a)(2) (1980).

39. ALI Fed. Sec. Code § 1518, comment 6 (tent. draft no. 3, 1973).

40. See Santa Fe Indus. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975). Rule 10b-5 is codified at 17 C.F.R. § 240.10b-5 (1981).

41. TSC Indus. v. Northway, Inc., 426 U.S. 438 (1976).

42. Piper v. Chris-Craft Indus., 430 U.S. 1 (1977); Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975).

43. Foremost-McKesson, Inc. v. Provident Sec. Co., 423 U.S. 232 (1976); Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973). See generally Hazen, New Pragmatism, supra note 32.

44. See generally Lowenfels, Recent Supreme Court Decisions Under the Federal Securities Laws: The Pendulum Swings, 65 Geo. L.J. 891 (1977). See also Freeman, A Study in Contrasts: The Warren and Burger Courts' Approach to the Securities Laws, 83 Dick. L. Rev. 183 (1978); Whitaker & Rotch, The Supreme Court and The Counterrevolution in Securities Regulation, 30 Ala. L. Rev. 335 (1979).

45. Securities Act of 1933, §§ 11, 12(2), 15 U.S.C. §§ 77k, *l*(2) (1976). See, e.g., Hill York Corp. v. American Int'l Franchises, Inc., 448 F.2d 680, 695 (5th Cir. 1971); Feit v. Leasco Data Proc. Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971); Escott v. Barchris Constr. Corp., 283 F. Supp. 643 (S.D.N.Y. 1968); Folk, Civil Liabilities Under the Federal Securities Acts: The *Bar-*

ter, while rule 10b-5 does not.[46] Furthermore, the Supreme Court now has taken a no-scienter approach to section 17(a) of the 1933 Act while reaffirming its scienter requirement for actions under the 1934 Act's rule 10b-5.[47] It is thus to be expected that the amount of 1933 Act litigation will increase dramatically. Apart from the Securities Act, there has been a dearth of non-1934 Act private securities litigation, at both the federal and state levels; there is no reason to expect any change, regardless of the jurisdictional provisions.

Even before the foregoing new incentives for the 1933 Act litigation, the volume of state court litigation was not insignificant. In general, the state courts have not shirked their responsibility to hear federal securities claims that are properly before them.[48] Fears of hostility to the federal cause of action[49] are unjustified. Receptivity exists even in those decisions in which the federal claim must fail on the merits. However, the state courts have not hesitated to dismiss such suits,[50] thereby displaying the proper balance between investor protection and the specter of overzealous enforcement. Not only have the state courts been duly watchful of investor protection under the express liability provisions, they have been willing to recognize implied remedies when necessary to carry out the federal enforcement scheme.[51] Even the 1934 Act's grant of exclusive federal jurisdiction has not precluded some state courts from looking to the federal law by analogy[52] or from permitting use of

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chris Case (pts. 1-2), 55 Va. L. Rev. 1, 199 (1969); Kaminsky, An Analysis of Securities Litigation Under Section 12(2) and How it Compares with Rule 10b-5, 13 Hous. L. Rev. 231 (1976).

46. See Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

47. Aaron v. SEC, 446 U.S. 680 (1980). Although *Aaron* was an SEC enforcement action, it has impact for the potential implied remedy under section 17(a). See Hazen, Symposium Introduction—The Supreme Court and the Securities Laws: Has the Pendulum Slowed?, 30 Emory L.J. 5 (1981) [hereinafter cited as Hazen, Pendulum].

48. See, e.g., Lutz v. Boas, 171 A.2d 381 (Del Ch. 1961) (Investment Company Act of 1940); Guardian Inv. Corp. v. Rubinstein, 192 A.2d 296 (D.C. 1963) (1933 Act); Peoples Bank v. North Carolina Nat'l Bank, 139 Ga. App. 405, 228 S.E.2d 334 (1976) (1933 Act); Anvil Inv. Ltd. Partnership v. Thornhill Condominiums, Ltd., 85 Ill. App. 3d 1108, 407 N.E.2d 645 (1980) (1933 Act); United States Trust Co. v. First Nat'l City Bank, 57 A.D.2d 285, 394 N.Y.S.2d 653 (1977), aff'd, 45 N.Y.2d 869, 382 N.E.2d 1355, 410 N.Y.S.2d 580 (1978) (Trust Indenture Act of 1939); Levine v. Silverman, 43 Misc. 2d 415, 251 N.Y.S.2d 68 (Sup. Ct. 1964) (recognizing 1933 Act claim but dismissing Investment Advisers Act of 1940 cause of action).

49. See Note, The Securities Exchange Act and the Rule of Exclusive Federal Jurisdiction, 89 Yale L.J. 95, 110-13 (1979).

50. See, e.g., Kalav v. Pitt, 18 Ariz. App. 478, 503 P.2d 833 (1972); Rushing v. Williams, 125 Ga. App. 601, 188 S.E.2d 437 (1972); Sharp v. Idaho Inv. Corp., 95 Idaho 113, 504 P.2d 386 (1972); Coastal Finance Corp. v. Coastal Finance Corp., 387 A.2d 1373 (R.I. 1978); Sibley v. Horn Advertising, Inc., 505 S.W.2d 417 (Tex. Civ. App. 1974); Northrop v. duPont, 210 Va. 709, 173 S.E.2d 839 (1970).

51. E.g., Unit, Inc. v. Kentucky Fried Chicken Corp., 304 A.2d 320 (Del. Super. Ct. 1973); Anvil Inv. Ltd. Partnership v. Thornhill Condominiums, Ltd., 85 Ill. App. 3d 1108, 407 N.E.2d 645 (1980); Wolfson v. Ubile [1977-78 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,280 (N.Y. Sup. Ct. 1977), aff'd mem., 78 A.D.2d 612, 432 N.Y.S.2d 393 (1980). See Hazen, Pruning Rule 10b-5, supra note 26, at 653. See also Watling, Lerchen & Co. v. Ormond, 86 Mich. App. 238, 272 N.W.2d 614 (1978).

52. Twomey v. Michum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968); Williams v. Bartell, 34 Misc. 2d 552, 226 N.Y.S.2d 187 (Sup. Ct.), modified on other grounds, 16 A.D.2d 21, 225 N.Y.S.2d 351 (1962). See, e.g., Herron Northwest, Inc. v. Danskin, 78 Wash. 2d 500, 476 P.2d 702 (1970). But see, e.g., Malkan v. General Transistor Corp., 27 Misc. 2d 677, 207 N.Y.S.2d 345 (Sup. Ct. 1960); Mekrut v. Gould, 16 Misc. 2d 326, 188 N.Y.S.2d 6 (Sup. Ct. 1959). See text accompanying notes 95-101 infra.

a federal claim as a defense to a state law cause of action.[53] The only clear evidence of an aversion to a federal claim arose in the context of a strong dissent that took the position that Congress does not have the constitutional power to vest state courts with jurisdiction,[54] a position that finds little, if any, support elsewhere.[55]

One of the first questions to arise with regard to state court determination of federal claims is the extent to which the state court must follow federal procedural rules. This issue was created by the ambiguities of the current scheme. Although conferring concurrent jurisdiction upon the state courts, the 1933 Act is silent as to the types of facts or in-state contacts that will confer jurisdiction upon a particular state court.[56] A similar silence is found in the other grants of concurrent jurisdiction,[57] and the silence would continue under the ALI's Federal Securities Code.[58] The only possible guidance comes from the clause of the 1933 Act that permits suit in the district where the transaction occurred or "wherein the defendant is found or is an inhabitant or transacts business."[59] A broad reading might give this clause jurisdictional significance, which would in turn thrust upon a state court the power—if not the obligation[60]—to hear the federal claim. The better view is that this clause merely deals with venue and is not jurisdictional.[61] Otherwise, state courts might be forced to decide cases that they have no interest in hearing.

Two New York trial court decisions have taken the view that state court jurisdiction is created in the situs of the transaction.[62] This reading generally will enable the investor to sue in his own state court but will prevent the defendant from being dragged into a court in a state with which he has had minimal contact and where trial would be cumbersome to him. However, the question may be more conceptual than real. Even if the current provisions were viewed as jurisdictional, the doctrine of *forum non conveniens* presumably could be invoked by a state court not wishing to hear the case.[63] Nonethe-

53. E.g., Gregory-Massari, Inc. v. Purkitt, 1 Cal. App. 3d 968, 82 Cal. Rptr. 210 (1969); Johnson, Lane, Space, Smith & Co. v. Lenny, 129 Ga. App. 55, 198 S.E.2d 923 (1973); Birenbaum v. Bache & Co., 555 S.W.2d 513 (Tex. Civ. App. 1977). But see, e.g., New York Stock Exch. v. Pickard & Co., 274 A.2d 148 (Del. Ch. 1971); Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 238-39, 48 A.2d 501, 508-09 (1946), aff'd, 29 Del. Ch. 593, 606, 51 A.2d 572, 579 (1947); Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 92 A.2d 862 (1952), aff'd per curiam, 12 N.J. 467, 97 A.2d 437 (1953). See text accompanying notes 109-19 infra.

54. Guardian Inv. Corp. v. Rubinstein, 192 A.2d 296, 299 (D.C. 1963) (Myers, J., dissenting). Under this view the only function of the grant of concurrent jurisdiction is to negate any federal preemption of parallel, state-law causes of action. Id.

55. E.g., Testa v. Katt, 330 U.S. 386 (1947). See notes 193-96 and accompanying text infra.

56. See 15 U.S.C. § 77v(a) (1976).

57. See statutory citations, supra note 15.

58. See 2 ALI Fed. Sec. Code § 1822(a), (f) (1980).

59. 15 U.S.C. § 77v(a) (1976). See also, e.g., 2 ALI Fed. Sec. Code § 1822(a) (1980).

60. See Redish & Muench, supra note 1, at 347.

61. See Negin v. Cico Oil & Gas Co., 46 Misc. 2d 367, 259 N.Y.S.2d 434 (Sup. Ct. 1965).

62. Id.; Forster v. Energy Conversion Devices, Inc., [1964-66 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,549 (N.Y. Sup. Ct. 1965). Cf. Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976) (the broad venue provisions of the Securities Exchange Act must yield to the narrower, more specific provisions of the National Bank Act, 12 U.S.C. § 94 (1976)).

63. See Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950).

less, the *forum non conveniens* doctrine merely vests the trial court with discretion to dismiss, without mandating dismissal. An overzealous state court, in the name of enforcement, might exert its power unfairly over an out-of-state defendant although the transaction took place elsewhere and there were no in-state contact other than the defendant's presence. An express legislative statement of the scope of state court in personam jurisdiction is included in the proposed Federal Securities Code[64] and would be a welcome aid in resolving the ambiguities that currently exist.

Beyond the jurisdictional problem, there have been other procedural questions that have raised the issue whether state or federal law controls. It has been held that the state tribunal must look to federal law to determine the applicable statute of limitations in a federal securities case.[65] On the other hand, in a case arising under the Securities Act of 1933 in which one issue was the appropriate standard of appellate review of the findings of a trial judge sitting without a jury, the Rhode Island Supreme Court looked to state law precedent and did not discuss what the federal standard might be.[66] As will be discussed below,[67] Congress could direct expressly the extent to which the state courts must adopt federal procedure in federal-question cases. Continued legislative silence merely leaves another question unnecessarily unresolved.

Research has disclosed two areas in which the state courts have taken a different perspective on statutory construction than that currently prevailing in the federal courts. The differences that do exist are pro-enforcement and thus refute any claim, as may exist in criminal or civil rights areas, that federal rights will suffer by transferring their enforcement to state tribunals.[68] While the Supreme Court has never reached the issue, every federal decision on point has held that punitive damages are not recoverable in actions under the 1933 or 1934 Acts,[69] although they may be awarded in pendent state claims.[70] In contrast, the Illinois Intermediate Court of Appeals, citing primarily Illinois cases, rejected the scant and ambiguous (in the court's view) federal case law in favor of the rule that punitive damages are generally awardable in the absence of a statutory prohibition.[71] The decision might well have been otherwise had there been a clearer, more definitive federal court of appeals

64. 2 ALI Fed. Sec. Code § 1822 (1980).

65. Green v. Karol, 168 Ind. App. 467, 344 N.E.2d 106 (1976). This "reverse *Erie*" solution mirrors the federal courts' response in diversity cases. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

66. Coastal Finance Corp. v. Coastal Finance Corp., 387 A.2d 1373, 1377 (R.I. 1978).

67. See notes 197-200 and accompanying text infra.

68. See section III. *A*., notes 142-85 and accompanying text infra.

69. deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1970); Globus v. Law Res. Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); Green v. Wolf Corp., 406 F.2d 291 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969).

70. See Petrites v. J.C. Bradford & Co., 646 F.2d 1033 (5th Cir. 1981); Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972); Darling & Co. v. Klouman, 87 F.R.D. 756 (N.D. Ill. 1980).

71. Anvil Inv. Ltd. Partnership v. Thornhill Condominiums, Ltd., 85 Ill. App. 3d 1108, 407 N.E.2d 645 (1980).

precedent and most certainly represents an arguable interpretation of the applicable federal statute.

The second area in which state courts have shown a more favorable disposition toward the injured investor is the recognition of implied remedies. The Supreme Court recently has been taking a much closer look at the general question of implied remedies as well as those specifically asserted under the securities laws.[72] From these decisions has emerged the clear lesson that implied remedies should be recognized, if at all, only in cases of clear legislative intent.[73] It has been suggested by one observer that state courts need not feel constrained by Supreme Court decisions in applying their common law and accordingly should be more liberal in recognizing implied remedies.[74] Recent rulings seem to bear out such a predisposition even when dealing with federal statutes. The most notable example of the state courts' predilection for implied remedies is found amidst the lower federal courts' disagreement as to whether a private remedy is to be implied under section 17(a) of the 1933 Act.[75] No state court has refused such a remedy, with each court either expressly acknowledging its existence or leaving the question open.[76] Although these decisions can be characterized as more pro-enforcement than the current federal case law, it cannot fairly be said that they represent a clear departure from the federal interpretation since there have been a number of recent federal decisions that continue to recognize the section 17(a) remedy.[77]

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72. See Goldstein, A *Swann* Song For Remedies: Equitable Relief in the Burger Court, 13 Harv. C.R.-C.L.L. Rev. 1 (1978); McMahon & Rodos, Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment, 80 Dick. L. Rev. 167 (1976); Morrison, Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights, 30 Rutgers L. Rev. 841 (1977); Mowe, Federal Statutes and Implied Private Actions, 55 Or. L. Rev. 3 (1976); Pillai, Negative Implication: The Demise of Private Rights of Action in the Federal Courts, 47 U. Cin. L. Rev. 1 (1978); Pitt, Standing to Sue Under the Williams Act After *Chris-Craft*: A Leaky Ship on Troubled Waters, 34 Bus. Law. 117 (1978); Ratner, The Demise of the Implied Private Right of Action in the Supreme Court, 11 Inst. Sec. Reg. 289 (1980); Steinberg, Implied Private Rights of Action Under Federal Law, 55 Notre Dame Law. 33 (1979). See note 107 infra.

73. See, e.g., Wachovia Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342 (D.C. Cir. 1980), cert. denied, 101 S. Ct. 3098 (1981); Crane Co. v. Harsco Corp., 511 F. Supp. 294 (D. Del. 1980); Haynes v. Anderson & Strudwick, Inc., 508 F. Supp. 1303 (E.D. Va. 1981); Cunha v. Ward Foods, Inc., 501 F. Supp. 830 (D. Hawaii 1980); Cambridge Fund, Inc. v. Abella, 501 F. Supp. 598 (S.D.N.Y. 1980). See Hazen, Implied Private Remedies, supra note 8. See also, e.g., Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) (recognizing implied remedy under the Commodities Exchange Act), cert. granted, 450 U.S. 910 (1981); Bratton v. Shiffrin, 635 F.2d 1228 (7th Cir. 1980) (recognizing implied remedy under Federal Aviation Act), cert. denied, 449 U.S. 1123 (1981).

74. Note, Implied Causes of Action in the State Courts, 30 Stan. L. Rev. 1243 (1978).

75. See Hazen, Pruning Rule 10b-5, supra note 26; Steinberg, Section 17(a) of the Securities Act of 1933 After *Naftalin* and *Redington*, 68 Geo. L.J. 163 (1979).

76. See note 51 supra.

77. See, e.g., Stephinson v. Calpine Conifers II, Ltd., 652 F.2d 808 (9th Cir. 1980); Kirshner v. United States, 603 F.2d 234 (2d Cir. 1978), cert. denied, 442 U.S. 909 (1979); Roth v. Bank of the Commonwealth, [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,267 (W.D.N.Y. Aug. 17, 1981); Spatz v. Borenstein, 513 F. Supp. 571 (N.D. Ill. 1981); Engl v. Berg, 511 F. Supp. 1146 (E.D. Pa. 1981); Savino v. E.F. Hutton & Co., 507 F. Supp. 1225, 1233 n.6 (S.D.N.Y. 1981); Anschutz Corp. v. Kay Corp., 507 F. Supp. 72 (S.D.N.Y. 1981); Miffin Energy Sources, Inc. v. Brooks, 501 F. Supp. 334 (W.D. Pa. 1980); Cunah v. Ward Foods, Inc., 501 F. Supp. 830, 837 (D. Hawaii 1980). Contra, Westlake v. Abrams, 504 F. Supp. 337 (N.D. Ga. 1980); Ingram Indus. v. Norwicki, 502 F. Supp. 1060 (E.D. Ky. 1980); Manchester Bank v. Connecticut Bank & Trust Co., 497 F. Supp. 1304

Beyond section 17(a), the state courts have ventured even further into the implied remedy area notwithstanding the 1934 Act's grant of exclusive federal jurisdiction. The bulk of current federal authority holds that no remedy is to be implied for violations of stock exchange rules,[78] but there is no Supreme Court case on point. In a novel opinion, the Michigan Court of Appeals held that since a rule of the New York Stock Exchange is not an SEC rule, the 1934 Act's exclusive jurisdiction was not a bar to state court recognition of an implied remedy for negligent violation of the rule.[79]

Although it is technically true that the SEC does not actually promulgate exchange rules, all such rules are subject to its approval.[80] The Michigan decision is one example of state courts' lack of hostility towards federal securities regulation. In fact, at a time when the Supreme Court is cutting back the scope of private securities remedies, the only criticism is that the states may be overly protective of the federally imposed standards, which is not necessarily a negative factor. Even beyond the securities law issues, it has been suggested that concurrent jurisdiction opens up to different perspectives the development of uncharted areas. This new potential may be of positive value, as it minimizes institutional biases and is conducive to considering all sides of unresolved questions.[81] The added factor of the state courts' perspective may facilitate uniformity in the long run.

Because of the necessary overlap with state law concerns, the issue of implied remedies under exchange rules is not the only area in which state courts have become involved in spite of the 1934 Act's grant of exclusive federal jurisdiction in section 27.[82] There are further examples of state courts' borrowing from the federal law, notwithstanding section 27. With regard to conduct alleged to violate both state law and the 1934 Act, it has been indicated that federal standards may be considered by state courts through analogy, so long as the underlying state remedy would exist without—and therefore is not dependent upon—the federal statute.[83] The grant of exclusive federal jurisdiction thus may not be sufficient to keep state courts out of the area in the face of this negligence-per-se rationale.[84] Even if state courts were to go so far

(D.N.H. 1980); Freeman v. McCormack, 490 F. Supp. 767 (W.D. Okla. 1980); Mendelsohn v. Capital Underwriters, Inc., 490 F. Supp. 1069 (N.D. Cal. 1979).

78. E.g., Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980). See generally Lashbrooke, Implying a Cause of Action for Damages: Rule Violations by Registered Exchanges and Associations, 48 U. Cin. L. Rev. 949 (1980); Lowenfels, Implied Liabilities Based Upon Stock Exchange Rules, 66 Colum. L. Rev. 12 (1966). It has been held, however, that such rules may provide the basis for establishing the appropriate standard of conduct under SEC rule 10b-5 (17 C.F.R. § 240.10b-5 (1981)). See Comment, Private Actions Under the Suitability and Supervision Duties of Exchange and Dealer Association Rules: The Fraud Requirement, 16 San Diego L. Rev. 773 (1979).

79. Watling, Lerchen & Co. v. Ormond, 86 Mich. App. 238, 272 N.W.2d 614 (1978).

80. 15 U.S.C. §§ 78f, 78s (1976).

81. See Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation, 22 Wm. & Mary L. Rev. 639, 672-80 (1981); note 167 infra.

82. 15 U.S.C. § 78aa (1976).

83. See Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968), and cases cited therein.

84. Watling, Lerchen & Co. v. Ormond, 86 Mich. App. 238, 272 N.W.2d 614 (1978); Note,

as to use the long-recognized negligence-per-se rationale to imply private remedies, notwithstanding section 27's exclusive federal jurisdiction, the potential for review by the Supreme Court[85] would provide a check against undue expansion of the securities laws and lack of uniformity. Professor Loss' position on the scope of Supreme Court review appears to be that the decision whether to imply a remedy may not present a federal question, but substantive interpretation as to the alleged violation does.[86] Under this view, the states are able to provide more enforcement opportunities than can the federal courts. Prior to recommending the repeal of exclusive federal jurisdiction in drafting the proposed Code, Professor Loss viewed the state court implication threat as an "unfortunate" reason for giving a strong preclusive effect to section 27.[87] The wisdom of a state's invoking negligence per se is most questionable under a statutory scheme premised upon exclusive federal jurisdiction. Sanctioning a state law remedy in such a circumstance is a back-door entry to concurrent jurisdiction. In any event, federal exclusivity will not necessarily inhibit an enforcement-oriented state court. Concurrent jurisdiction, of course, would not eliminate the state court's negligence-per-se rationale, but the rationale would arise with parallel consideration of the federal claim. The right of removal would not help the defendant because a negligence-per-se rationale, properly viewed, is to be decided under state, not federal, law.[88] This problem does not arise under the 1933 Act because of its ban on removal.

One clear lesson that emerges from a reading of the litigation to date is that purchasers of securities who have been injured by material misstatements or omissions in, or failure to file, a registration statement, and who therefore have claims under the 1933 Act,[89] would be well advised to give serious consideration to a state court forum. State court resolution is particularly attractive when the controversy is not so complex as to require the federal procedural rules that may not be available in the state tribunal. In a complicated misstatement or omission case, the plaintiff very well may require the more extensive federal discovery rules. Although many states have adopted the federal rules, others continue to follow more cumbersome procedures. Even so, state courts may be compelled to follow the federal rules if they are deemed necessary to carry out the enforcement or related goals of the securi-

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supra note 74. It is worthy of notice that the negligence-per-se rationale was the basis for the seminal, federal securities implication decisions. See Osborne v. Mallory, 86 F. Supp. 869 (S.D.N.Y. 1949) (section 17(a) of the 1933 Act); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (rule 10b-5 of the 1934 Act).

85. 2 L. Loss, supra note 31, at 1000.

86. Id. See also Cullison, supra note 1, at 230, 243-44.

87. A complaint which pleaded a violation of one of the SEC filing rules as creating a state-law tort *per se* very likely *would* be removable as an action "arising under" federal law—which, unfortunately, is one more reason to consider §27 as closing the door of the state in such a case.

L. Loss, supra note 31, at 1000-01 (footnote omitted) (emphasis in original).

88. The right of removal is discussed in section III. *C.*, notes 223-50 and accompanying text infra.

89. Unlike rule 10b-5 of the 1934 Act, which applies to both purchases and sales, sections 11, 12 and 17(a) of the 1933 Act apply to violations in connection with a sale and therefore protect purchasers only. See 15 U.S.C. §§ 77k, 77*l*, 77q (1976); 17 C.F.R. § 240.10b-5 (1981).

ties laws.[90] Congress could make such procedures expressly applicable.[91] Whether or not the present law is retained or the proposed Code is adopted, Congress should give serious consideration to enumeration of any procedural protections that should apply in state court. One problem that must be kept in mind is that state courts may become burdened with foreign and unfamiliar procedural rules.

Even beyond the discovery rules, the federal forum will remain more attractive for many plaintiffs because of the class action rules and because of the possibility of coordinating several related suits through the panel on multidistrict litigation.[92] Plaintiffs' counsel should be aware of state court alternatives for those cases not presenting such complexity.

The securities cases that have arisen to date provide no basis for declaring concurrent state court jurisdiction a failure. Although clearly more pro-enforcement than the relatively ambiguous law in the lower federal courts, the state courts that have faced securities issues have shown the ability to deal with the federal securities laws in an evenhanded manner. The 1933 Act's ban on removal has not led to mistreatment of defendants. The advantages of federal court in many cases will steer the plaintiff there, which can be seen as creating the proper balance between federal and state forums without including the right of removal. Having examined the case law under the 1933 Act, the next issue is the 1934 Act's grant of exclusive federal jurisdiction. Has it achieved its purposes? The supposed advantages of exclusive federal jurisdiction of federal securities law violations are (1) promotion of uniform interpretation, (2) greater expertise of federal judges, (3) avoidance of state courts' hostility to "unfamiliar federal claims arising in familiar state law contract actions" and (4) the "disparate impact" of state and federal discovery provisions.[93] We already have seen that fear of state court hostility is unjustified. An examination of the 1934 Act in both the federal and state courts reveals that even beyond the absence of federal uniformity and questions of judicial expertise and competence, the ends of exclusive jurisdiction are not carried out. Furthermore, as noted above, a majority of states have either adopted or borrowed from federal discovery rules, and Congress has the power to make these rules expressly applicable.

If a plaintiff attempts to bring a 1934 Act claim into state court, section 27's exclusivity clearly will bar the action.[94] It will be barred even if the plain-

90. See, e.g., Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952); Brown v. Western Ry., 338 U.S. 294 (1949); Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1561-64 (1960); Note, Procedural Protection For Federal Rights in State Courts, 30 U. Cin. L. Rev. 184 (1961).

91. See notes 197-200 and accompanying text infra.

92. Multidistrict litigation may be used to consolidate or coordinate pretrial civil proceedings pending in different districts, when such proceedings involve one or more common questions of fact. See 28 U.S.C. § 1407 (Supp. III 1979).

93. Note, supra note 49, at 110-13. For a more complete discussion of the justifications for exclusive federal jurisdiction, see section III. *A.*, notes 136-76 and accompanying text infra.

94. 15 U.S.C. § 78aa (1976). See, e.g., Hudson v. Burns, 29 Conn. Supp. 484, 293 A.2d 610 (Super. Ct. 1971); New York Stock Exch. v. Pickard & Co., 274 A.2d 148 (Del. Ch. 1971) (federal counterclaim); Shearson Haydon Stone, Inc. v. Sather, 365 So. 2d 187 (Fla. App. 1979); Commu-

tiff's complaint does not mention the 1934 Act specifically but instead states facts that reveal such a claim but do not present a traditional common-law theory.[95] On the other hand, some state courts have found an indirect way to hear the federal claim. For example, it has been held that violations of the 1934 Act's margin requirements dealing with payments for securities may provide the basis for a state law cause of action for breach of contract.[96] Although the 1934 Act expressly declares void all contracts in violation of its provisions,[97] the grant of exclusive jurisdiction arguably limits any affirmative remedy to federal court. A California court has gone at least so far as to imply that the standard of conduct established by SEC rule 10b-5 can be used by analogy in a state court fraud action.[98] One court has even found an implied state law remedy.[99] Professor Loss takes the position that in the proxy area the state courts "*should* as a matter of the proper development of the state law—look to the case law under the SEC *fraud* rule by way of analogy."[100] Such analogies are even more likely when, as is frequently the case, the state blue sky law borrows from the federal scheme.[101] These encounters with federal law belie the claim of lack of state court expertise in the area and further detract from the uniformity that supposedly results from keeping securities litigation out of the state courts.

While it is true that the most highly publicized, contemporary securities litigation has taken place in the federal courts, it must not be forgotten that state law involvement in the area predates the first federal involvement by twenty-two years.[102] Today all fifty states have legislation regulating securities distributions and trading in much the same manner as the federal statutes.[103] Most private litigation in the securities area is brought under the

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nity Nat'l Bank & Trust Co. v. Vigman, 330 So. 2d 211 (Fla. Dist. Ct. App. 1976); Webster v. Steinberg, 84 Nev. 426, 422 P.2d 894 (1968); Mitchell v. Bache & Co., 52 Misc. 2d 985, 277 N.Y.S.2d 580 (Civ. Ct. 1966); Malkan v. General Transistor Corp., 27 Misc. 2d 677, 207 N.Y.S.2d 345 (Sup. Ct. 1960); Mekrut v. Gould, 16 Misc. 2d 326, 188 N.Y.S.2d 6 (Sup. Ct. 1959).

95. Hudson v. Burns, 29 Conn. Supp. 484, 293 A.2d 610 (Super. Ct. 1971); Community Nat'l Bank & Trust Co. v. Vigman, 330 So. 2d 211 (Fla. Dist. Ct. App. 1976).

96. Herron Northwest, Inc. v. Danskin, 78 Wash. 2d 500, 476 P.2d 702 (1970). See 5 L. Loss, supra note 31, at 2957: "[T]here is nothing in § 27 to prevent an action on the theory that violation of the Exchange Act or an SEC Rule is a *breach of contract*, either express or implied." (emphasis in original). Contra, Mitchell v. Bache & Co., 52 Misc. 2d 985, 987-89, 277 N.Y.S.2d 580, 582-83 (Sup. Ct. 1966).

97. 15 U.S.C. § 78cc(b) (1976). See generally Gruenbaum & Steinberg, Section 29(b) of the Securities Exchange Act of 1934: A Viable Remedy Awakened, 48 Geo. Wash. L. Rev. 1 (1979).

98. Twomey v. Mitchum, Jones & Templeton, Inc., 262 Cal. App. 2d 690, 695-700, 69 Cal. Rptr. 222, 232-35 (1968).

99. Watling, Lerchen & Co. v. Ormond, 86 Mich. App. 238, 272 N.W.2d 614 (1979), discussed at text accompanying notes 79-83 supra. Some state courts apparently have overlooked the jurisdictional bar. Cf. Green v. Karol, 168 Ind. App. 467, 344 N.W.2d 106 (1976) (dismissing 10b-5 claim due to statute of limitations but not discussing the jurisdictional issue).

100. 2 L. Loss, supra note 31, at 999 (emphasis in original).

101. See, e.g., Note, Action Under State Law: Florida's Blue Sky and Common Law Alternatives to Rule 10b-5 for Relief in Securities Fraud, 32 U. Fla. L. Rev. 636 (1980).

102. The first blue sky law was passed in 1911. Act of Mar. 10, 1911, ch. 133, 1911 Kan. Sess. Laws 210 (current version at Kan. Stat. Ann. §§ 17-1252 to -1285 (1975)).

103. See generally 7A U.L.A. 567 (1978) (Uniform Securities Act); L. Loss & E. Cowett, Blue Sky Laws (1958); J. Mofsky, Blue Sky Restrictions on Business Promotions (1971); H. Sowards &

various federal antifraud provisions, particularly the implied antifraud rights of action provided by SEC rule 10b-5,[104] the proxy[105] and tender offer rules[106] and other sections.[107] It certainly cannot be said that state courts lack experience and expertise with regard to common-law fraud. Furthermore, of the 1933 and 1934 Acts' express private remedies, only one can fairly be said to be foreign to state statutory or common law.[108] And, as pointed out above with regard to implied remedies, it is far from clear that even a grant of exclusive jurisdiction will keep the issue out of a state court that employs the negligence-per-se rationale.

Even aside from the few courts that have allowed the plaintiff's 1934 Act claim to sneak into state court, a greater problem arises with regard to exclusivity and the federal claim as a defense to a cause of action based on a state law. Although a large number of states will hear 1934 Act claims when raised defensively,[109] a few influential state courts, including Delaware's, have ruled

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N. Hirsch, Blue Sky Legislation (1977). For a partial bibliography of recent literature, see R. Jennings & H. Marsh, Securities Regulation Cases and Materials 1271-72 (4th ed. 1977).

104. 17 C.F.R. § 240.10b-5 (1981). See generally A. Bronberg & L. Lowenfels, Securities Law and Commodities Fraud (1979).

105. 15 U.S.C. § 78n(a) (1976); 17 C.F.R. § 240.14a-9 (1981). See generally E. Aronow & H. Einhorn, supra note 31.

106. 15 U.S.C. §§ 78m(d), m(e), n(d), n(e) (1976). But see Piper v. Chris-Craft Indus., 430 U.S. 1 (1972) (denying a private remedy in the hands of a competing tender offeror).

107. Although a number of suggested, implied private remedies have been argued to the courts, those that have been recognized involve some element of fraud, misrepresentation or deception. See Climan, Civil Liability Under the Credit-Regulation Provisions of the Securities Exchange Act of 1934, 63 Cornell L. Rev. 206 (1978); Dropkin, Implied Civil Liability Under the Trust Indenture Act: Trends and Prospects, 52 Tul. L. Rev. 299 (1978); Hazen, Pruning Rule 10b-5, supra note 26; Lashbrooke, supra note 78; Lowenfels, supra note 78; Siegel, The Implication Doctrine and the Foreign Corrupt Practices Act, 79 Colum. L. Rev. 1085 (1979); Note, Towards the Development of an Implied Right of Action Under Rule 14A-8 of the Securities Exchange Act of 1934, 27 Case W. Res. L. Rev. 1010 (1977); Note, Private Rights of Action for Damages Under Section 13(d), 32 Stan. L. Rev. 581 (1980).

In general, the Supreme Court has become less receptive to implied remedies. See, e.g., Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Davis v. Passman, 442 U.S. 228 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Chrysler Corp. v. Brown, 441 U.S. 281 (1979); Cort v. Ash, 422 U.S. 66 (1975). See note 72 supra.

108. Two of the express private remedies deal with matters other than fraud or misrepresentation. First, section 12(1) of the 1933 Act gives a private right of action against those who fail to comply with the Act's registration, disclosure and prospectus delivery requirements. 15 U.S.C. § 77k(1) (1976). All state securities statutes have similar provisions. Second, section 16(b) of the 1934 Act provides for disgorgement of short-swing profits by certain corporate insiders. Id. § 78p(b). Section 9(e) of that Act imposes liability for certain types of market manipulation, but it is arguable whether this is divergent from the common law, or from common sense for that matter. Id. § 78i(e).

In contrast, the 1933 Act contains two express antifraud cases of liability, id. §§ 77j, 77k(2), while the 1934 Act recognizes liability for material misstatements (of fact) in SEC filings. Id. § 78r(a).

109. Gregory-Massari, Inc. v. Purkitt, 1 Cal. App. 3d 968, 82 Cal. Rptr. 210 (1969); Johnson, Lane, Space, Smith & Co. v. Lenny, 129 Ga. App. 55, 198 S.E.2d 923 (1973); Michigan Nat'l Bank v. Dunbar, 91 Mich. App. 385, 283 N.W.2d 747 (1979); J. Cliff Rahel & Co. v. Roper, 186 Neb. 34, 180 N.W.2d 682 (1970); Birenbaum v. Bache & Co., 555 S.W.2d 513 (Tex. Civ. App. 1977). See also Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1231 n.6 (7th Cir. 1979); Shareholders Mgmt. Co. v. Gregory, 449 F.2d 326 (9th Cir. 1971) (per curiam); Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970). Cf. Bache Halsey Stuart, Inc. v. Killop, 509 F. Supp.

that they are without jurisdiction to do so.[110] This minority view has been criticized severely and even attacked as contrary to the prevailing view that congressional power, stemming from the supremacy clause, exists to confer jurisdiction upon the state courts.[111] Refusal to hear the defense takes away from the injured investor the ability to use the least expensive attack on securities law violations. He cannot take the more passive route of refusing to fulfill obligations under the challenged transactions because the alleged offender can race to state court and thereby deny the injured party any opportunity to raise the federal law violation. The only avenue open to the injured investor is to go through the expense of filing suit in federal court. Such a process necessarily takes the teeth out of the 1934 Act provision voiding violative contracts. Although the exclusivity view of defenses is a minority one that apparently has been rejected by two federal courts of appeals,[112] it was sufficiently important to be a primary factor behind the ALI's proposal to abolish exclusive federal jurisdiction in virtually all private actions under the securities laws.[113]

In the absence of revision of the Securities Acts to abolish exclusive jurisdiction, states like Delaware should abandon their minority position. By way of analogy, state courts generally are considered to have jurisdiction to hear federal antitrust defenses even though there is exclusive jurisdiction over affirmative claims,[114] although a few state courts mistakenly have denied that they have the power to hear the defense.[115]

The power to hear the federal defense does not necessarily incorporate the duty to do so. There well may be instances in which the state courts may

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256 (E.D. Mich. 1980) (violation of Exchange Act is not a complete defense to action for money due but is ground for rescission of the contract).

110. Investment Assocs. v. Standard Power & Light Corp., 29 Del. Ch. 225, 238-39, 48 A.2d 501, 508-09 (1946), aff'd, 29 Del. Ch. 593, 606, 51 A.2d 572, 579 (1947); Eliasberg v. Standard Oil Co., 23 N.J. Super. 431, 92 A.2d 862 (1952), aff'd per curiam, 12 N.J. 467, 97 A.2d 437 (1953). See generally 2 L. Loss, supra note 31, at 973-1000. See also, e.g., New York Stock Exch. v. Pickard & Co., 274 A.2d 148 (Del. Ch. 1971) (refusal to hear 1934 Act counterclaim).

111. Professor Loss takes the position that the refusal to hear the defense is worse than Rhode Island's refusal to enforce a federal, treble damage right under the Emergency Price Control Act, a refusal that was reversed in Testa v. Katt, 330 U.S. 386 (1947). 2 L. Loss, supra note 31, at 978-79; see notes 193-95 and accompanying text infra.

112. See Shareholders Mgmt. Co. v. Gregory, 449 F.2d 326 (9th Cir. 1971) (per curiam) (granting stay of 1934 Act claim pending state court determination of contract and defense based on breach of the Act's provisions); Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970) (same).

113. 2 ALI Fed. Sec. Code § 1822(a) (1980). See text accompanying notes 184-85 infra.

114. National Cigarette Serv. Co. v. Farr, 42 Colo. App. 356, 594 P.2d 603 (1979); Allied Bldg. & Airport Serv., Inc. v. 101-103 Park Ave., Inc., 54 A.D.2d 852, 388 N.Y.S.2d 582 (1976); Merchant Suppliers Paper Co. v. Photo-Marker Corp., 29 A.D.2d 94, 285 N.Y.S.2d 932 (1967); The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 206 (1959). See generally 2 P. Areeda & D. Turner, Antitrust Law ¶ 349 (1978); Comment, The Defense of Antitrust Illegality in Contract Actions, 27 U. Chi. L. Rev. 758 (1960).

115. Vaughn & Co. v. Saul, 143 Ga. App. 74, 86, 237 S.E.2d 622, 631 (1977); Burgess v. Hogan, 175 So. 2d 924 (La. App. 1965); AMF Pinspotters, Inc. v. Harkin Bowling, Inc., 260 Minn. 499, 507-08, 110 N.W.2d 348, 353-54 (1961); General Talking Pictures Corp. v. De Marce, 203 Minn. 28, 33, 279 N.W. 750, 753 (1938) (alternative holding).

The power to hear the claim is implicit in the long line of cases holding that collateral antitrust defenses cannot be raised while federally illegal conduct that is inherent to the state claim can be heard. See note 117 and accompanying text infra.

wish to avoid the securities law defense. There has been at least one case[116] in which, notwithstanding concurrent jurisdiction, the state court refused to hear a Public Utility Holding Company Act[117] defense to a utility's suit on a contract to purchase an apartment complex. The court deferred to a pending SEC administrative proceeding and suggested that the effect of the federal defense would have been merely to complicate and protract the state law contract claim unnecessarily. In an analogous line of cases, courts have found that a collateral federal antitrust defense could not be raised in answer to a simple claim for breach of contract,[118] but this result was not based on jurisdictional grounds. Instead, it was founded on a recognition that the courts have discretion to prevent undue complication of an otherwise simple state law claim when the antitrust issues are collateral to the transaction in question.[119] It follows that the state courts have ample discretion to prevent harassment by way of a federal securities law defense even in the absence of the 1934 Act's exclusive federal jurisdiction.

C. Multiple Claims, Pendent Jurisdiction and Res Judicata

The impact of the jurisdictional provisions upon multiple suits is signficant. Multiple litigation is of particular concern in the securities area because of the overlap between federal and state law. In addition to the existence of parallel provisions of securities regulation under state blue-sky laws, corporate chartering statutes impose upon corporate issuers of securities a wide variety of fiduciary obligations concerning internal corporate governance.[120] Overlap with state-law fiduciary principles is not limited to corporations because common-law fraud frequently will give rise to rights of action that complement federal and state securities law suits.[121] Significantly, some state courts have extended common-law fraud to negligent[122] and even innocent[123] misrepresentations, as well as to the trading of securities on the basis of insider information.[124] The contraction of federal remedies under SEC rule 10b-5 renders

116. Citibank, N.A. v. Indiana & Mich. Elec. Co., 58 A.D.2d 519, 395 N.Y.S.2d 182 (1977).

117. 15 U.S.C. § 79y (1976) (original version at ch. 687, § 25, 49 Stat. 835 (1935)).

118. See, e.g., Kelly v. Kosuga, 358 U.S. 516 (1959); Response of Carolina v. Leasco Response, Inc., 498 F.2d 314 (5th Cir. 1974); Union Oil Co. v. Chandler, 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970); Eastman Kodak Co. v. GAF Corp., 71 A.D.2d 833, 419 N.Y.S.2d 372 (1979); American Broadcasting-Paramount Theatres, Inc. v. American Mfrs. Mut. Ins. Co., 42 Misc. 2d 939, 249 N.Y.S.2d 481 (Sup. Ct. 1963); Sessions Co. v. W.A. Schaeffer Pen Co., 344 S.W.2d 180, 184 (Tex. Civ. App. 1961); Keene Corp. v. R.W. Taylor Steel Co., 594 P.2d 889 (Utah 1979).

119. See, e.g., Phoenix Newspapers, Inc. v. Schmuhl, 114 Ariz. 113, 559 P.2d 669 (1976); Axiom Mkt. Res. Bureau, Inc. v. Times Mirror Magazines, Inc., 433 N.Y.S.2d 523 (Sup. Ct. 1980).

120. See Hazen, Corporate Chartering, supra note 5. The 1934 Act expressly preserves all common-law remedies. 15 U.S.C. § 78bb(a) (1976).

121. See, e.g., McMenomy v. Ryden, 276 Minn. 55, 148 N.W.2d 804 (1967) (derivative suit by investment company shareholders); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974) (sale of stock by corporate insider).

122. See, e.g., Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bressenoff, Yavner & Jacobs, 455 F.2d 847 (4th Cir. 1972); Williams v. Polgar, 391 Mich. 6, 215 N.W.2d 149 (1974); Restatement (Second) of Torts § 552 (1977); Annot., 46 A.L.R.3d 979 (1972).

123. See Hill, Damages for Innocent Misrepresentation, 73 Colum. L. Rev. 679 (1973).

124. See Brophy v. Cities Serv. Co., 31 Del. Ch. 241, 70 A.2d 5 (1949); Blakesley v. Johnson, 227 Kan. 495, 608 P.2d 908 (1980); Diamond v. Oreamuno, 24 N.Y.2d 494, 248 N.E.2d 910, 301

these state remedies increasingly important. Under exclusive jurisdiction all related claims can be heard together only if the federal court exercises its discretion to invoke pendent jurisdiction over the state claims.[125] One limitation is that once the federal claim has failed, the federal court is likely to dismiss the state claim.[126] Even if the federal court retains jurisdiction, there appears to be some question whether it will invoke a state remedy that is not recognized federally.[127]

Exclusive jurisdiction thus puts the injured investor in a dilemma. If he wants to appeal to the state law's forward-looking view of common-law misrepresentation, he may be forced to split his claims by going into state court for that claim and leaving his 1934 Act claim for federal litigation. In addition to the inefficiency and expense involved, the res judicata prohibition against splitting a cause of action may render such a tactic ineffective. By going to federal court on a pendent basis, on the other hand, the plaintiff takes the risk that the federal court will assume a less progressive view of the state law. Furthermore, in hearing the case the federal court is likely to emphasize the federal claim at the expense of state law issues.[128] Pendent jurisdiction is therefore far from a cure-all;[129] in many cases involving the small investor, pendent jurisdiction will not be sufficient to encourage bringing the federal claim, leaving a significant gap in the private enforcement scheme.[130]

That state-law issues are frequently involved in federal litigation, and even predominate federal securities claims, is evident from the federal courts' ability to stay the federal proceedings pending the state court outcome. The Supreme Court recently has announced that the federal district courts have considerable discretion in deciding whether to order a stay in an implied action under rule 10b-5.[131] Although courts on occasion have exercised their discretion,[132] the general trend has been to the contrary,[133] with some courts

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N.Y.S.2d 78 (1969); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974). But see Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978) (refusing to adopt New York law expressed in *Oreamuno* that corporation may not recover profits made by officers trading on inside information); Schein v. Chasen, 313 So. 2d 739 (Fla. 1975) (investor-tippees not liable to corporation for profits derived from inside information provided by broker-tippee via president-tipper).

125. United Mine Workers v. Gibbs, 383 U.S. 715 (1966); 5 L. Loss, supra note 31, at 2962-76.

126. United Mine Workers v. Gibbs, 383 U.S. at 725, 727.

127. See Young, supra note 13, at 171. But see Susquehanna Corp. v. General Refractories Co., 250 F. Supp. 797 (E.D. Pa.), aff'd in part per curiam, 356 F.2d 985 (3d Cir. 1966) (state law remedy conditionally adequate; federal relief unnecessary).

128. Failure to give more attention to the federal claim may well result in dismissal from federal court on the basis that the state issues predominate. United Mine Workers v. Gibbs, 383 U.S. at 726-27. See also, e.g., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 627 (1974); Merritt v. Colonial Foods, Inc., 499 F. Supp. 910 (D. Del. 1980).

129. See 5 L. Loss, supra note 31, at 2962-76; C. Wright, supra note 22, at 74-77.

130. This is especially serious, as many federal securities law violations that involve relatively small damages or relatively few injured parties will never be redressed even by way of administrative enforcement by the SEC. See note 247 infra.

131. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

132. See Shareholders' Mgmt. Co. v. Gregory, 449 F.2d 326 (9th Cir. 1971) (per curiam); Aetna State Bank v. Altheimer, 430 F.2d 750 (7th Cir. 1970). See also Baer v. Fahnestock & Co., 565 F.2d 261 (3d Cir. 1977) (per curiam) (stay pending New York Stock Exchange arbitration proceeding).

133. See Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Merritt v. Colonial Foods, Inc., 499

raising the question of whether the grant of exclusive jurisdiction precludes a stay.[134] Further, in light of the federal Anti-Injunction Act,[135] the federal courts are very limited in their abiliy to stay state court proceedings pending outcome of the federal securities suit.[136] Exclusive jurisdiction thus encourages parallel state and federal litigation.

An important protection against the possible inefficiency of multiple litigation is found in the related doctrines of res judicata and collateral estoppel. It generally is held that a grant of exclusive jurisdiction does not prevent a federal court from applying collateral estoppel, thereby giving preclusive effect to facts determined in a prior state court litigation.[137] This may be one explanation for the federal courts' reluctance to stay securities claims, but in light of overcrowded dockets, state court determinations in appropriate cases might be welcomed as time-savers for the federal judiciary. Also, the application of res judicata and collateral estoppel is but another example of the dilution and inefficiency of exclusive federal jurisdiction. The absence of concurrent state court jurisdiction may prevent the complete claim preclusion of res judicata in favor of the more limited issue preclusion of collateral estoppel. Concurrent state court jurisdiction to hear the federal claim would decrease the doubling of judicial efforts because the res judicata effect would be greater.

Two of the first district court decisions on point took the position that the federal cause of action under the 1934 Act would be barred completely by res judicata when the prior, parallel, state law claim was premised upon the same

F. Supp. 910, 916 (D. Del. 1980); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806, 810 (S.D.N.Y. 1970), aff'd per curiam, 452 F.2d 662, (2d Cir. 1971). Cf. Lyons v. Westinghouse Elec. Co., 222 F.2d 184 (2d Cir. 1955) (refusal to stay federal antitrust action).

134. See LeCoz, Inc. v. District Court, 502 F.2d 104 (9th Cir. 1974); Merritt v. Colonial Foods, Inc., 449 F. Supp. 910, 916 (D. Del. 1980) (citing Cotler v. Inter-County Orthopaedic Ass'n, P.A., 526 F.2d 537, 542 (3d Cir. 1975)). Cf. Certified Group (USA), Inc. v. First Variable Fund Rate for Gov't Income, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 98,242 (D.D.C. July 31, 1981) (declining to abstain from deciding 1934 Act claim in deference to ongoing, state interpleader suit).

135. 28 U.S.C. § 2283 (1976). See generally Mayton, Ersatz Federalism Under the Anti-Injunction Statute, 78 Colum. L. Rev. 330 (1978); Comment, The Anti-Injunction Statute—Timing Federal Court Stays of State Court Proceedings, 64 Minn. L. Rev. 830 (1980).

136. See, e.g., In re Glenn W. Turner Enterprises Litigation, 521 F.2d 775 (3d Cir. 1975); McGough v. Arlington Nat'l Bank, 519 F.2d 552 (7th Cir. 1975); Jennings v. Boenning & Co., 482 F.2d 1128 (3d Cir.), cert. denied, 414 U.S. 1025 (1973); Vernitron Corp. v. Benjamin, 440 F.2d 105 (2d Cir.), cert. denied, 402 U.S. 987 (1971); Lefferts v. Silverstein, 396 F. Supp. 983 (E.D.N.Y. 1975).

137. Allen v. McCurry, 449 U.S. 90 (1980); Becher v. Contoure Labs., Inc., 279 U.S. 388, 391 (1929); Key v. Wise, 629 F.2d 1049, 1063-68 (5th Cir. 1980); Abramson v. Pennwood Inv. Corp., 392 F.2d 759 (2d Cir. 1968); Boothe v. Baker Indus., 262 F. Supp. 168 (D. Del. 1966). See generally Einhorn & Gray, The Preclusive Effect of State Court Determinations in Federal Actions Under the Securities Exchange Act of 1934, 3 J. Corp. L. 235 (1978); Comment, Exclusive Federal Court Jurisdiction and State Judgment Finality—The Dilemma Facing the Federal Courts, 10 Seton Hall L. Rev. 848 (1980); Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction, 91 Harv. L. Rev. 1281 (1978); Note, The Effect of Prior Nonfederal Proceedings on Exclusive Federal Jurisdiction Over Section 10(b) of the Securities Exchange Act of 1934, 46 N.Y.U. L. Rev. 936 (1971); Note, Res Judicata: Exclusive Federal Jurisdiction and The Effect of Prior State Court Determinations, 53 Va. L. Rev. 1360 (1967); Note, The Res Judicata and Collateral Estoppel Effect of Prior State Suits on Actions Under SEC Rule 10b-5, 69 Yale L.J. 606 (1960).

essential elements.[138] Although lauded by one commentator on an election-of-remedies basis,[139] this res judicata rationale generally has been rejected in favor of a collateral estoppel approach that precludes relitigation of facts but will not bar an action in federal court as a matter of law.[140] Under this latter, better reasoned view, there is considerable opportunity for multiple litigation under the 1934 Act. Creating across-the-board, concurrent state court jurisdiction would put an end to the collateral estoppel/res judicata debate. The plaintiff suing in state court would then have to assert any federal claim arising out of the same facts or be barred under the res judicata prohibition against splitting a cause of action. Under either approach, however, the defendant needs protection against multiple suits by different plaintiffs. In the event that there are a number of potential plaintiffs, some of whom may bring suit in state courts while others look to federal courts, the defendant is faced with a great hardship. The proposed Federal Securities Code provides a reasonable solution: limited exclusive jurisdiction that has the effect of forcing coordination of such cases through multidistrict litigation in the federal courts.[141]

The preceding discussion demonstrates some of the problems with the current jurisdictional scheme of the federal securities laws. The securities laws present only a microcosm of jurisdiction-allocation questions. It thus is appropriate to examine the issues on a broader scale as well. Much of the teaching of the cases discussed above has equal weight with regard to other federal-question areas.

III. ALLOCATION OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS

A. Exclusive Versus Concurrent Jurisdiction

The federal district courts are vested with two types of original jurisdiction, one based on diversity of citizenship, the other on questions arising under

138. Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959); Kaufman v. Shoenberg, 154 F. Supp. 64 (D. Del. 1954).

139. 1 B. Moore, Federal Practice ¶ 10.410[2], at 1182-83 (2d ed. 1974). Election of remedies is inappropriate in light of the 1934 Act's express provision preserving common-law remedies, 15 U.S.C. § 78bb(a) (1976). See Omega Executive Serv., Inc. v. Grant, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,623 (S.D.N.Y. 1980).

140. See Clark v. Watchie, 513 F.2d 994 (9th Cir.), cert. denied, 423 U.S. 841 (1975); Vernitron v. Benjamin, 440 F.2d 105 (2d Cir.), cert. denied, 402 U.S. 987 (1971); Klein v. Walston & Co., 432 F.2d 936, 937 (2d Cir. 1970) (per curiam); Abramson v. Pennwood Inv. Corp. 392 F.2d 759 (2d Cir. 1968); McNally v. Esmark, Inc., 427 F. Supp. 1211 (N.D. Ill. 1977); Lincoln Nat'l Bank v. Lampe, 421 F. Supp. 346 (N.D. Ill. 1977) (memorandum); Puma v. Mariott, 348 F. Supp. 18 (D. Del. 1972); Movielab, Inc. v. Berkey Photo, Inc., 321 F. Supp. 806 (S.D.N.Y. 1970), aff'd per curiam, 452 F.2d 662 (2d Cir. 1971); Wellington Computer Graphics, Inc. v. Modell, 315 F. Supp. 24 (S.D.N.Y. 1970); Kahan v. Rosenstiel, 285 F. Supp. 61 (D. Del. 1968) (memorandum); Moran v. Paine, Webber, Jackson & Curtis, 279 F. Supp. 573 (W.D. Pa. 1967), aff'd, 389 F.2d 242 (3d Cir. 1968). See generally Einhorn & Gray, supra note 137, at 242-48. But see In re Clinton Oil Co. Secs. Litigation, 368 F. Supp. 813 (J.P.M.D.L. 1973) (per curiam); Dembitzer v. First Republic Corp., [1964-65 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,566 (S.D.N.Y. 1965).

141. 2 ALI Fed. Sec. Code § 1711 (1980), which is discussed at text accompanying notes 185-86 infra.

federal law. In order to protect out-of-state litigants from supposed prejudice on the part of local state courts, diversity jurisdiction was granted to the federal courts by Congress in the Judiciary Act of 1789.[142] Today, suits premised upon state law may be heard in a federal forum when the parties are from diverse states and the amount in controversy exceeds $10,000.[143] There has been considerable on-going debate[144] concerning the retention of diversity jurisdiction, a debate that becomes increasingly heated as the congestion of federal courts spirals upward. In response to criticism and to growing federal-docket problems, the American Law Institute proposed limitations on the federal courts' diversity jurisdiction.[145] Others have favored the elimination of diversity jurisdiction altogether, but no such changes have been implemented to date. One objection to the elimination of diversity jurisdiction is that many state dockets also are overcrowded. Although the backlog in some states may not be as dramatic or as well publicized as the federal backlog, it is a factor that must be weighed in evaluating any question of jurisdictional allocation.

The second type of federal district court original jurisdiction, cases arising under federal law,[146] raises similar questions regarding judicial economy and efficiency. Most current discussion, however, has been geared toward paring down diversity of citizenship. As will be developed more fully below, reallocation of federal-question cases could lessen docket pressures without compromising the fundamental underpinnings of federal-question jurisdiction. Changes such as those suggested herein for the securities laws thus would be beneficial not only in facilitating better treatment of the substantive law issues but also in helping to relieve the caseload problem.

The Judicial Code generally provides for federal-question jurisdiction in civil actions regardless of the amount in controversy.[147] In addition to jurisdiction over criminal offenses[148] and actions involving agencies,[149] both of

142. Ch. 20, 1 Stat. 73.

143. 28 U.S.C. § 1332(a) (1976). See generally Hart & Wechsler, supra note 23, at 1050-1102 (2d ed. 1973 & Supp. 1977); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3601 (1976); Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).

144. Compare, e.g., Frank, For Maintaining Diversity Jurisdiction, 73 Yale L.J. 7 (1963); Frank, The Case for Diversity Jurisdiction, 16 Harv. J. Leg. 403 (1979); and Parker, Dual Sovereignty and the Federal Courts, 51 Nw. U.L. Rev. 407 (1956), with Burger, The State of the Federal Judiciary—1979, 65 A.B.A.J. 358, (1979); Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1 (1968); Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499 (1928); and Kastenmeier & Remington, Court Reform and Access to Justice: A Legislative Perspective, 16 Harv. J. Leg. 301, 311-18 (1979). See C. Wright, supra note 22, at 87 nn.16 & 17. See also Bartels, Recent Expansion in Federal Jurisdiction: A Call for Restraint, 55 St. John's L. Rev. 219 (1981).

145. ALI Study, supra note 9. See, e.g., C. Wright, supra note 22, at 88; Currie, supra note 144.

146. 28 U.S.C.A. § 1331 (West Supp. 1981). See generally C. Wright, supra note 22, at 63-84; Aycock, Introduction to Certain Members of the Federal Question Family, 49 N.C.L. Rev. 1 (1970); Bergman, Reappraisal of Federal Question Jurisdiction, 46 Mich. L. Rev. 17 (1947); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953).

147. 28 U.S.C.A. § 1331 (West Supp. 1981). A minimum amount in controversy may still be found in some statutes. E.g., 15 U.S.C. § 2310(d)(3)(B) (1976) ($50,000); id. § 2072(a) (Supp. IV 1980) ($10,000).

148. 18 U.S.C. § 3231 (1976) (giving the district courts exclusive jurisdiction).

149. Such jurisdiction exists both for enforcement actions instituted by federal agencies and

which are generally exclusively federal, an overwhelming number of federal statutes invoke the district court's power with no limitation on the amount in controversy.[150] It is reasoned, presumably, that the importance of matters such as regulation of commerce,[151] which necessarily includes the Securities Acts, warrants access to federal courts regardless of the amount in controversy. This rationale is extended by making federal jurisdiction exclusive and to a lesser extent by making concurrent state jurisdiction subject to removal to a federal forum. However, when there is concurrent jurisdiction with no right of removal, as is the case with private actions arising under the Securities Act of 1933[152] and the Trust Indenture Act of 1939,[153] it is the plaintiff's choice of forum, not any consideration of federalism, that governs.

Exclusive federal-question jurisdiction such as that found under the Securities Exchange Act of 1934 has been justified on the basis of uniformity of result, and judicial competency and expertise,[154] as well as freedom from state court judges' sensitivity to the political climate and majoritarian pressures. Whether these asserted advantages to the federal forum are more apparent than real is open to serious question.[155]

Federal courts' expertise in matters of federal law has been accepted as a justification for exclusive jurisdiction by the American Law Institute with regard to bankruptcy, patent, copyright and antitrust suits, as well as to suits under the Miller Act[156] on contracts to which the United States is a party.[157]

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for appeals from their administrative or quasi-judicial rulings. See generally K. Davis, Administrative Law Treatise (2d ed. 1978).

150. E.g., 28 U.S.C. § 1343 (1976) (civil rights cases); id. § 1337 (any act regulating commerce). See C. Wright, supra note 22, at 87 nn.16-17.

151. 28 U.S.C. § 1337 (1976).

152. 15 id. § 77v(a).

153. Id. § 77vvv.

154. See text accompanying note 93 supra. See generally D. Currie, Federal Courts 355-62 (1968); Neuborne, supra note 1; Young, supra note 13, at 165-69; Note, Exclusive Jurisdiction of the Federal Courts in Private Civil Actions, 70 Harv. L. Rev. 509 (1956); Note, supra note 49, at 110-13.

155. See Fischer, supra note 1. See also notes 93-108 and accompanying text supra.

156. 40 U.S.C. § 270b (1976). See ALI Study, supra note 9, at App. E.

157. ALI Study, supra note 9, at 182-87. The comments explain:

> There are good reasons for continuing exclusive jurisdiction in these classes of cases. The federal judicial system has a well-developed machinery for handling bankruptcy matters, as well as much experience with them. In patent and copyright cases the federal courts again have experience, which the state courts lack, and in these cases there is a federal interest in the monopoly conferred by the patent or copyright that is more important than the wishes of the parties. Similar arguments, though somewhat less forceful, can be made with regard to antitrust cases. Suits under the Miller Act, 40 U.S.C. § 270b, are discussed in detail in an appendix. For the reasons there set forth, there is an advantage in requiring that all suits on Miller Act bonds—and on the similar bonds under the Capehart Act, *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 499 (8th Cir. 1964); *Lasley v. United States*, 285 F.2d 98 (5th Cir. 1960); *Griners' and Shaw, Inc. v. Federal Insurance Co.*, 234 F. Supp. 753 (E.D.S.C. 1964)—be brought in a single federal court. Accordingly this subsection continues exclusive jurisdiction of such cases, and the existing venue provision requiring suit in the district where the contract was to be performed and executed, 40 U.S.C. § 270b(b), will be preserved.

Id. at 183 (footnote omitted). For arguments generally favoring exclusive jurisdiction, see Redish

But neither the ALI nor Professor Loss, one of the premier securities scholars and the drafter of the proposed Securities Code, finds that such compelling federal court expertise exists in the securities area.[158] Unlike under bankruptcy, and to a lesser degree, antitrust laws, private remedies under federal securities laws are not matters unfamiliar to state judges.[159]

Even beyond the close analogy of federal securities law private damage and enforcement actions to comparable state law claims, it is questionable whether past exposure to the statutes necessarily results in expertise.[160] Furthermore, the expertise argument is self-fulfilling because it is the jurisdictional provisions at issue that determine the extent of the state courts' experience with the subject matter. Even if the state courts were able to build up additional experience in private remedies under the securities laws, they still would not have exposure to the criminal and SEC-originated actions that would remain exclusively federal under the current law or under any of the proposals discussed herein.[161] But if the key is expertise in the technical aspects of the securities industry, it is the SEC, not the federal courts, that should be vested with the adjudicatory authority in question. One would hope and certainly expect that state court judges are as able to digest relevant SEC doctrine as are their federal counterparts.[162] Another argument advanced for the retention of exclusive federal jurisdiction is the complexity of the cases, not only in the number of parties but also in the amount of discovery and evidentiary material that may be involved. Although many securities cases will be of this magnitude, complexity is not endemic to every claim, as it may be with antitrust cases, which are more likely to involve protracted discovery and trial coordination of complex and multidistrict litigation problems. Especially

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& Muench, supra note 1, at 311, 322 n.88; Young, supra note 13, at 167. See also Chisum, supra note 1.

158. At present federal jurisdiction is exclusive in cases under the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, while there is concurrent state and federal jurisdiction of cases under the Securities Act of 1933, and a ban on removal of cases under that Act brought in state court, 15 U.S.C. § 77v(a). So far as the legislative history shows, this difference in these two related statutes is pure happenstance. It appears desirable to treat the statutes in similar fashion. The leading student of these statutes has argued for concurrent jurisdiction under both statutes. Loss, *The SEC Proxy Rules and State Law*, 73 Harv. L. Rev. 1249, 1274-1276 (1960). Although the present proposals in § 1313 as to scope of the action will avoid some of the problems that exclusive jurisdiction now creates, there is no compelling reason for exclusive jurisdiction. Accordingly no reference is made to these statutes in this subsection, and elsewhere amendments are proposed to remove from the 1934 Act the provision for exclusive jurisdiction and to remove from the 1933 Act the ban on removal.

ALI Study, supra note 9, at 183-84 (footnote omitted). See also 2 ALI Fed. Sec. Code § 1822(a)(2) (1980); ALI Fed. Sec. Code § 1578 & accompanying comments (tent. draft no. 3, 1973); 5 L. Loss, supra note 31, at 977-1000, 2950-57; Note, supra note 49.

159. See notes 102-08 and accompanying text supra.

160. The confusion that currently is rampant in many lower federal court securities cases belies any claim of expertise. See, e.g., Beecher v. Able, 374 F. Supp. 341 (S.D.N.Y. 1974); notes 21, 77 and accompanying text supra; note 165 infra.

161. Both types of actions call for exclusive jurisdiction, for reasons not applicable to private remedies. Accordingly, the current law, like the proposed Code, would keep such governmental enforcement actions out of state courts. 2 ALI Fed. Sec. Code § 1822 (1980). See text accompanying notes 181-85 infra.

162. But see Neuborne, supra note 1, at 1121.

when an investor is suing insured individuals, such as an issuer or a brokerage house, the defendant generally is better able to bear the costs of extended litigation and may be able to litigate the plaintiff out of court by exhausting his resources. While the federal rules certainly provide procedural advantages, especially within the context of a class action, they also give the parties the ability to delay ultimate resolution of the case. This is due not only to the liberal discovery rules but also to the docket congestion in the federal courts at both the trial and appellate levels. Concurrent jurisdiction gives the plaintiff the opportunity to make his choice and then live with the consequences.[163]

Two other, proferred rationales for exclusive jurisdiction—(1) the easier achievement of uniformity of result and (2) the competence of the federal judiciary—are equally questionable justifications. The potential for conflict among the twelve federal circuits must not be underestimated. The Supreme Court grants review in only a small number of securities cases, and even in those areas in which the Court has granted review, the decisions tend to raise more questions than they answer.[164] It is not surprising then that the federal courts of appeals are in conflict over monumental securities issues.[165] Furthermore, the Supreme Court can review any state court determination of federal law.[166] The only difference in terms of uniformity that remains is a comparison of numbers—fifty states versus twelve circuits. This jurisdictional redundancy in fact may improve the decision-making process. It recently has been suggested that by expanding the number of potential forums, concurrent jurisdiction presents an opportunity for "polycentric norm articulation" and a better basis for resolving areas of the law that are in conflict.[167]

Perhaps the most difficult factor to weigh in the allocation balance is the relative competence of the federal and state judiciaries. One commentator has asserted brashly, "[B]ecause it is relatively small, the federal trial bench maintains a level of [technical] competence in its pool of potential appointees which dwarfs the competence of the vastly larger pool from which state trial judges are selected."[168] In addition to lacking an empirical basis for this assertion,

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163. The streamlined federal discovery provisions are likely to benefit the plaintiff, who in the typical securities case is not as able to bear the cost of extended litigation as is the defendant. Concurrent jurisdiction without a right of removal allows the plaintiff to have the final say and does not permit the defendant to subvert this choice. See generally notes 223-40 and accompanying text infra.

164. See Hazen, Pendulum, supra note 47.

165. Examples include tipper and tippee liability under rule 10b-5 of the 1934 Act (see note 21 supra), the existence of an implied remedy under section 17(a) of the 1933 Act (see note 77 supra) and whether reckless conduct satisfies the scienter requirement (see, e.g., Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981)).

166. 28 U.S.C. § 1257 (1976).

167. Cover, supra note 81, at 675-77. "[S]o long as such a forum is only one of several, there is room, for a while at least, for recognition of the truly open, tentative, transitional status of norms which do not yet command common acquiescence among all relevant authoritative courts." Id. at 680.

168. Neuborne, supra note 1, at 1121. Professor Neuborne extends this argument by further asserting that the disparity in the "caliber of judicial clerks" also weighs heavily in favor of the superiority of the federal judiciary. Id. at 1122. See also, e.g., Mishkin, supra note 146, at 158-59.

It recently has been pointed out that the selection and retention system in many states pro-

Professor Neuborne's view of innate federal superiority falls far short of universal acceptance.[169] As is generally the case with such unsubstantiated generalizations, Professor Neuborne's position originates from a result-oriented perspective.[170]

Professor Neuborne further maintains that the life tenure of federal district judges insulates them from the "majoritarian pressures" that prey upon elected state court judges and those who are appointed for a specific term.[171] Once again, the proponent fails to offer evidence that state court judges are so affected, or that federal judges are not. Such majoritarian influences are more likely to have an effect in Professor Neuborne's area of concern, the protection of civil rights, in which political emotions run high, than in other areas. Thus, federal law adjudication may be necessary to ensure the protection of civil rights, but it is not necessarily essential in the securities area—a subject that is not likely to arouse the passions of the electorate. If anything, the state courts have been more protective of rights created under the securities laws.[172] Additionally, life-long tenure arguably acts against superior competence and creates an unfortunate insulation from the political process. The appointment of judges in sympathy with contemporary majoritarian views locks those views into the judicial system. Some awareness of, and responsiveness to, the political climate on the part of judges may be a positive factor in maintaining our systems of checks and balances and separation of powers.[173] Second, it has been suggested that as time passes and some judges lose interest or acuity, there is less to hold them accountable than with other selection and retention procedures.[174] This argument does not question the importance of independent federal judges[175] but rather suggests that there is nothing inherent in their selection or retention that fosters an atmosphere superior to that in state systems.[176] As with many other institutions, it is the actual operation of the system, rather than its structural aspects, that primarily affects the end product.

As pointed out above, Professor Neuborne is concerned with the protection of civil rights, a topic that traditionally has been at the forefront of fed-

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vides equivalent safeguards. O'Connor, Trends in the Relationship between Federal and State Courts from the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 811-14 (1981).

169. See, e.g., Fischer, supra note 1, at 184-91; O'Connor, supra note 168. See also P. Carrington & B. Babcock, Civil Procedure, Cases and Comments on the Process of Adjudication 128-30 (2d ed. 1977); Rosenberg, The Qualities of Justices—Are They Strainable?, 44 Tex. L. Rev. 1063 (1966); Totenberg, Will Judges Be Chosen Rationally?, 60 Jud. 93, 93-99 (1976).

170. See Neuborne, supra note 1, at 1120, 1124-27. For an excellent, well-reasoned criticism of Professor Neuborne's overgeneralizations, written from an outcome-oriented perspective, see Fischer, supra note 1. See also, e.g., Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981).

171. Neuborne, supra note 1, at 1127-28.

172. See text accompanying notes 68-89 supra.

173. See generally Bishin, Judicial Review in Democratic Theory, 50 S. Cal. L. Rev. 1099 (1977); Linde, Judges, Critics and the Realist Tradition, 82 Yale L.J. 227 (1972).

174. See Fischer, supra note 1, at 192-93.

175. See generally Kurland, The Constitution and the Tenure of Federal Judges: Some Notes From History, 36 U. Chi. L. Rev. 665 (1969).

176. See O'Connor, supra note 168, at 812-13. In fact, it has been suggested that state courts are equally as "counter-majoritarian" as federal courts. Fischer, supra note 1, at 194; Linde, supra note 173, at 248-49.

eral/state tensions. Constitutional and individual rights are areas in which congressional action or federal judicial activism often has been necessary to accomplish national goals. These areas should not be overgeneralized or necessarily associated with other federal law areas. The only way to respond fully to the problems identified by Professor Neuborne is through exclusive federal jurisdiction. However, on the broader questions of general allocation of jurisdiction, the trend has been quite the opposite, with both Congress and commentators generally favoring concurrent jurisdiction for private federal-question litigation.[177] The prevailing legislative choice can be seen as a statement of "congressional neutrality on the question of institutional competence."[178]

There is much to commend the elimination of exclusive federal jurisdiction in the vast majority of private federal-question cases,[179] including those brought under the Securities Exchange Act of 1934.[180] In contrast, the American Law Institute proposals would retain exclusive federal jurisdiction over administrative enforcement and all criminal offenses.[181] As noted above, the ALI also would not allow state courts to hear suits involving the bankruptcy, patent, copyright and antitrust laws, as well as actions involving public contractors under the Miller Act.[182] The reasons for these exceptions include the belief that these areas are sufficiently foreign to normal state-law concerns that they are in more need of federal-court expertise, that they are overly complex from a litigation-management perspective (especially the antitrust laws) or that they are purely federal concerns that should not be thrust upon the states.

Even in the securities regulation area there are matters that find no common-law analogy and under the proposed Code still would involve exclusive federal jurisdiction for civil actions. In addition to criminal prosecutions and actions brought by the SEC, the proposed Code would retain exclusive federal jurisdiction for civil actions brought by the Securities Investor Protection Corporation (SIPC)[183] for a protective decree in the case of broker-dealer insolvency and for suits to compel payment of customer claims and actions against the SIPC.[184] The proposed Code also would retain exclusive federal jurisdiction to prorate damages in multiple suits involving the same defendant.[185] The Code's very limited retention of exclusive jurisdiction seems a sufficient answer to the proponents of continued federal exclusivity. The provisions relating to broker-dealer insolvency are consistent with the more general recommendation of retaining exclusive federal jurisdiction for federal bankruptcy matters and with the general rule of exclusive jurisdiction for actions involving

177. See notes 156-59 and accompanying text supra.
178. Fischer, supra note 1, at 203.
179. ALI Study, supra note 9, § 1311(b).
180. 2 ALI Fed. Sec. Code § 1822 (1980). But see Note, supra note 49.
181. See 2 ALI Fed. Sec. Code § 1822 (1980).
182. See ALI Study, supra note 9, at App. E.
183. Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78o(c)(3), 78aaa-*lll* (1976).
184. 2 ALI Fed. Sec. Code §§ 1205, 1209(e), 1210(a)(2), 1822(a)(1) (1980).
185. Id. §§ 1711, 1822(a)(1).

federal agencies, in this case the SIPC. The provisions regarding proration of damages in multiple civil suits are designed to continue the facilitation of management and claim coordination through the panel on multidistrict litigation. This provision would provide the necessary insurance against state courts being overburdened by complex litigation that they might not be equipped to handle.

Notwithstanding the aforementioned preferences for the elimination of exclusive federal jurisdiction in most private federal question cases, other factors must be considered before making a final judgment. How are the states to apply the federal law? If there is to be concurrent jurisdiction, should there be a right of removal to federal court? These questions are taken up in the sections that follow.

B. Federal Law in the State Courts

There are two threshold questions with regard to the application of federal law in the state courts: (1) Does the state court have the *power* to hear the federal issues?; (2) If so, does the state court have the *duty* to hear the case?[186] The power question generally is answered by congressional declaration in terms of the express grant of either exclusive or concurrent jurisdiction. In some instances, however, there is no explicit answer, and the courts are faced with the task of allocating jurisdiction. The judicial treatment of congressional silence on the allocation issue is illustrative of the delicate balance that must be struck. The legislative preference for concurrent jurisdiction has been recognized by the courts. The Supreme Court long ago announced a policy of presumptive concurrent jurisdiction,[187] but this presumption is not always followed[188] and has come under sharp criticism.[189] One route is to look for the legislative intent, but this rarely answers the question. The intricacies of the attendant problems and the variations that exist within different federal question areas make insurmountable the task of manufacturing legislative intent out of whole cloth.[190] It follows that the only satisfactory solution is for Congress to make a well-reasoned decision regarding the appropriate jurisdic-

186. For an excellent discussion of these two questions, see Redish & Muench, supra note 1.

187. Claflin v. Houseman, 93 U.S. 130 (1876). See also, e.g., Bowles v. Barde Steel Co., 177 Or. 421, 164 P.2d 692 (1945).

188. The most notable example is the exclusive federal jurisdiction exercised under the antitrust laws. See Klein v. American Luggage Works, Inc., 206 F. Supp. 924 (D. Del. 1962), rev'd on other grounds, 323 F.2d 787 (3d Cir. 1963); Vaughn & Co. v. Saul, 143 Ga. App. 74, 237 S.E.2d 622 (1977); Burgess v. Hogan, 175 So. 2d 924 (La. App. 1965); AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 260 Minn. 499, 110 N.W.2d 348 (1961); Otis Elevator Co. v. John J. Reynolds, Inc., 81 Misc. 2d 314, 366 N.Y.S.2d 256 (Sup. Ct. 1975); American Broadcasting-Paramount Theatres, Inc. v. Hazel Bishop, Inc., 31 Misc. 2d 1056, 223 N.Y.S.2d 178 (Sup. Ct. 1961); Ackert v. Ausman, 29 Misc. 2d 962, 218 N.Y.S.2d 814 (Sup. Ct. 1961).

189. Fischer, supra note 1, at 203-11; Redish & Muench, supra note 1, at 313-40.

190. It has been suggested that the absence of concrete legislative history is due to congressional inattention and is too flimsy a basis for making such a decision. "If the desired goal is a reasoned and deliberate allocation of jurisdiction over federal statutory claims between federal and state courts, exclusive reliance on legislative history seems inadequate." Redish & Muench, supra note 1, at 327. For a recent example of the Court's refusal to imply exclusive jurisdiction, see Colorado River Conserv. Dist. v. United States, 424 U.S. 800 (1976).

tional allocation for the subject matter in question.[191] Even when Congress has spoken, however, there often is a serious question whether the legislation is the result of a deliberate decision-making process, as there generally is little relevant legislative history. Specifically, it is difficult, if not impossible, to point to a well-reasoned rationale for the trifurcated approach taken by the securities laws.[192]

Once Congress has made the decision that state courts have jurisdiction, the question then arises as to state court obligation to hear the federal claim. Congress clearly has at least a limited power, presumably arising out of the supremacy clause, to require state courts to hear such claims.[193] It has been suggested, however, that the commerce clause may not properly be relied upon to create an undue incursion upon the tenth amendment's recognition of state sovereignty.[194] Even in the face of such a limitation on congressional power, securities regulation does not infringe upon the essence of state sovereignty. Furthermore, it has been argued persuasively that congressional grants of concurrent jurisdiction generally should be viewed as imposing an obligation upon the state courts to hear federal claims.[195] Even if the state court has discretion to refuse to adjudicate the federal claim under a scheme of concurrent jurisdiction, a state court's refusal to entertain the claim would not bar the

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191. See Fischer, supra note 1, at 203-11.

192. See 2 L. Loss, supra note 31, at 997-98; Note, supra note 49, at 109-10 n.58.

193. Testa v. Katt, 330 U.S. 386 (1947); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233-34 (1934); Note, State Enforcement, supra note 90. All such holdings, however, have been in the context of "analogous state-created rights." C. Wright, supra note 22, at 195; Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507-08 (1954).

Not all authorities agree that Congress has this power even to a limited degree. See Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring). See generally Redish & Muench, supra note 1, at 341.

194. See Redish & Muench, supra note 1, at 343-45 (discussing National League of Cities v. Usery, 426 U.S. 833 (1976)). See also Young, supra note 13, at 162. The relevant theory is that Congress cannot constitutionally burden state resources when there is no counterbalancing, federal interest in doing so. The *Usery* case, however, dealt with attempted, federal labor-law intervention in the terms and condition of state employment, which in turn directly affected the use of state funds and the state treasury, a matter that goes to the essence of state sovereignty. It would be a significant jump to apply this rationale to federal invocation of state court jurisdiction.

195. In our judgment, the view that state courts should have the power to enforce federal claims without some accompanying obligation is inconsistent with the concept of federal supremacy that has evolved over the years. In giving state courts the power to adjudicate federal causes of action, presumably Congress (or, where Congress is silent, the court, necessarily exercising a lawmaking function) has decided that the substantive policies embodied in the federal statute creating the cause of action and the federal policies concerning the administration of the federal court system are best advanced by distributing the case burden between the state and federal courts. If the state courts could frustrate these federal policies by simply declining to adjudicate the federal claims, then the concept of federal supremacy would be considerably undercut. A second consideration is that, under such a system, each state judiciary would decide for itself whether to accept federal cases; thus there would be no way to regulate the allocation of burdens between state and federal courts. The resulting unpredictability in the federal judiciary's caseload could conceivably hinder congressional decision-making concerning the structure and jurisdiction of the federal courts. It therefore seems unwise to presume that Congress intended such a result unless, of course, it explicitly provides in the terms of a new statute that state courts are to be given the power but not the duty to hear federal cases.

Redish & Muench, supra note 1, at 347 (footnote omitted). But see Sandalow, *Henry v. Mississippi* and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 207.

plaintiff's assertion in federal court. There have been legislative attempts to take full advantage of the power to vest the state courts with exclusive jurisdiction over federal claims. For example, Congress recently has attempted to impose such an obligation on the state courts without giving a federal forum for remedies of violations of the Magnuson-Moss Warranty Act,[196] thus evidencing a broad view of constitutional congressional reach. Extension of the 1933 Act's concurrent jurisdiction without removal would be a less radical departure from the norm. Therefore, no constitutional barrier would appear to preclude the changes discussed herein.

Once it is established that the state court will hear the federal claim, questions arise concerning the law governing both procedural and substantive issues in applying stare decisis to lower federal court decisions. It once was assumed that where there was concurrent jurisdiction the plaintiff who opted for state court wavied any rights to federal procedural protections.[197] It is now clear, however, that fundamental federal procedural rules can govern in state court,[198] either by implication from the statutory scheme[199] or by express congressional directive.[200]

As pointed out above,[201] exclusive federal jurisdiction does not guaranty uniformity of result in the absence of definitive Supreme Court pronouncements on point. The larger number of state jurisdictions, as compared with the twelve circuits, necessarily increases the potential for conflict and presents the opportunity for a wider number of variations on a single point of law. The impact of this increased potential for conflict depends upon state court treat-

196. 15 U.S.C. § 2310 (1976). State courts have jurisdiction over all claims under the Act, but the federal courts can hear cases only where there is more than $50,000 in controversy and in a class action when there are no fewer than 100 claimants. For such suits the only forum is the state court, thus leaving the right without a remedy if the state can abstain from hearing the case. See generally Denicola, The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case, 44 Ford. L. Rev. 273 (1975); Schroeder, Private Actions Under the Magnuson-Moss Warranty Act, 66 Calif. L. Rev. 1 (1978).

197. See Minneapolis & St. L.R.R. v. Bambolis, 241 U.S. 211 (1916); C. Wright, supra note 22, at 195-96.

198. C. Wright, supra note 22, at 195-96; Hill, Substance and Procedure in State FELA Actions—The Converse of The *Erie* Problem?, 17 Ohio St. L.J. 384 (1956); Note, Procedural Protection, supra note 90.

199. For example, while imposing concurrent state court jurisdiction in FELA cases, congressional silence on procedural issues did not prevent the Supreme Court from holding that the Federal Rules of Civil Procedure control regardless of the forum. Dice v. Akron C. & Y.R.R., 342 U.S. 359 (1952); Brown v. Western Ry., 338 U.S. 294 (1949); Hill, supra note 198. See also Neuborne, Toward Procedural Parity in Constitutional Litigation, 22 Wm. & Mary L. Rev. 725 (1981).

200. One proposed solution to the problems raised by exclusive jurisdiction under the 1934 Act is that affirmative claims remain exclusively within the federal courts' adjudicatory authority while all counterclaims and defenses to state causes of action be cognizable in state court, provided that the federal rules of procedure be made applicable to the federal claim. Note, supra note 49, at 115. This seems to be a far more awkward solution than merely replacing exclusive with concurrent state and federal jurisdiction and retaining the right of removal, even for counterclaims and defenses, if the guaranty of a federal forum is warranted. The latter approach is taken by the American Law Institute's proposals. ALI Study, supra note 9, at 196-200; 2 ALI Fed. Sec. Code § 1822(a) (1980). See text accompanying notes 239-41 infra.

201. See text accompanying notes 163-68 supra.

ment of federal precedent.[202] Because there have been no United States Supreme Court decisions directly on point, it is appropriate to examine by way of analogy the more fully developed question of how federal courts are to determine and apply state law in diversity cases.[203]

After the monumental decision in *Erie Railroad v. Tompkins*[204] that federal courts must follow state law in diversity cases, it was unclear how the principles of stare decisis were to be applied. It soon was held that a federal court was bound to follow a state trial court "in the absence of more convincing evidence of what the law is."[205] Eight years later, however, the Court held that a federal court is not bound to follow an unreported trial court decision which, of course, would be of questionable precedential value even in state court.[206] The trend in recent years has been to give the federal courts more flexibility: "[U]nder some conditions, federal authority may not be bound even by an intermediate state appellate court ruling . . . . [When there is no ruling by the highest court] federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State."[207] In sum, it appears that the federal courts are compelled to follow the highest state court,[208] as well as any clear indication by lower state courts, leaving the federal court to "find" the state law only in the absence of clear authority.[209] Even though the *Erie* mandate is not directed to state

202. See, e.g., United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); Note, Freeing State Courts to Disregard Lower Federal Court Constitutional Holdings, 25 Sw. L.J. 478 (1971); Note, State Supreme Court Not Bound to Follow Federal District Court Decision on Constitutionality of Municipal Ordinance, 24 Vand. L. Rev. 627 (1971).

203. See generally Hart & Wechsler, supra note 23, at 708-10.

204. 304 U.S. 64 (1938).

205. Fidelity Union Trust Co. v. Field, 311 U.S. 169, 178 (1940). Ironically, the state trial court decision at issue subsequently was rejected by higher state authority. See Clark, State Law in the Federal Courts: The Brooding Omnipresence of *Erie v. Tompkins,* 55 Yale L.J. 267, 291-92 (1946).

206. King v. Order of United Commercial Travelers, 333 U.S. 153 (1948). This ruling would be of minimal importance in the reverse question, because there are relatively few unreported federal securities decisions and those which do exist are found easily in the comprehensive looseleaf reporting services: Fed. Sec. L. Rep. (CCH); Sec. Reg. & L. Rep. (BNA).

207. Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (quoting S. Rep. No. 1013, 80th Cong., 2d Sess. 4 (1948)).

208. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (federal courts are bound to follow forty-six-year-old state supreme court ruling).

209. See C. Wright, supra note 22, at 270-71; Corbin, The Laws of the Several States, 50 Yale L.J. 762, 775-76 (1941).

Many states have minimized further the role of the federal courts by permitting certification of unclear questions to the state supreme courts. E.g., Fla. Stat. Ann. § 25.031 (Harrison 1976); Hawaii Rev. Stat. §§ 602-36, -37 (1976); Me. Rev. Stat. Ann. tit. 4, § 57 (1979); N.H. S. Ct. R. 21; Wash. Rev. Code Ann. § 2.60 (Supp. 1981). This procedure has been utilized in the securities area. See 313 So. 2d 739 (Fla. 1975), on request for certification after Lehman Bros. v. Schein, 416 U.S. 386 (1974), vacating and remanding for opportunity to certify question, Schein v. Chasen, 478 F.2d 817 (2d Cir. 1973). The Court of Appeals for the Second Circuit reversed its 1974 holding after receiving the Florida Supreme Court's response to the certification request. Schein v. Chasen, 519 F.2d 453 (2d Cir. 1975).

It has been suggested that this certification procedure has not proved to be "as expeditious or as helpful as its advocates had hoped." Hart & Wechsler, supra note 23, at 710, relying on Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963), certified in 304 F.2d 70 (5th Cir. 1962). See also Thiry v. Atlantic Monthly Co., 74 Wash. 2d 679, 445 P.2d 1012 (1968).

courts faced with a federal question, the relative hierarchy of precedential sources seems equally applicable.

The treatment of federal law in the state courts has not been given equivalent judicial consideration, and most cases have arisen with regard to constitutional issues rather than nonconstitutional federal questions. It is held uniformly that on constitutional issues, unless there is a Supreme Court ruling, the state courts are not bound to follow either the federal district courts or the courts of appeals.[210] The rationale in these cases is that the constitution must be read into all areas of state substantive law: "In passing on federal constitutional questions, the state courts and the lower federal courts have the same responsibility and occupy the same position; there is parallelism but not paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court."[211] In federal question cases it is equally true that the final arbiter is the United States Supreme Court. But the creation of a state forum for a federal nonconstitutional claim, in contrast to a constitutional claim, does not incorporate the federal law into the body of state law. Accordingly, the state courts in federal question cases should give even more deference to lower federal court decisions.[212] It has been suggested in an analogous context, however, that the rules should be quite flexible, so as to allow the judicial process to proceed normally rather than with "a pair of scissors and paste pot."[213] But judicial creativity must not be used as a guise for disregard-

210. Bromley v. Crisp, 561 F.2d 1351, 1354 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978); United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971); City of Chicago v. Groffman, 42 Ill. App. 3d 139, 145, 354 N.E.2d 572, 577 (1976); Coard v. State, 43 Md. App. 146, 150, 403 A.2d 826, 829 (1979); Martineau v. Perrin, 119 N.H. 529, 531, 404 A.2d 1100, 1101 (1979); Dean v. Crisp, 536 P.2d 961, 965 (Okla. Crim. 1975); In re H.D.O., 580 S.W.2d 421, 423-24 (Tex. Civ. App. 1979); Annot., 147 A.L.R. 857, (1943). See also authorities cited at note 202 supra.

211. State v. Coleman, 46 N.J. 16, 36, 214 A.2d 393, 403 (1965), cert. denied, 383 U.S. 950 (1966).

212. But see Breckline v. Metropolitan Life Ins. Co., 406 Pa. 573, 578, 178 A.2d 748, 751 (1962).

213. See Hart & Wechsler, supra note 23, at 709-10. Consider the following, from Corbin, supra note 209, at 775-76:

> When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what the law is. It must use its judicial brains, not a pair of scissors and a paste pot. Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the accident of diversity and citizenship, be deprived of the advantages of this judicial process? Shall the Supreme Court, by what superficially appears to be an unselfish and self-denying ordinance, foreclose the use of such a process by federal judges? It is in fact a denial of judges to those for whom a court exists. We must not forget that a litigant has only one day in court. When forced into a federal court, that is his only court. If he is denied life, liberty, or property by the narrow syllogistic use of a state judge's worded doctrine, he is not restored by the fact that intelligent state judges later refuse to apply that doctrine to other litigants . . . If the federal judges use the customary judicial process in determining and applying state law with respect to the litigating parties before them, it is quite possible that conflict may exist between a federal decision and a state decision. . . . We may not like such conflict; but it is an inevitable part of our judicial process, or of any other. It is by such variation as this that the evolutionary growth of law is possible. Each litigant, whether in the

ing clear precedent in the controlling jurisdiction. Such persuasive precedent would exist, for example, where the lower federal courts are in substantial agreement on a federal question issue. Even where there are few federal decisions on point, there is no reason to expect that a state court will willy-nilly disregard those rulings. In fact, a number of older state court rulings have given considerable deference to federal court determinations.[214] Beyond such basic guidelines, this is not an area where the formulation of rigid standards is appropriate.[215] As is the case with any line of judicial decision-making, all that properly can be asked is that the courts be duly mindful of the hierarchical structure for precedent.

Regardless of whether the federal courts are given exclusive jurisdiction, the only real assurance of uniformity in federal question cases is review by the Supreme Court. One effect of state court adjudication and the increased probability of disagreement among the circuits and various states is to increase the number of judicial conflicts that are ripe for Supreme Court review.[216] The securities bar would have reason to welcome this event because it gives the Court added incentive to resolve the uncertainties and inconsistencies that proliferate today in the lower federal courts.[217] The additional conflicts, however, put further pressure on an already overcrowded Supreme Court docket. Crowded federal appellate dockets have led to numerous proposed anticongestion solutions, including the establishment of a national or intermediate court of appeals.[218] One variation is found in Professor Stolz's suggestion for a na-

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federal or the state courts, has a right that his case shall be a part of this evolution—a live cell in the tree of justice.

See also Essex Universal Corp. v. Yates, 305 F.2d 572, 580-82 (2d Cir. 1962) (Friendly, J., concurring); Cooper v. American Airlines, Inc., 149 F.2d 355, 359 (2d Cir. 1945) (Frank, J.); Pomerantz v. Clark, 101 F. Supp. 341 (D. Mass. 1951) (Wyzanski, J.).

214. See, e.g., State v. Cissna, 168 Ark. 565, 569, 270 S.W. 963, 964 (1925) ("highly persuasive"); Lewis v. Braun, 356 Ill. 467, 475, 191 N.E. 56, 59 (1934) ("respectful consideration"); Brown v. Palmer Clay Prods. Co., 290 Mass. 108, 110, 195 N.E. 122, 123 (1935) ("respectful consideration"); Harrison v. Barngrover, 72 S.W.2d 971, 974 (Tex. Civ. App. 1934), cert. denied, 294 U.S. 731 (1935) ("persuasive"). A few state courts have felt bound even by lower federal court decisions. E.g., Handy v. Goodyear Tire & Rubber Co., 230 Ala. 211, 160 So. 530 (1935). See Annot., supra note 201; Note, State Supreme Court, supra note 202, at 629.

215. For consideration of the treatment of federal common law in state courts, see Note, The State Courts and the Federal Common Law, 27 Alb. L. Rev. 73, 80-82 (1963):

> (1) Where there is only scant federal authority at the district court level . . . [t]he state courts should feel relatively free to examine the federal question in light of the purposes behind the federal statute or behind the exercise of the federal power, and, if necessary, substitute its conception of the federal policy for the determination of federal policy made by the district courts. . . .
>
> (2) Where a United States Court of Appeals has passed upon the issue presented. . . . "[a] state court should be very reluctant to substitute its conception of the federal policy involved. . . . Only upon a showing of complete inconsistency with the Congressional program involved should the state court interpose its views. . . .
>
> (3) Where there is conflicting federal authority on the issue presented, [t]he state courts should choose that precedent which they believe to be the most likely to produce the result which the federal program is aimed to achieve. . . .
>
> (4) When there is a rule relatively settled in the lower federal courts, . . . [u]nder no circumstances should state courts reject a well-settled federal rule.

216. It also has been said to give rise to a better basis for decision making. See note 167 supra.

217. See notes 21, 77 & 165 supra.

218. See, e.g., Commission on Rev. of the Fed. Court Appellate System, Structure and Inter-

tional court of appeals that would review state court determinations of federal questions and facilitate substantial reduction of the federal dockets at all levels by transferring many federal question cases to state court.[219] Such a court coincidentally would eliminate a major rationale for coupling concurrent state court jurisdiction with a right of removal to federal court.[220] Professor Stolz's suggestion arises in the context of criminal cases where, because of the individual rights and constitutional protections involved, the need for a federal forum may be more compelling than in other types of cases.[221] He primarily addresses the problems raised by collateral attack in federal court against state court decisions and the more radical suggestion that a great deal of the federal criminal docket be transferred to the states.[222] Professor Stolz's recommendations are certainly worthy of serious consideration. However, because of the relatively small burden on the Supreme Court that might result from increased state law determination of private federal securities law litigation, such a new national court of appeals should not be viewed as a condition precedent to abandoning the current jurisdictional allocation.

C. Concurrent Jurisdiction and Removability

Subject to certain enumerated exceptions, any action brought in state court that also falls within the original jurisdiction of the federal district courts is removable to federal court by the defendant.[223] The underlying theory is that both parties should have a guaranteed choice of a federal forum. A major exception to the liberal removal statutes is the judicial interpretation that the right of removal does not exist where the only federal question arises in the form of a defense to a state claim.[224] This limitation has fallen under much criticism and would be narrowed substantially under the American Law Institute's proposals.[225]

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nal Procedures: Recommendations for Change (1975); Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972); Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973); Symposium, 59 Cornell L. Rev. 571 (1974); Warren, The Proposed New "National Court of Appeals," 28 N.Y.C.A.B.A Rec. 627 (1973); Note, The National Court of Appeals: A Constitutional "Inferior Court"?, 72 Mich. L. Rev. 290 (1973).

219. Stolz, supra note 1, at 967-68. This proposal likely would arouse the consternation of state court judges at the prospect of their highest court being reviewed by an "inferior" federal court.

220. Removal would not be necessary to assure federal uniformity on major issues. It would, however, still be necessary to give the protection of the federal rules of procedure unless they were imposed specifically on the state courts. See notes 197-200 and accompanying text supra. Removal is discussed in section III.*C.*, notes 223-50 infra.

221. See text accompanying notes 171-72 supra.

222. Stolz, supra note 1, at 968. See also H. Friendly, Federal Jurisdiction: A General View 55-61 (1973); Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law & Contemp. Prob. 64 (1948); Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 Harv. L. Rev. 966 (1947).

223. 28 U.S.C. § 1441(a) (1976). See generally 14 C. Wright, A. Miller & E. Cooper, supra note 143, §§ 3721-3740 (1976): C. Wright, supra note 22, at ch. 6.

224. Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908): Tennessee v. Union & Planters Bank, 152 U.S. 454 (1894); Metcalf v. Watertown, 128 U.S. 586 (1888).

225. ALI Study, supra note 9, at 187-94. But see, e.g, Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 234 (1948).

Even beyond the limitation of removal of federal questions used as a sword rather than a shield, there are certain enumerated exceptions to the general rule of removability that provide notable parallels to the jurisdictional provisions of the Securities Act of 1933 and the Trust Indenture Act of 1939.[226] For example, in the face of congressional silence, there is conflicting authority concerning whether actions brought in state court under the Fair Labor Standards Act[227] should be removable to federal court.[228] Also, actions brought in state court under the Federal Employers' Liability Act (FELA) are not removable, despite concurrent original jurisdiction in the federal district courts.[229] It has been suggested that the rule of nonremovability "demonstrates the weakness of the federal interest in FELA actions."[230]

The lack of a federal interest surely cannot be the explanation for the prohibition on removal contained in the 1933 Securities Act and the 1939 Trust Indenture Act. There is no evidence in the legislative history as to what Congress had in mind when it drafted these provisions.[231] However, legislative history is available for the deliberations that led to the adoption of the 1934 Act's exclusive jurisdictional provision.[232] One year later, in the Public Utility Holding Company Act of 1935, Congress opted for concurrent jurisdiction with no prohibition against removal.[233] Yet four years later Congress reverted to the no-removal provision of the earlier statute when it enacted the Trust Indenture Act of 1939,[234] before again omitting such a provision from both the Investment Company Act of 1940[235] and the Investment Advisers Act of 1940.[236] The easiest explanation for this checkered pattern might be congressional confusion or inattention. But despite numerous opportunities to correct any oversight, more than forty years have elapsed without alteration of these provisions. In fact, in 1933 a proposed amendment to the 1933 Act recommended by the American Bar Association would have deleted the state courts' concurrent jurisdiction. This amendment was opposed by Dean Landis, who was instrumental in inserting the exclusive jurisdiction provision into the 1934 Act. He stated, "The frequent inaccessibility, burdensome procedure and added expense of Federal court proceedings, as against State court pro-

226. 15 U.S.C. §§ 77v(a), 77vvv (1976).

227. 29 id. § 216(b) (Supp. III 1979).

228. See 14 C. Wright, A. Miller & E. Cooper, supra note 143, § 3729, at 712, n.29, 713 n.30.

229. 28 U.S.C. § 1445(a) (1976). See also id. §§ 1445(b), 1445(c) (1976 & Supp. III 1979). These are but the most notable, illustrative examples of nonremovability. In addition to the foregoing there are a number of important exceptions to the general rule of removability in diversity actions. See, e.g., id. § 1441(b) (1976); Great Northern Ry. v. Alexander, 246 U.S. 276 (1918); Martin v. Snyder, 148 U.S. 663 (1893); 14 C. Wright, A. Miller & E. Cooper, supra note 143, § 3723.

230. Stolz, supra note 1, at 967.

231. See Horton, supra note 26, at 56 n.32.

232. See American Distilling Co. v. Brown, 295 N.Y. 36, 40-42, 64 N.E.2d 347, 348-49 (1945) (citing 78 Cong. Rec. 8099, 8571 (1934).

233. 15 U.S.C. § 79y (1976) (original version at ch. 687, § 25, 49 Stat. 835 (1935)).

234. Id. § 77vvv (originally enacted as ch. 411, 53 Stat. 1175 (1939)).

235. Id. § 80a-43 (original version at ch. 686, § 44, 54 Stat. 844 (1940)).

236. Id. § 80b-14 (originally enacted as ch. 686, § 214, 54 Stat. 856 (1940)).

ceedings, makes this change undesirable."[237]

At some point it becomes unrealistic to ascribe the current jurisdictional pattern to anything other than conscious, though unexplained, legislative choice. One leading commentator surmises that the contrast between the 1933 and 1934 Acts can be explained by a greater federal interest in uniformity.[238] This same commentator, Professor Loss, was the reporter for the Federal Securities Code project that would eliminate most exclusive jurisdiction.[239] It seems fairly clear that it was not the desirability of a state forum for affirmative claims, but rather the desirability of permitting state courts to entertain defenses and counterclaims, that spurred the ALI's rejection of exclusive jurisdiction.[240]

The proposed Code also would eliminate the ban on removal—contained in the 1933 Act and the Trust Indenture Act—primarily on the grounds that the reasons for guaranteeing a state forum are negligible and that, at least in complex cases, everyone is presumed to be better off in federal court.[241] This rationale does not address the argument raised by the scant but extant legislative history. When dealing with a relatively small or straightforward antifraud claim, the plaintiff might well prefer state court as a matter of "convenience and economy."[242] The costs of state court litigation well may inhibit a number of relatively small claims from ever being litigated, and this is even more the case where the defendant can gain tactical advantage by forcing the plaintiff into the federal system and then litigating him beyond his resources. The goal of the securities laws' private remedies is to compensate injured investors as well as to promote enforcement. The drafters of the proposed Code unduly minimize the importance of providing a remedy for the small investor.[243] Further, enforcement, rather than compensation of those injured, may

237. 2 L. Loss, supra note 31, at 997 n. 526 (citing 78 Cong. Rec. 8717 (1934)).

238. Id. at 997:

> [T]he logical inference from these Delphic indications is that the exclusive federal jurisdiction provision in the 1934 act was motivated by a desire to achieve a greater uniformity of construction, and perhaps a more sympathetic judicial approach, than would be possible if the many state courts were to be kept in line only through the Supreme Court's *certiorari* jurisdiction.

These justifications for exclusive jurisdiction are discussed in section III*A*., notes 142-85 supra.

239. ALI Fed. Sec. Code § 1822(a)(1980). See text accompanying notes 179-85 supra.

240. See 2 ALI Fed. Sec. Code § 1822(a), comments 1, 6, at 942-43 (1980). For discussion of the current barrriers to 1934 Act defenses to claims asserted in state court, see text accompanying notes 109-19 supra.

241. Id. § 1822(a), comments 2, 4, at 942-43:

> Without a ban on removal, and with the likelihood that the Judicial Code will be amended to permit removal at the instance of a single defendant [see ALI, Study of the Division of Jurisdiction between State and Federal Courts 1981], the effect of concurrent jurisdiction is simply not to preclude a state forum when both (or all) parties prefer it. Experience with the small amount of state court litigation under the Sec. Act and Inv. Co. Act—the only acts other than the Sec. Ex. Act that have given rise to an appreciable amount of private litigation—indicates that resort to the state courts will be relatively infrequent. . . . Certainly the plaintiff's lawyer will prefer a federal court if his case is at all unusual or complex.

242. Id. comment 3, at 942-43.

243. 2 A.L.I. Fed. Sec. Code § 1409, comment 3, at 124 (tent. draft no. 2, 1973):

> The only reasons for concurrent jurisdiction are (a) to permit "Aunt Minnie deep in the

well have been the primary basis for creating private remedies.[244] There is great positive value in not limiting the scope of securities law enforcement to large frauds; effective policing of the marketplace requires more.[245]

The guarantee of the state court forum, should the plaintiff so choose it, would fill a current gap. There is no streamlined method of settling private disputes analogous to the reparation proceedings that exist under the Commodities Exchange Act.[246] There is thus no efficient mechanism for making whole the large number of unsophisticated, small investors who become easy prey for securities frauds and other types of SEC-prohibited conduct.[247] As noted by the comments to the proposed Code, in complex cases the plaintiff-investor will prefer federal court, but in other cases he may prefer state court.[248] The allowance of removal jurisdiction would remove the plaintiff's choice of forum.

A loophole that would have to be closed to make effective the ban on removal is the alleged wrongdoer's ability to secure a federal forum by winning a race to the federal courthouse, through use of a declaratory judgment action seeking a ruling that no securities violations have occurred. Similarly, a potential securities case defendant desiring a state forum could thwart the plaintiff's desire for a federal forum by racing to state court.[249] This abuse could be prevented by explicit statutory provision. Even in the absence of statute, such defensive tactics generally will not be profitable. Rarely will a suspected violator have sufficient advance notice of the injured party's intention to bring suit. Additionally, such a defensive maneuver would alert potential plaintiffs to claims of which they otherwise might not be aware.

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heart of Texas" to sue in her local state court without having to travel a considerable distance to the nearest federal court (if she can get jurisdiction locally, as very likely she can today under the "long-arm" statutes), and (b) to avoid the complexities that have resulted under the 1934 Act when questions under the Code arise by way of defense or replication, etc.

See 2 Loss 973-1001; 5 id. 2949-58.

244. See Shulman, Civil Liability and the Securities Act, 43 Yale L.J. 227, 253 (1933).

245. See note 247 infra.

246. 7 U.S.C. § 18 (1976 & Supp. IV 1980).

247. As this author previously has stated:

> Many securities violations involve sufficiently large scale transactions to provide incentives for injured investors to bring suit. But what about the small investor? Consider, for example, the broker who invests an individual's ten thousand dollar life savings and because of churning and improper investment advice the account dwindles to nothing. Unsophisticated investors are easy prey for brokers, especially when there is little threat of private enforcement as a result of the expense of litigating a securities case. Of course NASD and SEC sanctions are available, but limitations on resources make investigation and prosecution of such small scale activity unlikely.

Hazen, Administrative Enforcement: An Evaluation of the Securities and Exchange Commission's Use of Injunctions and Other Enforcement Methods, 31 Hastings L.J. 427, 469-70 (1979).

248. 2 ALI Fed. Sec. Code § 1822(a), comments 3, 4, at 942-43 (1980).

249. For an analogous situation see Care Corp. v. Kiddie Care Corp., 344 F. Supp. 12 (D. Del. 1972), in which a purchaser of stock sought a declaratory judgment that there had been no violation of state law, without mentioning the seller's potential rule 10b-5 claim. The district court denied removal and remanded to the state court, which had no jurisdiction to decide issues arising under the 1934 Act. Had the potential federal claim arisen under the 1933 Act the state-court declaratory judgment action would have precluded the federal forum.

In light of the trifurcated nature of the securities laws' jurisdictional provisions, it is time to consider unification in approach.[250] Proper evaluation of the factors discussed above seems to call for the elimination of exclusive jurisdiction in favor of concurrent jurisdiction. While the weight of the American Law Institute is behind a right of removal to federal court, this section has pointed out that there is reason to give serious consideration to a ban on removal.

IV. CONCLUSION

The federal securities laws' varied provisions for jurisdiction over private litigation raise a number of significant issues. Beyond their relationship to substantive securities law, the issues raised by the current trifurcated scheme are instructive in considering more general questions of allocation of jurisdiction over federal claims. In addition to manifesting a pattern that is in need of change, the current allocation of jurisdiction for private securities claims presents an opportunity to examine state courts' ability to deal with federal issues without hostility or local bias. Even if no change is in the offing, there is reason to expect an increase in the use of the state forum.

The grant of concurrent jurisdiction for private suits brought under all of the federal securities laws, except for those filed pursuant to the 1934 Exchange Act, presents avenues for injured investors that have not yet been explored to their fullest. The recent cutbacks on the scope of relief available under the 1934 Act give new vitality to purchasers' claims under the Securities Act of 1933 with its concurrent jurisdiction and ban on removal. The state forum also provides the plaintiff a better opportunity to fully explore the parallel state law remedies, many of which have been expanded in recent years.

Contrary to the expectations of some observers, the state courts have shown anything but hostility toward federal rights created under the securities laws. They have been vigorous enforcers without losing sight of the potential for overextension of private remedies. Private plaintiffs have found state forums friendly with regard to both express and implied remedies. Especially when dealing with relatively simple securities law violations, plaintiffs should think carefully before opting for federal court. The state cases to date generally have resulted in more effective enforcement, in contrast to certain criminal and civil rights issues in which some state courts have shunned federal rights.

Observers long have decried the overburdened, federal judiciary and have suggested various packages for reform. Most commentators agree that the federal courts should not be shackled with cases that belong in state court or that are equally well-suited there. However, there is sharp dispute as to the classes of cases that properly fall within this category. The substantive impact of federal securities regulation creates a climate conducive to state court adjudication in many cases.

There has been constant overlap between federal securities legislation and

250. See 2 ALI Fed. Sec. Code § 1822(a), comments 1, 2, at 942 (1980).

state law governing corporate conduct and securities trading. The Supreme Court's initial expansion of federal private remedies can be viewed as a message to the states that they should act to protect investors. Now that even states such as Delaware have heeded the call, the Court has slowed, if not stopped, its expansion. There has been increased state law concern due to judicial interpretations of corporate fiduciary duties and extensions of common law fraud. Furthermore, state legislatures have been active in the securities area, and many state securities commissioners have increased significantly their enforcement efforts. If it was ever true, it can no longer be said that securities regulation is an area foreign to the state courts. With its decreasing resources in the face of ever-expanding securities markets, the Securities and Exchange Commission needs all the help available to it.

The current statutory pattern is in much need of reform. In the absence of any indication of a reasoned basis for the present approach, the three jurisdictional variations that currently exist should not be retained. Further, it should be recognized that exclusive jurisdiction has created a number of problems, such as the inability to raise in state court defenses based on Exchange Act violations. Since these problems outweigh the supposed advantages, there is much support for substantial elimination of federal exclusivity. Although the proposed Federal Securities Code would, with a few necessary exceptions, opt for concurrent jurisdiction coupled with a right of removal to federal court, retention of the 1933 Act's removal prohibition should be given at least serious consideration. If facilitating the enforcement of relatively small claims is the justification for concurrent jurisdiction, removal should not be available to the alleged violator merely as a tactic to increase the time and cost of litigation. Removal also weakens any state law claims that the plaintiff may have, because they could be transferred to federal court subject to the discretion to dismiss under the doctrine of pendent jurisdiction. The right of removal, as is the case with exclusive jurisdiction, thus increases the chance of multiple litigation in an area where the state courts have been duly mindful of the federal rights involved.

Even if the current jurisdictional allocation is retained, there are a number of areas in need of clarification. With regard to the 1934 Act's exclusive federal jurisdiction, the few but influential states that refuse to hear federal claims raised as a defense to state law actions should see the error of their ways. If not, corrective legislation may be necessary. The concurrent jurisdiction provisions also create unnecessary ambiguities, such as what type of in-state contacts are necessary to give the state court in personam jurisdiction, or the extent to which state courts are bound to follow federal procedure. Both of these problems are solved most easily by legislation.

Whether by way of legislative reforms or of increased awareness of injured investors, the time has come to take the fullest advantage of the state courts' ability to hear claims arising under the federal securities laws. This utilization of state forums will provide for more efficient processing of private claims and help relieve some of the pressure on overcrowded federal dockets.