UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 47 | Number 3 Article 13

4-1-1969

Federal Courts -- The "Erie Doctrine" and Tolling of the State Statute of Limitation

C. Frank Goldsmith Jr.

In a commercial setting where economic conditions often change rapidly and unexpectedly, to interpret all contracts that are indefinite as to duration as binding in perpetuity would result in inequities to the parties. On the other hand, to interpret all contracts that are indefinite as to duration as terminable at will would lead to uncertainty and perhaps defeat the clear intent of the contracting parties. It would be a rare case in which the parties intended to make a contract that could be terminated within one day or one week. A third approach would be to construe the contract as enduring for a reasonable time. This approach would lend a degree of certainty to the contract, yet would allow sufficient flexibility to avoid unpredictable and inequitable consequences. In fact, the court in *Southern Bell* may have implicitly adopted this approach and concluded that a reasonable time had elapsed, since the contract had endured for nearly fifty years. The court was certainly justified in placing the burden upon the contracting parties to make the terms of duration explicit in the contract if they intended it to endure in perpetuity. When the parties failed to manifest such an intent and when one party could not show detrimental reliance, the court logically interpreted the contract as terminable at will upon giving reasonable notice.

MICKEY A. HERRIN

Federal Courts—The "Erie Doctrine" and Tolling of the State Statute of Limitation

> Thus perhaps we can conclude that under the Constitution only Pennsylvania can say what tort duties are imposed on Pennsylvania landowners, that under the Constitution only the federal government can say how the federal courts are to administer their proceedings, and that under the Constitution it is a difficult and doubtful question whether New York or the federal government should have the right to determine how promptly a suit must be brought in federal court to vindicate a right created by the state.[1]

The "difficult and doubtful question" posed by Professor Wright came into issue recently in the United States Court of Appeals for the Fourth Circuit in the case of *Atkins v. Schmutz Manufacturing Co.*,[2] where an

[1] C. WRIGHT, FEDERAL COURTS § 56, at 198 (1963).

[2] 401 F.2d 731 (4th Cir. 1968) (petition for rehearing en banc has been granted, limited to the issue of whether either state or federal equitable remedies may be available to plaintiff).

injured worker became enmeshed in a "procedural booby trap"[3] upon attempting to sue the manufacturer of the machine that injured him. This note will consider the methods available to extricate plaintiff from such a trap, and will examine the rationale of the court of appeals in denying him a trial on the merits.

Plaintiff was injured on June 22, 1961, in Virginia, when he became entangled in a machine manufactured and sold by defendant; the accident necessitated the amputation of both feet. Defendant's only place of business was in Kentucky, and since Virginia then had no "long-arm" statute,[4] plaintiff reasonably elected to sue defendant in a Kentucky federal court. Suit was brought on June 19, 1963—after the one-year Kentucky statute of limitations[5] had elapsed, but three days before the two-year Virginia statute[6] expired. At that time, however, Kentucky law, as understood in the federal courts, permitted a foreign state's statute of limitations to govern a cause of action arising in that state, where the foreign statute of limitations allowed a longer period in which to bring the action.[7] Plaintiff's procedural problems began when the Kentucky Court of Appeals announced, while his case was pending in a Kentucky federal court, that in such cases the Kentucky statute would prevail,[8] and that this rule applied retroactively.[9] Defendant's motion for summary judgment was granted, the judgment was affirmed by the Court of Appeals for the Sixth Circuit,[10] and certiorari denied by the United States Supreme Court.[11] An action in a Virginia federal court followed, and that court also granted summary judgment for defendant, finding that the action pending in the Kentucky court had not tolled the two-year Virginia statute of limitations.[12] The Court of Appeals for the Fourth Circuit affirmed,[13] with Judge Craven dissenting. The decision to deny relief to the plaintiff merits close scrutiny.

---

[3] *Id.* at 735 (Craven, J., dissenting).

[4] Such a statute has since been enacted. VA. CODE ANN. § 8-81.2 (Cum. Supp. 1968).

[5] KY. REV. STAT. § 413.140 (1942).

[6] VA. CODE ANN. § 8-24 (1957).

[7] *See, e.g.*, Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362 (6th Cir. 1962); Koeppe v. Great Atl. & Pac. Tea Co., 250 F.2d 270 (6th Cir. 1957); Burton v. Miller, 185 F.2d 817 (6th Cir. 1950).

[8] Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. 1965).

[9] Wethington v. Griggs, 392 S.W.2d 56 (Ky. 1965).

[10] Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).

[11] Atkins v. Schmutz Mfg. Co., 389 U.S. 829 (1967).

[12] Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406 (W.D. Va. 1967).

[13] Atkins v. Schmutz Mfg. Co., 401 F.2d 731 (4th Cir. 1968).

What in existing law required such a severe result? The court of appeals relied on a Virginia statute,[14] which enumerates the instances in which a statute of limitations is suspended, and cited a Virginia case,[15] which in another situation had strictly construed that statute. The court found that had the action been brought in a state court, the statute of limitations would not have been tolled, and applying what the court perceived to be the principle of *Erie Railroad v. Tompkins*,[16] a majority of the three-judge court held that they were bound to this construction, citing as additional authority *Guaranty Trust Co. v. York*.[17] Judge Craven did not agree. In a scholarly and well-reasoned dissent, he presented a forceful argument that the "*Erie* Doctrine" did not forbid granting plaintiff a trial on the merits, and expressed doubt as to the continuing vitality of *Guaranty* itself. The dissent raises issues long assumed to have been settled, but worthy of reconsideration.

It is helpful to begin with a summary history, familiar to every first-year law student, of the "*Erie* Doctrine." Traditionally, the Rules of Decision Act[18] has required federal courts sitting in diversity jurisdiction to apply the laws of the states; *Swift v. Tyson*,[19] however, held that the language of the Act referred only to statutory law, and that the decisions of state courts were not binding on the federal judiciary, even though the substantive rights were state-created. This pattern prevailed until 1938, when the Supreme Court in *Erie* overturned nearly a century of precedent and held that state decisional law was henceforth to be weighted equally with state statutory law by federal courts exercising diversity jurisdiction. This was followed in 1941 by *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[20] which significantly extended the *Erie* principle to require a federal court to adopt the conflict of laws rule of the state in which it sits. Then came a startling development in 1945, when the Court held in *Guaranty* that a federal court, being "only another court of the state,"[21] was to apply state law whenever necessary to insure that the "outcome" of the litigation would be the same as if the action had been brought in a state court;[22] thus a state statute that required the same

[14] VA. CODE ANN. §§ 8-30 to -34 (1957).
[15] Jones v. Morris Plan Bank, 170 Va. 88, 195 S.E. 525 (1938).
[16] 304 U.S. 64 (1938).
[17] 326 U.S. 99 (1945).
[18] 28 U.S.C. § 1652 (1964).
[19] 41 U.S. (16 Pet.) 1 (1842).
[20] 313 U.S. 487 (1941).
[21] 326 U.S. at 108.
[22] *Id.* at 109.

statute of limitations at law and in equity was accepted as controlling. The "intent" of *Erie* was declared to require this "outcome-determinative" test, and the case was cited for that proposition.[23] Subsequent cases hastened, on authority of what became known as the "*Erie* Doctrine," to apply state law to a variety of problems, many of which had traditionally been denominated "procedural" in other contexts, until it seemed likely that even the Federal Rules of Civil Procedure would succumb to "outcome-determinative" analysis.[24]

The theory was weakened, however, in 1958, when the Supreme Court decided in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[25] that even where the outcome could arguably be determined by choice of the federal rule, that rule would prevail if there were a strong federal policy in favor of its application compared to a relatively weak state interest in the state law. There the strong federal policy favoring jury trials expressed in the seventh amendment was found to outweigh a state rule requiring judges to determine factual issues in workmen's compensation proceedings. In 1965, another partial refutation of the earlier post-*Erie* cases was announced in *Hanna v. Plumer*;[26] Federal Rule 4(d)(1),[27] describing the federal manner of service of process, was held to prevail over a Massachusetts rule that demanded in-hand service. Though the same result could have been reached in conformity to the post-*Erie* cases, the decision is significant for the breadth of its language, which impliedly shielded the entire Federal Rules of Civil Procedure against potential *Erie* attacks. Moreover, *Hanna* arguably overruled *Ragan v. Merchants Transfer Co.*,[28] which had held that Federal Rule 3,[29] providing that the filing of a complaint commences an action in federal court, yielded to a local rule that deemed an action commenced by service of process. The distinction was crucial, for between filing of the complaint and service of process the statute of limitations had run.

It should be noted that though the *Erie* decision purported to rest on constitutional grounds, no specific portion of the Constitution was

[23] *Id.*

[24] *See, e.g.*, Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Note, *The Erie Case and the Federal Rules—A Prediction*, 39 GEO. L.J. 600 (1951); Clark, Book Review, 36 CORNELL L.Q. 181 (1950).

[25] 356 U.S. 525 (1958).

[26] 380 U.S. 460 (1965).

[27] FED. R. CIV. P. 4(d)(1).

[28] 337 U.S. 530 (1949).

[29] FED. R. CIV. P. 3.

mentioned in Justice Brandeis' majority opinion, and the existence vel non of a constitutional basis for *Erie* has been a topic widely debated by legal scholars.[30] Regardless of the obscurity of *Erie*'s precise constitutional basis, however, it can reasonably claim some inherent foundation in the spirit of that document, if not its letter, for it echoes a fundamental tenet of federalism. The rigid determinism of *Guaranty*, on the other hand, is clearly without any such constitutional compulsion, innate or explicit.

Further, it is at least arguable that the Rules of Decision Act does not require extension to the extreme reached in *Guaranty* and its progeny. That statute provides that the "laws of the several states" are to be "rules of decision" in the federal courts, with two exceptions: (1) except where the federal Constitution or federal statutes "otherwise require or provide," and (2) only "in cases where they apply."[31] Under the first exception, a possible argument is that article III and the diversity statute determine what causes will be heard by the federal courts, and presumably require federal procedure to administer them. But such statutes merely grant the court jurisdiction, not require it,[32] as is recognized in the abstention doctrine.[33] As to the second exception, arguably the only "cases" where the state rules apply are cases involving substantive issues, and a state procedural rule, being directed by its very terms to the state courts, is simply not applicable in a federal court. This, obviously, is only the old "substance-procedure" dichotomy in another form.[34]

The oft-cited "*Erie* Doctrine" is thus only remotely based on the *Erie* holding. Technically, that decision merely clarified and enlarged slightly the words of the Rules of Decision Act. Actually, it was the subsequent line of decisions—*Klaxon, Guaranty, Ragan, Angel v. Bullington*,[35] and others—that formed the basis of the "Erie Doctrine" as it is

[30] *Compare* Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946), *with* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954), *and* Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

[31] 28 U.S.C. § 1652 (1964).

[32] Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). *But cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328-30 (1816).

[33] *See* Harrison v. NAACP, 360 U.S. 167 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

[34] *Cf.* Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963).

[35] 330 U.S. 183 (1947).

commonly known today, modified by *Byrd* and *Hanna.* These post-*Erie* cases seemed to require that federal courts "mirror," as closely as possible, the state courts, and that state rules, no matter how "procedural" for other purposes, were to govern the federal courts if the outcome of the litigation hinged on their application. Justice Rutledge, dissenting in *Cohen v. Beneficial Industrial Loan Corp.*,[36] was persuaded that the courts had misapplied the *Erie* principle:

> But the Erie case made no ruling that in so deciding diversity cases a federal court is "merely another court of the state in which it sits," and hence that in every situation in which the doors of state courts are closed to a suitor, so must be also those of the federal courts. Not only is this not true when the state bar is raised by a purely procedural obstacle. There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in the state courts.[37]

If, as suggested by the absence of other bases, the *Guaranty* doctrine rests only in judicial policy, then of course it may be altered by judges. A reconsideration by the courts of the function and purpose of diversity jurisdiction in a federal system is desirable. It was said in *Byrd* that "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction,"[38] and that "state laws cannot alter the essential character or function of a federal court."[39] If only the *Guaranty* line of decisions were controlling, that "essential character or function" would be limited to providing a forum distinguishable from its neighboring state courts only in the most minimal detail. But is this the reason for which diversity jurisdiction finds a place in the Constitution? Is it not the function of the federal courts to insure diverse litigants a "juster justice,"[40] perhaps even to set an example by the enlightened use of judicial power? Or, as put by Professors Hart and Wechsler: "Once we conclude that the *summum bonum* of diversity litigation is a federal court which perfectly mirrors the courts of the state in which it is sitting, is it possible to attribute *any* rational purpose to the diversity clause?"[41] It is necessary to remember

[36] 337 U.S. 541, 557 (1949).
[37] *Id.* at 558.
[38] 356 U.S. at 537.
[39] *Id.* at 539, *quoting* Herron v. Southern Pac. Co., 283 U.S. 91, 94 (1931).
[40] The phrase is borrowed from H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 652 (1953).
[41] *Id.* at 635.

that *Erie* alone does not confine the federal judges to the "role of the ventriloquist's dummy";[42] that interpretation stems from post-*Erie* cases that have misapplied it, and that are themselves grounded neither in the Constitution nor in congressional command. It is unlikely that federalism is better served by requiring federal courts to assist state courts in denying a remedy for a prima facie substantive right—itself state-created—particularly, as in *Atkins*, when it is far from clear that the state court itself would have denied its citizen a remedy against a foreign defendant. Aversion to "forum-shopping" alone cannot be the answer, for undisputedly "procedural" considerations frequently influence choice of forum, as where an attorney prefers the Federal Rules of Civil Procedure to an antiquated state code, or believes he will find better-trained judges, or is motivated by a difference in jury selection procedures. Further, if "forum-shopping" is the ogre it is represented to be, why is it more of one as between adjacent state and federal courts, yet excusable among geographical areas within the federal court system?[43]

If the above analyses of policy and precedent be reasonably accurate, then, as Judge Craven put it, there is "room for doubt"[44] whether the majority in *Atkins* was correct in disposing of plaintiff's problem by summarily citing *Erie* and *Guaranty* and proceeding to infer what the Virginia court would do when confronted by a situation it had never encountered. This is far removed from any result compelled by *Erie* alone, and it ignores the modification of the *Guaranty* doctrine in *Byrd* and *Hanna*, which, it would seem, deserved at least parenthetical mention. Judge Craven, reluctantly conceding for purposes of argument the validity of *Guaranty*, pointed out that plaintiff's remedy—trial on the merits—could still have been granted him without resorting to an *Erie* analysis. The facts peculiar to plaintiff's situation suggest several alternative bases for relief.

By clever use of the federal transfer statute, 28 U.S.C. § 1406 (1964),

[42] Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942) (quoted by Judge Craven in *Atkins*, 401 F.2d at 735).

[43] C. WRIGHT, *supra* note 1, § 58, at 205, gives another example of the double-edged nature of the forum-shopping argument:

> Unless some freedom is vouchsafed the federal judge, the Erie doctrine will simply have substituted one kind of forum-shopping for another. The lawyer whose case is dependent on an old or shaky state court decision which might no longer be followed within the state, will have strong incentive to maneuver the case into federal court, where, on the mechanical jurisprudence which the Erie doctrine was once thought to require, the state decision cannot be impeached.

[44] 401 F.2d at 735.

Judge Craven illustrated how the entire problem could have been avoided when it became apparent that relief could not be obtained in the Kentucky federal courts. When the one-year statute of limitations was held to prevail over the Virginia statute, plaintiff was then in a "wrong" judicial district within the meaning of § 1406, and could have transferred to the Virginia district court without the statute of limitations of either state barring his claim.[45] Thus, trial on the merits could have been had even though the state statute of limitations had run, through the purely mechanical method of operation of the federal courts, which is undoubtedly not a matter of state regulation. The significance of this route's availability is to demonstrate how "procedural" the problem really is; for what considerations of policy require the statute to be a bar in the *Atkins* situation, but allow its tolling through invocation of the right technical devices?

The problem could also have been resolved within the confines of the post-*Erie* doctrine. *Byrd* held that where a strong federal policy competes with a weak state policy, the federal rule prevails. It is especially ironic that by paying lip service through *Erie* to state law and policy, the majority in *Atkins* becomes subject to the same criticism that brought about the demise of *Swift v. Tyson*—discrimination in favor of non-residents against residents. "The essence of diversity jurisdiction," said Justice Frankfurter in *Angel*, "is that a federal court enforces State law and State policy."[46] It is beyond belief that one could seriously impute to Virginia a policy that would allow a foreign corporation to mangle one of its citizens within the borders of that state and leave him without a remedy. The recently-enacted "long-arm" statute,[47] in fact, suggests just the opposite. And if there is a strong federal *and* a strong state interest in the same result—trial on the merits—then the *Byrd* "balancing" test would seem to demand that result. As to the policy behind application of the statute of limitations, that, too, is hardly controlling, for where there is an identical action involving the same parties pending in another court, there is little danger of stale claims based on obscure evidence and fact. This argument is particularly appealing in the instant case, where extensive discovery was under way prior to dismissal of the Kentucky action.[48]

[45] *Cf.* Goldlawr v. Heiman, 369 U.S. 463 (1962).
[46] 330 U.S. at 191.
[47] VA. CODE ANN. § 8-81.2 (Cum. Supp. 1968).
[48] Brief for Appellant at 7, Appendix for Appellant at 21-25, Atkins v. Schmutz Mfg. Co., 401 F.2d 731 (4th Cir. 1968).

The defendant in *Atkins*, by confining its jurisdictional "presence" to a state that allowed assertion of remedies within only a very short time was permitted, in effect, to defeat both the right and the remedy created by the plaintiff's state. A persuasive case could be made, as Justice Rutledge pointed out in *Guaranty*, that the diversity clause was inserted to afford protection against exactly this form of abuse of state sovereignty.[49]

If the result in *Atkins* was required neither by *Erie*, nor by the Constitution, nor by congressional mandate, nor even by post-*Erie* case law, and if the relevant policy considerations militate against it, then why did the court of appeals feel constrained to deny plaintiff relief, particularly when, as the court itself admitted, the "equities" of the case "strongly favor[ed]" him?[50] The answer can be found in the confusion prevalent among the lower federal courts as to the proper scope of the *Erie* principle. Perhaps the injustice done Donald Atkins in the name of this doctrine will serve as a catalyst for resolution of the conflict. Certainly, *Byrd* and *Hanna* are evidence of growing dissatisfaction with the mechanistic application of "outcome-determination," and it is arguable that they foreshadow a trend towards dignifying the role of the federal court in diversity litigation, perhaps even by directly overruling *Guaranty* and the brood it has spawned. An appealing solution is that suggested by Justice Harlan, concurring in *Hanna*:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation.[51]

C. FRANK GOLDSMITH, JR.

Wills—Ghosts in North Carolina—The Haunting Problem of the After-Discovered Will

Given a death in North Carolina, a will or intestate administration will normally follow fairly quickly, enabling all concerned to get their

[49] 326 U.S. at 118-19.
[50] 401 F.2d at 733-34.
[51] 380 U.S. at 475. *See* H. M. HART & H. WECHSLER, *supra* note 40. *Cf.* Angel v. Bullington, 150 F.2d 679 (4th Cir. 1945) (opinion of Dobie, J.), *rev'd*, 330 U.S. 183 (1947).