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Civil Procedure - Avoiding Duplicative Litigation - The First-Filed Rule

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CIVIL PROCEDURE—AVOIDING DUPLICATIVE LITIGATION—THE "FIRST-FILED" RULE

EEOC v. University of Pennsylvania (1988)

The dilemma of duplicative litigation is presented when two federal district courts contemporaneously exercise jurisdiction over proceedings involving the same parties and issues.[1] In order to avoid duplicative litigation, federal courts have invoked the "first-filed" rule which permits jurisdiction to be retained by the forum which first possessed the subject matter and enjoined in the forum with second possession.[2] However, the first-filed rule is not a firm legal principle to be applied mechanically, but rather an equitable principle.[3] Therefore, given ap-

1. Duplicative litigation in federal district courts presents such evils as threatened judicial comity, inconsistent burdens, inefficient administration of justice and economic waste. *See* EEOC v. University of Pa., 850 F.2d 969, 971 (3d Cir.), *cert. granted in part*, 109 S. Ct. 554 (1988); West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728-29 (5th Cir.), *cert. denied*, 474 U.S. 844 (1985). Therefore, even though "no precise rule has evolved, the general principle is to avoid duplicative litigation." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

This casebrief will discuss the controversy that exists when parties file contemporaneous actions in different federal district courts which involve very similar issues. Considerations other than those discussed herein come into play when deciding which court should retain jurisdiction when one party files in federal court and another files in state court or the court of a foreign sovereign. For a discussion of those considerations, see generally 17A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4247 (1988) (contemporaneous state and federal litigation); Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877 (3d Cir. 1981) (contemporaneous litigation in the District Court for Western District of Pennsylvania and court of a foreign sovereign), *rev'd on other grounds*, 724 F.2d 369 (3d Cir. 1983).

2. *University of Pa.*, 850 F.2d at 979; *see, e.g.*, *West Gulf Maritime*, 751 F.2d at 728 (district court abused its discretion when it rejected first-filed rule); Pacesetter Sys. v. Medtronic, Inc., 678 F.2d 93, 94 (9th Cir. 1982) (dismissal of second-filed action was not abuse of discretion); Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) (affirmed dismissal of second-filed action); Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421, 423-24 (2d Cir. 1965) (judge in second-filed action abused discretion by staying first-filed action), *cert. dismissed*, 384 U.S. 948 (1966); Triangle Conduit & Cable Co, v. National Elec. Prods. Corp., 125 F.2d 1008, 1009 (3d Cir.) (duty of court below to enjoin second-filed action), *cert. denied*, 316 U.S. 676 (1942); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 929 (3d Cir. 1941) (refusal to enjoin second-filed action is abuse of discretion), *cert. denied*, 315 U.S. 813 (1942).

3. *See University of Pa.*, 850 F.2d at 972. "The letter and spirit of the first-filed rule . . . are grounded on equitable principles." *Id.* at 977. Federal courts have the power, not the right, to enjoin subsequent proceedings; their rulings may be reviewed for abuse of discretion. *Id.* at 971-72.

In *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, the Third Circuit stated that its previous decisions, in which the first-filed rule was invoked, were not intended to establish a "rule of thumb." The real question, the court held,

propriate circumstances, federal courts have the discretion to bypass the first-filed rule and retain jurisdiction over the second-filed action.[4] Recently, the Third Circuit held that exceptional circumstances existed which justified the district court's departure from the first-filed rule in *EEOC v. University of Pennsylvania*.[5]

In *University of Pennsylvania*, a faculty member of the University of Pennsylvania (the University), to whom tenure had been denied, filed discrimination charges with the Equal Employment Opportunity Commission (the EEOC).[6] In cooperating with the EEOC investigation, the University surrendered many documents to the EEOC, but refused to supply peer review reports which the University had used in making its tenure decisions.[7] Consequently, the EEOC issued a subpoena for the peer review reports, the identity of members of the University's personnel committee and the identity, tenure status and qualifications of members of the peer review committee.[8] The University requested that the

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is not which suit is first-filed, but rather, which will provide relief more expeditiously and effectively. Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 189 F.2d 31, 34-35 (3d Cir. 1951), *aff'd*, 342 U.S. 180 (1952). The Supreme Court affirmed, noting that there is no rigid rule. *Kerotest*, 342 U.S. at 184 n.3. For a discussion of circuit court rulings regarding the first-filed rule, see *infra* notes 4, 26-29, 55 and accompanying text.

4. *See University of Pa.*, 850 F.2d at 972. The Third Circuit stated that the first-filed rule need not be invoked when (1) bad faith is present, (2) the first party to file has engaged in forum shopping, (3) the second-filed action has developed further than the first, or (4) the first suit was filed in anticipation of an imminent action in a less favorable forum. *Id.* at 976. *See* Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987); Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985); Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 761 (E.D. Va. 1986) (first-filed action did not include all parties to second); Consolidated Rail Corp. v. Grand Trunk W. R.R., 592 F. Supp. 562, 568 (E.D. Pa. 1984). For additional discussion of circumstances in which the first-filed rule would not be invoked, see *infra* notes 26-29, 55 and accompanying text.

5. 850 F.2d 969, 972 (3d Cir.), *cert. granted in part*, 109 S. Ct. 554 (1988). *Certiori* has been granted solely on the question of whether compelled disclosure of faculty peer review tenure materials violates the University's first amendment interests.

6. *University of Pa.*, 850 F.2d at 972. The faculty member alleged that the University denied tenure on the basis of sex (female) and race (Asian). *Id.*

The Equal Employment Opportunity Commission (EEOC) was created pursuant to 42 U.S.C. § 2000e-4(a) (1982). The EEOC is the administrative agency created to process individual discrimination charges. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 769 (BNA 1976). The EEOC has the power to promulgate procedural regulations, investigate and subpoena. *Id.* at 769-79. Specifically, the EEOC can issue subpoenas requiring production of evidence. *Id.* at 778. If the respondent refuses to comply with the subpoena and has not filed a petition to revoke the subpoena, the EEOC may petition the district court to enforce the subpoena. *Id.*

7. *University of Pa.*, 850 F.2d at 972. The University also refused to provide the peer review reports for five male tenure candidates. *Id.*

8. *Id.* The EEOC stated that in order to compare denial of tenure to one faculty member with the treatment of the other five faculty members, examina-

EEOC exclude the confidential peer review material from the subpoena, urging that confidentiality in the review process was imperative to yield results which truly reflected the faculty member's worthiness of tenure.[9]

The EEOC refused, noting that the Third Circuit's decision in *EEOC v. Franklin & Marshall College*[10] required such disclosure.[11] Further, the EEOC informed the University that proceedings to enforce the subpoena would be initiated unless it responded within twenty days.[12] Prior to the expiration of this twenty-day period, the University filed an action in the District Court for the District of Columbia seeking a declaratory judgment and injunctive relief.[13]

The EEOC then instituted proceedings to enforce the subpoena in the District Court for the Eastern District of Pennsylvania.[14] The University requested that the district judge for the Eastern District of Pennsylvania invoke the first-filed rule to dismiss the second-filed action.[15]

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tion of all of the subpoenaed materials was necessary. *Id.* at 972-73. The EEOC claimed that it had such power because its enabling legislation provided that the EEOC "shall have access to . . . and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 42 U.S.C. § 2000e-8(a) (1982). For a discussion of the EEOC and its subpoena power, see *supra* note 6 and accompanying text.

9. *University of Pa.*, 850 F.2d at 972-73. The University urged that the societal and constitutional interests in the confidentiality of the peer review process outweighed the EEOC's need for investigative materials. *Id.*

10. 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). In *Franklin & Marshall*, the Third Circuit affirmed the district court's decision to compel disclosure of the peer review material involved in a tenure discrimination complaint. *Id.* at 117. The court declined to adopt an academic peer review privilege which would eliminate confidential peer review material from the subpoena. *Id.* at 111. The court ruled that peer review material relating to a tenure discrimination complaint was relevant and enforced the subpoena. *Id.* at 117. However, the names and identifying data of the faculty members were to be omitted. *Id.*

11. *University of Pa.*, 850 F.2d at 972-73.

12. *Id.* at 973.

13. *Id.* More specifically stated, the twenty-day grace period began April 14, 1987, expired May 4, 1987 and the University filed the action in the District of Columbia on May 1, 1987. *Id.* The University alleged violation of the first and fifth amendments and § 553 of the Administrative Procedure Act (APA). *Id.* (citing 5 U.S.C. § 553 (1982)). In addition, the University requested that the subpoena be quashed. *Id.* The University stated that the action was filed in the District of Columbia in order to settle the constitutional and APA defenses as "more was at stake than the single question of the [EEOC's] possible enforcement of . . . its subpoena against the University." *Id.*

14. *Id.* At this point, there was contemporaneous litigation of similar issues by the same parties in courts of equal rank and concurrent jurisdiction. The action was first-filed in the District of Columbia and second-filed in the Eastern District of Pennsylvania. *Id.*

15. *Id.* The University cited the Third Circuit's decision in Crosley Corp. v. Hazeltine Corp., 122 F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942), which held that the party who first-filed should "be free from the vexation of subsequent litigation over the same subject matter." *Id.* at 930.

In the alternative, the University requested permission to raise constitutional and Administrative Procedure Act (APA)[16] defenses in the Eastern District of Pennsylvania proceedings and sought discovery to support those claims.[17] The district judge for the Eastern District of Pennsylvania denied the University's motion to dismiss and the discovery requests.[18] Moreover, the judge ordered that the University produce the subpoenaed documents within ten days.[19] The University appealed to the Third Circuit.[20]

The Third Circuit acknowledged that circumstances which called for application of the first-filed rule were present in *University of Pennsylvania*.[21] First, the court recognized that adjudication of essentially the

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For a discussion of *Crosley v. Hazeltine*, see *infra* note 21.

16. 5 U.S.C. §§ 551-570 (1982 & Supp. 1986). The APA provides procedural requirements for "broad classes of actions taken by many different agencies." R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 6.1 (1985).

17. *University of Pa.*, 850 F.2d at 973 & n.1. The University alleged that the EEOC was participating in agency rulemaking without notice in violation of the APA, 5 U.S.C. § 553(b) (1982). *University of Pa.*, 850 F.2d at 981. In addition, the University alleged that the EEOC subpoena compelled disclosure in violation of the first and fifth amendments. *Id.* at 979. For a more detailed discussion of the constitutional and APA defenses, see *infra* note 40.

18. *University of Pa.*, 850 F.2d at 973-74. At oral argument, the district judge suggested that the University hurriedly filed the first action in the District of Columbia in order to avoid adverse precedent in the Third Circuit. Adverse precedent was established in EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). Counsel for the University responded that even though this avoidance might have been a consideration, jurisdiction was proper in the District of Columbia. *University of Pa.*, 850 F.2d at 973.

19. *University of Pa.*, 850 F.2d at 973-74.

20. *Id.* at 971. The EEOC requested that the District Court for the District of Columbia, where the University first-filed, stay adjudication in that district until resolution of the appeal in the Third Circuit. *Id.* at 974. The District of Columbia judge denied the request. *Id.*

21. The Third Circuit first dealt with the first-filed rule in Crosley Corp. v. Hazeltine Corp., 122 F.2d 925 (3d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942), where the circuit court reversed the district court's denial of a motion to stay the second-filed action. *Id.* at 930. The Third Circuit quoted Chief Justice Marshall's "salutary rule that '[i]n all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it.'" *Id.* at 929 (quoting Smith v. M'Iver, 22 U.S. 532, 535 (9 Wheat. 1824)). The Third Circuit's justifications for invoking the first-filed rule included yielding a single determination of a controversy, preventing economic waste, providing prompt and efficient administration of justice and fulfilling the purposes of the Declaratory Judgment Act. *Id.* at 930.

Similarly, the Third Circuit invoked the first-filed rule in Triangle Conduit & Cable Co. v. National Electric Products Corp., 125 F.2d 1008 (3d Cir.), *cert. denied*, 316 U.S. 676 (1942). In *Triangle*, National formally notified Triangle that Triangle was infringing on 11 of National's patents. *Id.* at 1008. One week later, Triangle filed a declaratory judgment action in the District Court for the District of Delaware. *Id.* Next, National filed an infringement action against Triangle in the District Court for the Eastern District of Michigan. *Id.* The district court in

same issue by two courts of equal dignity could result in inconsistent rulings.[22] In addition, the Third Circuit noted that both parties were legally entitled to file the suit in the chosen forums.[23] The court stated, however, that these jurisdictional guideposts did not address another federal policy—that of federal comity. The dispositive issue before the Third Circuit was whether the district judge for the Eastern District of Pennsylvania had abused his discretion by not invoking the first-filed rule.[24]

Delaware refused Triangle's motion to enjoin National's infringement suit until the Delaware adjudication was complete. *Id.* at 1009. The Third Circuit reversed the district court's ruling and enjoined the second-filed action, stating that the district court should have followed the first-filed rule adopted in *Crosley v. Hazeltine. Id.* at 1009-10.

22. *University of Pa.*, 850 F.2d at 974. The Third Circuit noted the possibility that the District Court for the District of Columbia might enjoin the EEOC's subpoena which had already been held to be valid by the Pennsylvania district court. *Id.* Although the first-filed rule could be applied here to avoid duplicative litigation and possible inconsistent burdens, the court stated that the University created the potential conflict in order to "initiate its constitutional challenge in a more friendly forum." *Id.* at 974-75. The District Court for the District of Columbia had not dealt with the issue of confidentiality in the academic peer review process. *Id.* at 975. However, the "University perceive[d] the District of Columbia as favoring its position." *Id.*

The District of Columbia had recognized a qualified privilege in the academic setting in Greenya v. George Washington University, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975). In *Greenya*, the defendant terminated the plaintiff's employment as a part-time, off-campus instructor. *Id.* at 558. The plaintiff alleged that the chairman of the defendant's English department had defamed him by writing "Do not staff" on an index card in the Office of Academic Staffing. *Id.* at 563. The court held that the faculty members enjoyed a "qualified privilege to discuss the qualifications and character of fellow officers and faculty members." *Id.*

For a discussion of precedent in the Third Circuit on the issue of disclosure of confidential records in the academic setting, see *supra* note 10.

23. *University of Pa.*, 850 F.2d at 975-76. When the defendant is an agency of the United States, the action may, "except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose . . . ." 28 U.S.C. § 1391(e) (1982). This statute provides authority for filing in the District of Columbia because pursuant to 42 U.S.C. § 2000e-4(f), the principal office of the EEOC is in or near the District of Columbia. 42 U.S.C. § 2000e-4(f) (1982). However, § 2000e-5(f)(3) provides that the action may be brought in the district in which the alleged discrimination occurred, which in this case is the Eastern District of Pennsylvania. 42 U.S.C. § 2000e-5(f)(3) (1982). The Third Circuit stated that the action with respect to the allegation concerning the subpoena "would be more properly brought in the Eastern District of Pennsylvania" because the employment records were located in this district. *University of Pa.*, 850 F.2d at 976; *see* 42 U.S.C. § 2000e-8(c) (1982) (action should be filed in district where such person found). It has been noted that the venue statutes do create the possibility of contemporaneous litigation of similar issues by the same parties in multiple forums. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 16, § 5.6.

24. *University of Pa.*, 850 F.2d at 976-77. The Third Circuit stated that the first-filed rule is not a firm legal principle requiring dismissal of the second-filed suit without regard to the circumstances. The trial judge must examine the circumstances and decide what ruling would yield the most equitable result. *Id.* at

The court stated that although exceptions to the first-filed rule are rare, there are certain proper bases for departure.[25] The Third Circuit listed four instances where departure from the rule is appropriate: (1) when bad faith is present;[26] (2) when the first party to file has engaged in forum shopping;[27] (3) when the second-filed action has developed further than the first;[28] and (4) when the first suit was filed in anticipation of an imminent action in a less favorable forum.[29]

977. In doing so, the judge must consider the reasons for invoking the first-filed rule. "[T]he rule's primary purpose is to avoid burdening the federal judiciary and to prevent the judicial embarrassment of conflicting judgments." *Id.*

In addition, justifications for departure from the first-filed rule must be considered by the judge in exercising her discretion. The Third Circuit first suggested that it might be proper for a court not to invoke the first-filed rule in Crosley Corp. v. Westinghouse Electric & Manufacturing Co., 130 F.2d 474 (3d Cir.), *cert. denied*, 317 U.S. 681 (1942). In this action, the Third Circuit held that the district court judge had abused his discretion in not enjoining the second-filed suit. *Id.* at 475. The court did suggest, however, that the first-filed rule should be defeated when the second-filed suit would provide relief more expeditiously and effectively, or when the first-filed suit was not brought in good faith. *Id.* at 475-76.

25. *University of Pa.*, 850 F.2d at 976-77. An example of the Third Circuit's departure from the first-filed rule can be found in Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 189 F.2d 31, 34 (3d Cir. 1951), *aff'd*, 342 U.S. 180 (1952). In *Kerotest*, the court stated that the real question is not which suit is first-filed, but rather, which will provide relief more expeditiously and effectively. *Id.* at 34-35 (citing *Crosley v. Westinghouse*, 130 F.2d at 475). Consequently, because the second-filed action involved a party who could not be joined in the first action, the first-filed action was dismissed in order to conserve judicial resources. *Id.*

26. *University of Pa.*, 850 F.2d at 976; *see also Crosley v. Westinghouse*, 130 F.2d at 476 (invoked first-filed rule because no evidence first-filed suit not brought in good faith); Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 588 (E.D. Pa. 1976) (extraordinary circumstance such as bad faith not found; first-filed rule invoked).

27. *University of Pa.*, 850 F.2d at 976; *see also* Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421, 424 n.4 (2d Cir. 1965) (departed from first-filed rule when forum shopping alone motivated first filing), *cert. dismissed*, 384 U.S. 948 (1966); *Berkshire*, 69 F.R.D. at 588 (first-filed rule invoked because no evidence forum shopping alone motivated situs of first filing).

28. *University of Pa.*, 850 F.2d at 976; *see also* Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985) (first-filed action dismissed because second-filed action more developed); Church of Scientology v. United States Dept. of Army, 611 F.2d 738, 750 (9th Cir. 1979) (first-filed rule not invoked because second-filed action had judgment on merits, appeal and remand).

29. *University of Pa.*, 850 F.2d at 976; *see also* Ven-Fuel, Inc. v. Department of Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982) (whether action was filed in apparent anticipation of another proceeding is equitable consideration); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 219 (2d Cir. 1978) (first-filed action triggered by notice letter), *cert. denied*, 440 U.S. 908 (1979).

At first blush the justification of anticipatory filing may sound identical to that of forum shopping. However, anticipatory filing consists of more than searching for an appropriate forum with favorable precedent, as in forum shopping. An anticipatory filing is triggered by notification from the adverse party that unless compromise is reached by a certain date, the adverse party will file suit. Therefore, the anticipatory filer races to the courthouse with favorable precedent without putting forth best efforts toward settlement.

The Third Circuit found that, in view of the totality of circumstances of this case, the district court did not abuse its discretion by departing from the first-filed rule.[30] The court focused on the University's attempt to avoid precedent by filing in the District of Columbia in anticipation of the EEOC subpoena enforcement action.[31] The court stated that permitting a party to side-step precedent by using the first-filed rule would violate the rule's equitable basis.[32]

In addition to undermining precedent, the court stated that sidestepping adverse precedent for a more favorable forum—here the District Court for the District of Columbia—would establish a "super court of appeals" for all academic institutions who wished to maintain confidentiality in the peer review process.[33] Moreover, the Third Circuit stated that the first-filed rule should not apply when "at least one of the filing party's motives is to circumvent local law and preempt an imminent subpoena enforcement action."[34]

Next, the Third Circuit stated that its holding was supported by several objectives of Title VII:[35] prompt resolution of discrimination claims and resolution through conciliation.[36] To ensure prompt resolution of discrimination charges, time limits are proscribed for processing claims, district judges are assigned to proceedings and hearings are scheduled as soon as possible.[37] The Third Circuit opined that if the first-filed rule were invoked, the goal of prompt resolution would be subverted.[38] Further, the court stated that invoking the first-filed rule

30. *University of Pa.*, 850 F.2d at 977.

31. *Id.* The court noted that the EEOC informed the University that an enforcement action would be filed in the event the University did not comply with the subpoena by May 4, 1987. Instead of complying or notifying the EEOC of its intent to contest a ruling, the University filed in the District Court for the District of Columbia on May 1, 1987. *Id.* at 973. Counsel for the University conceded that the adverse precedent may have been a consideration when the action was filed in the District of Columbia. *Id.* For a discussion of the adverse precedent, see *supra* note 10.

32. *University of Pa.*, 850 F.2d at 978. For a discussion of the equitable basis of the rule, see *supra* note 3 and accompanying text.

33. *University of Pa.*, 850 F.2d at 978. The Third Circuit found no congressional intent for the courts of the District of Columbia "to play such a pivotal role in Title VII enforcement." *Id.*

34. *Id.*

35. For a general discussion of Title VII, see B. SCHEI & P. GROSSMAN, *supra* note 6.

36. *University of Pa.*, 850 F.2d at 978-79. The Third Circuit reasoned that to uphold the first-filed rule in this case would contradict the congressional intent reflected in 42 U.S.C. § 2000e-5(f)(1)-(5) which encourages expedition of the investigation and § 2000e-8 which permits the EEOC to obtain information to determine if a charge is valid. *Id.* Further, under Title VII, the EEOC is to encourage conference and conciliation to cause an unlawful employment practice to cease. 42 U.S.C. § 2000e-5(b) (1982).

37. *See* 42 U.S.C. § 2000e-5(f) (1982).

38. *University of Pa.*, 850 F.2d at 978. The court does not specifically state why invoking the first-filed rule would undermine prompt resolution of the Title

would frustrate Title VII's goal of conciliation by promoting discussions about the race to the courthouse rather than discussions toward resolution of the dispute.[39]

In sum, the Third Circuit affirmed the district court's refusal to dismiss the second-filed suit because exceptional circumstances such as the "purposes of Title VII, along with this court's precedent, and principles underlying the first-filed rule" justified departure.[40]

Where two actions, as in *University of Pennsylvania*, are properly filed in different federal courts, courts have relied on the first-filed rule to determine which suit should proceed.[41] Because the first-filed rule is an

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VII claim. Presumably, the court is relying on the district court's order that the EEOC subpoena be complied with as a basis for asserting that promptness will be served by not invoking the first-filed rule.

39. *Id.* at 978-79.

40. *Id.* at 979. The Third Circuit continued its opinion with a discussion of issues other than the first-filed rule: redacted peer review records, APA and constitutional defenses. *See id.* at 979-82. The court affirmed the district court's ruling that the University's APA and constitutional defenses were not appropriate issues to be raised in this subpoena enforcement action. *Id.* at 982. Because the constitutional defenses were raised and denied in EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986), the Third Circuit refused to reconsider the defenses stating that neither it nor the district court could "overrule an opinion of a previous panel." *University of Pa.*, 850 F.2d at 980. For a discussion of *Franklin & Marshall*, see *supra* note 10.

In regard to the APA defense, the University alleged that the EEOC created a national policy which required full disclosure of academic peer review materials. *University of Pa.*, 850 F.2d at 981. According to the University, this was participation in agency rulemaking without notice, which violated the APA. *Id.* (citing 5 U.S.C. § 553(b) (1982)). The Third Circuit, cognizant of express congressional grant of authority for the EEOC to subpoena records which related to a discrimination charge, stated that "regardless of the APA, the EEOC maintains its ability to justify a subpoena in a particular case." *Id.*; *see* 42 U.S.C. § 2000e-8(a) (1982). In addition, the court stated that consideration of the APA defense at a subpoena enforcement action would delay the EEOC's investigation. *University of Pa.*, 850 F.2d at 981. Consequently, the Third Circuit opined that the APA rulemaking defense could not be raised at this point in the proceeding, but did not rule out the possibility of raising the defense at a later stage. *Id.* at 981-82.

The Third Circuit vacated the portion of the district court's order which required the University to provide records which were not redacted. *Id.* at 982. Noting that the University had posited justifications for redacted records such as EEOC acceptance of redacted records in the past, the Third Circuit stated that notwithstanding the fact that the University had not offered redacted records, it should be given the opportunity to do so. *Id.* Therefore, the Third Circuit remanded the redaction issue for further consideration. *Id.*

41. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). When two federal district courts contemporaneously exercise concurrent jurisdiction, "though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Id.* Conversely, in courts of appeals, the record shall be filed "in that one of such courts in which a proceeding with respect to such order was first instituted." 28 U.S.C. § 2112(a) (1982). Further, the first-filed court may transfer the action to any other court of appeals "for the convenience of the parties in the interest of justice." *Id.* For a discussion of forum shopping in the appellate court context, see generally McGarity, *Multi-*

equitable principle, it is important to understand its underlying purposes to determine whether departure is justified. First, the rule is based on comity—a willingness on the part of courts, due to deference and respect, to avoid interference with each other's affairs.[42] Second, the rule provides for a single determination of a controversy which prevents judicial embarrassment and avoids inconsistent burdens.[43] Finally, the first-filed rule promotes efficient judicial administration.[44] Clearly, these policies would have been furthered if the Third Circuit invoked the first-filed rule in *EEOC v. University of Pennsylvania*. Nevertheless, the first-filed rule is equitable in nature and does not lend itself to mechanical application.[45]

Previous Third Circuit decisions state that the first-filed rule should be defeated when the second-filed action would provide more expeditious and effective relief or when the first-filer has other than good faith motives.[46] Unfortunately, those decisions do not provide guidelines as

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Party Forum Shopping for Appellate Review of Administrative Action, 129 U. PA. L. REV. 302 (1980). For a discussion of statutory jurisdiction, see *supra* note 23.

42. *See* West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728 (5th Cir.), *cert. denied*, 474 U.S. 844 (1985); *see also* Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985) (doctrine of federal comity permits second-filed court to decline jurisdiction); Schauss v. Metals Depository Corp., 757 F.2d 649, 654 (5th Cir. 1985) (comity between federal courts advanced where courts avoid hindering each other's proceedings); Washington Metro. Area Transit Auth. v. Ragonese, 617 F.2d 828, 830 (D.C. Cir. 1980) (district court's dismissal of first-filed action "finds ample support in traditional notions of comity").

43. *See University of Pa.*, 850 F.2d at 977 ("rule's primary purpose is to . . . prevent the judicial embarrassment of conflicting judgments"); *see also* Pacesetter Sys. v. Medtronic, Inc., 678 F.2d 93, 96 (9th Cir. 1982) ("risk of conflicting determinations as to patent's validity and enforceability was clear"); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941) ("It is of obvious importance to all litigants to have a single determination of their controversy . . . ."), *cert. denied*, 315 U.S. 813 (1942).

44. Courts wish to avoid overburdening the federal judiciary, which already carries a heavy load of cases, and prevent economic waste when no purpose is served by the second action. *See* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952) (wise judicial administration regards conservation of judicial resources); *West Gulf*, 751 F.2d at 729 (first-filed rule avoids waste of duplication); *Pacesetter*, 678 F.2d at 96 (first-filed rule results in "economic use of both court's resources"); *Crosley v. Hazeltine*, 122 F.2d at 930 (first-filed rule encourages efficient administration of justice without economic waste).

45. *Kerotest*, 342 U.S. at 183. The Court noted that other cases in the courts of appeals do not show a rigid rule. *Id.* at 184 n.3. Indeed, a survey of current opinions of the courts of appeals illustrates that the first-filed rule is not to be applied mechanically. For a discussion of *Kerotest*, see *supra* note 3. For examples of instances in which the first-filed rule should not be invoked, see *supra* notes 4, 26-29, and *infra* note 55 and accompanying text.

46. *See* Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 189 F.2d 31, 34 (3d Cir. 1951) (first-filed action dismissed because second-filed action involved party who could not be joined in each), *aff'd*, 342 U.S. 180 (1952); Crosley Corp. v. Westinghouse Elect. & Mfg. Co., 130 F.2d 474 (3d Cir.) (suggesting second-filed action be continued if it will provide relief more expeditiously, or lack of good

to what circumstances constitute questionable conduct in instituting the first suit and, therefore, require departure from the first-filed rule.[47]

Decisions in other circuits do provide such guidelines and provide justification for defeating the first-filed rule under the circumstances presented in this case.[48] For example, the Seventh Circuit upheld the district court's decision not to invoke the first-filed rule in *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*[49] The Seventh Circuit stated several justifications for its decision: (1) Tempco's declaratory judgment action was filed in anticipation of Omega's infringement action; (2) the purpose of the declaratory action would be miscarried if used to choose a forum; and (3) condoning this tactic would encourage races to the courthouse and numerous unnecessary suits.[50]

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faith existed in first filing), *cert. denied*, 317 U.S. 681 (1942). Because the Third Circuit stated that the lower court record was devoid of bad faith, it cannot be said that *University of Pa.* falls within the lack of good faith exception as espoused in *Crosley v. Westinghouse*. For a discussion of *Crosley v. Westinghouse*, see *supra* note 24.

47. However, in Consolidated Rail Corp. v. Grand Trunk Western Railroad Co., 592 F. Supp. 562 (E.D. Pa. 1984), the District Court for the Eastern District of Pennsylvania refused to invoke the first-filed rule because of inequitable conduct on the part of the first-filer. Consolidated (the first-filer) filed an action for declaratory judgment in the Eastern District of Pennsylvania. *Id.* at 564. Subsequently, Grand Trunk filed suit in the Eastern District of Michigan alleging that Consolidated violated the Sherman Act. *Id.* at 565. The district judge for the Eastern District of Pennsylvania granted Grand Trunk's motion to dismiss the first-filed action because (1) Consolidated raced to the courthouse to file suit when they had led Grand Trunk to believe that a settlement proposal was forthcoming, (2) Consolidated's first-filing was in anticipation of Grand Trunk's threatened suit, and (3) this race to the courthouse was a misuse of the Declaratory Judgment Act. *Id.* at 568.

Similarities can be found in *University of Pa.* where the University filed in the District Court for the District of Columbia in order to avoid adverse precedent in the Third Circuit.

48. For a discussion of justifications for defeating the first-filed rule, see *supra* notes 4, 26-29 and *infra* note 55 and accompanying text.

49. 819 F.2d 746 (7th Cir. 1987). Omega informed Tempco that Tempco was infringing on Omega's trademark and threatened litigation in the event that Tempco did not respond within 10 days. *Id.* at 746-47. This initial letter from Omega was followed by a second threatening letter from Omega, a call from Tempco stating that they had used the mark for a long time, communication from Tempco indicating that they would not comply with the demand and a third letter from Omega stating that they had no alternative but to file suit against Tempco. *Id.* These actions clearly established Omega's attempts to settle the dispute. Within the 10-day grace period, however, Tempco filed a declaratory judgment action in the District Court for the Northern District of Illinois. *Id.* at 747. Omega then filed an infringement action in the District Court of Connecticut and sought dismissal from the Illinois district court. *Id.* The Seventh Circuit affirmed the district court's grant of Omega's motion to dismiss the first-filed action. *Id.* at 747, 750.

50. *Id.* at 749–50. When a controversy has reached the point where one of the parties could file suit, as Omega could in this case, a declaratory judgment should be used "to prevent one party from continually accusing the other, to his detriment, without allowing the other to secure an adjudication of his rights by

Several of the justifications for defeating the first-filed rule found in *Tempco* are present in *University of Pennsylvania*. The University admittedly participated in forum shopping when it filed the action in the District of Columbia. When pressed by the district judge, counsel for the University replied that adverse precedent in the Third Circuit may have been a consideration for filing in the District of Columbia.[51] Forum shopping has both desirable and detrimental aspects,[52] and it is questionable whether forum shopping alone should defeat the first-filed rule.

However, forum shopping augmented by anticipatory filing should defeat application of the first-filed rule. In *University of Pennsylvania*, as in *Tempco*, a party filed in anticipation of the adverse party's action.[53] In both cases the first-filer had been forewarned that if it did not comply with the adverse party's request, proceedings would be initiated.[54] Such anticipatory filing and use of the first-filed rule to preempt an adverse party's action should not be condoned.[55] First, as in *University of Penn-*

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bringing suit." *Id.* at 749. In *Tempco*, however, Omega had not engaged in such harassing conduct. *Id.* Therefore, if the first-filed action were to continue, the court would be condoning Tempco's use of a declaratory judgment for an inequitable purpose by allowing Tempco to win the race to the courthouse.

51. *University of Pa.*, 850 F.2d at 973.

52. Although forum shopping rarely receives much attention from the lay press, this "unseemly" practice may nonetheless lessen the public image of lawyers and courts. McGarity, *supra* note 41, at 312-13. Even if the public is generally not aware of the practice of forum shopping, lawyers, parties and others intimately involved with the legal process should view the system as impartial and consistent in order to nurture respect for the judiciary. Forum shopping clearly undermines these views. Forum shopping also threatens judicial comity by straining the goodwill between federal district courts and jeopardizes federal administrative agency "attempts to apply policy uniformly across the country." *Id.* at 313-16. Subsequent litigants will race to a different circuit to obtain conflicting rulings. *Id.* at 315. Further, forum shopping wastes judicial and economic resources. *Id.* at 318.

Conversely, forum shopping can be beneficial because it is a signal to the Supreme Court that an issue requires attention. *Id.* at 319. In addition, forum shopping allows the Court to observe resolution of an issue by lower courts of differing opinions. *Id.* at 318-19.

McGarity concludes that forum shopping "probably cannot and should not be avoided entirely." *Id.* at 306. For additional discussion of forum shopping, see R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 16, § 5.6.2.

Several courts have suggested that forum shopping alone does justify departure from the first-filed rule. *See* Berkshire Int'l Corp. v. Marquez, 69 F.R.D. 583, 588 (E.D. Pa. 1976) (first-filed rule invoked because no evidence forum shopping *alone* motivated situs of filing); Rayco Mfg. Co. v. Chicopee Mfg. Corp., 148 F. Supp. 588, 592 (S.D.N.Y. 1957) (forum shopping is a deplorable tactic).

53. For a discussion of the timing involved, see *supra* note 13 and accompanying text.

54. *University of Pa.*, 850 F.2d at 973. The University's filing in the District of Columbia prior to the expiration of the grace period demonstrates that the University had no intention of supplying the records and therefore knew that the EEOC's Pennsylvania action was imminent.

55. *See* Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 749 (7th Cir. 1987) (second-filed action proceeds because first action was filed in

sylvania, precedent shopping results in a particular court attracting a certain type of litigation, even though "[t]here is no indication that Congress intended the [particular court] to play such a pivotal role."[56]

Second, permitting anticipatory filing discourages settlement attempts in two respects. If the party who is allotted the grace period is permitted to seek a more favorable forum, their efforts may be concentrated on anticipatory forum shopping rather than settlement.[57] In addition, the party providing the grace period will be less likely to provide such a period in which to settle if they know their choice of forum is likely to be lost. Thus, anticipatory forum shopping results in "an unseemly race to the courthouse and, quite likely, numerous unnecessary suits—[a cost which] is simply too high."[58]

Finally, the Third Circuit looked to several goals of Title VII to determine whether the first-filed rule should be invoked. The court stated that Title VII requires claims to be expedited and that the EEOC subpoena power enables the EEOC to fulfill this goal.[59] The court concluded that the congressional goal of expediency would be thwarted if the first-filed rule were invoked in *University of Pennsylvania*.[60] The court appears to conclude that permitting the second-filed action to proceed will expedite the resolution of the discrimination charge because the EEOC subpoena will be enforced. However, when deciding whether the first or second-filed action would expedite resolution of the issue, the court should inquire as to which forum's docket lends itself to speedier resolution of the subpoena enforcement action.[61] The Third Circuit did not address the claim in terms of dockets or in terms of the stage of advancement of the litigation in each forum.[62] The court addressed

anticipation of such); Ven-Fuel, Inc. v. Department of Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982) (refusal to hear first-filed action not abuse of discretion when first filed in anticipation of second); Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 219 (2d Cir. 1978) (one consideration in allowing second-filed action to proceed is when first was triggered by notice letter), *cert. denied*, 440 U.S. 908 (1979); Yoder v. Heinold Commodities, Inc., 630 F. Supp. 756, 761 (E.D. Va. 1986) (second-filed action maintained when first was tactical maneuver to avoid adverse precedent); Consolidated Rail Corp. v. Grand Trunk W. R.R., 592 F. Supp. 562, 566 (E.D. Pa. 1984) (first-filed case does not have priority when filed in anticipation of another).

56. *University of Pa.*, 850 F.2d at 978.

57. *See id.* at 979; *see also Consolidated Rail*, 592 F. Supp. at 568.

58. *Tempco*, 819 F.2d at 750. *See also* McGarity, *supra* note 41, at 318 (numerous unnecessary suits where threshold jurisdictional question is at issue rather than resolution of merits of case).

59. *University of Pa.*, 850 F.2d at 978 (citing 42 U.S.C. § 2000e-5(f)(1)-(5)).

60. *Id.*, at 978-79. For a discussion of the Third Circuit's application of Title VII in *University of Pa.*, see *supra* notes 35-39 and accompanying text.

61. After all, it is the subpoena enforcement action, not the discrimination charge that is at issue in both district courts.

62. If the second-filed action has proceeded further than the first-filed action, in order to expedite resolution, the second-filed action should not be enjoined. *See* Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th

only the rationale for the EEOC's subpoena power. This leads one to believe that enforcement of the subpoena was at the root of this "justification" for departure from the first-filed rule.

Additionally, the Third Circuit stated that the EEOC's duty to eliminate discrimination through conciliation would be frustrated if the first-filed rule were applied.[63] The court hypothesized that rather than attempting to resolve a dispute in good faith, a party might put its efforts toward filing in a forum with favorable precedent.[64] Although this may be true, it cannot be said that the EEOC made an earnest attempt to conciliate. Despite the fact that precedent existed in the Third Circuit where an EEOC subpoena was enforced only when modified to request redacted records, the EEOC did not offer to modify the subpoena in this case.[65] Because the EEOC contributed to undermining the congressional goal of resolution through conciliation, it cannot be said that invoking the first-filed rule in this instance would circumvent this goal of Title VII.

CONCLUSION

Although several of the Third Circuit's jurisdictions for defeating the first-filed rule do not appear well founded, it is submitted that the Third Circuit properly concluded that the first-filed rule should not be invoked under the circumstances presented in *EEOC v. University of Pennsylvania*.[66] Notwithstanding the fact that the University's injunctive and declaratory judgment action were properly filed in the District of Columbia, the University admittedly considered the adverse precedent in the Third Circuit when it filed in the District of Columbia prior to the expiration of the grace period allotted by the EEOC. As a survey of decisions in various courts of appeals illustrates, racing to the courthouse in anticipation of an imminent suit in a less favorable forum is a factor which weighs against invoking the first-filed rule.[67]

Moreover, the first-filed rule should not be applied as rigidly as it was in the Third Circuit decisions of the 1940's. Rather the rule should respond to the equities of the circumstances presented.[68] This ruling

Cir. 1985). There is no indication that the Eastern District of Pennsylvania action had proceeded further than the District of Columbia action.

63. *University of Pa.*, 850 F.2d at 978-79. "[T]he Commission shall endeavor to eliminate . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1982).

64. *University of Pa.*, 850 F.2d at 979.

65. The Third Circuit enforced a subpoena only after modifying the request to redact the records in EEOC v. Franklin & Marshall College, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 467 U.S. 1163 (1986). For the holding in *Franklin & Marshall*, see *supra* note 10.

66. 850 F.2d 969 (3d Cir.), *cert. granted in part*, 109 S. Ct. 554 (1988).

67. *See supra* note 55 and accompanying text.

68. For a discussion of the Third Circuit decisions of the 1940's, see *supra* notes 3, 21, 24 and accompanying text.

brings the Third Circuit in step with other courts of appeals by expanding the justifications for departure from the first-filed rule to include questionable conduct of the first-filer such as racing to the courthouse in anticipation of imminent action in a forum with adverse precedent. Such use of the trial court's discretion should be condoned as this will diminish litigants' attempts to misuse the first-filed rule.

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