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## Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?—*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1998)

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**FORUM-SELECTION CLAUSES: SHOULD STATE OR FEDERAL LAW DETERMINE VALIDITY IN DIVERSITY ACTIONS?—*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988).**

*Abstract:* Forum-selection clauses are contractual provisions that confine future litigation to particular courts. Such clauses are common in interstate contracts despite uncertainty concerning their validity. Before *Stewart Organization, Inc. v. Ricoh Corp.*, the circuit courts were divided as to whether federal courts with diversity jurisdiction were compelled to determine forum-selection clause validity in accordance with state law, as directed by *Erie R.R. Co. v. Tompkins*. In *Stewart*, the United States Supreme Court ruled that federal courts did not have to apply state law. Instead, the court held that the federal transfer statute, 28 U.S.C. § 1404(a), governed forum-selection clause validity. A statutory interpretation analysis demonstrates 28 U.S.C. § 1404(a) was never intended to govern forum-selection clause validity. State law should govern the clause's validity in order to prevent forum shopping and the inequitable administration of the laws.

Forum-selection clauses are often included in interstate contracts despite uncertainty concerning their validity. Some states refuse to enforce such clauses. Must a federal court located in a state that disregards forum-selection clauses apply the state's rule in a diversity case?

The United States Supreme Court recently answered that question in the negative in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>1</sup> The Court in *Stewart* ruled that a forum-selection clause's validity is governed by the federal transfer statute, 28 U.S.C. § 1404.<sup>2</sup> In the analysis, this Note will first demonstrate that the federal transfer statute should not determine the validity of forum-selection clauses because the statute disqualifies itself. In addition, the legislative history and circumstances surrounding the enactment indicate 28 U.S.C. § 1404(a) never was intended to govern an area of law predominantly governed by state law. Assuming 28 U.S.C. § 1404(a) does not govern forum-selection clause validity, this Note will further argue that a federal court with diversity jurisdiction must apply state law in order to prevent forum shopping and the inequitable administration of the laws.

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1. 108 S. Ct. 2239 (1988).

2. 28 U.S.C. § 1404 (1982).

## I. OVERVIEW OF FORUM-SELECTION CLAUSES AND THE FEDERAL TRANSFER STATUTE

A forum-selection clause is a contractual provision that confines future litigation between parties to the courts of a particular state.<sup>3</sup> Such a clause helps to eliminate uncertainties inherent in interstate or international contracts by allowing contracting parties to pre-arrange a fair and convenient forum for dispute resolution.<sup>4</sup> As a result, forum-selection clauses tend to encourage interstate trade by reducing the fear of litigating in a foreign court.<sup>5</sup>

### A. Judicial Treatment of Forum-Selection Clauses

Historically, American courts have disregarded forum-selection clauses.<sup>6</sup> Courts invalidated the clauses for a variety of reasons. It was not considered proper for parties to privately encroach upon a court's jurisdiction, nor were parties allowed to oust a court of its jurisdiction by bargaining away their substantive rights.<sup>7</sup> Many courts simply determined that a forum-selection clause violated the state's public policy.<sup>8</sup>

Some courts may also have had unstated reasons for refusing to enforce forum-selection clauses. Many were unwilling to force a local party to litigate in a foreign forum.<sup>9</sup> Judges were paid by the case and may have felt that forum-selection clauses were a threat to their livelihood.<sup>10</sup> As a result, these clauses were rarely enforced.

Forum-selection clauses began to gain favor in the early 1950's.<sup>11</sup> The Supreme Court sanctified the trend toward enforcing forum-selec-

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3. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964).

4. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972); Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 133-34.

5. See *Bremen*, 407 U.S. at 9; Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 3 (1976/77).

6. *Bremen*, 407 U.S. at 9; *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 184 (1856); Gruson, *supra* note 4, at 138.

7. See, e.g., *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874); Gilbert, *supra* note 5, at 8; Gruson, *supra* note 4, at 139.

8. Gilbert, *supra* note 5, at 8.

9. *Id.* at 9.

10. *Id.*

11. One of the first major cases to enforce such a clause was *William H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ramborg*, 377 F.2d 200 (2d Cir. 1967). *Muller* was not the first case to enforce a forum-selection clause but it "arouse[d] an interest in re-evaluating the traditional view." Gruson, *supra* note 4, at 144-45.

tion clauses in the landmark case of *The Bremen v. Zapata Off-Shore Co.*<sup>12</sup> The Court held that forum-selection clauses are prima facie valid and therefore should be enforced unless unreasonable.<sup>13</sup>

*Bremen* was an admiralty case and therefore not binding on a federal court with diversity jurisdiction.<sup>14</sup> Many federal district courts sitting in diversity, however, have adopted the *Bremen* rule.<sup>15</sup> Some of the courts that applied the rule to diversity cases did so because there was no conflict between state and federal law,<sup>16</sup> while others applied the rule even when it conflicted with state law.<sup>17</sup> Not all circuit courts, however, have applied the *Bremen* rule to diversity actions. Instead, some circuits have determined that the law of the state is controlling.<sup>18</sup>

*B. The Federal Transfer Statute: 28 U.S.C. § 1404(a)*

The transfer statute allows a district court, at its discretion, to transfer a case to a more convenient forum even though the court's jurisdiction is technically proper.<sup>19</sup> The statute was enacted in 1948 in accordance with the general principles of the doctrine of *forum non conveniens*.<sup>20</sup> Congress intended 28 U.S.C. § 1404(a) to mitigate the harshness of the *forum non conveniens* doctrine, which permitted a court to dismiss a case—even though jurisdiction was proper—when the action could have been brought in a more convenient forum.<sup>21</sup>

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12. 407 U.S. 1 (1972).

13. *Id.* at 10.

14. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641–42 (1981); see 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 257–59 (2d ed. 1982) [hereinafter 19 WRIGHT & MILLER].

15. See Gruson, *supra* note 4, at 149 n.58.

16. Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization, Inc. v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1096 n.32. (1988).

17. *Id.* at 1096 n.33.

18. The Third and Eighth Circuits determined the validity of a forum-selection clause by applying state law. For a list of the Third and Eighth Circuit cases that apply state law, see *id.* at 1097 n.34.

19. 28 U.S.C. § 1404(a) (1982).

20. 28 U.S.C. § 1404(a) revisor's note (1982). For a discussion of the doctrine of *forum non conveniens*, see *infra* note 79.

21. Dismissal under the doctrine of *forum non conveniens* can bar relief completely if the statute of limitations has run while the action is pending in the inconvenient forum. Section 1404(a) alleviates the problem by transferring rather than dismissing the action. *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955) (citing *Freight v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952)).

A transfer under 28 U.S.C. § 1404(a) results in a change in court-rooms and not a change in substantive law.<sup>22</sup> The transfer statute restricts the transfer of a case to a court in which the action “might have been brought.”<sup>23</sup> The Supreme Court has interpreted the statute to mean that a case can be transferred only to a court in which the plaintiff could have instituted the action originally.<sup>24</sup> The transfer statute applies to “any civil action.”<sup>25</sup> Although the Court has narrowly interpreted where a case “might have been brought,” it has not attempted to limit the broad “any civil action” language of 28 U.S.C. § 1404(a).<sup>26</sup>

The only legislative history to the enactment of 28 U.S.C. § 1404(a) is the revisor’s note that bases the section on the doctrine of *forum non conveniens*.<sup>27</sup> This note is not particularly illuminating.<sup>28</sup> Although courts, under 28 U.S.C. § 1404(a), may transfer the case to the optimal forum, some have argued that such transfers create more litigation effort than they are worth.<sup>29</sup>

### C. Stewart Organization, Inc. v. Ricoh Corp.

With the circuit courts split on the matter of which law—federal or state—should determine a forum-selection clause’s validity, the Supreme Court resolved the dispute in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>30</sup> Stewart, an Alabama corporation, negotiated a dealership sales agreement with the Ricoh Corporation to market Ricoh’s

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22. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). Applying the law of the transferee state court would encourage the defendant to shop for the most advantageous law. *Id.* at 638–39.

23. 28 U.S.C. § 1404(a) (1982).

24. Hoffman v. Blaski, 363 U.S. 335, 344 (1960); see 15 C. WRIGHT & A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3845, at 323 (2d ed. 1986) [hereinafter 15 WRIGHT & MILLER].

25. 28 U.S.C. § 1404(a) (1982).

26. Some courts have held that § 1404(a) applies to cases removed to a federal court, cases in admiralty even though admiralty claims are not civil actions for the purposes of 28 U.S.C. §§ 1391–1393, and cases which are covered under specific venue statutes. 15 WRIGHT & MILLER, *supra* note 24, § 3843, at 323.

27. Korbelt, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 610 n.22 (1960–61).

28. 15 WRIGHT & MILLER, *supra* note 24, § 3841, at 320.

29. Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 268, 307 (1968/69) (“The theory is good, but it is practically unworkable. It would be mellow to try every action in the most convenient forum. But deciding where that forum is costs altogether too much time and money.”); Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 494 n.36 (1956) (“As a *delaying* tactic [§ 1404(a)] has few equals.” (emphasis in original)); Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99, 141–42 (1965) (the burdens and delay of § 1404(a) motions outweigh the benefits).

30. 108 S. Ct. 2239 (1988).

copiers.<sup>31</sup> The contract contained a forum-selection clause requiring that any action arising from the contract be brought in a court located in New York City.<sup>32</sup> Stewart, however, brought suit in an Alabama federal district court, and alleged, *inter alia*,<sup>33</sup> that Ricoh had breached the contract.<sup>34</sup> Ricoh moved to either transfer the case to New York under 28 U.S.C. § 1404(a)<sup>35</sup> in accordance with the forum-selection clause, or to dismiss on grounds of improper venue.<sup>36</sup> The district court denied the motion to transfer the case to New York because it determined that state law governed the validity of a forum-selection clause and that Alabama did not enforce such clauses.<sup>37</sup>

The Eleventh Circuit Court of Appeals reversed and remanded with instructions to transfer the case to New York in compliance with the forum-selection clause.<sup>38</sup> The court held that venue in general was procedural and therefore governed by federal law.<sup>39</sup> Because forum-selection clauses attempt to limit venue, the court held that such clauses are also governed by federal law.<sup>40</sup> The clause in question was

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31. *Id.* at 2241.

32. *Id.* at 2241 n.1. The clause read as follows:

Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

*Id.*

33. Stewart also brought an antitrust claim against Ricoh under 28 U.S.C. § 1337, but the issue of how the antitrust claim should affect the district court's analysis was not raised by Ricoh. The Court of Appeals for the Eleventh Circuit therefore characterized the issue as a diversity breach of contract case only. *Id.* at 2242 n.3.

34. *Id.* at 2241.

35. *Id.* For a discussion of § 1404(a) see *supra* text accompanying notes 19–29.

36. Ricoh made the motion to dismiss under 28 U.S.C. § 1406(a). *Stewart*, 108 S. Ct. at 2241. Section 1406(a) allows a court to transfer a case to another court even though venue is improper in the transferor court. 28 U.S.C. § 1406(a) (1982). Because Ricoh was doing business in the Northern District of Alabama, and therefore venue was proper, the court denied the § 1406(a) motion. *Stewart*, 108 S. Ct. at 2243, n.8.

37. *Stewart*, 108 S. Ct. at 2241.

38. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1071 (11th Cir. 1987), *aff'd on other grounds*, 108 S. Ct. 2239 (1988).

39. *Id.* at 1068. The court noted that Congress had enacted rules of venue for diversity actions and had permitted the adoption of FED. R. CIV. P. 12(b)(3) and 41(b). *Id.* FED. R. CIV. P. 12(b)(3) allows a party to raise the defense of improper venue by motion. FED. R. CIV. P. 41(b) allows a defendant, after plaintiff has completed the presentation of evidence, to move for dismissal of an action for failure to prosecute. Granting a dismissal under FED. R. CIV. P. 41(b) amounts to an adjudication on the merits unless the dismissal is granted because of a lack of jurisdiction, improper venue, or for failure to join a party.

40. *Stewart*, 810 F.2d at 1068.

deemed enforceable under the rules set forth in *The Bremen v. Zapata Off-Shore Co.*<sup>41</sup> Stewart appealed to the United States Supreme Court.

The Supreme Court determined that the primary issue was whether 28 U.S.C. § 1404(a) governed a forum-selection clause's validity.<sup>42</sup> The majority opinion, by Justice Marshall, held that 28 U.S.C. § 1404(a) did govern the clause's validity because the statute is flexible and discretionary and therefore broad enough to control the issue of transfer.<sup>43</sup> As a result, 28 U.S.C. § 1404(a) governed the parties' private expression of their venue preferences embodied in the forum-selection clause.<sup>44</sup> The Supreme Court directed the district court to consider the convenience of the stipulated forum, the fairness of the transfer with respect to the forum-selection clause, and the parties' relative bargaining power in deciding whether the clause should be enforced.<sup>45</sup>

The majority, moreover, concluded that the question of a forum-selection clause's validity was not an instance where both federal and state law could apply, each controlling its intended sphere of coverage, without conflict.<sup>46</sup> The Court recognized that 28 U.S.C. § 1404(a) called for the district court to weigh many factors and therefore was not coextensive with Alabama's state policy against enforcing forum-selection clauses.<sup>47</sup> The Court stated, however, that Congress intended a multi-factored analysis and that a state policy that determined transferability on a single factor would defeat the balancing intent of 28 U.S.C. § 1404(a).<sup>48</sup> Therefore, the multi-factored analysis of 28 U.S.C. § 1404(a) was an additional reason why the section should govern the validity of a forum-selection clause.<sup>49</sup>

After concluding that 28 U.S.C. § 1404(a) governed forum-selection clause validity, the Court noted that 28 U.S.C. § 1404(a) represents a

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41. 407 U.S. 1 (1972). For a discussion of the rule set forth in *Bremen*, see *supra*, text accompanying notes 12-13.

42. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2243 (1988). The Court further stated that if § 1404(a) is broad enough to govern forum-selection clause validity, it would control the issue if the statute is a valid exercise of Congress' constitutional powers. *Id.* at 2242.

43. *Id.* at 2243-45.

44. *Id.*

45. *Id.* at 2244.

46. *Id.* at 2245 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).

47. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2245 (1988). The Supreme Court in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980) required a "direct collision" between state and federal law in order for federal law to apply. The Supreme Court in *Stewart*, however, determined that for a "direct collision" to exist, the federal statute or rule need not be perfectly coextensive. *Stewart*, 108 S. Ct. at 2242 n.4.

48. *Stewart*, 108 S. Ct. at 2244.

49. *Id.* at 2244-45.

valid exercise of Congress' authority under the Constitution.<sup>50</sup> The majority determined that the enactment of the statute was within constitutional bounds because it was a "housekeeping" rule enacted to regulate procedural aspects of the federal courts.<sup>51</sup>

Justice Scalia, writing in dissent, agreed that the first question was whether 28 U.S.C. § 1404(a) governed the validity of forum-selection clauses. He concluded that it did not for three reasons.<sup>52</sup> First, the transfer statute pertains only to present and future considerations of convenience to determine whether to transfer a case, and does not refer to past considerations as suggested by the majority.<sup>53</sup> Second, when 28 U.S.C. § 1404(a) was enacted, cases concerning a contract's validity were generally governed by state law.<sup>54</sup> When Congress had desired to preempt state contract law it had done so explicitly.<sup>55</sup> Third, since 28 U.S.C. § 1404(a) should not govern forum-selection clause validity, uniformity between federal and state courts should have been the primary goal of the Court.<sup>56</sup>

Having concluded that 28 U.S.C. § 1404(a) did not govern forum-selection clause validity, the dissent considered whether the Court could apply a judicial rule to govern the question<sup>57</sup> and determined that it could not.<sup>58</sup> Whether state or federal law governed forum-selection clause validity depended on whether such a law was substantive or procedural.<sup>59</sup> If it was substantive, the federal court would have to apply the state's law in accordance with *Erie R.R. Co. v. Tompkins*.<sup>60</sup> If a rule governing the validity of forum-selection clauses was deemed procedural, the federal court could apply its own law. To

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50. *Id.* at 2245.

51. *Id.* at 2245. The majority determined § 1404(a) was within congressional powers granted under article III of the United States Constitution as augmented by the "Necessary and Proper Clause." U.S. CONST. art. I, § 8, cl. 18. Article III of the Constitution together with the "Necessary and Proper Clause" empower Congress to establish a federal court system and, by implication, to establish procedural rules to govern litigation within the system. *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 n.3 (1987).

52. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2246–48 (Scalia, J., dissenting).

53. *Id.* at 2246.

54. *Id.* at 2247.

55. *Id.*; see *infra* text accompanying notes 88–90.

56. *Stewart*, 108 S.Ct. at 2247. The dissent cited both *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) for support.

57. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2248 (1988).

58. *Id.* at 2249.

59. *Id.* at 2248–49.

60. 304 U.S. 64 (1938). *Erie* overturned *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and determined that the Rules of Decision Act, ch. 20, 1 Stat. 92 (1789) (current version at 28 U.S.C. § 1652 (1982)), required federal district courts to apply a state's substantive common laws as well as the state's legislative laws in federal diversity actions. For a further discussion of *Erie* and its progeny see *infra*, notes 105–23 and accompanying text.



determine whether the enforcement of forum-selection clauses was substantive or procedural, the dissent applied the twin-aims test of *Erie*: To discourage forum shopping and to avoid the inequitable administration of the laws.<sup>61</sup>

The first part of the *Erie* test—to discourage forum shopping—directed the use of state law.<sup>62</sup> The dissent determined that a plaintiff who wanted to avoid a transfer to the venue stipulated in a forum-selection clause would probably sue in a state court that did not enforce such clauses.<sup>63</sup> The defendant would then remove to a federal court in order to obtain the benefit of a more favorable federal law that enforces forum-selection clauses. In a state that enforced forum-selection clauses, the plaintiff would probably sue in a federal court, hoping that the other factors in a 28 U.S.C. § 1404(a) analysis would invalidate an otherwise valid forum-selection clause.<sup>64</sup>

In addition to encouraging forum shopping, the dissent argued, applying a federal rule that enforced forum-selection clauses would produce inequitable administration of the laws, and therefore would violate the second *Erie* test.<sup>65</sup> Inequitable administration of the laws occurs when a difference between state and federal law promotes unfair discrimination between citizens and non-citizens of a state.<sup>66</sup> Whether discrimination between these groups is unfair depends upon the importance of the matter in question.<sup>67</sup> The dissent noted examples of other matters that were similar to or of “obviously lesser importance” to questions of venue in which the Court held state law controlled.<sup>68</sup> As a result, the second part of the twin-aims test of *Erie*, to avoid inequitable administration of the laws, also directed the use of state law to determine the validity of forum-selection clauses.<sup>69</sup>

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61. *Stewart*, 108 S. Ct. at 2248 (Scalia, J., dissenting).

62. *Id.* at 2249.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* In a diversity setting, non-citizens would be able to take advantage of a more favorable federal law while citizens of a state would be restricted to the less favorable state law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–75 (1938).

67. *Id.*

68. *Id.* The dissent noted three examples: First, whether filing a complaint or service toll a statute of limitations, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980); second, whether an arbitration clause is enforceable, *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202–04 (1956); third, whether an indemnity bond covers litigation expenses, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 555–56 (1949). *Stewart*, 108 S. Ct. at 2249 (Scalia, J., dissenting).

69. *Stewart*, 108 S. Ct. at 2249 (Scalia, J., dissenting).

## II. ANALYSIS

### A. *The Federal Transfer Statute Should Not Govern the Validity of Forum-Selection Clauses*

The federal transfer statute should not govern forum-selection clause validity because the language, the legislative history, and the circumstances surrounding the enactment of 28 U.S.C. § 1404(a) indicate that Congress never intended the statute to do so. Instead, state law should govern as required by *Erie R.R. Co. v. Tompkins*.<sup>70</sup>

#### 1. *The “Interest of Justice” Clause of 28 U.S.C. § 1404(a) Disallows It From Governing Forum-Selection Clause Validity*

The federal transfer statute allows a federal district court to transfer a case to a more convenient forum if it is in the “interest of justice.”<sup>71</sup> In *Van Dusen v. Barrack*<sup>72</sup> the Supreme Court held that, following a transfer under 28 U.S.C. § 1404(a), the state law of the transferor court was to be applied in the transferee court.<sup>73</sup> The Court stated that it was in the interest of justice to disallow a change of law because such a bonus to a change of venue would turn 28 U.S.C. § 1404(a) into a forum shopping device.<sup>74</sup> Similarly, if federal district courts sitting in diversity applied 28 U.S.C. § 1404(a) to give a different effect to forum-selection clauses than the state court in which the federal court sits, the transfer statute would again promote forum shopping.<sup>75</sup> Just as it was in the interest of justice to apply the transferor court’s law in *Van Dusen*, it is in the interest of justice for 28 U.S.C. § 1404(a) not to govern forum-selection clause validity in order to achieve the same goal—the prevention of forum shopping. Therefore, even if 28 U.S.C. § 1404(a) is construed to cover past considerations of a party’s convenience, the “interest of justice” clause does not allow the statute to govern forum-selection clause validity.

#### 2. *Congress Did Not Intend 28 U.S.C. § 1404(a) To Govern Forum-Selection Clause Validity.*

28 U.S.C. § 1404(a) does not provide an unambiguous answer to whether it should govern the validity of the parties’ past considera-

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70. 304 U.S. 64 (1938).

71. 28 U.S.C. § 1404(a) (1982).

72. 376 U.S. 612 (1964).

73. *Id.* at 639.

74. *Id.* at 635–37, 637 n.36.

75. *See infra* notes 124–36 and accompanying text.

tions of convenience as embodied in a forum-selection clause.<sup>76</sup> When language is not clear, a court must look to intrinsic and extrinsic aids to determine legislative intent.<sup>77</sup>

*a. Legislative History of 28 U.S.C. § 1404(a)*

The legislative history of 28 U.S.C. § 1404(a) suggests that Congress did not intend the statute to govern the validity of forum-selection clauses. The only legislative history to 28 U.S.C. § 1404(a) is the revisor's note<sup>78</sup> that states in part, "Subsection (a) was drafted in accordance with the doctrine of *forum non conveniens* . . . ."<sup>79</sup> The Supreme Court has ruled that 28 U.S.C. § 1404(a) is not technically a codification, but a revision of the *forum non conveniens* doctrine.<sup>80</sup> But because most of the factors relevant in a *forum non conveniens* analysis are relevant in an analysis under 28 U.S.C. § 1404(a), and because many courts make reference to the doctrine of *forum non conveniens* when deciding a 28 U.S.C. § 1404(a) motion to transfer,<sup>81</sup> it is reasonable to infer legislative intent from the revisor's note which characterizes 28 U.S.C. § 1404(a) as a codification of the doctrine of *forum non conveniens*.

A year before the enactment of the Judiciary Act of 1948,<sup>82</sup> the Supreme Court set forth in *Gulf Oil Co. v. Gilbert*<sup>83</sup> the relevant factors a district court must consider when contemplating a dismissal in accordance with the doctrine of *forum non conveniens*.<sup>84</sup> None of the

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76. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2246 (1988) (Scalia, J., dissenting).

77. Intrinsic aids examine the internal structure of the statute and conventional meanings of the terms used in it to determine the meaning of a statute. Extrinsic aids consist of background text including legislative history and related statutes. Extrinsic aids are used to decipher the legislative intent expressed by a statute. 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.14, at 70 (4th ed. 1984).

78. 28 U.S.C. § 1404(a) revisor's note (1982); Korbelt, *supra* note 27, at 610 n.22 (the revisor's note is the only available legislative history).

79. 28 U.S.C. § 1404(a) revisor's note (1982). The doctrine of *forum non conveniens* allows a court to resist imposition upon its jurisdiction—even though the court has jurisdiction of the action—when the litigation could be brought in a more convenient forum. *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 507 (1947); see J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 2.17, at 88–89 (1985).

80. *Norwood v. Kirkpatrick*, 349 U.S. 29, 31–32 (1955).

81. See, e.g., *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986); *Davis v. Hill Eng'g Inc.*, 549 F.2d 314, 323 (5th Cir. 1977); *Rowles v. Hammermill Paper Co.*, 689 F. Supp. 494, 495 (E.D. Pa. 1988); *Crosfield Hastech, Inc. v. Harris Corp.*, 672 F. Supp. 580, 589–90 (D.N.H. 1987).

82. Pub. L. No. 80-773, 62 Stat. 869 (codified as amended at 28 U.S.C. §§ 1–2680 (1982 & Supp. IV 1986)).

83. 330 U.S. 501 (1947).

84. *Gilbert* sets forth a balancing of conveniences that includes: Access to sources of proof; ability to force attendance of unwilling witnesses; cost of obtaining willing witnesses; possibility

factors set forth in *Gilbert* indicate that 28 U.S.C. § 1404(a) should determine the validity of forum-selection clauses. In fact, the Court stated in *Gilbert*, that “[u]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”<sup>85</sup> The Court’s presumption in favor of plaintiff’s choice of forum suggests that not only was the doctrine of *forum non conveniens* silent as to forum-selection clauses, but a court applying a *forum non conveniens* analysis would not enforce such clauses because they would interfere with the presumptive right of the plaintiff to choose the forum.

*b. Conditions Surrounding the Enactment of 28 U.S.C. § 1404(a)*

At the time 28 U.S.C. § 1404(a) was enacted, courts almost universally refused to enforce forum-selection clauses.<sup>86</sup> In addition, state law predominantly governed contractual matters.<sup>87</sup> When Congress has preempted what is traditionally governed by state contract law, it has used explicit language.<sup>88</sup> The dissent in *Stewart* used as an example of such explicit language the Federal Arbitration Act,<sup>89</sup> enacted one year before 28 U.S.C. § 1404(a), which states that an arbitration clause “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity of the revocation of any contract.”<sup>90</sup> It is unlikely that the federal transfer statute was intended to include the validity of forum-selection clauses when at the time of enactment forum-selection clauses were routinely disregarded, and a federal enactment one year earlier regarding arbitration clauses, which have been called a “kind of a forum-selection clause,”<sup>91</sup> explicitly

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to view premises (if appropriate); practical trial considerations of speed and expense; enforceability of an obtained judgment; advantages and obstacles to a fair trial; plaintiff’s choice of forum; public interests, such as congestion of courts or burden on a jury to hear a case which has no relation to the community; local interest in having localized controversies decided at home; and having the state whose law governs apply its own law in its own forum. *Id.* at 508–09.

85. *Id.* at 508. One could argue that the plaintiff did choose a forum when he or she signed the contract containing the forum-selection clause. At the time of signing, however, the contracting parties were not parties to litigation and therefore neither could be the plaintiff or the defendant. The defendant’s choice of forum is the forum stipulated in the clause; the plaintiff’s choice, however, is favored under the doctrine of *forum non conveniens*.

86. Gruson, *supra* note 4, at 138–39; Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 56 A.L.R.2d 300, 306 (1957) (superseded by 31 A.L.R.4th 404 (1984)); *see supra* note 6 and accompanying text.

87. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2247 (1988) (Scalia, J., dissenting).

88. *Id.*

89. Pub. L. No. 80-282, 61 Stat. 669 (codified at 9 U.S.C. § 2 (1982)), *cited in Stewart*, 108 S. Ct. at 2247 (Scalia, J., dissenting).

90. 9 U.S.C. § 2 (1982).

91. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

assumed control over what had been traditionally governed by state contract law.

### 3. *Judicial Interpretation of 28 U.S.C. § 1404(a)*

The factors to be considered in a 28 U.S.C. § 1404(a) analysis were originally based on the factors in a *forum non conveniens* analysis.<sup>92</sup> Because the result of a successful 28 U.S.C. § 1404(a) motion is a transfer to another court, rather than a dismissal under the doctrine of *forum non conveniens*, the discretion to be exercised in a 28 U.S.C. § 1404(a) analysis is quite broad and, as a result, a transfer may be granted upon a lesser showing of inconvenience.<sup>93</sup> Additional factors are now relevant that were not relevant under the doctrine of *forum non conveniens*.<sup>94</sup> All of the traditional factors under the doctrine of *forum non conveniens* and the factors which have developed since the enactment of 28 U.S.C. § 1404(a) are forward looking; they pertain to conditions that currently exist or will exist in the future.<sup>95</sup> No case has ever set forth a factor to be considered under a 28 U.S.C. § 1404(a) analysis that looks to the past.

The language, legislative history, circumstances surrounding the enactment, and subsequent judicial interpretations of 28 U.S.C. § 1404(a) indicate that Congress did not intend the section to determine forum-selection clause validity. In spite of the intrinsic and extrinsic evidence to the contrary, the majority in *Stewart* determined that the discretionary, individualized nature of 28 U.S.C. § 1404(a) permitted the statute to govern the validity of forum-selection clauses.<sup>96</sup> This expansive step was unwarranted.<sup>97</sup> Instead, 28 U.S.C.

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92. See *supra* text accompanying note 79. For a list of factors relevant in a *forum non conveniens* analysis, see *supra* note 84.

93. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

94. 1 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* 0.145[5], at 1626-27 n.16 and accompanying text (2d ed. 1985). Some of the new factors include: transferee court judge is familiar with the complex details of the case, *Pfizer, Inc. v. Lord*, 447 F.2d 122, 125 (2d Cir. 1971); convenience of a third-party defendant, *Krupp Int'l, Inc. v. Yarn Industries, Inc.*, 615 F. Supp. 1103, 1107 (D. Del. 1985); physical condition of the parties, *L.B. Sales Corp. v. Dial Mfg., Inc.*, 593 F. Supp. 290, 295 (E.D. Wis. 1984); evidence of a suit pending in another district, *Blue Diamond Coal Co. v. United Mine Workers*, 282 F. Supp. 562, 563-64 (E.D. Tenn. 1968). These new factors have been the result of increased litigation complexity. The standard traditional factors are still the same as those used in a *forum non conveniens* analysis.

95. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2246 (1988) (Scalia, J., dissenting); see 15 WRIGHT & MILLER, *supra* note 24, §§ 3848-49, 3851, 3853-54.

96. *Stewart*, 108 S. Ct. at 2244.

97. When there is some uncertainty about the intended scope of a rule, if the broader construction would interfere with state substantive policies it should be avoided if the text permits. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-51 (1980). Since *Hanna v. Plumer*, 380 U.S. 460 (1965), the federal rules have been construed to avoid conflict with

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§ 1404(a) should have been ruled inapplicable because the statute itself allows a transfer only if it is in the interest of justice, and justice is not served by a rule that promotes forum shopping. Because neither 28 U.S.C. § 1404(a) nor any other federal statute governs forum-selection clause validity, an *Erie*<sup>98</sup> analysis should be applied to determine whether a federal judge-made rule or state law should govern their validity.

### B. State Law Should Govern Under an Erie Analysis

Assuming 28 U.S.C. § 1404(a) was not intended to determine the validity of forum-selection clauses, the issue becomes whether federal courts may create a rule to govern the validity of forum-selection clauses.<sup>99</sup> Federal courts have the authority to fashion procedural rules for the conduct of their business.<sup>100</sup> Federal courts, however, cannot create substantive law except in limited circumstances.<sup>101</sup> As the Eleventh Circuit Court of Appeals in *Stewart* correctly noted, the distinction between procedure and substance is difficult and often misleading.<sup>102</sup> Distinguishing between procedure and substance is espe-

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important state policies. P. BATER, D. MELTZER, D. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS & THE FEDERAL SYSTEM 828 (3d ed. 1988).

98. For a discussion of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), see *infra* notes 105–11 and accompanying text.

99. *Stewart*, 108 S. Ct. at 2248 (Scalia, J., dissenting). The majority, finding that 28 U.S.C. § 1404(a) governed forum-selection clause validity, did not evaluate whether federal judge-made law or state law governed under the twin-aims test of *Erie*. *Id.* at 2245 n.11.

100. 28 U.S.C. § 2071 (1982). Section 2071 reads: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." See also *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (federal courts have power to make rules governing the practice and pleading in those courts); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (Congress may regulate practice of federal courts but cannot abolish the substantive law of a state unless it is a field committed to Congress by the Constitution).

101. *Erie* banished "general federal law" but "specialized" or "limited" common law remains. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964). The Court, in *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981), recognized generally two instances where federal common law should be applied: First, where it is needed to protect a uniquely federal interest, and second, where Congress has given the courts power to develop substantive law. See generally 19 WRIGHT & MILLER, *supra* note 14, § 4514. A forum-selection clause is not a uniquely federal concern such as commercial paper, government bonds, or government contracts. Nor has Congress given the courts power to develop substantive law with regard to forum-selection clauses. Therefore, validating forum-selection clauses using federal common law is inappropriate. *But see Moretti & Perlow Law Offices v. Aleet Assoc.*, 668 F. Supp. 103 (D.R.I. 1987); see also Comment, *supra* note 16, at 1111–12.

102. The terms substance and procedure may imply different concepts depending on the particular problem they are used for. *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945).

cially difficult with forum-selection clauses because on the one hand they are contractual, and therefore substantive, while on the other hand they govern venue, which is considered procedural.<sup>103</sup> The guidelines set forth in *Erie R.R. Co. v. Tompkins*<sup>104</sup> and its progeny determine whether a rule of law is procedural or substantive.

### 1. Erie Doctrine

The Rules of Decision Act<sup>105</sup> states that “[t]he laws of several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply.” The Supreme Court, in *Swift v. Tyson*,<sup>106</sup> had earlier held that “the laws of several states” applied only to a state’s legislative laws and did not include a state’s common laws.<sup>107</sup> In *Erie R.R. Co. v. Tompkins*<sup>108</sup> the Court overruled *Swift*, concluding that the majority in *Swift* had misinterpreted the congressional intent of the Rules of Decision Act.<sup>109</sup> The Court announced the new rule that federal courts sitting in diversity will “apply as their rules of decision the law of the State, unwritten as well as written.”<sup>110</sup> Justice Reed’s concurring opinion noted that federal law would still apply to procedural matters.<sup>111</sup> Because the distinction between procedure and substance was unclear, the Court in three post-*Erie* cases attempted to formulate a test to determine questions of procedure and substance.

The first case, *Guaranty Trust Co. v. York*,<sup>112</sup> held that a federal court sitting in diversity must apply state law to an issue which arguably could be either procedural or substantive, if applying federal law would result in a different outcome than would application of state law.<sup>113</sup> This “outcome determinative” test, however, proved too mechanical because virtually any federal procedural rule could affect

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103. *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 651 (11th Cir. 1986) (Godbold, C.J., dissenting), *aff’d on other grounds*, 108 S. Ct. 2239 (1988).

104. 304 U.S. 64 (1938).

105. Judiciary Act of 1789, § 34 (current version at 28 U.S.C. § 1652 (1982)).

106. 41 U.S. (16 Pet.) 1 (1842).

107. *Id.* at 12–13, 18.

108. 304 U.S. 64 (1938).

109. *Id.* at 79.

110. *Id.* at 73.

111. *Id.* at 92 (Reed, J., concurring).

112. 326 U.S. 99 (1945).

113. *Id.* at 109.

the outcome of a case.<sup>114</sup> There was, as one commentator noted, no extreme to which the argument had not been pushed.<sup>115</sup>

Because the “outcome determinative” test was unworkable, the Supreme Court reformulated the *Erie* doctrine in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*<sup>116</sup> The Court in *Byrd* noted that the possibility of a different outcome in a federal diversity case was not, on its own, determinative.<sup>117</sup> In addition to applying the “outcome determinative” test, courts should weigh the federal and state policies in question.<sup>118</sup>

The balancing approach of *Byrd* lacked an objective standard, however, and courts had difficulty applying the balancing test.<sup>119</sup> As a result, the Supreme Court addressed the issue once more in *Hanna v. Plumer*<sup>120</sup> to establish a rule by which to determine when a federal court would be allowed to apply its “procedural” laws. In *Hanna*, the Court determined that a federal court sitting in diversity could apply its own service of process rule since a difference in service of process between state and federal courts would not subvert the twin aims of *Erie*.<sup>121</sup> The Court articulated the twin aims of *Erie* as: First, to discourage forum shopping and second, to avoid inequitable administration of the laws.<sup>122</sup> Thus, to determine whether state law must govern or whether a federal judge-made rule may govern a forum-selection clause’s validity, the issue must be analyzed with respect to the twin-aims test of *Erie* as formulated in *Hanna*.<sup>123</sup>

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114. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 709 (1974) (outcome determinative test was too broad and a backlash was inevitable).

115. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 234 (1963/64).

116. 356 U.S. 525 (1958).

117. *Id.* at 537.

118. *Id.* at 536–40.

119. Different courts weighed certain policies differently and some courts weighed the same policy differently in different cases. For example, the Second Circuit in *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960), found that federal standards would dictate whether a foreign corporation was present in a state. *Id.* at 511–13. Three years later, in *Arrowsmith v. United Press Int’l*, 320 F.2d 219 (2d Cir. 1963), the same court overruled *Jaftex*, holding that the state policy was more significant than the policies underlying application of federal law. *Id.* at 229–30. The confusion was greater than what normally accompanied a balancing test since the continued validity of *York*’s “outcome determinative” test was in question. See Ely, *supra* note 114, at 709 n.93; see also Comment, *Of Lawyers and Laymen: A Study of Federalism, the Judicial Process, and Erie*, 71 YALE L.J. 344, 351 (1961).

120. 380 U.S. 460 (1965).

121. *Id.* at 468–70, 469 n.11.

122. *Id.* at 467.

123. The outcome determinative test of *York* was not repudiated but was refined by *Hanna*. Ely, *supra* note 114, at 717–18. The status of the *Byrd* balancing test is less certain. 19 WRIGHT & MILLER, *supra* note 14, § 4504, at 43.



## 2. *Application of the Twin-Aims Test of Erie to Forum-Selection Clauses*

### a. *A Federal Rule that Validates Forum-Selection Clauses Encourages Forum Shopping*

Because a change in venue may affect court congestion, the relative access to sources of proof, the availability of a compulsory process for unwilling witnesses, and a party's knowledge of special local conditions and laws,<sup>124</sup> the selection of the best forum is a critical pre-litigation decision. The importance of venue is supported by the fact that many commercial agreements include forum-selection clauses.<sup>125</sup>

In *Van Dusen v. Barrack*,<sup>126</sup> the Court ruled that a transfer of venue under 28 U.S.C. § 1404(a) did not also mean a change in substantive law.<sup>127</sup> The transferor court's law, therefore, would be applied in the transferee court.<sup>128</sup> Venue considerations,<sup>129</sup> however, do not raise substantive law issues but rather important "procedural" convenience factors.<sup>130</sup> A convenient forum is often a less costly forum.<sup>131</sup> The cost of an inconvenient forum can alter the practical outcome<sup>132</sup> of a case to the point that parties have an incentive to shop for the most convenient forum for themselves or the most inconvenient forum for their opponent. Therefore, although *Van Dusen* disallows a change in substantive law after a 28 U.S.C. § 1404(a) transfer, a difference between state and federal enforcement of forum-selection clauses may affect a party's ability to bring or defend a suit depending on the convenience of the venue stipulated in the clause. As a result, a difference between state and federal law governing the validity of forum-selection

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124. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257-61 (1981); *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947).

125. Forum-selection clauses have become more prevalent in commercial contracts since the *Bremen* decision, which held that the clauses are presumptively valid. Covey & Morris, *The Enforceability of Agreements Providing For Forum and Choice of Law Selection*, 61 DEN. U.L. REV. 837, 841 (1984).

126. 376 U.S. 612 (1964).

127. *Id.* at 635-36.

128. *Id.* at 639.

129. See *supra* text accompanying note 124.

130. The outcome of a case can be determined on grounds other than a change in the substantive law that governs the merits of the case. Provisions for discovery and a party's ability to amend pleadings, for example, often lead to the difference between winning and losing a lawsuit. If such matters were not governed by the Rules Enabling Act, deciding them under federal law would be prohibited by *Erie*. Ely, *supra* note 114, at 721-22.

131. *E.g.*, *Solar Electronics, Inc. v. Tandy Corp.*, (N.D. Ill. June 29, 1987) (WESTLAW 13427); *Blumenthal v. Management Assistance, Inc.*, 480 F. Supp. 470, 474 (N.D. Ill. 1979); *Fluor Corp. v. Pullman, Inc.*, 446 F. Supp. 777, 778-79 (W.D. Okla. 1977); *Mobile Oil Corp. v. W.R. Grace & Co.*, 334 F. Supp. 117, 124-25 n.5 (S.D. Tex. 1971).

132. See *supra* note 123.

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clauses may lead to as much forum shopping as a change in the law governing the merits of the case.

In *Hanna* the Court determined that the difference between federal and state service of process procedures would not promote forum shopping.<sup>133</sup> Where service of process occurs after a party commences a suit, the decision to bring a suit is the first a party must make. As a result, venue, as stipulated by a forum-selection clause, is more likely to cause forum shopping because parties will recognize a difference in state and federal forum-selection clause enforcement and attempt to manipulate the difference to their advantage.

Because venue significantly affects convenience, and parties will recognize any difference between federal and state law, they will attempt to manipulate the differences in order to escape or enforce a venue stipulated in a forum-selection clause. Although differences among states may lead to interstate forum shopping, this is not the sort of forum shopping that *Erie* attempted to eliminate.<sup>134</sup> *Erie* was concerned with uniformity of laws among federal and state courts of the same state.<sup>135</sup> If federal law enforces forum-selection clauses and state law does not, an in-state plaintiff will bring suit in a state court to avoid the clause and an out-of-state defendant will be encouraged to “shop” for the more advantageous federal law by removing to a federal court. An out-of-state plaintiff hoping to avoid a forum-selection clause stipulating a forum of a different state will bring suit in a state court. A resident defendant will not be able to remove because of the “one way” nature of the federal removal statute.<sup>136</sup>

### *b. A Federal Rule that Validates Forum-Selection Clauses Results in the Inequitable Administration of the Laws*

In *Walker v. Armco Steel Corp.*<sup>137</sup> the Court held that failing either prong of the twin-aims test of *Erie* is enough to warrant the application of state law. Applying federal law to enforce forum-selection clauses will produce an inequitable administration of the laws. Inequi-

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133. *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965).

134. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); Ely, *supra* note 114, at 714-15 n.125 (between horizontal uniformity among all federal courts and vertical uniformity between federal and state courts of a given state, uniformity of one inevitably sacrifices the other).

135. *Hanna*, 380 U.S. at 467.

136. 28 U.S.C. § 1441(b) (1982). Section 1441(b) does not allow an in-state defendant to remove to a federal court in a diversity case. The rationale is that an in-state resident does not need protection from a state court which may be biased in favor of in-state residents. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 79, § 2.11, at 58 (1985).

137. 446 U.S. 740 (1980).

table administration of the laws results when there is unfair discrimination between citizens and non-citizens of the forum state.<sup>138</sup> An out-of-state plaintiff desiring a certain state court may effectively avoid a forum-selection clause by bringing suit in a state court that does not enforce such clauses. Not only is this forum shopping, but it will also result in discrimination against the resident plaintiff who, due to the accident of diversity, will not be able to enforce the forum-selection clause as allowed in the federal court. In addition, it is unfair that a suit in which both parties are in-state residents is decided differently than a similar case in a federal court where jurisdiction is based upon diversity.<sup>139</sup>

Under an *Erie* analysis, therefore, state law should be applied because a difference in venue laws leads to a significant difference in convenience, which in turn will lead to forum shopping. In addition, a difference between state and federal law unfairly discriminates against in-state defendants who can not remove to a federal court under 28 U.S.C. § 1441(b). Discrimination against in-state residents also occurs when both parties are residents of the same state and therefore not able to take advantage of a federal law that enforces forum-selection clauses. Discrimination of this sort results in inequitable administration of the laws.

### C. *Desirable Effects of State Law Governing the Validity of Forum-Selection Clauses*

The Supreme Court should have avoided a novel and unwarranted expansion of 28 U.S.C. § 1404(a). Applying state law would have been in line with the twin aims of *Erie*. More importantly, the use of state law would have achieved a more desirable result.

The Supreme Court's decision in *Stewart* suggests that the Court desires uniform enforcement of forum-selection clauses to ensure the certainty and predictability benefits of such clauses.<sup>140</sup> It is uncertain,

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138. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938); *Hanna v. Plumer*, 380 U.S. 460, 467-69 (1965). A resident defendant has no right to removal under 28 U.S.C. § 1441 (1982), *see supra* note 136. Therefore, non-citizens are favored over citizens when state and federal law differ.

139. *See Ely, supra* note 114, at 712-13 n.112.

140. The Supreme Court stated in *Stewart* that the *Bremen* case may prove "instructive" in resolving the dispute. *Stewart Org., Inc. v. Ricoh Corp.*, 108 S. Ct. 2239, 2243 (1988). *Bremen* was an admiralty case holding that a forum-selection clause was to be presumptively enforced because it would increase trade by eliminating uncertainty. *See supra* notes 12-13 and accompanying text. In addition, Justice Kennedy, in the *Stewart* concurring opinion, noted that enforcement of forum-selection clauses would further the vital interests of justice and protect the legitimate expectations of the parties. He stated that courts should encourage such clauses by

however, whether federal courts located in a state that does not enforce forum-selection clauses will enforce such clauses even after applying the *Stewart* analysis. In fact, on remand, the district court found that the other factors in a 28 U.S.C. § 1404(a) analysis outweighed the forum-selection clause, and the district court refused to transfer the case.<sup>141</sup> Therefore, the end result was the same as if state law had been applied.

The decision in *Stewart* may have been premature as well as ineffective. The Supreme Court eventually could have achieved universal enforcement of forum-selection clauses by determining state law governs the issue in accordance with *Erie*. Although the use of state law would create inconsistency in theory, because some states enforce forum-selection clauses and others do not, uniformity would result in practice. All but four states have adopted a rule which enforces forum-selection clauses.<sup>142</sup> The trend is toward enforcing forum-selection clauses, and state courts in the past thirty-five years have overturned precedent to the contrary.<sup>143</sup> When all states have adopted a rule to enforce forum-selection clauses, the result will be uniform enforcement in state and, therefore, federal courts.<sup>144</sup> If state law had governed the validity, however, the clause may have carried more weight in a 28 U.S.C. § 1404(a) motion to transfer.

### III. CONCLUSION

The Supreme Court misconstrued the legislative intent behind 28 U.S.C. § 1404(a) by allowing the statute to govern contractual forum-selection clause validity. In so doing, the Court failed to achieve, and may have prevented, uniformity in enforcement of forum-selection clauses. Because federal standards will control enforcement, state courts will have fewer opportunities to overturn obsolete precedent concerning forum-selection clauses. Regardless of the *Stewart* deci-

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giving them controlling weight in a § 1404(a) analysis. *Stewart*, 108 S. Ct. at 2249–50 (Kennedy, J., concurring).

141. *Stewart Org., Inc. v. Ricoh Corp.*, 696 F. Supp. 583 (N.D. Ala. 1988).

142. Alabama, Georgia, Missouri, and Texas refuse to enforce forum-selection clauses. Comment, *supra* note 16, at 1095 n.28.

143. Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4th 404, 408–09 (1984).

144. The *Stewart* decision may impede the chances of the four remaining states to adopt the majority rule. Many cases involving forum-selection clauses involve parties from different states. An out-of-state defendant will remove to a federal court in order to obtain the benefits of the *Stewart* rule that validates forum-selection clauses. As a result, the four remaining states will have far fewer cases concerning forum-selection clauses remaining in the state courts and therefore fewer opportunities to overturn their antiquated precedents that invalidate forum-selection clauses.

sion, there is some doubt whether federal district courts sitting in diversity will enforce such clauses in a state that refuses to do so.

Further, the Court's treatment of forum-selection clauses as a federal procedural issue violates the policies underlying *Erie* and *Hanna*. Differences between state and federal treatment of the clauses may increase forum shopping between state and federal courts and encourage the inequitable administration of the laws between residents and non-residents. Despite *Stewart*, a district court with diversity jurisdiction should not enforce a clause that is unenforceable under the forum state's law because enforcement would violate the "interest of justice" clause of 28 U.S.C. § 1404(a) by encouraging forum shopping. By not enforcing forum-selection clauses in such instances, the outcome would not only be in accordance with *Erie*, *Hanna*, and the "interest of justice" clause of 28 U.S.C. § 1404(a), but would eventually lead to a system that uniformly enforces forum-selection clauses. That result would be achieved without overextending a federal house-keeping statute to pre-empt state law.

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