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Motion to Transfer and the Interests of Justice

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The Motion to Transfer and the Interests of Justice

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I. INTRODUCTION

Two bodies of law primarily determine where the parties will litigate a federal court suit. The law of personal jurisdiction imposes one set of limitations; a court may enter a judgment only if the defendant possesses some relationship to the forum.[1] Under personal jurisdiction principles, any state with which defendants possesses "minimum contacts" typically may assert jurisdiction over the defendant.[2]

But even if a court possesses personal jurisdiction, and assuming the subject matter is properly before the court, a plaintiff nonetheless may be unable to proceed against the defendant in that forum.[3] The defendant may move for a change of venue,

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1 *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 204 (1977) ("[T]he relationship among the defendant, the forum, and the litigation . . . [has become] the central concern of the inquiry into personal jurisdiction."); Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 691-92 (1987); Stewart, *Forum Non Conveniens: A Doctrine in Search of a Rule*, 74 CALIF. L. REV. 1259, 1264 (1986).

2 *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

3 The requirement that a plaintiff initially file suit in a proper venue represents another geographical limitation on federal suits. Proper venue in most federal cases is governed by 28 U.S.C. § 1391 (1988). *See generally* Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82 (1968).

Proper venue represents a requirement distinct from personal jurisdiction. Personal jurisdiction refers to the authority of the courts to bind a defendant to a judgment, while venue refers to the convenience of the court as a site for litigation. *See, e.g.*, Nierbo Co. v. Bethlehem Shipping Corp., 308 U.S. 165, 167-68 (1939); *but cf.* Stein, *Forum Non Conveniens and the Redundancy of the Court-Access Doctrine*, 133 U. PA. L. REV.

under section 1404 of the judicial code.[4] Pursuant to this statute, a transferor court may send a case to a transferee district[5] "[f]or the convenience of parties and witnesses, in the interest of justice."[6]

781, 800-01 (1985). In some cases, venue may be improper, even though the court possesses personal jurisdiction over all defendants. *See, e.g.*, Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979).

4 28 U.S.C. § 1404(a) (1988).

The vast majority of motions to transfer are brought by defendants. Courts have held that a plaintiff, as well as a defendant, may move to transfer a case. *See generally* Ferens v. John Deere Co., 110 S. Ct. 1274 (1990). A plaintiff often will file a motion to transfer after learning that the selected forum lacks personal jurisdiction over a defendant. The plaintiff then may seek to transfer the case to a forum that possesses personal jurisdiction over all defendants. *See, e.g.*, Saylor v. Dyniewski, 836 F.2d 341, 345 (7th Cir. 1988) (denying plaintiffs' motion to transfer, where Illinois courts lacked personal jurisdiction over the defendant); Schwilm v. Holbrook, 661 F.2d 12 (3d Cir. 1981) (granting plaintiff's motion to transfer her suit from Pennsylvania to West Virginia, where Pennsylvania courts may have lacked personal jurisdicton over the defendant).

This article addresses the more typical § 1404 transfer motion filed by a defendant. Such a motion does not assert that a case cannot proceed in the court chosen by the plaintiff. Instead, the defendant's motion argues that another forum would provide a more convenient site for litigation. The issues raised by a plaintiff's transfer motion are beyond the scope of this article.

5 Opinions have referred to the court receiving a transferred case as the "transferee court." This article attempts to spare the reader from this jargon whenever possible.

6 28 U.S.C. § 1404(a) (1988). The § 1404 motion to transfer grew out of the common law doctrine of forum non conveniens, which authorized the dismissal of a suit filed in an inconvenient forum. *See infra* text accompanying notes 19-37.

Section 1404 only authorizes a district court to transfer a case "to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988). A federal court cannot effect a § 1404 transfer to the courts of a foreign county, because the foreign courts are not another "district or division" of the federal courts. Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 592, 600 (1949). Where the courts of a foreign country would provide a more convenient forum, a district court may dismiss the suit under the doctrine of forum non conveniens. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 201 (1981) (forum non conveniens motion to dismiss granted, where a trial in Scotland would prove more convenient); Kempe v. Ocean Drilling & Ocean Exploration Co., 876 F.2d 1138 (5th Cir.) (dismissing suit filed in the Eastern District of Louisiana, because Bermuda would provide a more convenient forum), *cert. denied*, 110 S. Ct. 270 (1989); Transunion Corp. v. Pepsico, Inc., 811 F.2d 127 (2d Cir. 1987) (affirming dismissal under the doctrine of forum non conveniens, because the Philippines would provide an appropriate forum).

State courts also continue to apply the doctrine of forum non conveniens. The doctrine authorizes a state court to dismiss a suit, where the courts of another state would provide a more convenient site for litigation. *See, e.g.*, McClain v. Illinois Cent. R.R. Co., 121 Ill. 2d 278, 520 N.E.2d 368, 374, (1988) (dismissing case under the forum non conveniens doctrine, where "the circumstances in this case strongly favor Tennessee as the more convenient forum"); Szmyd v. Szmyd, 641 P.2d 14 (Alaska 1982) (dismissing suit brought in Alaska, where the California courts would provide a more convenient forum). *See also* Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245 (1984) (granting forum non conveniens motion, and dismissing suit brought against the former ruler of Iran by the current Iranian government), *cert. denied*, 469 U.S. 1108 (1985).

In theory, the law of personal jurisdiction and the change of venue statute are complimentary provisions. Personal jurisdiction provides the plaintiff with a broad choice of forum, requiring only some "minimum contacts" between the defendant and any forum that the plaintiff has chosen.[7] However, where the plaintiff has chosen a district arbitrarily or to harass a defendant, the defendant may seek a transfer to a more convenient federal district.[8]

The law of personal jurisdiction has undergone a carefully scrutinized, if not always coherent, development. The Supreme Court frequently has re-examined the proper standards for the

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A forum non conveniens dismissal may impose a greater hardship on a plaintiff than a § 1404 transfer. For various reasons, including the possible expiration of statutes of limitations, a plaintiff whose suit is dismissed under forum non conveniens may be unable to prosecute his suit in any forum. Conversely, a plaintiff whose suit is transferred may continue to litigate his suit in another federal court.

Because a forum non conveniens dismissal carries implications different from a § 1404 transfer, the issues raised by the doctrine of forum non conveniens are beyond the scope of this article. *See Piper*, 454 U.S. at 258 n.26 ("dismissals on grounds of forum non conveniens and § 1404(a) transfers are not directly comparable."). *See also id.* at 253-54.

7 A tenuous connection between a defendant and the forum state may satisfy the constitutional requirement of minimum contacts. A defendant may be subject to personal jurisdiction even through he never has entered the forum state. *See, e.g.*, Burger King v. Rudzewicz, 471 U.S. 462 (1985) (upholding personal jurisdiction over franchise owners in Florida, even though owners had no physical presence in Florida); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (New Hampshire courts possessed personal jurisdiction over a defendant magazine publisher, where the defendant's only contact with state was the monthly sale of 10,000 to 15,000 magazines in New Hampshire). *But see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (California court did not possess personal jurisdiction over a Japanese company, which maintained no offices in California).

8 Section 1404 authorizes a transfer from a court that possesses personal jurisdiction over all defendants, and is a proper venue for the suit. Where a plaintiff has filed suit in an improper venue, a federal court either may dismiss or transfer the suit. 28 U.S.C. § 1406(a) (1988). A venue dismissal may have a severe effect on a plaintiff's ability to litigate a dispute, particulary if the relevant statute of limitations in a proper venue has expired. A court that is not a proper venue sometimes will transfer a suit, pursuant to § 1406, rather than dismiss the case. *See, e.g.*, Goldlawr, Inc. v. Heiman, 369 U.S. 463, 466 (1962) (§ 1406 authorizes a transfer "however wrong the plaintiff may have been in filing his case to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not"); Porter v. Groat, 840 F.2d 255 (4th Cir. 1988); Cote v. Wadel, 796 F.2d 981, 984-85 (7th Cir. 1986).

A § 1406 transfer of a case filed in an improper court raises different issues than a § 1404 transfer. The issues raised by a § 1406 transfer are beyond the scope of this article.

exercise of personal jurisdiction.[9] The law of personal jurisdiction has received a regular review in scholarly works.[10]

Despite the deluge of motions to transfer litigated in the lower federal courts,[11] the methodology employed to resolve such motions has received little attention. The Supreme Court rarely has addressed section 1404 transfers, and the few Court opinions that discuss the proper legal standards do so in only the most general terms.[12] Legal scholars have ignored the motion to transfer.[13] As a result, the development of proper standards to govern the transfer of cases has been left to the lower federal courts, and almost exclusively to the district courts.[14]

This article reviews the law governing section 1404 motions, and concludes that this body of law is in chaos. The ad hoc balancing employed by the district courts precludes any prediction on whether a particular transfer motion will succeed. This lack of

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9 *See, e.g., Asahi*, 480 U.S. 102; *Burger King*, 471 U.S. 462; Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); *Keeton*, 465 U.S. 770.

10 *See, e.g.*, Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1 (1984); Redish, *Due Process, Federalism and Personal Jurisdiction*, 75 NW. U.L. REV. 1112 (1981); Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988); Weisburg, *Territorial Authority and Personal Jurisdiction*, 63 WASH. U.L.Q. 377 (1985).

11 The federal courts ordered more than 3,000 § 1404 transfers each year between 1985 and 1989.

Year	*Number of Transfers*
Fiscal Year Ending 6/30/85	3,728
Fiscal Year Ending 6/30/86	3,409
Fiscal Year Ending 6/30/87	3,773
Fiscal Year Ending 6/30/88	4,126
Fiscal Year Ending 6/30/89	3,765

Letter to David E. Steinberg from Charles D. Gentry, Assistant Chief, Statistical Analysis and Reports Division, Adminstrative Office of the United States Courts (March 8, 1990) [copy on file with author]. The roughly 3,700 § 1404 transfers ordered in 1988-89 represent a more than 100% increase from the roughly 1,700 annual transfers ordered ten years early. Marcus, *Conflicts Among the Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 680 & n.16 (1984) (citing transfer statistics from 1974 through 1982). *See also* Kaufman, *supra* note 6, at 595.

These figures report only cases actually transferred, and do not take into account the large number of unsuccessful § 1404 motions.

12 *See infra* text accompanying notes 47-107.

13 Recent scholarly pieces discussing § 1404 are almost nonexistent. *But see* Waggoner, *Section 1404(a), 'Where It Might Been Brought': Brought By Whom?*, 1988 B.Y.U. L. REV. 67. Very few scholarly considerations of the § 1404 motion have appeared since the 1960s. *See, e.g.*, Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice?*, 40 IND. L.J. 99 (1965).

Recent scholarship has devoted considerably more attention to the related but distinct doctrine of forum non conveniens. *See, e.g.*, Stein, *supra* note 3; Stewart, *supra* note 1.

14 *See* Kitch, *supra* note 13, at 136-37.

standards invites a defendant to seek a transfer even when the plaintiff has chosen a reasonable forum. Today, the motion to transfer often has little relationship to the "interests of justice."[15] Instead, such motions have become a vehicle for defendant delay and an increasing burden on the already backlogged federal courts.

Part I of this Article examines the development of the section 1404 transfer. Part I reviews the Supreme Court's repeated statements that transfer decisions should be left to the discretion of the district courts. Part I concludes by examining the Supreme Court's single specific limitation on section 1404 transfers, which authorizes transfers only to a district where the suit "might have been brought."[16] The Article concludes that this limitation rarely will apply and is inappropriate.

Given the Supreme Court's failure to provide any standards for resolving transfer motions, Part II considers three other possible sources of such standards: (1) the defendants sued in civil litigation; (2) the district courts; and (3) the federal appeals courts. Part II concludes that none of these actors have promoted or are likely to promote a coherent motion to transfer. In support of this conclusion, Part II reviews two recurring types of inappropriate transfers.

Given these improper transfer decisions, Part III of the Article turns to the multi-factor balancing test used to decide transfer motions. Part III examines four factors typically considered by the district courts in resolving a motion to transfer: (1) whether the plaintiff has brought suit in his district of residence; (2) whether the suit is governed by the law of the forum state or by the law of another state; (3) whether the district where the plaintiff has brought suit possesses a more or less congested docket than an alternative district; and (4) whether a related case is pending in another district.

Part III notes that different lower court decisions have placed a vastly different emphasis on each of these factors. But Part III concludes that even if the lower courts agreed on the importance of each factor, reliance on these distinctions still would not produce appropriate results. Each of the four factors discussed actually has little bearing on whether a particular district may provide a convenient forum for litigation. After re-examining the relation-

15 28 U.S.C. § 1404(a) (1988).

16 Hoffman v. Blaski, 363 U.S. 335 (1960).

ship between the law of personal jurisdiction and the section 1404 transfer, Part III concludes that courts should abandon the current method of deciding transfer motions.

Part IV of this Article urges courts to replace the current bouillabaisse of factors used to resolve transfer motions with a few simple rules. Courts should decide most transfer motions only by considering the location of relevant witnesses and documents. In addition, courts should transfer a case only to a district *where the plaintiff possesses minimum contacts.* Finally, this concluding part proposes that if a valid forum selection clause applies, a judge automatically should transfer a case to the court specified in the forum selection clause.

II. THE DEVELOPMENT OF THE MOTION TO TRANSFER

A. *The Motion to Transfer and the Doctrine of Forum Non Conveniens*

Until 1948, no motion to transfer was available to civil litigants in federal court.[17] Before this time, a transfer provision probably would have served little purpose. Under the narrow interpretation of personal jurisdiction embraced during the late nineteenth century, a plaintiff typically could bring suit only in the defendant's state of domicile.[18] This rule precluded most plaintiffs from filing a suit in an inconvenient forum, distant from the defendant's residence.

In 1945, the Supreme Court explicitly abandoned this restrictive view of personal jurisdiction. The Court adopted the modern rule that a defendant is subject to personal jurisdiction in any state with which the defendant possesses "minimum contacts."[19]

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17 Marcus, *supra* note 11, at 679.

18 Pennoyer v. Neff, 95 U.S. 714, 722-23 (1877).

The primary exception to this rule authorized personal jurisdicion over non-residents receiving personal service of process while physically present in the forum state. *See* Burham v. Superior Court 110 S. Ct. 2105, 2110-17 (1990). *Cf. id.* at 2123 (Brennan, J., concurring) ("[f]or most of the 19th century, American courts did not uniformaly recognized the concept of transient jurisdiction").

In *Burham*, the Court held that personal service on a defendant physically present in the forum state is sufficient to establish personal jurisdiction, even if the defendant's presence in the forum state lasts only for a short period of time. *Id.* at 2115-17.

19 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (upholding personal jurisdiction over a corporation, where between 11 and 13 of the corporation's permanent salesmen worked and lived within the State of Washington, displayed the corporation's shoes in permanent display rooms, and sold a substantial volume of the corporation's shoes within the state).

This expansion of personal jurisdiction was accompanied by concerns that plaintiffs might now bring suit in a forum that possessed few connections with the parties or the underlying dispute.[20] The "forum shopping" plaintiff might choose a distant court, hoping to benefit from some unique legal doctrine. Or the plaintiff might choose a distant forum merely to harass the defendant, perhaps forcing a quick settlement of a marginal suit.[21]

Many commentators viewed the case of *Baltimore & Ohio Railroad v. Kepner*,[22] as a prime example of such harassment.[23] The Supreme Court's *Kepner* decision arose out of a suit under the Federal Employers' Liability Act,[24] brought by an injured employee. The plaintiff, an Ohio resident, was injured while working in Butler County, Ohio. The plaintiff brought suit in the Eastern District of New York, asserting personal jurisdiction because the "defendant railroad was doing business in the New York district where the same suit was filed."[25]

In *Kepner*, the defendant Baltimore & Ohio Railroad sought an injunction in an Ohio state court, which would have prevented the plaintiff from continuing his Eastern District of New York suit.[26] The Ohio state court denied the injunction, and the United States Supreme Court affirmed. In support of its holding, the *Kepner* Court wrote: "[T]he federal courts have felt they could not interfere with suits in far federal districts where the inequity alleged was based only on inconvenience."[27]

The federal courts subsequently developed the doctrine of forum non conveniens, which authorized dismissal of a suit where another court would provide a more convenient forum.[28] In

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20 *See* J. MOORE, MOORE'S JUDICIAL CODE COMMENTARY 202 (1949).

At the same time that the Supreme Court expanded personal jurisdiction, Congress adopted statutes relaxing traditional limitations on the proper venue for certain types of suits. For example, the Federal Employers' Liability Act allowed an injured railroad employee to bring suit "in the district of residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (1988). *See also* Baltimore & Ohio R.R. Co. v. Kepner, 314 U.S. 44 (1941).

21 *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) ("A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 930-31 (1947).

22 314 U.S. 44 (1941).

23 *See* J. MOORE, *supra* note 20, at 205-06; Braucher, *supra* note 21, at 935.

24 45 U.S.C. §§ 51-60 (1988).

25 *Baltimore & Ohio R.R.*, 314 U.S. at 48.

26 *Id.* at 48, 50.

27 *Id.* at 53.

28 Masington, *Venue in the Federal Courts—The Problem of the Inconvenient Forum*, 15

Koster v. Lumbermen's Mutual Co.,[29] the plaintiff brought a shareholder's derivative action in the Eastern District of New York, alleging self-dealing by an officer of defendant Lumbermen's Mutual Casualty Company. The individual and corporate defendants named in *Koster* all resided in Illinois.[30]

The Supreme Court's *Koster* opinion noted that Illinois contained the relevant "books, records and witnesses."[31] In addition, the Court observed that the *Koster* plaintiff was "utterly silent as to any reason of convenience to himself or to witnesses and as to any advantage to him in expense, speed of trial, or adequacy of remedy if the case were tried in New York."[32] The Supreme Court affirmed the dismissal of the *Koster* action on forum non conveniens grounds.[33]

The forum non conveniens dismissal granted in *Koster* could result in severe prejudice to a plaintiff.[34] Courts premised forum non conveniens dismissals on the assumption that the plaintiff could refile his action in a more convenient forum. However, while the plaintiff litigated a forum non conveniens motion, the applicable statutes of limitations in other forums would continue to run. By the time a court had ordered a forum non conveniens dismissal, the relevant limitations period in any alternative forum might have expired, leaving the plaintiff without any court that would hear his suit. In addition, a defendant might not be subject to personal jurisdiction in an alternative forum.[35] Forum non

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U. MIAMI L. REV. 237, 237 (1961). The doctrine of forum non conveniens continues to authorize dismissals of federal court actions in which the courts in a foreign nation would provide a more convenient forum. *Id.* at 239; Stein, *supra* note 3, at 831-40; *supra* note 6.

29 330 U.S. 501, 518 (1947).

30 *Id.* at 519.

31 *Id.* at 526.

32 *Id.* at 531.

33 *See also* Canada Malting Co. v. Patterson, 285 U.S. 413, 423-24 (1932) (dismissing an admiralty case, on forum non conveniens grounds, where all the parties resided in Canada).

34 *See* Masington, *supra* note 28, at 238 ("This procedure is indeed harsh for, while forum non conveniens presupposes the existence of another forum where the defendant can be served, there is no guarantee that the defendant *will* be available for service, and a stipulation to that effect by the defendant is not a prerequisite to dismissal."); Note, *Appellate Review of § 1404(a) Orders—Misuse of an Extraordinary Writ*, 1 J. MARSHALL J. PRAC. & PROC. 297, 297 (1968).

35 *See* Masington, *supra* note 28, at 238; Waggoner, *supra* note 13, at 84.

conveniens dismissals thus were not favored,[36] and courts often declined to grant such motions.[37]

In 1948, Congress authorized transfer of cases brought in inconvenient courts by adopting 28 U.S.C. § 1404,[38] which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.[39]

Because section 1404 provides for a transfer, rather than a dismissal, the plaintiff will not face personal jurisdiction or statute of limitations problems.[40]

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36 *See* Norwood v. Kirkpatrick, 349 U.S. 29, 42 (1955) (Clark, J., dissenting) ("*Koster* may be regarded as an extreme decision in depriving a plaintiff of his home forum."); Marcus, *supra* note 11, at 679.

37 *See, e.g.*, United States v. National City Lines, 334 U.S. 573 (1948) (refusing to dismiss an antitrust suit brought in the Southern District of California, where the defendants asserted that the Northern District of Illinois would have provided a more convenient forum); Williams v. Green Bay & W. R.R. Co., 326 U.S. 549 (1946) (reversing forum non conveniens dismissal, where the plaintiffs brought suit in New York against a Wisconsin corporation); Meredith v. Winter Haven, 320 U.S. 228 (1943) (federal court should not have dismissed suit, on the ground that the Florida state courts would provide a superior forum for litigation); Miles v. Illinois Cent. R.R. Co., 315 U.S. 698, 700, 706 (1942) (the doctrine of forum non conveniens did not authorize Tennessee courts to enjoin a plaintiff from bringing suit in Missouri).

38 *See* Kaufman, *supra* note 6, at 598; Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 610 (1961); Stein, *supra*, note 3, at 808; Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 811, 821 (1948).

39 28 U.S.C. § 1404(a) (1988). Paragraphs (b) and (c) of § 1404 have proven far less important than paragraph (a). J. MOORE, *supra* note 20, at 201. Section 1404(b) authorizes the transfer of a case "from the division in which it is pending to any other division of the same district." 28 U.S.C. § 1404(b) (1988). Section 1404(c) provides for the trial of a civil action "at any place within the division in which it is pending." 28 U.S.C. § 1404(c) (1988).

The same Congress that adopted § 1404 also enacted 28 U.S.C. § 1406 (1988). Section 1404 authorizes a transfer when the court chosen by a plaintiff is a proper venue for his suit. Under § 1406, a court either may dismiss or transfer a suit filed in an improper venue. *See also supra* note 8.

40 *See* Ferens v. John Deere & Co., 110 S. Ct. 1274 (1990); Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) ("A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."); Masington, *supra* note 28, at 238 ("When a district court orders an action to be transferred, the transferee court picks up the case where the transferor court left it.").

Congress adopted section 1404 as part of the Judiciary Act of 1948. For a general review of the 1948 Act, see J. MOORE, *supra* note 20. Among other things, this extensive bill altered federal court subject matter jurisdiction, 28 U.S.C. §§ 1331, 1332, 1335 (1988) (Historical and Revision Notes) changed the grounds for removing a case from state court to federal court, 28 U.S.C. § 1441 (1988) (Historial and Revision Notes), and revised the procedure for obtaining review of a criminal conviction on a writ of habeas corpus.

Congress appended a brief "Reviser's Note" to section 1404. The Note cites *Baltimore & Ohio Railroad v. Kepner*[41] as an example "of the need of such a provision."[42] Otherwise, the Reviser's Note largely quotes the language of section 1404.[43] Very little additional legislative history discusses the transfer statute.[44]

The section 1404 transfer assumes that the long-run efficiency gains resulting from the litigation of a case in a more convenient forum will outweigh the immediate costs that accompany a transfer. Every transfer order will impose some short-term costs. A new judge must familiarize himself with the facts in dispute, repeating work already undertaken by the judge who transferred the case. The parties will probably need to hire local counsel in the district receiving the case,[45] and local counsel must repeat a background review of the case already conducted by the attorneys initially retained. The process of transmitting the case files from one district to another, as well as the process of assigning the case to a new judge, invariably will delay a suit.[46]

Such immediate costs may be recovered if the convenience of a new district will result in litigation proceeding with greater speed and less expense. On the other hand, such immediate costs will not be recovered if a second district is no more convenient than the district initially chosen by the plaintiff.

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41 314 U.S. 44 (1941).

42 28 U.S.C. § 1404 (1988) (Historical and Revision Notes).

43 "The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." *Id.*

One treatise describes the Reviser's Note as "not particularly illuminating." 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3841 (1986).

44 *See Ferens* 110 S. Ct. at 1280 (noting the "scant legislative history of § 1404(a)"); Norwood v. Kirkpatrick, 349 U.S. 29, 40 (1955) (Clark, J., dissenting) ("[T]here is no legislative record of opposition to the adoption of § 1404(a)."); Korbel, *supra* note 38, at 613 (describing the "sparse legislative history" of section 1404); Waggoner, *supra* note 13, at 80-81.

45 *See infra* note 194 and accompanying text.

46 *See* Peteet v. Dow Chemical Co., 868 F.2d 1428, 1436 (5th Cir.), *cert. denied*, 110 S. Ct. 328 (1989); Securities and Exch. Comm'n v. Savoy Industries, 587 F.2d 1149, 1156 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) ("The court here had a familiarity with allegations, characters, lawyers, and previous history of [the] litigation."). *See generally* 15 C. WRIGHT, A. MILLER, E. COOPER, *supra* note 43, § 3841 (In authorizing a discretionary motion to transfer, "[t]he greatest cost is that an extra decision point has been added in already complex litigation.").

B. The Supreme Court and the Motion to Transfer

1. A Deference to District Court Discretion

Supreme Court review of transfer motions has occurred rarely and has proven unilluminating. With one exception,[47] the Court has insisted on a simple deference to district court transfer decisions.[48] The Court has not developed workable standards for limiting or reviewing this district court discretion.

The Court decision that has most influenced motion to transfer analysis did not involve section 1404, but instead involved a forum non conveniens motion.[49] In *Gulf Oil Corp. v. Gilbert*,[50] the plaintiff alleged that defendant Gulf Oil negligently allowed a fire to start at its Lynchburg, Virginia storage site, resulting in a gasoline explosion that destroyed the plaintiff's adjacent warehouse.[51] The plaintiff, a Lynchburg resident, brought this action in the Southern District of New York. Defendant Gulf Oil was a Pennsylvania corporation that did business in both Virginia and New York.[52] Gulf Oil sought to dismiss the suit on forum non conveniens grounds. Gulf Oil prevailed in the district court, but the Second Circuit Court of Appeals reversed this decision.[53]

In *Gulf Oil*, the Supreme Court reversed the Second Circuit and upheld the district court's decision to dismiss the suit. In reviewing the standards for a forum non coveniens dismissal, Justice Robert H. Jackson's majority opinion observed: "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either a grant or denial of remedy."[54] Justice Jackson continued that the doctrine of forum non conveniens

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47 Hoffman v. Blaski, 363 U.S. 335 (1960). For a discussion and criticism of the result in *Hoffman*, see *infra* text accompanying notes 78-105.

48 The language of section 1404, which authorizes any transfer "in the interest of justice," may be read as a grant of broad discretion to the district courts. *See* J. MOORE, *supra* note 20, at 210 ("[A district court's] discretionary ruling should not be reviewed except on the most clear showing of subsequently developed facts or other circumstances warranting a departure from the settled ruling."); Masington, *supra* note 28, at 240. On some problems raised by such an interpretation, see *infra* text accompanying notes 181-232.

49 *See* Waggoner, *supra* note 13, at 69 (noting the relationship between § 1404 transfers and the doctrine of forum non conveniens).

50 330 U.S. 501 (1947). The *Gulf Oil* decision was announced on the same day as the decision in Koster v. Lumbermen's Mutual Casualty Co., 330 U.S. 518 (1947).

51 *Gulf Oil*, 330 U.S. at 502-03.

52 *Id.*

53 *Id.* at 503.

54 *Id.* at 508.

properly "leaves much to the discretion of the court to which [a] plaintiff resorts."[55]

Justice Jackson then presented a laundry list of factors relevant to a forum non conveniens dismissal. The majority opinion divided these factors into two groupings. The first grouping, the "private interest of the litigant," included factors such as "the relative ease of access to sources of proof," and the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses."[56] The second group of considerations, "factors of public interest," included the varying degree of docket congestion in different courts, the relationship between the forum chosen by the plaintiff and the underlying controversy, and whether the law of the forum state or the law of a different state would apply to the suit.[57]

The *Gulf Oil* opinion concluded that the plaintiff had brought suit in New York only because a Virginia jury might be hesitant to return the $400,000 damage award sought by the plaintiff.[58] After reviewing the limited connections between New York and the underlying dispute, the majority opinion concluded that "the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint . . . ."[59]

During the 1950s and early 1960s, a scattering of Supreme Court opinions on section 1404 applied the *Gulf Oil* policy of deference.[60] An example of such deference to district court transfer decisions appears in *Norwood v. Kirkpatrick*.[61] The three *Norwood* plaintiffs worked for defendant Atlantic Coast Line Railroad Company as dining car employees. The plaintiffs allegedly sustained injuries when a train that the defendant owned, and in which the plantiffs were working, derailed near Dillon, South Carolina.[62] The plaintiffs, one of them a Philadelphia, Pennsylvania resident, filed suit in the Eastern District of Pennsylvania.[63]

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55 *Id.*

56 *Id.*

57 *Id.* at 508-09.

58 *Id.* at 510.

59 *Id.* at 512. On the continuing importance of the *Gulf Oil* opinion, *see* J. MOORE, *supra* note 20, at 208-09.

60 *See* Van Dusen v. Barrack, 376 U.S. 612 (1964) (affirming district judge's transfer order); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960) (same); Norwood v. Kirkpatrick, 349 U.S. 29 (1955) (same). *See also* Kitch, *supra* note 13, at 132 ("Apparently the district courts have followed the lead of *Moore's Federal Practice*, which lists the factors discussed in *Gulf Oil* as controlling 'Grounds for Transfer under § 1404(a).'").

61 349 U.S. 29 (1955).

62 *Id.* at 29-30.

63 *Id.* at 33 (Clark, J., dissenting). The other two plaintiffs were domiciled in Wash-

The defendant moved to transfer the suit to the Eastern District of South Carolina. The district judge granted this motion, and was affirmed by the Third Circuit Court of Appeals.[64]

In a brief opinion, the Supreme Court affirmed the district judge's decision. The *Norwood* Court simply stated: "[W]e agree that the district judge correctly construed the statute in evaluating the evidence, [and] we do not find it necessary to detail the facts considered by him in reaching his judgment."[65] In dissent, Justice Clark complained: "The opinion of the Court . . . goes far toward assigning to the trial judge the choice of forums, a prerogative which has previously rested with the plaintiff."[66]

After the mid-1960s, the Supreme Court did not consider another section 1404 case for more than 20 years. The Court occasionally referred to the section 1404 transfer as a counterweight to the broad choice of forum available to a plaintiff under expansive interpretations of personal jurisdiction.[67] But the Court has said little else about section 1404.

The Court recently reexamined the section 1404 transfer in *Stewart Organization, Inc. v. Ricoh Corp.*,[68] but this decision does little to clarify the standards governing motions to transfer.[69] Stewart Organization, Inc. an Alabama corporation, had entered into a contract to market the copier products of Ricoh Corporation, which maintained its principal place of business in New Jersey. The contract included a forum-selection clause "providing that any dispute arising out of the contract could be brought only in a court located in Manhattan."[70] Stewart Organization nonetheless filed suit against Ricoh Corp. in the Northern District of Alabama, alleging a breach of contract, antitrust violations, and various state law causes of action.[71]

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ington, D.C.

64 *Id.* at 30.

65 *Id.* at 32.

66 *Id.* at 37.

67 *See, e.g.*, Burger King v. Rudzewicz, 471 U.S. 462, 477 (1985). *See also* Seidelson, *supra* note 3, at 87.

68 487 U.S. 22 (1988).

69 *See also* Ferens v. John Deere Co., 110 S. Ct. 1274 (1990). *Ferens* dealt only with a choice-of-law problem raised by a transfer, and not with the standards governing transfer decisions.

70 *Stewart Organization*, 487 U.S. at 24.

71 The federal district court possessed diversity jurisdiction over the plaintiff's state law claims, 28 U.S.C. § 1332 (1988), and subject matter jurisdiction over the plaintiff's antitrust claim pursuant to a federal statute. 28 U.S.C. § 1337 (1988). The Court would have reached the same result regardless of whether the district court's subject matter

Defendant Ricoh Corp. sought to transfer this suit from the Northern District of Alabama to the Soutern Distirct of New York, relying heavily on the forum selection clause. The district court held that the case was governed by Alabama state law, which "looks unfavorably upon forum selection clauses,"[72] rather than federal law, which authorizes the enforcement of such clauses. Holding that the forum selection clause should not receive significant weight, the district court thus denied the motion to transfer.

In *Stewart Organization*, the Court was presented with the narrow issue of whether the district court should assess the forum selection clause under federal law or Alabama state law. The *Stewart Organization* opinion held that federal law, rather than Alabama state law, should govern the forum selection clause.[73] The Court did not determine whether to transfer the case to the Southern District of New York, but instead directed the district court to reconsider its decision rejecting the defendant's transfer motion.[74]

In discussing the section 1404 transfer, *Stewart Organization* approved Justice Jackson's *Gulf Oil* analysis, which "calls on the district court to weigh in the balance a number of case-specific factors."[75] The majority opinion continued:

> In its resolution of the 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preferences for that venue, and the fairness of transfer in light of the forum selection clause and the parties' relative bargaining power . . . . The District Court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness, that, in addition to private concerns, come under the heading of 'the

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jurisdiction was based on § 1332 or § 1337. *Stewart Organization*, 487 U.S. at 26 n.3.

72 *Id.* at 24.

73 *Id.* at 32. Justice Scalia dissented from this holding. *Id.* at 38.

74 *Id.* at 32. The Court did not decide whether the forum selection clause was valid. *Id.* The Court wrote that the presence of an enforceable forum selection clause should be a "significant factor" considered in a transfer decision. *Id.* at 30. However, the Court also stated: "It is conceivable in a particular case . . . [that] a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause . . . ." *Id.* at 30-31.

In a concurring opinion, Justice Anthony Kennedy urged that a valid forum selection clause should be "given controlling weight in all but the most exceptional circumstances." *Id.* at 33. *See also infra* text accompanying note 376.

75 *Id.* at 29.

interest of justice."[76]

In *Stewart Organization*, the Court thus failed to develop any more concrete transfer standards than the "case-specific," *ad hoc* balancing advanced in past precedents. *Stewart Organization* may not have represented the appropriate controversy for a revision of these standards. The *Stewart Organization* decision primarily involved a choice-of-law issue, and the lower courts had not undertaken any extensive consideration of appropriate transfer motion standards.[77] On the other hand, the Court's explicit approval of case-by-case balancing may discourage any future attempt to develop a more predictable and consistent approach to section 1404 motions.

In general, the Court has declined to develop meaningful standards governing transfer motions, deferring instead to the discretion of the district courts. The next Section considers the only Supreme Court decision that has imposed a clear restriction on section 1404 transfers.

2. The Court's Limitation on Motions to Transfer: The *Hoffman* Rule

The only specific Supreme Court limitation on section 1404 transfer motions appears in *Hoffman v. Blaski*.[78] In *Hoffman*, the Court proscribed transfers to any district where personal jurisdiction or venue was not authorized. Because the *Hoffman* rule provides no protection to the plaintiff, the party potentially prejudiced by a defendant's section 1404 transfer motion, the *Hoffman* rule is an inappropriate limitation on the motion to transfer.

Any law student is familiar with the adage of Justice Oliver Wendell Holmes: "Great cases, like hard cases, make bad law."[79] But *Hoffman v. Blaski* might be cited for a corollary proposition: "Strange cases make bad law." The *Hoffman* plaintiffs, Illinois residents, brought a patent infringement action against defendant R. P. Howell and the Lifetime Metal Building Company, a Texas corporation controlled by Howell. Howell was a resident of Dallas,

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76 *Id.* at 29-30.

77 *See* Stewart Org., Inc. v. Ricoh Corp., No. 84-AR-2460-S (N.D. Ala. Jan. 29, 1985), *rev'd*, 779 F.2d 643 (11th Cir.), *vacated*, 785 F.2d 896 (11th Cir. 1986), *rev'd*, 810 F.2d 1066 (11th Cir. 1987) (en banc) (per curiam), *aff'd*, 487 U.S. 22 (1988).

78 363 U.S. 335 (1960).

79 Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904).

Texas, and Lifetime Metal Building maintained its only place of business in Dallas.[80]

The plaintiffs filed their patent infringement suit in the Northern District of Texas, where the defendants resided. In a bizarre litigation strategy, the defendants moved to transfer the case to the plaintiffs' district of residence, the Northern District of Illinois.

In opposition to this motion, the plaintiffs argued that the Texas court lacked authority to transfer the case to the Northern District of Illinois. First, the plaintiffs asserted that the Illinois court would lack personal jurisdiction over the defendants, because an Illinois court could not authorize the service of process on the Texas defendants.[81] Second, the plaintiffs asserted that the Northern District of Illinois was not a proper venue for the suit.[82]

The Texas district court granted the defendants' transfer motion,[83] the Fifth Circuit affirmed,[84] and the Supreme Court denied certiorari.[85] Upon receiving the *Hoffman* case, the Northern District of Illinois court denied "with misgivings" the plaintiffs' motion to return the case to Texas.[86] On their fifth attempt, the plaintiffs finally succeeded in opposing the transfer order, with the Seventh Circuit Court of Appeals reversing the decision of the Northern District of Illinois.[87]

The Supreme Court agreed with the Seventh Circuit, disagreed with the Fifth Circuit, and held that the Northern District of Texas court had erred in transferring the suit to Illinois.[88] In reaching this decision, the *Hoffman* Court focused on one phrase appearing in section 1404, which authorizes the transfer of a suit to any district "where it might have been brought."[89]

The *Hoffman* majority held that the Northern District of Illinois did not qualify as a district where the suit "might have been brought," because that court lacked personal jurisdiction over the

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80 *Hoffman*, 363 U.S. at 340.

81 *Id.* at 341-42 & n.11. *See also* FED. R. CIV. P. 4e, 4f.

82 *Hoffman*, 363 U.S. at 341.

83 *Id.* at 337.

84 Ex parte Blaski, 245 F.2d 737 (5th Cir. 1957).

85 Blaski v. Davidson, 355 U.S. 872 (1957).

86 *Hoffman*, 363 U.S. at 338.

87 Blaski v. Hoffman, 260 F.2d 317 (7th Cir. 1958), *aff'd*, 363 U.S. 335 (1960). *See also* Masington, *supra* note 28, at 247 (summarizing the history of the *Hoffman* litigation).

88 *Hoffman*, 363 U.S. at 342.

89 28 U.S.C. § 1404(a) (1988).

defendants and was not a proper venue.[90] In dissent, Justice Felix Frankfurter asserted that the Northern District of Illinois was indeed a district where the suit "might have been brought," because the *Hoffman* defendants had waived any personal jurisdiction and venue objections when they moved to transfer the case to Illinois.[91] The majority disagreed with Justice Frankfurter's statutory interpretation: "We do not think that the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.'"[92]

The *Hoffman* decision might be defended as an attempt to give some meaning to the plain language at secion 1404. The statute authorizes a transfer to any district where a suit "might have been brought."[93] Nonetheless, most scholarly discussions of *Hoffman* have harshly criticized the decision.[94]

A consideration of the policy embodied in personal jurisdiction and venue statutes indicates that Justice Frankfurter's dissent was correct and the *Hoffman* majority was wrong. In the civil system, the plaintiff possesses broad discretion in choosing the forum for his suit. This discretion is limited by the requirements of personal jurisdiction and proper venue—requirements that primarily protect the defendant.[95] These requirements designed to

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90 *Hoffman*, 363 U.S. at 342-45. *See also* Masington, *supra* note 28, at 247; Waggoner, *supra* note 13, at 70.

91 Sullivan v. Behimer, 363 U.S. 351, 361 (1960) (Frankfurter, J., dissenting) (The Northern District of Illinois court possessed "jurisdiction to adjudicate this action with the defendant's acquiesence."). *Sullivan* was a companion case, decided together with *Hoffman*. *See Hoffman*, 363 U.S. at 338-39.

92 *Hoffman*, 363 U.S. at 342-43.

93 28 U.S.C. § 1404(a) (1988). *But cf.* Waggoner, *supra* note 13, at 75 (the *Hoffman* decidion incorrectly interprets the language of section 1404).

94 *See, e.g.*, 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3845, at 346 ("The commentators have been harshly critical of *Hoffman v. Blaski* and lower courts have not been unwilling to make their dislike for the decision known."); Korbel, *supra* note 38, at 613 (the *Hoffman* opinion relies on "some rather bizzare reasoning"); Waggoner, *supra* note 13, at 75 n.30, 77-87.

Some authors have noted that the *Hoffman* limitation did not apply under the common law doctrine of forum non conveniens. *See* Masington, *supra* note 28, at 248.

95 *See, e.g.*, Burger King v. Rudzewicz, 471 U.S. 462, 471-72 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (personal jurisdiction "protects the defendant against the burdens of litigating in a distant or inconvenient forum"); Leroy v. Great W. United Corp., 443 U.S. 173, 183-84 (1979) ("In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial.").

protect the defendant should not bar a defendant's section 1404 transfer motion.[96]

A hypothetical dispute may illustrate the inappropriateness of the *Hoffman* rule. Paul's Paradise Foods, Inc. is a Hawaiian business that sells tropical fruits to mainlanders by taking phone orders. It sells fruit primarily to individuals living on the west coast of the continental United States. The company never has taken an order from anyone living east of the Mississippi River.

The World-Wide Telephone Corporation provides the telephone receivers used by Paul's Paradise Foods. World-Wide Telephone is a Delaware corporation that maintains its principal place of business in New York, New York. World-Wide Telephone also maintains offices in Hawaii and most other states, but it does no business in Arizona, New Mexico, or Utah.

The telephones sold by World-Wide Telephone to Paul's Paradise Foods allegedly malfunction. Paul's Paradise Foods loses several thousand dollars in orders before the telephone failure is discovered, diagnosed, and repaired. Paul's Paradise Foods brings a federal court negligence suit against World-Wide Telephone in the District of Hawaii, invoking the court's diversity jurisdiction.[97] World-Wide Telephone moves to transfer the suit filed by Paul's Paradise Foods.

Under the *Hoffman* rule, the Hawaii district court would possess authority to transfer the suit brought by Paul's Paradise Foods to New York, New York. A court in New York would possess personal jurisdiction over World-Wide Telephone, because this corporation maintains its principal place of business of in New York. The New York court also would provide a proper venue for this suit.[98] Under *Hoffman*, the Hawaii federal court thus could transfer the case to New York, even though plaintiff Paul's Paradise Foods lacks any contacts with New York.[99]

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96 *See* Korbel, *supra* note 38, at 612.

97 *See* 28 U.S.C. § 1332 (1988).

98 Venue is proper in any federal district "where all defendants reside," among other places. 28 U.S.C. §§ 1391(a), 1391(b) (1988). For venue purposes, "a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction." 28 U.S.C. § 1391(c) (1988). Because a New York court could exercise personal jurisdiction over World-Wide Telephone, and World-Wide Telephone is the only defendant in this case, a New York court would represent a proper venue. *See, e.g.*, First Sec. Bank of Utah v. Aetna Casualty & Sur. Co., 541 F.2d 869, 871 (10th Cir. 1976).

99 A number of courts have transferred cases to districts where the plaintiff lacks any contacts. *See infra* text accompanying notes 178-98.

But the *Hoffman* rule would not allow the Hawaii court to transfer the suit brought by Paul's Paradise Foods to Arizona. If Paul's Paradise Foods had brought its suit against World-Wide Telephone in the District of Arizona, the federal district court could not have asserted personal jurisdiction over World-Wide Telephone, because this defendant lacked any contacts with the state of Arizona. Under *Hoffman*, the District of Arizona would not qualify as a district where the suit filed by Paul's Paradise Foods "might have been brought."

The hypothetical case of *Paul's Paradise Foods v. World-Wide Telephone* suggests two problems with the *Hoffman* rule. First, the actual rule adopted in *Hoffman* seems unnecessary. *Hoffman* prevents a transfer to a district where a defendant lacks contacts. But with the exception of the occasional bizarre case such as *Hoffman*, it is difficult to understand why a defendant would seek a transfer to a forum where she lacked any contacts.[100] Even if a defendant did file such a strange motion, litigation in the alternative district probably would not facilitate "the convenience of the parties and witnesses."[101] The defendant would not reside in that district, and presumably few or none of the defendant's possible witnesses would reside in that district.[102] Regardlesss of the *Hoffman* rule, a district court should deny such a transfer motion, because the alternative forum would be no more convenient than the district where the plaintiff first filed suit.[103]

Second, the decision in *Hoffman* focuses on the wrong party. *Hoffman* protects the defendant against a transfer to an inconvenient forum. But the defendant does not need this protection where the defendant himself is seeking the transfer. As Justice Frankfuter's *Hoffman* dissent asserts, if the defendant wishes to litigate in a forum where he lacks any contacts, and that forum is

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100 The *Hoffman* rule would make more sense in the relatively unusual case where the plaintiff, and not the defendant, moved for a § 1404 transfer. *See, e.g.*, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990). Here the defendant may suffer prejudice from a transfer, and may require the protection afforded by the rules of personal jurisdiction and venue. *See infra* text accompanying note 4.

101 28 U.S.C. § 1404(a) (1988).

102 In a case involving multiple defendants, the *Hoffman* rule could preclude a transfer to a district where some, but not all of the defendants resided. A federal district that serves as the residence of only some of the multiple defendants would qualify as a proper venue only if the plaintiff's "claim arose" in that district, or if the plaintiff resides in that district and has brought an action premised on diversity jurisdiction. *See* 28 U.S.C. §§ 1391(a), 1391(b) (1988) (bringing suit in a federal district where "all defendants reside" constitutes one method for establishing proper venue).

103 *See* Korbel, *supra* note 38, at 612.

somehow more convenient than the court chosen by the plaintiff, it is hard to imagine how a transfer will prejudice the defendant.[104]

Instead, the party who may suffer prejudice from a section 1404 transfer is the plaintiff—the party opposing the defendant's motion. In the hypothetical dispute described above, Paul's Paradise Foods might suffer severe prejudice if the Hawaii court transferred the corporation's suit to New York, where Paul's Paradise Foods lacks any contacts. But the *Hoffman* rule provides no protection to a plaintiff opposing a defendant's motion to transfer.[105] A plaintiff's lack of contacts with a state in no way prevents a transfer to a court in that state.[106]

C. *Summary*

The Supreme Court has declined to formulate specific rules for deciding section 1404 transfer motions. Instead, the justices have deferred to the discretion of the district courts, and have encouraged these courts to decide transfer motions by balancing a variety of factors on a case-by-case basis.

The Supreme Court's one specific limitation on section 1404 transfers, stated in *Hoffman v. Blaski*,[107] will apply only in extraordinary situations. In addition, the rule offers protection for the defendant, the party seeking a transfer, rather than the plaintiff, the party who may suffer prejudice as a result of a transfer.

In short, the Supreme Court has failed to provide standards that will result in predictable and consistent transfer decisions. This Article next considers other potential sources for such standards.

II. SOURCES OF CONTROL

A dearth of Supreme Court opinions on a particular issue will not inevitably result in lower court contradiction and chaos. The following discussion identifies three potential sources of standards that would limit section 1404 transfers: (1) the civil defendants, who may or may not file a motion to transfer; (2) the district courts, which will first rule on a transfer motion; and (3) the

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104 *See* Hoffman v. Sullivan, 363 U.S. 335, 360-62 (1960) (Frankfurter, J., dissenting); *see also* Kaufman, *supra* note 6, at 604.

105 Waggoner, *supra* note 13, at 83-84 & n.58

106 *See supra* text accompanying notes 178-98.

107 363 U.S. 335 (1960).

appellate courts. This discussion concludes that none of these actors will impose significant limitations on the section 1404 transfer.

The second part of this discussion examines two recurrent problems raised by transfer decisions. First, courts have transferred cases to distant districts, resulting in prejudice to plaintiffs who lack contacts with these districts. Second, courts have issued multiple transfer orders, transferring a single case two or three times. Such decisions demonstrate that courts need more specific standards for deciding transfer motions.

A. The Civil Defendants

Civil defendants represent one possible source of limitation on the number of transfers. Defendants might file section 1404 motions only when litigation in the forum chosen by the plaintiff would impose a significant hardship. Where a plaintiff has made a reasonable choice of forum, a transfer motion is unlikely to succeed and only will impose an unnecessary burden on both the plaintiff's counsel and the federal courts.

Such a suggestion of attorney restraint may seem terribly naive given the prevalent sentiment that courts must sanction civil attorneys to deter unwarranted pleadings and motions.[108] Nevertheless, simply given that civil defendants will abuse some motions, it does not necessarily follow that defendants will file inappropriate motions to transfer.

A defendant must pay his attorney to draft a transfer motion. And even if the district court grants a defendant's motion to transfer, the defendant has not achieved any substantive victory. Instead, litigation simply will occur in another court. The section 1404 transfer motion conceivably might be classed with procedures such as the motion to strike a pleading as containing "re-

108 The principal provision used for this purpose is Federal Rule 11. In 1983, Congress amended rule 11 to provide, among other things, that the federal courts could sanction attorneys who filed a pleading or motion "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11.

Since the 1983 amendment, rule 11 has generated a tremendous volume of litigation and a number of scholarly discussions. *See generally* Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); *see also infra* text accompanying notes 128-34.

dundant, immaterial, impertinent, or scandalous matter"[109]—a motion available to the defendant, but infrequently employed.

But sheer numbers demonstrate that transfer motions are not an unimportant procedural anachronism.[110] If anything, defendants appear likely to file a transfer motion almost as a matter of course when some colorable argument exists that an alternative forum could prove more convenient.[111] In both 1987 and 1988, district courts published more than 100 opinions discussing § 1404 transfer motions.[112]

This glut of transfer motions has not occurred because defense counsel have hoodwinked their clients into paying for an unnecessary procedural gimmick. Instead, the mere filing of a transfer motion may provide important strategic benefits to a civil defendant.

These strategic benefits result from the fact that a court typically will consider a motion to transfer prior to any other issue in a case. Although no formal time limit governs transfer motions,[113] defendants should file a motion to transfer at the very outset of litigation. An immediate transfer motion will prevent a

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109 FED. R. CIV. P. 12(f).

110 *See supra* note 11.

111 As early as 1950, The Hon. Irving R. Kaufman observed: "The extensive use of section 1404(a) can best be seen by the fact that few motions days in the Southern District of New York pass without several motions to transfer being argued." Kaufman, *supra* note 6, at 595.

112 West's Federal Practice Digest lists about 100 transfer opinions published by the district courts in 1987, and about 110 transfer opinions published in 1988. 46 WEST'S FEDERAL PRACTICE DIGEST (3d ed. 1985 & Supp. 1989). These figures understate the actual number of published transfer opinions. The Federal Practice Digest does not include transfer decisions published only in looseleaf services and several other sources.

These published opinions represent only a small portion of district court transfer decisions. District judges often will decide a § 1404 motion in an unpublished opinion, or in an oral statement read from the bench.

113 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3844, at 334 ("Section 1404(a) sets no limit on the time at which a motion to transfer may be made."). *See also* Martin-Trigona v. Meister, 668 F. Supp. 1 (D.D.C. 1987) (motion to transfer granted after a jury found in favor of one defendant, but where a mistrial was declared as to the other two defendants); Kolko v. Holiday Inns, Inc., 672 F. Supp. 713, 716 (S.D.N.Y. 1987) (defendant did not waive its right to bring a transfer motion, by undertaking some discovery in the district where the plaintiff had filed suit); Genden v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 621 F. Supp. 780, 782 (N.D. Ill. 1985) (ordering a transfer after the court had granted class certification, and after "some progress has been made in discovery").

The defendant's ability to bring a motion to transfer even after a substantial delay differs significantly from the federal rule governing personal jurisdiction. If a defendant fails to raise a personal jurisdiction defense in either her answer or a pre-answer motion to dismiss, the defendant will have waived this defense. FED. R. CIV. P. 12(h)(1).

judge from wasting time on a detailed examination of a case destined for another district. Accordingly, some decisions have denied transfer motions solely because a defendant delayed in filing the motion.[114]

Strictly read, the Federal Rules of Civil Procedure require a defendant to file either an answer or a motion to dismiss within 20 days after the plaintiff has served the defendant with a copy of the complaint.[115] Once the defendant files his answer to the complaint, discovery will begin, and the defendant's counsel must undertake the costly tasks of producing documents, answering interrogatories, and attending depositions.

Conversely, filing a motion to dismiss will bring the plaintiff's suit to a complete halt. If a court grants the defendant's motion and dismisses the suit, the case will conclude and no discovery will occur. Even if a court eventually denies the motion to dismiss, no discovery or other activity will occur while the motion remains pending.

Such delay is valuable to a defendant, even in cases where the defendant faces certain liability. Any defendant should prefer to pay a judgment one year in the future, rather than pay the judgment immediately. During the intervening year, the defendant may keep money invested, and pocket the interest that her investments earn.[116]

A rational defendant thus will file a motion to dismiss wherever possible. But defendants may move to dismiss a complaint only under a limited number of circumstances.[117] As the Su-

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114 McGraw-Edison Co. v. Van Pelt, 350 F.2d 361, 364 (8th Cir. 1965) ("the court's denial of the motions to transfer for untimeliness cannot be contended to be arbitrary"); Oral-B Laboratories, Inc. v. Mi-Lor Corp., 611 F. Supp. 460, 463 (S.D.N.Y. 1985), *aff'd in part, mod. in part*, 810 F.2d 20 (2d Cir. 1987) ("a preliminary injunction hearing has already been held, and it seems unwise to transfer a case after initial substantive decisions have already been made"); Meinerz v. Harding Bros. Oil & Gas Co., 343 F. Supp. 681, 682 (E.D. Wis. 1972) (motion to transfer denied, where the motion was filed nine months after the plaintiffs had initiated suit). *See also* Kitch, *supra* note 13, at 134; Masington, *supra* note 28, at 245.

115 FED. R. CIV. P. 12(a), 12(b).

116 This fact that one dollar in hand is worth more than one dollar paid one year in the future often is referred to as the "present value" of assets. *See* P. SAMUELSON & W. NORDHAUS, ECONOMICS 651-52 (11th ed. 1985).

117 Federal Rule 12(b) lists only seven grounds for a motion to dismiss: "(1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19." However, the rule 12(b)(6) motion—a motion to dismiss for "failure to state a claim upon which relief can be granted"—in fact embraces a variety of arguments.

preme Court has written: "[A] complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[118] Frequently, the defense attorney will be unable to afford his client the delay that will accompany a motion to dismiss.

The defense attorney thus may use the motion to dismiss as a means of delaying litigation.[119] Motions to transfer do not receive the same strict review as motions to dismiss. Instead, the Supreme Court has provided the district courts with broad discretion to grant or deny transfer motions.[120] A defense attorney thus may seek a section 1404 transfer in any case where another court could provide a more convenient forum.

A transfer motion typically will have the same delaying effect as a motion to dismiss. While a transfer motion remains pending, courts have stayed discovery,[121] allowed defendants to postpone filing an answer,[122] and deferred decisions on substantive motions.[123]

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118 Conley v. Gibson, 355 U.S. 41, 45-46 (1957). *Accord* Neitzke v. Williams, 490 U.S. 319 (1989); Haines v. Kerner, 404 U.S. 519 (1972).

119 Ethics codes typically assert that attorneys must not take action for the sole purpose of delaying litigation. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 comment (1989). Two commentators have observed that such ethical provisions purportedly require "a plausible *legal* purpose for any delaying tactics . . . though such a requirement is not much of a hindrance in practice." Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 419 n.24 (1985). An attorney probably may avoid any ethical questions by asserting that the purpose of his § 1404 motion is to transfer a suit to a preferable forum, rather than to delay the suit.

120 *See supra* text accompanying notes 47-107.

121 *See, e.g.*, LaBrier v. A. H. Robins Co., 551 F. Supp. 53, 57 (D.D.C. 1982) (court declines to resolve discovery motions and stays discovery, pending a transfer of the case); Goodman v. Fleischmann, 364 F. Supp. 1172, 1176 (E.D. Pa. 1973) ("Our courts have uniformly held that the decision to transfer is preliminary to discovery on the merits, and that motions to transfer should be acted upon at the threshold of the litigation.").

122 *See, e.g.*, Dutchen v. Ecological Science Corp., 54 F.R.D. 493, 495 (S.D.N.Y. 1971) (defendants could file their answer within ten days of the court's decision on a transfer motion); United States v. S.S. Claiborne, 226 F. Supp. 578, 579 (S.D.N.Y. 1964).

123 Eichenholtz v. Brennan, 677 F. Supp. 198, 199 (S.D.N.Y. 1988) ("Granting the motion to transfer, the court defers ruling on the motion to dismiss."); McAlister v. General American Life Ins. Co., 516 F. Supp. 919, 920 (W.D. Okla. 1980); First Fullen Commodity Servs, Inc. v. A. G. Becker-Kipnis & Co., 507 F. Supp. 770, 776 (S.D. Fla. 1981) (granting motion to transfer, and declining to rule on several other motions); Simmons Ford, Inc. v. Consumers Union of the United States, Inc., 490 F. Supp. 106, 106 (W.D. Mich. 1980) (court grants the defendant's motion to transfer, "and does not reach the question of dismissal").

A court contemplating a possible transfer typically should not resolve a host of outstanding issues.[124] The judge receiving a transferred case might disagree with orders entered by the judge who has transferred the case. The new judge then would face the difficult dilemma of applying orders that he believes are incorrect, or reversing orders entered by another district judge.[125] To avoid such problems, the judge receiving a transferred case should be allowed to begin with a clean slate.[126]

A defendant thus may delay or halt litigation by filing a transfer motion. The defendant might prevail on the motion, with the district court transferring the case to the defendant's preferred forum. But even if the court denies the transfer motion, the defendant still has achieved a victory by delaying the plaintiff's suit.[127]

Accordingly, courts should expect that defendants will raise transfer motions whenever an alternative forum arguably could prove more convenient. Other sources of control must be examined.

B. The District Courts

The district courts represent another possible source for uniform and limiting transfer standards. District judges initially will decide a section 1404 transfer motion. District courts could deter

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Some courts will refuse to freeze other components of litigation while a transfer motion remains pending. *See, e.g.*, Kron Medical Corp. v. Groth, 119 F.R.D. 636, 638 (M.D.N.C. 1988) ("This general policy disfavoring the staying of discovery applies equally to cases wherein a motion is made to transfer the case to another district pursuant to 28 U.S.C. § 1404(a).").

124 *See, e.g.*, Donnelly v. Klosters Rederi A/S, 515 F. Supp. 5, 6 (E.D. Pa. 1981); St. Cyr v. Greyhound Lines, Inc., 486 F. Supp. 724, 726 (E.D.N.Y. 1980).

125 As illustrated by cases where different courts have entered conflicting transfer orders, district judges sometimes will refuse to follow a colleague's decision. *See* text accompanying notes 202-231 *infra*.

126 *See, e.g.*, Dutchen v. Ecological Science Corp., 54 F.R.D. 493, 495 (S.D.N.Y. 1971) (declining to decide class certification motion, since case would be transferred to the Southern District of Florida).

127 *See* Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 494 n.36 (1956) ("As a *delaying* tactic it [the section 1404 motion to transfer] has few equals . . . ."); Kitch, *supra* note 13, at 139 ("The motion can always be made for purposes of delay, and even though chances of success are slim, the hope of obtaining a jury which is thought likely to be more favorable may spur a flood of objectively superfluous motions."); Waggoner, *supra* note 13, at 67.

A defendant may achieve additional delay, either by moving for reconsideration where the court has denied a transfer, or by renewing the transfer motion at a later date. Masington, *supra* note 28, at 250.

defendants from filing transfer motions by granting these motions only in a limited number of carefully-delineated circumstances.

In attempting to deter abuse of pre-trial procedures, the district courts increasingly have imposed sanctions pursuant to Federal Rule 11.[128] The rule authorizes sanctions where a pleading, motion, or other filing is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . ."[129] Courts have sanctioned attorneys under rule 11 for filing frivolous complaints,[130] frivolous motions to dismiss and motions for summary judgment,[131] and frivolous discovery motions.[132]

But courts almost never have imposed rule 11 sanctions for a frivolous motion to transfer. Because the Supreme Court has refused to impose significant limitations on the motion to transfer, almost any transfer motion "will be warranted by existing law,"[133] and thus will comply with rule 11. Courts typically have denied the few rule 11 arguments challenging transfer motions.[134]

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128 Grossberg, *Rethinking Rule 11*, 32 VILL. L. REV. 575, 630 (1987) ("Rule 11 . . . has quite substantially changed the nature of the courts' perception of their function as evaluators of lawyering quality . . . . Indeed, it now is commonplace for federal courts to examine the quality of lawyering before them."); Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 901 (1988) ("Rule 11 is transforming the conduct of litigation in the federal courts.").

Commentators have reached vastly differing conclusions on the propriety and effectiveness of rule 11 sanctions. *Compare* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1018 (1988) ("Rule 11 should not be repealed. The litigation abuse which necessitated the rule remains with us and requires ongoing remedial measures.") *with* LaFrance, *Federal Rule 11 and Public Interest Litigation*, 22 VAL. U. L. REV. 331, 344 (1988) (Rule 11 "tends toward closing access to the courts, and directly collides with Congress' will as expressed over the past fifty years.").

129 FED. R. CIV. P. 11.

130 *See, e.g.*, Lloyd v. Schlag, 884 F.2d 409, 411-14 (9th Cir. 1989); Yosef v. Passamaquoddy Tribe, 876 F.2d 283, 287 (2d Cir. 1989); Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988) (per curiam); Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988).

131 Ortho Pharmaceutical Corp. v. Sona Distribs., 847 F.2d 1512, 1518-19 (11th Cir. 1988).

132 Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 937 (7th Cir. 1989); Magnus Elecs., Inc. v. Masco Corp. of Indiana, 871 F.2d 626, 630-31 (7th Cir.), *cert. denied*, 110 S. Ct. 237 (1989).

133 FED. R. CIV. P. 11.

134 *See, e.g.*, Leonardo's, Inc. v. Greathall, Ltd., 714 F. Supp. 949, 955 n.5 (N.D. Ill. 1989) (suggesting that an unsuccessful transfer motion did not justify rule 11 sanctions, because "one frivolous argument in an otherwise legitimate brief does not violate rule 11"); Cresswell v. Walt Disney Prods., 677 F. Supp. 284, 289 (M.D. Pa. 1987) ("This is not an appropriate case for sanctions.").

Courts have granted rule 11 sanctions only in unusual transfer contests where a party has sought to relitigate a previously decided venue question. *See, e.g.*, Hapaniewski

Nonetheless, district courts might impose significant limitations on transfer motions without resorting to sanctions. District judges could require defendants seeking a transfer to make a strong showing as to the convenience of another court.

To date, most district courts have not adopted such a restrictive standard limiting section 1404 transfers. District courts might view such a standard as inconsistent with the Supreme Court's past approval of several section 1404 transfers.[135] But like civil defendants, district judges also receive a benefit when they grant a motion to transfer.

Consider the following hypothetical. Judge James Upright is a federal district judge sitting in the Northern District of California. Like his brethren, Judge Upright manages a docket crowded by an increasing number of criminal trials and a tremendous variety of civil cases. Nonetheless, Judge Upright's calendar remains in reasonably good shape. Judge Upright manages his calendar closely, assists parties attempting to reach a private settlement, and decides simple motions without drafting a lengthy opinion.

One typical day, the district's random assignment process directs the civil case of *Smith v. Dallas Oil Corp.* to Judge Upright's chambers. *Smith v. Dallas Oil Corp.* is a securities fraud class action brought by small investors who had purchased stock in the Dallas Oil Corporation. The investors allegedly bought the securities based on a glowing prospectus which predicted a fifty percent increase in the corporation's annual net earnings. The predictions contained in the prospectus proved wrong, Dallas Oil stock plummeted, and stockholders lost most of their investments.

John Smith, who resides in the Northern District of California and who will serve as the representative plaintiff in this class action, has filed a 100-page, twenty-count complaint. The complaint names thirty different parties as defendants, including an accounting firm that helped to prepare the allegedly fraudulent prospectus, a law firm that reviewed the prospectus, several banks

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v. City of Chicago Heights, 883 F.2d 576, 580-81 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990) (repeated efforts to convince court to transfer suit pursuant to § 1406 justified sanctions); Naylor v. Lee's Summit Reorganized School Dist. R-7, 703 F. Supp. 803, 820 (W.D. Mo. 1989) (sanctions justified when plaintiffs filed a second transfer motion, identical to a motion denied "only days before"), *rev'd on other grounds*, Jenkins v. Missouri 904 F.2d 415 (8th Cir. 1990).

135 *See, e.g.*, Van Dusen v. Barrack, 376 U.S. 612 (1964); Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960); Norwood v. Kirkpatrick, 349 U.S. 29 (1955).

that extended financing to Dallas Oil, and various individual defendants.

Ten days after John Smith filed his complaint, Judge Upright holds his first status conference in *Smith v. Dallas Oil Corp.* Attorneys for the defendants represent that they will move to dismiss several counts alleged in the complaint, but these attorneys agree that no argument justifies a dismissal of the entire complaint. In addition, defense attorneys will file third-party complaints against various other defendants seeking indemnification and contribution, and alleging claims of securities fraud. Attorneys for the third-party defendants will move to dismiss at least some of these third-party claims.

Exhausted by the prospect of deciding such extensive motions, Judge Upright wanders to the judicial cafeteria for lunch. "Jim, you've got that Dallas Oil case?," Judge Hull asks Judge Upright over lunch. "Remember when I had the Norkon Securities litigation?" chuckles Judge Hull. "For nine months I couldn't get away from chambers for one day. Better say goodbye to your family, Jim."

As he walks back to his chambers from lunch, Judge Upright breathes a deep sigh.

In his chambers, Judge Upright is surprised to find a motion to transfer, filed jointly by several of the *Smith v. Dallas Oil Corp.* defendants. The 20-page motion asserts that Judge Upright should transfer *Smith v. Dallas Oil Corp.* to the Northern District of Texas. The motion notes that the corporate headquarters of Dallas Oil are located in Texas, as are the defendant law firm and several of the defendant banks. Accordingly, many of the potentially relevant witnesses and documents also will be found in Texas. The motion includes statistics showing that district judges in the Northern District of Texas face less onerous dockets than Judge Upright faces in the Northern District of California.

The motion concludes by noting that *Smith v. Dallas Oil Corp.* probably will constitute a protacted and time-consuming case. Judge Upright knows that if he denies the motion to transfer, this case will make a mess of his docket. But if Judge Upright grants the motion, the case literally will disappear and will become the responsibility of a district judge in Texas.

The notion that district judges come to work each day with the goal of dumping as many cases as possible onto the dockets of their colleagues is inaccurate and unreasonably cynical. On the other hand, to assert that judges are blind to their docket condi-

tions in deciding motions to transfer seems equally implausible.[136] Some judges have attempted to transfer cases solely because of a backlog in their courts.[137] And district judges often have transferred cases on their own motion, even though the defendant initially did not seek a transfer.[138]

In short, district judges will receive the benefit of a less crowded docket when they transfer a case. For this reason, district courts are unlikely to advocate specific standards limiting the availability of the section 1404 transfer.

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136 *See, e.g.*, Masington, *supra* note 28, at 250 ("A liberal attitude exists in most courts with respect to entertaining motions to transfer.").

137 Circuit court decisions typically have reversed such attempts. Appellate courts have agreed that docket congestion, in and of itself, does not justify a transfer. In re Scott, 709 F.2d 717, 721 (D.C. Cir. 1983) ("The law is well established that a federal court may not order transfer under section 1404(a) merely to service its personal convenience."); Collins v. American Auto. Ins. Co., 230 F.2d 416, 419 (2d Cir.), *cert. dismissed*, 352 U.S. 802 (1956) ("we think it dangerous to suggest that a judge may deny entrance to his court to a litigant on the ground of his serious burdens"). *See also* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1337 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (reversing forum non conveniens dismssal based heavily on the court's docket congestion).

138 *See, e.g.*, Ferens v. John Deere Co., 110 S. Ct. 1274, 1274 (1990); Clopay Corp. v. Newell Cos., Inc., 527 F. Supp. 733, 737-39 (D. Del. 1981) (parties received adequate notice and an opportunity to be heard before court transferred case on its own motion from the District of Delaware to the Northern District of Illinois); Hite v. Norwegian Carribbean Lines, 551 F. Supp. 390, 392 (E.D. Mich. 1982) (court orders parties "to show cause why the case should not be transferred"). *See also* Lead Indus. Assoc. v. Occupational Safety and Health Administration, 610 F.2d 70, 79 n.17 (2d Cir. 1979) ("The broad language of 28 U.S.C. § 1404(a) would seem to permit a court to order transfer sua sponte . . . .").

One possible attack on this argument might note that district judges also could reduce their workload by freely granting motions to dismiss and motions for summary judgment. But if anything, the Supreme Court has suggested that many lower courts have proven too hesitant to resolve cases on summary judgment. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . .").

But for several reasons, district courts are likely to approach transfer motions differently from motions to dismiss or motions for summary judgment. First, a district court may grant a motion to dismiss or a motion for summary judgment only in certain carefully delineated circumstances. *See supra* text accompanying notes 117-18. A district court contemplating a § 1404 transfer faces no such limitations. Second, a court that terminates an entire case on a motion to dismiss or a motion for summary judgment may anticipate immediate appellate review of its decision. Meaningful appellate review of a transfer ruling is unlikely to occur. *See supra* text accompanying notes 139-77.

Third, and perhaps most importantly, a district judge's decision to grant a motion to dismiss or a motion for summary judgment will have a serious substantive effect. Simply put, such a decision will end the plaintiff's case. On the other hand, a district judge can view a transfer order as producing no substantive effect. The court has not precluded the plaintiff's suit, but instead merely has transferred the suit to another district.

C. *The Appeals Courts*

The federal appellate courts represent a final possible source for the development of principled standards governing transfer motions.[139] In theory, the circuit courts might constitute a proper source for such standards. In an era in which the volume of federal court litigation has continued to increase, some commentators have urged that attorneys should look to the federal appeals courts, rather than the United States Supreme Court, for the development of fair and uniform legal standards.[140]

But section 1404 transfer decisions are perhaps uniquely insulated from any form of appellate review.[141] First, as any first-year law student may recite, civil litigants typically may appeal as a matter of right only from a final judgment.[142] The Supreme Court has defined a "final judgment" as a decision "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[143] Of course, a decision either denying or granting a motion to transfer does not "end the litigation on the merits" and is not a final judgment.[144]

The Supreme Court has recognized that under certain very limited circumstances a party may appeal a non-final interlocutory order issued by a district court. Under this "collateral order exception" to the final judgment rule, a party may seek immediate appellate review only of those interlocutory orders that satisfy three conditions: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on

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139 *See* Kitch, *supra* note 13, at 130.

140 *See, e.g.*, R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 99 (1985) ("It is essential that the intermediate appellate courts maintain a reasonable quality and uniformity of federal law to minimize the occasions on which the Supreme Court must intervene."); Wasby, *Inconsistency in United States Court of Appeals: Dimensions and Mechanics for Resolution*, 32 VAND. L. REV. 1343, 1343-46 (1979); White, *A Salute to the Circuits*, 28 LOY. L. REV. 669, 670 (1982). *See also* Marcus, *supra* note 11, at 677.

141 *See* Masington, *supra* note 28, at 254.

142 28 U.S.C. § 1291 (1988); Van Cauwenberghe v. Biard, 486 U.S. 517, 522-25 (1988); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431 (1956).

143 Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198-201 (1988); Catlin v. United States, 324 U.S. 229, 233 (1945).

144 United States Fire Ins. Co. v. Am. Family Life Assoc. Co., 787 F.2d 438, 439 (8th Cir. 1986) (per curiam); Howard Elec. & Mechanical Co. v. Frank Briscoe Co., 754 F.2d 847, 850-51 (9th Cir. 1985); Wallace v. Norman Indus., Inc., 467 F.2d 824, 826 (5th Cir. 1972); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3855 at 472-73; Masington, *supra* note 28, at 252.

appeal from a final judgment."[145] The circuit courts have agreed that transfer orders are not immediately appealable under the collateral order exception.[146] Appellate panels apparently have concluded, at least for purposes of the collateral order exception, that transfer orders may be reviewed effectively after a district court has entered a final judgment.[147]

While in theory a party may challenge a transfer ruling after a case has ended with a decision on the merits, such an appeal probably will fail, because the appellant will be unable to demonstrate that a transfer motion ruling constitutes a reversible error.[148] Consider a plaintiff who fails to defeat a transfer motion.

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145 Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1988). *Accord* Lauro Lines v. Chasser, 109 S. Ct. 1976, 1978 (1989). *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949).

146 *See, e.g.*, In re Dalton, 733 F.2d 710, 715 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1185 (1985); D'Ippolito v. American Oil Co., 401 F.2d 764 (2d Cir. 1968) (per curiam).

One circuit has suggested, in *dicta*, that courts might allow immediate appeals of transfer decisions under the collateral order exception. Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 952 n.8 (9th Cir. 1968) ("These [Supreme Court] holdings cast doubt on the rule against the appealability of § 1404(a) and § 1406(a) orders . . . .") This language in *Pence* has received severe criticism. *See, e.g.*, 9 J. MOORE, B. WARD, & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.13[6], at 174-75 (2d ed. 1989).

147 Jesko v. United States, 713 F.2d 565, 567 (10th Cir. 1983); D'Ippolito v. American Oil Co., 401 F.2d 764, 765 (2d Cir. 1968) ("the cited decisions would not preclude review . . . on appeal from a final judgment"). *But see* Sterling Forest Assoc. v. Barnett-Range Corp., 840 F.2d 249, 253 (4th Cir. 1988) (district court's denial of a motion to transfer, premised on the court's misinterpretation of a forum selection clause, fell within the collateral order exception and could be challenged in an immediate appeal); *infra*, text accompanying notes 148-51.

The party resisting immediate appeal of a transfer decision also might argue that such a decision is "not completely separate from the merits." The Supreme Court has held that a decision denying a forum non conveniens motion to dismiss does not fall within the collateral order exception. The Court reasoned that the district court's forum non conveniens decision was not competely separate from the merits of the underlying litigation. Van Cauwenberghe v. Biard, 486 U.S. 517, 527-31 (1988) ("[T]he court must consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum.").

In addition to rulings that fall within the collateral order exception, litigants may bring immediate appeals from orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." 28 U.S.C. § 1292(a)(1) (1988). *See generally* Carson v. American Brands, Inc., 450 U.S. 79 (1981). Some litigants have asserted that transfer decisions constitute orders "granting or refusing an injunction." However, the appellate courts have agreed that a transfer order simply is not an injunction and is not immediately appealable pursuant to section 1292(a)(1). *See, e.g.*, M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp., 531 F.2d 669, 670 (2d Cir. 1976) ("A ruling on a stay or transfer motion is not independently appealable under 28 U.S.C. § 1292(a)(1) as a grant or denial of an injunction."); In re Josephson, 218 F.2d 174, 177 (1st Cir. 1954); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, at § 3855, at 475.

148 *See, e.g.*, Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp.,

The parties then litigate the case aggressively, with the court ruling on contested motions, discovery issues, and evidentiary disputes. The trial concludes, and the jury finds in favor of the defendant.

If, at the conclusion of this litigation, the plaintiff's appeal focuses on the transfer decision, an appellate court might well view the appeal with skepticism.[149] In addition, if the case were transferred from a different circuit, the appellate panel hearing the post-trial appeal would lack authority to review the decision of the district judge who transferred the case.[150] Not surprisingly, the circuit courts have stated that a post-trial appeal challenging a transfer decision is unlikely to succeed.[151]

A party seeking to challenge an adverse transfer decision thus may consider two plausible avenues for an immediate appeal. Neither approach is likely to succeed. First, the party may assert that the district court should certify an immediate appeal, pursuant to section 1292(b) of the judicial code.[152] Such certified appeals are appropriate where an "order involves a controlling question of law as to which there is a substantial ground for difference of opinion," and "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[153] A district judge is in no way required to certify an appeal under this statutory provision, but may allow for such an appeal in her discretion.[154]

A party seeking to bring a certified appeal from a transfer order faces two almost insurmountable problems. First, a district court is unlikely to find that the challenged transfer decision involves "a controlling question of law," or that "there is a substantial ground for difference of opinion" as to the merits of the

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579 F.2d 561, 567-68 (10th Cir. 1978); Marbury-Patillo Constr. Co. v. Bayside Warehouse Co., 490 F.2d 155, 157-58 (5th Cir. 1974). *See also* Masington, *supra* note 28, at 254 ("[T]o postpone review of transfer orders is to make them virtually irreversible on appeal.").

149 *See* Note, *supra* note 34, at 298.

150 Linnell v. Sloan, 636 F.2d 65, 67 (4th Cir. 1980); Starnes v. McGuire, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc., 436 F.2d 1180, 1187-88 (7th Cir.), *cert. dismissed*, 403 U.S. 942 (1971). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3855, at 473-74.

151 *See, e.g.*, Filmline Prod., Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989); Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 20 (9th Cir. 1969). *See also* Kitch, *supra* note 13, at 117.

152 28 U.S.C. § 1292(b) (1988).

153 *Id.*

154 *Id.*; Coopers & Lybrand v. Livesay, 437 U.S. 463, 474-75 (1978).

transfer order.[155] In almost any conceivable fact situation the court will find ample precedent supporting a decision either granting or denying a transfer.[156] Second, the court may be unconvinced that the delay accompanying an immediate appeal "will materially advance the ultimate termination of the litigation."[157] Rather than allow an appeal and face a possible reversal, a district court is much more likely simply to deny certification of an appeal from a transfer ruling.[158]

If the district court refuses to certify an appeal of a transfer decision, the party wishing to challenge this decision must apply for a writ of mandamus to obtain immediate appellate review. A number of courts have stated that this writ constitutes the preferred mechanism for reviewing section 1404 decisions,[159] although some disagreement exists on the propriety of such review.[160]

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155 Masington, *supra* note 28, at 252.

156 *See* Note, *supra* note 34, at 298 ("Interlocutory appeal is generally considered unavailable to review a section 1404(a) order because seldom, if ever, is a controlling question presented.").

157 *See, e.g,* Plum Tree, Inc. v. Stockment, 488 F.2d 754, 755-56 (3d Cir. 1973); Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 952 (1978); Mazzella v. Stineman, 472 F. Supp. 432, 436 (E.D. Pa. 1979); Arkansas-Best Freight System, Inc. v. Youngblood, 359 F. Supp. 1125, 1129-30 (W.D. Ark. 1973) ("An immediate appeal from the order refusing to transfer the case would not materially advance the ultimate termination of the litigation."). *See also* Masington, *supra* note 28, at 255 ("[I]f interlocutory review is permitted, the purpose of § 1404(a) is undermined in that convenience and justice are not served because of the delay and expense of an additional appeal."). *Cf.* Stewart Org. Corp. v. Ricoh, 487 U.S. 22, 24 (1988) (district court certifies its transfer decision for an immediate appeal, pursuant to § 1292(b)).

Even where a district court certifies an appeal pursuant to § 1292(b), the circuit court possesses discretion to hear or dismiss that appeal. 28 U.S.C. § 1292(b) (1988); Van Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988).

158 *See, e.g.*, Arkansas-Best Freight System, Inc. v. Youngblood, 359 F. Supp. 1125, 1129-30 (W.D. Ark. 1973); State of Hawaii v. Standard Oil Co. of Cal., 301 F. Supp. 980 (D. Hawaii 1969).

159 *See, e.g.*, Sunshine Beauty Supplies v. United States Dist. Court, 872 F.2d 310, 311 (9th Cir. 1989); Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 178 F.2d 866, 869 (2d Cir. 1950).

160 One Supreme Court dissent has described an order transferring a case outside of a judicial circuit as appropriate for mandamus review. LaBuy v. Howes Leather Co., 352 U.S. 249, 264 (1957) (Brennan, J., dissenting). But another Supreme Court opinion refused to specify whether appellate courts should review transfer decisions on a writ of mandamus. Norwood v. Kirkpatrick, 349 U.S. 29, 33 (1955).

See Masington, *supra* note 28, at 253-54 ("[T]his area is one of considerable confusion."); Note, *Appealability of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122, 133-34 (1967) [hereinafter Note, *Appealability of 1404(a) Orders*]; Note, *supra* note 34, at 300 ("Disregarding the prohibition against piecemeal appeals delays the ultimate termination of the litigation by permitting lengthy litigation over issues which are not determinative of the merits, such as place of trial.").

The circuit courts have reached little agreement on the appropriate standards for mandamus review of a district court order.[161] But all courts agree that a mere showing of error on the part of a district judge does not justify mandamus review.[162] Instead, the appellant must demonstrate that a transfer decision was "clearly erroneous as a matter of law,"[163] or must make "a clear showing of abuse of discretion."[164]

However, the lack of specific standards governing section 1404 transfers typically will prevent an appellate court from finding that a district judge has abused his discretion. As the Fifth Circuit Court of Appeals stated in reviewing a mandamus appeal from a transfer decision: "The presumption in favor of the district court judge is heavy. Appellate review is limited because it serves little purpose to reappraise such an inherently subjective decision."[165] The relatively few appellate court decisions reviewing motions to transfer on writs of mandamus typically have affirmed district court decisions in summary opinions.[166]

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161 *See, e.g.*, Hustler Magazine v. United States District Court, 790 F.2d 69, 70 (10th Cir. 1986); Kasey v. Molybdenum Corp., 408 F.2d 16, 18 (9th Cir. 1969) ("the circuits are drastically divided on the question"). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3855, at 481 ("Indeed, the variations among the circuits, and the changes of view within a particular circuit, are so great that the law on this point must be examined on a circuit-by-circuit basis."); Kitch, *supra* note 13, at 110.

162 Kerr v. United States Dist. Court, 426 U.S. 394, 402 (1976); DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945); A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439, 445 (2d Cir. 1968) (refusing to reverse transfer decision on mandamus appeal).

163 NBS Imaging Sys. v. United States Dist. Court, 841 F.2d 297, 298 (9th Cir. 1988). *Accord* Sypert v. Miner, 266 F.2d 196, 199 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959) ("something more must be shown than an erroneuos decision by the District Court . . . . [A]n abuse of discretion must clearly appear.").

164 Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 146 (10th Cir. 1967); *accord* A. Olinick & Sons v. Dempster, 365 F.2d 439, 445 (2d Cir. 1966) ("Mandamus does not lie to review mere error in the disposition of § 1404(a) motions, but only to redress a clearcut abuse of discretion."); *see also* Note, *supra* note 34, at 303.

165 Howell v. Tanner, 650 F.2d 610, 616 (5th Cir.), *reh'g denied*, 659 F.2d 1079 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982); *accord* Codex Corp. v. Milgo Elec. Corp., 553 F.2d 735, 737 (1st Cir.), *cert. denied*, 434 U.S. 860 (1977); Kasey v. Molybdenum Corp. of America, 408 F.2d 16, 20 (9th Cir. 1969); Ford Motor Co. v. Ryan, 182 F.2d 329, 331-32 (2d Cir.), ("At best, the judge must guess, and we should accept his guess unless it is too wild."), *cert. denied*, 340 U.S. 851 (1950).

One Eighth Circuit panel stated its disinclination to reverse transfer orders in even more blunt terms. "This court has never looked with favor on the use by a disappointed litigant of the extraordinary writ of mandamus to secure interlocutory review of an order entered pursuant to § 1404(a)." Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977) (petition for a writ of mandamus denied), *cert. denied*, 435 U.S. 925 (1978).

166 *See, e.g.*, Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 520 (2d Cir. 1989); Collins v. Straight, Inc., 748 F.2d 916, 921-22 (4th Cir. 1984);

Appellate courts thus have reversed district court decisions on a motion to transfer only in extraordinary situations. *In re Scott*[167] involved a Tennessee prisoner's suit seeking government documents under the Freedom of Information Act.[168] The plaintiff brought suit in a federal court in the District of Columbia, which possessed venue over such suits under a provision of the Freedom of Information Act.[169]

The district court transferred the case to the Northern District of Georgia on its own motion, soley because "the very large number of forma pauperis cases . . . filed [in the District of Columbia by prisoners impose] a considerable burden on the Judges of the District Court."[170] The District of Columbia Circuit Court reversed the order because "a federal court may not order transfer under section 1404(a) merely to serve its personal convenience."[171]

The Ninth Circuit decision in *Washington Public Utilities Group v. United States District Court*[172] involved a much more typical mandamus review of a transfer decision. This complex securities fraud action arose out of a bond default by the Washington Public Power Supply System.[173] A Western District of Washington judge had transferred the *Washington Public Utilities Group* litigation to the District of Arizona.[174] Parties opposing the transfer appealed, asserting that the district judge had "ignored the convenience of the parties and witnesses," and that he made several other errors in deciding the transfer motion.[175]

In denying the mandamus petition, the Ninth Circuit did not reach the merits of the appellants' arguments. Instead, the court

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Howell v. Tanner, 650 F.2d 610, 616 (5th Cir.), *reh'g denied*, 659 F.2d 1079 (5th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982); Federal Deposit Ins. Corp. v. Citizens Bank & Trust Co., 592 F.2d 364, 367-68 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979); Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567-68 (10th Cir. 1978).

But see General Tire & Rubber Co. v. Watkins, 373 F.2d 361 (5th Cir.) (writ issued, compelling district court to transfer case from the District of Maryland to the Northern District of Illinois, where a related case was pending), *cert. denied*, 386 U.S. 960 (1967).

167 709 F.2d 717 (D.C. Cir. 1983).

168 5 U.S.C. § 552 (1988).

169 *Id.* at § 552(a)(4)(B).

170 In re Scott, 709 F.2d 717, 719 (D.C. Cir. 1983) (quoting Scott v. McCune, C.A. No. 82-1879 (D.D.C. Jan. 17, 1983)).

171 *Id.* at 723.

172 843 F.2d 319 (9th Cir. 1987).

173 *Id.* at 321.

174 *Id.*

175 *Id.* at 323.

merely held that the parties could challenge the transfer motion after a final judgment, and that the parties had not demonstrated that "severe prejudice" would result from the transfer ruling.[176]

District court rulings on motions to transfer are unlikely to receive the scrutiny of meticulous appellate review. Parties typically may challenge transfer orders only by seeking a writ of mandamus, and must demonstrate a clear abuse of discretion. Because the Supreme Court has authorized the district courts to exercise broad discretion in resolving transfer motions, appellate courts will find an abuse of discretion only in the most extraordinary circumstances. Such limited appellate review of transfer orders has not and will not produce coherent standards.[177]

D. Problems in Resolving Motions to Transfer

The preceding discussion demonstrates that neither the defendants, the district courts, nor the circuit courts are likely to develop standards limiting the section 1404 transfer. A continued lack of such limitations is disturbing, because some transfer decisions raise serious problems. The following discussion identifies two such problems: (1) transfers to distant districts, which result in plaintiff prejudice; and (2) multiple transfers of a single case.

1. Transfers to Distant Districts and Plaintiff Prejudice

Courts hearing section 1404 motions typically have stated that a plaintiff's choice of forum should receive some weight.[178] Despite suggestions that a transfer should not impose a substantial hardship on the plaintiff, a number of decisions have transferred cases a great geographic distance. Although Congress adopted section 1404 in part to prevent plaintiffs from harassing defendants by filing suit in a distant forum,[179] some transfer decisions

176 *Id.* at 325. *See also* A. Olnick & Sons v. Dempster Bros., 365 F.2d 439, 444 (2d Cir. 1966) ("We do not believe that the District Court so abused its discretion in ordering a transfer as to require the issuance of mandamus.").

177 *See* Stein, *supra* note 3, at 815, 817, 832 (broad district court discretion precludes effective appellate review of forum non conveniens decisions).

178 *See, e.g.*, Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970) ("It is black letter law that a plaintiff's choice of a proper forum is a paramount consideration in any determination of a transfer request, and that choice . . . should not be lightly disturbed."), *cert. denied*, 401 U.S. 910 (1971); A. Olinick & Sons v. Dempster Bros., 365 F.2d 439, 444 (2d Cir. 1966) ("The plaintiff's choice of venue is still entitled to substantial consideration . . . ."). *See also infra* text accompanying notes 238-255.

179 *See supra* text accompanying notes 17-46.

have allowed defendants to impose the same type of hardship on the plaintiff.

Section 1404 was used to move litigation from one coast to another in *Lou v. Belzberg*.[180] Plaintiff Jacques Lou brought a shareholders' derivative suit on behalf of Ashland Oil Company shareholders. Lou's complaint alleged that these shareholders had suffered injury when members of the Belzberg family first threatened to take over Ashland Oil, but later sold their stock back to Ashland Oil at a premium price.[181] The *Lou* complaint alleged that the Belzbergs and various other defendants had violated federal securities fraud statutes, and the federal racketeering statute.[182]

Lou filed her complaint with a California state court in Los Angeles. The defendants subsequently removed the case from state court to the United States District Court for the Central District of California.[183] The defendants then moved for a section 1404 transfer of the case to the Southern District of New York.

In an unpublished opinion, the district court granted the defendants' transfer motion.[184] In three paragraphs, the Ninth Circuit affirmed this decision. The appellate panel noted that the contested repurchase of the Belzbergs' stock was negotiated in New York, that the majority of potential witnesses resided in the New York area, and that "the costs of litigation would be drastically reduced if the case were heard in New York."[185] The plaintiff's choice of a California forum was dismissed by the Ninth Circuit, because "when an individual brings a derivative suit or represents a class, the named plaintiff's choice of forum is given less weight."[186]

Transfers to a distant forum may prejudice corporate plaintiffs as well as individual plaintiffs. In *Letter-Rite, Inc. v. Computer Talk, Inc.*,[187] the plaintiff brought a diversity action, alleging that the defendant had breached a contract by failing to develop, con-

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180 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

181 *Id.* at 732.

182 18 U.S.C. §§ 1961-1968 (1988).

183 Defendants removed the case pursuant to 28 U.S.C. § 1441(a), (c) (1988).

184 Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988).

185 *Id.*

186 *Id.* (citations omitted). *Cf.* note 252 *infra* (questioning whether court willingness to transfer class actions and derivative suits is appropriate).

187 605 F. Supp. 717 (N.D. Ill. 1985).

struct, and install a stenciling machine. Plaintiff Letter-Rite, a small closely-held Illinois corporation, filed suit in the Northern District of Illinois. Defendant Computer Talk, a small closely-held Colorado corporation, moved to transfer the case to the District of Colorado.[188]

In analyzing this transfer motion, the Northern District of Illinois court began by noting that "[e]ach side's forum is really inconvenient for the other."[189] The court also did not find that either Illinois or Colorado would be significantly more convenient for potential witnesses. Nonetheless, the court decided to transfer the case to the District of Colorado, based on three facts. First, the defendant's contract performance was to occur in Colorado. Second, the court held that Illinois law would govern the controversy. Third, the court found that "[j]udges in this District have a heavier average caseload than their Colorado counterparts."[190]

Transfers to a distant district may prejudice the plaintiff for at least two reasons. First, a distant trial may be far more expensive for a plaintiff than a trial near the plaintiff's residence.[191] A plaintiff attending a distant trial must pay his travel and accommodation costs. The plaintiff presumably also must pay similar costs incurred by witnesses traveling to the distant court. Even if the plaintiff can afford these expenses, convincing witnesses to appear voluntarily at a distant trial may prove difficult.[192]

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188 *Id.* at 719.

189 *Id.* at 720.

190 *Id.* at 722. *See also* Bayless v. Dresser Indus., Inc., 677 F. Supp. 195 (S.D.N.Y.), *rehearing granted*, 702 F. Supp. 79 (S.D.N.Y. 1988) (transferring case from the Southern District of New York to the Southern District of Texas, despite the plaintiff's lack of any contacts with Texas).

191 *See* Norwood v. Kirkpatrick, 349 U.S. 29, 33 (1955) (Clark, J., dissenting). Occasionally, courts will order a transfer only if the defendant agrees to pay some of the plaintiff's costs of litigating in a foreign district. *See, e.g.*, Semro v. Halstead Enters., Inc., 619 F. Supp. 682, 684 (N.D. Ill. 1985); Masington, *supra* note 28, at 250 (citing cases). But most transfer orders do not require such reimbursement. *See* Kaufman, *supra* note 6, at 606 ("[O]ne factor which has not appeared too often in the cases is the ability of the parties to bear the expense of trial in the transferee forum.").

192 *See* Masington, *supra* note 28, at 243.

If a witness is hostile or recalcitrant, the plaintiff may be unable to produce this witness at trial after a transfer to a distant district. A federal court may issue a subpoena compelling trial attendance only as to persons found either within the state where the federal court sits, or within 100 miles of the federal district where the case is pending. Fed. R. Civ. P. 45(e)(1). If a witness is not located within this geographic distance from the transferee court, a party cannot require that witness to testify at trial. *See, e.g.*, Horwitz v. Southwest Forest Industries, Inc., 612 F. Supp. 179, 182 (D. Nev. 1985); Kreisner v. Hilton Hotel Corp., 468 F. Supp. 176, 178 (E.D.N.Y. 1979).

The problems generated by a distant trial should not be overstated, given the small number of federal civil cases that ever reach trial.[193] But a transfer typically will require the plaintiff to retain a new attorney who practices in the transferee district.[194] For a plaintiff with little litigation experience, identifying a local counsel may prove particularly difficult.[195]

This does not suggest that the federal courts never should transfer a case. To the contrary, a transfer of litigation away from the plaintiff's home forum sometimes will appear perfectly appropriate. For example, in *Bally Manufacturing Corp. v. Kane*,[196] plaintiff Bally Manufacturing Corporation brought a breach of contract suit, alleging that the individual and corporate defendants had purchased but failed to pay for coin-operated games. Plaintiff Bally Manufacturing maintained its principal place of business in Chicago, Illinois, and filed suit in the Northern District of Illinois. The defendants sought a section 1404 transfer to the Middle District of Florida.[197]

In granting the transfer, the *Bally Manufacturing* court emphasized the hardships that travel from Florida to Illinois would impose on at least one of the individual defendants. The court also noted: "While [plaintiff] Bally's principal place of business is located within this district, Bally obviously does business in Florida

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Where a party cannot convince or compel a witness to attend a trial in a distant court, the party might videotape a deposition of the witness and produce this videotape as evidence. But such videotaped testimony typically will not prove as effective as in-person testimony at trial. *See* Wasserman, *The Subpoena Power*: Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37, 119 (1989).

193 As of June 30, 1988, only about 4.9 percent of all federal cases reached trial. ANNUAL REPORT OF THE DIRECTOR OF THE OFFICE OF THE ADMINISTRATIVE COURTS 211 (1988) [hereinafter ANNUAL REPORT OF THE DIRECTOR].

194 A number of federal districts require that litigants employ local counsel who practice in the district. *See, e.g.*, C.D. CAL. R. 2.2.3.3 (party must "designate an attorney who is a member of the Bar of this Court and who maintains an office within this District as local counsel"); N.D. ILL. R. 3.13(A) (party must designate "a member of the bar of this Court having an office within this District upon whom service of papers may be made"); S.D.N.Y. & E.D.N.Y. R. 3(a) (judge may require a party to designate "a member of the bar of either district having an office within either district upon whom service of papers may be made"); N.D. TEX. R. 13.4 (foreign attorney must "designate as local counsel a member of the Bar of this Court"). Copies of these local rules are on file with the author.

195 *See* Nascone v. Spudnuts, Inc., 735 F.2d 763, 773 (3d Cir. 1984) ("In real terms, transfer of venue to Utah may deprive the plaintiff not only of the forum of his choice, but also of the attorney of his choice.").

196 698 F. Supp. 734 (N.D. Ill. 1988).

197 *Id.* at 736.

and does not deny that it conducts business throughout the United States."[198]

Plaintiff Bally Manufacturing's contacts with Florida distinguish this decision from the transfers granted in cases such as *Lou v. Belzberg* and *Letter-Rite, Inc. v. ComputerTalk, Inc.*, where the plaintiffs apparently possessed no contacts with the transferee forum. A plaintiff probably will suffer little hardship if a court transfers the plaintiff's case to a district where the plaintiff already conducts business. Particularly if the case arises out of an incident occurring in the transferee district, some of the plaintiff's witnesses probably will reside near the transferee court. The plaintiff also may have some familiarity with local counsel, through experience in prior litigation.

On the other hand, a transfer to a distant forum may result in severe prejudice to a plaintiff, where the plaintiff lacks any contacts with the district receiving the transferred case. In cases such as *Lou* and *Letter-Rite*, courts nonetheless have transferred litigation to distant districts, notwithstanding a lack of plaintiff contacts with the transferee forum. These cases suggest that the analysis used to decide transfer motions needs rethinking.

2. The Civil Case as a Ping-Pong Ball: Multiple Transfers

In a number of cases, courts have granted multiple motions to transfer.[199] In other words, a court receiving a transferred case subsequently may return the case to the district where the plaintiff originally filed suit, or may send the case to a third district. Where courts grant such multiple transfers, litigation may take on the appearance of a judicial ping-pong game, with a case bounced back and forth between courts without any resolution of substantive issues.[200]

Some transferee courts have have returned a case to the court issuing a transfer order, asserting that the transferee court lacked personal jurisdiction or was an improper venue for the suit.[201] In *Hite v. Norwegian Caribbean Lines*,[202] the plaintiff

198 *Id.* at 738.

199 *See* Masington, *supra* note 28, at 250.

200 Although the Supreme Court has not ruled directly on the propriety of multiple transfers, some court decisions appear to authorize such orders. *See* Koehring v. Hyde Co., 382 U.S. 362, 365 (1966) (parties may apply "to have the case transferred back to the Southern District of Mississippi because of changed conditions"); Hoffman v. Blaski, 363 U.S. 335 (1960) (returning transferred case from the Northern District of Illinois to the Northern District of Texas).

201 *See* Hoffman v. Blaski, 363 U.S. 335, 342-44 (1960) (court may transfer a case

sought to recover for personal injuries he had sustained aboard a cruise ship operated by the defendant. The plaintiff filed suit in the Michigan state courts, but the defendants removed the case to the United States District Court for the Eastern District of Michigan.

The district court, on its own motion, transferred the case to the Western District of Michigan.[203] The district judge concluded that the Eastern District of Michigan was not a proper venue for the suit, but that the Western District of Michigan would represent a proper venue.[204]

About two months after receiving the *Hite* case, the United States Court for the Western District of Michigan entered a second transfer order, returning the case to the Eastern District of Michigan.[205] In ordering this second transfer, Judge Enslen of the Western District of Michigan entered findings of fact that contradicted the prior Eastern District of Michigan holding. Specifically, Judge Enslen found that the Eastern District of Michigan was a proper venue for the *Hite* suit, but that the Western District of Michigan was not a proper venue.[206]

After receiving the *Hite* case back from the Western District of Michigan, the Eastern District of Michigan court did not move on to the substantive aspects of the litigation, but once again considered the venue issue. The Eastern District court remained unpersuaded that its earlier venue ruling was in error.[207] The court thus transferred the *Hite* case for the third time, returning the litigation to the Western District of Michigan.[208]

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only to a district where the suit "might have been brought"). *See also* 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3846, at 361-62 ("A motion to retransfer is perfectly appropriate on a showing of changed circumstances.").

202 551 F. Supp. 390 (E.D. Mich. 1982).

203 *Id.* at 392. The plaintiff asserted that the case should remain in the Eastern District of Michigan. The defendant argued that if the court did enter an transfer order, the court should transfer the case to the Southern District of Florida. *Id.*

204 *Id.* at 395.

205 *Id.* at 392.

206 *Id.* at 395.

207 *Id.* at 394-95.

208 *Id.* at 393-97. Prior to again transferring the case, the Eastern District of Michigan court established a 15-day interim period, during which either party could seek to set aside the third transfer order through a writ of mandamus issued by the Sixth Circuit Court of Appeals. *Id.* at 397.

See also Bashir v. U.S. Attorney Gen., 508 F. Supp. 1108, 1113-14 (E.D. Va. 1981) (case returned from the Eastern District of Virginia to the Middle District of Pennsylvania); Rixner v. White, 417 F. Supp. 995 (D.N.D. 1976) (North Dakota court, which had received a transferred case from a Missouri court, in turn transferred the case to the

In other cases where litigation in the transferee court would not raise personal jurisdiction or venue problems, a transferee court nonetheless has transferred the case for a second or third time.[209] In *Fluor Corp. v. Pullman, Inc.*,[210] the plaintiff filed antitrust and patent litigation in the United States District Court for the Central District of California. On the defendant's section 1404 motion, the California court transferred this case to the Western District of Oklahoma.[211]

After the *Fluor* suit arrived in Oklahoma, the defendant moved for a second transfer of the case to Georgia. In support of this section 1404 motion, the defendant asserted that subsequently-filed and related litigation was pending in the Southern District of Georgia. The United States District Court for the Western District of Oklahoma granted this second transfer motion, because "it would be more convenient for Defendant to try the instant case with the consolidated cases now pending before the Georgia Court rather than having separate trials."[212]

Multiple transfers raise a number of conceptual and practical problems. First, when a district court receiving a transferred case decides to send that litigation elsewhere, the court in effect is reversing the district court that had entered the first transfer order. For a court to enter a second transfer order, the court must determine that it is *not* a convenient forum for the litigation, contrary to the conclusion of the court that first transferred the litigation.

It is highly questionable whether district judges should exercise such appellate review of decisions by other district courts.[213]

District of Minnesota); Ferri v. United Aircraft Corp., 357 F. Supp. 814, 815-16 (D. Conn. 1973) (returning case to the Southern District of Florida); Watwood v. Barber, 70 F.R.D. 1, 9 (N.D. Ga. 1976) (returning case to the Southern District of Alabama).

209 *See* Koehring Co. v. Hyde Constr. Co., 382 U.S. 362, 365 (1966); In re Cragar Indus., 706 F.2d 503, 505-06 (5th Cir. 1983); Russell v. IU Int'l, 685 F. Supp. 172, 176 (N.D. Ill. 1988); Holszager v. Valley Hosp., 482 F. Supp. 629, 630 (S.D.N.Y. 1979). *But see* Railway Labor Executives' Ass'n v. Chicago & North Western Transp. Co., 692 F. Supp. 1066, 1067 (D. Minn. 1988) (refusing to return case to the Eastern District of Michigan, although a Minnesota district judge had declined to consolidate the suit with an allegedly related action).

210 446 F. Supp. 777 (W.D. Okla. 1977).

211 *Id.* at 778.

212 *Id. See also* Union Tank Leasehold Building Co. v. Dupont Glore Forgan, Inc., 494 F. Supp. 514, 516 (S.D.N.Y. 1980) (returning case to the Northern District of Illinois, after the plaintiffs had dropped allegations that were similar to the claims asserted in a Southern District of New York case); Ferri v. United States Dep't of Justice, 441 F. Supp. 404 (M.D. Pa. 1977) (returning Freedom of Information Act suit to a District of Columbia federal court).

213 *See generally* Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816

Appellate review in the federal courts typically is exercised by three-judge circuit court panels, not by individual district judges. Individual district judges perform an appellate function only in a few situations, which include reviewing the decisions of a bankruptcy judge[214] or the report and recommendations of a magistrate.[215] District judges may lack sufficient appellate experience or authority to evaluate the section 1404 determinations of other district judges.[216]

Multiple transfers also may violate the policy preserving the finality of judicial decisions. As stated in a frequently quoted Supreme Court passage, this policy of finality "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."[217]

The principles of res judicata do not preclude reconsideration of a transfer decision because a court's transfer ruling is not a final decision on the merits of a case.[218] However, a transfer decision can bind a judge receiving the transferred case under the more flexible "law of the case" rules.[219] Law of the case rules require that a court's interlocutory orders continue to govern litigation, even when those orders are of questionable validity.[220]

Immunizing a court order from subsequent or collateral attack preserves the integrity of the judiciary by preventing inconsis-

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(1988); Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3d Cir. 1982).

214 *See* 28 U.S.C. § 158 (1988).

215 28 U.S.C. § 636(c)(4) (1988); FED. R. CIV. P. 73(d), 74-76.

216 *See* Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 169 (3d Cir. 1982); *cf.*, Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 648 (1987).

A better approach would limit reconsideration of a transfer order to direct appellate review. A writ of mandamus may allow for immediate appellate review of a transfer decision. *See supra* text accompanying notes 156-76.

217 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979).

218 Hoffman v. Blaksi, 363 U.S. 335, 341 n.9 (1960); Buhl v. Jeffers, 435 F. Supp. 1149, 1151-52 (M.D. Pa. 1977); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3846, at 359. *But cf.* Masington, *supra* note 28, at 257 ("res judicata should apply as between the circuits on issues of fact and law raised on motions to transfer").

219 *See* Christianson v. Colt Industries Operating Corp., 408 U.S. 800, 815 (1988); Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, 165-68 (3d Cir. 1982); J. MOORE, *supra* note 20, at 210-11 ("[I]f the motion to transfer is granted and the case is transferred to another district, this latter district should accept the ruling as the law of the case for it, and there should be no further transfer except under the most impelling and unusual circumstances.").

220 Arizona v. California, 460 U.S. 605, 618 (1983) (dictum). *See generally* Steinman, *supra* note 216, at 597-613.

tent rulings on the same controversy.[221] The Third Circuit Court of Appeals has written that a transferee court's holding that the transferror court should not have sent litigation elsewhere is just such an inconsistent ruling.[222] The integrity of the judiciary is not enhanced when judges in the Eastern and Western Districts of Michigan send a case back and forth because of a venue disagreement.[223] Nor does respect for the federal judicial system increase when courts shuffle a case from California to Oklahoma to Georgia, rather than moving forward on substantive issues.[224]

Criticism of multiple motions to transfer is not limited to abstract conceptions concerning the lack of appellate authority possessed by district judges, or the principle of judicial finality. The most convincing criticism is that multiple transfer decisions are counterproductive and unfair to the parties. In a system where both judges and practitioners complain of backlogged dockets and long delays,[225] courts should not rehash the question of which forum is most convenient.[226] Repeated considerations of motions to transfer result in excessive attorney's fees. Each time a case moves to a new district, the parties are required either by a local rule or by practical necessity to hire new local counsel, who require payment for time spent learning about the case.[227] And each time a court entertains a section 1404 motion, parties again must pay attorneys to brief the transfer issue.

The plaintiff who lacks strong feelings about where her case should be adjudicated and primarily seeks a quick resolution of

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221 Steinman, *supra* note 216, at 604-05 ("[I]nconsistency and vacilation in decisions undermine public confidence in the judiciary as a whole, thus lessening respect for and obedience of the law.").

222 Hayman Cash Register Co. v. Sarokin, 669 F.2d 162 (3d Cir. 1982) (New Jersey federal court receiving a transferred case should not return the case to the District of Columbia). The *Hayman Cash Register* decision did not involve a transfer under § 1404. Instead, the *Hayman Cash Register* suit was transferred pursuant to a related provision, 28 U.S.C. § 1406 (1988). *See supra* note 8 (discussing the relationship between § 1404 and § 1406). *See also* United States v. Koenig, 290 F.2d 166, 173 n.11 (5th Cir. 1961) (dictum).

223 Hite v. Norweigian Caribbean Lines, 551 F. Supp. 390 (E.D. Mich. 1982).

224 *Compare* Steinman, *supra* note 216, at 650 ("Insofar as a section 1404 transfer decision is discretionary, the better rule is for transferee courts to refuse reconsideration of the transfer order unless they believe that an error of a clear abuse of discretion has been committed) *with* Marcus, *supra* note 11, at 702 ("If a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job.").

225 On the increase in federal court filings and the consequences of congested court dockets, see generally R. POSNER, *supra* note 143, at 59-129; Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976).

226 Masington, *supra* note 28, at 256.

227 *See supra* text accompanying notes 45-46.

substantive issues may be offended by the repeated transfer of the case. In fact, the plaintiff may view the courts as entirely unresponsive, as judges shuffle her case from district to district, in an apparent attempt to avoid addressing the plaintiff's substantive claims.[228]

Courts that consider ordering the second or third transfer of case should recall that section 1404 authorizes a transfer "[f]or the convenience of parties and witnesses."[229] The drafters of this section could not have contemplated that section 1404 would result in the strange reality of multiple transfers.

3. Summary: The Problems of an Unlimited Transfer Motion

The Supreme Court has asserted that transfer motions are best left to the discretion of the lower courts. This assertion has proven incorrect. Civil defendants, the district courts, and the appellate courts have not provided any meaningful standards to govern the section 1404 transfer. As a result, courts have ordered improvident transfers. Courts have transferred cases to distant districts with which the plaintiff lacks any contact, and have ordered multiple transfers of the same case. The conflicting decisions reached by different courts on the transfer of a single case illustrate the limits of current section 1404 analysis.[230]

Given the unfortunate results of some section 1404 transfers, the next Part of this Article reviews the factors that courts have considered in deciding transfer motions. Part III concludes that several of these factors actually demonstrate little about the convenience of different courts.

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228 Hite v. Norwegian Carribean Lines, 551 F. Supp. 390, 392 (E.D. Mich. 1982) (court, rather than one of the parties, initially suggested a transfer of the action); Fluor Corp. v. Pullman, Inc., 446 F. Supp. 777, 778 (W.D. Okla. 1977) (the plaintiffs, who initially had filed their case in the Central District of California, consistently requested that their case proceed in that district).

One court issuing a third transfer order apologized for "the delay experienced by the parties to this action." Hite v. Norwegian Carribean Lines, 551 F. Supp. 390, 395 (E.D. Mich. 1982).

229 28 U.S.C. § 1404(a) (1988).

230 On some problems raised by uncontrolled district court discretion, *see generally* Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 748, 756-58 (1982).

III. THE CURRENT METHOD FOR RESOLVING MOTIONS TO TRANSFER

Following the approach developed in Supreme Court decisions such as *Gulf Oil Corp. v. Gilbert*[231] district courts have decided section 1404 motions to transfer by balancing a number of factors on a case-by-case basis.[232] One court has suggested that as many as twenty different factors are relevant when considering a transfer motion.[233] Although the lower courts have used a similar method to decide transfer motions, they have disagreed on which factors are relevant, and on the importance of particular factors.[234]

As many courts have held, the location of witnesses and documents is important in determining the most convenient forum. Conducting litigation in a court located near relevant witnesses and documents will result in benefits during discovery and at trial.[235] Courts also have looked to a number of other factors in deciding transfer motions. This Part evaluates four factors given considerable weight by most courts: (1) the plaintiff's suit in his home forum; (2) the applicable law; (3) docket congestion; and (4) the pendency of a related case. This Part concludes that none of these factors should have any significant effect on a transfer decision.

A. The Plaintiff's Suit in His Home Forum

The vast majority of courts have agreed that a plaintiff's choice of forum should receive some deference, and that this initial choice of forum always weighs against a transfer.[236] Be-

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231 330 U.S. 501 (1947).

232 *See supra* text accompanying notes 49-59.

233 Eastern Scientific Marketing, Inc. v. Tekna-Seal, Inc., 696 F. Supp. 173, 180 n.13 (E.D. Va. 1988). *See also* Annotation, *Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of Judicial Code (28 U.S.C. § 1404(a))*, 1 A.L.R. FED. 15, 37-38 (listing 16 factors relevant to a transfer motion).

234 *See, e.g.*, Philipp Brothers, Inc. v. Schoen, 661 F. Supp. 39, 42 (S.D.N.Y. 1987) (listing seven factors relevant to a transfer decision); Houk v. Kimberly-Clark Corp., 613 F. Supp. 923, 927 (W.D. Mo. 1985) (in determining whether to transfer a case, "the court may consider a myriad of factors"); Kitch, *supra* note 13, at 131 ("District court opinions on these issues are published in great number, suggesting that the district judges find them difficult to deal with."); Masington, *supra* note 28, at 241-42.

235 *See infra* text accompanying notes 334-339.

236 *See, e.g.*, Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981) ("The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations."); Federal Deposit Insurance Corp. v. Citizens Bank & Trust Co., 592 F.2d 364,

yond this general proposition, however, courts have agreed on little with respect to importance of the plaintiff's forum choice. As one leading treatise states: "The courts have developed a bewildering variety of formulations on how much weight is to be given to plaintiff's choice of forum."[237]

At one extreme, some cases have freely granted transfer motions even when the plaintiff has brought suit in his district of residence, or "home forum." This article already has discussed some of these decisions.[238] Other examples are not hard to find.

In *Neff Athletic Lettering Co. v. Walters*,[239] plaintiff Neff Athletic Lettering Company brought a breach of contract suit against a former company salesman, James Walters. Neff Athletic Lettering filed suit in the Southern District of Ohio, where the company "resided."[240] Even though Ohio law would apply to the suit and the plaintiff's witnesses were located in Ohio,[241] the Ohio court transferred the *Neff* case to the District of New Hampshire. The court ordered a transfer because the defendant's potential witnesses were located in "the eastern United States,"[242] the defendant had stored his business records in New Hampshire, and the New Hampshire federal court's docket was less crowded than the Ohio court's docket.[243]

At the other extreme, some courts have held that a plaintiff's choice of forum should receive great deference, regardless of the plaintiff's connection to the forum state. In *Babbidge v. Apex Oil Co.*,[244] a seaman who had suffered personal injury aboard the S/T St. Emillion brought suit against three defendant corporations that owned and operated the ship. All of the defendants

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368 (7th Cir. 1979).

237 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3848, at 375.

238 *See* Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987); Letter-Rite, Inc. v. Computer Talk, Inc., 605 F. Supp. 717, 719-22 (N.D. Ill. 1985).

239 524 F. Supp. 268 (S.D. Ohio 1981).

240 *Id.* at 271.

241 *Id.* at 273.

242 *Id.* at 274.

243 *Id. See also* Anderson v. Thompson, 634 F. Supp. 1201, 1203 (D. Mont. 1986) (transferring suit from Montana to the Eastern District of Washington, where the "overwhelming majority of plaintiffs are Montana residents"); Windmere Corp. v. Remington Products, Inc., 617 F. Supp. 8 (S.D. Fla. 1985) (transferring suit brought in Florida by Florida corporation to the District of Connecticut); Environmental Services, Inc. v. Bell Lumber & Pole Co., 607 F. Supp. 851 (N.D. Ill. 1984) (even though Illinois corporation with its principal place of business in Chicago brought suit in the Northern District of Illinois, court transfers the case to the District of Minnesota).

244 676 F. Supp. 517 (S.D.N.Y. 1987).

were Missouri corporations. The plaintiff, a Maine resident, brought suit in the Southern District of New York.[245]

The *Babbidge* court denied the defendants' motion to transfer the case to the District of Maine. The district court noted that both the plaintiff and his physicians resided in Maine.[246] Nonetheless, the court held that the Southern District of New York was a convenient forum, noting that the plaintiff's former vessel had docked at New York six times during the past year.[247] The *Babbidge* court further stated: "Even assuming, however, that none of the parties has any significant contacts with New York, plaintiff's choice is still entitled to some deference."[248]

Most courts have settled on a compromise between the extreme view that the plaintiff's choice of forum should never be disturbed, and the equally extreme view that the plaintiff's choice of forum is of no importance. This majority view holds that when a plaintiff brings suit within his "home state," meaning his state of domicile or residence, a court should not transfer the case.[249] But when the plaintiff brings suit outside his state of domicile or residence, this choice of forum will receive little deference, and a court should transfer the case if another forum appears more convenient.[250]

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245 *Id.* at 519.

246 *Id.* at 520.

247 *Id.*

248 *Id.* at 519. *See also* Ayers v. Arabian American Oil Co., 571 F. Supp. 707, 709 (S.D.N.Y. 1983) (denying motion to transfer suit brought by Ohio residents in the Southern District of New York); Lee v. Ohio Casualty Insurance Co., 445 F. Supp. 189, 195 (D. Del. 1978) (refusing to transfer case, even though the district where the plaintiff filed suit "is not his 'home turf'").

249 *See, e.g.*, Zangiacomi v. Saunders, 714 F. Supp. 658, 660 (S.D.N.Y. 1989) ("There is a strong presumption in favor of the residents-plaintiff's original choice of forum."); Continental Illinois National Bank & Trust Co. of Chicago v. Stanley, 585 F. Supp. 610, 612 (N.D. Ill. 1984) (refusing to transfer suit brought in Illinois by bank with its principal place of business in Illinois); American Argo v. United States Fidelity & Guaranty, 590 F. Supp. 1002, 1004 (E.D. Pa. 1984) ("[W]here, as here, the plaintiff files suit in his home forum, that choice is entitled to considerable deference."); Kitch, *supra* note 13, at 135 ("Generally, if the plaintiff is a resident of the forum or if some of his important witnesses reside there, his choice of venue will not be disturbed."). *See also* Marcus, *supra* note 11, at 697.

250 *See, e.g.*, Chicago, Rock Island and Pacific Railroad Co. v. Igoe, 220 F.2d 299, 304 (7th Cir. 1955); CES Publishing Corp. v. Dealerscope, Inc., 544 F. Supp. 656, 662 (E.D. Pa. 1982) ("plaintiff's choice is entitled to less weight where, as here, plaintiff is not a resident of the forum and the cause of action did not arise here"). *See also* General Instrument Corp. v. Mostek Corp., 417 F. Supp. 821, 822-23 (D. Del. 1976).

Courts also have found that the plaintiff's choice of forum should receive little deference where the plaintiff brings suit in a representative capacity, as in the case of a class action or a shareholders' derivative suit. *See, e.g.*, Lou v. Belzberg, 834 F.2d 730,

This distinction, based on whether the plaintiff has brought suit in his state of residence, has prima facie intuitive appeal. Where a plaintiff has brought suit in his state of residence or domicile, a court may assume that considerations of convenience truly have motivated this choice of forum. If nothing else, a plaintiff suing in his state of residence will have a short trip from his home (or from the home office) to the courthouse.

On the other hand, courts have assumed that a plaintiff filing suit in a forum far from his residence did not choose the distant forum for reasons of convenience. Instead, courts often have suggested that a plaintiff's decision to file suit in a distant forum represents an exercise in abhorrent "forum shopping," designed solely to gain advantage of some procedural or substantive idiosyncrasy.[251]

But the plaintiff's choice of forum may result more from the geographic location of the defendant than from a preconceived litigation strategy. A plaintiff has no absolute right to bring a suit in his state of residence, despite the suggestion of some transfer decisions to the contrary. Instead, the plaintiff may bring suit in his state of residence or domicile only where that forum possesses personal jurisdiction over the defendant and constitutes a proper venue.

The heavy emphasis on whether the plaintiff has filed suit in his state of residence may produce arbitrary results. Consider two

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739 (9th Cir. 1987) (affirming transfer of plaintiff's class action and shareholders' derivative suit); Supco Automotive Parts v. Triangle Auto Spring Co., 538 F. Supp. 1187, 1192 (E.D. Pa. 1982) (transferring class action); Stoltz v. Baker, 466 F. Supp. 24, 27 (M.D.N.C. 1978) (transferring shareholders' derivative suit). Courts have reasoned that because a large class action or derivative suit will include class members living throughout the United States, the domicile of the individual class represenative is of limited importance in determining the most convenient forum for the suit. *See, e.g.*, Impervious Paint Industries, Ltd. v. Ashland Oil, Inc., 444 F. Supp. 465, 467 (E.D. Pa. 1978); Silverman v. Wellington Management Co., 298 F. Supp. 877, 879 (S.D.N.Y. 1969).

This reasoning conflicts with the rule that a representative plaintiff owes a special duty to prosecute a suit effectively on behalf of absent class members. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 403 (1975); Hassine v. Jeffers, 846 F.2d 169, 179 (3d Cir. 1988) (named plaintiff must possess "the ability and the incentive to represent the claims of the class vigorously"); Sharif v. New York State Education Department, 127 F.R.D. 84, 90 (S.D.N.Y. 1989) (court must inquire whether class representatives "are able to act as fiduciaries in protecting the interests of the class"). *See also* National Super Spuds v. New York Mercantile Exchange, 425 F. Supp. 665, 668 (S.D.N.Y. 1977) ("Plaintiff's choice of forum is significant in a class action where it appears preferable to other forums in administering the action and protecting the class.").

251 *See, e.g.*, General Tire & Rubber Co. v. Watkins, 373 F.2d 361, 369 (4th Cir. 1967); Schmid Laboratories, Inc. v. Hartford Accident & Indemnity Co., 654 F. Supp. 734, 736-37 (D.D.C. 1986); Waggoner, *supra* note 13, at 81.

hypothetical plaintiffs, Arthur Adams and Benjamin Bernard. Both Adams and Bernard live in Pittsburgh, Pennslvania. At about the same time, Adams and Bernard each sought to purchase "beachfront" Florida property for a retirement home. The two plots of Florida land purchased by Adams and Bernard turn out to be below the tideline, and are not suitable for any residential use. Both Adams and Bernard plan to sue the realtors who sold the properties for breach of contract and fraud.

In deciding to purchase his worthless Florida property, Adams dealt with the Tidewater Property Corporation. Tidewater Property is a Florida corporation with its principal place of business in Miami, Florida. Tidewater Property Corporation maintains a permanent sales office in Pittsburgh, Pennslyvania.

Adams wishes to bring a federal court suit against Tidewater Property in Adams' district of residence, the Western District of Pennsylvania. Because Tidewater Property maintains a permanent sales office in Pittsburgh, Tidewater Property possesses minimum contacts with the State of Pennsylvania, and the federal court in the Western District of Pennsylvania may exercise personal jurisdiction over Tidewater Property.[252] Adams may bring suit in the Western District of Pennsylvania.

Bernard dealt with the Sandpiper Property Corporation. Like Tidewater Property, Sandpiper Property is a Florida corporation with its principal place of business in Miami, Florida. However, unlike Tidewater Property, Sandpiper Property maintains no office in Pittsburgh. The Sandpiper Property office nearest to Bernard's home is located in Cleveland, Ohio. Because Sandpiper Property does not possess minimum contacts with Pennsylvania, a Western District of Pennsylvania court will lack personal jurisdiction over Sandpiper Property.[253] Bernard must bring suit in the Northern District of Ohio, or in Florida.

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252 Kuntz v. Windjammer "Barefoot" Cruises, Ltd., 573 F. Supp. 1277, 1288 (W.D. Pa. 1983) (court could assert personal jurisdiction over a British Virgin Islands corporation, which maintained an office in the Western District of Pennsylvania).

253 Johnson v. Summa Construction, 632 F. Supp. 122, 126 (E.D. Pa. 1985) (personal jurisdiction in Pennsylvania was not established by "[t]he maintenance of a toll-free number, the presence of brochures in one travel agency with no information about commissions or referrals, and a single mailing"); Bucks County Playhouse v. Bradshaw, 577 F. Supp. 1203, 1209 (E.D. Pa. 1983) (a series of telephone calls, a mailing, and a telegraph sent to Pennsylvania were insufficient to establish personal jurisdiction in Pennsylvania); George Trans. & Rigging Co. v. International Publications Equip. Corp., 425 F. Supp. 1351, 1354-55 (E.D. Pa. 1977).

Although these two suits are virtually identical, Adams and Bernard might receive very different rulings if a defendant seeks a section 1404 transfer to a federal court in Miami, Florida. Most district courts probably would refuse to transfer Adams' suit to the Southern District of Florida. Plaintiff Adams has brought suit in his state of residence, and the court probably would give deference to this choice of forum.

On the other hand, a court might well grant a Sandpiper Property motion to transfer a suit filed by Bernard from the Northern District of Ohio to Miami. Bernard has not brought suit in his state of residence, and thus his choice of a Northern District of Ohio court probably would receive little deference. If Sandpiper Property shows that many of its witnesses and documents are located in Florida, and that the Florida courts are not overburdened, Sandpiper Property might well succeed in transferring Bernard's suit to Florida.

These divergent results seem unfair. Adams could bring suit in the Western District of Pennsylvania only because of the fortuitous fact that Tidewater Property maintanined an office in Pennsylvania. Bernard could not bring suit in his state of residence because Sandpiper Property did not possess minimum contacts with the state. Bernard was no more engaged in "forum shopping" than Adams, and yet a court might transfer Bernard's suit to a distant district.

Not only may this focus on the plaintiff's home forum cause a court to order improvident transfers, this focus also might cause a court to deny meritorious transfer motions. Assume that instead of defending a suit brought by Adams, Tidewater Property must defend against a fraud suit brought by the National Trucking Corporation. National Trucking sought to purchase Florida property for an office complex, and dealt with Tidewater Property.

Like Adams, National Trucking is a Pennsylvania domiciliary. National Trucking is incorporated in Pennsylvania, and maintains its principal place of business in the state. Also like Adams, National Trucking files suit against Tidewater Property in the Western District of Pennsylvania.

But unlike Adams, National Trucking possesses extensive contacts with the State of Florida. Perhaps National Trucking maintains a permanent office in Miami. The National Trucking employees who negotiated the Florida land contract, and who would testify against Tidewater Property at a trial, work at this Florida office. All of National Trucking's relevant documents also

are located in Florida. Litigation of the National Trucking suit thus could prove more convenient in Florida, and a transfer to Florida would not prejudice plaintiff National Trucking. Nonetheless, a court might decline to transfer this case, because National Trucking has filed suit in its "home forum."

A focus on whether a plaintiff has brought suit in his home forum thus appears inappropriate. This focus neither provides a plaintiff with adequate protection against the hardship of an inappropriate transfer, nor insures that litigation will occur in the most convenient court.

B. The Applicable Law

Many decisions have viewed the applicable state law as relevant to a transfer motion.[254] If the substantive law of a foreign state governs a case, a court should consider transferring the case to a district court that sits in that foreign state.[255] On the other hand, if the substantive law of the state where the plaintiff has filed suit applies, a district court should hesitate to order a transfer.[256]

For example, in *Vaughn v. American Basketball Association*,[257] professional basketball player David Vaughn, Jr. brought suit against his former employer, the Virginia Squires Basketball Club of the American Basketball Association. Vaughn alleged that the Virginia Squires had failed to make salary payments required under Vaughn's $1.2 million employment contract.

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254 *See* Van Dusen v. Barrack, 376 U.S. 612, 645 (1964); Kitch, *supra* note 13, at 133. *See also* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). This factor is relevant only if a complaint alleges substantive state law claims. All federal courts are equally competent to interpret the United States Constitution and federal statutes. 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 43, § 3854, at 469.

255 *See, e.g.*, Van Dusen v. Barrack, 376 U.S. 612, 645 (1964) (reversing circuit court's refusal to transfer cases from the Eastern District of Pennsylvania to the District of Massachusetts); Security Sav. Bank v. Green Tree Acceptance, Inc., 703 F. Supp. 350, 354 (D.N.J. 1989) (finding the applicability of Minnesota law "to strongly weigh in favor of transfer"); Wallen v. Loving, 609 F. Supp. 159, 162 (N.D. Ill. 1985) (transferring case to Colorado, where suit "may involve a question of Colorado law").

256 Prudential Ins. Co. v. BMC Indus., Inc., 626 F. Supp. 652, 655 (S.D.N.Y. 1985) (declining to transfer case from the Southern District of New York to the District of Minnesota, where New York law applied); Omni Exploration, Inc. v. Graham Eng'g Corp., 562 F. Supp. 449, 456 (E.D. Pa. 1983) (court would not transfer case to Texas, where Pennsylvania law applied); Ronco, Inc. v. Plastics, Inc., 539 F. Supp. 391, 402 (N.D. Ill. 1982) (court would not transfer case to Texas, in part because Illinois law applied to the suit).

257 419 F. Supp. 1274 (S.D.N.Y. 1976).

The Virginia Squires responded that Vaughn himself had breached the employment contract. Police had arrested Vaughn after an auto chase, resulting in Vaughn's injury from police gunfire.[258] Vaughn's conduct allegedly breached a clause in his employment contract, requiring that Vaughn "conduct himself in accordance with the highest standards of morality."[259]

A Southern District of New York decision transferred Vaughn's suit to the Eastern District of Virginia. In support of this decision, the *Vaughn* court noted that Virginia law would apply to the employment contract, and that a Virginia federal judge should feel comfortable interpreting this law.[260] In determining whether Vaughn had failed to act within "the highest standards of morality," and thus had breached the contract, the *Vaughn* court stated that "a sensitivity not only to Virginia law, but to Virginia mores and customs might be a particularly valuable asset."[261]

Like all section 1404 factors, courts have disagreed on the importance of the applicable law. A number of opinions have denied section 1404 transfers, even though the law of a foreign state would govern the case.[262]

Determining transfer motions based on the applicable law seems plausible at first glance. District judges are presumed to be more familiar with the law of the state where they sit than with the law of foreign states. For this reason, so the argument goes, a case requiring the application of a particular state's law should proceed before a federal judge sitting in that state.[263]

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258 *Id.* at 1275.

259 *Id.* at 1276.

260 *Id.* at 1278.

261 *Id.*

262 *See, e.g.*, Turrett Steel Corp. v. Manuel Int'l, Inc., 612 F. Supp. 387, 390 (W.D. Pa. 1985) ("District courts regularly apply law of states other than the forum state."); Vassallo v. Niedermeyer, 495 F. Supp. 757, 760 (S.D.N.Y. 1980) ("The fact that the law of another jurisdiction governs the outcome of the case is a factor to be accorded little weight on a motion to transfer . . . ."); Lee v. Ohio Casualty Ins. Co., 445 F. Supp. 189, 195 (D. Del. 1978) ("probable application of Maryland law" was not "a decisive factor requiring transfer").

263 Kyle v. Days Inn of America, Inc., 550 F. Supp. 368, 370 (M.D. Pa. 1982) ("a federal court sitting in Georgia would be better prepared to fairly consider the nuances of Georgia tort law"); Higgins v. Washington Metro. Area Transit Auth., 507 F. Supp. 984, 987 (D.D.C. 1981) (transferring case to the Eastern District of Virginia, where the case raised "the issue of the plaintiff's capacity to bring suit under Virginia law, a question which a court sitting in Virginia is much better able to resolve").

Compare Coface v. Optique Du Monde, Ltd., 521 F. Supp. 500, 511 (S.D.N.Y. 1980) (court transfers case governed by New York law from New York to Illinois, writing that

But this seemingly plausible reasoning is actually of questionable validity. First, it is not clear that a federal district judge will possess much greater familiarity with the law of the state where she sits than with the law of a foreign state. Of course, a Texas district judge, who had practiced as a personal injury litigator in the state for twenty years before her appointment to the bench, will be more familiar with Texas tort law than a federal district judge in New York or California.

But federal district judges by no means are drawn exclusively from private practice. Recent federal district appointments have come from federal enforcement agencies, state administrative departments, or law school faculties.[264] Such individuals are unlikely to possess any special experience with a particular body of state law.

One might assert that even if a new federal district judge does not possess extensive experience with the law of the state where she sits, she will learn this law through hearing cases on the bench. This assumption also seems highly questionable.

In 1988, only about twenty-nine percent of the cases filed in the federal courts were diversity jurisdiction suits, in which adverse parties residing in different states contested state law claims.[265] Federal district judges will learn little about substantive state law when hearing suits brought under the United States Constitution or a federal statute.[266] Even where parties assert substantive state law claims, a federal court may need to apply the

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"the Illinois federal court undoubtedly has sufficient access to New York legal materials").

264 Consider a few relatively recent appointments to the federal district courts. For ten years before his appointment to the Northern District of Illinois, the Hon. James B. Zagel had worked in various state agencies, including the Illinois Department of State Police. *Confirmation Hearings on Federal Appointments, Part I, Before the Senate Judiciary Committee*, 100th Cong., 1st Sess. 132 (1987). The Hon. Wayne E. Alley had served as a Military Judge and as the Dean of the University of Oklahoma College of Law before his 1985 appointment to the Western District of Oklahoma. W. DORNETTE & R. CROSS, FEDERAL JUDICIARY ALMANAC 805 (1987). Before his appointment to the District of Columbia District Court, The Hon. Stanley Sporkin had held positions with several federal administrative agencies, and had served as General Counsel of the Central Intelligence Agency. *Id.* at 309-10.

265 Of the 239,634 cases filed in the federal courts in 1988, 68,224 were based on diversity jurisdiction. ANNUAL REPORT OF THE DIRECTOR, *supra* note 193, at 180. Federal courts also possess jurisdiction over cases where the United States is a plaintiff or a defendant. *See* 28 U.S.C. §§ 1345, 1346 (1988). Some of these cases involve claims based on substantive state law. *But see* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal law, rather than state law, governed suit brought by the United States to recover payment on a forged check).

266 *See* 28 U.S.C. § 1331 (1988) (providing for federal question jurisdiction).

law of a foreign state, rather than the law of the state where the federal court sits.[267] And if the substantive law of the state where the federal district court sits is applicable, a federal judge will not apply this law if a case is resolved on a procedural issue, such as a personal jurisdiction or improper venue argument.[268]

But even assuming each federal district judge possessed an expert's knowledge of the civil law in the state where he sat, transfer of a case still might complicate, rather than simplify, the application of state law.[269] Under a rule promulgated by the Supreme Court in *Van Dusen v. Barrack*,[270] "the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue."[271]

This rule was adopted to prevent defendants from using section 1404 in aid of forum shopping. The *Van Dusen* Court expressed concern that federal court defendants might seek a transfer to a different state solely because the substantive law of that state would prove more favorable.[272] Under the *Van Dusen* rule, a federal judge receiving a transferred case applies the conflict-of-law rules of the state where the plaintiff first brought suit to determine which State's law applies.[273]

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267 *See* Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496-98 (1941). *See also* Ferens v. John Deere Co., 110 S. Ct. 1274 (1990); Van Dusen v. Barrack, 376 U.S. 612, 639, 643-46 (1964).

268 Federal procedural rules typically govern all federal court cases, even those alleging state law claims. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965) (federal rule, rather than Massachusetts statute, determined proper methods for serving process in federal court diversity action); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (federal law, and not South Carolina state law, determined whether the parties would try a federal court suit before a judge or a jury).

269 *See, e.g.*, Masington, *supra* note 28, at 251.

270 376 U.S. 612 (1964).

271 *Id.* at 639. *Van Dusen* involved a defendant's transfer motion. The Supreme Court recently held that the *Van Dusen* rule also applies where the plaintiff has moved for a § 1404 transfer. Ferens v. John Deere Co., 110 S. Ct. 1274 (1990).

272 The *Van Dusen* court stated: "The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.'" 376 U.S. at 635-36 (citations omitted). *See also id.* at 639 ("A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.").

273 The *Van Dusen* choice-of-law rule is one of the few aspects of the § 1404 motion to transfer that has received regular scholarly examination. *See, e.g.*, Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960); Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); Note, *Choice of Law in Federal Court After Change of Venue*, 63 CORNELL L. REV. 149 (1977) [hereinafter cited as Note, *Choice of Law in Federal Court*]. This article does not assess the merits of the *Van Dusen* rule.

In some cases, a federal judge receiving a transferred case must spend relatively little time with a foreign state's law. Consider a case transferred from the Northern Destrict of California to the Northern District of Ohio. Under the *Van Dusen* rule, the Ohio judge must apply California conflicts of law principles. If California conflicts rules dictate that Ohio law applies to the suit, the Ohio district judge will work with the law of his home state until the suit has concluded.

But in other cases, a transfer only will complicate the applications of state law. After applying California conflicts rules, the Ohio judge may have concluded that Illinois law applied to the transferred case. The Ohio judge now must apply the laws of two foreign states—California conflicts law and Illinois substantive law. If this case had remainded in California, the California federal judge need only have applied Illinois substantive law.

The Fifth Circuit Court of Appeals decision in *James v. Bell Helicopter Co.*[274] illustrates the complex choice-of-law problems that might arise after a transfer. The *James* suit involved a mysterious helicopter crash near Salmon, Idaho. Plaintiffs Jerry Jamer, the helicopter pilot, and Rocky Mountain Helicopters, the helicopter owner, brought a products liablity and negligence suit against Defendant Bell Helicopter Company, which had sold the helicopter, and Defendant Borg-Warner Corporation, which had manufactured a clutch used in the helicopter.[275]

The *James* plaintiffs initially filed suit in California state court. The defendants removed the diversity case to a federal court in California,[276] which subsequently transferred the case to the Northern District of Texas.[277] The Texas district judge dismissed the plaintiffs' products liability claims, and a jury found in favor of both defendants on the plaintiffs' negligence claims.[278] The plaintiffs appealed, arguing that the district court should not have dismissed the plaintiffs' products liability claims.

Because a California court had transferred the *James* case to Texas, the *Van Dusen v. Barrack*[279] rule required the Texas federal court to apply California conlfict-of-law rules, to determine

274 715 F.2d 166 (5th Cir. 1983).
275 *Id.* at 168.
276 *See* 28 U.S.C. § 1441 (1988).
277 James v. Bell Helicopter Co., 715 F.2d 166, 168 (5th Cir. 1983).
278 *Id.* at 168-69.
279 376 U.S. 612 (1964).

which state's substantive law applied to the case.[280] The Fifth Circuit Court of Appeals thus sought to choose the correct body of state law by applying California's "governmental interest test," which required a review of "the interests of litigants and involved states."[281]

Applying this approach, the Fifth Circuit agreed with the district court that Texas law governed the plaintiffs' products liability claim against Bell Helicopter, the seller of the destroyed helicopter. The appellate panel reasoned that Texas, the residence of Defendant Bell Helicopter, had adopted a strong policy of allowing strict liability recovery only for personal injury, as opposed to the property damage alleged by the *James* plaintiffs. Utah, the state where Plaintiff Rocky Mountain resided, had developed no clear rule on this issue.[282] The Fifth Circuit thus affirmed the district court's dismissal of the products liability claim brought against Bell Helicopter.[283]

The circuit court next considered the plaintiffs' products liability claim against Defendant Borg-Warner, which had manufactured a clutch used in the destroyed helicopter. Because Borg-Warner maintained its principal place of business in Illinois, California's conflict-of-law rules dictated that Illinois law should govern the products liability claim brought against Borg-Warner. Applying Illinois law, the *James* court concluded that a plaintiff could bring a strict liability suit for "physical damage," such as the destruction of the helicopter.[284] Accordingly, the Fifth Circuit reversed the dismissal of the product liability claims brought against Borg-Warner.[285]

The transfer of the *James* case from California to Texas did not make the application of state law any easier. If the *James* case had remained in California, a California federal judge would have had to apply California conflict-of-law rules. The transfer of the case merely forced a Texas judge to apply the foreign conflict-of-law rules of California.[286] The court receiving a transferred case

280 James v. Bell Helicopter Co., 715 F.2d at 169.

281 *Id.* (quoting Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 161, 583 P.2d 721, 723, 148 Cal. Rptr. 867, 869 (1978)).

282 *Id.* at 170-72.

283 *Id.* at 172.

284 *Id.* at 173-74 (quoting Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 82, 435 N.E.2d 442, 449 (1982)). *See also id.* at 174 n.8.

285 *Id.* at 174.

286 *See also* McVicar v. Standard Insulations, Inc., 824 F.2d 920, 921 (11th Cir. 1987) (in a case transferred from Mississippi to Florida, Florida court must apply Mississippi

thus always must apply some foreign state law.[287] Court decisions asserting that a transfer will eliminate the need to apply a foreign state's law are mistaken.[288]

The application of state law may prove more difficult if a case is transferred, because it forces a judge to apply foreign conflict-of-law rules.[289] This conclusion does not indicate that district courts should reject all transfer motions. In cases where a foreign district contains a vast majority of the relevant witnesses and documents, the efficiency gained from litigation in the foreign district may outweigh the problems of applying a foreign state's conflicts law. But courts should not conclude that the application of state law necessarily will prove easier after a transfer.

C. Docket Congestion

Most courts have held that the relative docket congestion of different districts is relevant to a section 1404 transfer.[290] In

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conflicts-of-law rules); Consul Limited v. Solide Enters., Inc., 802 F.2d 1143, 1146 (9th Cir. 1986) (in consolidated cases, California conflicts-of-law principles would govern case filed and litigated in California, while North Carolina conflicts-of-law principes would govern case filed in North Carolina and transferred to California); Linnell v. Sloan, 636 F.2d 65, 66-67 (4th Cir. 1980) (where case had been transferred from the District of Columbia, a Virginia court was required to apply District of Columibia choice-of-law principles, which in turn required the court to apply Maryland substantive law); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967) (Illinois Controls Statue of Limitations defense, in a case transferred to Minnesota).

287 *See* Kitch, *supra* note 13, at 134 ("After *Barrack*, every transferee court will have to apply the conflicts laws of the transferor before it can arrive at the conclusion that the substantive law of its own state controls.").

288 A few court decisions have asserted that a transfer is unlikely to simplify state law interpretations. *See* Kendall U.S.A., Inc. v. Central Printing Co., 666 F. Supp. 1264, 1269 (N.D. Ind. 1987) ("Ohio law governs the substantive issues relating to the third-party complaint under Indiana's choice of law rules. That will contine to be true after transfer . . . ."); Peterson v. United States Steel Corp., 624 F. Supp. 44, 46 (N.D. Ill. 1985) ("[F]amiliarity with state law does not weigh heavily in consideration of a motion to transfer since a change of venue under § 1404(a) is to be 'but a change of courtrooms.'").

See also Baird v. Bell Helicopter Textron, 491 F. Supp. 1129, 1133 (N.D. Tex. 1980) ("By agreed order, the case was dismissed and refiled in this Court, a fortuitous circumstance given the choice of law complexities inherent in a transfer under 28 U.S.C. § 1404(a).").

289 *See* Ferens v. John Deere Co., 110 S. Ct. 1274, 1287 (1990) (Scalia, J., dissenting) (noting difficulty of applying a foreign state's choice-of-law rules "in an era when the diversity among the States in choice-of-law principles has become kaleidoscopic"); Kaufman, *supra* note 6, at 601; Marcus, *supra* note 11, at 682 (noting that a transfer "greatly complicates" choice-of-law problems).

290 *See, e.g.*, Parsons v. Chesapeake & Ohio R.R., 375 U.S. 71, 73 (1963); A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 445 (2d Cir. 1966); Fanin v. Jones, 229 F.2d 368, 369-70 (6th Cir. 1956) (per curiam); Stoltz v. Baker, 466 F. Supp. 24, 29

other words, statistics showing that the average case progresses more quickly in another court will support a transfer. Alternatively, statistics showing that the average case progresses more slowly in a proposed transferee district weigh against a transfer.[291]

Like the other factors relevant to a transfer motion, courts have diverged on the importance of docket congestion statistics.[292] Most courts agree that a lighter docket in another court does not, in and of itself, justify a transfer.[293] Beyond this basic proposition, courts have come to little agreement about the importance of relative docket congestion.

In some cases, courts have relied on a less congested docket as a basis for transferring a suit. In *Eichenholtz v. Brennan*,[294] plaintiff Paulette Eichenholtz brought both a class action and a shareholders' derivative suit in the Southern District of New York. The defendants moved to transfer this suit to the District of New Jersey. In transferring the case to New Jersey, the *Eichenholtz* court noted that while the Southern District of New York had experienced a 2.4% increase in cases pending between June 30, 1985 and June 30, 1986, during the same period the district of New Jersey had enjoyed a 0.8% decrease in cases pending.[295]

(M.D.N.C. 1978). *See also* Kaufman, *supra* note 6, at 606; Kitch, *supra* note 13, at 132 (relative docket congestion "is perhaps the most frequently discussed factor in the cases.").

291 *See, e.g.*, Mead Corp. v. Stuart Hall Co., 679 F. Supp. 1446, 1451-52 (S.D. Ohio 1987); American Argo v. United States Fidelity & Guar. Co., 590 F. Supp. 1002, 1003 (E.D. Pa. 1984).

292 *See* Masington, *supra* note 28, at 244 ("Often the *same* court will find docket congestion determinative in one case and immaterial in another, depending upon the facts").

293 *See, e.g.*, In re Scott, 709 F.2d 717, 721 (D.C. Cir. 1983) (reversing transfer of Freedom of Information Act case to the Northern District of Georgia); Eichenholtz v. Brennan, 677 F. Supp. 198, 202 (S.D.N.Y. 1988). *Cf.* Fanin v. Jones, 229 F.2d 368 (6th Cir.) (per curiam), *cert. denied*, 357 U.S. 938 (1956).

This basic proposition is intuitively plausible. If docket congestion was itself a sufficient reason to transfer a case, the district with the fewest filings per judge soon would be swamped with disputes centered all over the country. Similary, "courts in congested areas . . . would have to grant [a] transfer in nearly every case where it was sought." Masington, *supra* note 28, at 244 n.12.

294 677 F. Supp. 198 (S.D.N.Y. 1988).

295 *Id.* at 202. *See also* Solomon v. Continental Amer. Life Ins. Co., 472 F.2d 1043, 1047 (3d Cir. 1973) (upholding transfer, where "[t]he New Jersey district court had 353 pending cases per judge at the end of fiscal year 1972, while the Middle District of North Carolina had 177"); A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439, 445 (2d Cir. 1966) ("[T]he trial court was entitled to attribute weight to the large difference in docket crowding between the Eastern District of New York . . . and the Eastern District of Tennessee, Northern Division."); First Nat'l Bank of Minneapolis v. White, 420 F. Supp. 1331, 1337 (D. Minn. 1976) (transferring case from the District of Minnesota to

Plaintiffs also have relied on differences in docket congestion to defeat motions to transfer. In *AMF, Inc. v. Computer Automation, Inc.*,[296] plaintiff AMF, Inc. brought suit in the Southern District of Ohio. In declining to transfer the case to the Central District of California, the *AMF* court noted: "[T]he median time between filing and disposition by trial, of civil cases, was twenty-five months in the Southern District of Ohio, while in the Central District of California, the median time was thirty-one months."[297]

In other cases, however, courts have disregarded docket congestion arguments in deciding section 1404 motions. In *Hall v. Kittay*,[298] plaintiff Frank M. Hall brought a shareholders' derivative suit and class action in the District of Delaware. In transferring the case to the Southern District of New York, the *Hall* court gave little weight to the plaintiff's contention that docket conditions were worse in the New York district. Instead, the *Hall* court wrote: "[T]he mere possibility of reaching trial in a shorter space of time in Delaware (conjectural at most) does not justify the denial of a transfer motion which is otherwise called for . . . ."[299]

As an empirical matter, the difference in docket conditions between districts rarely will be sufficient to produce a significant effect on how rapidly a suit will proceed. If the District of Utah and the Middle District of North Carolina represented the two alternative courts that could hear a suit, the choice of forum might effect how quickly the case would be resolved. In 1988, the average civil case in the Middle District of North Carolina was resolved in about four months, while the average civil case in the District of Utah was concluded in about twenty-one months.[300]

However, such a disparity in court dockets is rare. In about seventy-one percent of the federal districts, the average case is resolved in between six and ten months.[301] In most cases, the time involved in sending a file to a transferee court, assigning the

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the District of Utah, where "this case can come to trial considerably sooner in Utah than in this district.").

296 532 F. Supp. 1335 (S.D. Ohio 1982).

297 *Id.* at 1346; *see also* National Super Spuds v. New York Mercantile Exch., 425 F. Supp. 665, 668 (S.D.N.Y. 1977).

298 396 F. Supp. 261 (D. Del. 1975).

299 *Id.* at 264 (citations omitted).

300 ANNUAL REPORT OF THE DIRECTOR, *supra* note 193, at 216-19.

301 In 1988, the median civil case was resolved in between 6 and 10 months in 67 of the 94 federal districts. ANNUAL REPORT OF THE DIRECTOR, *supra* note 196, at 216-19.

case to a new judge, and allowing the judge to familiarize herself with the case probably will outweigh any benefits gained from a less crowded calender.[302] Not surprisingly, many decisions have rejected arguments that one district will resolve a case more quickly than an alternative district.[303]

Even if greater disparities existed in docket conditions among the federal districts, it is unclear why such disparities should be relevant to a transfer motion. Section 1404 transfers could be viewed as a mechanism to equalize the judicial workload in different districts. But appointment of more judges to overburdened districts represents the obvious method for equalizing federal court dockets.[304] Attempting to aid overburdened districts by transferring one case at a time is similar to bailing out a sinking ship with an empty coffee can. If anything, reading and researching transfer motions, some of them frivolous, will impose more work on district judges in already overburdened courts.

A second rationale for considering relative court dockets is based on fairness to parties, rather than on equalizing judges' caseloads. Courts have justified transfers on the grounds that the parties will benefit from the more rapid case resolution occurring in a less congested court.[305] Such a quick resolution should prove particularly desirable for the plaintiff, the party who typically will oppose a defendant's section 1404 transfer motion. The plaintiff presumably will prefer a prompt award of damages or other relief.

But this assumption that a plaintiff will prefer a speedier result in a different district conflicts with the choice of forum actually made by the plaintiff. The plaintiff's counsel presumably

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302 Courts also face difficulties in assessing docket congestion arguments, because different decisions have relied on different statistics to determine docket congestion. *See* AMF, Inc. v. Computer Automation, Inc., 553 F. Supp. 1335, 1346 (S.D. Ohio 1982) (comparing statistics on the median period between the filing of a civil case and its disposition by trial); Neff Athletic Lettering Co. v. Walters, 524 F. Supp. 268, 274 (S.D. Ohio 1981) (comparing the number of cases per judge pending in two different districts); Stoltz v. Baker, 466 F. Supp. 24, 29 (M.D.N.C. 1978) (comparing a variety of statistics that might illustrate relative docket congestion).

303 *See, e.g.*, DeJesus v. National R.R. Passenger Corp., 725 F. Supp. 207, 209 (S.D.N.Y. 1989); Beverage Mktg. Corp. v. Emerald Coast Spring Water Co., 697 F. Supp. 767, 771 (S.D.N.Y. 1988) ("With all due respect to the Northern District of Florida, it is unlikely that any court bears as crushing a burden as does the Southern District of New York."); Eastern Scientific Mktg. v. Tekna-Seal, Inc., 696 F. Supp. 173, 179 n.12 (E.D. Va. 1988); Babbidge v. Apex Oil Co., 676 F. Supp. 517, 522 (S.D.N.Y. 1987); Austin v. Johns-Mansville Corp., 524 F. Supp. 1166, 1169 (E.D. Pa. 1981).

304 *See* Kitch, *supra* note 13, at 137.

305 Kaufman, *supra* note 6, at 606.

possessed at least some rough idea of the varying docket conditions in different courts. Nonetheless, the plaintiff decided to file suit in a relatively slow-moving court.

A plaintiff may possess several valid reasons for sacrificing a speedier resolution of his case. The plaintiff may believe that he can more easily gain the cooperation of important witnesses if his case goes to trial at the local courthouse, rather than hundreds of miles away. The plaintiff may have enjoyed a positive past experience or an exceptional working relationship with his attorney, who practices in the district where the plaintiff has filed suit. This attorney may feel more comfortable with the local rules and procedures in the district where he has filed suit. In short, for a court to inform a plaintiff that he actually will be better off litigating in a different forum, because that court may resolve the plaintiff's case more quickly, seems unreasonably paternalistic.

The transfer of a case to a less congested court is unlikely to result in any appreciable benefits to the federal court system. The fact that a foreign district resolves an average case more quickly does not mean that both parties to a suit will benefit from litigating in that district. In short, relative docket conditions should not effect transfer decisions.

D. Related Litigation Pending in a Different District

Courts have cited the pendency of related litigation in a different federal district as a favorite justification for a section 1404 transfer.[306] Like every other factor considered in motion to transfer analysis, different courts have placed vastly different measures of importance on the pendency of related litigation. While many courts have granted transfer motions based on the presence of related litigation in another court,[307] others have denied such motions.[308]

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306 *See, e.g.*, Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528-29 (5th Cir. 1988); Wyndham Assoc. v. Bintliff, 398 F.2d 614, 619 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); Marcus, *supra* note 11, at 716; Waggoner, *supra* note 13, at 72.

307 *See, e.g.*, Countryman v. Stein, Roe & Farnham, 681 F. Supp. 479, 484-85 (N.D. Ill. 1987) (transferring case to the Northern District of New York); Chrysler Capital Corp. v. Woehling, 663 F. Supp. 478, 483 (D. Del. 1987) ("[S]uits involving the same legal and factual issues should be decided in one court and not permitted to proceed in two different courts."); Berg v. First Amer. Bankshares, 576 F. Supp. 1239, 1243 (S.D.N.Y. 1983) (transferring case to the District of Columbia). *See also* Masington, *supra* note 28, at 245 (consolidation of related cases is "one of the strongest reasons for transfer because minimizing the number of trials directly serves the interest of justice").

308 *See, e.g.*, Mowtown Record Corp. v. Mary Jane Girls, Inc., 660 F. Supp. 174, 174

Like the other factors currently balanced in the section 1404 calculus, transferring a case to the site of related litigation initially seems plausible. A prior pending case may have familiarized a judge with a factual dispute and the relevant law. This judge presumably would resolve a transferred case more quickly and easily than a judge who had no previous experience with the contested factual or legal issues.[309] Such benefits were asserted by Justice Hugo L. Black in a frequently-cited Supreme Court opinion.[310]

If a transfer to a district hearing a related case conferred such obvious benefits, one must wonder why plaintiffs have opposed these motions. Presumably, a plaintiff bringing suit and wishing to collect a judgment will seek a quick path to such a

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(S.D.N.Y. 1987) (transfer denied, where "related" case in the Western District of New York was filed four months after the plaintiff's suit); International Brotherhood of Painters and Allied Trades Union v. Best Painting & Sandblasting Co., 621 F. Supp. 906, 908 (D.D.C. 1985) (declining to transfer case to the Southern District of Alabama, where related case was pending); General Battery Corp. v. TSS-Seedman's, Inc., 609 F. Supp. 488, 490 (E.D. Pa. 1985) (declining to transfer case to the Eastern District of New York).

Section 1404 is not the primary mechanism for consolidating complex litigation. Under § 1407 of the judicial code, a judicial panel on multidistrict litigation is authorized to transfer cases "involving one or more common questions of fact" to "any district for coordinated or consolidated pretrial proceedings." *See* Waggoner, *supra* note 13, at 74 ("The inability of section 1404 to deal with problems of multi-district litigation is hardly surprising, because the section was not designed for that purpose."). Where a mass disaster or an extensive securities fraud results in a large number of suits, the courts will consolidate these suits pursuant to § 1407, rather than § 1404. *See, e.g.*, In re Dow Chem. Co. Sarabond Prods. Liability Litig., 650 F. Supp. 187 (J.P.M.D.L. 1986) (consolidating in the District of Colorado 14 suits that alleged injuries from a toxic chemical); In re LTV Corp. Securities Litig., 470 F. Supp. 859 (J.P.M.D.L. 1979) (the Northern District of Texas was the most convenient forum for seven securities fraud suits alleging that a corporation had made material mistatements in reports and prospectuses). But courts have held that § 1407 only applies where a fairly large number of related suits are filed. *See, e.g.*, In re Scilia Di R. Biebow & Company Contract Litig., 490 F. Supp. 513, 515 (J.P.M.D.L. 1980) (refusing to order consolidation under § 1407, where only two related cases were pending in different districts); In re Magic Marker Securities Litigation, 470 F. Supp. 862, 865-66 (J.P.M.D.L. 1979) (same).

309 *See, e.g.*, Skyline Displays, Inc. v. Sweeney, 634 F. Supp. 746, 748 (D. Minn. 1986) ("It would be wasteful of the time and resources of both the courts and the parties to permit cases arising out of the same situation to proceed in both Minnesota and California."); Berg v. First Amer. Bankshares, 576 F. Supp. 1239, 1243 (S.D.N.Y. 1983); Sundance Leasing v. Bingham, 503 F. Supp. 139, 140 (N.D. Tex. 1980) ("Considerations of judicial economy and efficiency clearly support a policy of having substantially similar matters litigated before the same tribunal.").

310 Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy, and money that § 1404(a) was designed to prevent.").

judgment.[311] Yet plaintiffs typically have opposed motions to transfer based on the pendency of a related case.

Such plaintiff opposition suggests that some suits purportedly related to a pending case in fact have little in common with the other case.[312] In such situations, the plaintiff and the courts will receive no benefit from a transfer, because the judge receiving the transferred case will have no more knowledge of the relevant facts and law than the judge who initially transferred the case.[313] The sole party benefitting from the transfer is the defendant, who has succeeded in moving the case out of the forum chosen by the plaintiff.

The above analysis suggests that courts should examine the similarities of pending cases thoroughly before transferring a case to a district that is hearing a case described by the defendant as "related." But such a thorough examination, involving extensive briefing and perhaps hearing, would conflict with the convenience and expediency that should accompany a section 1404 transfer.[314]

A court faced with a transfer motion based on related litigation must choose between two unattractive alternatives. If a court simply accepts the defendant's transfer argument because a relat-

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311 On the benefits that a defendant receives from litigation delay, *see supra* text accompanying notes 116-27.

312 *See, e.g.*, Rouse Woodstock, Inc. v. Surety Federal Savs. & Loan Ass'n, 630 F. Supp. 1004, 1013-14 (N.D. Ill. 1986) (declining to transfer case to North Carolina, where action pending in North Carolina involved different factual and legal issues); Mead Data Cent., Inc. v. West Publishing Co., 679 F. Supp. 1455, 1464 (S.D. Ohio 1987) (declining to transfer suit where "the questions of law, fact, and evidence raised by the two cases are dissimilar"); Fidelity & Deposit Co. of Maryland v. Southern Utils., Inc., 524 F. Supp. 692, 694 (M.D. Ga. 1981) (denying motion to transfer case to Missouri, "as the instant action involves two claims not subject to resolution in the Missouri suit"); Payne v. AHFI Netherlands, B.V., 482 F. Supp. 1158, 1165 (N.D. Ill. 1980) (refusing to transfer case to California district hearing "related" suit, where the suits "are not as related as they may at first glance have appeared").

313 In addition, a "related" suit filed in a different district probably would be governed by a different body of substantive law than the suit that a defendant seeks to transfer. *See* Waggoner, *supra* note 13, at 74. *See also supra* text accompanying notes 268-88.

314 *See* Ferens v. John Deere Co., 110 S. Ct. 1274, 1282 (1990) (courts should not adopt a method of deciding transfers which "would turn what is supposed to be a statute for convenience of the courts into one expending extensive judicial time and resources"); Rouse Woodstock, Inc. v. Surety Fed. Savs. & Loan Ass'n, 630 F. Supp. 1004, 1011 (N.D. Ill. 1986) ("An evidentiary hearing on such potentially outcome-determinative questions seems inappropriate merely to place venue.").

One article notes some suggestions that prior to a transfer decision, "a hearing is required by due process of law." Kitch, *supra* note 13, at 136. The article concludes: "The absurdity of this procedure needs no comment." *Id.*

ed case is pending, the court probably will grant too many transfer motions, to the possible prejudice of plaintiffs. On the other hand, if the court attempts to determine whether the pending case cited by the defendant is indeed similar to the suit that the defendant seeks to transfer, the process will involve unacceptable expense and delay for both parties.

But even if courts instantly could determine the degree of similarity between two suits, a court still should not transfer a suit simply because a related case was pending in a foreign district. If the similarity between two cases automatically justified a transfer, a defendant who faced frequent suits arising out of similar facts could transfer the plaintiff's suit to any district where the defendant preferred to litigate. Such a result, however, would conflict with a long tradition that allows the plaintiff, and not the defendant, to choose where litigation should proceed.[315]

Consider a hypothetical problem. The Thornton Automobile Corporation is incorporated in the hypothetical state of Jefferson, and maintains its principal place of business within that state. Like any automobile manufacturer, Thornton Automobile each year defends a large number of products liability suits based on certain alleged mechanical defects, such as faulty brakes or steering mechanisms.

Because Thornton Automobile sells its cars throughout the country, Thornton Automobile faces suit in several different federal districts, as well as in the Jefferson federal court.[316] Thornton Automobile would prefer to defend all these suits in its home state of Jefferson. Thornton Automobile is well acquainted with the Jefferson federal courts and their procedures. Juries in Jefferson are thought to be sympathetic to automobile manufacturers, because so many of the state's residents work in the automobile industry.

Now assume that a Northern District of California products liability suit names Thornton Automobile as the defendant, alleging that Thornton Automobile placed defective brakes in one of its cars. Thornton Automobile faces a similar suit alleging a brake system defect in the District of Jefferson federal court. Thornton

315 *See infra* text accompanying notes 325-29.

316 For diversity jurisdiction purposes, Thornton Automobile would be a citizen of the State of Jefferson. 28 U.S.C. § 1332(c)(1) (1988). Where a citizen of a state other than Jefferson brought suit against Thornton Automobile, and the suit alleged an "amount in controversy" in excess of $50,000, this plaintiff could bring his suit in federal court. *See* 28 U.S.C. § 1332(a) (1988).

Automobile brings a motion to transfer the California suit to Jefferson, where the related suit is pending. The allegations of the California and Jefferson suits indeed are very similar, and the Northern District of California grants Thornton Automobile's transfer motion.

A second plaintiff now brings a suit against Thornton Automobile in the Northern District of Illinois. This Illinois suit also alleges a brake system defect. Thornton Automobile again moves to transfer, and now cites the pendency of the two related suits in the District of Jefferson—the suit filed in Jefferson, and the suit transferred from California. Given the pendency of not one, but two related suits in a foreign district, the Northern District of Illinois transfers this second suit to the District of Jefferson.

The logical conclusion of such repreated transfers is that Thornton Automobile will litigate brake defect suits only in the District of Jefferson, where it is domiciled. But such a result conflicts with the Supreme Court's personal jurisdiction decisions, which explicitly have repudiated a rule allowing suit only in the defendant's state of domicile.[317]

Such a result also seems unfair. Thornton Automobile does business nationwide, and presumably will face relatively little difficulty in litigating outside of its district of domicile. On the other hand, the plaintiffs who have brought suit against Thornton Automobile may have no connections with the state of Jefferson, and may face serious prejudice if a court transfers their cases to Jefferson.

Deciding motions to transfer on the basis of a "related" suit pending in a foreign court seems neither feasible nor appropriate. Like the other factors discussed above, this factor should have little bearing on transfer decisions.

E. Motions to Transfer, Ad Hoc Balancing and Personal Jurisdiction: A Summary

Part III has reviewed the multi-factor, case-by-case balancing employed in section 1404 transfer decisions. This Part also has reviewed four factors considered by courts deciding transfer motions: (1) the plaintiff's suit in his home forum; (2) the applicable law; (3) the relative docket congestion; and (4) the presence of related litigation pending in a different district.

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317 *See infra* text accompanying notes 325-29.

This Part has concluded that these factors actually demonstrate little about the relative convenience of different districts. But even if each of these factors were relevant to a convenience determination, the multi-factor, case-specific balancing used to decide transfer motions still would be inappropriate.

First, the use of this multi-factor test results in a bias against parties lacking in resources or inexperienced in federal court litigation. Because courts decide transfers on the basis of so many different factors, parties must file lengthy transfer briefs that include complex arguments.[318] The regular federal court practitioner will know that statistics on the docket conditions in different districts appear in the *Annual Report of the Director of the Administrative Office of the United States Courts*.[319] A state court personal injury litigator, who appears in federal court only in a rare diversity case,[320] may be unfamiliar with this volume.

Similarly, a well-financed litigant may willingly pay an associate at a large law firm to spend hours developing complex choice-of-law arguments that support or disfavor a transfer. A litigant of more humble means may be unable to finance a response to such elaborate arguments.[321]

In short, while Congress intended section 1404 to promote convenient and efficient litigation, the current multi-factor balancing approach insures that transfer litigation will be neither quick nor inexpensive.[322] Instead, the parties may engage in expensive and time-consuming "satellite litigation" on the proper forum for a suit before addressing the merits of their dispute.[323]

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318 *See* Kaufman, *supra* note 6, at 607 (noting the "voluminous affidavits presented" in transfer litigation).

319 ANNUAL REPORT OF THE DIRECTOR, *supra* note 193, at 216-19.

320 Federal courts possess subject matter jurisdiction over state law claims—"diversity jurisdiction"—where the adverse parties are citizens of different states. 28 U.S.C. § 1332 (1988).

321 One commentator suggests that many rules, both procedural and substantive, result in a similar bias. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 124 (1974) ("the rules are sufficiently complex and problematic . . . that differences in the quantity and quality of legal services will affect capacity to derive advantages from the rules").

322 *See* Kitch, *supra* note 13, at 101 ("Section 1404(a) rulings have become one of the battery of motions by which a defendant can introduce matters peripheral to the merits and postpone the day of trial.").

323 The term "satellite litigation" typically describes motions to sanction attorneys. Such motions have little relationship to the underlying dispute that resulted in the allegedly improper attorney conduct. *See, e.g.*, Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 CATH. U. L. REV. 587, 606-07 (1987); Scwharzer, *supra* note 128, at 1017-18. The term seems equally applicable to transfer litigation, which also has little

Also, as discussed above, the case-by-case balancing employed to decide transfer motions results in uncertainty. Parties cannot predict whether a court will transfer any particular case. Such uncertainty is inherent in the use of an *ad hoc* balancing test, which weighs an extensive list of factors on a case-by-case basis.[324] But such uncertainty is particularly inappropriate in deciding the proper forum for a civil suit.[325]

Traditionally, the plaintiff bringing a civil suit has enjoyed broad lattitude in determining where to file his action.[326] The Court long ago repudiated its once restrictive reading of personal jurisdiction,[327] and adopted the modern rule that a defendant may be subject to suit in any district where the defendant possesses "minimum contacts."[328] Because a defendant sued outside of his state of residence may take advantage of modern transportation and communication, the Court found no justification for a strict limitation on a plaintiff's choice of forum.[329] But given the uncertainty accompanying section 1404 transfers, the "minimum contacts" standard may provide federal court plaintiffs with a significant choice of forums only in theory, and not in practice.[330]

Consider a plaintiff who seeks a speedy resolution of his case against a corporate defendant. The plaintiff wishes to file suit in a particular district well-removed from the defendant's principal place of business. The defendant's activities in the plaintiff's dis-

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relationship with the underlying dispute between two parties.

324 *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW 1055-56 (11th ed. 1985); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 978-80 (1987).

325 *See* Kaufman, *supra* note 6, at 608.

326 326Ely, *The Irrepresible Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974); Marcus, *supra* note 11, at 678 (noting "the presumed legislative intent behind section 1404(a) to preserve the plaintiff's 'venue privilege' to shop for favorable state law"); Seidelson, *supra* note 3, at 85 ("It is appropriate to presume, at least *in limine*, that plaintiff is the wronged party and defendant the wrongdoer. If one must bear the inconvenience of a foreign forum, therefore, it should be the defendant.").

But cf. Stein, *supra* note 3, at 844-45 (favoring "elimination of the deference accorded a plaintiff's choice of forum").

327 Pennoyer v. Neff, 95 U.S. 714, 722-23 (1877).

328 The "minimum contacts" test was adopted in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09 (1987).

329 *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980); Hanson v. Deckla, 357 U.S. 235, 250-51 (1958).

330 *Cf.* Stein, *supra* note 3, at 785 (criticizing the "crazy quilt of ad hoc, capricious, and inconsistent decisions" that have developed under the doctrine of forum non conveniens).

trict of choice satisfy the "minimum contacts" required for personal jurisdiction.

But if the plaintiff files suit in his district of choice, the defendant may move for a transfer to the district where its principal place of business is located. The plaintiff has no certainty of defeating such a motion. Even if a district judge eventually denies the transfer motion, the plaintiff will suffer the expense and delay that accompanies transfer litigation.

The plaintiff is certain to avoid such expense and delay only by filing suit where the defendant maintains its principal place of business. Only in this situation will a defendant be unable to file a transfer motion asserting that an alternative district is more convenient.

The current method of deciding transfer motions stands the Supreme Court's law of personal jurisdiction on its head. The Court purportedly has authorized a suit in any forum where a defendant possesses "minimum contacts."[331] But unless a plaintiff can afford the time and expense of a section 1404 transfer dispute, the plaintiff may feel compelled to file suit in the defendant's "home forum." The asserted broad right of a plaintiff to choose where her suit will proceed thus exists only in theory.

Standards that would result in consistent and predictable transfer decisions are sorely needed. If clear standards delineated when courts should grant a section 1404 motion, a plaintiff often could file suit in his district of preference without fearing an eventual transfer to a distant court. Because more specific standards would render certain transfer motions clearly unmeritorious, civil defendants could not seek delay by filing transfer motions as a matter of course. The reduction in transfer motions would reduce the litigation expenses faced by civil parties and the workload of the federal courts.

Part IV of this Article suggests one simplified and more predictable approach for resolving section 1404 motions.

IV. AN ALTERNATIVE APPROACH FOR RESOLVING MOTIONS TO TRANSFER

The ad hoc balancing currently used to decide section 1404 transfer motions is unsatisfactory. This nebulous balancing has resulted in conflicting decisions, and has prompted an excessive

331 Of course, the federal court plaintiff also must establish that she has filed suit in a proper venue. *See* 28 U.S.C. §§ 1391-1403 (1988).

filing of unfounded transfer motions. Courts have transferred cases far from the district where the plaintiff initially filed suit, despite apparent prejudice to the plaintiff. The section 1404 transfer is returning the federal courts to the restrictive notions of a proper forum seemingly repudiated in the Supreme Court's personal jurisdiciton opinions.

The concluding Section of this Article suggests a simple, straightforward test to replace the vague balancing test currently employed by the federal courts. Under this proposed test:

(1) a court would determine whether to transfer a case solely by comparing the number of relevant witnesses and documents located in or near each of two alternative districts;

(2) the defendant moving for a transfer would bear a clear burden of demonstrating that an alternative district will contain more of the relevant witnesses and documents;

(3) the federal courts could transfer a case only once;

(4) a district court could transfer a case only to another district where *the plaintiff* possessed minimum contacts; and

(5) courts would recognize an exception for cases involving forum selection clauses. Where a valid and relevant forum selection clause specified an alternative forum, courts would be required to transfer the case to the forum specified in the clause.

The following discussion explores each part of this test, and explains how the test would yield different results from the approach currently used to decide section 1404 motions.

A. Elements of the Test

1. The Proximity of Alternate Courts to Documents and Witnesses

Under the proposed test, courts would consider only a single factor in determining whether to transfer a case—the proximity of alternative forums to witnesses and documents.[332] This factor already has received significant emphasis in a number of transfer decisions.[333]

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332 In cases where a valid forum selection clause was applicable, a court automatically would transfer a case to the forum specified in that clause. The court would not decide these cases based on the location of relevant witnesses and documents. *See infra* text accompanying notes 353-76.

333 *See, e.g.*, Pennwalt Corp. v. Purex Indus., Inc., 659 F. Supp. 287, 291 (D. Del. 1986) ("The availability of witnesses . . . is in the context of this case the most crucial factor in deciding this motion to transfer."); American Standard, Inc. v. Bendix Corp., 487 F. Supp. 254, 262 (W.D. Mo. 1980) ("The most important factor in passing on a

Litigating a case in a district that contains most of the relevant witnesses and documents will prove convenient for at least two reasons. First, during discovery, both parties may seek rulings on their right to inspect specific documents, or their right to require a witness to answer specific questions during a deposition. If the court hearing the case is located near the site of a document review or deposition, obtaining a discovery ruling should prove easier than if the relevant court is located across the country.[334]

Second, witnesses testifying at trial will save travel time and expense.[335] If a case involves voluminous documentary evidence, the parties will also save the cost of transporting these documents from a distant office or warehouse.[336]

A district court thus will prove convenient for litigation if most witnesses and documents can be found nearby. If the relevant documents and witnesses are not located within or near a district, that court will not provide a convenient site for litigation.

One might object that basing transfer decisions solely on the location of relevant documents and witnesses will prove overly simplistic. Other factors, such as an extreme disparity in the docket congeston of two courts, might conceivably be relevant in some cases.[337] But a continued reliance on the ad hoc balancing of multiple factors will be accompanied by a continued lack of predictability in transfer decisions, together with excessive transfer litigation.

Basing transfer decisions solely on the location of relevant documents and witnesses would have several positive effects on

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motion to transfer under § 1404(a) is the convenience of witnesses."); Masington, *supra* note 28, at 242.

334 *See* Zurich Ins. Co. v. Raymark Indus., Inc., 672 F. Supp. 1102, 1103 (N.D. Ill. 1987); Supco Automotive Parts v. Triangle Auto Spring Co., 538 F. Supp. 1187, 1193 (E.D. Pa. 1982).

335 *See, e.g.*, Cunnigham v. Cunningham, 477 F. Supp. 632, 636 (N.D. Ill. 1979) (transferring case to the Western District of Michigan); McGuire v. Singer Co., 441 F. Supp. 210, 214 (D.V.I. 1977) (transferring part of the case to the Southern District of New York, where "a transfer to said forum would decrease the travelling and lodging expenses of all prospective witnesses").

336 *See* Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 953 (9th Cir. 1968) (district court should have transferred case, where a trial in Hawaii would require the defendants to ship "up to one thousand file drawers of records"); Oudes v. Block, 516 F. Supp. 13, 15 (D.D.C. 1981) (transferring case to the Northern District of West Virginia, where relevant documents were "quite voluminous and located entirely in West Virginia").

337 *But cf. supra* text accompanying notes 289-304 (questioning whether relative docket conditions should be relevant to a motion to transfer).

transfer litigation. Defendants would make fewer transfer motions. Where a plaintiff brought suit in a district that contained the majority of witnesses or documents, a transfer would not be possible.

Litigation of transfer motions would involve a much simpler process. Parties would no longer prepare lengthy and complex briefs discussing a long list of factors. Instead, the parties would only discuss the location of relevant witnesses and documents.[338]

Basing transfer decisions solely on the location of the documents and witnesses also would promote consistent district court decisions. Because the district courts would resolve transfer motions after reviewing far fewer factors than under the current multi-factor balancing approach, these courts could achieve greater consistency.

Finally, under the suggested approach, meaningful appellate review of transfer decisions would be facilitated. District courts no longer would decide section 1404 motions after a vague balancing of numerous factors. Because a narrower set of criteria would be revelant to a transfer, appellate courts could identify instances of reversible error.

2. Burden on the Defendant

Under the suggested approach, the defendant seeking a transfer would bear a clear burden of demonstrating the advantages of an alternative district. Some cases have held that the defendant already possesses such a burden. These decisions have declined to transfer a case when the merits of alternative districts are "in equipoise."[339] But other decisions have granted transfer motions even though the defendant has made only a minimal showing that a different district would prove more convenient than the court chosen by the plaintiff.[340]

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338 Under this suggested approach, parties could bring or oppose motions to transfer in more limited circumstances. Courts thus could conclude that certain transfer motions were frivolous, and could impose rule 11 sanctions under appropriate circumstances. *See also supra* text accompanying notes 128-34 (describing the current disinclination of courts to impose rule 11 sanctions for frivolous transfer motions).

339 Ayers v. Arabian American Oil Corp., 571 F. Supp. 707, 709 (S.D.N.Y. 1983) (refusing to transfer case from the Southern District of New York to the Southern District of Texas); GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 438 F. Supp. 208, 211 (D. Del. 1977) (motion to transfer case to the District of Columbia denied). *See also* Sollinger v. Nasco Int'l, Inc., 655 F. Supp. 1385, 1390 (D. Vt. 1987) ("Absent a clear and convincing showing that the balance of convenience strongly favors an alternate forum, discretionary transfers are not favored.").

340 *See, e.g.*, Environmental Serv., Inc. v. Bell Lumber & Pole Co., 607 F. Supp. 851,

Placing a clear burden on the defendant would limit transfer motions to cases where the forum chosen by a plaintiff could result in serious prejudice to the moving defendant. Such a rule also would follow from the general civil litigation principle that a moving party bears the burden of establishing that a court should grant her motion.[341]

Finally, as discussed above, the transfer of any case inherently will cause both parties to suffer immediate expense and delay.[342] Because a transfer always will involve such costs, courts should require a moving defendant to make a persuasive argument as to the advantages of another district.

3. Only One Transfer of Any Case Allowed

Under the suggested approach, the federal courts could transfer a case only once. After a single transfer had occurred, the district judge receiving the case would see the litigation through to its conclusion, even if her court proved to be a relatively poor site for the suit.

Allowing only one transfer of any case would eliminate the problem of multiple transfers, where judges shuffle a case from one courthouse to another.[343] Such repeated examinations of a transfer decision are inappropriate in a federal system beset by delay and backlog, judicial ping-pong weakens the integrity of the federal courts.

All members of the federal judiciary possess the competency to hear any case, even when an errant transfer has brought a case to an inconvenient forum. Because each transfer motion will cause parties to suffer expense and delay, multiple transfers are inconsistent with the convenience that section 1404 was designed to promote. If the courts cannot locate the optimal site for litigation without several transfer rulings, the game is simply not worth the candle.

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854 (N.D. Ill. 1984) (transferring case to Minnesota, where "the convenience of the parties is neutral"); Neff Athletic Lettering Co. v. Walters, 524 F. Supp. 268, 272 (S.D. Ohio 1981) (transferring case to New Hampshire where "the question is a relatively close one").

341 Celotex Corp. v. Catrett 477 U.S. 317, 322-23, 325 (1986) (the party moving for summary judgment bears the burden of demonstrating the basis for the motion); Tally Ho, Inc. v. Coast Community College Dist., 889 F.2d 1018, 1022 (11th Cir. 1989) (the party moving for a preliminary injunction bears the burden of proof).

342 *See supra* text accompanying notes 45-46.

343 *See supra* text accompanying notes 199-228.

4. The Plaintiff Must Possess Minimum Contacts With the District Receiving a Transferred Case

The law of personal jurisdiction allows a plaintiff to bring suit against a defendant only in a state with which the defendant possesses "minimum contacts."[344] Under the current interpretation of section 1404, however, a court conceivably may transfer a case to any district—even a district with which the plaintiff possesses no contacts.[345] Where a significant distance separates a transferee court from the plaintiff's residence, a transfer may cause the plaintiff to suffer serious prejudice.

To eliminate this anomaly, district courts should possess authority to transfer cases only to a state with which the *plaintiff* possesses minimum contacts.[346] This limitation would replace the longstanding *Hoffman v. Blaski*[347] rule, which precludes any transfer to a district that is an improper venue, or that lacks personal jurisdiction over a defendant.[348]

As discussed above, courts have developed the concepts of venue and personal jurisdiction primarily to protect the civil defendant.[349] Where a defendant voluntarily moves to transfer the case, the defendant does not need the safeguards afforded by the venue and personal jurisdiction requirements.[350] Instead, it is the plaintiff who needs protection against litigating in a forum with which he lacks any contacts.[351]

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344 *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09 (1987); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

345 Waggoner, *supra* note 13, at 77.

346 Professor Michael J. Waggoner has suggested a very similar proposal:

> This article proposes a third interpretation of the phrase 'where [the action] might have been brought.' That phrase, this article suggests, refers to any district where the party seeking transfer might have brought the action . . . . [Where the defendant has filed a section 1404 motion,] [t]ransfers would be authorized to districts in which personal jurisdiction and venue would have been satisfied for a hypothetical action on the same subject matter brought by the true defendant against the true plaintiff.

Waggoner, *supra* note 13, at 75 (first alteration in original).

347 363 U.S. 335 (1960).

348 *See supra* text accompanhing notes 79-106.

349 *See supra* text accompanying notes 104-05.

350 Retention of the *Hoffman* rule seems appropriate in the relatively unusual case where a plaintiff moves for a § 1404 transfer. *See, e.g.*, Ferens v. John Deere Co., 110 S. Ct. 1274 (1990). As discussed above, the issues raised by a plaintiff's transfer motion are beyond the scope of this article.

351 Decisions traditionally have employed the "minimum contacts" standard in determining a court's authority to exercise personal jurisdiction over a defendant. Minimum

The suggested approach would eliminate the inconsistent and confusing rules on the proper weight that a plaintiff's choice of forum should receive in transfer analysis. If a plaintiff has conducted no activity outside the district where he brought suit, then a federal court could not transfer the suit. On the other hand, where a plaintiff conducts extensive business throughout the United States, the plaintiff's decision to file suit in his "home forum" should in no way preclude a transfer.[352]

This suggested approach also would result in a symmetry between the law of personal jurisdiction and the law governing section 1404 transfers. Under the law of personal jurisdiction, a defendant cannot be required to defend a suit unless he possesses minimum contacts with the forum state.[353] Under the approach suggested in this article, a plaintiff would not be required to prosecute a suit transferred to a distant state, unless the plaintiff similarly possesses minimum contacts with that state.

5. The Forum Selection Clause Exception

In some cases, the parties have previously agreed to litigate certain disputes in a predetermined forum. Courts have referred to such a contractual agreement as a "forum selection clause." A plaintiff sometimes will bring suit outside of the court specified in the forum selection clause. The approach advocated in this article would require a court, on the motion of a defendant, to transfer such a case to the court specified in a relevant and enforceable forum selection clause.

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contacts analysis may prove useful in confronting a variety of issues that focus on the relationship of an individual or a dispute to a geographical unit. *See, e.g.*, Wasserman, *supra* note 192, at 138-42 (minimum contacts analysis would advance proper determinations of state subpoena power over non-resident witnesses).

352 Some cases have considered the prejudice to a plaintiff that will result from a transfer. *See, e.g.*, Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528 (5th Cir. 1988) ("This case is not being consigned to the wastelands of Siberia or some remote, distant area of the Continental United States."); Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 148 (10th Cir. 1967) (affirming district court denial of defendants' transfer motion, where a transfer would have forced the plaintiff "to travel nearly across the continent to pursue his litigation").

Concerns that a transfer may prejudice a plaintiff are appropriate. *See supra* text accompanying notes 235-52. But unlike the minimum contacts requirement proposed here, current decisions provide no certain protection to a plaintiff opposing a transfer motion. In addition, some decisions largely have failed to consider possible plaintiff prejudice resulting from a transfer. *See supra* text accompanying notes 178-98.

353 *See supra* text accompanying notes 328-332.

To date, courts have treated motions to transfer that rely on a forum selection clause much like any other transfer motion. Courts have described the presence of a forum selection clause as just one of many relevant factors.[354] Judges have reached very different conclusions on the importance of a forum selection clause.[355] Some courts have relied heavily on such a clause in granting a motion to transfer.[356] Other courts have denied motions to transfer, despite the presence of a forum selection clause.[357]

The Supreme Court recently approved this case-by-case approach to forum selection clauses in *Stewart Organization, Inc. v. Ricoh Corp.*[358] Plaintiff Stewart Organization brought suit against Defendant Ricoh, alleging breach of a contract that obligated Stewart Organization to sell Ricoh's products. This contract contained a forum selection clause, which provided that a party must bring any suit arising out of the contract in Manhattan.[359]

Stewart Organization, an Alabama Corporation, instead brought a diversity suit against Ricoh in the Northern District of Alabama. Defendant Ricoh moved to transfer the suit to the

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354 *See, e.g.*, Red Bull Assoc. v. Best Western Int'l, Inc., 862 F.2d 963, 967 (2d Cir. 1988); Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757-58 (3d Cir. 1973); Rouse Woodstock, Inc. v. Surety Fed. Sav. & Loan Ass'n., 630 F. Supp. 1004, 1008 (N.D. Ill. 1986).

355 *Compare* Plum Tree, Inc. v. Stockment, 488 F.2d 754, 758 (3d Cir. 1973) ("Such an agreement [to a forum selection clause] does not obviate the need for an analysis of the factors set forth in § 1404(a) and does not necessarily preclude the granting of the motion to transfer.") *with* Richardson Greenshields Sec., Inc. v. Metz, 566 F. Supp. 131, 134 (S.D.N.Y. 1983) ("the forum-selection clause is determinative as to the convenience of the parties").

356 *See, e.g.*, Nascone v. Spudnuts, Inc., 735 F.2d 763, 773-74 (3d Cir. 1984) (affirming district court's transfer of case from Pennsylvania to Utah, which relied in part on a forum selection clause); In re Firemen's Fund Ins. Co., 588 F.2d 93, 95 (5th Cir. 1979) ("Where the parties have by contract selected a forum, it is incumbent upon the party resisting to establish that the choice was unreasonable, unfair, or unjust."); Advent Elec., Inc. v. Samsung Semiconductor, Inc. 709 F. Supp. 843, 846-47 (N.D. Ill. 1989) (court transfers case from Illinois to California, relying heavily on a forum selection clause). *See also* Sunshine Beauty Supplies, Inc. v. United States District Court, 872 F.2d 310, 311-12 (9th Cir. 1989).

357 Red Bull Assoc. v. Best Western Int'l, Inc., 862 F.2d 963, 967 (2d Cir. 1988) (affirming district judge's refusal to transfer case from the Southern District of New York to the District of Arizona); Fibra-Streel, Inc. v. Astoria Indus., Inc., 708 F. Supp. 255, 257 (E.D. Mo. 1989) ("The Court cannot say that the forum selection clause, without more, weighs heavily enough to tip the scales away from plaintiff's choice of forum."); Galli v. Travelhost, Inc., 603 F. Supp. 1260, 1262-64 (D. Nev. 1985) (denying motion to transfer case to Texas, although the parties had agreed to a forum selection clause specifying Texas as the proper venue for any suit).

358 487 U.S. 22 (1988). *See also supra* notes 68-77 and accompanying text.

359 *Id.* at 24.

Southern District of New York, relying heavily on the forum selection clause. The district court denied the transfer motion,[360] and Ricoh appealed.[361]

The *Stewart Organization* decision did not explicitly rule on whether the district court erred in denying the motion to transfer despite the presence of the forum selection clause.[362] However, some Court language seemed to approve the case-by-case consideration of forum selection clauses embraced by lower court transfer decisions.[363]

The authority of courts to deny a transfer motion despite the presence of a forum selection clause conflicts with the law of personal jurisdiction. Where an applicable forum selection clause is raised in a motion to dismiss for lack of personal jurisdiction, the Supreme Court has held that only a court specified in the forum clause may resolve the dispute. This rule constitutes an exception to modern personal jurisdiction principles, which typically authorize resolution of a dispute in any forum where a defendant possesses "minimum contacts."[364]

The Court announced this limiting effect of forum selection clauses in *The Bremen v. Zapata Co.*[365] In *Bremen*, an admiralty action arose out of an agreement by defendant Unterwesser to tow Plaintiff Zapata's barge, the Chaparral. The towing contract between Zapata, an American corporation, and Unterwesser, a German corporation, included a forum selection clause. The

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360 *Id.*

361 The district court certified the case for an immediate appeal after its transfer ruling, pursuant to 28 U.S.C. § 1292(b) (1988). Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988). As discussed above, such district court certification of transfer decisions rarely occurs. *See supra* text accompanying notes 152-58.

362 Instead, the Court remanded the case to the district court for a reconsideration of the district judge's transfer decision, in light of the majority's other rulings. *Stewart Organization*, 487 U.S. at 32.

363 The *Stewart* majority held:

> A motion to transfer under § 1404(a) thus calls on the District Court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the District Court's calculus . . . . The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.

Id. at 29.

364 Of course, the plaintiff also must satisfy subject matter jurisdiction and proper venue requirements. *See, e.g.*, 28 U.S.C. §§ 1330-1366 (1988) (specifying subject matter jurisdiction of the federal courts); 28 U.S.C. §§ 1391-1403 (1988) (venue restrictions applicable in the federal courts).

365 407 U.S. 1 (1972).

clause specified that any suit arising out of the contract "must be treated before the London [England] Court of Justice."[366]

While Unterwesser's ship, The Bremen, was towing Zapata's barge from Louisiana to Italy, a heavy storm arose in the Gulf of Mexico. The barge sustained serious damage, and Zapata instructed the crew of The Bremen to dock at Tampa, Florida, the nearest port.[367] Zapata susbsequently brought an admiralty suit in the federal district court for the Middle District of Florida, alleging that Unterwesser's breach of contract and negligence had damaged the Zapata barge.

The *Bremen* Court stated that the Middle District of Florida court could not hear the suit brought by Zapata, if the forum selection clause was enforceable. The Court held that only the court specified in a valid forum selection clause could resolve a dispute between parties who had agreed to such a provision. The *Bremen* Court concluded that the regular enforcement of forum selection clauses would add an element of certainty to litigation, and that such certainty constitutes "an indispensable element in international trade, commerce, and contracting."[368]

The Court noted that forum selection clauses would not be enforced if "unreasonable and unjust," or if procured by "fraud or overreaching."[369] The justices thus remanded the case to the district court, which would determine whether the forum selection clause designating a London court was enforceable.[370] But, given the strong public policy involved, a party challenging the validity of a forum clause must make "a strong showing that it should be set aside."[371]

The *Bremen* decision thus holds that, where parties have provided a forum selection clause in a contract, only the court specified in that clause may resolve a controversy between the parties. It is possible to read The *Bremen* decision as applying only to international admiralty cases.[372] Most courts, however, have interpreted this case as establishing a rule applicable to all civil suits.[373] Such a reading receives support from the broad lan-

366 *Id.* at 2.
367 *Id.* at 3.
368 *Id.* at 13-14.
369 *Id.* at 15.
370 *Id.*
371 *Id.*
372 *See id.* at 17 (noting that The *Bremen* controversy did not involve "an agreement between two Americans to resolve their essentially local disputes in a remote alien forum").
373 *See, e.g.*, Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838

guage in the majority opinion.[374] This interpretation also follows from subsequent decisions referring cases initially filed in federal court to arbitration panels, which have characterized a prior arbitration agreement between the parties as "a specialized kind of forum selection clause."[375]

The decisions in *Stewart Organization* and *Bremen* result in an inexplicable divergence between the law of personal jurisdiction and the law governing section 1404 transfers. Assume that two parties have entered into an enforceable forum selection clause. Assume also that the plaintiff has brought suit in a district other than the court specified by the clause. If the defendant moves to dismiss for lack of personal jurisdiction, under *Bremen* the district court must enforce the forum selection clause and dismiss the suit. But if the defendant instead moves to transfer the case under section 1404 to the district specified in the forum selection clause, the court need not grant this motion. Instead, the court must only weigh the forum selection clause together with "a number of case-specific factors."[376]

In a *Stewart Organization* concurring opinion, Justice Anthony M. Kennedy apparently recognized this divergence. Justice Kennedy asserted that the federal courts' ruling on section 1404(a) motions should insure that "a valid forum selection clause is given controlling weight in all but the most exceptional cases."[377]

This Article proposes a more straightforward rule than suggested in Justice Kennedy's concurrence. Simply put, where a valid forum selection clause applies to a controversy, a court should be required to transfer the case to the district specified in

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F.2d 656, 659-60 (2d Cir. 1988) (New Jersey corporation could not sue New York corporation in federal court, where a valid forum selection clause authorized suit only in New York state court); Pelleport Investors, Inc. v. Budco Quality Theatres, 741 F.2d 273, 280-81 (9th Cir. 1984) (affirming enforcement of a valid forum selection clause, in a dispute between New York and Pennsyvania corporations). *See also* Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 149 (1982).

374 407 U.S. at 9-15. *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.14 (1985) ("Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust' . . . their enforcement does not offend due process.").

375 Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917, 1921 (1989) (agreement to arbitrate federal securities claim is enforceable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630 (1985) (authorizing arbitration of federal antitrust claims); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (requiring arbitration of federal securities claims).

376 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 29, 29 (1988).

377 *Id.* at 33.

the forum selection clause. This rule would harmonize the law governing section 1404 transfers and the law governing personal jurisdiction motions. Such a rule also would make transfer decisions more predictable and consistent.

B. Limitations of the Suggested Approach

Critics might assert that the suggested approach does not actually change the balancing methodology used by the district courts, but instead merely emphasizes different factors from those currently relied upon. District courts still must engage in balancing to decide a transfer motion, and thus in some situations the suggested approach will not produce certain results.

Consider the situation where a plaintiff has filed suit in the Southern District of New York, and the single party defending the suit seeks a transfer to the Western District of Pennsylvania.[378] Seventy percent of the plaintiff's witnesses and documents are located in the New York district, and thirty percent of these witnesses and documents will be found in the Pennsylvania district. Conversely, thirty percent of the defendant's witnesses and documents are located in the New York district, and seventy percent of these witnesses and documents will be found in the Pennsylvania district.

The suggested approach does not provide a clear answer to whether a district court should transfer this hypothetical case. A decision either granting or denying a section 1404 transfer would be appropriate. The suggested approach would not entirely eliminate uncertainty or discretion from transfer decisions.

But under the suggested approach, cases involving such uncertainty and discretion would arise far more rarely than under the current balancing test. Regardless of the analysis used to reach any legal decision, some hard cases will arise and the test will not dictate a particular result. Under the suggested approach, such hard cases will arise only in relatively rare instances, when documents and witnesses are dispersed equally among two or more districts. Under the current approach to section 1404 motions, almost every transfer motion constitutes a hard case, resolved through significant district court discretion.

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378 This hypothetical assumes that the plaintiff possesses minimum contacts with the Western District of Pennsylvania. Under the suggested approach, the New York court thus could transfer the case to the Pennsylvania district. *See supra* text accompanying notes 346-55.

A different criticism of the suggested approach might assert not that the approach fails to achieve the goal of limiting district court discretion, but that this goal is inappropriate. While this Article asserts that many factors currently reviewed in deciding motions to transfer should be irrelevant,[379] one might respond that in certain cases one of these factors might prove relevant to a just determination. A district judge, using her discretion, should determine when a factor is relevant, and when the factor is unimportant. In short, one might argue that the suggested approach inappropriately limits district court discretion.[380]

One response to this argument is that the current system, which leaves transfer decisions almost entirely to the discretion of the district judges, has not worked particularly well. In addition, as discussed above, the suggested approach will not completely deprive the district courts of discretion. Instead, the suggested approach limits district court discretion to cases actually presenting a close question on the relative convenience of two different districts.

The suggested approach thus would not eliminate all district court discretion from section 1404 decisions. But unlike the current method for resolving section 1404 transfers, the suggested approach would provide standards governing the appropriate exercise of district court discretion. The suggested approach not only would promote greater predictability and certainty in transfer decisions, but also would make these decisions easier and less time-consuming for the overburdened district judge.

V. CONCLUSION

The section 1404 transfer illustrates how modern federal court litigation may distort a facially reasonable proposal into a cumbersome and costly procedure with few real beneficiaries. The transfer motion represents an obstacle to a plaintiff seeking a quick resolution of his suit. The section 1404 transfer results in

379 *See supra* text accompanying notes 237-319.

380 This argument would receive support from Supreme Court decisions which have repeatedly emphasized that transfer decisions should be left to the discretion of district judges. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 29, 29 (1988) ("Section 1404(a) is intended to place discretion in the District Court to adjudicate motions for transfer according to an 'individualized case-by-case consideration of convenience and fairness.'"); Norwood v. Kirkpatrick, 349 U.S. 29 (1955) (when a district judge considers a § 1404 transfer, "the discretion to be exercised is broader" than under the doctrine of forum non conveniens). *See also supra* text accompanying notes 47-77.

little benefit to district courts, but instead imposes one more complex motion on already backlogged district judges.

Civil defendants will gain some benefits in delay through the use of section 1404 motions. But such delay comes at a price, because defendants must pay their counsel to research and draft transfer motions. In the end, the only individuals who receive substantial benefits from section 1404 motions may be members of the private bar, who have the opportunity to earn a substantial fee from complex transfer litigation.

Given the congresssional purpose embodied in section 1404, the added burden imposed on federal litigants and judges by transfer motions is indeed ironic. As stated in the plain language of the statute, Congress intended section 1404 transfers to promote "[t]he convenience of parties and witnesses" and to serve "the interest of justice."[381] Today, the transfer motion promotes neither convenience nor justice.

Nonetheless, this Article maintains that the motion to transfer may serve its intended purposes, if courts no longer decide such motions through a vague balancing that results in unrestricted judicial discretion.[382] Part IV of this Article suggests that courts abandon their reliance on the many irrelevant factors currently considered in transfer analysis. Instead, courts should decide the majority of transfer motions by considering only one factor—the location of relevant witnesses and documents.

This approach would simplify transfer motions, making transfer litigation less expensive for the parties and easier for the district courts to resolve. The approach would reduce the number of transfer motions, by defining numerous situations where a defendant could not make a colorable transfer argument. The simplicity of this approach would reduce the unpredictability of transfer decisions, and promote consistency among the district courts. Finally, a more limited district court discretion would allow for meaningful appellate review of transfer decisions.

A number of actors deserve some responsibility for the current problems generated by the section 1404 transfer. Congress

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381 28 U.S.C. § 1404(a) (1988).

382 Abolishing the § 1404 transfer would represent a more extreme suggestion. At least one commentator has suggested that the courts abolish forum non conveniens dismissals. *See* Stewart, *supra* note 1, at 1263 ("the doctrine of forum non conveniens has outlived its usefulness"); *see also id.* at 1321-24. *Cf.* Stein, *supra* note 3, at 842 (although forum non conveniens dismissals raise serious problems, "[t]he solution is not necessarily the elimination of the forum non conveniens doctrine").

enacted a vague and unilluminating statute when it adopted section 1404. Defendants have filed too many unmeritorious transfer motions. District courts have granted too many unwarranted transfers. And legal scholars have not addressed the growing body of inconsistent transfer decisions.

But the Supreme Court deserves the primary responsibility for the expense and confusion that accompanies the section 1404 transfer. In this area, the Court simply has abdicated its function of providing meaningful standards for federal litigants and courts. The justices rarely have discussed the section 1404 motion. The infrequent Court opinions have not suggested any useful standards, instead encouraging a simplistic deference to district court discretion.

Section 1404 transfer motions need not generate unpredictable and confusing decisions. But, for section 1404 to serve the purposes envisioned by Congress, the Supreme Court must begin to formulate clear and specific rules governing the transfer of civil cases.