NOTES

STATE STATUTES OF LIMITATIONS IN FEDERAL COURTS: BY WHOM IS THE STATUTE TOLLED?

Two years ago a personal injury action filed successively in Kentucky and Virginia federal courts was dismissed in Virginia[1] after an earlier dismissal in Kentucky when—through no fault of the plaintiff—the statutes of limitations in both states were deemed to have run. Now, ten years and nine court decisions[2] after the cause of action arose, the case of *Atkins v. Schmutz Manufacturing Co.*[3] will finally proceed to litigation on the merits as the result of a decision by the Fourth Circuit Court of Appeals, on a rehearing of the case, to reverse itself and to create a new federal rule for tolling state statutes of limitations in diversity cases.

In 1961 Donald Atkins was seriously injured in Virginia by a machine manufactured by Schmutz Manufacturing Company, a Kentucky firm doing business solely in Kentucky. Since Virginia at the time had no long-arm statute, Atkins' personal injury action was filed in federal district court in Kentucky shortly before the expiration of Virginia's two-year limitation for tort actions,[4] but after Kentucky's one-year limitation had run,[5] under the then reasonable assumption that Virginia's statute applied in such a case.[6] While

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

2. Schmutz Mfg. Co. v. Atkins, 402 U.S. 932 (1971); Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970); Atkins v. Schmutz Mfg. Co., 401 F.2d 731 (4th Cir. 1968); Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406 (W.D. Va. 1967); Atkins v. Schmutz Mfg. Co., 389 U.S. 829 (1967); Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967). The initial dismissal in the federal district court for the Eastern District of Kentucky was not reported, and the reports of two proceedings in the Fourth Circuit Court of Appeals—one a reconsideration of the earlier dismissal by that court and the other involving a petition for further reconsideration—were withdrawn before publication.

3. 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

4. VA. CODE ANN. §§ 8-24, 8-628.1 (1957).

5. KY. REV. STAT. ANN. § 413.140 (1969).

6. Kentucky's borrowing statute, KY. REV. STAT. ANN. § 413.320 (1969), which in its current amended form has been in force since 1942, actually rather plainly indicated Kentucky's one-year limitation was applicable in Atkins' case. Federal courts, however, insisted on following the pre-1942 rule, which applied Virginia's two-year statute of limitations, because Kentucky's highest state court had not had occasion to consider and interpret the borrowing provision after it was amended in 1942. *See, e.g.*, Albanese v. Ohio River-Frankfort Cooperage

discovery and other pre-trial proceedings were in progress the Kentucky Court of Appeals, the state's highest court, for the first time construed the applicable state statute, holding in *Seat v. Eastern Greyhound Lines, Inc.*[7] that Kentucky's one-year statute of limitations applied in cases arising in foreign jurisdictions granting a longer limitation period. The state court subsequently dismissed another case[8] which had been filed in reliance on Kentucky's earlier rule but was still pending decision when the new rule was announced.[9] The federal district court in Kentucky declared itself bound to follow these decisions of the state's highest court and dismissed Atkins' suit as time barred.[10] Atkins' appeal to the Sixth Circuit Court of Appeals was unsuccessful,[11] and the United States Supreme Court eventually denied his petition for a writ of certiorari.[12] Meanwhile, Virginia had enacted a long-arm statute,[13] and before the Supreme Court's denial of the petition for certiorari made the appeals court decision final, Atkins commenced a second action in federal district court in Virginia. Again the suit was dismissed, this time on the ground that the Kentucky action had not tolled Virginia's statute of limitations, which by this time had expired.[14]

The Fourth Circuit Court of Appeals affirmed the dismissal,[15] but then granted petition for rehearing en banc solely to consider the issue of whether either state or federal equitable remedies were available to plaintiff. The resulting decision, and opinion by Chief Judge

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Corp., 125 F. Supp. 333, 335 (W.D. Ky. 1954); Burton v. Miller, 185 F.2d 817, 819 (6th Cir. 1950). In both these cases the federal judges acknowledged that sooner or later a binding state court interpretation would permit them to apply the obvious meaning of the amended statute. When Atkins instituted his suit in 1963, however, the application of Virginia's two-year limitations period by Kentucky federal courts was still relatively certain. Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362, 364 (6th Cir. 1962); Koeppe v. Great Atlantic & Pacific Tea Co., 250 F.2d 270 (6th Cir. 1957).

7. 389 S.W.2d 908 (Ky. 1965).

8. Wethington v. Griggs, 392 S.W.2d 56 (Ky. 1965).

9. The *Seat* case in 1965 represented the first opportunity for the Kentucky high court to deliver the long-awaited binding construction of the state's borrowing statute. See note 6 *supra*. The court in *Wethington* apparently treated the ruling in *Seat* as a statement of the law as in effect since 1942 and dismissed plaintiff's action. Presumably, the subsequent dismissal of Atkins' suit by the federal district court in Kentucky was similarly grounded.

10. The opinion in this case was not reported, but it is described in the Sixth Circuit's opinion delivered on appeal. Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).

11. *Id.*

12. Atkins v. Schmutz Mfg. Co., 389 U.S. 829 (1967).

13. VA. CODE ANN. §§ 8-81.1 - .5 (Supp. 1970).

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

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

Haynsworth, reversed the dismissal and set forth new "federal law" designed to standardize federal procedure for tolling state statutes of limitations in diversity cases.[16] In April, 1971, the Supreme Court denied Schmutz Manufacturing Company's petition for certiorari,[17] and thus left standing the Court of Appeals' holding that the tolling effect of the pendency of an identical suit in another federal court is a matter for federal, and not state determination, even though state statutes of limitations are applied.[18] The *Atkins* decision is conspicuous for its manifest fairness in leading the plaintiff out of a procedural dilemma. The path the court took in order to accomplish this result, however, strikes new features on the ever-changing face of the so-called *"Erie* doctrine," and raises complex issues regarding judicial rulemaking power.

Atkins AS A MODIFICATION OF THE Erie DOCTRINE

Emergence and Development of the Erie *Doctrine*

The decision in *Erie Railroad Co. v. Tompkins*[19] discarded nearly a century of federal diversity decisions based on the 1842 case of *Swift v. Tyson.*[20] The *Erie* rule itself has undergone considerable modification since its announcement in 1938.[21] When Congress enacted the Federal Judiciary Act of 1789,[22] it provided that "the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."[23] Uncertainty over the phrase "laws of the several states" was settled in 1842, when the Supreme Court held in *Swift v. Tyson*[24] that federal courts deciding diversity cases need only apply a state's statutory law, not its decisional law, in obeying the command of the Judiciary Act. For almost a century thereafter federal courts steadily erected a body of general law

16. 435 F.2d at 527-28.
17. 402 U.S. 932 (1971).
18. 435 F.2d at 527-28.
19. 304 U.S. 64, 78 (1938).
20. 41 U.S. (16 Pet.) 1 (1842).
21. See text accompanying notes 34-44 *infra.*
22. Act of Sept. 24, 1789, ch. 20, §§ 1-35, 1 Stat. 73-93, *now codified in* title 28, *United States Code* (1964).
23. 28 U.S.C. § 1652 (1964) (corresponds to Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92).
24. 41 U.S. (16 Pet.) 1 (1842).

superimposed on and often at variance with state opinions on questions of common law.[25] The existence of two bodies of applicable law led to forum shopping and unequal administration of the law in favor of diversity plaintiffs.[26] When confronted once again with conflicting federal and state decisional law in the case of *Erie Railroad Co. v. Tompkins*,[27] the Supreme Court, per Justice Brandeis, announced that the phrase "the laws of the . . . states" in the Judiciary Act had been erroneously limited to state statutory law, and henceforth would include state decisional law in substantive matters.[28] It further declared that the course pursued by federal courts during the preceding century in creating a body of federal common law was unsupported by any grant of power from the Constitution.[29] Three concurring justices objected to the latter holding, expressing doubt that lack of constitutionality could be conclusively shown,[30] and asserted that the new statutory interpretation alone was a sufficient ground for the decision.[31] These concurring opinions immediately touched off the debate over the extent to which the *Erie* ruling was constitutionally compelled, which debate continues unresolved to this day.[32]

The *Erie* decision also marked the beginning of efforts to find the line between procedural and substantive law, since *Erie* applied only

25. *See* Sharp & Brennan, *The Application of the Doctrine of* Swift v. Tyson *Since 1900*, 4 IND. L.J. 367 (1929).

26. *See, e.g.*, Interstate Realty & Investment Co. v. Bibb Co., 293 F. 721 (5th Cir. 1923); Harrison v. Foley, 206 F. 57 (8th Cir. 1913); Gardner v. Michigan Cent. R. Co., 150 U.S. 349 (1893); Mills, *Should Federal Courts Ignore State Laws?*, 34 AM. L. REV. 51 (1900).

27. 304 U.S. 64 (1938).

28. *Id.* at 78.

29. *Id.* at 80.

30. *Id.* at 90-92.

31. *Id.* at 80-84, 90-92.

32. In support of the *Erie* majority's view of constitutionality see, for example, Bowman, *The Unconstitutionality of the Rule of* Swift v. Tyson, 18 B.U.L. REV. 659 (1938); Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 384-98 (1964); Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 465-70 (1962). For the view that *Erie* was not required by the Constitution see, for example: Ahrens, Erie v. Tompkins—*The Not So Common Law*, 1 WASHBURN L.J. 343 (1961); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 278 (1946); Cowan, *Constitutional Aspects of the Abolition of Federal "Common Law,"* 1 LA. L. REV. 161 (1938); Keeffe, *In Praise of* Joseph Story, Swift v. Tyson *and "The" True National Common Law*, 18 AM. U.L. REV. 316 (1969). The arguments are summarized in C. WRIGHT, LAW OF FEDERAL COURTS 228-32 (3d ed. 1970). In its simplest form the question is whether the *Erie* holding is constitutionally compelled, or merely constitutionally permitted. That it is constitutionally proscribed has not been seriously advanced.

to state substantive law.[33] A significant early gloss on the *Erie* ruling required federal courts to apply state conflicts of laws rules,[34] establishing the rule that was partially responsible for Donald Atkins' difficulties. In *Guaranty Trust Co. v. York*[35] came an attempt to formulate an alternative rule to the elusive substance-procedure dichotomy.[36] The resulting "outcome-determinative" test required a federal court hearing a diversity case to apply the forum state's statute of limitations, where failure to do so would "significantly affect the result of a litigation . . . ."[37] Because the use of the terms "substance" and "procedure" has persisted, the net result of *Guaranty* has simply been for statutes of limitations to be categorized as matters of substantive law for *Erie* purposes. In a similar vein, it was held in *Ragan v. Merchants Transfer & Warehouse Co.*,[38] that for the purpose of *tolling* a statute of limitations state law is sufficiently "substantive" to prevail over federal law where the Federal Rules and state procedural law differ as to the point at which an action is deemed to commence. In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[39] the court injected a new variable into the *Erie* equation, namely that of "countervailing federal considerations." *Byrd* held that in procedural matters federal courts could set aside the outcome-determinative test if this was required by the presence of significant factors favoring the effective functioning of the federal judiciary.[40] In particular, the case upheld the right in federal diversity cases to a jury determination of issues otherwise exclusively triable by a judge under state law. *Hanna v. Plummer*,[41] the most recent principal case in the

33. Sibbach v. Wilson, 312 U.S. 1 (1941).

34. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

35. 326 U.S. 99 (1945).

36. Speaking for the majority in *Guaranty*, Justice Frankfurter wrote:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represent the same invariants. Each implies different variables depending upon the particular problem for which it is used.

326 U.S. at 108.

Illustrative of Justice Frankfurter's point is the classification of statutes of limitations as "procedural" for the purpose of choosing between forum and foreign law in state conflicts of law situations, and as "substantive" for the purpose of choosing between state and federal law in state-federal conflicts of law situations.

37. 326 U.S. at 10.

38. 337 U.S. 530, 531-34 (1949).

39. 356 U.S. 525 (1958).

40. *Id.* at 537-38.

41. 380 U.S. 460 (1965).

development of the *Erie* doctrine, also relied on countervailing federal considerations in order to sustain a Federal Rule of Civil Procedure over a contrary state statute, thus effectively overruling *Ragan* to the extent that it may have held to the contrary[42] and assuring the pre-eminence of the Federal Rules of Civil Procedure over conflicting state procedures.[43] In its modern form then, the *Erie* doctrine continues to require observance of state law in substantive matters; may bring certain matters into the penumbra of substance if they are outcome determinative; and may reserve certain outcome-determinative issues for federal determination where there are strong federal considerations.

The Effect of Atkins *on the* Erie *Doctrine*

The court in *Atkins* declares that "we do no violence to the doctrine of *Erie Railroad Co. v. Tompkins*," in deciding that the tolling effect of pendency in diversity cases is a matter for federal determination.[44] In at least two respects, however, *Atkins* represents a departure from prior *Erie* rulings. First, *Atkins* is a departure from *Guaranty Trust Co. v. York. Guaranty* implied that any normally procedural issue which would be outcome determinative was to be treated in effect as an issue of substantive law.[45] That this outcome-determinative test is valid today, and has only been modified rather than abolished by the countervailing federal considerations rule, is recognized by the *Atkins* court.[46] And, although the reservation of statutes of limitations for state determination in *Guaranty* did not specifically include tolling provisions, the Court's holding in *Ragan* clearly indicates that tolling provisions are to be treated no differently than statutes of limitations.[47] To this extent, at least, *Ragan* is apparently still good law.[48] *Atkins*, on the other hand, marks the first

42. The court in *Hanna* explicitly refused to overrule *Ragan*, 380 U.S. at 469-70, and the question of *Ragan's* continuing vitality has engendered some comment. *See, e.g.*, C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1057 (1969) [hereinafter cited as WRIGHT & MILLER]; Note, *Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases*, 20 STAN. L. REV. 1281 (1968). *See also* note 48 *infra* and accompanying text.

43. 380 U.S. at 473-74.

44. 435 F.2d at 535.

45. 326 U.S. at 110-12. See text accompanying notes 35-37 *supra*.

46. 435 F.2d at 536.

47. 337 U.S. at 532. *See also* Glebus v. Fillmore, 104 F. Supp. 902, 903 (D. Conn. 1952) (dictum), and cases cited therein.

48. The *Hanna* court, in distinguishing *Ragan*, said that the holding in the latter case "was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but

time that tolling has been treated as independent of the underlying state limitations statute, either before or since *Erie*.[49] Second, to the extent that the court in *Atkins* seeks to justify its separation of the two on grounds of a countervailing federal interest in maintaining the unitary nature of its court system, it represents a departure from *Byrd* and *Hanna* as well. The exceptions to *Guaranty's* outcome-determinative test which were formulated in *Byrd* and *Hanna* were based strictly on *specific* expressions of countervailing federal interests. While the courts have differed on the weight to be given to the federal interest in maintaining the unitary nature of its court system,[50] the presence or absence of a specific embodiment of that interest in a federal statute or rule would appear, by weight of authority, to be decisive to the determination.[51] *Atkins*, on the other hand, represents an attempt to find countervailing considerations in general federal policies unsupported by or, at best, with only analogical support from specific legislation.[52] It is noteworthy that the arguments cited in support of this holding in *Atkins*[53] are remarkably similar to those advanced over one hundred years ago in *Swift v.*

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rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U.S. at 470. *Hanna*, on the other hand, involved a direct clash between the federal rules and state law. The *Erie* doctrine, the *Hanna* court said, did not apply in adjudicating the validity of federal rules. *Id.* Thus, *Ragan* and *Hanna* were thought to be compatible. *But see Federal Rule 3 and the Tolling of State Statutes of Limitations in Diversity Cases, supra* note 42, at 1285-87.

49. *See, e.g.*, Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68, 72 (1953). *But cf.* Burnett v. New York Cent. R.R. Co., 380 U.S. 424 (1965) (plaintiff's prior state court action tolled a *federal* limitation provision, and thus his federal court action was timely).

50. *See* C. WRIGHT, *supra* note 32, at 244.

51. *See, e.g.*, Arrowsmith v. United Press Int'l, 320 F.2d 219, 224-25 (2d Cir. 1963), *overruling* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960), to the extent that *Jaftex* asserted a "federal standard" for determining jurisdiction over foreign corporations in ordinary diversity cases, on the ground that the assertion "was unwarranted, was causing confusion by its failure to identify or define the 'federal standard,' and was leading to unfortunate results in the district courts." 320 F.2d at 225.

The *Jaftex* case bears a striking resemblance to *Atkins*. In *Jaftex* the Second Circuit Court of Appeals reversed the dismissal of a complaint against a foreign corporation, holding that state law supported the assertion of jurisdiction, but going on to assert as an alternative basis for its reversal, that the matter was governed by a "federal standard," which the court found to be implied in a host of federal statutes and decisions none of which, however, were directly on point. Judge Friendly, who wrote for the majority in *Arrowsmith*, concurred in the result in *Jaftex* on the ground that state law supported the assertion of jurisdiction, but criticized the alternative, federal ground for the decision as unwarranted.

52. See notes 80-92 *infra* and accompanying text.

53. See notes 98-99 *infra* and accompanying text.

Tyson,[54] the cornerstone of pre-*Erie* federal common law. In order to determine whether or not these departures have indeed done no violence to the *Erie* doctrine, each must be examined in greater detail.

The modern *Erie* doctrine still attempts to limit federal diversity law to those matters which may be classed as procedural. Rules which govern the tolling of state statutesof limitations may to the uninitiated be obviously procedural, but in the context of *Guaranty* and *Ragan*, which still represent good *Erie* law, it is far from obvious.[55] Statute-of-limitations questions in diversity litigation are reserved for determination by state law, not only because generally the only limitations law available is state law,[56] but because, as *Guaranty* shows, resolution of such questions is usually a significant determinant of the litigation's outcome.[57] Logically, however, a rule for tolling a statute of limitations is precisely as outcome determinative as the statute of limitations itself. Conversely, if it is maintained that a federal tolling rule is necessary in the interest of maintaining the unitary nature of the federal judiciary, it would appear, as Judge Winters points out in his special concurrence in *Atkins*, that a federal statute of limitations is equally necessary therefor, "so that by implication *Guaranty Trust* is being overruled."[58] *Byrd* and *Hanna* fashioned exceptions to *Guaranty*, but left the substance of its outcome-determinative test, at least as applied to statutes of limitations, intact. Thus, the creation in *Atkins* of a judge-made federal rule to toll state statutes of limitations in the case of succeeding identical diversity suits brought in different federal courts, not only strikes at the heart of *Guaranty*, but to that extent marks a departure from *Byrd* and *Hanna* as well.

In justifying the distinction which it has drawn between tolling rules and the underlying limitations statute, the court in *Atkins* relied on the maintenance of unity in the federal court system as the countervailing consideration to authorize departure from the outcome-determinative test.[59] This is clearly broader than the exception as originally fashioned. In *Hanna* the compelling federal interest was clearly embodied in the Federal Rules of Civil

54. See notes 95-97 *infra* and accompanying text.
55. See notes 47-48 *supra* and accompanying text.
56. 435 F.2d at 538 n.48.
57. See note 37 *supra* and accompanying text.
58. 435 F.2d at 539.
59. *Id.* at 531, 535, 537.

Procedure;[60] in *Byrd* the federal policies were expressed in the seventh amendment jury trial guarantee.[61] But in *Atkins* there is no such limiting factor. Theoretically, any issue occurring in diversity litigation which is currently determined by resort to state law could be made the object of rulemaking by federal judges because of alleged adverse effects on the unitary nature of the federal judiciary.[62] Absent the support of a specific statute or constitutional provision, the judicial declaration of the unitary nature of the federal court system as a countervailing federal consideration for purposes of the *Erie* doctrine[63] represents an extension of *Hanna* and *Byrd*.

Of course, the Court does more than recite the words "unitary nature of the federal court system" in seeking to establish a countervailing federal interest. It emphasizes the inappropriateness of referring to state law in a federal diversity suit in order to gauge the effect of the pendency of an identical suit in another federal court.[64] It also attempts to draw support from the fact that "in the analogous situation of transfers from one district court to another, after a period of limitations has run, we look to federal law to reach the conclusion that the pendency of the action in the transferor district tolls the running of the statute."[65]

It is clear that there are drastic differences between the Virginia and federal court systems. The majority in *Atkins* apparently believed that state institutional considerations shaped the state's tolling provision and that these considerations are irrelevant to, and incompatible with, the federal judicial system.[66] In its opinion the majority conducted a review of the Virginia court system to point out the elements which it believed most likely to produce rules inimical to the federal system. The opinion listed the autonomous nature of Virginia's trial courts;[67] the sparse procedural provisions for coordination of effort or complementing of functions within the system;[68] and the sometimes overlapping territorial and subject matter

60. 380 U.S. at 473-74.

61. 356 U.S. at 537-40.

62. Perhaps the earliest objects of such a process would be statutes of limitations and conflicts of law rules, since, as this case illustrates, they can occasionally be troublesome in diversity litigation.

63. 435 F.2d at 537.

64. *Id.* at 531, 534.

65. *Id.* at 528.

66. *Id.* at 534.

67. *Id.* at 531-32.

68. *Id.* at 532-33.

jurisdiction of the various types of trial courts.[69] The state tolling law which allegedly springs from these institutional features suspends the statute of limitations by reason of the pendency of a former suit in only four instances, none of which properly applied to Atkins' action.[70] In *Jones v. Morris Plan Bank of Portsmouth*,[71] the Virginia Supreme Court of Appeals strictly construed the tolling law to allow the statute of limitations to run while plaintiff filed the same cause of action successively in two different state courts.

More recently, however, in the case of *Weinstein v. Glens Falls Insurance Co.*,[72] an equity suit ancillary to a pending law action was treated as a continuation of the law action and not barred by the statute. And in *Caudill v. Wise Rambler, Inc.*,[73] Virginia's highest court declared its reluctance to reach results which are unjust and inequitable in deciding statute-of-limitations questions. Moreover, the *Atkins* court's claim that institutional features in the state court system are responsible for the strict standards of Virginia's tolling statute or the holding in *Jones v. Morris Plan Bank* is not substantiated. The fact that a substantial majority of states, many with court systems exhibiting features similar to Virginia's, have tolling laws which *would* have permitted Atkins to proceed in this instance to the merits of his suit,[74] is some indication that state policies other than institutional considerations may be involved.

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69. *Id.*

70. An analysis of our statute (section 5826) shows that in only four instances is there a suspension of the statute of limitations by reason of the pendency of a former suit brought in due time. These are: (1) Where such suit abates "by return of no inhabitant," that is, where the writ is not served for that reason; (2) where the suit abates by reason of the "death of marriage" of a party; (3) where, after the plaintiff has obtained a judgment or decree in his favor, it is "arrested or reversed upon a ground which does not preclude a new action or suit for the same cause"; and (4) where "there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time." None of these provisions applies to the plaintiff's case. There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits. Jones v. Morris Plan Bank of Portsmouth, 170 Va. 88, 92-93, 195 S.E. 525, 526 (1938), as quoted in 435 F.2d at 529 n.14.

71. 170 Va. 88, 195 S.E. 525 (1938).

72. 202 Va. 722, 119 S.E.2d 497 (1961).

73. 210 Va. 11, 168 S.E.2d 257 (1969).

74. *See, e.g.*, CAL. CIV. PROC. CODE § 355 (West 1954); ILL. REV. STAT. ch. 83, § 24 (1967); MASS. GEN. LAWS ANN. ch. 260, § 32 (1968); MICH. COMP. LAWS ANN. § 600.5856 (1968); N.Y. CIV. PRAC. LAW § 205 (McKinney 1963); OHIO REV. CODE ANN. § 2305.19 (Page 1954); TEX. REV. CIV. STAT. ANN. art. 5539a (1958). *But cf.* FLA. STAT. ANN. § 95.06 (1960); N.J. REV. STAT. § 2A:14-28 (1952); PA. STAT. ANN. tit. 12, § 33 (1953).

It may indeed be true, as the majority points out, that by its nature the issue before it in *Atkins* "never has been and never will be resolved, or even considered, by any court in the Commonwealth of Virginia,"[75] but this is a frequently occurring situation in diversity litigation, in which the federal judge in effect sits as another state court; and federal judges have been remarkably versatile in applying state laws to novel situations. This versatility, however, was lacking in the *Atkins* decision.

It would appear that the court created the federal tolling rule mainly to help plaintiff escape the pernicious procedural trap sprung by the courts in Kentucky.[76] Inexplicably, however, the court chose not to employ an equally effective and less questionable rationale, i.e., to adopt an interpretation of Virginia law permitting the statute of limitations to be tolled, to achieve the same end. Indeed, while the majority's resort to the "countervailing federal considerations" exception intimates that to apply state law would be to subvert a legitimate federal interest, the majority opinion in fact fairly bristles with admissions that by judicious application of state law, the same result could have been achieved without the creation of a "federal rule."[77] The special concurrence of Judges Winter and Sobeloff was specifically so grounded.[78] To them, plaintiff's Virginia suit was merely a continuation of his earlier action in Kentucky, and was therefore to be disposed of in his favor by virtue of the decision in *Weinstein*, which could be accepted, they argued, as the latest expression of Virginia law.[79] It was unnecessary to decide more than that Atkins' suit was not barred by Virginia limitations law. In the view of these two judges, the formulation of a federal tolling rule was therefore unjustified.

In the face of the adequacy of state law to achieve an equitable result, therefore, the only real justification for the formulation of such a rule is that, quite apart from the applicable state law, the rule serves to promote a policy of unity within the federal system. The court professed to find strong support for its position by citing an apparent analogy between the initiation of plaintiff's action in Virginia and a

75. 435 F.2d at 531.
76. See notes 6-7 *supra* and accompanying text.
77. *See, e.g.*, 435 F.2d at 529, 530, 531, 534-35.
78. *Id.* at 538-59.
79. *Id.* at 538-39.

hypothetical transfer of his case under the federal transfer provisions[80] from the Kentucky federal court to the federal court in Virginia.[81] For reasons not made known to the court, the case was not transferred; however, the court speculated that if it had been validly shifted to the Virginia court, the filing in Kentucky would have tolled the Virginia statute of limitations.[82] In testing the accuracy of the analogy drawn by the court, a perplexing question of *Atkins'* transferability is presented. If Atkins had first filed in Kentucky after the Kentucky Court of Appeals held that Kentucky's one-year statute of limitations applied in cases arising in foreign jurisdictions with a longer statute of limitations[83] and after Kentucky's one-year statute had run, his suit would probably not have been transferable.[84] A fortiori a filing in a district where the statute had run would not toll the statute in any other district.[85] Since the dismissal of Atkins' suit in Kentucky in

80. References to "federal transfer provisions" are to 28 U.S.C. §§ 1404(a) & 1406(a) (1964):

§ 1404(a). For the convenience of the 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.

§ 1406(a). The district court of a district in which is filed a case laying venue in the wrong district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

81. 435 F.2d at 537-38.

82. *Id.*

83. See text accompanying note 7 *supra.*

84. The legislative history of § 1406(a) as amended in 1949 reveals that it was enacted to prevent plaintiffs from bringing suit in the wrong district merely to obtain service of process on the defendant, and then have the case transferred to a proper district. *See* Skilling v. Funk Aircraft Co., 173 F. Supp. 939, 942 (W.D. Mo. 1959); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.146[4] at 1906 (1964). Bringing suit in a district where the statute of limitations has run in order to toll the statute of limitations in the district to which plaintiff desires a transfer appears to be a similar abuse. Under present practice, dismissal under § 1406(a) is usually reserved for actions evidencing harassment or some other indication of plaintiff's bad faith. 1 J. MOORE, FEDERAL PRACTICE ¶ 0.146[5] at 1909. The key issue here is whether the federal district court in Virginia was a court where the action "could have been brought." Since Virginia's long-arm statute was not enacted until 1964, defendant would not have been amenable to process from the transferee court before Virginia's statute of limitations expired. To grant transfer under the theory that the transferee forum need not originally have been one where the case might have been brought, Schultz v. McAfee, 160 F. Supp. 210 (D. Me. 1958), would seem hardly to be in the interest of justice where defendant is concerned. Normally the defendant must be amenable to process in the transferee forum before institution of the suit, Sypert v. Bendix Aviation Corp., 172 F. Supp. 480 (N.D. Ill. 1958). The precise transferability question presented by *Atkins* has never been decided. Judge Craven, dissenting in the court's initial affirmation of dismissal, presents a detailed case for transferability concluding, however, "that the path to trial on the merits [by means of transfer] is not a broad, inviting one," and suggesting only that "it may have been negotiable." 401 F.2d at 739.

85. Filing tolls all applicable statutes of limitations, Goldlawr v. Heiman, 369 U.S. 463, 467

effect was a declaration that the applicable statute of limitations had run before he had filed,[86] it cannot be said with certainty that the filing in Kentucky would have tolled the Virginia statute, or even that the Kentucky court could have transferred the suit at all. This may explain why transfer was not sought. Another possible explanation is that the Virginia federal court was not a court where the suit could have originally been brought until enactment of the long-arm statute in 1964.[87] If Virginia was not a potential transferee forum, its statute of limitations would not have been tolled by the action in Kentucky and would have run before the long-arm statute made the Virginia federal court a possible transferee forum.[88] A third explanation for the failure of plaintiff to formally transfer is the possible belief that the law of the transferor forum carried over to the transferee forum.[89] Under this rule, a transferring court in Kentucky would have "transferred," and the transferee court would have applied Kentucky's one-year statute of limitations, which in Atkins' case had already run. Transfer law is at best, however, a somewhat uncertain area of the law, permeated by conflicts between different jurisdictions.[90] Analogy to transfer provisions offers little support to the tolling rule where it is not clear that the instant case was even transferrable.

Despite the doubtful transferability of his cause of action, Atkins now has successfully achieved his change of venue, albeit in an unorthodox manner. The one remaining question is what this portends for existing federal transfer provisions. If any plaintiff may, while his first cause of action is pending, re-file the same action in another jurisdiction which he thinks will be more advantageous to

(1962). Districts not eligible as transferee forums would not have applicable statutes of limitations.

86. *See* Atkins v. Schmutz Mfg. Co., 372 F.2d 762, 763 (1967); note 9 *supra* and accompanying text.

87. See note 84.

88. *Id.*

89. This area of the law is still unsettled. The proposition cited in the text was the holding of the leading case of Van Dusen v. Barrack, 376 U.S. 612 (1964), but that rationale applied only to transfers under 28 U.S.C. § 1404 (1964). *But cf.* Geehan v. Monahan, 382 F.2d 111 (7th Cir. 1967). The recent case of Carson v. U-Haul Co., 434 F.2d 916 (6th Cir. 1970), restricted the *Van Dusen* holding to transfers by defendants. *Carson* was decided three days before *Atkins*. *See generally* Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405 (1955); Currie, *The* Erie *Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353 (1955). The conclusions reached by Professor Currie in these articles were withdrawn five years later in Currie, *Change of Venue and Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

90. *See generally* 1 J. MOORE, *supra* note 84, at ¶ 0.145 *et seq.*

him, thereby gaining the tolling benefit of formal transfer and avoiding possible fatal dismissal by the judge in the first forum, of what value are the transfer provision to plaintiffs? Obviously, some forum shopping is possible under current transfer laws,[91] but forum-shopping plaintiffs have normally been subject to some discretionary restraint from the magistrate, who may dismiss rather than transfer, when justice requires.[92] Under the rule announced in *Atkins*, no such restraint on blatant forum shopping is provided, and change of venue is conceivably available to a plaintiff who would be denied a formal transfer. Thus the new tolling rule goes considerably beyond the statutes it allegedly imitates, and indeed seems to undercut, rather than promote, that statutory expression of federal policy.

In summary, while the majority opinion adequately establishes the fact that the federal judiciary is a remarkably unified system, and that preserving this unity is highly desirable, it fails to show how the presence or absence of a federal tolling rule affects that unity. The federal court system exhibits a unitary nature because it was framed by a series of federal enactments based on constitutional mandate. Unity is maintained by a set of procedural rules applicable to all federal courts. There is no suggestion in the court's opinion that any of these elements was threatened by the application of the Virginia tolling rule. As a practical matter, the ostensible injustice threatening Donald Atkins was in no way attributable to any flaw in the rules of decision regarding Virginia's statute of limitations, nor did the real solution to his problem lie in any modification of the federal judicial system. His difficulties stemmed first from counsel's willingness to play the statute of limitations game down to the wire,[93] and then from some untenable rule of jurisprudence which induced the federal courts sitting in Kentucky to judicially turn their heads when that state's borrowing statute was amended in 1942, because the highest state court did not have occasion to officially declare it the law until 1965.[94] Here then, the unity of the federal judicial system is invoked to correct with a tolling rule the results of unrelated institutional flaws.

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91. Forum shopping problems under 28 U.S.C. § 1406(a) are not at stake according to Judge Craven in Atkins v. Schmutz Mfg. Co., 401 F.2d 731, 739 (1968). *See also* Note, *Federal Courts—The* "Erie *Doctrine*" *and Tolling of the State Statute of Limitations*, 47 N.C.L. REV. 715 (1969).

92. 28 U.S.C. § 1406(a) (1964).

93. Atkins' original action was filed only two days before Virginia's statute of limitations would have run and almost a full year after Kentucky's had expired.

94. See notes 6-7 *supra* and accompanying text.

Indeed, it may be only slightly hyperbolic to contend that this particular rationale has extended *Erie* so far that it begins to look again like *Swift v. Tyson*.[95] Following the *Swift* decision, federal courts sitting in diversity cases were permitted to ignore state court decisions on common-law matters and supplant them with a presumably more adequate rule of federal law.[96] It was hoped thereby to standardize key areas of the law and eliminate the uncertainty and occasional unfairness which resulted from reliance on state law in diversity cases.[97] While it is probably inaccurate to dub *Atkins* a return to *Swift*, each opinion contains language which ascribes its holding—allowing federal rulings to supersede state decisions—to a desire to standardize the law and relieve diversity litigants of disabilities created by different states' laws.[98] The new tolling rule is not substantially different from the myriad rules of federal common law which sprang up after *Swift*,[99] either in form or rationale. Thus, *Atkins* not only extends the letter of *Erie* through a broader concept of countervailing federal considerations, but appears also to turn the spirit of *Erie* back in the direction of *Swift*.

Atkins as an Exercise in Judicial Rulemaking

Quite apart from its effect on the *Erie* doctrine, the *Atkins* decision is unusual for its forthright assertion of judicial rulemaking power. Although it is widely recognized today that a great deal of judge-made law—both procedural and substantive—exists,[100] lower federal courts are nevertheless on uncertain ground when exercising their rulemaking power. The power to regulate practice and procedure was possessed by the earliest common-law and equity courts in

95. 41 U.S. (16 Pet.) 1 (1842).

96. *See* Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 70 (1955).

97. 41 U.S. (16 Pet.) at 18-19.

98. Justice Story declared for the majority in *Swift:* "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." 41 U.S. (16 Pet.) at 18-19. *Compare* Judge Haynsworth speaking for the majority in *Atkins:* "[S]ince the question here arises out of a different system and reasonable answers are dependent upon the nature and structure of that system and its effective functioning, we conclude that we must seek the answer as a matter of federal, not state, law." 435 F.2d at 538.

99. *See, e.g.*, Bowman, *supra* note 32, at 663.

100. *See, e.g.*, Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

England and in this country.[101] Some rules were merely decisional,[102] others were formally declared by courts,[103] and an occasional act of parliament attempted to ameliorate harsh technicalities of common-law pleading.[104] Full scale legislative intervention in court rulemaking occurred in England with the English Civil Procedure Act of 1833 and the Hilary Rules of 1834.[105] A similar trend began in the United States with the 1848 Field Code of New York.[106] Disenchantment with the rigidity of legislative rules led to renewed interest in returning some rulemaking power to the courts.[107] The issue in the United States was and remains, however, whether the legislature or the judiciary is exclusively empowered to regulate judicial procedure, or whether the power is shared or can be delegated by either or both.[108]

With regard to federal courts, at least, the weight of authority is said to support the right of Congress to prescribe rules of procedure for the federal courts.[109] Frequent Congressional exercise of that right culminated in the 1934 Enabling Act[110] delegating authority to the Supreme Court to devise rules for federal court procedure subject to Congressional approval,[111] and the 1938 Federal Rules of Civil Procedure established pursuant thereto. In return, the Court is said to

101. *See generally* E. JENKS, A SHORT HISTORY OF ENGLISH LAW 191 (6th ed. 1949); Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81 (1918); Rosenbaum, *Studies in English Civil Procedure*, 63 U. PA. L. REV. 105, 151, 273, 380, 505 (1915). In this country, the English rulemaking practice was adopted early in the proceedings of the new Supreme Court, as witnessed by the following declaration: "The Attorney General having moved for information, relative to the system of practice by which the attorney and counsellors of this court shall regulate themselves, and of the place in which rules in causes here depending shall be obtained, the CHIEF JUSTICE, at a subsequent day, stated, that – The court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary." In Hayburn's Case, 2 U.S. (2 Dall.) 414 (1792).

102. *See* E. JENKS, *supra* note 101, at 191.

103. *See* Rosenbaum, *supra* note 101, at 151, 165 n.50. For a list of English court rules of the King's Bench from 1604 to 1827, and the Common Pleas courts from 1457 to 1822, see 1 TIDD, PRACTICE xxxvii-xlviii (9th ed. 1828).

104. *See* Morgan, *supra* note 101, at 81-82.

105. *Id.* at 82. *See* E. JENKS, *supra* note 101, at 192.

106. *See* Morgan, *supra* note 101, at 82.

107. *See generally* C. WRIGHT, *supra* note 32, at 257-58; Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34, 35 (1922).

108. WRIGHT & MILLER § 1001 at 26.

109. *Id.* at 27. See note 112 *infra*.

110. Act of June 19, 1934, ch. 651, 48 Stat. 1064 *(now codified in* 28 U.S.C. § 2072 (1964)).

111. "[T]he Supreme Court of the United States shall have the power to prescribe, . . . practice and procedure in civil actions at law." *Id.* As required by the Enabling Act, the rules were submitted for Congressional approval and became effective September 16, 1938.

have "inferentially . . . recognized that a rule that is not within the scope of the power delegated by Congress would be invalid."[112] The existing situation in federal courts may thus be described as "judicial rulemaking pursuant to legislative delegation and subject to a congressional veto."[113] A notable feature in the arrangement thus far is the restraint that Congress has shown with respect to its veto power.[114]

The uncertainty obtaining in federal rulemaking today stems from the absence of an explicit definition of the extent to which an individual court in the federal system may establish its own rules of practice and procedure. Federal courts have always acquiesced in legislative regulation of their practice and procedure, and it is now settled that inferior trial or appellate courts may be required to adhere to rules prescribed by the highest court.[115] If the rulemaking authority delegated to the Supreme Court is complete and comprehensive, lower federal courts are arguably without power to devise their own rules of procedure beyond their authority to interpret the Federal Rules of Civil Procedure to fit their own requirements and to establish administrative rules.[116] Indeed, it could be said that this very lack of power is a significant factor in the maintenance of the unitary nature of the federal judiciary. To illustrate the role of lower federal courts in procedural rulemaking, an analogy to their substantive rulemaking power[117] may be drawn. Since the Supreme Court admittedly has

112. WRIGHT & MILLER § 1001 at 29. *See also* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945).

The Enabling Act provides that the rules promulgated by the Supreme Court "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072 (1964). The Court has scrupulously avoided construing the rules in derogation of that provision of the Act. The narrow construction which the Court gave to the federal rules in *Ragan*, for example, could be said to be due as much to a fear of overstepping its rulemaking authority as it was to the Court's desire to adhere to its own judicially-created *Erie* doctrine. See notes 38, 42 *supra* and accompanying text.

At the same time, the Supreme Court has felt equally bound to uphold the power of Congress to prescribe procedure and to delegate that power. In *Hanna* the Court immunized the federal rules from attack on *Erie* grounds, reasoning that through the Enabling Act "the court has been instructed to apply the Federal Rule, and can refuse to do so only if . . . this Court . . . and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U.S. at 471.

113. WRIGHT & MILLER § 1001 at 30.

114. *Id.* at 31.

115. *See* Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

116. *See, e.g.*, Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1315 (1936).

117. *See, e.g., The Federal Common Law, supra* note 100.

neither the time nor the resources to produce all the substantive rules that are needed in the federal system,[118] it must rely on lower courts to formulate an appropriate rule when the need arises, which rule is then subject to rejection or approval on review. Similarly, a lower federal court might be required to decide which matters are properly within its procedural rulemaking competence and which are better left to the formal rulemaking machinery established for the Federal Rules of Civil Procedure,[119] guided in that determination by the policy of restraint expressed in the Supreme Court's own deference to Congress in matters of federal procedure.[120]

Viewed in this light, the *Atkins* decision, far from promoting a policy of unity in the federal judiciary, actually undermines that policy in the very act of rulemaking to the extent that the rule so formulated is not based on a specific statute or Federal Rule. And while the Supreme Court's decision not to review *Atkins* permits the lower court rule to become law, several possible ramifications of the rule suggest that it might more properly have been subjected to the scrutiny of those responsible for drafting and amending the Federal Rules of Civil Procedure.[121] The most disturbing aspect of the particular rule enunciated, as with the assertion of the rulemaking power itself, is the rule's tendency to undermine explicit manifestations of federal policy. That it could stimulate widespread circumvention of the transfer statutes has already been indicated.[122] The dearth of details in the court-formulated rule leaves much freedom for venue-changing plaintiffs. For instance, if mere filing of a suit with no effort at pre-trial preparations obviously indicates creation of pendency only to toll the statute, is that sufficient pendency for purposes of the federal tolling rule? If the identical suit filed in a second federal court has meanwhile acquired additional (or fewer) parties or causes of action, is that "identical" for purposes of the federal tolling rule? What if the theory of recovery has been altered between suits? Is the running of the statute suspended indefinitely or

118. *Id.* at 1513, 1530-31.

119. In 1942 the Supreme Court designated the Advisory Committee which had prepared the rules as a continuing Advisory Committee to consider amendments to the rules. *See* WRIGHT & MILLER § 1006. While the Committee was discharged in 1956, Congress acting on a felt need for a continuing body to propose amendments to the rules, amended the act creating the Judicial Conference so as to include as one of its functions the task of advising the Supreme Court on needed changes. *See* WRIGHT & MILLER § 1007.

120. See note 112 *supra* and accompanying text.

121. See note 119 *supra*.

122. See text accompanying notes 91-92 *supra*.

only for a limited time, and if only for a limited time, for how long? To answer the foregoing questions and to correct possible abuses of the rule, further rulemaking will be necessary, with further opportunity for confusion and fragmentation in federal practice[123]—perhaps leading to Congressional intervention—as the inevitable consequence.

Of more immediate concern is that only in the Fourth Circuit will the tolling rule be applied consistently,[124] even though its very terms presume and require its nationwide application. Clearly the transfer rules would be of little use if only selected districts or circuits in the federal system would accept a transferred case or ascribe a tolling effect to the filing in the transferor forum. If, as the *Atkins* court insists, the new tolling rule really is analogous to the transfer provisions, it—like the transfer laws—can be of little service to litigants unless it is by statute given the force of law throughout the nation.

In short then, formulation of a federal tolling rule by the court in *Atkins* is neither significantly less deleterious to nor significantly more effective in furthering the unity of the federal judiciary than the application of state law would have been. It is little wonder that the two concurring members of the court, at least, urged the latter course of action.[125]

CONCLUSION

Atkins v. Schmutz Manufacturing Co. has given federal diversity law a new rule to toll state statutes of limitations, but in so doing it has added new features to the *Erie* doctrine. The countervailing federal considerations concept has been broadened beyond explicit constitutional and congressional mandates to include a federal policy based on a "notion of an institutional interest in the uniform management of the federal court system." Tolling rules have been termed "procedural"—a departure from *Guaranty*—and made a

123. See note 51 *supra*, in which is described the experience of the Second Circuit with a similar, judge-made rule.

124. Just as the Supreme Court's supervisory power extends only to lower *federal* courts, *cf.* Thiel v. Southern Pacific Co., 328 U.S. 217, 225 (1946); McNabb v. United States, 318 U.S. 332, 340 (1943), so the supervisory powers of a court of appeals extends only to those district courts within its circuit, *cf.* Thomas v. United States, 368 F.2d 941, 947 (5th Cir. 1966). *See generally The Judge-Made Supervisory Power of the Federal Courts, supra* note 115; Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963).

125. See text accompanying notes 78-79 *supra*.

thing apart from state statutes of limitations for the first time in American judicial history. The decision has also taken as well as given. From the transfer provisions it has taken an undetermined amount of control over venue-changing in the federal court system. From the entire federal judiciary itself it has taken a degree of uniformity by declaring for one circuit a rule that actually requires nationwide application. It has brought to an area of settled law, i.e., statutes of limitations in diversity cases, an issue which invites continuing judicial innovation. In view of the numerous possible undesirable consequences of *Atkins*, the high improbability that its tortured fact situation will be repeated, and the general availability of state law capable of settling issues presented here, the decision should not be given wide application, nor should undue significance attach to the Supreme Court's refusal to challenge the new rule.