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Displacement of State Rules of Decision in Construing Releases of Federal Claims

Daniel C. Cohn

DISPLACEMENT OF STATE RULES OF DECISION IN CONSTRUING RELEASES OF FEDERAL CLAIMS

Courts have failed to develop a coherent body of law to determine whether state or federal rules of decision[1] should govern releases[2] of federal claims. Automatic application of state contract

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[1] Rules of decision are "the laws which are applied by courts to determine the questions brought before them." Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428, 1428 n.6 (1960). State common law and federal common law are each an aggregation of rules of decision.

The problem of choosing rules of decision arises only after the resolution of a choice-of-law question under Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and the first branch of Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See* notes 37-54 and accompanying text *infra*. Concluding whether state or federal law governs under *Erie* and *Clearfield* determines only whether the state courts or the federal courts have the *competence* to choose rules of decision for the case at hand. *See id.* If federal law governs, the federal court may still choose state rules of decision. *See* note 54 *infra*. *See generally* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Comment, *Federal Judicial Law-Making Power: Competence as a Function of Cognizable Federal Interests*, 18 B.C. INDUS. & COM. L. REV. 171 (1976) [hereinafter cited as Comment, *Federal Law-Making Power*]; Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969); Note, *The Competence of Federal Courts To Formulate Rules of Decision*, 77 HARV. L. REV. 1084 (1964) [hereinafter cited as Note, *Federal Competence*]; Comment, *Adopting State Law as the Federal Rule of Decision: A Proposed Test*, 43 U. CHI. L. REV. 823 (1976) [hereinafter cited as Comment, *Adopting State Law*].

It is clear that federal law governs releases of federal claims. *See* notes 46-50 and accompanying text *infra*. Releases exemplify the problem—faced by all federal courts adjudicating federal claims intertwined with common-law issues—of choosing between state and federal rules of decision. This choice is the focus of this Note. *See* notes 55-61 and accompanying text *infra*.

[2] Included in the term "release," as used in this Note, is the "covenant not to sue." Both are contracts. A covenant not to sue is an agreement not to enforce a right of action; a release is an agreement that surrenders a right of action. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 301, 303 (4th ed. 1971). The existence of a release is an affirmative defense under the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 8(c). Breach of a covenant not to sue gives rise to a counterclaim, entitling the defendant to damages but not barring the primary action. Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814, 821 (S.D.N.Y. 1964), *aff'd*, 363 F.2d 1002 (2d Cir. 1966). Many courts, however, have allowed parties to plead a covenant not to sue as a defense. *See, e.g.*, Caplan v. City of Pittsburgh, 375 Pa. 268, 272, 100 A.2d 380, 383 (1953). These courts have treated the covenant not to sue as though it destroyed the right of action. This approach, although analytically imprecise, is no more so than the label "covenant not to sue" itself. Some courts have treated as a covenant not to sue a document clearly in the form of a release, contemplating the surrender of a claim as to certain parties yet explicitly reserving rights against other parties. *See* W. PROSSER, *supra*, § 49, at 303-04. The "covenant not to sue" label served to give effect to the reservation of rights, since under the common-law joint-tortfeasor rule a *release* of one joint tortfeasor released them all, irrespective of the contracting parties' intentions. *See* notes 14-15 and accompanying text *infra*.

law to agreements releasing federal claims[3] could subvert federal policies underlying those claims. Yet the general application of federal common law could threaten legitimate state concerns, the interests of the contracting parties, and the vitality of federalism. To strike an appropriate state-federal balance, commentators have suggested that state rules should govern except where important federal policy or the need for nationwide uniformity dictates resort to federal common law.[4] This analysis, however, requires further refinement. Courts should displace state law in varying degrees, depending on whether the primacy of federal policy or the need for uniformity dictates application of federal rules of decision. This Note will examine the displacement of state rules of decision in the context of releases of federal claims.

I

CASES CONSTRUING RELEASES OF FEDERAL CLAIMS

Analysis of the confusion surrounding the choice of decisional rules for releases of federal claims must begin with two pairs of Supreme Court cases. The first comprises *Garrett v. Moore-McCormack Co.*[5] and *Dice v. Akron, Canton & Youngstown Railroad.*[6] In 1942, *Garrett* adopted a federal rule of decision for allocating the burden of proving duress in a dispute over a seaman's release of an admiralty claim.[7] Ten years later, *Dice* formulated a federal rule of decision to determine whether a plaintiff who negligently released a Federal Employers' Liability Act[8] (FELA) claim could protest the defendant's fraud in inducing the release.[9] Each decision voided a release that a state's highest court had upheld.[10] The two opinions

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The significance of these tortured distinctions is that the choice between state and federal rules of decision for labeling a given agreement either a release or a covenant not to sue may well determine the outcome of a case. *See, e.g.*, Ayers v. Pastime Amusement Co., 259 F. Supp. 358, 361-62 (D.S.C. 1966); Dale Hilton, Inc. v. Triangle Publications, Inc., 198 F. Supp. 638, 639 (S.D.N.Y. 1961).

[3] As used in this Note, "federal claim" designates a claim arising under federal law. For a discussion of the cases construing releases of federal claims, see notes 5-36 and accompanying text *infra*.

[4] *See* Note, *The Federal Common Law*, *supra* note 1, at 1517-31. *See also* Comment, *Federal Law-Making Power*, *supra* note 1, at 176; Note, *Federal Competence*, *supra* note 1, at 1097-99. *But cf.* Comment, *Adopting State Law*, *supra* note 1 (proposing decrease in emphasis on need for uniformity).

[5] 317 U.S. 239 (1942).

[6] 342 U.S. 359 (1952).

[7] 317 U.S. at 243-45.

[8] 45 U.S.C. §§ 51-60 (1970).

[9] 342 U.S. at 361.

[10] *See* Dice v. Akron, C. & Y.R.R., 155 Ohio St. 185, 98 N.E.2d 301 (1951) (legal effect

stressed the need for nationally uniform standards defining federal plaintiffs' rights.[11] *Garrett* also noted the special protection traditionally accorded seamen as "wards" of the admiralty (*i.e.*, federal) courts.[12] *Dice* took the position that the FELA granted claimants a right not only to recover but to recover under a "federally declared standard."[13]

The second pair of Supreme Court cases adopted a federal rule of decision to govern a release's effect on joint tortfeasors. Because the common law regarded a cause of action as indivisible,[14] potential plaintiffs who released one of several joint tortfeasors automatically released them all.[15] In *Aro Manufacturing Co. v. Convertible Top Replacement Co.*[16] the Supreme Court refused to apply the common-law rule to the release of a patent infringement claim.[17] Subsequently, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[18] the Court rejected the old joint-tortfeasor rule for antitrust claims, holding that the parties' intent determined the scope of a release.[19] The Supreme Court evidently assumed that federal rules applied,[20] for neither opinion touched on the question of applicable rules of decision.

The *Garrett-Dice* and *Aro-Zenith* lines of decision have received narrow application. Citing *Garrett* and *Dice*, courts now routinely apply federal common law to all aspects of seamen's admiralty releases[21] and, after further prodding by the Supreme Court,[22] to

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of release of FELA claim executed in Ohio should be determined in Ohio courts by Ohio law), *rev'd*, 342 U.S. 359 (1952); Garrett v. Moore-McCormack Co., 344 Pa. 69, 23 A.2d 503 (evidence not sufficient to declare release invalid on grounds of fraud, duress, or mistake), *rev'd*, 317 U.S. 239 (1942).

[11] Dice v. Akron, C. & Y.R.R., 342 U.S. at 361; Garrett v. Moore-McCormack Co., 317 U.S. at 244.

[12] 317 U.S. at 246-48.

[13] 342 U.S. at 361.

[14] W. PROSSER, *supra* note 2, § 49, at 301 & n.93.

[15] The release applied to all joint tortfeasors even when it took the form of a written instrument expressly reserving rights against some of them. *Id.* at 301-02. Some courts, however, interpreted such a release as a covenant not to sue, which could serve as a defense or counterclaim only for the covenantee. *See* note 2 *supra*.

[16] 377 U.S. 476 (1964).

[17] *Id.* at 500-02.

[18] 401 U.S. 321 (1971).

[19] *Id.* at 346-47.

[20] So it has appeared to at least two judges. *See* Virginia Impression Prods. Co. v. SCM Corp., 448 F.2d 262, 270 (4th Cir. 1971) (dissenting opinion), *cert. denied*, 405 U.S. 936 (1972); Three Rivers Motors Co. v. Ford Motor Co., 374 F. Supp. 620, 624 (W.D. Pa. 1974), *rev'd*, 522 F.2d 885 (3d Cir. 1975).

[21] *See, e.g.*, Lewis v. S.S. Baune, 534 F.2d 1115, 1123 (5th Cir. 1976); Lewis v. Texaco, Inc., 527 F.2d 921, 923-25 (2d Cir. 1975). Under *Garrett*, federal rules also govern releases

FELA releases as well.[23] But when construing releases of other federal claims, courts have generally declined to invoke *Garrett* or *Dice*.[24] Courts have relied on *Aro* and *Zenith* to abolish the common-law joint-tortfeasor rule for all federal causes of action,[25] but have not read those cases as requiring application of federal rules

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by longshoremen, who, like seamen, are considered wards of admiralty. *See* Robertson v. Douglas S.S. Co., 510 F.2d 829, 834-35 (5th Cir. 1975); Wooten v. Skibs a/s Samuel Bakke, 431 F.2d 821, 823 (4th Cir. 1970). *See also* Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-945, 947-950 (1970). *But cf.* Capotorto v. Compania Sud Americana de Vapores, Chilean Line, Inc., 541 F.2d 985, 987 (2d Cir. 1976) (court refused to treat longshoreman as ward of admiralty, not specifying whether some other *federal* standard governed); Harris v. Lykes Bros. S.S. Co., 375 F. Supp. 1155, 1157 (E.D. Tex. 1974) (same). Yet a district court ignored *Garrett* and applied state rules of decision to a release of a claim under the Death on the High Seas Act (46 U.S.C. §§ 761-768 (1970)). Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 301 F. Supp. 513, 525 (S.D.N.Y. 1968). Apparently the factor that triggers application of federal rules is not the maritime nature of the cause of action but rather the need to protect a "ward" of the admiralty courts.

[22] *See* Maynard v. Durham & S. Ry., 365 U.S. 160 (1961) (federal rule governs FELA release challenged for lack of consideration), *rev'g* 251 N.C. 783, 112 S.E.2d 249 (1960).

[23] *E.g.*, Taylor v. Chesapeake & O. Ry., 518 F.2d 536, 537 (4th Cir. 1975); Fournier v. Canadian Pac. R.R., 512 F.2d 317, 318 (2d Cir. 1975) (per curiam). *But see* Bafico v. Southern Pac. Co., 364 F.2d 36, 37-38 (9th Cir. 1966), *cert. denied*, 385 U.S. 1025 (1967).

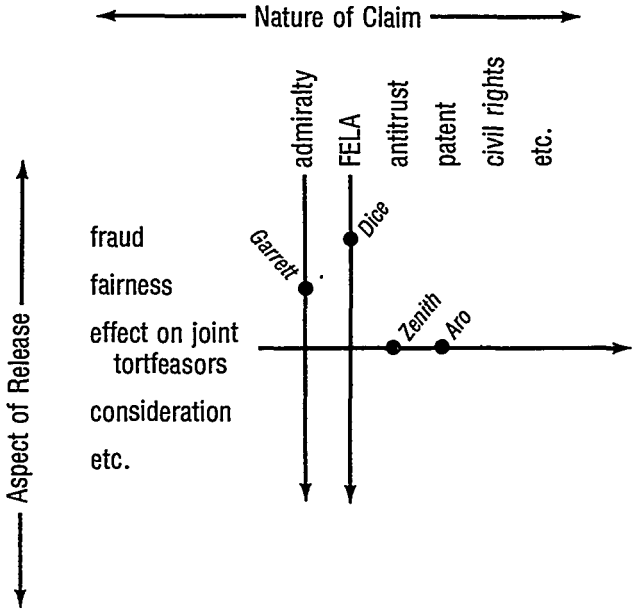
[24] *See* Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 892-93 (3d Cir. 1975); Virginia Impression Prods. Co. v. SCM Corp., 448 F.2d 262, 265-66 (4th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); Eagle Lion Films, Inc. v. Loew's Inc., 219 F.2d 196, 198 (2d Cir. 1955); Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc., 208 F.2d 316, 324 (10th Cir. 1953), *cert. denied*, 347 U.S. 935 (1954). *See also* Schott Enterprises, Inc. v. Pepsico, Inc., 520 F.2d 1298, 1300 (6th Cir. 1975).

The Ninth Circuit, however, has cited *Dice* as authority for the application of federal common law to an antitrust release. Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., 351 F.2d 925, 928 (9th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). Although the case was wrongly decided (*see* note 59 and accompanying text *infra*), the Fifth Circuit followed *Twentieth Century-Fox* in another antitrust case. Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 402 F.2d 83 (5th Cir. 1968) (per curiam). The Third Circuit, in Taxin v. Food Fair Stores, Inc., 181 F. Supp. 181, 183-84 (E.D. Pa. 1960), *aff'd*, 287 F.2d 448 (3d Cir.), *cert. denied*, 366 U.S. 930 (1961), also applied federal rules to an antitrust release on the authority of *Dice*, but it has since changed its mind. *See* Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 892-93 (3d Cir. 1975) (applying state rules of decision in antitrust case with only passing mention of *Dice*). The Sixth Circuit, citing *Dice*, held that a federal rule of decision governed the issue of fraud in the release of an age discrimination claim. Ott v. Midland-Ross Corp., 523 F.2d 1367, 1368-69 (6th Cir. 1975).

[25] *See* Cates v. United States, 451 F.2d 411, 415-16 (5th Cir. 1971) (rejecting common-law rule as to release of admiralty claim on authority of *Zenith*); Billiot v. Sewart Seacraft, Inc., 382 F.2d 662, 664 n.1 (5th Cir. 1967) (rejecting common-law rule as to release of admiralty claim on authority of *Aro*). *See also* Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 890-91 (3d Cir. 1975) (interpreting *Zenith* as adopting "a uniform national rule to govern the effect of a release on co-defendants *in other states*") (emphasis added); Wiederhold v. Elgin, J. & E. Ry., 368 F. Supp. 1054, 1058-60 (N.D. Ind. 1974) (rejecting common-law rule as to release of FELA claim, citing but not exclusively relying on *Zenith*).

to other aspects of releases.[26] Thus, *Garrett* and *Dice* require application of federal rules to all aspects of contracts releasing certain federal claims (the vertical bars on the chart below), while *Aro* and *Zenith* establish a federal rule governing one aspect of releases of all federal claims (the horizontal bar on the chart below). This pattern rests on no discernible principles of reason.

WHERE FEDERAL RULES GOVERN RELEASES OF FEDERAL CLAIMS



As to releases of most federal claims—those not arising under the FELA or admiralty law, nor involving the release's effect on joint tortfeasors—which rules of decision to apply remains an open question.[27] Some opinions cite state cases, as though there were no

[26] *See, e.g.*, Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 888-91 (3d Cir. 1975); Virginia Impression Prods. Co. v. SCM Corp., 448 F.2d 262, 265-66 (4th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

[27] The problem arises only where Congress has neither specified the applicable rules of decision nor indicated what law should supply them. *See* Comment, *Adopting State Law*, *supra* note 1, at 824-27. For example, state rules of decision govern releases of tort claims against the federal government because the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2672 (1970)) provides for government liability "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [tort] occurred." *Id.* § 1346(b). *See* United States Lines, Inc. v. United States, 470 F.2d 487, 489-90 (5th Cir. 1972); Scoggin v. United States, 444 F.2d 74, 75

question but that state rules of decision govern.[28] Other decisions summarily hold that federal rules apply.[29] Some courts refer to both state and federal rules where they yield the same result,[30] while other courts cite no cases at all.[31] It appears that counsel often fail to spot the issue or to perceive how the choice between state and federal rules of decision might determine the outcome of litigation.[32] Judges may be reluctant to raise such a complex issue on their own,[33] and many have legitimately avoided it by refusing to enforce a release that would have contravened federal statutory policy.[34] Cases that explicitly find a release to comport with federal

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(10th Cir. 1971) (per curiam); Bacon v. United States, 321 F.2d 880, 885 (8th Cir. 1963); Montellier v. United States, 315 F.2d 180, 184-85 (2d Cir. 1963); Robinson v. United States, 408 F. Supp. 132, 136 (N.D. Ill. 1976). *But cf.* Garrett v. Jeffcoat, 483 F.2d 590, 592-93 (4th Cir. 1973) (state rule that releasing servant releases master inapplicable to master such as United States, held exclusively liable for servants' negligent driving under Federal Drivers Act); Munson v. United States, 380 F.2d 976, 979-80 (6th Cir. 1967) (state rule that releasing servant releases master inapplicable to master such as United States, which could not seek indemnity from its servant). *See also* Mishkin, *supra* note 1, at 797 & n.1, 811.

[28] *E.g.*, Clapper v. Original Tractor Cab Co., 270 F.2d 616, 620-21 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960); Eagle Lion Films, Inc. v. Loew's, Inc., 219 F.2d 196, 198 (2d Cir. 1955). *See* Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395, 1398 (1962). *See also* Bafico v. Southern Pac. Co., 364 F.2d 36, 37-38 (9th Cir. 1966) (state law applied without explanation in FELA case), *cert. denied*, 385 U.S. 1025 (1967).

[29] *E.g.*, Clark v. Ziedonis, 513 F.2d 79, 81 (7th Cir. 1975); Barninger v. National Maritime Union, 372 F. Supp. 908, 914 (S.D.N.Y. 1974).

[30] *E.g.*, Dura Elec. Lamp Co. v. Westinghouse Elec. Corp., 249 F.2d 5, 7 (3d Cir. 1957). The Second Circuit for a time chose "to ignore the usually-theoretical question of what law governs and to draw precedents from both federal and state . . . courts." Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) (dictum).

[31] *E.g.*, Kershaw v. Kershaw Mfg. Co., 209 F. Supp. 447, 455 (M.D. Ala. 1962), *aff'd per curiam*, 327 F.2d 1002 (5th Cir. 1964).

[32] It is obvious that the choice of a rule of decision may be outcome-determinative where the federal rule differs from the state rule. But even where the federal and state rules are the same, litigants facing probable defeat can argue that a federal rule should govern and that the federal court should change the existing federal rule. *See, e.g.*, Miree v. United States, 538 F.2d 643, 645, 648 (5th Cir. 1976) (en banc) (dissenting opinion), *vacated sub nom.* Miree v. DeKalb County, 97 S. Ct. 2490 (1977).

[33] *See, e.g.*, Baker v. Chicago, Fire & Burglary Detection, Inc., 489 F.2d 953, 955 n.4 (7th Cir. 1973) (court applied Illinois law because both parties cited it).

[34] Completely apart from the choice-of-law issue, a release—like any other contract—may be void as against public policy. Mittendorf v. J.R. Williston & Beane, Inc., 372 F. Supp. 821, 834-35 (S.D.N.Y. 1974). The Supreme Court has specifically held: "[A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy." Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945) (Fair Labor Standards Act). *Accord*, Redel's Inc. v. General Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974) (Clayton Act); Chastang v. Flynn & Emrich Co., 365 F. Supp. 957, 968 (D. Md. 1973) (Civil Rights Act of 1964); Buford v.

statutory policy have tended to follow state rules of decision in resolving any further questions about the release.[35] Only a few decisions have confronted the problem head-on.[36]

II

AN ANALYTIC FRAMEWORK

A. *Background*

Under the doctrine of *Erie Railroad v. Tompkins*,[37] the interpretation of a release is a substantive matter subject to the same law in both state and federal court.[38] But to which law? *Clearfield Trust Co. v. United States*[39] set the stage for answering this question.[40] *Clear-*

American Fin. Co., 333 F. Supp. 1243, 1248-49 (N.D. Ga. 1971) (Truth in Lending Act); Cohen v. Tenney Corp., 318 F. Supp. 280, 282 (S.D.N.Y. 1970) (Securities Exchange Acts).

[35] *See, e.g.*, Virginia Impression Prods. Co. v. SCM Corp., 448 F.2d 262, 265-66 (4th Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); Duffy Theatres, Inc. v. Griffith Consol. Theatres, Inc., 208 F.2d 316, 324 (10th Cir. 1953), *cert. denied*, 347 U.S. 935 (1954); Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196, 206-07 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); Marketing Assistance Plan, Inc. v. Associated Milk Prod., Inc., 338 F. Supp. 1019, 1022-23 (S.D. Tex. 1972).

[36] *E.g.*, Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 888-93 (3d Cir. 1975) (Forman, J.) (*see* notes 83-96 and accompanying text *infra*); Novak v. General Elec. Corp., 282 F. Supp. 1010, 1013-19 (E.D. Pa. 1967) (Higginbotham, J.); Artvale, Inc. v. Rugby Fabrics Corp., 232 F. Supp. 814, 825 (S.D.N.Y. 1964) (Levet, J.), *aff'd*, 363 F.2d 1002 (2d Cir. 1966) (Friendly, J.); Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co., 232 F. Supp. 556, 560-61 (N.D. Cal. 1964) (Zirpoli, J.), *rev'd*, 351 F.2d 925 (9th Cir. 1965) (Barnes, J.), *cert. denied*, 382 U.S. 1011 (1966).

[37] 304 U.S. 64 (1938).

[38] *Erie* sets standards for determining whether the same law must govern in both state and federal court (in which case the issue is "substantive") or whether each court may apply its own law (in which case the issue is "procedural"). An issue is substantive if the application of different decisional rules in state and federal court would induce forum shopping or deny litigants equal protection of the laws. *See id.* at 74-78. An issue is substantive as well if either the state or federal government has an overwhelming interest in seeing its own law govern. *See id.* at 78-80. Where no reason exists to apply the same law in both state and federal court, or where such reasons are outweighed by the interest of a forum court per se in applying its own law, state law governs in state court and federal law in federal court. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472-73 (1965) (interest of forum court in applying own rules of civil procedure).

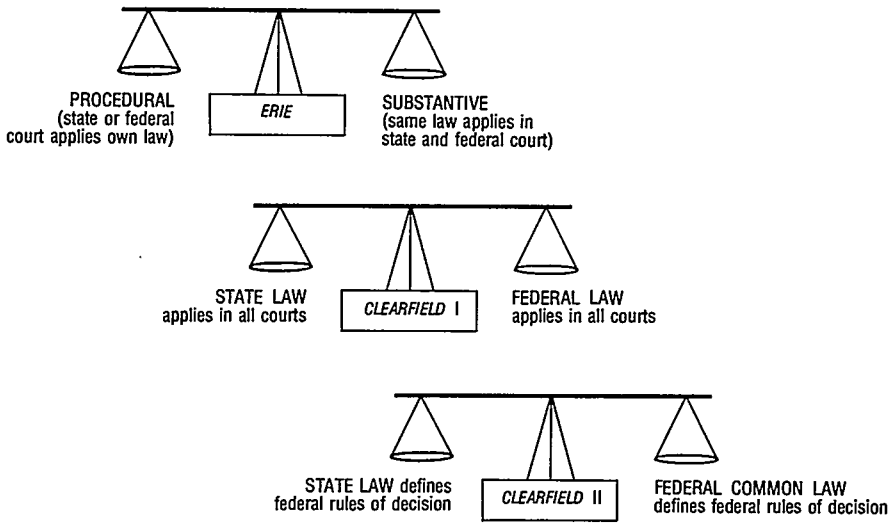
Since the outcome of litigation will often hinge on the effect given to a release, different rules of decision governing releases in state and federal courts will induce forum shopping. Moreover, the weight of the arguments in favor of state or federal rules of decision—however closely balanced—does not vary from forum to forum; in other words, a forum court faced with a release problem has almost no interest in applying its own law to releases just because it is the forum court. The interpretation of a release is therefore a substantive matter.

[39] 318 U.S. 363 (1943).

[40] *See generally* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39

field involved the affirmative defense of laches rather than release,[41] but the choice-of-law problem is similar.[42] The Supreme Court posed two questions, each to be answered by balancing state and federal interests. The first was whether state or federal law controlled.[43] Since the Court decided that federal law applied,[44] it reached the second question: whether federal law would draw its rules of decision from state law or from federal common law.[45] The chart below illustrates the sequence of choices that *Erie* and *Clearfield* impose.

ERIE-CLEARFIELD DECISIDN TREE



N.Y.U. L. REV. 383 (1964); Mishkin, *supra* note 1; Note, *The Federal Common Law*, *supra* note 1; Note, *Federal Competence*, *supra* note 1; Note, *Rules of Decision in Nondiversity Suits*, 69 YALE L.J. 1428 (1960).

[41] 318 U.S. at 366.

[42] The defense of release, however, arises not out of inaction but out of some act alleged to constitute the surrender of a claim. A release agreement may stipulate or imply which law is to govern.

[43] 318 U.S. at 366-67.

The principal legal question in *Erie* was whether the issue at hand was substantive or procedural. *See* note 38 *supra*. In deciding that the issue was substantive, the Court relied in part on the importance to the state of having its own law govern in both state and federal courts. Erie R.R. v. Tompkins, 304 U.S. 64, 78-79 (1938). It was thus obvious in *Erie* that state law would control. In contrast, the question of controlling law in *Clearfield* was sufficiently close to warrant explicit treatment. Therefore, in this Note the question of controlling law is referred to as *Clearfield*'s first balancing test.

[44] 318 U.S. at 366-67.

[45] *Id.* at 367. For a closer examination of this double-balancing test, see note 54 *infra*.

Clearfield's first determination—that federal law controls—does no more than establish a federal court's competence to choose rules of decision.[46] The Rules of Decision Act[47] confers such competence wherever "the Constitution or treaties of the United States or Acts of Congress . . . require or provide."[48] All federal claims, by definition, fall within the sweep of a constitutional grant of power to the federal government. Defenses to federal claims, such as release or laches, are sufficiently intertwined with the claims themselves to enter the realm of federal competence as well.[49] Federal courts thus have the power to choose rules of decision for all releases of federal claims.[50]

This federal competence indicates only a potential federal interest in the application of distinct federal rules of decision (*i.e.*, federal common law). Although relieved of constitutional or statutory[51] commands to follow state law,[52] federal courts[53] may still apply state rules of decision.[54]

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[46] Mishkin, *supra* note 1, at 802. *See generally* Comment, *Federal Law-Making Power*, *supra* note 1; Note, *Federal Competence*, *supra* note 1.

[47] 28 U.S.C. § 1652 (1970).

[48] *Id.*

[49] *See* Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 361-62 (1952). *See also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 704 (1945).

[50] Mishkin, *supra* note 1, at 799. *See generally* Comment, *Federal Law-Making Power*, *supra* note 1; Note, *Federal Competence*, *supra* note 1.

[51] Commentators dispute whether *Erie* rests primarily on the Constitution or the Rules of Decision Act. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 56 (3d ed. 1976) and conflicting authorities cited therein.

[52] "[U]nder Erie R. R. v. Tompkins [*i.e.*, *Clearfield*'s first balancing test (*see* note 43 and accompanying text *supra*)] . . . we are bound to follow state law, whether or not we agree with the reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision." Delta Air Lines, Inc. v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975). When *Clearfield*'s first balancing test swings to state law, even the Supreme Court of the United States must accept that law as interpreted by the state's highest court. *E.g.*, Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482, 488 (1976).

[53] State courts adjudicating federal claims must apply whatever rules of decision the local federal court would apply. *See, e.g.*, Dice v. Akron, C. & Y.R.R., 342 U.S. 359 (1952).

[54] *Clearfield*'s double-balancing test might seem unnecessary. Why would a court hold that federal law controlled a given issue and then decide the issue according to state law? The court could accomplish the same result through a single balancing of interests in which those of the state prevailed. However, the double-balancing test does serve to distinguish cases such as *Erie* in which state law governs of its own force (*i.e.*, by prevailing in the first test) and hence binds the federal courts (*see* note 52 *supra*) from those in which state law governs by incorporation into federal law (*i.e.*, by prevailing in the second test) at the option of federal courts. Note, *Federal Competence*, *supra* note 1, at 1099. This distinction is not always sharp nor of great practical importance. *See, e.g.*, United States v. Yazell, 382 U.S. 341, 357 (1966) ("it is unnecessary to decide in the present case whether the Texas law . . . should apply *ex proprio vigore* . . . or by 'adoption' as a federal principle" because "it

B. *Displacement of State Rules of Decision*

To determine whether state or federal rules of decision should govern under *Clearfield*'s second balancing test, commentators have urged a presumption in favor of state rules that can be overridden by the need to foster federal policy or to impose nationwide uniformity.[55] Courts, however, have failed to recognize that the extent of displacement of state law can and should vary depending on whether uniformity or federal policy justifies application of federal rules.

Two principles follow from the presumption in favor of state rules of decision. First, the greater the displacement of state rules required by the promotion of a federal interest, the more important that interest should be. Second, when courts apply federal common law, they should do so in the manner that least disrupts state law.

Promoting federal policy[56] requires courts to void releases of federal claims[57] under certain circumstances.[58] But federal rules should not unnecessarily displace state rules. Therefore, in the absence of an overriding need for uniformity, federal rules should merely define minimum federal standards. State rules limiting the effect of releases of federal claims to a greater degree than federal rules of decision should be allowed to operate.[59] Reliance on over-

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is clear that the state rule should govern"). *But see* Note, *Federal Competence*, *supra* note 1, at 1099 (arguing that reason for applying state rule can affect precedential value of decision). Nevertheless, the Court returned to the double-balancing approach in United States v. Little Lake Misere Land Co., 412 U.S. 580, 593-94 (1973).

[55] *See* authorities cited in note 4 *supra*.

[56] Examples of federal policies are the protection of seamen (*see* Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)) and private enforcement of the antitrust laws (*see* note 79 and accompanying text *infra*).

[57] Federal policy may also demand that releases be allowed to operate, in order to facilitate settlement. *See, e.g.*, Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd., 185 F.2d 196, 206-07 (9th Cir. 1950) (by implication). However, settlements are best promoted by preventing the overly broad or capricious operation of releases, which might discourage their use. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346-47 (1971) (rejecting common-law joint-tortfeasor rule in part because it impeded settlement of claims).

[58] For example, the federal policy of protecting railroad workers demonstrates governmental interest in preventing a worker's release from operating when obtained by fraud, even when he is negligent in signing it. Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 361 (1952).

[59] This would avoid the absurd results of cases like Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., 351 F.2d 925 (9th Cir. 1965) (antitrust claim), *cert. denied*, 382 U.S. 1011 (1966), and Canillas v. Joseph H. Carter, Inc., 280 F. Supp. 48 (S.D.N.Y. 1968) (seaman's admiralty claim). In these cases, the application of federal common law served to validate releases that state law would probably not have recognized, thus

riding federal policy permits only a veto of objectionable state rules of decision. Courts should exercise this veto only when state rules accord greater deference to releases of federal claims than federal policy can tolerate.

In contrast to this circumscribed veto designed to foster federal policy, a federal interest in nationally uniform rules of decision requires the complete displacement of state rules of decision; national uniformity, by definition, requires that all state rules yield to a single federal standard. Where the court finds a need for nationally uniform treatment of releases of a certain type of federal claim, the mere veto of particular state rules will not suffice. Rather, the court must substitute federal rules for all state rules as to all aspects of releases of such claims.[60]

When a court opts for a nationally uniform rule, the next question is what that rule should be. Where an overriding federal policy is present, the court should tailor its uniform rule to best effectuate that policy. Absent an overriding federal policy, the court could cushion the complete displacement of state rules by declaring the national rule to be that of the majority of states.[61] Even then, however, the displacement of state rules due to the imposition of nationwide uniformity would vastly exceed that required by the fostering of federal policy. Therefore, courts should be particularly reluctant to recognize a need for uniformity.

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depriving plaintiffs of their federal claims. Moreover, *Twentieth Century-Fox* and *Canillas* adopted a rule of decision—the joint-tortfeasor rule of the first *Restatement of Torts* (*see* RESTATEMENT OF TORTS § 885(1) (1939))—that the Supreme Court repudiated shortly thereafter as contrary to federal interests. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 346-47 (1971); notes 14-20 and accompanying text *supra*. *See also* Miree v. United States, 538 F.2d 643, 647-48 (5th Cir. 1976) (en banc) (dissenting opinion, Morgan, J.) (criticizing majority for invoking federal common law because of federal interest in promoting air safety and then formulating rule of decision contrary to that interest), *vacated sub nom.* Miree v. DeKalb County, 97 S. Ct. 2490 (1977).

[60] In theory, a court might find the need for nationally uniform rules of decision as to only one aspect of a release. This position is illogical, however, because the reasons for adopting nationwide uniformity (such as the desirability of having identical acts by parties lead to identical consequences in all fifty states) apply with equal force to all aspects of releases. Courts have implicitly recognized this proposition. *See, e.g.*, Taylor v. Chesapeake & O. Ry., 518 F.2d 536, 537 & n.2 (4th Cir. 1975) (applying nationally uniform rule for mutual mistake in release of FELA claim, citing as authority case applying nationally uniform rule for fraud in release of FELA claim).

[61] A trivial concession to the states, this approach might actually subvert the federal system by promoting conformity among the states and discouraging the evolution of the common law. *But cf.* Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938) (application of federal rules of decision to state-created rights since early nineteenth century did not induce state law to conform to federal law).

For some criteria for choosing the federal rule most compatible with state law, see Wiederhold v. Elgin, J. & E. Ry., 368 F. Supp. 1054, 1057-58 (N.D. Ind. 1974).

III

THE CASES REVISITED

In light of these principles, the Supreme Court's opinions construing releases of federal claims have generally applied the correct rules of decision. The Court's holdings, however, have been unnecessarily broad. The Court has bloated the federal rules' sphere of operation and diminished that of state rules—all to the detriment of federalism. Lower courts should therefore utilize the Court's decisions for the concerns they reflect rather than the rules they propound.

Garrett v. Moore-McCormack Co.[62] comports with the principles developed above. *Garrett* held that federal rules govern all aspects of seamen's releases of admiralty claims due to the seaman's traditional status as ward of the admiralty[63] and the need for nationally uniform rules.[64] The seaman's status as ward of the admiralty translates into a federal policy of protecting seamen. Since a federal policy interest requires veto only of state rules contravening that policy,[65] *Garrett*'s holding that federal rules control *all* aspects of *all* admiralty releases must stand, if at all, on the need for nationally uniform rules. Although that need seldom justifies the complete displacement of state rules,[66] admiralty cases are the exception. The tendency to treat seamen as virtually incompetent[67] so pervades the law of releases and so constricts their operation that applying state rules subject to federal veto would seldom allow state rules to operate at all.[68] Moreover, uniform rules regarding seamen's releases are attainable because they, or the principles from which they derive, already exist.[69] Nationally uniform rules are thus appropriate in the case of admiralty releases.

Under the FELA, however, uniform rules would displace state rules to a greater extent than federal interests require. Hence *Dice*

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[62] 317 U.S. 239 (1942). *See* text accompanying notes 5-13 *supra*.

[63] 317 U.S. at 246-48.

[64] *Id.* at 244.

[65] *See* note 59 and accompanying text *supra*.

[66] *See* notes 60-61 and accompanying text *supra*.

[67] Seamen "are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and *cestuis que trustent* with their trustees." Garrett v. Moore-McCormack Co., 317 U.S. 239, 246 (1942) (quoting Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047) (Story, J.)).

[68] *See* Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942).

[69] *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-16 (2d ed. 1975).

v. Akron, Canton & Youngstown Railroad,[70] in decreeing that federal rules govern FELA releases, held too broadly. In *Dice*, representatives of the employer railroad deliberately misled an injured employee, who then signed a release without reading it.[71] Under state law, the worker's negligent failure to read the release prevented him from protesting his employer's fraud.[72] This the Supreme Court would not countenance: "Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the [FELA] to give railroad employees a right to recover . . . ."[73] The Court's principal concern was to avoid the operation of a particular rule of decision[74] because the result would contravene the FELA's policy of protecting railroad workers. This concern in no way required the broad holding that followed: "[V]alidity of releases under the Federal Employers' Liability Act . . . . must constantly be determined in these cases according to a uniform federal law."[75] Having failed to demonstrate the need for nationwide uniformity, the Court erred in exercising rulemaking rather than veto power to implement federal policy.[76]

The Court repeated this mistake in *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[77] an antitrust action that enunciated a federal rule to govern the effect of a release on joint tortfeasors.[78] Private enforcement of the antitrust laws was the federal policy at stake.[79] Although releases do not in themselves contravene this policy,[80] forcing wrongdoers to bargain for their releases and thus pay a "fine" is implicit in the private attorney general system. The common-law joint-tortfeasor rule rejected in *Zenith* would have

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[70] 342 U.S. 359 (1952). *See* text accompanying notes 5-13 *supra*.

[71] 342 U.S. at 360.

[72] *Id.* at 360-61.

[73] *Id.* at 362.

[74] The Court admitted that the "Ohio rule [was] out of harmony with modern judicial and legislative practice." *Id.*

[75] *Id.* at 361-62.

[76] *See* notes 59-61 and accompanying text *supra*.

[77] 401 U.S. 321 (1971). *See* text accompanying notes 14-20 *supra*.

[78] 401 U.S. at 346.

[79] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969). In recent years, the Supreme Court has been less hospitable to this private attorney general concept. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977). *See also* Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977) (narrowing standing under securities laws).

[80] Richard's Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18, 20 (7th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); Schott Enterprises, Inc. v. Pepsico, Inc., 520 F.2d 1298, 1300 (6th Cir. 1975); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 891-92 (3d Cir. 1975).

subverted federal policy by releasing tortfeasors who never bargained. *Zenith*'s holding that a release may operate on nonparties only where the parties so intend[81] increases the likelihood that wrongdoers will bargain for releases. It thus constitutes the minimum acceptable rule in private actions affected with a public interest. But a stricter state rule that required, for instance, the actual naming of the parties on whom the release would operate would not offend any federal policy interest. The Court in *Zenith* should therefore have simply vetoed the unacceptable state rule.[82]

Against this background stands *Three Rivers Motors Co. v. Ford Motor Co.*[83] At issue was whether the language of a general release was sufficiently broad to bar an antitrust claim.[84] The Third Circuit initially established its competence to choose a rule of decision[85] (*Clearfield*'s first balancing test[86]), its option to adopt state law as the rule of decision[87] (*Clearfield*'s second balancing test[88]), and the need to balance state against federal interests.[89] The court observed that state law customarily governs contracts, such as releases,[90] and found no federal interest in nationally uniform rules of decision.[91] Turning to the effect of state law on federal policy, the court pinpointed the policy at stake: the "private cause of action as a supplemental means for the enforcement of the antitrust laws."[92] Determining that neither releases in general[93] nor the applicable state law on releases[94] contravened that policy, the court concluded that state rules of decision should govern.[95] In so doing, however, the court intimated that, in an appropriate case, federal policy would justify a limited veto of a state rule of decision: "[a] federal court would still be permitted . . . to reject the rule of a particular state whose doctrine on the interpretation of releases is not entirely consistent with federal antitrust objectives."[96]

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[81] 401 U.S. at 346.
[82] *See* note 59 and accompanying text *supra*.
[83] 522 F.2d 885 (3d Cir. 1975) (Forman, J.).
[84] *Id.* at 888.
[85] *Id.* at 888-89.
[86] *See* notes 39-45 and accompanying text *supra*.
[87] 522 F.2d at 889.
[88] *See* notes 39-45 and accompanying text *supra*.
[89] 522 F.2d at 889-90.
[90] *Id.* at 891.
[91] *Id.* at 890-91.
[92] *Id.* at 891. *See* note 79 and accompanying text *supra*.
[93] 522 F.2d at 891-92.
[94] *Id.* at 892.
[95] *Id.*
[96] *Id.*

CONCLUSION

Releases of federal claims occupy a region between exclusively state and exclusively federal concerns. When federal courts exercise their power to formulate rules of decision for such releases, constitutional federalism should serve as the fulcrum in balancing state against federal interests. Respect for state interests requires federal courts to minimize the displacement of state rules of decision. Promoting federal policy necessitates the limited judicial veto of state rules of decision that are incompatible with the federal policy at stake. In contrast, the imposition of nationally uniform rules of decision requires, by definition, expansive application of federal common law. Courts should therefore give effect to only the most urgent need for national uniformity.

Daniel C. Cohn