In Defense of Forum Shopping: A Realistic Look at Selecting a Venue

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I. INTRODUCTION

"Forum shopping" typically refers to the act of seeking the most advantageous venue in which to try a case. Forum shopping can take
place "horizontally" when a party is shopping for the best venue from among courts within the same court system, such as when a party is shopping for the best state court in which to litigate his case. Forum shopping can also take place "vertically" when a party is trying to move from state court to federal court or vice versa. Regardless of which type of forum shopping is taking place, attorneys filing lawsuits or defending against lawsuits usually have the same objective when it comes to evaluating or seeking a venue — they seek a venue in which their clients can not only get a fair trial, but in which their clients might gain some advantage or begin with the odds in their favor.²

Many practicing attorneys and judges were led to believe in law school that forum shopping was a terrible thing, practiced by only the most manipulative and devious attorneys.³ This teaching may have confused some who may have wondered why venue and jurisdictional

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² An attorney who is forum shopping might take into account any one or more of the following factors: the reputation of the judges in a particular trial court and the corresponding appellate court; an evaluation of the reputation and characteristics of potential jurors who would make up the jury venire; potential success by counsel for both parties in the jurisdiction, including perceived advantages attorneys might have in that jurisdiction because of political connections, friendships, family name, past success, or current reputation; the political climate and bias in a particular jurisdiction; the characteristics and reputation of one's own client in light of the above; traditional factors of convenience, including convenience of witnesses, parties, and attorneys; procedural rules existing in the venue; and the law likely to be applied in a particular jurisdiction. See Laurie P. Cohen, *Southern Exposure: Lawyer Gets Investors to Sue GE, Prudential in Poor Border Town*, WALL ST. J., Nov. 30, 1994, at A1, for a candid discussion of the motives of an attorney who filed a complex securities-fraud case in a poor Texas town. See also *Note, Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1678-80 (1990).

³ For example, as the Court explained in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250 (1981), "jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous." See also Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 776-77 (1995) (noting that litigators frequently believe that the forum in which a case is litigated will dictate the outcome of the case).

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L. REV. 11, 14 ("'Forum shopping' is commonly defined as attempting to have one's case heard in the forum where it has the greatest chance of success."); Kimberly Jade Norwood, *Shopping for a Venue: the Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 268 (1996) ("Forum-shopping 'occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'" (quoting BLACK'S LAW DICTIONARY 555 (6th ed. 1980))).

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provisions existed that allowed some discretion in selecting a forum, yet "shopping" for a forum was taboo. Thus, "selecting" a forum was a necessary practice for those filing a lawsuit; "shopping" for one, on the other hand, was forbidden. Likewise, "evaluating" the plaintiff's chosen forum was certainly necessary to adequately represent a defendant, but "shopping" for a better forum was forbidden.

The confusion may have been compounded when these graduates began to practice law and were asked by their respected colleagues to evaluate jurisdiction and venue for the cases to which they were assigned. Were they being asked to compromise their legal ethics already and join the ranks of the manipulative and devious, or were they just being asked to apply the procedural rules and analyze their cases thoroughly? The most likely answer to the question raised above is that these attorneys were being asked to zealously represent their clients and thoroughly analyze their cases in light of the governing procedural rules. After all, most attorneys believe that where an action will be litigated is a significant factor in evaluating the merits of a case.  

So then, what is or should be forbidden or discouraged under the term "forum shopping"? Perhaps it refers only to those egregious circumstances in which attorneys file suits in forums allowed by law, but inconvenient because of their lack of connection to the issues involved in the lawsuits. Often these "egregious" circumstances occur when the client's only chance of proceeding with a lawsuit is in a remote forum, which may occur when the client has waited too long to seek the assistance of an attorney. The attorney may file in the remote forum, hoping to have the court apply a statute of limitations that would make the client's filing timely. Certainly, the attorney is not at fault for trying to provide his client with his day in court.

Other times, the attorney is simply seeking a forum in which awards are traditionally high or the juries are liberal or conservative, depending on the client's position. Do his actions amount to forum shopping? Of course. Should they be forbidden either on an ethical or procedural level? Should the attorney use restraint and not seek the more advantageous venue for his client? If so, the attorney could face a malpractice claim from his client.

But in spite of the phrase's pejorative connotation, forum shopping remains popular."

4. See Cameron & Johnson, supra note 2, at 777; see also Weyman I. Lundquist, The New Art of Forum Shopping, 11 LrrG. 21, 22 (Spring 1985) ("What is certain is that it is naive—bordering on foolish—to fail to consider all options before filing suit.").


6. See infra notes 175-85 and accompanying text.
This article discusses forum shopping and its place in the American judicial system. It defends forum shopping and those accused of forum shopping to the extent that such shopping is done within the procedural and ethical rules, and it considers some of the rules and decisions that have addressed or discussed forum shopping. Further, it calls on lawmakers—legislators and judges—to accept forum shopping as simply a procedural part of litigation, when that forum shopping takes place within the rules, and to eliminate what is deemed unacceptable forum shopping by legislatively limiting alternative forums and judicially exercising the power to transfer cases to more convenient forums.

II. FORUM SHOPPING'S PLACE IN THE AMERICAN JUDICIAL SYSTEM

Attempts to extinguish the "danger of forum-shopping" have been only partially successful because forum shopping is an intrinsic part of the American judicial system. Not only do venue options provided by procedural rules allow forum shopping, but the structure of the judicial system provides incentives to shop for a forum.8

The American judicial system comprises the federal court system and the state court systems. These court systems were designed to function independently of each other. Commenting on this independence, the Court explained that the United States Constitution recognizes and preserves the autonomy and independence of the States, independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.9

Co-existing with this independence, however, are the instances in which jurisdiction of the court systems overlaps, most notably brought about by choices granted to litigants in diversity of citizenship cases.10

Originally, diversity jurisdiction was created "to prevent apprehended discrimination in state courts against those not citizens of the State." Thus, forum shopping or venue selection was sanctioned in those cases in which a litigant might have felt that he would not be given a fair trial in a state forum.

Overlapping jurisdiction between the federal court system and a state court system is not the only sanctioned means by which a litigant can select a venue or forum shop. State venue provisions typically provide two or more alternative venues within a state in which a suit may be filed. Additionally, specialty courts, like the federal bankruptcy court, give litigants alternative forums in which to litigate their disputes.

In light of the potential venue choices provided to litigants under the American judicial system and the governing laws, we should not be surprised or dismayed at the fact that forum shopping has thrived. On the other hand, lawmakers have the responsibility to limit choices when those choices "render[] impossible equal protection of the law."

Several cases illustrate the extent to which forum shopping is part of the American judicial system. In these cases, the courts attempted to prevent forum shopping, but in each case the court prevented some forum shopping while creating other opportunities for forum shopping. One of the first cases to raise awareness about forum shopping


Also, these provisions, in conjunction with personal jurisdiction requirements, often provide litigants with opportunities to select from among the courts of different states. See generally Juenger, supra note 3, at 557-58 (recognizing that the decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), broadened the potential for forum shopping by expanding state court jurisdiction over parties and thus expanding plaintiffs' forum choices).

13. See Baird, supra note 8, at 826-28; see also infra notes 136-50 and accompanying text.
15. Erie, 304 U.S. at 75.
is *Swift v. Tyson*. In *Swift v. Tyson*, the Court, interpreting section 34 of the Federal Judiciary Act of 1789, held that federal courts need not follow state case law in diversity cases when the state cases are based on general principles of commercial law and not on local statute or "local usages of a fixed and permanent operation." The Court explained that state court decisions could be considered, but they were not conclusive of state law because they were not the law themselves, but were only evidence of what the laws were at a particular time.

Following this decision, problems with uniformity arose between state and federal court interpretations of state law and "general law." These discrepancies in interpretation, as well as trouble determining the difference between general law and local law, caused uncertainty among courts and litigants. The state courts and federal courts each insisted on applying their own interpretations of common law, which prevented uniformity of decisions between those of state courts and those of federal courts purporting to apply the same common law. Thus, despite the Court's attempt to preserve state autonomy, the result of *Swift* was that it preserved federal court autonomy to some extent and "prevented uniformity in the administration of the law of the State."

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17. Section 34 of the Federal Judiciary Act of 1789 provided: "[T]he laws of the several states, except where the Constitution, treaties, or statutes of the United States shall 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." Federal Judiciary Act of 1789, ch. 20, § 34, 1 stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1652 (1994)).
19. See id.
20. The scope of the term "general law" was wide and included commercial law, obligations under contracts entered into and to be performed within the State, the extent to which a carrier operating within a State may stipulate for exemption from liability for his own negligence or that of his employee; the liability for torts committed within the State upon persons resident or property located there, even where the question of liability depended upon the scope of a property right conferred by the State; and the right to exemplary or punitive damages. Furthermore, state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded.
21. See *Erie R.R. Co.*, 304 U.S. at 74; see also id. at 69 n.1 & 74 n.5, for a listing of several cases and articles that had questioned the decision in *Swift*.
22. See id. at 74.
23. Id. at 75; see also Hanna v. Plumer, 380 U.S. 460, 467 (1965) (recognizing that under *Swift*, there was a possibility that the result of a case could depend upon whether it had been brought in state or federal court); Corr, supra note 3, at 1095
The Court addressed the uncertainty resulting from *Swift* and overruled *Swift* 's interpretation of section 34 of the Federal Judiciary Act of 1789 in *Erie Railroad Co. v. Tompkins*. In *Erie*, the Court held that federal courts sitting in diversity must apply the law of the forum state, whether that law is statutory or the case law of the highest state court, unless the matter is governed by the Constitution or a specific act of Congress. The Court intended to prevent vertical forum shopping, or forum shopping from state court to federal court within the same state. This objective may have been achieved, however, it indirectly may have encouraged horizontal forum shopping from state to state in search of favorable law.

The Court acknowledged this possibility in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, a case in which the Court had to determine the appropriate conflicts of laws rules that a federal district court sitting in Delaware should apply in a diversity case. After noting that a Delaware state court would apply Delaware state law on this issue, the Court held that Delaware state conflicts of laws rules should also be applied by the federal district court. "Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." The Court recognized that this ruling might disturb uniformity among federal courts in different states, but noted that "[w]hatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors." (arguing that the *Swift* Court was unrealistic in believing its rule would create uniformity in state law administration).

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24. 304 U.S. 64 (1938).
25. See id. at 78.
26. See id. at 74-77; see also Hanna v. Plumer, 380 U.S. at 467 ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court."); Corr, *supra* note 3, at 1091-92, 1115 (recognizing one of the reasons behind *Erie* was to prevent forum shopping before state and federal courts); Wright, *supra* note 14, at 317 (referring to the decision in *Erie* as "the celebrated federal answer to forum shopping").
27. 313 U.S. 487, 496 (1941); see generally, Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for *Erie* and *Klaxon*,* 72 Tex. L. Rev. 79, 82 (1993).
29. *Id.*
30. *Id.; see also* Edelson v. Soricelli, 610 F.2d 131, 141 (3d Cir. 1979) (commenting on the *Erie* decision: "The decision to require that federal courts apply state substantive law in diversity cases represented a preference for vertical uniformity of substantive law within each state over horizontal uniformity among federal courts nationwide." (quoting Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 164 (3d Cir. 1976))).
Another case which illustrates that forum shopping is an intrinsic part of the American judicial system is found in the Court's opinion and the dissenting opinion in *Stewart Organization, Inc. v. Ricoh Corp.* At issue in *Stewart* was whether a federal court, sitting in diversity, should apply state or federal law in adjudicating a motion to transfer to a venue designated by the parties in a forum-selection clause of their contract. The contract between the parties provided that litigation arising out of the contract shall be brought in a court in New York, New York. Despite this provision, one of the parties, an Alabama corporation, filed a suit arising out of the contract in federal court in Alabama. In response, the defendant moved for the court to transfer the case to the Southern District of New York pursuant to 28 U.S.C. § 1404(a), specifically relying on the forum selection clause to support the transfer.

The district court applied Alabama law, which disfavors forum selection clauses, and denied the motion with no analysis of the merits of the transfer. Had the court applied the applicable federal law, 28 U.S.C. § 1404(a), the court would have been required to evaluate the transfer motion in light of the convenience of the parties and witnesses and the interest of justice, and the motion might have been granted. In fact, on appeal, the Supreme Court held that a district court must apply federal law when that law is a federal statute that controls the issue and the statute is a "valid exercise of Congress' constitutional powers." Thus, the district court was bound to apply § 1404(a) to the venue dispute in this case.

The Court's decision should discourage horizontal forum shopping within the federal system, or forum shopping from federal court in one state to federal court in another state, by requiring that all federal courts faced with similar issues apply federal law, thereby taking away the incentive for plaintiffs like the one in *Stewart* to seek out venues with law favorable to their positions. On the other hand, this decision may promote vertical forum shopping, or forum shopping

32. See id. at 24.
33. See id. at 24 n.1.
34. 28 U.S.C. § 1404(a) (1994) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See also infra text accompanying notes 82-86.
35. See *Stewart*, 487 U.S. at 24. In the alternative, defendant moved for dismissal of the case pursuant to 28 U.S.C. § 1406 (1994 & Supp. II 1996). The district court denied the motion in its entirety, then certified its ruling for interlocutory appeal. See id. The parties did not appeal the ruling with respect to the motion to dismiss. See id. at 28 n.8.
37. Id. at 27.
38. See id. at 28.
from state court to federal court, because of the difference that would result in each venue. If the parties can overcome a removal of the case to federal court based on diversity of citizenship, then they can ensure that the state’s law, in this case, Alabama law, would apply. The lesson to be learned by the plaintiff in this case is that it should have filed suit in state court originally to ensure that Alabama state law would apply and to avoid application of § 1404(a).\(^3\)

Justice Scalia explained in his dissent in *Stewart* that the Court was letting § 1404(a) interfere with or preempt state contract law.\(^4\)

Further, he explained:

Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum. Transfer to such a less desirable forum is, therefore, of sufficient import that plaintiffs will base their decisions on the likelihood of that eventual-ity when they are choosing whether to sue in state or federal court. With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and nonresident defendants will be encouraged to shop for more favorable law by removing to federal court. In a reverse situation—where a State has law favorable to enforcing such clauses—plaintiffs will be en-couraged to sue in federal court.\(^4\)

Working within judicial systems that provide such options, attorneys are bound to consider these options when evaluating their clients’ lawsuits. In fact, these options are the necessary consequences of having independence between the state and federal judicial systems.

III. WHAT CONGRESS AND THE COURTS HAVE SAID ABOUT FORUM SHOPPING

Despite the fact that forum shopping is allowed and facilitated by the American judicial system, Congress and the courts have generally disparaged the practice of forum shopping, tolerating it at times when

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40. *Id.* at 36 (Scalia, J. dissenting).
41. *Id.* at 39-40 (Scalia, J. dissenting). Commenting on Justice Scalia’s dissent, one commentator remarked, “Preventing intrastate forum shopping only encourages interstate forum shopping. As long as the states have different rules on this sub-ject, sophisticated litigants will travel to the state in which the law is most favorable.” Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 96 (1992).

In response to *Stewart* and other cases on enforceability of selection clauses, Professor Borchers explained, “the only way to discourage interstate forum shopping is to develop uniform rules that transcend state lines. Requiring federal courts to adhere to the same rule is a substantial step in this direction.” *Id.*
other interests are at stake. Thus, defending the practice may appear to be insupportable. However, consideration of the relevant statutes and cases reveals that forum shopping is allowed by law, and it can be and has been limited by statute when that is felt to be in the interest of justice.

A. Forum Shopping to Select the Applicable Law

A review of reported cases in which forum shopping has been discussed reveals that the most common motive for forum shopping is selection of the law to be applied to the case. Parties in the cases discussed herein sought to select the applicable law to determine recoverable damages, a party's capacity to sue, the statute of limitations, child custody, and the division of community property.

1. Forum Shopping to Dictate Recoverable Damages

The first case considered is Nolan v. Boeing Co. Nolan presents an example of several forum shopping moves made by both plaintiffs and defendants seeking to control the law to be applied to the case and, consequently, to determine the recoverable damages. Interestingly, despite the jockeying back and forth between state and federal court in this case, the federal court recognized the legitimacy of forum shopping when that shopping is done within the procedural rules.

Nolan is a case that arose from the crash in England of a British Midland Airways aircraft that was en route from London, England to

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43. Discussion is limited to reported cases, but it must be acknowledged that forum shopping or venue selection occurs every time an attorney files a lawsuit, considers filing a lawsuit, or responds to a lawsuit. In each of these instances the attorney evaluates the venue in terms of whether it is a proper venue and whether a more favorable venue is available. The majority of these cases are either not reported or venue has not been raised as a point of contention.

An interesting study of forum shopping in the bankruptcy context examines bankruptcy filings in which forum shopping was not an issue raised during litigation, but from which a very definite pattern of forum shopping was found. See LoPucki & Whitford, supra note 1, at 12, discussed infra notes 136-50.

44. See infra notes 49-77 and accompanying text.

45. See infra notes 80, 83, 87-96 and accompanying text.

46. See infra notes 81, 97-117 and accompanying text.

47. See infra notes 120-30.

48. See infra notes 121, 131-34.


50. See Nolan v. Boeing Co., 919 F.2d 1058, 1067-68 (5th Cir. 1990).
Belfast, Northern Ireland. The named plaintiffs were two American attorneys from Washington and New York who had no relationship to the crash. However, they had petitioned a Louisiana court and were appointed to act as representatives for 126 non-American individuals who were seeking recovery based on the accident. Plaintiffs and their representatives wished to have their cases tried in the United States, in particular, in Louisiana state court, so that they could take advantage of Louisiana law and the higher damage awards usually given in the United States. Defendants wanted to have the case heard in federal court so they could be sure that the court would apply the doctrine of forum non conveniens and dismiss the case.

The first move in Nolan was for the two American attorneys, Nolan and Judkins, to have themselves appointed representatives of the various victims of the crash by a Louisiana state court, which they did shortly after the crash. These attorneys then filed suits in Louisiana state court for the represented parties, none of whom was an American citizen or resident. Suit was filed relatively quickly, within four months of the crash, because plaintiffs were trying to avoid removal to federal court under a revision to 28 U.S.C. § 1332(c), which would take effect on May 18, 1989, five months after the crash.

What plaintiffs sought to avoid was a removal based on the federal court's diversity of citizenship jurisdiction. Section 1332(a) of Title 28 grants the federal courts diversity jurisdiction, that is, jurisdiction of civil actions in which the matter in controversy exceeds the

51. See id. at 1060-61.
52. Plaintiffs admitted that the representatives were chosen and the appointments secured to avoid diversity of citizenship and prevent removal of the case to federal court. See id. at 1061. Plaintiffs also knew that Louisiana law does not incorporate the common law doctrine of forum non conveniens. Thus, the case would not likely be dismissed by a Louisiana state court. See Fox v. Board of Supervisors, 576 So. 2d 978, 989-91 (La. 1991); see also Michael J. Maloney and Allison Taylor Blizzard, Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread," 36 S. Tex. L. Rev. 933, 950 & n.61 (1995) ("[F]iling in the United States is usually in the client's best interest . . . because the United States litigation system offers advantages to the plaintiff which are virtually unparalleled around the world.").
53. See Nolan, 919 F.2d at 1061.
54. See id. at 1060.

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
Id.
sum of $75,000 and the parties are geographically diverse. Section 1332(c) prescribes the citizenships to be assigned to different types of parties. Subpart (c) was amended in 1988 specifically to reduce the power given to plaintiffs to forum shop through representatives.

Prior to the amendment, the citizenship of a represented person or estate was determined based on the citizenship of the representative. This allowed potential litigants to expand or constrict the list of potential venues by selecting their representatives based on the representatives’ citizenship. Thus, if a potential litigant wanted to limit venues, such as preventing removal from a state court based on diversity of citizenship, the potential litigant could simply have a representative appointed who was not diverse to the defendant. Removal in this situation was prevented under the old law even if the defendant was diverse to the person represented. Likewise, if a potential litigant wanted to ensure a federal forum, he could have a person named as the representative who was diverse to the defendant. Commentary on the 1988 revision to § 1332 notes that the previous interpretation left “too much power on the decedent’s side to arrange things to suit its own choice-of-forum preferences.”

In Nolan, the representative plaintiffs were citizens of Washington and New York. Defendants included The Boeing Company, a Delaware corporation with its principal place of business in Washington; General Electric Company, a New York corporation with its principal place of business in New York; and CFM International, Inc., a Delaware corporation with its principal place of business in Ohio. Thus, under the version of 1332(c) effective in April 1989, diversity was destroyed because the representatives’ citizenships were not diverse to two of the three defendants.

56. Section 1332(c) provides:

For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

60. See Nolan, 919 F.2d 1058, 1060-61 (5th Cir. 1990).
61. See id.
When defendants filed a Notice of Removal with the federal court, plaintiffs responded by filing a Motion to Remand, relying upon § 1332(c) as it existed prior to the 1988 amendment. After considering the lack of diversity between the plaintiffs and defendants, the court granted the motion to remand.\(^{62}\)

Although the rule has been amended that allowed the representative's citizenship to be the citizenship considered for diversity purposes,\(^{63}\) this one change in § 1332 has not eliminated forum shopping in this type of case, nor did it stop the parties in Nolan. With the plaintiffs back in state court in Nolan, defendants had to find a way to get back to federal court or to some court that would apply the doctrine of forum non conveniens and dismiss the case to be filed in a more convenient forum outside of the United States.\(^{64}\) Defendants were now in the position of having to "shop" for a better venue in which to have these cases tried. Boeing, one of the defendants, filed a third-party demand against a company owned by the French government.\(^{65}\) Anticipating a Notice of Removal by the French sovereign pursuant to the Foreign Sovereign Immunities Act (FSIA)\(^{66}\) and 28 U.S.C. § 1441(d),\(^{67}\) plaintiffs moved to "sever" the third-party demand from the principal demand. The state court granted the motion and

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63. The amendment now requires that the court consider the citizenship of the person or estate represented, thus taking away some of the plaintiff's ability to shop for a forum. See 28 U.S.C. § 1332(c)(2) (1994 & Supp. I. 1996).
64. Louisiana law does not recognize the common law doctrine of forum non conveniens. See Fox v. Board of Supervisors, 576 So. 2d 978, 991 (La. 1991). The common law doctrine of forum non conveniens allows a court to dismiss a case in favor of a more convenient foreign forum when the more convenient forum would have jurisdiction over the case. See American Dredging Co. v. Miller, 510 U.S. 443, 447-48 (1994); see also Juenger, supra note 3, at 555-56 (referring to the doctrine of forum non conveniens as a "broadly gauged anti-forum-shopping device").

To determine whether a dismissal in favor of another jurisdiction is appropriate, the court should consider both private and public interest factors, including "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial easy, expeditious and inexpensive," as well as administrative difficulties that might result, the local interest of a people in having "localized controversies decided at home," and the benefits of having a court familiar with the applicable law apply that law. American Dredging Co. v. Miller, 510 U.S. 443, 448 (1994) (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)).

65. See Nolan, 919 F.2d at 1061.
67. Section 1441(d) provides in pertinent part: "Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(d) (1994).
severed the third-party demand, but only to the extent that the actions were “severed” for trial purposes.68

The third-party foreign defendant then removed the entire case to federal court based on the FSIA and § 1441(d). The case was once again in federal court where the defendants could seek a dismissal based on the doctrine of forum non conveniens. In response, plaintiffs sought a remand on the grounds that the third-party defendant could only remove the third-party demands, not the entire action. In the alternative, and despite all of the jockeying that plaintiffs themselves had already performed, plaintiffs argued that defendants may have improperly colluded to create removal jurisdiction.69 “28 U.S.C. § 1359 provides that a district court ‘shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.’”70 Ironically, “[t]he purpose of the statute is to prevent the manipulation of jurisdictional facts where none existed before—for example, through collusive assignments from a non-diverse party to a diverse party.”71

The court held that the removal was proper, interpreting § 1441(d) to allow a foreign sovereign to remove an entire action, not just isolated claims against the foreign sovereign.72 Addressing the argument that the defendants may have improperly colluded with each other to create diversity jurisdiction, the court found the argument “frivolous.”73 The court found that Boeing had a substantial claim against the foreign company.74 Further, the court noted that “parties may legitimately try to obtain the jurisdiction of federal courts, as

68. See Nolan, 919 F.2d at 1067.
69. See id. at 1061.
70. Id. at 1067 (quoting 28 U.S.C. § 1359 (1994)).
71. Id.; see also 28 U.S.C. § 1359, Historical Notes (1994); Sowell v. Federal Reserve Bank, 268 U.S. 449, 453-54 (1925) (The original purpose and effect of the assignee clause of the section “were to prevent the conferring of jurisdiction on the federal courts, on grounds of diversity of citizenship, by assignment, in cases where it would not otherwise exist, and not to deprive the federal court of jurisdiction where it was conferred on grounds other than diversity of citizenship.”); Yokeno v. Mafnas, 973 F.2d 803, 809 (9th Cir. 1992). Section 1359 is also meant to prevent parties from “artificially” leaving other parties out of litigation in order to invoke federal diversity jurisdiction. See U.S.I. Properties Corp. v. M.D. Constr. Co., 860 F.2d 1, 5-6 (1st Cir. 1988).

The injured parties in Nolan, in fact, had done just the opposite of what the statute was meant to prevent by selecting “non-diverse” representatives; they had colluded to defeat diversity jurisdiction.
72. See Nolan, 919 F.2d at 1064, 1066; see also In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932, 941-43 (7th Cir. 1996) (holding that § 1441(d) authorizes removal of the entire action and not just those claims against the foreign sovereign).
73. See Nolan, 919 F.2d at 1067.
74. See id. at 1067-68.
IN DEFENSE OF FORUM SHOPPING

long as they lawfully qualify under some of the grounds that allow access to this forum of limited jurisdiction."[75] "[A] party's motive in preferring a federal tribunal is immaterial."[76] Thus, despite the blatant forum shopping for favorable law, the Nolan court acknowledged the legitimacy of forum shopping when that shopping is done within the rules.[77]

2. Forum Shopping to Ensure Capacity to Sue

In Van Dusen v. Barrack[78] and Ferens v. John Deere Co.[79] choice of law was also the motivation for forum shopping. In Van Dusen, plaintiffs sought application of a particular state's law to ensure their capacity to sue.[80] In Ferens, plaintiffs sought application of a particular state's law to ensure that their claim had not been prescribed.[81] In both cases, the parties relied on the federal transfer statute, 28 U.S.C. § 1404(a), in an attempt to control the law to be applied to the cases.

Section 1404(a) of title 28 of the United States Code provides: "[F]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[82] The Court in Van Dusen explained, "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice."[83] "[T]he purpose of the section is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'"[84] Ironically, § 1404(a) was

75. Id. at 1068 (quoting U.S.I. Properties Corp. v. MD Constr. Co., 860 F.2d 1, 6 (1st Cir. 1988)).
76. Id. (citing Chicago v. Mills, 204 U.S. 321, 330 (1907)).
77. See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778-79 (1984) (recognizing implicitly a litigant's right to search for a forum with a favorable statute of limitations when the forum had personal jurisdiction over the parties); Goad v. Celotex Corp., 831 F.2d 508, 512 n.12 (4th Cir. 1987) (explaining that statutes governing venue and jurisdiction in diversity cases represent "approval of alternate forums for plaintiffs," and also commenting that complaints about forum shopping should be directed to Congress, who has enacted statutes giving litigants venue choices).
80. See Van Dusen, 376 U.S. at 613-15.
81. See Ferens, 494 U.S. at 519.
83. Van Dusen, 376 U.S. at 616 (citing Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955)).
84. Id. (quoting Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26-27 (1960)). See also Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 90 CORNELL L. REV. 1507, 1515-16 (1995), in which the authors conclude that transfer shifts the choice of venue from plaintiff to judge when the interest of justice dictates.
enacted to discourage forum shopping by plaintiffs from federal court to federal court.\textsuperscript{85} What it has become after the Van Dusen and Frens decisions is a statute that allows plaintiffs to capture the state law they would like applied to their cases, then have their cases transferred to a more convenient forum for trial.\textsuperscript{86}

The suit in Van Dusen arose from injuries and deaths resulting from the crash of an airplane shortly after takeoff from a Massachusetts airport.\textsuperscript{87} The plane was bound for Pennsylvania.\textsuperscript{88} Forty-five plaintiffs filed suit in Pennsylvania, rather than Massachusetts, because they did not qualify under Massachusetts law to sue as representatives of the decedents. Other plaintiffs brought suit in Massachusetts.\textsuperscript{89} Defendants moved to transfer the actions from Pennsylvania to Massachusetts based on § 1404(a).\textsuperscript{90} Plaintiffs fought the transfer, arguing that the transfer and the resulting application of Massachusetts law would more than likely defeat the plaintiffs' capacity to serve as representatives and would limit the type of damages recoverable.\textsuperscript{91}

The Court was unwilling to allow plaintiffs to defeat a transfer to an otherwise more convenient forum and to control venue by not qualifying to proceed in that venue.\textsuperscript{92} At the same time, the Court was unwilling to allow the defendants to use § 1404(a) as a "forum shopping instrument."\textsuperscript{93} Therefore, the Court held that the law to be applied by the transferor court would be the law applied by the transferee court.\textsuperscript{94} Moreover, commenting on the statute's role, the Court explained that § 1404(a) should be seen merely as a "judicial housekeeping measure, dealing with the placement of litigation in the federal courts."\textsuperscript{95} The Court explained:

There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.

... §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this

\textsuperscript{85} See Van Dusen, 376 U.S. at 612, 636; 28 U.S.C. § 1404(a) Historical Notes (1994) ("Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper."); see also Michael Rodden, Is 28 U.S.C. § 1404(a) A Federal Forum Shopping Statute?, 66 Wash. L. Rev. 851, 854-55, 870 (1991).


\textsuperscript{87} See Van Dusen, 376 U.S. at 613.

\textsuperscript{88} See id.

\textsuperscript{89} See id. at 614.

\textsuperscript{90} See id.

\textsuperscript{91} See id. at 626.

\textsuperscript{92} See id. at 623-24.

\textsuperscript{93} Id. at 634-36.

\textsuperscript{94} See id. at 639.

\textsuperscript{95} Id. at 636.
venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court.96

3. Forum Shopping to Determine Applicable Statutes of Limitations

The Court expanded this holding in Ferens v. John Deere Co.97 when it allowed plaintiffs to seek a transfer and held that the transferee court's choice of law rules would apply in the transferor court. The plaintiffs in Ferens not only selected an "inconvenient" forum, but moved for a transfer of the case to a more convenient forum under § 1404(a) shortly after the case was filed.98 Thus, the plaintiffs were able to secure the favorable law from one jurisdiction, then move the case to the preferred jurisdiction.

In Ferens, the plaintiff was injured in Pennsylvania by a product manufactured by a Delaware corporation with its principal place of business in Illinois.99 Although the plaintiffs timely filed their contract and warranty claims against the defendant in Pennsylvania federal court based on diversity jurisdiction, they did not timely file their tort claims in Pennsylvania; more than two years had passed since the incident, and Pennsylvania had a two-year statute of limitations on tort claims.100 After searching for a state with a longer statute of limitations and a state whose courts would have jurisdiction over the defendant, plaintiffs filed a tort action in federal court in Mississippi. Mississippi had a six-year statute of limitations and was a state in which the defendant conducted business.101

The plaintiffs then moved to transfer the case to Pennsylvania pursuant to § 1404(a), asserting that Pennsylvania was a more convenient forum in which to try the case.102 The Court recognized plaintiffs' actions as forum shopping, commenting that the "Ferenses took their forum shopping a step further" when they sought the transfer.103 The plaintiffs did not disguise the fact that they had filed in

96. Id. at 633-35.
97. 494 U.S. at 519.
98. See Ferens, 494 U.S. at 519-20.
99. See id. at 519.
100. See id.
101. See id. at 519-20.
102. See id. at 520.
103. Id. Interestingly, the Ferenses argued in support of their motion that: they resided in Pennsylvania; that the accident occurred there; that the claim had no connection to Mississippi; that a substantial number of witnesses resided in the Western District of Pennsylvania but none resided in Mississippi; that most of the documentary evidence was located in the Western District of Pennsylvania but none was located in Mississippi; and that the warranty action pending in the Western District of Pennsylvania presented common questions of law and fact.
Mississippi solely to take advantage of Mississippi's statute of limitations.\textsuperscript{104}

The Court explained that the policy behind § 1404(a) was based on the \textit{Erie} decision and the principle that "for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."\textsuperscript{105} This principle, coupled with the recognition that the plaintiff always has the opportunity to shop for a forum with favorable law, supported the Court's decision in \textit{Ferens}.\textsuperscript{106} Thus, the \textit{Ferens} Court essentially balanced the advantages and disadvantages to each of the parties that would result from its decision and concluded that allowing plaintiffs some latitude to forum shop was the best way to continue the policies set forth in earlier cases.

The four dissenters in \textit{Ferens} were not afraid to recognize the balancing that had taken place. They commented:

\begin{quotation}
[Just as it is unlikely that Congress, in enacting § 1404(a), meant to provide the defendant with a vehicle by which to manipulate in his favor the substantive law to be applied in a diversity case, so too is it unlikely that Congress meant to provide the plaintiff with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case.]
\end{quotation}

Further, the dissenters pointed out that the decision would also promote forum shopping from state to federal court because parties would choose the federal court forum over the state court forum to ensure the opportunity to have the federal court apply a different state's substantive law.\textsuperscript{108} The dissenters urged the Court not to allow the plaintiff to engage in such blatant law shopping.\textsuperscript{109}

Another circumstance in which the courts have, at times, recognized and tolerated the potential for forum shopping in search of favorable law involves the application of federal statutes that do not have their own statutes of limitation.\textsuperscript{110} At issue in \textit{North Star Steel v. Thomas}\textsuperscript{111} was the appropriate limitations period for an action
brought under the Worker Adjustment and Retraining Notification Act (WARN), a federal statute meant to protect workers from being laid off without at least sixty days notice. Before ruling that the court should borrow a limitations period from a comparable state statute, the Court weighed the consequences of following the tradition of borrowing state statutes in these circumstances, against the argument that such a ruling would encourage forum shopping. The court reasoned that, although "the practice of adopting state statutes of limitations for federal causes of action can result in different limitations periods in different states for the same federal action," and although "some plaintiffs will canvass the variations and shop around for a forum,... these are just the costs of the rule itself, and nothing about WARN makes them exorbitant." The Court distinguished cases arising under WARN, which usually arise from layoffs at a single site of employment, from multi-state claims, such as those arising under the Racketeer Influenced and Corrupt Organizations Act (RICO).

The Court selected a uniform statute of limitations to be applied in RICO cases in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, and selected a uniform statute of limitations to be applied to § 10(b) actions in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*. Explaining its decision in *Lampf* concerning the § 10(b) actions, the Court reasoned:

The multi-state nature of the [federal cause of action at issue] indicates the desirability of a uniform federal statute of limitations. With the possibility of multiple state limitations, the use of state statutes would present the danger of forum shopping and, at the very least, would virtually guarantee... complex and expensive litigation over what should be a straightforward matter.

These cases involving federal statutory law and the reasoning behind them illustrate well the delicate balance the courts have tried to strike between uniformity among the federal courts and uniformity

114. *Id.* at 36.
115. *Id.* at 36-37 (citing 18 U.S.C. § 1964 (1994)).
among the courts operating within a state. When the likelihood is that a case arising under a federal statute will involve citizens of different states and acts occurring in different states, the Court favors a uniform statute of limitations to prevent forum shopping from state to state. However, when the risk of multi-state litigation is low, the Court favors uniformity between the law that a state court would apply and the law that a federal court in that state would apply.

4. Forum Shopping for Favorable Custody and Divorce Laws

In the area of family law, almost all litigation takes place in state court. Thus, the forum shopping that takes place in family law cases is horizontal forum shopping, that is, shopping from one state court to another state court. Each state has its own law in this area and has its own venue provisions. However, because family law cases often involve ongoing relationships, they often lack the finality typical in other types of litigation. This lack of finality opens the door for forum shopping even after an issue has been litigated in one state court.

After many years of forum shopping in the areas of family law and community property law, Congress enacted the Parental Kidnapping Prevention Act of 1980 (PKPA) and the Uniformed Services Former Spouses’ Protection Act (USFSPA) to curb forum shopping practices. A section of the PKPA imposes a duty on state courts to enforce child custody determinations entered by courts of another state if the decree is consistent with the Act, that is, if the court had jurisdiction over the child consistent with the PKPA. If jurisdiction exists, no other state may exercise concurrent jurisdiction over the dispute. “[O]ne of the chief purposes of the PKPA is to ‘avoid jurisdictional competition and conflict between State courts.’”


126. Thompson, 484 U.S. at 177 (quoting Pub. L. No. 96-611, § 7(c)(5), 94 Stat. 3569 (1980)).
The Court had an opportunity to comment on the PKPA in *Thompson v. Thompson*, in which it was asked to determine whether the PKPA provides a private right of action in federal court to rule on the validity of two conflicting custody decrees from different states.\(^{127}\) The Court held that it does not.\(^{128}\) Reviewing the history of child custody law, the court recognized that child custody orders lack the finality of most judgments because courts in other states can modify these orders at any time, in the best interests of the child.\(^{129}\) The result was that parents would kidnap their children and take the children to another state seeking a ruling on child custody more favorable to them than the one they received from the initial state in which the case was filed.\(^{130}\) Congress' intent in enacting the PKPA was to eliminate this type of incentive to forum shop.\(^{131}\)

Similar to the PKPA, the USFSPA "prevents spouses from forum shopping for a State with favorable divorce laws."\(^{132}\) *Mansell v. Mansell*\(^ {133}\) involved the application and interpretation of the USFSPA.\(^ {134}\) The Court explained that the Act dictates what military pay should be treated as community property, it provides a mechanism for distributing pay directly to a former spouse, and it preempts state law on this topic, thus doing away with the incentive to shop for favorable law.\(^ {135}\)

B. Forum Shopping in Search of Favorable Interpretation and Application of the Law

Litigants not only seek courts that will apply law favorable to their positions, but they also seek courts that are most likely to interpret and apply the law in a way that is favorable to their positions. An area of litigation governed by federal law in which litigants have sought a favorable interpretation and application of the law is the area of bankruptcy. Debtors have sought out those forums in which bankruptcy and reorganization proceedings tend to run smoothly for debtors.\(^ {136}\) This type of shopping is analogous to the venue selection process that every plaintiff's attorney goes through before filing a lawsuit, when the attorney is simply selecting from among several venues within a state. The one significant exception to the analogy is that in

\(^{127}\) See id. at 174.
\(^{128}\) See id. at 179.
\(^{129}\) See id. at 180.
\(^{130}\) See id. at 182.
\(^{131}\) See id. at 181-82. For a discussion of the inadequacies of the PKPA and the UCCJA, see Goldstein, *supra* note 119.
\(^{133}\) 490 U.S. 581 (1989).
\(^{135}\) *See Mansell*, 490 U.S. at 590-92.
\(^{136}\) *See LoPucki & Whitford*, *supra* note 1.
the bankruptcy arena, the debtors have some control over selecting
which venues they would like in their list of options.137

The fact that companies wishing to file for bankruptcy and reor-
ganization frequently shop for the most favorable forum in which to do
so was brought to light by Professors LoPucki and Whitford after they
studied the bankruptcy reorganizations of forty-three large, publicly-
held companies.138 In their article, they report that companies often
focused on a court's record on ruling on extensions of exclusivity and
on regulation of attorneys' fees in selecting a forum.139 This shopping
has allowed petitioners to shape the outcome of their cases to some
extent, despite the fact that the same federal law is being applied to
all of the cases regardless of which court is deciding the case.140

Professors LoPucki and Whitford found that most often the compa-
nies studied chose to file in New York City, despite, in what they re-
ferred to as a "substantial minority" of the cases, a lack of physical
presence in the city.141 Companies were able to select New York City
and other jurisdictions relatively easily because the venue provision in
the Bankruptcy Code and case precedent give debtors a choice of fo-
rums in which to file for bankruptcy, and changing or adding to the
possible forums available under the statute is not difficult.142

Permissible forums for filing for bankruptcy and reorganization in-
clude the following: (1) the district in which the debtor is incorporated;
(2) the district in which the debtor keeps his principal assets in the
United States; (3) the district in which the debtor has its principal
place of business; (4) a district in which a case concerning an affiliate
of the debtor is pending; and (5) any district when the parties have
expressly or by conduct waived objections to venue.143

137. See infra notes 148-49 and accompanying text.
138. See LoPucki & Whitford, supra note 1.
139. See id. at 12.
140. See id. at 13 ("Although bankruptcy cases are governed by federal law that theo-
retically mandates the same outcome regardless of the district in which the case
happens to be brought, earlier studies of bankruptcy administration have estab-
lished the existence of substantial, outcome determinative differences in the
manner in which the law is applied from district to district." (citing Karen Gross,
Perception and Reality: American Bankruptcy Institute Survey on Se-
lected Provisions of the 1984 Amendments to the Bankruptcy Code (1987);
Teresa A. Sullivan, et al., Persistence of Community: Local Variations in a
National Bankruptcy System (1991); Teresa A. Sullivan, et al., As We For-
give Our Debtors (1989); D. Stanley & M. Girth, Bankruptcy: Problem, Pro-
cess and Reform (1969); William C. Whitford, Has the Time Come to Repeal
Chapter 13?, 65 Ind. L. Rev. 85 (1989); Lynn M. LoPucki, Encouraging Repay-
ment Under Chapter 13 of the Bankruptcy Code, 18 Harv. J. on Legis. 347, 349
(1981)).
141. See id. at 12.
142. See id. at 16 (citing 28 U.S.C. § 1408 (1994)).
143. See id.
Should a company wish to file for bankruptcy in a particular district because of its favorable rulings, it need only make a change or two to satisfy one of the venues identified above before filing. For example, Professors LoPucki and Whitford found that companies can usually move their company headquarters to a desired venue easily and that five of the companies studied had moved their headquarters to the district in which they filed for bankruptcy shortly before filing.144

Another tactic discussed by Professors LoPucki and Whitford is referred to as the “venue hook.” A company files for bankruptcy on behalf of one of its affiliated companies in a favorable district in which venue is proper for the affiliate, then shortly thereafter files on behalf of the parent company.145 This particular venue rule provides corporate groups with an even wider choice of venues than is ordinarily allowed.

This type of forum shopping within the federal court system would ordinarily be frustrated by 28 U.S.C. § 1404(a), which gives the court the power to transfer a case to another federal court “for the convenience of parties and witnesses, in the interest of justice.”146 However, the equivalent of this rule in the bankruptcy context, Bankruptcy Rule 1014(a)(2),147 provides that the court may only transfer the matter under the above circumstances upon the motion of a party in interest.148 Professors LoPucki and Whitford concluded that “[t]he dynamics of a voluntary reorganization case filed by a large, publicly held company make such a motion unlikely.”149 They cited several reasons for the lack of successful transfer motions, including the professional and financial interests of the presiding judge and the attorneys in having the case remain in the original venue, the lack of an organized force to oppose the venue, and the expense of litigating the issue of venue in a distant city.150 Thus, as long as the venue options exist for the bankruptcy case, parties are able to, and will continue to forum shop for favorable interpretations of federal law.

Additional examples of searching for favorable interpretations and application of the law include those cases in which litigants attempt to

144. See id. at 18-19. Professors LoPucki and Whitford were unable to confirm the motives behind the moving of headquarters to venues in which the companies filed for bankruptcy shortly thereafter, but the facts seem to indicate some forum shopping. See id. at 19.

145. See id. at 21-22.

146. 28 U.S.C. § 1404(a) (1994); see supra notes 34 and 82-85 and accompanying text.

147. FED. R. BANKR. P. 1014(a)(2).

148. The Advisory Committee Note to Rule 1014 explains: “Under this rule, a motion by a party in interest is necessary. There is no provision for the court to act on its own initiative.”

149. LoPucki and Whitford, supra note 1, at 24.

150. See id. at 24-25.
have their cases tried in certain venues because of the reputation of the judges or juries in those venues. For example, plaintiffs in civil suits frequently seek out those venues in which damage awards are customarily high.151 Defendants often seek to move cases from such venues and will seek to litigate in venues in which damage awards are not so liberally conferred.152 Such shopping for a favorable interpretation and application of the law is difficult to challenge because to prove his case, the challenger must call into question the court and the judicial system's ability to be impartial and evenhanded. Moreover, unless the venue is improper, the parties' motives in selecting a venue are usually not relevant.153

C. Forum Shopping by the "Potential Defendant" Before the "Potential Plaintiff" Has Filed Suit

Selecting a venue has been referred to as the plaintiff's privilege.154 In an effort to appropriate that privilege, "potential defendants" have acted under the Declaratory Judgment Act.155 The Declaratory Judgment Act enables a potential defendant to file suit against the potential plaintiff to have his rights and liabilities as to the potential plaintiff declared by the court.156 However, as the cases discussed below demonstrate, the courts have recently taken steps to foreclose forum shopping using this act. The courts have expressed a strong anti-forum shopping sentiment, explaining that "[u]sing a declaratory judgment action to race to res judicata or to change forums is thoroughly inconsistent with the purposes of the Declaratory Judgment Act and should not be countenanced."157

151. See, e.g., Clermont & Eisenberg, supra note 84, at 1508 n.1 (discussing examples of plaintiffs seeking venues in certain south Texas counties where judges are sympathetic and juries are generous (citing John MacCormack, Remote Venue: Plaintiffs' Pick, Nat'l L.J., Jan. 31, 1994, at 1, 1, 30, and Laurie P. Cohen, Lawyer Gets Investors to Sue GE, Prudential in Poor Border Town, Wall St. J., Nov. 30, 1994, at A1)).

152. See John MacCormack, Remote Venue: Plaintiffs' Pick, Nat'l L.J., Jan. 31, 1994, at 1, 1, 30 (discussing litigation brought against Prudential Securities Inc. and General Electric Capital Corp. in Maverick County, Texas, where defendants attempted to have the judge removed from the case and attempted to have the venue changed).

153. See supra notes 75-77 and accompanying text. Under some procedural rules, a transfer may be a viable option, in which case the challenger can focus on factors such as convenience and avoid having to raise the venue's reputation as the sole reason for challenging the venue selection. See, e.g., 28 U.S.C. § 1404(a), discussed supra, notes 82-86 and accompanying text.


156. See id.

In *Wilton v. Seven Falls Co.*,\(^{158}\) the Court held that a federal court has discretion as to whether to hear a declaratory judgment suit or whether to stay or dismiss that suit in favor of a parallel state suit filed by the “plaintiff” sometime after the federal suit.\(^{159}\) In support of its decision, which was affirmed by the Supreme Court, the appellate court reasoned that “[t]he district court did not abuse its discretion in concluding that maintenance of this declaratory judgment action would result in piecemeal adjudication of the coverage dispute and would reward [defendant] London Underwriters’s attempts to forum shop.”\(^{160}\) Thus, even though the “defendant” may be the first to the courthouse of his choice to file a declaratory judgment action, the “plaintiff,” who might be unsatisfied with this choice, may have the power to change the venue of the dispute simply by filing his own suit in state court.

The United States Court of Appeals for the Fifth Circuit has developed a six-factor test for courts to use when considering whether to stay or dismiss a declaratory judgment action filed in federal court. This test includes at least three factors that appear to be directed at curtailing forum shopping. The six factors include:

1. whether there is a pending state action in which all of the matters in controversy may be fully litigated,
2. whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant,
3. whether the plaintiff engaged in forum shopping in bringing the suit,
4. whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist,
5. whether the federal court is a convenient forum for the parties and the witnesses, and
6. whether retaining the lawsuit in federal court would serve the purpose of judicial economy.\(^{161}\)


\(^{159}\) *Wilton*, the appellants, London Underwriters (London), filed a declaratory judgment action in federal court against appellees, Hill Group. Through the action, London sought a declaration of their rights and liabilities under commercial general liability policies after a verdict in a related case was entered against appellees and others. London had refused to defend and indemnify Hill Group in a dispute over oil & gas property. London agreed to dismiss the declaratory judgment action if Hill Group would notify it two weeks in advance of the filing of any lawsuit by Hill against London. Hill Group notified London, and London filed a second declaratory judgment action in federal district court. Subsequently, Hill Group filed an action against London in state court. Hill Group also filed a motion for dismissal or for a stay in federal court. The court stayed the action, which was upheld by the appellate court, *Wilton v. Seven Falls Co.*, *41* F.3d *934, 935* (5th Cir. 1994), and was affirmed by the Supreme Court. *See Wilton*, *515 U.S. at 284* (1995).

\(^{160}\) *Wilton*, *41* F.3d at *935.

\(^{161}\) *Rowan Cos. v. Ainsworth*, *5* F. Supp. 3d *420, 422* (W.D. La. 1998) (quoting *Travelers*, *996 F.2d at 778*).
Factors two and three require the court to evaluate the plaintiff's motive in bringing the declaratory judgment action to ensure that the plaintiff did not file suit as part of a race to the courthouse or in an effort to be the one to select the forum. Factor four requires the court to consider the possible inequity that the true plaintiff would suffer because of the action being brought in the chosen court.

Despite this strong and express desire to prevent forum shopping using the Declaratory Judgment Act, one of the consequences of the Act, when properly utilized, is that the party who ordinarily does not have the power to select the forum in which to litigate will have that power. To overcome an adverse result from application of the above factors concerning forum shopping and to successfully maintain suits pursuant to the Declaratory Judgment Act, potential defendants must simply be able to prove the existence of some motive other than forum shopping, such as the filing of the suit to "avoid multiple lawsuits in numerous different forums"\(^{162}\) or the filing of the suit because the potential defendant "was attempting to resolve the question of liability within a reasonable time frame."\(^{163}\) Because coming up with such proof will not be difficult in some cases, potential defendants will probably continue to use this Act to select a forum, but will select carefully so that they are able to withstand the scrutiny of the courts applying the six-factor test.

For example, in a situation in which a potential defendant expects to be sued by multiple plaintiffs, the potential defendant has a good chance of succeeding in maintaining a declaratory judgment action by asserting that the action was filed to avoid multiple lawsuits in numerous different forums. This was the situation in *Travelers Insurance Co.*\(^ {164}\) In *Travelers*, a dispute arose when Travelers discontinued certain insurance coverage, leaving several insureds who had been diagnosed with terminal illnesses without insurance coverage.

Six insureds filed declaratory judgment actions in three different state courts asking the courts to define their rights under the Travelers' policy in light of a state statute that prohibited insurance companies from unilaterally terminating coverage to insureds after they have been diagnosed with a terminal condition.\(^ {165}\) In response to these suits, Travelers filed its own declaratory judgment action in federal court in Louisiana in which it sought to bring all potential claimants into one forum for litigation.\(^ {166}\) After two years of litigation, all parties resolved their differences with Travelers except for Ashley Hurdle, one of the parties who had filed her own suit in state court.

\(^{162}\) *Travelers*, 996 F.2d at 779.
\(^{163}\) *Rowan*, 5 F. Supp. 3d at 423.
\(^{164}\) See *Travelers*, 996 F.2d at 778-79.
\(^{165}\) See id. at 775 (citing *LA. REV. STAT. ANN.* § 22:228(A) (West Supp. 1993)).
\(^{166}\) See id.
prior to Travelers' federal suit. The district court raised the issue of abstention sua sponte, then dismissed the federal suit in favor of the state court action.167

On appeal, the Fifth Circuit reversed the district court’s decision after applying the six-factor test set forth above.168 The court focused on the fact that Travelers had brought the action to avoid “a multiplicity of suits in various forums”169 and explained that “[s]uch a goal, unlike that of changing forums or subverting the real plaintiff’s advantage in state court, is entirely consistent with the purposes of the Declaratory Judgment Act.”170 The court also focused on the fact that the plaintiff in the state case had not actively pursued litigation in state court, while the litigation in federal court had been quite active over the preceding two years.171

Thus, although the courts have limited the opportunity for forum shopping using the Declaratory Judgment Act, windows of opportunity still exist for doing so. The difference in this line of cases from those previously discussed is that the courts have expressly stated that forum shopping is “thoroughly inconsistent with the purposes of the Declaratory Judgment Act and should not be countenanced.”172

IV. THE ETHICS OF FORUM SHOPPING AND THE POSSIBILITY OF BEING SANCTIONED

A. The Ethics of Forum Shopping

As the above discussion demonstrates, attorneys often get mixed signals about the proper way to proceed regarding venue selection. For example, consider the attorney who represents a potential defendant who is considering filing a declaratory judgment action on behalf of his client. The court has explained that declaratory judgment actions should not be used to forum shop.173 If the attorney has a legitimate reason for filing the Declaratory Judgment action, should he file the action even though one of his reasons is selection of a favorable forum for his client? No easy answer exists to this question. The eth-

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167. See id. at 776.
168. See id. at 777.
169. Id.
170. Id.
171. See id. at 777, 779.
172. Id. at 777 n.7 (citing Dresser Indus., Inc. v. Insurance Co. of N. Am., 358 F. Supp. 327 (N.D. Tex 1973)).
cal rules that govern attorneys' behavior in this area are found in section 3 of the Model Rules of Professional Conduct. 174

Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." 175 The scenario above assumes that in addition to forum shopping, there exists a non-frivolous basis for filing the declaratory judgment action, such as having the litigation settled in one suit in one forum instead of having duplicative litigation in many forums. Arguably, filing the declaratory judgment action in this case would be allowed under Rule 3.1.

Comment 1 to Rule 3.1 directs that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed." 176 This comment describes well the pressures on the attorney and illustrates why attorneys should not be and can not be expected to refrain from forum shopping within the procedural rules when doing so is in their client's best interest. This comment indicates that actions taken within the procedural and substantive rules for the benefit of a client are ethical as long as they do not constitute an abuse of legal procedure. In fact, in many cases, an attorney's ethical duty to his client may include selecting a forum with little connection to the events giving rise to a cause of action if that forum is an acceptable forum under the law, despite the fact that the attorney may be accused of taking advantage of "loopholes" or "technicalities." 177

Rule 3.3 may actually present the stickier issue for an attorney in this situation. Rule 3.3(a) provides: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal." 178 The attorney may violate this rule if his or the client's true motive in filing a suit pursuant to the Declaratory Judgment Act is to forum shop, yet

174. The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates on August 2, 1983, to replace the Model Code of Professional Responsibility. Approximately forty jurisdictions have adopted the Model Rules or substantial portions of them. See Stephen Gillers & Ray D. Simon, Regulation of Lawyers: Statutes & Standards 3 (1999). Canon 9 of the Model Code of Professional Responsibility, which counsels that "[a] lawyer should avoid even the appearance of professional impropriety," and the ethical considerations that follow it, were to some extent, assimilated into section 3 of the Model Rules and the Preamble to the Model Rules.


176. Id. cmt. 1.


he represents to the court that the motive is to have the court decide all related cases in one action. Thus, the attorney is faced with a situation in which two motives support his actions—one legitimate and one declared improper by the courts. Many attorneys would resolve this situation easily by representing to the court that the action was filed to have the court decide all related cases in one action. Once this is done, who can question this seemingly legitimate use of the Declaratory Judgment Act?

Is this an honest and ethical way to proceed? The comment to Rule 3.2, which rule addresses a lawyer’s duty to “make reasonable efforts to expedite litigation consistent with the interests of the client,” counsels that “[i]t is not justification that similar conduct is often tolerated by the bench and bar.” Accordingly, the fact that many attorneys would resolve the situation as mentioned above is not alone sufficient justification for resolving the situation in that manner. The preamble to the Model Rules recognizes that attorneys will face difficult ethical problems and advises that “[s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”

Is it practical to expect attorneys and their clients to forego the possible benefit of a “favorable” forum for their litigation simply because two motivations support a legal maneuver, and one is not favored by the courts? For example, should a client be penalized because his attorney is willing to admit that he first thought of filing a declaratory judgment action to control selection of the forum, when in fact a declaratory judgment action is the most expedient and efficient way to proceed? Of course not. Moreover, the attorney’s behavior should not be considered unethical when he is proceeding within the procedural and substantive limits of the law. Comment 1 to Rule 3.1, which is quoted above, supports attorneys’ efforts to forum shop when the “shopping” is done with the intent of using “legal procedure for the fullest benefit of the client’s cause” and is not done to delay litigation or to harass.

Few ethical opinions or decisions were found in which an attorney was disciplined for forum shopping or for attempting to forum shop. Discipline has been reserved for those cases in which attorneys have violated the governing procedural or substantive laws. One of these opinions involves attorney abuse of legal procedure and focuses on the attorney’s intent. An Informal Opinion issued by the ABA Committee on Professional Ethics addresses the question of whether an attorney who intentionally files suit in an improper venue is acting unethically, when he does so with the hope of obtaining a default judgment against

180. Id. at Preamble.
181. Id. Rule 3.1 cmt. 1.
the defendant because the defendant is not located in the venue.\footnote{182} The Committee opined that the practice would unquestionably be unethical under Canon 15\footnote{183} and Canon 30\footnote{184} if it was done to harass the defendant or to take advantage of the absence of the opposing party in the county or venue.\footnote{185}

Thus, except in those cases in which attorneys have acted outside of procedural and substantive law, attorneys should be assured that they are acting ethically when they abide by the law in selecting a forum. As was stated in the \textit{ABA Canons of Professional Ethics}, "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."\footnote{186}

\section*{B. Sanctions for Forum Shopping}

Despite the lack of any explicit ethical preclusion of forum shopping, attorneys have been sanctioned for forum shopping when their actions have violated statutes like Federal Rule of Civil Procedure 11, which prohibits attorneys and parties from filing pleadings that result "in an abuse of litigation or misuse of the court's process" or that involve frivolous motions.\footnote{187} The published cases in which attorneys have been sanctioned for forum shopping have involved attorneys who have shopped for better results for their clients after courts have ruled against their clients. The attorneys have essentially ignored the rulings of the original courts and have shopped for better results, not by filing appeals, but by filing independent actions.

\footnote{183} Canon 15 provides, in part: "It is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane." ABA Comm. On Professional Ethics, Informal Op. 1011 (quoting Canon 15 of the \textit{CANONS OF PROFESSIONAL ETHICS}). From 1908 through 1969, the Canons of Professional Ethics set the standards to which attorneys in the United States were to aspire. \textit{See THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY} 12 (1995).
\footnote{184} Canon 30 provides, in part: "The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong." \textit{ABA CANONS OF PROFESSIONAL ETHICS} Canon 30 (1908).
\footnote{185} ABA Comm. On Professional Ethics, Informal Op. 1011 (1967). The question posed to the ABA Committee regarded a situation in which an attorney had exhibited a pattern of filing suits in improper venues. \textit{Id}.
\footnote{186} \textit{ABA CANONS OF PROFESSIONAL ETHICS} Canon 15 (1908).
\footnote{187} \textit{See, e.g., Y.J. Sons & Co. v. Anemone, Inc.}, 212 B.R. 793, 806 (D.N.J. 1997) (citing \textit{FED. R. CIV. PROC.} 11; Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988)).
In defense of forum shopping is a case in which a party was sanctioned by a state court for apparent forum shopping because the shopping was deemed to be an abuse of the judicial process.\textsuperscript{188} Plaintiff filed a suit for divorce in Douglas County, Washington.\textsuperscript{189} The court entered an order of divorce and entered a visitation schedule for the father and the paternal grandparents.\textsuperscript{190} The court retained jurisdiction over "the parenting plan to consider future issues regarding the visitation rights."\textsuperscript{191} Unhappy with the visitation awarded to her ex-husband and his parents, the plaintiff unsuccessfully sought a reconsideration of the plan by the Douglas County court.

Still unhappy with the plan, plaintiff filed a separate action in another Washington county, Yakima County, in which she attempted to obtain a better ruling on visitation.\textsuperscript{192} She filed a "dependency action," which is an action traditionally filed when the person with custody is allegedly abusing or neglecting the child, which was not the case here.\textsuperscript{193} Thus, the Yakima county court dismissed the dependency action.\textsuperscript{194} Moreover, the Yakima County Juvenile Court Commissioner, at the urging of the Washington State Attorney General's Office, imposed monetary sanctions on plaintiff for what the Attorney General's Office called "blatant forum shopping."\textsuperscript{195} The appellate court upheld the sanctions, which were imposed pursuant to the State's version of Federal Rule of Civil Procedure 11, which is directed at deterring baseless filings and curbing abuses of the judicial system.\textsuperscript{196} The court penalized plaintiff for attempting to thwart the original court's orders by seeking a favorable ruling by another court.

Similar actions resulted in sanctions against the plaintiff and its attorney in \textit{Y.J. Sons, Inc. v. Anemone, Inc.}\textsuperscript{197} Plaintiff filed a lawsuit against the defendant in state court over the terms of a contract. The contract governed the sale of the defendant's business to the plaintiff. Plaintiff alleged that the business was not performing as well as had been represented by the defendant.\textsuperscript{198} Defendant then filed a counterclaim against plaintiff based on the promissory note between the parties.\textsuperscript{199} After several state court rulings favorable to the defendant concerning foreclosure and the subsequent attempt by the plaintiff to

\begin{footnotes}
\item[189] See id. at 1236.
\item[190] See id. at 1235.
\item[191] See id.
\item[192] Id.
\item[193] See id. at 1236.
\item[194] See id.
\item[195] See id. at 1235.
\item[196] See id.
\item[197] See id. at 1237 (citing Wash. Civ. R. 11).
\item[199] See id. at 797.
\item[200] See id.
\end{footnotes}
sell the business to a third party, plaintiff filed a petition for bankruptcy protection with the bankruptcy court and sought the bankruptcy court's approval of the sale of the business pursuant to section 363(f) of the Bankruptcy Code, which allows a debtor to sell property free and clear of liens under certain circumstances. Not only did the court decline to approve the sale, but it also granted motions filed by the state court defendant to dismiss the bankruptcy proceeding and for sanctions against the petitioner. The court explained that "Y.J. 'had, in essence, forum shopped not being satisfied with the results of the action that was before the Superior Court [and sought] a second bite of the apple." Sanctions were awarded pursuant to Bankruptcy Rule 9011, which is the equivalent in bankruptcy proceedings of Federal Rule of Civil Procedure 11.

V. CONCLUSION

Despite statements disparaging the practice of forum shopping, the United States Constitution sanctions a federal court system that exists concurrently with state court systems. Further, federal and state legislatures have enacted laws that give litigants choices from among

201. See id. at 799 (citing 11 U.S.C. § 363(f) (1994)). While the litigation was pending, the court initially ordered the plaintiff to deposit the payments owed to defendant for the business into an escrow account and the court prohibited defendant from exercising any of its rights under the promissory note, including foreclosure, without a court order. Subsequently, the court granted defendant's motion to terminate the escrow account and allowed defendant to proceed with foreclosure pursuant to the promissory note.

The plaintiff then entered into a contract with a third party to sell the business, but moved the court to have the proceeds of the sale deposited into an escrow account until the litigation was concluded. Defendant opposed this motion, and the court denied the motion. Moreover, defendant refused to issue a statement vacating its security interest in the business, and the court refused to require such a statement, ordering plaintiff to pay the money directly to the defendant. See id. at 797-98.

202. See id. at 799.

203. See id. at 803.

204. See id. at 805 (citing BANKR. RULE 9011 and FED. R. CIV. P. 11). But see Coast Mfg. Co. v. Keylon, 600 F. Supp. 696 (S.D.N.Y. 1985), for an example of the denial of sanctions under Rule 11 for forum shopping. In Keylon, plaintiff filed a suit in federal court based on the court's diversity jurisdiction, after the defendant in the federal suit had already filed a state court suit on the same action. Defendant moved for a dismissal of the federal suit and for sanctions pursuant to Rule 11. The court referred to the issue of sanctions as a "close question," but refused to sanction the plaintiff. The court explained:

[j]It is understandable that litigants will do a small amount of artful conning to gain access to the diversity jurisdiction of the federal courts, and for a long time such efforts have been tolerated. It is our duty to protect the diversity jurisdiction from abuses of the sort attempted here. In doing so, we need not become punitive.

Id. at 698.
forums within which to file suit, courts have recognized the legitimacy of litigants seeking particular venues for the litigation of their disputes, and ethical rules require attorneys to use rules and procedures to the fullest benefit of their clients. In light of the options available and the law to support studying the options before filing or defending against a lawsuit, the practice of forum shopping should be recognized as a legitimate practice and a legitimate use of procedure when procedural rules are followed.

The legal profession should take an honest look at what it expects of attorneys and litigants with regard to forum selection and should restrict forum choices to the extent that exercising one's power of selection is undesirable. The incentive to forum shop is created whenever a litigant has an option as to where to file his lawsuit,205 and attorneys should not be expected to ignore such options.

Arguments against forum shopping that suggest that it is a waste of time, money, and resources are certainly sound to some degree when proponents are able to point to cases of outrageous forum shopping when the parties and the court are involved in months of litigation simply to decide which court will litigate a case. However, careful study of these cases reveals that the time spent litigating issues involving the proper forum may not be so repugnant or undesirable. Had the attorney for Mr. and Mrs. Ferens not shopped for a forum in which to file suit, the Ferenses would have been deprived of an opportunity to recover for their personal injuries, despite the fact that one legally existed; had the attorneys for the defendants in the Nolan cases not fought to have the cases dismissed from courts in the United States, United States courts would have ended up litigating these cases, which had little connection to the United States. Moreover, the American judicial system was not founded on the premise that justice should be dispensed as quickly and as inexpensively as possible at the expense of providing a just determination of the issues before the court.206

As long as venue choices exist, venue will potentially be an issue that must be litigated by the courts, just like evidentiary issues are litigated and other procedural issues are litigated. Sometimes litigating venue will be expensive and will occupy a good deal of the court's time, while in most cases it will not be an issue. Venue is no different from any other issue in a suit in terms of the attention it deserves and the variations that will exist from one case to the next.

Some possible solutions for those who oppose forum shopping include legislatively restricting venue choices, either by limiting the pos-

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205. See Baird, supra note 8, at 826-27.
206. See generally Fed. R. Civ. P. 1, which was amended in 1993 to provide that the Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."
sible venues or ranking the venue choices available,\textsuperscript{207} liberally applying transfer provisions, such as 28 U.S.C. § 1404(a), and utilizing the doctrine of \textit{forum non conveniens} to dismiss cases. Expecting attorneys to ignore their clients' best interests by failing to select a favorable venue when it is available is asking attorneys to commit malpractice, a move that would be more undesirable than the "waste" trying to be prevented.

\textsuperscript{207} For example, rather than providing plaintiffs in cases brought in federal court with potentially three or four venue choices, as is set out in 28 U.S.C. § 1391 (1994 & Supp. II 1996), that statute could provide that suits shall be filed in choice (a) if available, choice (b) if choice (a) is not available, and so on. A possible drawback of such a ranking system is that choice (a) may be available, but may not be the most convenient forum, which may lead to litigation over § 1404(a) transfer and forum non conveniens dismissal.