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Seaboard Finance Co. v. Davis - A New Approach to the Application of Erie, 2 J. Marshall J. of Prac. & Proc. 189 (1968)

James P. Weissenborn

SEABOARD FINANCE CO. V. DAVIS — A NEW APPROACH TO THE APPLICATION OF *ERIE*

Plaintiff, Seaboard Finance Co., loaned $35,000 to the defendants and received their executed promissory note and the stock of National Tours, Inc. as security for the debt.[1] When financial reports were not furnished as required by the loan agreement and when payments on the loan were not made, Seaboard filed an action on the promissory note in the Superior Court of Los Angeles seeking recovery on the loan.[2] The defendants appeared and answered. Shortly thereafter, plaintiff filed the present diversity action,[3] alleging that material misrepresentations by the defendants in inducing the loan had damaged plaintiff in the amount of $45,000. It was the contention of Seaboard that false statements, written and oral, were made by the defendants concerning the financial condition of National Group Plan, Inc., doing business as National Tours. It was further claimed that the defendants knew that bankruptcy, voluntary or involuntary, was likely if not imminent.[4]

Arguing that the application of section 48(1)(c) of the Illinois Civil Practice Act[5] was required according to the *Erie Railroad Co.* v. *Tompkins*[6] doctrine, defendant, Davis, filed a motion to dismiss.[7] Dismissal was sought not under federal law as an exercise of discretion based on federal-state comity, but rather under state law as a mandatory requirement of the policy

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[1] Defendants, George Davis, George Patterson and Joan M. Patterson, were the sole stockholders and the principal officers of National Tours, Inc.

[2] Civil No. 904867 (Super. Ct. Los Angeles County, Cal., filed Mar. 3, 1967).

[3] Seaboard Finance Co. v. Davis, 276 F. Supp. 507 (N.D. Ill. 1967).

[4] In fact involuntary bankruptcy did occur. *See In re* Nat'l Group Plan, Inc., No. 66B9276 (N.D. Ill., E.D. filed Dec. 1, 1966).

[5] ILL. REV. STAT. ch. 110, §48 (1)(c) (1967), which provides in part:

> (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds.
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> . . . .
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> (c) That there is another action pending between the same parties for the same cause.

[6] 304 U.S. 64 (1938).

[7] Defendant in Seaboard filed his motion to dismiss pursuant to FED. R. CIV. P. 12 (b)(1) which provides in part:

> [T]hat the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . . .

The motion attacked the jurisdiction of the court alleging a lack of complete diversity of citizenship. After examining the affidavits of the parties, the court stated:

> [D]efendant's presence in California on the date of the commencement of the action is . . . [a] dispute. . . . involv[ing] a question of fact which cannot be properly resolved without a hearing at which relevant evidence can be heard and weighed.

276 F. Supp. at 511.

and theory of *Erie*.[8] The court, while recognizing that the defendant's motion[9] presented a situation which "obviously calls for a result which is contrary to the current federal practice,"[10] held that *Erie* required application of state law which made dismissal mandatory.

In reaching this conclusion, the court reviewed the history of *Erie* and subsequent decisions to determine what tests were to be applied.

In 1789, Congress passed the Rules of Decision Act[11] which was to govern the question of what state law should be applied when a federal court exercises jurisdiction over a non-federal claim. The problem was the meaning of the word "laws." Were the federal courts to apply state decisional law, just the statutory law, or both? In *Swift* v. *Tyson*,[12] the United States Supreme Court, in an attempt to achieve "uniformity of law throughout the United States,"[13] construed the Act to be "limited [in] its application to state laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals. . . ."[14] The effect of this decision was to allow the federal courts in a diversity action to determine the general common law in the absence of local laws or positive statutes on the particular subject before them, and in so doing escape application of state law. More importantly, because the general common law, as interpreted by the federal courts, varied according to the court where the action was brought, the goal of diversity jurisdiction, prevention of discrimination in the application of state law between citizen and non-citizen,[15] went

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[8] *See* text at notes 17-23 *infra*.

[9] It should be noted, as it was by the court, that the motion called for dismissal and not for abatement. In the normal situation of a prior pending action and a subsequent federal suit involving the same parties and issues, the federal courts may proceed concurrently (usual occurrence) or invoke their discretionary power and stay the federal proceedings (rare). *See* Note, *Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits*, 60 COLUM. L. REV. 684 (1960). It appears that the only time that the courts have the power to dismiss is in actions for declaratory judgment, and then only because of the special nature of the court's jurisdiction. *See* 6 J. MOORE, FEDERAL PRACTICE ¶57.08 (2d ed. 1966).

[10] 276 F. Supp. at 512.

[11] Act of Sept. 24, 1789, ch. 20, §34, 1 Stat. 92 (now 28 U.S.C. §1652), which 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.

[12] 41 U.S. (16 Pet.) 1 (1842).

[13] Erie R.R. v. Tompkins, 304 U.S. 64, 75 (1938).

[14] 41 U.S. at 18. For a discussion of the intent of the drafters of the Federal Judiciary Act of 1789 see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1933). Warren argues that it was the intention of the first congress to include state decisional law as well as statutory law. *Id.* at 82-83. *But see* Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519 (1941).

[15] Erie R.R. v. Tompkins, 304 U.S. 64, 74 (1938).

unrealized. As a consequence of application of differing rules of law in the two court systems, the practice of forum shopping within a state developed.[16]

In *Erie Railroad Co.* v. *Tompkins*,[17] the Supreme Court overruled *Swift* and its doctrine of non-application of state decisional law, holding that the law to be applied in any case, except in matters governed by the Federal Constitution or by acts of Congress, is the law of the state. Tompkins, a resident of Pennsylvania, was injured in that state, and subsequently instituted a diversity action for damages in a New York district court against the Erie Railroad, a New York corporation. The defendant appealed the district court's decision in favor of plaintiff, contending that Pennsylvania law,[18] which imposed a lesser standard of care, should have applied. The Supreme Court granted certiorari to determine "whether the federal court was free to disregard the alleged rule of the Pennsylvania common law."[19] The conflict was between state substantive law, a willful and wanton standard, and federal substantive law, a standard of ordinary care. The Court held that the federal courts could not disregard state decisional law and that state substantive law must be applied where jurisdiction is based upon diversity of citizenship. The reasons for the decision, as advanced by Justice Brandeis, were the previous misinterpretation of the Rules of Decision Act and the desire for uniformity in treatment of litigants by both judicial systems within a state. Implicit in both these reasons are certain constitutional commands. The first concerns the allocation of power between the state and federal legislative and judicial systems. The argument is that neither Congress nor the federal courts may declare rules infringing upon substantive rights of citizens in an area which is not governed by an express grant of federal authority.[20] The

[16] The goal of forum shopping is to reach a result in the federal court unobtainable in the state court either by originally filing a diversity action in, or by removing a state action to, the federal court. The practice of forum shopping, after the decision in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), developed primarily because of the divergence between local and federal rule and because of the extensions of the doctrine of general common law. For the most flagrant example of forum shopping see Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1927).

[17] 304 U.S. 64 (1938). For a comprehensive collection of articles, comments and notes on the Erie subject see 1A J. MOORE, FEDERAL PRACTICE ¶0.304 (2d ed. 1965).

[18] Under Pennsylvania law "persons who use pathways along the railroad right of way . . . are to be deemed trespassers; and . . . the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful." 304 U.S. at 70.

[19] 304 U.S. at 71.

[20] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

'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 au-

federal government, one of limited powers, is confined to those activities specifically provided for in the Constitution.[21] It is not within that limited power to prescribe the substantive law applicable in diversity cases where the federal court is but another court of the state. Embodied in the second reason, the uniformity in treatment of litigants, is the doctrine of equal protection of the law.[22] The reasoning here is that all litigants within a state should be entitled to the same treatment by the courts located in that state regardless of which judicial system is chosen as the forum.[23]

Erie's state substance-federal procedure rule was a result of both of the above constitutional principles. The substance-procedure distinction was further solidified by the adoption of the Federal Rules of Civil Procedure in 1938. Prior to this, the various acts of Congress had required that the federal courts in law actions, as opposed to equity actions, conform to state procedural rules.[24] The new rules combined law and equity pleadings and eliminated much confusion that had previously existed. The Rules Enabling Act,[25] the basis of the new procedural rules, had been passed in 1934 with the admonition that the "rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."[26] This was the standard against which the validity of the new rules was hereafter to be measured.

In subsequent decisions, the Supreme Court has attempted to clarify *Erie* and to determine what tests should be used in deciding whether to apply federal or state law in a diversity case. In 1941, the court in *Sibbach* v. *Wilson & Co.*[27] applied the substance versus procedure test in the first Supreme Court,

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thority of the State and, to that extent, a denial of its independence.' *Id.* at 79.

[21] U.S. CONST. amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[22] U.S. CONST. amend. XIV, §1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

[23] *See* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

Swift v. *Tyson* introduced grave discrimination by non-citizen against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible *equal protection of the law.* In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State.

Id. at 74-75 (emphasis added).

[24] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §61 (1963).

[25] Act of June 19, 1934, ch. 651, §1, 48 Stat. 1064 (now 28 U.S.C. §2072).

[26] *Id.*

[27] 312 U.S. 1 (1941).

post-federal rules application of *Erie*. This action was brought in a district court in Illinois to recover damages for injuries sustained in Indiana. The defendant moved for an order requiring the plaintiff to submit to a physical examination as provided by the Federal Rules of Civil Procedure.[28] The plaintiff contended that Illinois law governed and under it such an order would be void. The district court disagreed, and the plaintiff, refusing to submit to a physical examination, was held in contempt of court.

In *Sibbach*, an express federal rule and a state decisional rule were, on their face, in conflict. The reasons for these rules were, likewise, in conflict, the federal rule being grounded on a desire to foster speedy, efficient trials, while the state rule was premised on a right to be free from bodily invasions. On certiorari, the Supreme Court reaffirmed the substance versus procedure test ennunciated in *Erie*, holding that the express federal rule was applicable inasmuch as it did not abridge plaintiff's substantive rights in violation of the Rules Enabling Act.[29]

In *Guaranty Trust Co.* v. *York*,[30] the Supreme Court substituted the rationale of the substance versus procedure test in *Erie* for the rule itself. York, representing similarly situated bondholders, brought a class action in equity against Guaranty Trust, alleging breach of trust in failing to protect the interests of the noteholders and in not disclosing its conflicting interest to the bondholders. The district court granted Guaranty Trust's motion for summary judgment based on the running of the statute of limitations. The court of appeals reversed, holding that a federal equity court could apply laches, rather than being bound by the state statute of limitations as was contended by Guaranty Trust.[31] After granting certiorari, the Supreme Court reversed,[32] stating:

> The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?[33]

Thus, if the application of state law would significantly affect the outcome of the litigation, it, rather than the federal law, was

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[28] FED. R. CIV. P. 35. It should be noted that while at that time, Indiana law provided for physical examinations, Illinois decisions did not permit them.

[29] *Cf.* with note 46 *infra*.

[30] 326 U.S. 99 (1945).

[31] Guaranty Trust Co. v. York, 143 F.2d 503 (2d. Cir. 1944).

[32] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[33] *Id.* at 109. This is really substance versus procedure analysis in theory while outcome in form. It is an attempt to further the *Erie* policy of uniformity of treatment of litigants within a state.

to be applied to insure uniformity in the two judicial systems within a state.[34]

The situation in *York* is unique and deserving of special consideration. Initially, there is a literal conflict between the state's statute of limitations requiring mandatory dismissal and the federal rule of laches which leaves dismissal to the discretion of the court. However, upon exercise of the discretion, the conflict may be mooted in that if the federal court decides to bar the action the result so obtained is identical to the result obtained by application of the state statute of limitations. On the other hand, if the federal court in the exercise of its discretion allows the suit to continue, the federal-state conflict then becomes unavoidable. In resolving this conflict, in *York*, the federal court considered the federal-state policy factor, uniformity of result within a state, as the decisive factor and, hence applied the state rule.

For 13 years there was little variance from the emphasis on outcome determinative considerations.[35] Then in *Byrd* v. *Blue Ridge Rural Electric Co-operative, Inc.*[36] a new approach to the *Erie* problem was mentioned wherein the previous reliance on outcome-determinative analysis[37] was limited by countervailing federal considerations. The problem confronting the Court was whether a question of fact, plaintiff's status as an employee under the state workmen's compensation act, should be tried to a judge in accordance with state law or to a jury in accordance with federal law. The Court held that the mere fact that the state rule was not substantive was not dispositive of the matter.

> It may well be that in the instant . . . case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only considera-

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[34] The Court seemed to ignore the fact that the state statute of limitations could have been held controlling by looking to the substantive purpose of the statute.

[35] In 1949 three diversity cases dealing with the application of *Erie* were handed down on the same day. In each case, the composition of the majority differed which is illustrative of the complex problems that faced the Court. In the first, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), a suit for damages was filed in federal court. It was conceded that if Kansas law were applicable, then, the action would be barred by the statute of limitations. The question was whether, for purposes of determining the running of a state statute, an action was commenced by serving the defendant as provided by state law or, by filing the complaint as provided by federal law. The Court held state law controlling. In the second suit, Woods v. Interstate Realty Co., 337 U.S. 535 (1949), the Court held that where a state statute prevents non-registered foreign corporations, doing business within that state, from maintaining a suit, then so must the federal courts. Finally in Cohen v. Beneficial Indus. Fin. Co., 337 U.S. 545 (1949), the plaintiff brought a stockholder's derivative action in federal court. The Court held that the suit was barred from the federal court unless the plaintiff complied with the state statute requiring the posting of security for the corporation's litigation expenses.

[36] 356 U.S. 525 (1958).

[37] *See* text at notes 30-34 *supra*.

> tion, a strong case might appear for saying that the federal court should follow the state practice.
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> But there are affirmative countervailing considerations at work here. . . . The policy of uniform enforcement of state-created rights and obligations, see, *e.g., Guaranty Trust Co.* v. *York supra,* cannot in every case exact compliance with a state rule . . . which disrupts the federal system of allocating functions between judge and jury.[38]

The *Byrd* Court thus found that a competing federal interest — the seventh amendment right to jury trial[39] — would transcend the consideration of uniformity, hence the federal law should apply.

The *Byrd* case is interesting because of the problem it poses between theoretical and practical considerations. In this situation, the literal conflict between the federal and state rules may, upon application, disappear. Theoretically, there is little reason to support a distinction between judge and jury as equally able triers of fact. Conceptually, the trier of fact, be it judge or jury, should reach the same results. However, in practice, it cannot be denied that in a particular situation there may be a difference in result depending upon whom decides the issues of fact. The *Byrd* Court, apparently not concerning itself with such distinctions, decided the case on seventh amendment policy considerations.

The latest Supreme Court consideration of the *Erie* doctrine was *Hanna* v. *Plumer.*[40] This case arose out of a conflict between federal rule 4(d)(1)[41] permitting "abode" service, and the Massachusetts statute[42] requiring "in hand" service for probate claims. The district court, on motion of defendant, dismissed the action for failure to comply with the state rule. The court of appeals affirmed, holding that the state statute was substantive.[43] On appeal, the Supreme Court reversed, holding that the application of rule 4(d)(1) in this case did not conflict with the policies of the *Erie* doctrine, which were identified as discouragement of forum shopping and avoidance of inequitable administration of the laws.[44] The import of the decision is that the validity of the Federal Rules of Civil Procedure is not controlled by the *Erie* doctrine. When the command of a federal legislative rule is clear, the validity of that command is to be tested not by the *Erie* doctrine but by the constitutional power of Congress to prescribe federal rules of procedure and by the

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[38] 356 U.S. at 537-38.
[39] U.S. CONST. amend. VII.
[40] 380 U.S. 460 (1965).
[41] FED. R. CIV. P. 4 (d)(1).
[42] MASS. GEN. LAWS ch. 197, §9 (1958).
[43] Hanna v. Plumer, 331 F.2d 157 (1st Cir. 1964).
[44] 380 U.S. at 468.

meaning of the Enabling Act,[45] through which Congress has exercised that power. *Hanna* thus narrowed *Erie's* policy of uniform treatment of litigants within a state by requiring supremacy of the Federal Rules of Civil Procedure.

Justice Harlan, concurring, disagreed with the reasoning of the majority opinion because of the lack of weight given by the majority to the "State's substantive regulation of the primary conduct and affairs of its citizens."[46] He also disagreed with the majority's interpretation of the Rules Enabling Act's standard for determining the validity of the Federal Rules of Civil Procedure.

> Whereas the unadulterated outcome and forum-shopping tests may err too far towards honoring state rules, I submit that the Court's 'arguably procedural, *ergo* constitutional' test moves too fast and far in the other direction.[47]

The peculiarity of *Hanna* is that while it seems to present a conflict, both literally and in application, between the state and federal rules, it is very difficult to find a sufficient difference in purpose to justify the application of one rule rather than the other. Both are reasonably calculated to apprise the representative of claims against the estate. Yet, the *Hanna* Court held that the application of the federal rules was mandatory.

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[45] The Rules Enabling Act, Act of June 19, 1934, ch. 651, §1, 48 Stat. 1064 (now 28 U.S.C. §2072), contained a limitation on the power to prescribe new rules. The limitation was based on the theory that Congress may not interfere with areas reserved to the states.

[46] 380 U.S. at 476. It has been suggested that the real way to evaluate substance versus procedure is not to take a mechanical approach.

> The words 'procedure' and 'substance' are not self-defining, and, it can be shown, have been given varying meanings by courts dealing with problems in different fields. As underlying social policy varies, so does the meaning of the term.
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> [A]n 'analytic determination' cannot be made by an attempt to analyze *in vacuo* 'the meaning' of the words 'procedure' and 'substance'; it can be made only by determining what meaning the ambiguous words in the statute ought to have to carry out the purpose in view.

W. W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 188-89 (1942).

[47] 380 U.S. at 476. Justice Harlan's opinion in *Hanna* indicates that in Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), he would have held the federal rule applicable.

> At most, application of the Federal Rule would have meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort.

380 U.S. at 477. But in Cohen v. Beneficial Indus. Fin. Co., 337 U.S. 545 (1949), Justice Harlan, as he indicated in *Hanna*, would have barred the suit.

> The proper view of Cohen is, in my opinion, that the statute was meant to inhibit small stockholders from instituting 'strike suits,' and thus it was designed and could be expected to have a substantial impact on private primary activity. Anyone who was at the trial bar during the period when Cohen arose can appreciate the strong state policy reflected in the statute.

380 U.S. at 477.

After reviewing the cases, from *Swift* to *Hanna*, the court in *Seaboard Finance Co.* v. *Davis*[48] stated:

> To summarize, *Erie* and its progeny normally require a federal court to apply the law of the forum state. In determining the applicability of the state law, a federal court is required to consider three factors: (1) whether the variance between the state and local rule is such that it will affect the outcome of the litigation; (2) whether the variance is of a nature that it would encourage forum shopping; and (3) whether there is some countervailing federal consideration which would justify the variance. Where a substantial variance exists, the court must balance the first two factors against the third. Only if the countervailing considerations outweigh the possibilities of divergent administration of the laws and forum shopping, should the federal rule be applied.[49]

Applying these factors to the *Seaboard* facts, the court concluded that "there is a material difference in result between the two systems of courts [and] [t]his variance is also of such a nature as to encourage forum shopping."[50] The court then looked for a countervailing federal consideration to justify the variance, and finding none, held that the Illinois law must apply.

Thus, the *Seaboard* court determined that three factors should be considered to resolve the federal-state procedural rule conflict: first, will the conflict affect the outcome of the litigation; second, will the conflict, assuming that it affects the outcome, encourage forum shopping; and third, will the conflict, assuming that it affects the outcome so as to encourage forum shopping, be outweighed by affirmative countervailing federal interests.[51] The second factor, forum shopping, is in reality the reason underlying the outcome-determinative test of the first factor.[52] It is here, however, made a separate and independent factor in that it determines whether the variance in result is substantial.

Application of the three *Seaboard* factors to the facts of the cases which the *Seaboard* opinion reviewed indicates the complexity involved in the choice of federal-state procedural law in diversity cases. In *Sibbach* v. *Wilson & Co.*,[53] a personal injury action was filed in a district court in Illinois, the injury having occurred in Indiana. Illinois law did not permit the defendant to compel the physical examination[54] of the plaintiff,

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[48] 276 F. Supp. 507 (N.D. Ill. 1967).
[49] *Id.* at 515.
[50] *Id.* at 516.
[51] *Id.* at 515.
[52] Guaranty Trust Co. v. York, 326 U.S. 99 (1945). It is only the unfairness which results from the opportunity of some litigants to choose advantageously between the two court systems applying different law that fosters the objection to forum shopping. There is no suggestion that forum shopping for any other purpose is improper.
[53] 312 U.S. 1 (1941).
[54] A physical examination is now provided for in Illinois. ILL. REV. STAT. ch. 110A, §215 (1967).

while federal law did so permit.[55] It can readily be seen that, depending upon the outcome of the examination, such a conflict might significantly affect the outcome of the litigation assuming that the suit had to be filed in Illinois. Here, plaintiff chose the federal court as the forum. This choice would generally not be to a plaintiff's advantage with respect to the physical examination rule; plaintiff's choice of forum in reality was based on the necessity of obtaining service. Thus, under these particular circumstances, the variance in results would not encourage forum shopping. So concluding, the three factor analysis of *Seaboard* need not go any further, and the federal rule must be applied. On the other hand, where it is the defendant who is dictating the choice of forum, by removing an action, commenced in the state court, to the federal court, it is clear that the variance in result will be very likely to encourage forum shopping. Under these circumstances, state law, if not outweighed by a countervailing federal interest, will be applied.

Guaranty Trust Co. v. *York*,[56] unlike *Sibbach*, presented an action in which forum shopping definitely was involved. York brought an action against Guaranty Trust for breach of trust. The cause of action was barred by the state statute of limitations but was not necessarily barred, at the time of filing, by the federal equitable laches rule. Whether the result of the two rules would affect the outcome would depend upon how the federal judge chose to exercise his discretion. If he barred the suit, the conflict would not exist. On the other hand, if he did not bar the suit, the conflict would result in a significant variance in the outcome. Where a suit barred in the state court is allowed in the federal system it is evident that forum shopping will be encouraged. Thus, where, as here, there is no outweighing countervailing federal interest, state law should apply.

The conflict in *Byrd* v. *Blue Ridge Electric Co-operative, Inc.*[57] was over who the trier of fact was to be. The state rule provided for the judge to make fact determinations in a workmen's compensation case; the federal rule left such determinations to the jury. If it is first assumed that judge and jury trying an issue of fact would arrive at the same result, the first factor in *Seaboard* fails, and the federal rule is applied. In fact, however, a judge and jury trying a factual issue may or may not reach the same result. Next, assuming that a different result will obtain, the first factor in *Seaboard* is present. Such a variance in result is likely to, and indeed in practice does, encourage forum shopping. Although the first two factors are present, a

[55] FED. R. CIV. P. 35.
[56] 326 U.S. 99 (1945).
[57] 356 U.S. 525 (1958).

strong federal policy, the seventh amendment, outweighs these factors and requires application of the federal rule.

A similar application of the *Seaboard* factors to *Hanna* v. *Plumer*[58] shows that, since it is unlikely that the result would be affected by choice of rule or that forum shopping would, thereby, be encouraged, the federal rule should apply.

The *Seaboard* case is commendable for introducing some consistent reasoning in a confused area, although like the cases it reviewed, it left certain questions unresolved. The court did not discuss whether in choosing the applicable rule, a federal decisional procedural rule was to be considered as valid a federal interest as a legislative procedural rule. Although *York* and *Seaboard* implicitly treat a decisional procedural rule and a legislative procedural rule as identical, the opinions provide no express basis for equating the two. One possible basis for this identity looks to the standard by which the initial validity of the rule, as a federal procedural rule, is measured. The validity of a legislative procedural rule is measured by the prohibition of the Rules Enabling Act against infringement of substantive state rights. It would seem to follow that decisional procedural rules must be measured by this same standard. Expressed differently, the constitutional grant of power to the legislature (to make federal procedural rules) and the legislative grant of power to the judiciary (creation by legislature of the courts) are only one step apart. Thus the same result follows from either — the procedural rule may not infringe upon an area reserved to the states.

Nor have the cases discussed the fact that, where the federal rule vests discretion in the district judge, and its exercise in a certain manner would harmonize the state and federal rules, upon such exercise, choice of the federal rule creates no problem under *Erie* and its progeny.

The *Erie* case itself really has little application to its progeny or to the *Seaboard* case. The question posed by *Erie* was the definition of the word "laws" for purposes of the Rules of Decision Act and the Constitution.[59] The "progeny" and the *Seaboard* case pose the choice between a state and a federal procedural rule in a diversity action when the choice of the latter purportedly impairs a substantive state right. The real question is the proper balance between the federal interest to be furthered by application of the federal procedural rule and the impairment of the state substantive right by such application. This balance, which is a constant constitutional question, demands express

[58] 380 U.S. 460 (1965).
[59] *See* text at notes 17-23 *supra*.

recognition of the state's interests.[60] This interest, although it may be implicitly recognized in the first factor discussed in the *Seaboard* case, i.e. the effect on the outcome of the litigation, is often neglected or even ignored in making the balance, due to the decisive importance given to whether forum shopping is thus encouraged.

A suggested approach to resolve the problem of choice between state and federal procedural rules is to first determine whether there is a literal conflict between the rules and whether upon application, this conflict will remain or disappear. If the conflict remains, a qualitative balance between the respective state and federal interests underlying the rules must be made. Such a balance would assure full recognition of the distribution of power between the state and federal governments.

If the interest behind both the state and federal rules is housekeeping, then the federal court will apply its own housekeeping rule. Where, however, there is a strong federal interest behind the federal rule an even greater reason for choosing that rule over a state housekeeping rule exists. Thus, where housekeeping is the interest behind the state rule, then without further analysis, the federal rule applies. If on the other hand, the interest underlying the state rule is more substantive than housekeeping, two possibilities must be considered. First, if the interest behind the federal rule is housekeeping, state law should apply. However, if the interest behind the federal rule is also something more substantive than housekeeping, a balance must be made between the respective state and federal interests.

For example, in the *Sibbach* case the initial conflict was between a state rule forbidding physical examinations and a federal rule permitting them within the court's discretion. The literal conflict is obvious; but whether, upon application, the conflict will remain is unknown until the judge exercises his discretion. If the rules remain in conflict both literally and upon application, then the state interest in the privacy of the individual and the federal interest in a "speedy and exact determination"[61] must be balanced. Under this analysis the federal rule would prevail because the above federal interest expressed in its broad discovery procedures is greater than the state substantive interest.

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[60] And it [*Erie*] recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard. Thus, in diversity cases *Erie* commands that it be the state law governing primary private activity which prevails.
Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (concurring opinion).

[61] 312 U.S. at 14.

In *York,* the conflict was between the state statute of limitations and the federal rule of laches which gave the district judge discretion in determining whether a definite lapse of time constituted a bar to a suit. If the conflict remains after exercise of this discretion a balance of the respective state and federal interests must be made. If the interest behind the state rule was to put an end to litigation, i.e. housekeeping, the federal rule should be applied. If, on the other hand, the interest for the state rule is more substantive than housekeeping, e.g. to terminate the defendant's risk of litigation, two remaining possibilities must be considered. If the interest for the federal rule is to end litigation, i.e. housekeeping, the state rule will apply. However, if the interest behind the federal rule is, like the state interest, terminating the defendant's risk of litigation, the two interests must be qualitatively balanced. In situations such as this where the balance of the two interests are the same, the state rule should be applied.

The conflict presented in *Byrd* is equally as complex. There the choice was over who would determine an issue of fact. While it is clear that a literal conflict was present, whether this will be resolved upon application cannot be determined until the results are compared. If they (the judge and jury) arrive at the same conclusion the issue is mooted. Assuming, however, that their results would differ, reference must be made to the underlying interests to determine which rule to apply. There are multiple interests at work: first, the interest common to both systems, that of the allocation of the fact-finding function between the judge and jury; second, the federal interest expressed in the seventh amendment right to a jury trial; and, third, the fact that workmen's compensation is peculiarly an area of state interest. Since the state interest in workmen's compensation is more substantive than housekeeping and the federal interest, the seventh amendment, is also non-housekeeping, the two must be balanced.

A new problem arises at this point. When the balance of interests is required, there is no difficulty in situations where more than one interest factor exists for either or both rules. The various factors are merely weighed cumulatively on their respective sides. However, where as here, there is an interest common to both rules, a different approach is taken. The common policy interest is independently treated using the suggested analysis — an independent determination of the rule to be applied is made. This factor is then added to that side as an independent weight factor. Here, for example, the common interest, allocation of fact finding, if classified under both state and federal rules as housekeeping, the federal rule therefore apply-

ing, would be a policy tipping the scale to the federal side. In *Byrd,* the federal interest — the seventh amendment — would be enough alone to outweigh the state interest; however a complete balance would, to be accurate, include the common factor as added weight on the federal side.

In *Hanna,* the conflict between the state rule and the federal rule was literal. Upon application of the two different rules the conflict would remain. The interest behind both the state and federal rules was twofold, first, actual notice of the action and, second, a housekeeping reason, the manner of service. Balancing the strong interests of actual notice, qualitative equals, dictates state law, while balancing the similar housekeeping interests dictates application of federal law. Since the interests of actual notice are equal and the interests in manner of service are not, the balance is tipped in favor of the federal rule. However, if the state's interest in actual notice is conceived to be greater than that of the similar federal interest, the balance may well be tipped in favor of the state rule.

In the *Seaboard* case the initial conflict was between the state rule requiring dismissal and the federal rule giving the court discretion in determining the dismissal.[62] If upon the exercise of discretion the conflict remains, consideration must be given to the interests behind the two rules. The reasons for both the federal and state rule are twofold — first, to terminate the defendant's risk of litigation and, second, to avoid the backlog, essentially a matter of judicial administration or housekeeping. The balancing of the two non-housekeeping interests is a factor weighing towards application of the state law while balancing of the two housekeeping interests weighs toward the application of the federal law since the state has little if any interest in a backlog in the federal court. The choice of rule thus depends upon whether the major interest was the housekeeping or the non-housekeeping interest. Here the major interest of the rule being to terminate the defendant's risk of litigation, the state law should apply.[63]

CONCLUSION

The analysis of the *Seaboard* court showed an awareness of some of the problems plaguing Erie's "progeny." The three factors suggested by the court were indeed considerations. However, if the suggested analysis of looking to see if the conflict

[62] It is assumed that a stay or abatement operates in the same manner as dismissal.

[63] If the enactment of a statute requiring a mandatory dismissal in abrogation of the common law indicates an interest of greater weight than the decisional rule permitting discretionary disposition, then the state rule should be applied.

remains upon application of the differing rules and then balancing the policy interests behind the respective rules is used, perhaps a clearer recognition of the vital federal-state interests will be achieved and the constitutional limitations more easily understood.

James P. Weissenborn