CONFLICT OF LAWS: SUPREME COURT APPLIES LAW OF TRANSFEROR FORUM TO TRANSFERS UNDER SECTION 1404 (a)

INHERENT in the provision for transfer of a civil action from one federal district court to another under section 1404 (a)[1] is the problem of which state's laws shall govern the adjudication of the case after transfer. Federal courts have struggled to find a solution which would be consistent with the limited purposes of 1404 (a)[2] without contravening the *Erie*[3] prescriptions regarding uniformity between federal and state courts within a given state. In the recent decision of *Van Dusen v. Barrack*,[4] the Supreme Court of the United States resolved the issue by holding that the law of the transferor forum would apply.

The case arose when a commercial airliner en route from Boston to Philadelphia crashed in Boston Harbor. More than one hundred wrongful death actions were brought in a Massachusetts federal district court, and over forty-five in a Pennsylvania federal court. The defendants moved under 1404 (a) to transfer the latter actions to Massachusetts, the transferee state, where most of the witnesses allegedly resided and where all the suits could be consolidated. The plaintiffs opposed the motion on the ground that Massachusetts was not a forum where the action "might have been brought," in that the plaintiffs had not qualified under Massachusetts law[5] to sue in a representative capacity as required by Federal Rule 17 (b).[6] The plaintiffs also maintained that transfer would be unduly prejudicial because a transferee federal court would apply the limited recovery

[1] "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." 28 U.S.C. § 1404 (a) (1958).

[2] 1404 (a) was designed as a simple device to prevent "wastefulness of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26-27 (1960).

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

[4] 376 U.S. 612 (1964).

[5] See MASS. ANN. LAWS ch. 195, § 8 (1955), requiring an administrator or executor from a foreign state to obtain ancillary appointments in order to acquire standing to sue in Massachusetts. The plaintiffs in *Barrack* had not obtained such appointments.

[6] The capacity of a representative to sue or be sued "shall be determined by the law of the state in which the district court is held. . . ." FED. R. CIV. P. 17 (b).

provisions of the Massachusetts Death Act,[7] whereas under Pennsylvania choice of law rules the unrestricted Pennsylvania measure of damages[8] would be applied.[9]

The Pennsylvania district court ordered the transfer regardless of which state law was applicable, and asserted that transfer was not precluded by the plaintiffs' failure to qualify to sue under Massachusetts law.[10] The Court of Appeals for the Third Circuit reversed, holding that there could be no transfer unless the plaintiffs had an unqualified right to sue in the transferee forum (Massachusetts) at the time the original action was filed.[11]

The Supreme Court reversed, rejecting the contention that Massachusetts was not a forum where the action "might have been brought" as required in 1404 (a). The Court held that this phrase refers only to federal venue and jurisdictional requirements, and does not comprehend state laws regarding the capacity to sue.[12] Although Massachusetts was a forum in which the action "might have been brought," the Court noted that transfer would nevertheless be contrary to the "interest of justice," and hence precluded by 1404 (a), if the transferee court would dismiss the action for lack of standing under Massachusetts law. Therefore, the Court deemed

[7] MASS. ANN. LAWS ch. 229, § 2C (1955), limiting recovery to damages not in excess of $20,000. The provision is regarded as punitive rather than compensatory and assesses damages according to the degree of culpability. Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956). The section has since been amended, raising the maximum recovery to $30,000, effective as of January 1, 1963. MASS. ANN. LAWS ch. 229, § 2 (Supp. 1963).

[8] PA. STAT. ANN. tit. 12, §§ 1601-04 (1953). Pennsylvania's standard of damages is compensatory, measuring damages by pecuniary injury. See Spangler v. Helm's New York-Pittsburgh Motor Express, 396 Pa. 482, 153 A.2d 490 (1959).

[9] The defendants had argued that Pennsylvania would follow the lex loci conflict of laws principle and apply the law of the jurisdiction where the tort was committed, Reply Brief for Petitioners, pp. 2-3. The plaintiffs, on the other hand, contended that Pennsylvania courts would be more likely to follow two recent New York cases which held that the damage features of the Massachusetts Death Act were incompatible with New York public policy and thus not applicable. 376 U.S. at 628-29. Compare Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 556-57 (2d Cir. 1962); Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Subsequent to the decision in *Barrack*, the Pennsylvania Supreme Court resolved the issue in a related context by holding that Pennsylvania damage provisions would apply in a wrongful death action by a Pennsylvania citizen on a tort committed in Colorado, where Colorado had no real interest in application of its more restrictive damage provisions. Griffith v. United Airlines, Inc., 203 A.2d 796 (Pa. Sup. Ct. 1964).

[10] Popkin v. Eastern Airlines, Inc., 204 F. Supp. 426 (E.D. Pa.), *rev'd sub nom.* Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1962), *rev'd*, 376 U.S. 612 (1964).

[11] Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1962).

[12] 376 U.S. at 621-24.

it essential to decide which state law would apply after a 1404 (a) transfer.[13]

The Supreme Court had a choice of several solutions. It might have followed the *ad hoc* approach employed by some district courts of granting transfer only upon certain stipulated conditions.[14] This would insure that neither party is unduly prejudiced by possible variances in the laws of the two forums. However, this approach fails to provide precise guidelines for future cases; moreover, it does not attempt to reconcile transfer under 1404 (a) with an interpretation of the *Erie* formula.

Another solution might have required application of the law of the transferee state where the action was ultimately to be tried. Superficially, this result would appear to conform to the view that the *Erie* doctrine requires uniformity of result between federal district courts and courts of the state in which they sit.[15] In *Guaranty Trust Co. v. York*,[16] the Supreme Court had construed the "nub of the policy that underlies Erie":

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court. . . . [T]he 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.[17]

This language could be easily interpreted to require uniformity between federal courts and courts of the state in which the action is

[13] *Id.* at 624-26. The case was remanded to the district court in Pennsylvania for a reconsideration of the question of "convenience" in light of the application of Pennsylvania's laws after transfer. *Id.* at 646; *cf.* Parsons v. Chesapeake & O. Ry., 375 U.S. 71 (1963). The Supreme Court directed the district court to consider judicial familiarity with the laws governing the case as a factor in determining whether the transferor forum would be more convenient. Although not a controlling criterion in itself, according to the Court uncertainty in a state's choice of law rules should weigh against transfer, convenience being facilitated by determination of these close questions by local judges more familiar with indigenous laws. 376 U.S. at 644-46.

[14] *E.g.*, Frechoux v. Lykes Bros. S.S. Co., 118 F. Supp. 234 (S.D.N.Y. 1954) (transfer on condition that transferor state statute of limitations will apply); Greve v. Gibraltar Enterprises, Inc., 85 F. Supp. 410 (D.N.M. 1949) (movant's express assurance not to assert transferee statute of limitations constitutes waiver of that defense).

[15] Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941).

[16] 326 U.S. 99 (1945).

[17] *Id.* at 109. (Emphasis added.)

instituted; until *Barrack,* no Supreme Court case interpreting *Erie* had been decided within the context of a 1404 (a) transfer. Hence, it would be preferable to adopt that interpretation of *Erie* which best effectuated the purposes of the transfer device. 1404 (a) was enacted as a provision intended only to reduce costs and facilitate the convenience of trials.[18] These limited purposes were not meant to sanction its use by parties to obtain "a change of law as a bonus for a change of venue,"[19] thereby prejudicing one of the litigants in many cases.[20] Where the transferee state's statute of limitations would bar the action, for example, transfer would be tantamount to dismissal of the action. Thus, the alternative adopted by the Court was the application of the law of the forum where the suit was filed. The Court in *Barrack* interpreted the *Guaranty* language to mean that the "critical identity" to be maintained in 1404 (a) cases is the uniformity of outcome between the federal court and the state courts of the forum where the action was filed.[21]

In reaching its ultimate decision to apply the law of the transferor forum, the Supreme Court relied upon two circuit court cases[22] for a proper interpretation of 1404 (a).[23] In one instance, the Tenth Circuit held that transfer would be appropriate even though the statute of limitations of the transferee forum would have precluded the action. It saw no logical reason why the right of action conferred by the state of filing should be completely obviated upon transfer to the more convenient forum.[24] Therefore, the effect of the decision was to permit transfer on condition that the transferee's short-

[18] See note 2 *supra.*

[19] Wells v. Simonds Abrasive Co., 345 U.S. 514, 522 (1953) (Jackson, J., dissenting). Justice Jackson insisted that making the place of trial the sole factor determining the law of cases tried in federal courts would transform 1404 (a) into a forum-shopping measure capable of causing great "conflict, confusion and injustice." *Ibid.*

[20] See Currie, *Change of Venue and the Conflict of Laws,* 22 U. CHI. L. REV. 405, 438-41 (1955). The author argues that "if it should be established as a rule of thumb that the transferee court is to apply the law of the state in which it sits, every case in which there is a difference of law between the original and the transferee state would become a game of chess, with Section 1404 (a) authorizing a knight's move; and nothing would be certain except that the parties would land on a square of a different color." *Id.* at 441.

[21] 376 U.S. at 639. This ruling refines the holding in previous cases interpreting *Erie.* See notes 15-16 *supra.*

[22] H. L. Green Co. v. MacMahon, 312 F.2d 650 (2d Cir. 1962), *cert. denied,* 372 U.S. 928 (1963); Headrick v. Atchison, T. & S.F. Ry., 182 F.2d 305 (10th Cir. 1950).

[23] 376 U.S. at 631.

[24] Headrick v. Atchison, T. & S.F. Ry., 182 F.2d 305, 310 (10th Cir. 1950). The analysis in *Headrick* has been criticized for its failure to consider whether New Mexico had a forum non conveniens rule. 60 YALE L.J. 537 (1951).

er statute of limitations would not be asserted.[25] Subsequently, the Second Circuit extended this rationale beyond the obvious prejudice inherent in dismissal under the transferee's statute of limitations. It stated that rights acquired under the state law of the forum of filing should remain unaffected, and that the transferee district court should apply common law and choice of law rules of the transferor forum.[26] The force of this language, however, was mere dictum, because the case was transferred to a different circuit.[27]

As a result of *Barrack,* the transferee court is to apply the state law which would have governed the action had there been no change of venue,[28] subject to the qualification that this includes only those laws which would significantly affect the outcome of the case.[29] In construing 1404 (a) the Supreme Court held that it is not a device to be used by defendants to "defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue."[30] The statute is simply a mechanism

[25] The Tenth Circuit also noted that transfer might be totally inappropriate because the district court failed to consider factors of convenience from the plaintiff's point of view. Headrick v. Atchison, T. & S.F. Ry., *supra* note 24, at 310-11.

[26] H. L. Green Co. v. MacMahon, 312 F.2d 650, 652-53 (2d Cir. 1962).

[27] In *Green,* plaintiff was a New York corporation asserting a right to damages for an alleged violation of the Securities Exchange Act of 1934. Transfer to Alabama was ordered, the court asserting that federal courts in the past had been unanimous in applying transferor statutes of limitations in analogous circumstances.

[28] 376 U.S. at 639.

[29] *Id.* at 629 n.40. Only laws of the transferor state which significantly affect the outcome are required to be applied by the transferee forum. Thus the transferee court could apply its own rules "governing conduct and dispatch of cases in its court." *Ibid.*

Cases subsequent to *Guaranty* have found the outcome test a rather difficult one to apply. See, *e.g.,* Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958). See generally Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation,* 36 TUL. L. REV. 443 (1962). Problems may arise, for example, in determining whether a particular rule of evidence of the transferor state is a rule governing "conduct and dispatch" of cases. Variances such as conflicting dead man statutes of the transferee and transferor states might well be categorized as outcome-determinative in a given situation. *Cf.* Wright v. Wilson, 154 F.2d 616 (3rd. Cir. 1946).

[30] 376 U.S. at 633-34. This solicitude for the plaintiff has not always been demonstrated by the Court. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), generally cited by the Court as the authoritative source of the doctrine of forum non conveniens as applied by the federal courts, all the advantages accruing to the plaintiff by suing in the inconvenient forum were defeated. The plaintiff in *Gulf Oil* brought suit in New York on a Virginia tort and was dismissed on forum non conveniens grounds, leaving him no choice but to sue in Virginia and accept all its rules of law. This result jeopardized the plaintiff's cause of action itself, for as Justice Black pointed out in his dissent, "whether the [Virginia] statute of limitations has run against the plaintiff, we do not know." *Id.* at 516-17. According to the revisor's Note accompanying 28 U.S.C. 1404 (a), the statute was drafted as a codification of the doctrine of forum non conveniens. Past history of 1404 (a), then, would indicate that

to counteract such inconveniences, and "should be regarded as a *federal judicial housekeeping measure,* dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change in courtrooms."[31]

To buttress this conclusion, the Court adopted the aforementioned interpretation of *Erie,* requiring the outcome in federal diversity cases to conform to the result which would have been reached in the courts of the state where the action was originally filed.[32] However, the Court expressly declined to decide which state law would be applicable in cases where state courts of the transferor forum would have dismissed the action pursuant to forum non conveniens.[33] It may be argued that where a suit would have been dismissed pursuant to forum non conveniens if commenced in a state instead of a federal court, it is reasonable to presume that the

its language and policy could indeed justify its use by defendants to dilute the effect of the plaintiff's venue privilege.

[31] 376 U.S. at 636-37. (Emphasis added.)

[32] See text accompanying notes 15-21 *supra.*

[33] Courts in a number of states have the prerogative to dismiss actions on a showing that a forum in another state would be a more convenient place for trial. Fifteen jurisdictions have applied the doctrine of forum non conveniens: Price v. Atchison, T. & S.F. Ry., 42 Cal. 2d 577, 268 P.2d 457 (1954); Winsor v. United Air Lines, Inc., 154 A.2d 561 (Del. Super. Ct. 1958); Depenbrock v. Safeway Stores, Inc., 172 A.2d 561 (D.C. Munic. Ct. App. 1961); Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936); Gonzales v. Atchison, T. & S.F. Ry., 189 Kau. 689, 371 P.2d 193 (1962); Carter v. Netherton, 302 S.W.2d 382 (Ky. Ct. App. 1957); Union City Transfer v. Fields, 199 So. 206 (La. Ct. App. 1940); Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 184 N.E. 152 (1933); Johnson v. Chicago, B. & Q.R.R., 243 Minn. 58, 66 N.W.2d 763 (1954); Strickland v. Humble Oil & Ref. Co., 194 Miss. 194, 11 So. 2d 820 (1943); Jackson & Sons v. Lumbermen's Mut. Cas. Co., 86 N.H. 341, 168 Atl. 895 (1933); Quigley Co. v. Asbestos Ltd., 134 N.J. Eq. 312, 35 A.2d 432 (Ch.), *aff'd,* 135 N.J. Eq. 460, 39 A.2d 135 (Ct. Err. & App. 1944); Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); Pruitt Tool & Supply Co. v. Windham, 379 P.2d 849 (Okla. 1963); Forcum-Dean Co. v. Missouri Pacific R.R., 341 S.W.2d 464 (Tex. Civ. App. 1960).

Five states have indicated approval of the doctrine but have not as yet applied it in an actual case: Running v. Southwest Freight Lines, Inc., 227 Ark. 839, 303 S.W.2d 578 (1957); Cotton v. Louisville & N.R.R., 14 Ill. 2d 144, 152 N.E.2d 385 (1958); Plum v. Tampax, Inc., 399 Pa. 553, 160 A.2d 549 (1960); Mooney v. Denver & R.G.W.R.R., 118 Utah 307, 221 P.2d 628 (1950); Lau v. Chicago & N.W. Ry., 14 Wis. 2d 329, 111 N.W.2d 158 (1961).

Four states have indicated possible acceptance in a proper case: Bradbury v. Chicago, R.I. & Pac. Ry., 149 Iowa 51, 128 N.W. 1 (1910); Fellers v. Belau, 87 Ohio Law Abs. 54, 178 N.E.2d 530 (C.P. 1961); Horner v. Pleasant Creek Mining Corp., 165 Ore. 683, 107 P.2d 989 (1940); Morisette v. Canadian Pac. Ry., 76 Vt. 267, 56 Atl. 1102 (1904).

Factors weighed by the courts in determining whether to decline jurisdiction vary. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947); 1964 DUKE L.J. 595, 600 n.33.

plaintiff would have refiled in a more convenient forum, resulting in the application of that state's laws. Under the strict logic of *Erie,* a 1404 (a) transfer should produce the same result—the law of the transferee forum should be applied in such cases.

The most serious objection to such unqualified obeisance to *Erie* is the "surprise, uncertainty and opportunity for maneuvering" which it permits the parties.[34] Either party might in a given situation obtain the change of law "bonus" which the Court disapproves, and an application of the transferee's law would permit the defendant to use 1404 (a) as a forum-shopping device, thereby gaining substantial advantages or, in extreme cases, actual dismissal upon transfer.[35] Several other factors militate against such a strict construction of *Erie.* In most states, situations in which the law of forum non conveniens will be invoked have not been clearly defined.[36] This uncertainty in state law is a weighty argument against adherence in federal courts to the outcome achieved under state forum non conveniens rules.[37] Furthermore, although state courts might dismiss an action on forum non conveniens grounds, occasionally they have done so only on condition that the movant agree not to assert certain prejudicial laws of the convenient forum when the action is refiled.[38] Other courts have simply refused to dismiss where it would be unduly prejudicial to the plaintiff.[39] The effect of such decisions has been to preserve many of the plaintiff's advantages gained in the original forum, a result which is consistent with the theory of 1404 (a) as enunciated in *Barrack.* Where the circumstances of a case would dictate such qualification or denial of a forum non conveniens dismissal in a state court, the application of transferor law following a 1404 (a) transfer in fact conforms to the uniformity of result prescribed in *Erie.*

Whether *Erie* requires adherence to outcomes produced by forum non conveniens at all is a question which has never been decided.[40] The application of the doctrine is a matter of discretion which varies with the factors of convenience and considerations of

[34] Currie, *The Erie Doctrine and Transfer of Civil Actions,* 17 F.R.D. 353, 367 (1955). See text accompanying notes 36-42 *infra.*

[35] *E.g.,* Headrick v. Atchison, T. & S.F. Ry., 182 F.2d 305 (10th Cir. 1950).

[36] Currie, *The Erie Doctrine and Transfer of Civil Actions,* 17 F.R.D. 353, 367 (1955).

[37] *Ibid.*

[38] *E.g.,* Wendel v. Hoffman, 259 App. Div. 732, 29 N.E.2d 664, 18 N.Y.S.2d 96 (1940).

[39] See, *e.g.,* Thistle v. Halstead, 95 N.H. 87, 58 A.2d 503 (1948).

[40] Currie, *The Erie Doctrine and Transfer of Civil Actions,* 17 F.R.D. 353, 367 (1955).

equity.[41] In light of the strong policy arguments against application of transferee state law, the uncertain and discretionary nature of forum non conveniens should not alter the basic rule of *Barrack*.

Although *Barrack* precludes the use of 1404 (a) as a defendant's forum-shopping measure, the Court intimated that the latitude afforded a plaintiff in his original choice of venue is not boundless. It stated that transferor state law might in some unspecified situations contravene constitutional limitations.[42] For example, where the transferor state has no real interest in the litigation, application of its laws (including its choice of law rules) in a transferee forum which does have such an interest might well deprive the defendant of due process of law.[43] In this instance the full faith and credit clause should not require application of transferor state law.[44]

Likewise, in a situation where the *plaintiff* moves for a transfer,[45] considerations other than maintaining uniformity of result between state and federal courts of the state of filing might dictate application of the transferee forum's laws. Otherwise, the plaintiff could first file an action in an available forum whose laws were

[41] Parsons v. Chesapeake & O. Ry., 375 U.S. 71 (1963).

[42] 376 U.S. at 639 n.4.

[43] Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 350-51 (1960); see, *e.g.*, Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954); Home Ins. Co. v. Dick, 281 U.S. 397 (1930). *But cf.* Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 216-22 (1960) (dissenting opinion); Hokanson v. Helene Curtis Indus., 177 F. Supp. 701 (S.D.N.Y. 1959).

[44] See Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341 (1960).

The American Law Institute's proposed transfer statute distinguishes a defendant's motion to transfer, under which the law of the transferor state will *always* continue to apply, and a motion by a plantiff, which is to result in application of the transferee's laws. A.L.I., *Study of the Division of Jurisdiction between State and Federal Courts* §§ 1306 (c), 1307 (b) (Tent. Draft No. 2 1964). To codify *Van Dusen v. Barrack* in this way might foreclose consideration of the constitutional "disinterested forum" question, which the Court purposely left open for future deliberation. 376 U.S. at 639 n.4. Sections 1306 (c) and 1307 (b) reduce the choice of law problem to a rather rigid formula, unless the proviso that these rules shall apply "to the extent that the court ordering the transfer would have been [is] obliged to apply the law of any state" can be construed as leaving the law applicable on transfers from disinterested states open to constitutional challenge. A.L.I., *Study of the Division of Jurisdiction between State and Federal Courts* §§ 1306 (c), 1307 (b) (Tent. Draft No. 2, 1964). Arguably, the resolution of this question should be left to the courts for further clarification before such codification, to insure a more viable statute. See Currie, *The Disinterested Third State*, 1963 LAW & CONTEMP. PROB. 754, 790-93.

[45] The great majority of cases allow a plaintiff to obtain a transfer on a proper showing of convenience and fairness. *E.g.*, *In re* Josephson, 218 F.2d 174 (1st Cir. 1954); Troy v. Poorvu, 132 F. Supp. 864 (D. Mass. 1955); Dufek v. Roux Distrib. Co., 125 F. Supp. 716 (S.D.N.Y. 1954). *Contra*, Barnhart v. John B. Rogers Prod. Co., 86 F. Supp. 595 (N.D. Ohio 1949).

most favorable to his case, however inconvenient it might be, and then obtain a transfer to a more convenient forum whose laws were perhaps less advantageous. The inequity of this result would in most cases warrant attaching a change of law to a plaintiff-requested transfer as a caveat against such maneuvers, subject to the objections against applying a disinterested transferee state's laws noted above. The proposed American Law Institute Tentative Draft statute provides for application of transferee state law *whenever* a plaintiff moves for transfer.[46] This rule may be too harsh and inflexible in situations where the transferee's statute of limitations would bar the action, and a measure of judicial discretion in such cases appears more desirable than a rigid statutory formulation.[47]

With these qualifications, the solution adopted by the Court is well-reasoned and equitable. Although the plaintiff is allowed to choose the applicable state law within the jurisdictional and venue limitations of federal statutes,[48] the defendant may nevertheless obtain transfer on a proper showing of convenience and fairness, which is all the statute was intended to facilitate. *Barrack* preserves the efficacy of 1404 (a) as a simple change of venue device by its utilization of the requirement that the transfer be in the interest of justice to preclude undesirable jockeying by the parties for a more favorable state law.

[46] A.L.I., *Study of the Division of Jurisdiction between State and Federal Courts* § 1307 (b) (Tent. Draft No. 2, 1964).

[47] See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754, 793-94 (1963).

[48] 28 U.S.C. §§ 1391-1406 (1958).