NOTES

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

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

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

6. Kentucky’s borrowing statute, Ky. Rev. Stat. Ann. § 413.320 (1969), which in its current amended form has been in force since 1942, actually rather plainly indicated Kentucky’s one-year limitation was applicable in Atkins’ case. Federal courts, however, insisted on following the pre-1942 rule, which applied Virginia’s two-year statute of limitations, because Kentucky’s highest state court had not had occasion to consider and interpret the borrowing provision after it was amended in 1942. See, e.g., Albanese v. Ohio River-Frankfort Cooperage
discovery and other pre-trial proceedings were in progress the Kentucky Court of Appeals, the state's highest court, for the first time construed the applicable state statute, holding in *Seat v. Eastern Greyhound Lines, Inc.* that Kentucky's one-year statute of limitations applied in cases arising in foreign jurisdictions granting a longer limitation period. The state court subsequently dismissed another case which had been filed in reliance on Kentucky's earlier rule but was still pending decision when the new rule was announced. The federal district court in Kentucky declared itself bound to follow these decisions of the state's highest court and dismissed Atkins' suit as time barred. Atkins' appeal to the Sixth Circuit Court of Appeals was unsuccessful, and the United States Supreme Court eventually denied his petition for a writ of certiorari. Meanwhile, Virginia had enacted a long-arm statute, and before the Supreme Court's denial of the petition for certiorari made the appeals court decision final, Atkins commenced a second action in federal district court in Virginia. Again the suit was dismissed, this time on the ground that the Kentucky action had not tolled Virginia's statute of limitations, which by this time had expired.

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

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7. 389 S.W.2d 908 (Ky. 1965).
8. Wethington v. Griggs, 392 S.W.2d 56 (Ky. 1965).
9. The *Seat* case in 1965 represented the first opportunity for the Kentucky high court to deliver the long-awaited binding construction of the state's borrowing statute. See note 6 supra. The court in *Wethington* apparently treated the ruling in *Seat* as a statement of the law as in effect since 1942 and dismissed plaintiff's action. Presumably, the subsequent dismissal of Atkins' suit by the federal district court in Kentucky was similarly grounded.
10. The opinion in this case was not reported, but it is described in the Sixth Circuit's opinion delivered on appeal. Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).
11. Id.
Haynsworth, reversed the dismissal and set forth new "federal law" designed to standardize federal procedure for tolling state statutes of limitations in diversity cases. In April, 1971, the Supreme Court denied Schmutz Manufacturing Company's petition for certiorari, and thus left standing the Court of Appeals' holding that the tolling effect of the pendency of an identical suit in another federal court is a matter for federal, and not state determination, even though state statutes of limitations are applied. The Atkins decision is conspicuous for its manifest fairness in leading the plaintiff out of a procedural dilemma. The path the court took in order to accomplish this result, however, strikes new features on the ever-changing face of the so-called "Erie doctrine," and raises complex issues regarding judicial rulemaking power.

**Atkins as a Modification of the Erie Doctrine**

_Emergence and Development of the Erie Doctrine_

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

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18. 435 F.2d at 527-28.
19. 304 U.S. 64, 78 (1938).
21. See text accompanying notes 34-44 infra.
superimposed on and often at variance with state opinions on questions of common law.\textsuperscript{25} The existence of two bodies of applicable law led to forum shopping and unequal administration of the law in favor of diversity plaintiffs.\textsuperscript{26} When confronted once again with conflicting federal and state decisional law in the case of \textit{Erie Railroad Co. v. Tompkins},\textsuperscript{27} the Supreme Court, per Justice Brandeis, announced that the phrase "the laws of the . . . states" in the Judiciary Act had been erroneously limited to state statutory law, and henceforth would include state decisional law in substantive matters.\textsuperscript{28} It further declared that the course pursued by federal courts during the preceding century in creating a body of federal common law was unsupported by any grant of power from the Constitution.\textsuperscript{29} Three concurring justices objected to the latter holding, expressing doubt that lack of constitutionality could be conclusively shown,\textsuperscript{30} and asserted that the new statutory interpretation alone was a sufficient ground for the decision.\textsuperscript{31} These concurring opinions immediately touched off the debate over the extent to which the \textit{Erie} ruling was constitutionally compelled, which debate continues unresolved to this day.\textsuperscript{32}

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

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\item \textsuperscript{26} See, e.g., Interstate Realty & Investment Co. v. Bibb Co., 293 F. 721 (5th Cir. 1923); Harrison v. Foley, 206 F. 57 (8th Cir. 1913); Gardner v. Michigan Cent. R. Co., 150 U.S. 349 (1893); Mills, \textit{Should Federal Courts Ignore State Laws?}, 34 AM. L. REV. 51 (1900).
\item \textsuperscript{27} 304 U.S. 64 (1938).
\item \textsuperscript{28} Id. at 78.
\item \textsuperscript{29} Id. at 80.
\item \textsuperscript{30} Id. at 92-93.
\item \textsuperscript{31} Id. at 84-92.
\end{itemize}
to state substantive law.\textsuperscript{33} A significant early gloss on the \textit{Erie} ruling required federal courts to apply state conflicts of laws rules,\textsuperscript{34} establishing the rule that was partially responsible for Donald Atkins' difficulties. In \textit{Guaranty Trust Co. v. York}\textsuperscript{35} came an attempt to formulate an alternative rule to the elusive substance-procedure dichotomy.\textsuperscript{36} The resulting "outcome-determinative" test required a federal court hearing a diversity case to apply the forum state's statute of limitations, where failure to do so would "significantly affect the result of a litigation . . . ."\textsuperscript{37} Because the use of the terms "substance" and "procedure" has persisted, the net result of \textit{Guaranty} has simply been for statutes of limitations to be categorized as matters of substantive law for \textit{Erie} purposes. In a similar vein, it was held in \textit{Ragan v. Merchants Transfer & Warehouse Co.},\textsuperscript{38} that for the purpose of tolling a statute of limitations state law is sufficiently "substantive" to prevail over federal law where the Federal Rules and state procedural law differ as to the point at which an action is deemed to commence. In \textit{Byrd v. Blue Ridge Rural Electric Cooperative, Inc.},\textsuperscript{39} the court injected a new variable into the \textit{Erie} equation, namely that of "countervailing federal considerations." \textit{Byrd} held that in procedural matters federal courts could set aside the outcome-determinative test if this was required by the presence of significant factors favoring the effective functioning of the federal judiciary.\textsuperscript{40} In particular, the case upheld the right in federal diversity cases to a jury determination of issues otherwise exclusively triable by a judge under state law. \textit{Hanna v. Plummer},\textsuperscript{41} the most recent principal case in the

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\item \textsuperscript{33} Sibbach v. Wilson, 312 U.S. 1 (1941).
\item \textsuperscript{34} Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
\item \textsuperscript{35} 326 U.S. 99 (1945).
\item \textsuperscript{36} Speaking for the majority in \textit{Guaranty}, Justice Frankfurter wrote:

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

326 U.S. at 108.

Illustrative of Justice Frankfurter's point is the classification of statutes of limitations as "procedural" for the purpose of choosing between forum and foreign law in state conflicts of law situations, and as "substantive" for the purpose of choosing between state and federal law in state-federal conflicts of law situations.
\item \textsuperscript{37} 326 U.S. at 10.
\item \textsuperscript{38} 337 U.S. 530, 531-34 (1949).
\item \textsuperscript{39} 356 U.S. 525 (1958).
\item \textsuperscript{40} \textit{Id.} at 537-38.
\item \textsuperscript{41} 380 U.S. 460 (1965).
\end{itemize}
development of the *Erie* doctrine, also relied on countervailing federal considerations in order to sustain a Federal Rule of Civil Procedure over a contrary state statute, thus effectively overruling *Ragan* to the extent that it may have held to the contrary and assuring the pre-eminence of the Federal Rules of Civil Procedure over conflicting state procedures. In its modern form then, the *Erie* doctrine continues to require observance of state law in substantive matters; may bring certain matters into the penumbra of substance if they are outcome determinative; and may reserve certain outcome-determinative issues for federal determination where there are strong federal considerations.

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

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

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

44. 435 F.2d at 535.


46. 435 F.2d at 536.

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

48. The *Hanna* court, in distinguishing *Ragan,* said that the holding in the latter case “was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but
time that tolling has been treated as independent of the underlying state limitations statute, either before or since *Erie*. Second, to the extent that the court in *Atkins* seeks to justify its separation of the two on grounds of a countervailing federal interest in maintaining the unitary nature of its court system, it represents a departure from *Byrd* and *Hanna* as well. The exceptions to *Guaranty*'s outcome-determinative test which were formulated in *Byrd* and *Hanna* were based strictly on *specific* expressions of countervailing federal interests. While the courts have differed on the weight to be given to the federal interest in maintaining the unitary nature of its court system, the presence or absence of a specific embodiment of that interest in a federal statute or rule would appear, by weight of authority, to be decisive to the determination. *Atkins*, on the other hand, represents an attempt to find countervailing considerations in general federal policies unsupported by or, at best, with only analogical support from specific legislation. It is noteworthy that the arguments cited in support of this holding in *Atkins* are remarkably similar to those advanced over one hundred years ago in *Swift v.*

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

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

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

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

53. See notes 98-99 infra and accompanying text.
Tyson, the cornerstone of pre-Erie federal common law. In order to determine whether or not these departures have indeed done no violence to the Erie doctrine, each must be examined in greater detail.

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

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

54. See notes 95-97 infra and accompanying text.
55. See notes 47-48 supra and accompanying text.
56. 435 F.2d at 538 n.48.
57. See note 37 supra and accompanying text.
58. 435 F.2d at 539.
59. Id. at 531, 535, 537.
Procedure; in *Byrd* the federal policies were expressed in the seventh amendment jury trial guarantee. But in *Atkins* there is no such limiting factor. Theoretically, any issue occurring in diversity litigation which is currently determined by resort to state law could be made the object of rulemaking by federal judges because of alleged adverse effects on the unitary nature of the federal judiciary. Absent the support of a specific statute or constitutional provision, the judicial declaration of the unitary nature of the federal court system as a countervailing federal consideration for purposes of the *Erie* doctrine represents an extension of *Hanna* and *Byrd*.

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

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

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60. 380 U.S. at 473-74.
61. 356 U.S. at 537-40.
62. Perhaps the earliest objects of such a process would be statutes of limitations and conflicts of law rules, since, as this case illustrates, they can occasionally be troublesome in diversity litigation.
63. 435 F.2d at 537.
64. *Id.* at 531, 534.
65. *Id.* at 528.
66. *Id.* at 534.
67. *Id.* at 531-32.
68. *Id.* at 532-33.
jurisdiction of the various types of trial courts.\textsuperscript{69} The state tolling law which allegedly springs from these institutional features suspends the statute of limitations by reason of the pendency of a former suit in only four instances, none of which properly applied to Atkins' action.\textsuperscript{70} In Jones v. Morris Plan Bank of Portsmouth,\textsuperscript{71} the Virginia Supreme Court of Appeals strictly construed the tolling law to allow the statute of limitations to run while plaintiff filed the same cause of action successively in two different state courts.

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

\textsuperscript{69} Id.

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

\textsuperscript{71} 170 Va. 88, 195 S.E. 525 (1938).


\textsuperscript{73} 210 Va. 11, 168 S.E.2d 257 (1969).

\textsuperscript{74} See, e.g., CAL. CIV. PROC. CODE § 355 (West 1954); ILL. REV. STAT. ch. 83, § 24 (1967); MASS. GEN. LAWS ANN. ch. 260, § 32 (1968); MICH. COMP. LAWS ANN. § 600.5856 (1968); N.Y. CIV. PRAC. LAW § 205 (McKinney 1963); OHIO REV. CODE ANN. § 2305.19 (Page 1954); TEX. REV. CIV. STAT. ANN. art. 5539a (1958). But cf. FLA. STAT. ANN. § 95.06 (1960); N.J. REV. STAT. § 2A:14-28 (1952); PA. STAT. ANN. tit. 12, § 33 (1953).
It may indeed be true, as the majority points out, that by its nature
the issue before it in *Atkins* "never has been and never will be
resolved, or even considered, by any court in the Commonwealth of
Virginia," but this is a frequently occurring situation in diversity
litigation, in which the federal judge in effect sits as another state
court; and federal judges have been remarkably versatile in applying
state laws to novel situations. This versatility, however, was lacking in
the *Atkins* decision.

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

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

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75. 435 F.2d at 531.
76. See notes 6-7 *supra* and accompanying text.
77. *See, e.g.*, 435 F.2d at 529, 530, 531, 534-35.
78. *Id.* at 538-59.
79. *Id.* at 538-39.
hypothetical transfer of his case under the federal transfer provisions \(^8\) from the Kentucky federal court to the federal court in Virginia. \(^4\) For reasons not made known to the court, the case was not transferred; however, the court speculated that if it had been validly shifted to the Virginia court, the filing in Kentucky would have tolled the Virginia statute of limitations. \(^8\) In testing the accuracy of the analogy drawn by the court, a perplexing question of Atkins' transferability is presented. If Atkins had first filed in Kentucky after the Kentucky Court of Appeals held that Kentucky's one-year statute of limitations applied in cases arising in foreign jurisdictions with a longer statute of limitations \(^8\) and after Kentucky's one-year statute had run, his suit would probably not have been transferable. \(^8\) A fortiori a filing in a district where the statute had run would not toll the statute in any other district. \(^8\) Since the dismissal of Atkins' suit in Kentucky in

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

§ 1404(a). For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

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

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

82. Id.

83. See text accompanying note 7 supra.

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

85. Filing tolls all applicable statutes of limitations, Goldlawr v. Heiman, 369 U.S. 463, 467
effect was a declaration that the applicable statute of limitations had run before he had filed, it cannot be said with certainty that the filing in Kentucky would have tolled the Virginia statute, or even that the Kentucky court could have transferred the suit at all. This may explain why transfer was not sought. Another possible explanation is that the Virginia federal court was not a court where the suit could have originally been brought until enactment of the long-arm statute in 1964. If Virginia was not a potential transferee forum, its statute of limitations would not have been tolled by the action in Kentucky and would have run before the long-arm statute made the Virginia federal court a possible transferee forum. A third explanation for the failure of plaintiff to formally transfer is the possible belief that the law of the transferor forum carried over to the transferee forum. Under this rule, a transferring court in Kentucky would have "transferred," and the transferee court would have applied Kentucky's one-year statute of limitations, which in Atkins' case had already run. Transfer law is at best, however, a somewhat uncertain area of the law, permeated by conflicts between different jurisdictions. Analogy to transfer provisions offers little support to the tolling rule where it is not clear that the instant case was even transferrable.

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

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86. See Atkins v. Schmutz Mfg. Co., 372 F.2d 762, 763 (1967); note 9 supra and accompanying text.
87. See note 84.
88. Id.
89. This area of the law is still unsettled. The proposition cited in the text was the holding of the leading case of Van Dusen v. Barrack, 376 U.S. 612 (1964), but that rationale applied only to transfers under 28 U.S.C. § 1404 (1964). But cf. Geshan v. Monahan, 382 F.2d 111 (7th Cir. 1967). The recent case of Carson v. U-Haul Co., 434 F.2d 916 (6th Cir. 1970), restricted the Van Dusen holding to transfers by defendants. Carson was decided three days before Atkins. See generally Currie, Change of Venue and the Conflict of Laws, 22 U. Chi. L. Rev. 405 (1955); Currie, The Erie Doctrine and Transfer of Civil Actions, 17 F.R.D. 353 (1955). The conclusions reached by Professor Currie in these articles were withdrawn five years later in Currie, Change of Venue and Conflict of Laws: A Retraction, 27 U. Chi. L. Rev. 341 (1960).
90. See generally 1 J. Moore, supra note 84, at ¶ 0.145 et seq.
him, thereby gaining the tolling benefit of formal transfer and
avoiding possible fatal dismissal by the judge in the first forum, of
what value are the transfer provision to plaintiffs? Obviously, some
forum shopping is possible under current transfer laws,91 but forum-
shopping plaintiffs have normally been subject to some discretionary
restraint from the magistrate, who may dismiss rather than transfer,
when justice requires.92 Under the rule announced in Atkins, no such
restraint on blatant forum shopping is provided, and change of venue
is conceivably available to a plaintiff who would be denied a formal
transfer. Thus the new tolling rule goes considerably beyond the
statutes it allegedly imitates, and indeed seems to undercut, rather
than promote, that statutory expression of federal policy.

In summary, while the majority opinion adequately establishes the
fact that the federal judiciary is a remarkably unified system, and that
preserving this unity is highly desirable, it fails to show how the
presence or absence of a federal tolling rule affects that unity. The
federal court system exhibits a unitary nature because it was framed
by a series of federal enactments based on constitutional mandate.
Unity is maintained by a set of procedural rules applicable to all
federal courts. There is no suggestion in the court's opinion that any
of these elements was threatened by the application of the Virginia
tolling rule. As a practical matter, the ostensible injustice threatening
Donald Atkins was in no way attributable to any flaw in the rules of
decision regarding Virginia's statute of limitations, nor did the real
solution to his problem lie in any modification of the federal judicial
system. His difficulties stemmed first from counsel’s willingness to
play the statute of limitations game down to the wire,93 and then from
some untenable rule of jurisprudence which induced the federal courts
sitting in Kentucky to judicially turn their heads when that state's
borrowing statute was amended in 1942, because the highest state
court did not have occasion to officially declare it the law until 1965.94
Here then, the unity of the federal judicial system is invoked to correct
with a tolling rule the results of unrelated institutional flaws.

91. Forum shopping problems under 28 U.S.C. § 1406(a) are not at stake according to
Courts—The "Erie Doctrine" and Tolling of the State Statute of Limitations, 47 N.C.L. Rev.
93. Atkins' original action was filed only two days before Virginia's statute of limitations
would have run and almost a full year after Kentucky's had expired.
94. See notes 6-7 supra and accompanying text.
Indeed, it may be only slightly hyperbolic to contend that this particular rationale has extended *Erie* so far that it begins to look again like *Swift v. Tyson.* Following the *Swift* decision, federal courts sitting in diversity cases were permitted to ignore state court decisions on common-law matters and supplant them with a presumably more adequate rule of federal law. It was hoped thereby to standardize key areas of the law and eliminate the uncertainty and occasional unfairness which resulted from reliance on state law in diversity cases. While it is probably inaccurate to dub *Atkins* a return to *Swift,* each opinion contains language which ascribes its holding—allowing federal rulings to supersede state decisions—to a desire to standardize the law and relieve diversity litigants of disabilities created by different states' laws. The new tolling rule is not substantially different from the myriad rules of federal common law which sprang up after *Swift,* either in form or rationale. Thus, *Atkins* not only extends the letter of *Erie* through a broader concept of countervailing federal considerations, but appears also to turn the spirit of *Erie* back in the direction of *Swift.*

**Atkins as an Exercise in Judicial Rulemaking**

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

95. 41 U.S. (16 Pet.) 1 (1842).
98. Justice Story declared for the majority in *Swift:* "Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed." 41 U.S. (16 Pet.) at 18-19. Compare Judge Haynsworth speaking for the majority in *Atkins:* "[S]ince the question here arises out of a different system and reasonable answers are dependent upon the nature and structure of that system and its effective functioning, we conclude that we must seek the answer as a matter of federal, not state, law." 435 F.2d at 538.
England and in this country. Some rules were merely decisional, others were formally declared by courts, and an occasional act of parliament attempted to ameliorate harsh technicalities of common-law pleading. Full scale legislative intervention in court rulemaking occurred in England with the English Civil Procedure Act of 1833 and the Hilary Rules of 1834. A similar trend began in the United States with the 1848 Field Code of New York. Disenchantment with the rigidity of legislative rules led to renewed interest in returning some rulemaking power to the courts. The issue in the United States was and remains, however, whether the legislature or the judiciary is exclusively empowered to regulate judicial procedure, or whether the power is shared or can be delegated by either or both.

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

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

102. See E. Jenks, supra note 101, at 191.

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

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

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

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

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


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


111. "[T]he Supreme Court of the United States shall have the power to prescribe... practice and procedure in civil actions at law." Id. As required by the Enabling Act, the rules were submitted for Congressional approval and became effective September 16, 1938.
have "inferentially . . . recognized that a rule that is not within the scope of the power delegated by Congress would be invalid."\textsuperscript{112} The existing situation in federal courts may thus be described as "judicial rulemaking pursuant to legislative delegation and subject to a congressional veto."\textsuperscript{113} A notable feature in the arrangement thus far is the restraint that Congress has shown with respect to its veto power.\textsuperscript{114}

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

\textsuperscript{112} Wright & Miller § 1001 at 29. See also Mississippi Publishing Corp. v. Murphree, 326 U.S. 438 (1945).

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

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

\textsuperscript{113} Wright & Miller § 1001 at 30.

\textsuperscript{114} Id. at 31.


\textsuperscript{116} See, e.g., Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv. L. Rev. 1303, 1315 (1936).

\textsuperscript{117} See, e.g., The Federal Common Law, supra note 100.
neither the time nor the resources to produce all the substantive rules
that are needed in the federal system,\textsuperscript{118} it must rely on lower courts to
formulate an appropriate rule when the need arises, which rule is then
subject to rejection or approval on review. Similarly, a lower federal
court might be required to decide which matters are properly within
its procedural rulemaking competence and which are better left to the
formal rulemaking machinery established for the Federal Rules of
Civil Procedure,\textsuperscript{119} guided in that determination by the policy of
restraint expressed in the Supreme Court’s own deference to Congress
in matters of federal procedure.\textsuperscript{120}

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

\textsuperscript{118} \textit{Id.} at 1513, 1530-31.

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

\textsuperscript{120} \textit{See} note 112 \textit{supra} and accompanying text.

\textsuperscript{121} \textit{See} note 119 \textit{supra}.

\textsuperscript{122} \textit{See} text accompanying notes 91-92 \textit{supra}.
only for a limited time, and if only for a limited time, for how long? To answer the foregoing questions and to correct possible abuses of the rule, further rulemaking will be necessary, with further opportunity for confusion and fragmentation in federal practice—perhaps leading to Congressional intervention—as the inevitable consequence.

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

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

CONCLUSION

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

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


125. See text accompanying notes 78-79 supra.
thing apart from state statutes of limitations for the first time in American judicial history. The decision has also taken as well as given. From the transfer provisions it has taken an undetermined amount of control over venue-changing in the federal court system. From the entire federal judiciary itself it has taken a degree of uniformity by declaring for one circuit a rule that actually requires nationwide application. It has brought to an area of settled law, i.e., statutes of limitations in diversity cases, an issue which invites continuing judicial innovation. In view of the numerous possible undesirable consequences of *Atkins*, the high improbability that its tortured fact situation will be repeated, and the general availability of state law capable of settling issues presented here, the decision should not be given wide application, nor should undue significance attach to the Supreme Court's refusal to challenge the new rule.