NOTES AND COMMENTS

CHOICE OF PROCEDURE IN DIVERSITY CASES

Since its decision in *Guaranty Trust Co. v. York*,[1] the Supreme Court has attempted unsuccessfully to formulate rational and consistent principles governing the choice between state and federal procedural rules in diversity cases. *Erie R.R. v. Tompkins*,[2] although it hinted that conflicts between procedural as well as substantive rules would present problems of choice of law, was generally interpreted to require federal courts to apply state law on "substantive" matters, leaving them free to follow federal rules and practices which regulated "procedure."[3] The aims of *Erie* were first to assure potential defendants that they would not be subject to different (and possibly conflicting) obligations depending on whether a potential plaintiff brought suit in state court or (availing himself of diversity jurisdiction) in federal court; and second, to give proper recognition to state authority and support to state policy.[4] Since lack of uniformity between federal and state procedural rules would seem neither to confuse the primary obligations of the state's citizens nor to thwart the "public policy of

1. 326 U.S. 99 (1945).

2. 304 U.S. 64 (1938). See generally Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Keeffe *et al.*, *Weary Erie*, 34 CORNELL L.Q. 494 (1949); Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248 (1963); Bonor, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEXAS L. REV. 509, 619 (1962); Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031 (1962); WRIGHT, FEDERAL COURTS 187-218 (1963).

3. Francis v. Humphrey, 25 F. Supp. 1 (E.D. Ill. 1938); Cohen v. Travelers Ins. Co., 134 F.2d 378, 384 (7th Cir. 1943); Schram v. Holmes, 4 F.R.D. 119 (E.D. Mich. 1943); Tunks, *Categorization and Federalism: 'Substance' and 'Procedure' after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939); Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031, 1032 (1962); See Guaranty Trust Co. v. York, 326 U.S. 99 (1945). See also Hanna v. Plumer, 380 U.S. 460, 465 (1965): "The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law."

4. The Court, in overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), implicitly adopted the position of Holmes' well-known dissent in Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co., 276 U.S. 518, 536 (1928) that "a settled line of state decisions . . . [should be] conclusive to establish . . . the public policy of the State. . . . [T]he State Courts should be taken to declare what the State wills." Justice Brandeis concurred in Holmes' dissent and later wrote the opinion in *Erie*. See also Comment, 75 YALE L.J. 90, 105 (1965).

the State," *Erie* seemed to permit federal courts to use federal procedures in diversity litigation. But *York* shattered this widespread assumption about *Erie*. *York* rejected the simple distinction between substance and procedure and required federal courts to apply state rules whenever they "significantly affect the result of a litigation."[5] "The nub of the policy that underlies *Erie R.R. v. Tompkins*," said the Court, "is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."[6] The Court in *York* did not consider whether the application of laws furthers or hinders governmental policy. Instead, the Court focused entirely on the "uniformity" aspect of the *Erie* doctrine.

Since almost any procedural rule may "significantly affect the outcome of a case," a literal application of the *York* test would always require the application of state procedures in diversity cases and thereby obliterate almost all distinction between state and federal courts. The principle of strict conformity to state procedure was nonetheless reinforced by the Supreme Court in three subsequent cases decided in 1949. In *Woods v. Interstate Realty Co.*,[7] plaintiff, a foreign corporation doing business locally which had not designated an agent for service of process, was barred from federal court because a state statute provided that such corporations may not sue in state courts. A pre-*Erie* federal common-law rule would have permitted the action.[8] In the second case, *Cohen v. Beneficial Industrial Loan Corp.*,[9] plaintiff's suit was dismissed because he did not comply with a state requirement[10] that plaintiffs in stockholders' derivative actions deposit with the court sufficient funds to cover expenses and attorneys' fees. A Federal Rule authorized stockholders' actions in federal court, but did not require such a bond to be posted.[11] In *Ragan v. Merchants Transfer & Warehouse Co.*,[12] the Court applied the state's method of determining when the statute of limitation was tolled, despite a seeming conflict with Federal Rule 3.[13]

5. 326 U.S. at 109.
6. *Ibid.*
7. 337 U.S. 535 (1949).
8. David Lupton's Sons Co. v. Automobile Club of America, 225 U.S. 489, 500 (1912).
9. 337 U.S. 541 (1949).
10. N.J. STATS. ANN. § 14:3-15 (1939).
11. FED. R. CIV. P. 23(b).
12. 337 U.S. 530 (1949).
13. *Ragan* was widely interpreted to have applied a state statute in the face of an applicable Federal Rule of Civil Procedure, and was thought to extend to other federal procedures. One commentator wrote that

[p]racticing attorneys are unable to determine which of the Federal Rules will remain

The Court rejected uniformity as its only concern in *Byrd v. Blue Ridge Rural Electric Co-op.*,[14] and rediscovered the "policy" concerns of the *Erie* doctrine. The issue before the Court was whether plaintiff in a personal injury action brought in a South Carolina federal court was entitled to trial by jury on a certain question of jurisdictional fact. The highest court of the forum state had ruled previously that the submission to the jury of such a fact was reversible error. Skimming the state court precedents, the Supreme Court found that no reason had ever been given for this ruling; no deliberate policy appeared to support the courts' resolution of the factual issue on their own.[15] In this personal injury case, the Court conceded, the outcome

> would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were "outcome" the

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in full effect, and which might be rejected by the courts on the theory that they conflict in a substantial way with some state law. Every important step in a federal diversity case is taken today at a calculated risk.

Merrigan, *Erie to York to Ragan—a Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 712 (1950). Another despaired that *Ragan* "threatens to invalidate all the Federal Rules of Civil Procedure." Quigley, *supra* note 3, at 1046. Four authors complained that the three 1949 cases together "spell the death of diversity litigation . . . . The only hope for the future lies in the dissent of Justice Rutledge. Let us believe that he is right and that his view will one day triumph." Keeffe *et al.*, *supra* note 2, at 531. See also Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 430-33 (1958); Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 194-95 (1957); Note, 56 NW. U.L. REV. 560, 563 (1961). *But see* 2 MOORE, FEDERAL PRACTICE ¶ 3.07, at 740 (1960) for the suggestion that the Advisory Committee which drafted Rule 3 never intended that it should toll state statutes of limitations. This interpretation of the Rule, and the corresponding interpretation of *Ragan* as a case in which the federal and state rules did not conflict, was approved by the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 470 n.12 (1965), over the objection of Mr. Justice Harlan, *id.* at 476-77.

The anguish expressed in the law reviews was probably unwarranted. The doctrine was undoubtedly applied from time to time to the detriment of various Federal Rules. Levitan v. Stout, 97 F. Supp. 105, 112-13 (W.D. Ky. 1951) (Rule 23b); Doyle v. Moylan, CA-54-507-A (D. Mass. 1955), cited in Doyle v. Moylan, 141 F. Supp. 95, 96 (D. Mass. 1956) (Rule 4(d)(1)); Palmer v. Fisher, 228 F.2d 603, 607-08 (7th Cir. 1955) (Rule 43a). And it may have deterred reliance on the Rules in an unknown number of cases. But at least some lower courts ignored *Ragan* or limited its holding to Rule 3. Guthrie v. Great American Ins. Co., 151 F.2d 738, 740 (4th Cir. 1945); Cook v. Davis, 178 F.2d 595, 602 (5th Cir. 1949), *cert. denied*, 340 U.S. 811 (1950); Moran v. Pittsburgh-DesMoines Steel Co., 183 F.2d 467, 471 (3d Cir. 1950). See also Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 261-62 (1963) for the suggestion that the rule of *York* was disregarded primarily in the areas of docket control, discovery (the lower courts relying on the decision in Sibbach v. Wilson Co., 312 U.S. 1 (1941)), the court's power to comment upon the evidence, and, to a lesser extent, rules of evidence.

14. 356 U.S. 525 (1958).

15. Adams v. Davison-Paxon Co., 230 S.C. 532, 543, 96 S.E.2d 566, 571 (1957).

> only consideration, 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 federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.[16]

Therefore, the Court held, the jury should decide the factual question. In other words, at least when the state rule represents no policy, a federal policy in favor of jury trials is a sufficient ground for the application of the federal procedure—even though this application is not constitutionally required,[17] and even though uniformity of outcome does not result.

The Court in *Hanna v. Plumer*[18] rejected this sensitive concern for the implementation of state and federal policies in favor of a new mechanical rule—this time, one which will select the *federal* procedural rule in nearly all diversity cases. Plaintiff, in accordance with Federal Rule 4,[19] left copies of his summons with the wife of defendant executor at his residence. The state statute prescribed that service of executors shall be in hand.[20] Relying on *York*, defendant contended that since the federal court's determination of applicable procedure was outcome-determinative, the state rule should be selected. The Supreme Court held that the federal rule controlled, reasoning that Federal Rules which have been promulgated according to the requirements of the Rules Enabling Act and which are "within the uncertain area between substance and procedure [in terms of the *Erie* doctrine] . . . rationally capable of classification as either" should always be applied in diversity cases.[21] Implicit in the Court's holding was a total disregard

16. 356 U.S. at 537. (Emphasis added.) *But see* Walker v. United States Gypsum Co., 270 F.2d 857 (4th Cir. 1959) for the suggestion that even in a federal court, jurisdictional issues of fact are never given to the jury. The *Walker* court questioned whether in *Byrd* there was in fact a conflict between federal and state practices.

17. In a footnote to the *Byrd* opinion, the Court said, "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action." 356 U.S. at 537 n.10.

18. 380 U.S. 460 (1965).

19. FED. R. CIV. P. 4(d)(1).

20. MASS. GEN. LAWS. ANN. ch. 197, § 9 (1955).

21. 380 U.S. at 472.

for those state policies with which the Federal Rules might interfere, as well as a lack of concern about federal-state uniformity.

A rational system for choosing between competing procedures in diversity cases must be founded on an appreciation both of the reasons for which uniformity is desirable and of the nature of the policies represented by rules of procedure. Uniformity is most needed when in its absence parties would be uncertain about their rights and duties,—that is, about how to conduct their ordinary affairs. When a person can only guess whether he might be sued in a federal or a state court, he may be unjustly subjected to two conflicting obligations. In most federal-state procedural conflicts, however, a lack of uniformity will at most affect the litigants' choice of forum. If the federal courts use procedures different from those of the local state, an out-of-state party may gain some advantage by choosing the federal forum. But the critical question is whether or not this advantage is unfair.

It is true, though not readily apparent, that there is no unfairness in allowing procedural advantages to those plaintiffs fortunate enough not to live in the same state as those whom they are suing. The case for unfairness would seem strongest when a citizen of State A and a citizen of State B sue another citizen of State B in separate actions arising out of the same tort. Both states might have the same restrictive rules of discovery which would prevent the plaintiffs from discovering the evidence needed to win. The more lenient Federal Rules, on the other hand, would enable a plaintiff to discover this evidence. Because the citizen of State A can bring suit in federal court, he wins, while his counterpart across the state line loses.

This distinction, far from being arbitrary, is a reasoned distinction sanctioned by the constitutional grant of diversity jurisdiction. The framers apparently felt it necessary to create an independent judicial system in order to insure that the laws of each state were fairly applied to residents of the other states. When a federal court acts in a diversity case it acts as part of this independent system, and it has the responsibility to administer fairly the laws of some state. This responsibility may be met in various ways, for example, tenured judges, impartial juries, etc. But certainly one way, indeed an essential way, to administer law fairly is to provide proper rules of procedure. Thus, when an out-of-state plaintiff shops for the procedures of a federal court he shops not for unfair advantages but for neutral procedures under which he may seek a fair disposition of his claim. If the federal courts deny him this choice and defer to state court procedure they abdicate their

constitutionally and congressionally imposed duty to choose for themselves rules which will treat fairly the litigants before them.

The very existence of diversity jurisdiction creates a strong presumption that the federal rules of procedure should always apply. However, another goal of diversity jurisdiction, the effectuation of local policy, a goal made clear in *Erie R.R. v. Tompkins*, might cause a state rule of procedure to displace the federal rule when the application of the federal rule instead of the state rule would frustrate state policy. A state may, of course, claim that all of its procedural rules represent policies, and that whenever a federal rule displaces one of these, state policy is frustrated. Although all procedural rules may represent policies it is necessary to distinguish the kinds of policies involved in order to determine whether the state rule should or should not apply.

It is helpful to distinguish between two kinds of policies. We may define a primary policy as an imputed desire of a sovereign to influence the future behavior of those within its legal jurisdiction in order to bring about a desired condition. A rule or law enacted to further a primary policy is one which, if controlling, promotes the sovereign's progress toward the state of affairs which the policy seeks to bring about. Such a rule, if not held to control in a situation it ostensibly governs, frustrates the sovereign's progress. For example, rules which establish the negotiability of commercial paper tend to encourage commercial transactions and therefore create a desired condition of free commercial intercourse. If one of these rules is displaced by a rule which removes negotiability from some paper, the future conduct of businessmen will be affected in a way which thwarts the sovereign's progress toward the desired condition. Rules which create criminal liability for murder (and deter killing to bring about a peaceful society), and rules which protect free speech (and encourage expression to create a better informed, more peaceful community), are also rules which represent primary policies. Rules of procedure may represent primary policies, though much less often than substantive rules. For example, the exclusion from evidence of a clergyman's testimony concerning confidential communications from his parishioner serves the policy of encouraging such communication. Failure to apply the exclusionary rule would deter intercourse which the sovereign wishes to encourage.

We may define a secondary policy as an imputed concern for the just disposition of cases. Rules which represent a sovereign's determination of what constitutes fairness in a lawsuit may take many forms. For example, most of what we call rules of procedure represent choices

about the best way for a court to reach a fair result. But other rules, normally thought of as substantive and which have nothing to do with how a lawsuit should be run, may represent a sovereign's determination of fairness between the litigants—for example, rules pertaining to the doctrine of mutual mistake.

Secondary policies differ from primary policies in two ways: First, rules which represent secondary policies do not attempt to influence future behavior in the ordinary or business affairs of the community. We do not mean to suggest that rules which represent secondary policies never affect behavior, only that in adopting these rules the sovereign has made a choice about fairness between the parties in a lawsuit, not a choice about what the society should look like in the future. Citizens in the community *may* let the doctrine of mutual mistake affect their commercial transactions (how likely is this supposition?), but the rules of mutual mistake were not designed to encourage one kind of action and discourage others in order to bring about any particular desired condition in the society. The second difference follows from the first. When one sovereign's rule representing a secondary policy is not applied by a court of a second sovereign the first sovereign is not thwarted significantly. Since the first sovereign was not attempting to affect the future behavior of its citizens in order to create any particular condition, the second sovereign was not interfering with the first's progress in any meaningful sense. Of course the first sovereign might claim that its rules should protect (or restrain) its citizens no matter in what court they are. But this claim would be unjustified because the rules in question were not designed for that purpose. It is of no concern to the first sovereign if the second sovereign has a different view of the requisites of fairness and administers a different kind of justice in its courts.

Since the application of the federal rule can never frustrate a state's secondary policy, the federal rule should always be applied whenever the state rule represents a secondary policy alone.[22] Only a state's

22. It is possible that in a given case of conflicting rules, the state rule might represent no policy, and in such a case it has no claim to applicability. This was true in *Byrd*, where no reasonable purpose could either be imagined or discovered in the state precedents to support the regulation. A more complex instance is presented by the case of Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959), *cert. denied sub nom.* Carlin v. Iovino, 362 U.S. 949 (1960). Defendant died during a suit for personal injury. His out-of-state administratrix *ad litem* resisted suit on the grounds that the federal court, under the rule of *York*, was bound by New York rules of revivor; New York law did not provide for substitution of out-of-state administrators. The only reasonable policy that might be assigned to the state decisional rule is the protection of estates from suit. But the fact that New York permitted revivor against domestic administrators argues against the likelihood that New

primary policies should be given any weight when federal and state rules of procedure conflict. This conclusion implements both policies of *Erie R.R. v. Tompkins*—effectuation of state policy and uniformity. When a federal court applies a rule representing a state's primary policy it is likely that the court furthers that policy and also discourages the kind of disuniformity which makes primary rights and duties uncertain. But, of course, the federal court should not apply the state rule, even if the rule represents a primary policy, when in a particular case the application would not further that policy or significantly reduce the uncertainty of conflicting primary rights or duties.

Thus, in *Monarch Ins. Co. v. Spach*,[23] the president of the insured corporation objected to the introduction into evidence of a statement made by him prior to suit in a federal district court. His statement had been made during a pre-trial investigation conducted pursuant to the terms of an insurance policy. A Florida statute[24] would have excluded this statement since the insurance company did not furnish the president with a copy as he had demanded. But since pre-1938 federal equity practice would admit the statement, it was held admissible as evidence under Federal Rule 43(a). The policy underlying the Florida statute is more than fairness at trial; the policy is primary to the extent that the rule sought free exchange of information between policyholders and insurance companies by assuring the policyholder that his statements could not be used against him at trial without his first seeing a copy of the statement. But Florida had no legitimate interest in the application of its rule in this particular case. In a federal court, unlike a Florida state court, the company president could have used discovery procedures to obtain a copy of his statement. Since the Florida rule was not needed to secure a copy of the statement before trial, the policy supporting that rule was not relevant.

If the state does have a legitimate interest, the federal court will have to resolve the state and federal interests.[25] When application of the state

York had adopted this policy. More important, this decisional rule did not represent any deliberate state policy; the New York legislature had twice tried to permit substitution but the New York courts declared the legislation to require an unconstitutional assertion of jurisdiction. McMaster v. Gould, 240 N.Y. 379, 148 N.E. 556 (1925). By the time of the *Iovino* decision, the Supreme Court had expanded the constitutional doctrine of state jurisdiction over out-of-state defendants. International Shoe Co. v. Washington, 326 U.S. 310 (1945). In the light of this history, New York could not be said to have any deliberate policy behind its rule of law.

23. 281 F.2d 401 (5th Cir. 1960).

24. FLA. STAT. ANN. § 92.33 (1959).

25. The resolution of conflicts of sovereign interests has been widely commented upon, usually in connection with conflicting state substantive rules. See generally Cook, *The*

rule would substantially undercut the federal system's notion of fairness, but application of the federal rule interferes only minimally with the state's primary policy, the federal rule should apply.[26] For instance, in the *Hanna*[27] case the state's primary policy was to facilitate the speedy distribution of estates by permitting an executor to disburse the funds if no party had served him personally by the time the statute of limitations had run. The policies behind the more liberal federal rules of service are to make it convenient to institute legal proceedings and to avoid the defeat of justice by defendants who evade process. Application of the state rule would defeat the federal policy in all cases in which the defendant evaded the process-server. By contrast, the federal rule would impair state policy only by requiring executors to inquire at home whether process has been served. In his concurring opinion in *Hanna,* Mr. Justice Harlan suggests a test for choice of procedure which at first glance seems similar to this analysis. He asks "how seriously [the federal procedure] frustrated the State's substantive regulation of the primary conduct and affairs of its citizens."[28] But Mr. Justice Harlan's opinion is deficient in two respects. He does not make explicit his definitions of "substantive" or "primary conduct and affairs." More important, he is concerned only with relative impairment of state policy, whereas the application of state rules in a federal court may influence federal policies in differing degrees. Logically, the court should consider the potential impairment of both federal and state policies in choosing the procedure to apply.

For some pairs of conflicting rules, each rule will equally impair the policy of the other in all cases, and it may be impossible to use the above test. The federal court may then attempt to balance interests to determine which policy to implement at the expense of the other. If, for example, a federal rule of discovery conflicts with a state rule regarding as privileged the communications between doctor and patient, there would seem to be no easy resolution of the federal policy of fairness and the state's primary policy of encouraging unrestricted communication. Disregard for the state policy in this example would render

Logical and Legal Bases of the Conflict of Laws, 33 YALE L.J. 457 (1924); Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933); Cavers, *The Two "Local Law" Theories,* 63 HARV. L. REV. 822 (1950); Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963); Traynor, *Conflicts of Laws: Professor Currie's Restrained and Enlightened Forum,* 49 CALIF. L. REV. 845 (1961); Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie,* 27 U. CHI. L. REV. 463 (1960). CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

26. *Cf.* Baxter, *supra* n.25.

27. Hanna v. Plumer, 380 U.S. 460 (1965).

28. *Id.* at 476.

uncertain and illusory the right of patients freely to communicate with their doctors. In this case the federal court must respect *Erie*'s concern for effectuating local policy and preventing uncertainties caused by forum-shopping by applying the state rule. This application will undercut the federal policy of fair procedure, but only by creating narrow exceptions to broad discovery rules.[29]

The method which we advocate for choosing between federal and state procedural rules will most often result in the application of the federal rule (since most state rules will represent secondary policies or relatively unimportant primary policies). In this regard our conclusion does not differ very much from the mechanical rule announced in *Hanna v. Plumer*. However, the courts should provide reasons for the application of one or the other rule which satisfy the policies of diversity jurisdiction and of *Erie R.R. v. Tompkins*. Mr. Justice Harlan's concurring opinion in *Hanna* comes closest to a satisfactory solution. In the future, the Court should adopt his opinion and should elaborate the distinctions between primary and secondary state policies, the conditions under which a state's policy supports an interest in litigation in a federal court, and the principles for the resolution of conflicts between state and federal interests.

29. Similarly, in Woods v. Interstate Realty Co., 337 U.S. 535 (1949), the federal rule should have been applied because it would have interfered less with the state policy than the state procedure interfered with the federal policy. Application of the state rule required all foreign plaintiff corporations to designate an agent for purposes of service of process. Even had the federal rule governed, many out of state corporations would have designated such an agent, if only to be able to sue local defendants in cases where the amount in controversy fell below the federal jurisdictional limit.