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FORUM SHOPPING FOR STATE CLAIMS: STATUTES OF LIMITATIONS AND CONFLICT OF LAWS

by
SAM WALKER*

The scenario is more familiar than one might expect: a prospective plaintiff is finally ready, a few days short of six years after his cause of action accrued, to file a complaint. Either because he did not finally decide to sue until now or his lawyer sat on the case too long or he has filed complaints in various jurisdictions only after their statutes of limitations have run or because of some other reason known only to him and his lawyer, his only remaining hope is to find a state where the statute has not run and which can take jurisdiction over the prospective defendants.

If these defendants are major corporations doing business in all states, he is very likely in luck. Notwithstanding the fact that his claim would be barred in every other jurisdiction, particularly those with the most substantial relation to the claim, he may yet bring the action in Mississippi. He may bring it there even though neither he nor the claim has any connection with the state. Moreover, if Mississippi is not a convenient forum, he may be able to obtain its benefit *and* that of a more convenient forum, by filing in federal court in that state, then moving to transfer the case to a more appropriate venue.

This is the epitome of forum shopping. Yet plaintiffs have done it successfully a number of times in recent years, taking advantage of what might be termed “statute of limitations havens” to prosecute actions that are barred everywhere else. Besides Mississippi, the most prominent of these “havens” is New Hampshire, as the well known *Keeton v. Hustler Magazine*¹ case demonstrated. What characterizes both of these states is not merely their long statutes of limitations² but also their willingness, expressed through judicial pronouncements, to apply these statutes to causes of action otherwise totally unrelated to them.

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The author dedicates this article to Professor Rudolf B. Schlesinger.

¹ 465 U.S. 770 (1984).

² MISS. CODE ANN. § 15-1-49 (1972); N.H. REV. STAT. ANN. § 508:4 (1983).

This attitude, and its concomitant impact on interstate, international and federal legal systems, illustrates the larger dilemma presented by the need to fit statutes of limitations into a rational conflict of laws system. The traditional common law view is that statutes of limitations are procedural, and that therefore the forum may apply its own no matter whose substantive law it uses. This view has given way to a much more fluid approach. The continuing divergence in rules among jurisdictions makes systematic consistency at best problematic and at worst impossible. One of the historical purposes for statutes of limitations — to relieve potential defendants from uncertainty — is thus not served at all.

This article, however, has a modest goal. It will not argue for rationality or for a new interests analysis, as some scholars have done,³ or for consistency or for the adoption of one or the other of the proposed solutions.⁴ It will review the interstate and international aspects of statutes of limitations and examine the unique role of statute “havens,” focusing not on criticism, but prediction. The most recent decisions by the United States⁵, New Hampshire⁶ and Mississippi⁷ Supreme Courts indicate that discussion of what *will*, or what could, happen may be more valuable than discussion of what *should* happen in the area of statutes of limitations and the conflict of laws. The conclusion this paper will reach can be stated simply: Forum shopping for statutes of limitations will continue as long as each state has the constitutional power to apply its own statute of limitations as it wishes.

AN ACCIDENT OF HISTORY: THE TRADITIONAL COMMON LAW RULE

Examination of statute of limitations problems in the conflict of laws must start from the general Anglo-American or common law rule that a forum will apply its own statute, even to causes of action accruing in another state or country. This rule and its continuing vitality, despite the creation of important exceptions and the impact of criticism, has been explained as “an accident of history.”⁸ Its historical context must therefore be looked at first.

³ See, e.g., Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405 (1980) [hereinafter Martin, *Rationality*]; Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitations*, 27 HASTINGS L.J. 1 (1979) [hereinafter Milhollin, *Interest Analysis*]; and Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1 (1980) [hereinafter Grossman, *Modern Analysis*].

⁴ See notes 158-172 and accompanying text.

⁵ Sun Oil v. Wortman, 108 S.Ct. 2117 (1988). See notes 46-65 and accompanying text for discussion.

⁶ Keeton v. Hustler Magazine, Inc., 131 N.H. 6, 549 A.2d 1187 (1988). See notes 95-105 and accompanying text for discussion.

⁷ Shewbrooks v. A.C. and S., Inc., 529 So.2d 557 (Miss. 1988); Williams v. Taylor Mach., Inc., 529 So.2d 606 (Miss. 1988). See notes 66-88 and accompanying text for discussion.

⁸ Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2d Cir. 1955). For recent opinions applying the traditional rule, see, e.g., Monroe v. Wood, 150 Ariz. 411, 724 P.2d 30 (1986); Trzecki v. Gruenewald,

History

Commentators have described the historical development of this rule on many occasions;⁹ a brief summary will suffice here. The rule has its source in the mid-18th century. At that time, first confronted with conflicts of law, English courts looked to the internal English statutes of limitations law that had been developing for centuries, and acted to protect this internal law from the influence of foreign law.¹⁰ The view generally held in most of the continental civil law countries at that time was that the state or country whose substantive law governed the case should supply the statutes of limitations applicable to the case as well.¹¹ The English courts found support, however, in the writings of Dutch jurists who had advocated application of the *lex fori*.¹²

In its 1839 *M'Elmoyle v. Cohen* decision,¹³ the United States Supreme Court held that a statute of limitations can be treated as procedural and that therefore the forum may apply its own statute even when the substantive law governing the case is that of another jurisdiction. This holding has been reaffirmed several times since.¹⁴ The *M'Elmoyle* opinion reflected a view that had been earlier enunciated by Justice Story in an opinion which used citations to international authority as support.¹⁵ This view continued to garner what one court has termed the approval of an "overwhelming body" of the common law.¹⁶ It was followed in England until the adoption there of the Foreign Limitation Periods Act in 1984.¹⁷

532 SW.2d 209 (Mo. 1976); *Boudreau v. Baughman*, 86 N.C. App. 165, 356 S.E.2d 907 (1987); *Alexander and Assoc. v. Wilde*, slip op. (Ohio Ct. App. Aug. 21, 1987); *Lee v. Estate of Herbert*, 476 N.E.2d 922 (Ind. Ct. App. 1985); and *Pledger v. Burnup & Sims, Inc.*, 432 So.2d 1323 (Fla. Dist. Ct. App. 1983).

⁹ See, e.g., Ailes, *Limitations of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474 (1933) [hereinafter Ailes, *Actions*]; Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492 (1919) [hereinafter Lorenzen, *Limitations*]; Grossman, *Modern Analysis*, *supra* note 3.

¹⁰ Lorenzen, *Limitations*, *supra* note 9, at 496.

¹¹ 3 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 511-16 (1964) [hereinafter RABEL, *CONFLICT OF LAWS*]; Ailes, *Actions*, *supra* note 9, at 478. While there have been several competing theories as to which country's statute of limitations applies, including that of the debtor's domicile and that of the place of contracting, RABEL, *CONFLICT OF LAWS*, *supra*, at 511-15, now "[b]y overwhelming consent in most civil law countries, the law governing the contract as such controls limitation of action." *Id.* at 515.

¹² Lorenzen, *Limitations*, *supra* note 9, at 496.

¹³ 38 U.S. (13 Pet.) 312 (1839).

¹⁴ See, e.g., *Sun Oil v. Wortman*, 108 S.Ct. 2117 (1988); and *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

¹⁵ *Le Roy v. Crowninshield*, 15 F. Cas. 362 (D. Mass. 1820) (No. 8,269).

¹⁶ *Shewbrooks v. A.C. and S., Inc.*, 529 So. 2d at 566.

¹⁷ See Carter, *The Foreign Limitation Periods Act 1984*, 101 THE LAW Q. REV. 68 (1985) for a thorough discussion of this act.

Two rationales have been advanced to justify this traditional rule. The first, established in the United States in the *M'Elmoyle* opinion,¹⁸ is that statute of limitations are procedural rules and as such are within the ambit of the forum's law, since the forum must apply its own procedures.¹⁹ That here the outcome may be affected, where normally application of the forum's procedures would not affect the outcome, is not a sufficient counterweight to the benefit the forum obtains by following its own procedures.²⁰ The second rationale is that the foreign substantive law to be applied governs the rights of the parties, and establishes the cause of action, but does not provide the remedy; it is thus within the power of the forum to apply any of its laws going only to a limitation on the remedies of the parties.²¹

While this general rule has continued to retain adherents, it has been eroded by criticism and the adoption of two major judge-made and legislative exceptions. These exceptions have become so well established, in fact, that they have nearly swallowed the rule, at least in states other than Mississippi and New Hampshire.

Exceptions

1. Judge-made

The first of these exceptions was articulated by the Supreme Court in *The Harrisburg*²² and refined in *Davis v. Mills*.²³ This judge-made exception allows application of the limitation contained in the law of the jurisdiction where the cause of action arose if it is found in the same law that creates the right sued upon, and if that right is not one that existed at common law.²⁴ Most frequently utilized in wrongful death cases, wherein the statute establishing the right to sue for the death often states that suit must be commenced within a specified time,²⁵ the exception has been invoked for other statutes as well.²⁶ In *Davis*, in fact, the Court enlarged

¹⁸ 38 U.S. (13 Pet.) 312 (1839).

¹⁹ Martin, *Rationality*, *supra* note 3, at 407.

²⁰ *Id.*

²¹ *Id.*

²² 119 U.S. 199 (1886).

²³ 194 U.S. 451 (1904).

²⁴ See *Bournias v. Atlantic Maritime Co.*, 220 F.2d at 156; Grossman, *Modern Analysis*, *supra* note 3, at 12-13.

²⁵ Grossman, *Modern Analysis*, *supra* note 3, at 12.

²⁶ For example, courts have construed in this manner workers' compensation laws, e.g., *White v. Malone Properties, Inc.*, 494 So. 2d 576 (Miss. 1986) and the Federal Employers' Liability Act. *Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199 (1915). See RABEL, *THE CONFLICT OF LAWS*, *supra* note 11, at 518; and Ailes, *Actions*, *supra* note 9, at 493, where the author points out that any loss of a right of action to recover land extinguishes the right everywhere since the suit can only be brought in the state where the land is located.

the exception to include instances where the limitation was found in a separate statute but “was directed to the newly created liability so specifically as to warrant saying that it qualified the right.”²⁷ A finding that the statute does so qualify the right means that it will be treated as substantive; if it does not it will be termed a procedural rule and the forum may then apply its own statute of limitations.²⁸ The court’s analysis thus frequently is concerned with whether the foreign jurisdiction treats the statute as substantive or procedural.

This exception becomes particularly problematic when a court must decide whether to apply the limitation period of a civil law country, where nearly every right of action has been created either by code or statute. As the fifth circuit stated after deciding that interpretation by the Belgian courts of the Belgian wrongful death prescription period would be determinative of whether that statute sufficiently conditioned the right:²⁹

This undertaking is made difficult, however, by the fact that a civil law jurisdiction seldom finds it necessary to construe its prescription statutes in such a way to make it easily apparent to a common law court whether the statute is considered substantive or procedural in the common law conflicts of law sense.³⁰

The court felt constrained to go through a difficult analysis of the attributes of the Belgian law before concluding that the prescription was a substantive law “going to the essence of the right of action” and so was applicable in the action.³¹ Similarly, in an earlier opinion the second circuit found that because the Panamanian labor Code section containing the statute of limitations was applicable to a variety of rights given laborers against their employers, it did not specifically condition the particular right sued upon.³²

²⁷ *Davis v. Mills*, 194 U.S. at 454.

²⁸ *See, e.g., Brooks v. Hess Oil V.I. Corp.*, 809 F.2d 206 (3d Cir. 1987) (Liberian three-year statute procedural so barred right not remedy for seamen seeking to recover under agreement otherwise governed by Liberian law); *Thomas v. FMC Corp.*, 610 F. Supp. 912 (D. Ala. 1985) (German statute procedural under Alabama test requiring that foreign statute specifically declare otherwise); and *Steele v. G.D. Searle and Co.*, 422 F. Supp. 560 (S.D. Miss. 1976) (Mississippi statute of limitations applied because Kansas courts had treated its statute as procedural.)

²⁹ *Ramsay v. Boeing Co.*, 432 F.2d 592, 599 (5th Cir. 1970).

³⁰ *Id.*

³¹ *Id.* at 603.

³² *Bournias v. Atlantic Maritime Co.*, 220 F.2d at 157.

2. Borrowing statutes

The second major exception to the general rule is the product of legislative recognition that separating the substantive law applying to a case from the statute of limitations that may indeed determine its outcome is not always rational.³³ So-called "borrowing statutes," provisions that call for application of the statute of limitations of the state where the cause of action accrued, if different from that of the forum, have been enacted in a majority of states.³⁴ To a large extent they alleviate the problem of inconsistency among jurisdictions.

However, there is still a minority of states that have no borrowing statute, and one, Mississippi, has one that judicial interpretation has rendered ineffective for most actions accruing in other states.³⁵ Other problems may be raised by new proposals intended to solve the dilemma. The newly approved Restatement of Conflicts § 142, which provides for application of the statute of the state "having a more significant relationship to the parties and the occurrence" if it would bar the claim,³⁶ may present a conundrum to judges faced with a choice between applying it and applying their states' borrowing statutes. The problem is, of course, inconsequential if there is not a significant difference between them; however, if the borrowing statute uses a different test it may obstruct rather than facilitate resolution of the inconsistency and irrationality. The same type of conflict may be engendered by the Uniform Conflict of Laws-Limitations Act, which treats statutes of limitations as substantive, the state providing the substantive law governing the case providing also the statute of limitations.³⁷ Presumably the uniform law will present less of a difficulty to judges since it is the legislatures that must choose between it and an existing or prospective borrowing statute.

The exceptions, the Restatement and the Uniform Law are the result of sustained criticism leveled at the general rule over the years by commentators. This criticism has been expressed in a series of articles significant enough to be repeatedly cited in judicial opinions.³⁸

³³ Grossman, *Modern Analysis*, *supra* note 3, at 14-15.

³⁴ According to the PREFATORY NOTE TO UNIFORM CONFLICT OF LAWS-LIMITATIONS ACT, 12 U.L.A. 54 (Supp. 1989) [hereinafter UNIFORM ACT], "about three-fourths" of the states have enacted borrowing statutes. Most borrowing statutes, however, do not apply when the plaintiff is a resident of the forum state.

³⁵ *Shewbrooks v. A.C. and S., Inc.*, 529 So. 2d at 565.

³⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142.

³⁷ UNIFORM ACT, *supra* note 34.

³⁸ See, e.g., *Keeton v. Hustler Magazine, Inc.*, 549 A.2d at 1199-1200 (Souter, J., dissenting) and *Shewbrooks*, 529 So. 2d at 567.

Criticism

Among the most influential of the commentators criticizing the traditional common law rule was professor Lorenzen, whose 1919 article in the *Yale Law Journal*³⁹ has been often cited in opinions by judges seeking to abrogate the traditional rule.⁴⁰ Lorenzen argued that the test used internally by a state or country, one classifying statutes of limitations as procedural or going only to the remedy, should not be carried over into the conflict of laws.⁴¹ When a right can no longer be enforced, he said, it is “shorn of its most valuable attribute” and when this occurs under the law governing the rights of the parties, “it would seem clear upon principle that the same consequences should attach to the operative facts everywhere.”⁴²

What Professor Lorenzen had to say about a forum applying its *shorter* statute of limitations, however, may only reinforce the premises used by statute of limitations havens to support their rule. Such a circumstance is different, he said, because the purpose of a statute of limitations rests on the forum’s particular procedures, particularly its evidentiary rules; depending on how a fact is to be proved, a shorter or longer time will make the proof less reliable. “The period prescribed by the statute of limitations itself defines the maximum time within which, in the estimation of the legislature of that state, substantial justice can be done in the particular case under the conditions surrounding the trial of such a case.”⁴³

Contributing to the recent trend toward modification of the traditional rule have been more modern critics of it. One commentator tied the application of a forum’s statute of limitations to claims unrelated to the state to a need for more restrictive judicial jurisdiction.⁴⁴ Jurisdictional rules would thus do what the Constitution otherwise does not. In this writer’s mind, moreover, the Constitution should prevent use of the traditional rule whenever there is no other contact between the forum state, the parties, and the claim, and the forum’s limitation is longer than that of a state with greater interest in the claim. There is no rational basis for allowing the forum to do this, he concluded, because: 1) a state does not create a right the remedy for which is limited in the state creating

³⁹ Lorenzen, *Limitations*, *supra* note 9.

⁴⁰ See Mihollin, *Interest Analysis*, *supra* note 3, at 5.

⁴¹ Lorenzen, *Limitations*, *supra* note 9, at 496.

⁴² *Id.*

⁴³ *Id.* at 498.

⁴⁴ Martin, *Rationality*, *supra* note 3, at 412.

it but not elsewhere; the remedy cannot therefore be separated from the right; 2) statutes of limitation serve the substantive purpose of granting repose to defendants, a purpose not effectuated if the remedy and the right are separated; and, 3) the primary justification for applying the forum's statute — to protect its dockets—is not served when the state applies a longer statute.⁴⁵

Most of the modern critics have argued for using the same choice of law analysis for choosing a statute of limitations that is used for choice of law generally. In particular, there has been a significant trend, both in commentary and in judicial opinions, toward utilization of an interest analysis approach.⁴⁶ To briefly summarize this method: the court starts with its own forum rule, examines the policy embodied in the rule, the interest the forum has in the case, the policy supporting the rule of any other forums with an interest in the case, and the nature and extent of the other forums' interest.⁴⁷ This analysis should point either to the forum's rule or another state's as being the most appropriate rule to apply. This approach has the advantage, say its proponents, of being less mechanical than the traditional common law rule and of producing fewer instances of irrational results.⁴⁸

Although scarce in recent times, defenders of the Anglo-American rule have spoken. A 1933 Michigan Law Review article reviewed the various approaches taken to the question and concluded that the simplicity and convenience of the *lex fieri* rule warrant maintaining it.⁴⁹ The other rules, the author argued, suffer from an impracticality that is not outweighed by any theoretical superiority.⁵⁰

Sun Oil Co. v. Wortman

All this criticism and these reform proposals may be of little import unless individual states decide to act upon them. It appears that there will be no constitutional mandate to do so. The Supreme Court, in 1988, declined to find that a state may not constitutionally apply its own statute of limitations to an action governed by the substantive law of another state.⁵¹ In its *Sun Oil Co. v. Wortman*⁵² opinion, the Court

⁴⁵ *Id.* at 419-20.

⁴⁶ See generally Justice Brennan's opinion concurring in part in *Sun Oil v. Wortman*, 108 S.Ct. at 2128; *Heavner v. Uniroyal, Inc.*, 60 N.J. 130, 305 A.2d 412 (1973); and Milhollin, *Interest Analysis*, *supra* note 3.

⁴⁷ Milhollin, *Interest Analysis*, *supra* note 3, at 8-12.

⁴⁸ Grossman, *Modern Analysis*, *supra* note 3, at 40.

⁴⁹ Ailes, *Actions*, *supra* note 9, at 502.

⁵⁰ *Id.* at 495-96, 502.

⁵¹ *Sun Oil v. Wortman*, 108 S.Ct. 2117.

⁵² *Id.*

reaffirmed its 1839 *M'Elmoyle v. Cohen* decision,⁵³ resting its holding on tradition and precedent, rather than analysis of the rule's continuing validity.

The case was a class action brought in Kansas by owners of mineral leaseholds for properties located in Texas, Oklahoma, and Louisiana. Plaintiffs claimed that the oil company had improperly suspended royalty payments owed to plaintiffs as a result of the company's extractions of gas from the properties.⁵⁴ After lengthy appellate review,⁵⁵ the trial court ruled on the issue subsequently presented to the Supreme Court, and held that the Kansas statute of limitations applied to the claims, even though under *Phillips Petroleum Co. v. Shutts*⁵⁶ the substantive law of the other states governed the company's liability for the suspended payments.⁵⁷ The Kansas Supreme Court affirmed.

Justice Scalia's majority opinion relied on history. The Constitution, he wrote, was adopted at a time when statutes of limitations were assumed to be "procedural restrictions fashioned by each jurisdiction for its own courts,"⁵⁸ and therefore the full faith and credit clause of the Constitution was accepted with the understanding and expectation that it would not preclude a forum applying its own statute of limitations even when it did mandate the application of another state's substantive law, and even when the latter state's statute of limitations would have barred the action.⁵⁹ The Justice's adherence to history further grounded his refusal to find that whatever the view may have been originally, statutes of limitations are now seen as "sufficiently 'substantive' to require full faith and credit."⁶⁰

⁵³ See *supra* notes 13-19 and accompanying text.

⁵⁴ *Sun Oil*, 108 S.Ct. at 2120-21.

⁵⁵ Following the trial court's initial ruling that Kansas law governed all claims for interest and that the oil company was liable for prejudgment interest, the Kansas Supreme Court affirmed on the basis of *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159 (1984), decided the same year and involving similar facts. The United States Supreme Court granted certiorari in both cases, reversed the part of *Shutts* holding that Kansas could apply its substantive law to claims by nonresidents regarding property located in other states, 472 U.S. 797 (1985), and vacated and remanded *Sun Oil* for reconsideration in light of its holding in *Shutts*, 474 U.S. 806 (1985). *Sun Oil*, 108 S.Ct. at 2121.

⁵⁶ 472 U.S. 797 (1985).

⁵⁷ *Sun Oil*, 108 S.Ct. at 2121.

⁵⁸ *Id.* at 2123.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2124.

In sum, long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional. If current conditions render it desirable that forum States no longer treat a particular issue as procedural for conflict of laws purposes, those States can themselves adopt a rule to that effect . . . It is not the function of this Court, however, to make departures from established choice-of-law precedent and practice constitutionally mandatory.⁶¹

To both the oil company's full faith and credit and its additional due process challenges, the Court responded that Kansas was not constitutionally prevented from applying its own statute of limitations.⁶²

The two concurring opinions in the case suggest, however, that Justice Scalia's dogmatic approach may not hold firm in the long run. Justice O'Connor, in an opinion joined by the Chief Justice, explained that she concurred in the result reached by the majority only because the issues were limited. "[I]f Texas, Oklahoma, or Louisiana regarded its own shorter statute of limitations as substantive," she declared, different questions "might have arisen" which were "not presented in this case."⁶³ Justice Brennan, joined by Justices Marshall and Blackmun, criticized the majority for focusing only on the substantive-procedural distinction, which forced it to eschew analysis in favor of tradition.⁶⁴ Instead, Justice Brennan argued that "a careful examination of the *Phillips Petroleum* test and the governmental interests created by the relevant contacts provides narrower and sounder grounds for affirming."⁶⁵

Thus, under the test Justice Brennan would use, states like Mississippi and New Hampshire could continue to apply their own statutes of limitations whenever those of the states supplying the substantive law for particular cases do not regard their own statutes as substantive. However, a different result may occur should the other states consider their statutes as substantive and should the relative interests and contacts involved point to application of their statutes. In such a case,

⁶¹ *Id.* at 2125.

⁶² Justice Scalia based his rejection of the due process claim on the generally accepted rules in place at the time the fourteenth amendment was adopted and on the fact that the defendant could not have been "unfairly surprised by the application to it of a rule that is as old as the Republic." *Id.* at 2125-26.

⁶³ *Id.* at 2133 (O'Connor, J., concurring in part and dissenting in part).

⁶⁴ *Id.* at 2132-33 (Brennan, J., concurring in part).

⁶⁵ *Id.* at 2133.

not considering changes in the composition of the Court or the position of Justice Kennedy, who did not participate in the decision, five justices would presumably vote to preclude application of the forum's statute of limitations. Until such a case arises, however, the traditional common law rule will continue to provide authority for the courts of statute of limitations "havens" to keep themselves open when all others have been closed, the numerical weight of judicial and scholarly opinion notwithstanding.

AN ENGRAVED INVITATION: THE STATUTE OF LIMITATIONS HAVENS

Mississippi

The availability of Mississippi as a haven to those litigants who are otherwise barred from pursuing their causes of action because of statutes of limitation in every other state has been recently reconfirmed by the Mississippi Supreme Court.⁶⁶ This state has thus become a "haven" not solely because it has a six-year statute of limitation applicable to "[a]ll actions for which no other period of limitation is prescribed";⁶⁷ the statute alone would not allow the prosecution of such actions if the Mississippi courts applied the limitations periods of the states where the causes of action accrued. But the judiciary of Mississippi has consistently and without qualification implemented the traditional rule that a forum may apply its own statute of limitations. This policy has brought actions into the Mississippi courts based on exceedingly attenuated connections between the parties, the action and the state. In many cases, the plaintiffs have openly admitted that they filed in Mississippi solely to take advantage of its statute of limitations. Mississippi is truly a statute of limitations haven.

In 1988, the Mississippi supreme court re-examined the problem twice. In *Shewbrooks v. A.C. and S. Inc.*,⁶⁸ the court had before it a suit against several asbestos companies which the Delaware plaintiffs had originally filed in Delaware for asbestos poisoning allegedly occurring in Delaware, New Jersey and Pennsylvania. None of the defendants were domiciled or had their principal place of business in Mississippi, but being national companies they did conduct business there and so were subject to service of process.⁶⁹ The Delaware action was dismissed because that state's statute of limitations barred it, and the state circuit court of Mississippi dismissed the action filed there on lack of personal juris-

⁶⁶ *Shewbrooks v. A.C. and S. Inc.*, 529 So. 2d 557; *Williams v. Taylor Mach. Inc.*, 529 So. 2d 606.

⁶⁷ MISS. CODE ANN. § 15-1-49 (1972).

⁶⁸ 529 So. 2d 557.

⁶⁹ *Id.* at 559.

diction and *forum non conveniens* grounds.⁷⁰ The state supreme court reversed, initially because it said a dismissal for *forum non conveniens* depends on the availability of an alternative forum and since the plaintiffs were barred from every other potential forum by the respective statutes of limitations, there was no alternative forum.⁷¹

The court, however, went on to address the statute of limitations issue because, it explained, the appellees had argued that the lower court's dismissal was correct, although not for the reasons it had stated.⁷² The court pointed to the nature of time limitations on actions as the creation of legislatures and the fact that the United States Supreme Court has consistently upheld the right of legislatures to prescribe such limitations as grounds for its refusal to apply the statute of the state with the most substantial relation to the causes of action.⁷³

It was true that Mississippi had a borrowing statute which on its face might have mandated application of a different statute of limitations; however, the court asserted, it had interpreted this statute on several occasions as requiring the application of the foreign statute only when the defendants in the case had moved to Mississippi after the cause of action had accrued in the other state.⁷⁴ Moreover, the legislature had re-enacted the provision, presumably with knowledge of the court's interpretation.⁷⁵ Finally, the court also referred to the "overwhelming body" of common law that allowed a forum to apply its own "procedural" statute of limitations.⁷⁶ The court did note that application of this rule has received much criticism and mentioned the then proposed Restatement § 142, but again pointed to the comments to the Restatement which said that any change could be effected by the legislatures.⁷⁷

The opinion was one in a series in which the majority's view was heartily criticized by Justice Robertson. Whether Mississippi will remain a statute of limitations haven may depend largely on whether Justice Robertson's vehemently expressed views have some influence on his fellow justices. In *Shewbrooks*, he argued that the center of gravity test which the court had previously adopted for choice of law problems in general

⁷⁰ *Id.* at 559 and 568.

⁷¹ *Id.* at 561-64.

⁷² *Id.* at 564.

⁷³ *Id.* at 565.

⁷⁴ *Id.*

⁷⁵ *Id.* at 566.

⁷⁶ *Id.*

⁷⁷ *Id.* at 567-68.

should serve as the test for choosing a statute of limitations as well.⁷⁸ In addition, he declared, while the borrowing statute does not apply by virtue of the judicial gloss, it does imply a deeper principle of law that where an action ought to be governed by the law of another state, the limitation on that action should also come from that state.⁷⁹ These two propositions in combination establish that an action should be dismissed if it would be barred under the statute of limitations of the state with the most significant relationship to the occurrence and the parties.⁸⁰

The consequences of the decision were enormous, Justice Robertson concluded, in a passage that directly confronts what may be an underlying policy argument which the majority preferred to leave unstated:

It is not just that we have obligated our courts to decide this particular controversy in spite of the fact that no sane person could imagine that it has any relation to our state. One such incident could be borne, albeit with some grumbling. The greater evil is that the present litigants are but the scouts for the plague of locusts that will inevitably descend upon us in response to today's engraved invitation. We have doomed Mississippi to become a dumping ground for the nation's homeless tort litigation.⁸¹

Whether or not Mississippi wants its courts to handle this extra litigation may be a matter the legislature will eventually decide.

Two months later the state supreme court again applied its view of the statute of limitations as a procedural prerogative of the forum. In *Williams v. Taylor Machinery, Inc.*,⁸² a case involving an action for negligence by a Tennessee domiciliary against a Tennessee corporation that did business in Mississippi for an accident that occurred in Tennessee, the court again applied the longer Mississippi statute of limitations, even though Tennessee law governed other aspects of the case and the Tennessee statute of limitations had run.⁸³ The court did not elaborate its rationale as it had in *Shewbrooks*; however, it did note that the just an-

⁷⁸ *Id.* at 569 (Robertson, J., dissenting). The "center of gravity" test requires examination of the relative contacts any relevant forums have with the parties and the action. It has also been termed a "most substantial relationship" test. See *White v. Malone Properties*, 494 So. 2d 576, 578, 580 (Miss. 1986).

⁷⁹ *Id.* at 570.

⁸⁰ *Id.* at 571.

⁸¹ *Id.* at 574 (Anderson, J., dissenting).

⁸² 529 So. 2d 606.

⁸³ *Id.* at 609.

nounced *Sun Oil* decision of the United States Supreme Court⁸⁴ precludes any constitutional bar to Mississippi's application of its own statute of limitations.⁸⁵

Justice Robertson, again criticizing the majority's view, pointed out, with some relish, that the American Law Institute, "with but a lone dissenting vote," had approved the new Restatement of Conflicts § 142 just eight days after the court's *Shewbrooks* decision was announced.⁸⁶ This event, Robertson wrote, "declared to the nation *Shewbrooks*' obsolescence."⁸⁷ He concluded by predicting that the new Restatement section would inspire the Mississippi court to revise its view.⁸⁸

These two cases are, of course, only the latest of a line through which the Mississippi court has established and maintained this statute of limitations as procedural and forum determined doctrine.⁸⁹ Essential to it are those decisions construing the Mississippi borrowing statute as not applicable to cases brought to Mississippi other than by defendants moving there after the cause of action has accrued against them elsewhere.⁹⁰ The Mississippi court has recognized the exception for statutory limitations that specifically condition a cause of action. In *White v. Malone Properties, Inc.*,⁹¹ the court held that the Louisiana time limit for bringing actions under its workers' compensation law applied to an action brought under that law in Mississippi. In 1970, the Fifth Circuit looked to Mississippi substantive law for the choice of law rules to be applied to an action brought against a jet manufacturer for a crash that had occurred in Belgium, but applied the Belgian limitation because the court found that Mississippi would apply it if it were substantive and, the court concluded, it was.⁹² So it is not for the lack of, but in spite of, the recognized exceptions that Mississippi has become a statute of limitations haven. The

⁸⁴ See *supra* notes 5 and 51-65 and accompanying text.

⁸⁵ *Williams*, 529 So. 2d at 609, n.1.

⁸⁶ *Id.* at 611 (Robertson, J., concurring). Justice Robertson concurred in the judgment because of the *Shewbrooks* precedent. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See, e.g., *Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975). In *Vick*, two Alabama residents were involved in an automobile accident while driving through a corner of Mississippi on a trip that began and would end in Alabama. The Mississippi Supreme Court, applying a choice-of-law analysis, concluded that Alabama substantive law governed the action, but also applied the Mississippi statute of limitations, which allowed the action to proceed, in lieu of the Alabama statute, which had run. *Id.* See also *Bethlehem Steel Co. v. Payne*, 183 So. 2d 912 (Miss. 1966); *Guthrie v. Merchants Nat. Bank*, 254 Miss. 532, 180 So. 2d 309 (1965); *Dunn Constr. Co. v. Bourne*, 172 Miss. 620, 159 So. 841 (1935); and *Louisiana & Miss. R. Transfer Co. v. Long*, 159 Miss. 654, 131 So. 84 (1930).

⁹⁰ See *Cummings v. Cowan*, 390 F. Supp. 1251, 1254 (N.D. Miss. 1975) and cases cited there.

⁹¹ 494 So. 2d 576 (Miss. 1986).

⁹² *Ramsey v. Boeing Co.*, 432 F.2d 592.

ramifications of this are not confined to Mississippi; transferee federal district courts outside the state have had to treat the consequences of the Mississippi rule.⁹³ And of course, Mississippi is not the only haven.

New Hampshire

Without judicial favor, and based upon its statute of limitations alone, New Hampshire, like Mississippi, would not be a haven for otherwise "homeless litigation." Indeed, New Hampshire amended its general statute in 1986, reducing the time limit for "all personal actions, except actions for slander or libel" from six to three years.⁹⁴ However, the New Hampshire Supreme Court also recently restated its view that the state as a forum would apply its own statute of limitations.⁹⁵ The reduced limitation period should have an effect on the number of out of state actions brought into the state; nevertheless, as one of the few states without a borrowing statute and with a judiciary not reluctant to accept cases barred everywhere else, New Hampshire will likely continue to rival Mississippi as a statute of limitations haven.⁹⁶

Already well known as a result of the earlier *Keeton v. Hustler Magazine* decision by the United States Supreme Court,⁹⁷ the New Hampshire rule was re-evaluated by that state's court in response to the first circuit's certification of the question to it after the defendants in the same case, upon remand, had appealed from the trial court on venue and statute of limitations grounds.⁹⁸ The first circuit actually asked the court to answer two questions, the first regarding New Hampshire's adherence to the single publication rule for libel, and the second:

[D]oes New Hampshire permit a plaintiff to recover for distribution of a libel in jurisdictions whose own statutes of limitations would bar recovery, where neither party is a New Hampshire resident, where the only factual connection with New Hampshire is the distribution there of one percent or less of the total circulation of the material, and where the relevant statute of limitations has expired in every jurisdiction but New Hampshire?⁹⁹

⁹³ See *infra* notes 111-138 and accompanying text.

⁹⁴ N.H. REV. STAT. ANN. § 508:4 (Supp. 1988).

⁹⁵ *Keeton v. Hustler Magazine, Inc.*, 131 N.H. 6, 549 A.2d 1187.

⁹⁶ New Hampshire's adherence to the traditional common law rule is also well-established. See, e.g., *Gordon v. Gordon*, 118 N.H. 356, 387 A.2d 339 (1978); *Barrett v. Boston & Me. R.R.*, 104 N.H. 70, 178 A.2d 291 (1962); *Dupuis v. Woodward*, 97 N.H. 351, 88 A.2d 177 (1952); and *Smith v. Turner*, 91 N.H. 198, 17 A.2d 87 (1940).

⁹⁷ 465 U.S. 770.

⁹⁸ *Keeton*, 131 N.H. at _____, 549 A.2d at 1188.

⁹⁹ *Id.*

Noting that the *Sun Oil* decision¹⁰⁰ had apparently eliminated the constitutional issue,¹⁰¹ the court held that New Hampshire would allow recovery in the instance described and explained its rationale in some detail. After agreeing with other states that the purpose of a statute of limitations is the elimination of stale or fraudulent claims and so is different from other procedural rules, the court said that these varied purposes justify application of the forum's statute even when another state's substantive law is also applied.¹⁰² First, the court said, the forum is better able to decide when the claims presented are too stale to burden its dockets and the burden on its dockets is an exclusive interest of the forum.¹⁰³ Second, the forum has an interest in the defendant's protection from stale claims and in the plaintiff's pursuit of recovery. The legislature of the forum determines the proper balance between the forum, the parties and the action, and, at the time the instant action was brought, the New Hampshire legislature had enacted a six-year limitation for libel and had not enacted a borrowing statute.¹⁰⁴ Finally, since the relevant foreign statutes did not express a strong local policy and did not extinguish the right involved, factors necessary for finding a judge-made exception, New Hampshire would apply its own statute and would allow the plaintiff to recover even for libel occurring in states that had barred the action.¹⁰⁵

The earlier opinion of the United States Supreme Court focused primarily on the jurisdictional question raised by the defendants.¹⁰⁶ The Court found this question entirely separable from the statute of limitations problem.¹⁰⁷ Nonetheless, addressing the court of appeals' suggestion that application of the New Hampshire statute of limitations was unfair from a due process standpoint, the Court seemed to find that the expectations of the defendant in effect provided the determinants for this matter, as it also did for jurisdiction.¹⁰⁸ Distributing 10,000 to 15,000 copies of a magazine in New Hampshire was a sufficient contact with the state to warrant the assertion of personal jurisdiction over the defendant, and it was sufficient to show that the defendant had "chosen" to do business in the state so as to "be charged with knowledge of its laws," presumably including its statute of limitations.¹⁰⁹ As then Justice Rehnquist wrote:

¹⁰⁰ See *supra* notes 5 and 51-65 and accompanying text.

¹⁰¹ *Keeton*, 131 N.H. at _____, 549 A.2d at 1191.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at _____, 549 A.2d at 1192-93.

¹⁰⁶ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770.

¹⁰⁷ *Id.* at 778.

¹⁰⁸ *Id.* at 779-80.

¹⁰⁹ *Id.* at 779.

Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.¹¹⁰

Forum shopping for favorable statutes of limitations thus has the imprimatur of the United States Supreme Court. This, now in combination with the recent pronouncements of the Mississippi and New Hampshire supreme courts, virtually guarantees that it will continue. It will continue in particular in those forums perhaps most affected by it: the federal courts.

Ramifications in federal court

In no other forum has the statute of limitations as prerogative of the forum concept produced more anomalous results than in the federal courts. A consequence of the related debate over the law and procedures to be applied when a case is transferred from a district court in one state to a district court in another state, shopping for federal forums has taken a new and effective form. Whether it will continue to be possible, however, depends on if and how the Supreme Court reacts to the latest court of appeals pronouncement on it.

The federal transfer of venue statute, 28 U.S.C. § 1404(a), has been termed a "housekeeping measure," which is not to affect the outcome of a case to which it is applied.¹¹¹ Used in the statute of limitations context, however, it has permitted plaintiffs to file, in Mississippi, actions wholly unrelated to the forum, thereby becoming able to prosecute the action even when it is transferred to a more convenient forum in a state where the action would otherwise be barred and whose law is otherwise applied to the action under the Mississippi choice of law rules. The most renown case before 1988 was *Schreiber v. Allis-Chalmers Corp.*¹¹²

1. Schreiber

Schreiber was a resident of Kansas who alleged that he was injured in Kansas while working on a Roto Baler manufactured by Allis-

¹¹⁰ *Id.*

¹¹¹ *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

¹¹² 611 F.2d 790 (10th Cir. 1979).

Chalmers, a Delaware corporation headquartered in Wisconsin, which did business in Mississippi.¹¹³ Six days short of six years later, Schreiber filed suit against Allis-Chalmers in federal district court in Mississippi. The defendants moved for a change of venue to Kansas, which was granted under order by the Fifth Circuit. The federal district court in Kansas then granted summary judgment for the defendants on alternative grounds: one, that the Mississippi court did not have jurisdiction, and two, even if it did, the two-year Kansas statute of limitations barred the action.¹¹⁴ The district court held that even though it must apply the law it would if it were a court sitting in Mississippi, under the rule of *Van Dusen v. Barrack*,¹¹⁵ a court in Mississippi presented with this case would abandon the long-established rule of that state providing for application of its own six-year statute of limitations.¹¹⁶

The Tenth Circuit reversed. The duty of the district court in Kansas, the court said, was to apply the law of Mississippi as it presently existed, not as the district court believed it would be fashioned for this case.¹¹⁷ The court went on to note that even though Mississippi had adopted the “center of gravity” test for choice of substantive law generally,¹¹⁸ that did not mean it had adopted it for determining the applicable statute of limitations,¹¹⁹ a comment born out by the recent Mississippi Supreme Court decisions discussed previously.¹²⁰ The court of appeals was not unmindful of the anomaly produced by the case and noted that “it [was] quite evident that [the trial judge] was disturbed by the fact that though the present case could not be maintained in the first instance in Kansas federal court . . . it possibly could be maintained in a Mississippi federal court.”¹²¹ Nevertheless, the court concluded, in language presaging the Supreme Court’s in *Sun Oil*:¹²²

[I]t is axiomatic that hard cases make bad law. We think it preferable to adhere to accepted legal principles rather than strive to achieve, at the expense of those principles, a result which might appear to some as being more fair and just than the alternative.¹²³

¹¹³ *Id.* at 791.

¹¹⁴ *Id.* at 792.

¹¹⁵ 376 U.S. 612.

¹¹⁶ *Schreiber*, 611 F.2d at 792.

¹¹⁷ *Id.* at 794.

¹¹⁸ The Mississippi Supreme Court adopted the “center of gravity” test as a general choice-of-law test in *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968). See note 78 for explanation of this test.

¹¹⁹ *Schreiber*, 611 F.2d at 794.

¹²⁰ See *supra* notes 66-88 and accompanying text.

¹²¹ *Schreiber*, 611 F.2d at 794.

¹²² See *supra* notes 5 and 51-65 and accompanying text.

¹²³ *Schreiber*, 611 F.2d at 794.

2. *Ferens v. Deere & Co.*

In November 1988, ten years after the *Schreiber* decision, another circuit announced its own version of a "fair and just" alternative. This case, *Ferens v. Deere & Co.*,¹²⁴ however, had been once reviewed by the Supreme Court and will be again, not surprisingly, given the controversial decision the Third Circuit rendered. If affirmed or allowed to stand, it will mean curtailment of those cases wherein plaintiffs use the federal transfer statute to seek the benefit of the Mississippi statute of limitations *and* a more convenient forum.

Ferens was a resident of Pennsylvania who alleged that he was injured in Pennsylvania while cleaning a combine manufactured by Deere, a Delaware corporation with its principal place of business in Moline, Illinois. Three years later, he and his wife filed breach of warranty actions in Pennsylvania and negligence and strict liability actions in district court in Mississippi. They then moved that the Mississippi action be transferred to Pennsylvania and consolidated with the actions pending there. The motion was granted, but the Pennsylvania court then ordered summary judgment for the defendants, holding that Pennsylvania's two-year statute of limitations barred the action. The Third Circuit affirmed, declaring that Mississippi courts were constitutionally required, by both the full faith and credit and the due process clauses, to apply the Pennsylvania statute of limitations.¹²⁵ The Supreme Court granted certiorari, vacated and remanded the case for reconsideration in light of its decision in *Sun Oil v. Wortman*.¹²⁶

¹²⁴ 862 F.2d 31 (3d Cir. 1988), *cert. granted*, 109 S.Ct. 2061 (1989).

¹²⁵ *Ferens v. Deere & Co.*, 819 F.2d 423 (3d Cir. 1987), *cert. granted and vacated*, 108 S.Ct. 2862 (1988). For discussion of the argument that the full faith and credit clause mandates application of the statute of limitations of the state whose substantive law is otherwise governing, see Vernon, *Some Constitutional Problems in the Conflict of Laws and Statutes of Limitation*, 7 J. PUB. LAW 120 (1958) and Martin, *Rationality*, *supra* note 3. Vernon asserted that because applying the forum's shorter statute of limitations has a substantive effect whenever the defendant is not amenable to suit in another forum, it is appropriate to allow the substantive effect of applying the forum's longer statute of limitations as well. Vernon, *Constitutional Problems*. Martin, on the other hand, argued that Mississippi should be required to give full faith and credit to the statute of limitations of another state if Mississippi has little or no relation to the action. Responding to Vernon's point, he said that dismissals on the grounds of a shorter statute of limitations was not a matter of substantive law at all, but a function of a forum's procedural interest in the action. Applying a longer statute is, however, a matter of substantive law: first, it is not sensible to say that the right and the remedy can be separated, because no state will create a right and limit it only internally; second, statutes of limitation serve the substantive purpose of granting repose to potential defendants; and finally, any "procedural" justification that a state is protecting its dockets does not operate when the state applies a longer statute. Martin, *Rationality*, *supra* note 3, at 415-21.

¹²⁶ 108 S.Ct. 2862 (1988).

Even without its constitutional objection, the court of appeals nevertheless found the plaintiff's claims time barred by Pennsylvania law. True, the court said, if Mississippi law came with the case when it was transferred its statute of limitations would too.¹²⁷ However, according to the Third Circuit, Mississippi law did not come with the case; the transferee forum's law would be applied, *Van Dusen v. Barrack*¹²⁸ notwithstanding.¹²⁹ This was so because in this case it was *the plaintiffs* who had moved to transfer, so none of the factors which had favored application of the transferor forum's law when defendants sought the transfer were present.¹³⁰ *Van Dusen* was limited to defendant-initiated transfers, the court said, in order to protect plaintiff's choice of venue and to prevent defendants from forum shopping.¹³¹ In the case at hand, the plaintiffs were attempting to forum shop by using "§ 1404(a) and a brief stop in Mississippi to achieve a result in the federal courts of Pennsylvania that they could not achieve in the state courts of Pennsylvania."¹³² The court acknowledged that a change in applicable law upon a plaintiff-initiated transfer will allow plaintiffs to correct their mistakes when they file in a forum with less favorable law, but viewed this as "less problematic" than allowing them to "bootstrap favorable law into a forum."¹³³ Accepting the plaintiffs' construction of the transfer statute, the court concluded,

would turn the longest state statute of limitation into the federal statute of limitation to be applied in diversity cases where the plaintiffs can initially bring the action in the favorable state and subsequently transfer it to a convenient forum.¹³⁴

¹²⁷ *Ferens*, 862 F.2d at 34.

¹²⁸ 376 U.S. 612.

¹²⁹ *Ferens*, 862 F.2d at 35-36.

¹³⁰ *Id.*

¹³¹ *Id.* at 35.

¹³² *Id.* at 36. The dissent suggested, however, that the plaintiffs were not forum shopping at all: forum shopping involves the exercise of some choice; with every forum except Mississippi no longer being available, these plaintiffs did not have a "choice" of forums. "Consequently, the act of filing suit in Mississippi, the only available forum, did not constitute forum shopping as that term is usually understood." *Id.* at 37 (Seitz, Cir. J., dissenting). Since a statute of limitations defense is not normally interposed until after a court has taken jurisdiction, and therefore it is not technically correct to say that the running of statutes in other states makes them wholly unavailable, the dissent's point is legitimate, if the concept of forum shopping necessarily involves a choice among alternative forums. However, since forum shopping, as it has been traditionally utilized, often results in an action going forward where it would not have otherwise, because of either procedural or substantive differences in law in the chosen forum, it does not seem correct to say that choosing the only forum in which the action can proceed is not a form of forum shopping. A different situation may be presented if the defendant is amenable to jurisdiction in only one forum.

¹³³ *Id.*

¹³⁴ *Id.*

As the court pointed out, the courts are split over whether this is the proper construction of § 1404(a).¹³⁵ The *Schreiber* court had invoked *Van Dusen* to support a contrary holding.¹³⁶ Indeed, this decision by the third circuit seems not to square with the Supreme Court's view that the purpose of the transfer statute is merely to change courtrooms, and, as the dissent in *Ferens* noted,¹³⁷ the Court only the same year had treated a transfer under § 1404(a) as not carrying with it a change in law.¹³⁸ It seems likely, therefore, that the Court will attempt soon to resolve the issue. Since certiorari has been granted in *Ferens*, a decision directly bearing on statutes of limitations forum shopping in federal courts should be expected.

3. Cases filed and heard in Mississippi federal court

Just as actions filed in federal court in Mississippi and transferred to another state may be subject to the Mississippi statute of limitations, actions filed there and heard there may, of course, also be subject to the Mississippi statute. Thus even when the plaintiffs make more than "a brief stop" in Mississippi, the federal courts provide an alternative forum within the haven. Application of the Mississippi statute is not automatic, however; the federal court will analyze, as the state court does, the pertinent statute of limitations from the state or country supplying the substantive law otherwise applied to the case. As the previous discussion of the judge-made exception to the general rule indicated,¹³⁹ if that statute is treated as substantive by the courts of the enacting state or country, the court will apply it to the Mississippi action. Three decisions from the 1970s illustrate this point.

The first, *Ramsay v. Boeing Company*,¹⁴⁰ discussed previously,¹⁴¹ required the court to thoroughly examine the law of Belgium to determine whether its prescription period for wrongful death had attributes characterizing it as substantive. The action was filed, thirteen days before expiration of the six-year Mississippi statute of limitations, against a

¹³⁵ *Id.* n.5. Other approaches include using the type of transfer as the determinant for which law the transferee court will apply, *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980), and using the *Van Dusen* rule even when the transfer is plaintiff-initiated. *Schreiber v. Allis-Chalmers Corp.*, 611 F.2d 790; *Gonzalez v. Volvo of America*, 734 F.2d 1221 (7th Cir. 1984).

¹³⁶ *Schreiber*, 611 F.2d at 792.

¹³⁷ *Ferens*, 862 F.2d at 37 (Seitz, Cir. J., dissenting).

¹³⁸ *Stewart Org. v. Ricoh Corp.*, 108 S.Ct. 2239, 2245 (1988).

¹³⁹ See *supra* notes 22-32 and accompanying text.

¹⁴⁰ 432 F.2d 599.

¹⁴¹ See *supra* notes 29-31 and *infra* note 92 and accompanying text.

jet manufacturer by passengers and descendants of passengers injured in the crash of a jetliner in Belgium in 1961. None of the plaintiffs or decedents were residents of Mississippi; the defendant was a Delaware corporation with its principal place of business in Washington. The plaintiffs admitted that the only reason for bringing the action in Mississippi was to take advantage of the statute of limitations. The action went to trial, ending with a general jury verdict for the defendant, and the plaintiffs appealed to the Fifth Circuit which, instead of reaching the grounds for error submitted by the plaintiffs, found that the five-year Belgian statute applied and barred the action, rendering decision on all other issues unnecessary.¹⁴²

After acknowledging Mississippi's traditional rule providing for application of its own "procedural" statute of limitations, the court noted that Mississippi also follows the generally recognized exception for statutory periods extinguishing rights of action rather than mere remedies and proceeded to examine the Belgian statute.¹⁴³ Among the factors the court pointed to as demonstrating the substantive nature of the statute was the fact that the prescription period was applied by the Belgian courts not at the desire of a party, but "as a matter of public order or policy,"¹⁴⁴ which the court must implement in the proper instance regardless of any waiver or renunciation by the parties.¹⁴⁵ The proper instance is when the facts sued upon constitute an infraction of the pertinent section of the Penal Code as well as establish civil liability. In such a case, the prescription period applied to the action regardless of any remedial measures that would or could be taken.¹⁴⁶ Thus, as treated in Belgium, the right as well as the remedy was conditioned by the statute.¹⁴⁷

A different result was obtained in two other cases decided by federal district courts in Mississippi, one by the northern district, one by the southern. In *Cummings v. Cowan*,¹⁴⁸ the decedent's husband, a resident of Tennessee, sued the persons, residents of Mississippi, allegedly responsible for the decedent's death, and notified the defendants' insurance company of the action. This first action was filed in Tennessee state court and was dismissed as barred by that state's one-year statute of limitations. A second action was then brought in federal court in Mississippi, and the insurance company moved for summary judgment on the same ground.¹⁴⁹ As the procedural law of the forum, the Mississippi six-year

¹⁴² *Ramsay*, 432 F.2d at 593-595.

¹⁴³ *Id.* at 596-99.

¹⁴⁴ *Id.* at 600.

¹⁴⁵ *Id.* at 601.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 603.

¹⁴⁸ 390 F. Supp. at 1254.

¹⁴⁹ *Id.* at 1252-53.

statute would apply, the court said, unless the Tennessee statute fell within the exception described in *Ramsay*.¹⁵⁰ The Tennessee wrongful death statute, however, contained no built-in limitation, and the courts of that state had instead applied its general one-year statute to wrongful death actions, thus "treating it as a procedural bar to legal remedies and not as an extinguisher or qualifier of a statutory cause of action."¹⁵¹ It did not apply to the action, which was allowed to proceed under the longer Mississippi statute.¹⁵²

Similarly, in *Steele v. G.D. Searle and Co.*,¹⁵³ the federal court for the southern district of Mississippi refused to apply the two-year Kansas statute of limitations because Kansas courts had treated it as procedural.¹⁵⁴ A Kansas resident brought an action which had accrued in Kansas against the defendant, who was not a resident of Mississippi, utilizing state attachment proceedings against resident creditors of the defendant.¹⁵⁵ Despite the defendant's arguments that Mississippi's borrowing statute should be interpreted as mandating application of another state's statute of limitations when the defendant is not subject to personal service of process, which the court found persuasive, it followed Mississippi state court rulings applying the Mississippi statute unless the other statute was regarded as substantive.¹⁵⁶

These federal court decisions, looking to the treatment by other forums of their statutes of limitations, may prove significant in light of the reservation expressed by Justice O'Connor in the Supreme Court's *Sun Oil* decision.¹⁵⁷ On the one hand, it would seem that any case involving application of the "substantive" statute of limitations of a foreign jurisdiction would fall into the exception applied in these lower court decisions and the question of whether a state could apply its own statute even in such circumstance would not arise. On the other hand, as long as it is the forum state's own courts, be they state or federal, that decide how a foreign jurisdiction treats its statute of limitations, and as long as the state may at any time abandon its adherence to the exception, the question will remain relevant. Courts in both Mississippi and New Hampshire have justified application of their own statutes of limitations, even to cases otherwise governed by the law of another state, by pointing to the fact that if one of the primary purposes of applying the other state's statute is to prevent the forum state from having to burden its courts

¹⁵⁰ *Id.* at 1254-55.

¹⁵¹ *Id.* at 1255.

¹⁵² *Id.*

¹⁵³ 422 F. Supp. 560.

¹⁵⁴ *Id.* at 563.

¹⁵⁵ *Id.* at 561.

¹⁵⁶ *Id.* at 563.

¹⁵⁷ See *supra* note 63 and accompanying text.

with actions the other state has deemed stale, this is clearly more an interest of the forum than of the other state. This justification could just as easily be used to support the forum's decision to no longer heed the foreign jurisdiction's characterization of its statute. To do so, of course, the statute of limitations "haven" would have to act against the course of recent developments. The new Restatement § 142 and the Uniform Conflict of Laws-Limitations Act provide for increased use by one state of the statute of limitations of another. However, until the Supreme Court rules on the matter, the conflicts these "proposals" themselves engender may leave individual states free to make all the "engraved invitations" they want.

THE FUTURE OF FORUM SHOPPING FOR STATUTES OF LIMITATIONS

Officially approved on May 19, 1988 by the American Law Institute,¹⁵⁸ after two years of debate, the new Restatement (Second) of Conflict of Laws § 142 ostensibly precludes the maintenance of statute of limitations havens. The Uniform Conflict of Laws-Limitations Act, approved in 1982 by the National Conference of Commissioners on Uniform State Laws and adopted to date in five states,¹⁵⁹ purports to do the same thing,¹⁶⁰ although obviously only if the haven state enacts it. Together these "proposals" present considered solutions to the "problem" of statute of limitations forum shopping. However, given the existing laws and rules with which they must be reconciled, and the autonomy of American state forums, the implementation of these "answers" may turn out to be just as problematic as the system they are intended to correct.

Restatement § 142

The Restatement section provides for the application of the forum's statute of limitations if it bars the claim. The forum's statute also applies when it permits the claim unless "(a) maintenance of the claim would serve no significant interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence."¹⁶¹ The comments accompanying the section suggest that it is specifically directed toward the type of policy practiced in statute of limitations havens like Mississippi.¹⁶² According to these comments, applying the forum's longer statute of

¹⁵⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, 1988 REVISIONS.

¹⁵⁹ UNIFORM ACT, *supra* note 34, 12 U.L.A. 57 (Supp. 1989).

¹⁶⁰ See Leflar, *The New Conflicts-Limitations Act*, 35 Mercer L. Rev. 461, 479 (1984) [hereinafter Leflar, *Conflicts-Limitations*].

¹⁶¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142.

¹⁶² *Id.* § 142, 1988 REVISIONS, comment g.

limitations disserves the forum's policy against preserving stale claims and the policies of states with more substantial interest in the action.¹⁶³ Thus, the comments conclude, in words that seem to address many of the Mississippi, New Hampshire and federal court cases,

the forum should not entertain a claim . . . when the state of the forum has only a slight contact with the case and the parties are both domiciled in the alternative forum under whose statute of limitations the action would be barred . . . Speaking generally, a claim that is not barred by the local statute of limitations should not be entertained if no interest of the forum state would be served . . . and the claim would be barred by the statute of limitations of the alternative forum. [To do so] would add to the burden on the local courts and bring no countervailing advantage. This will be so even in situations where entertainment of the claim would not be adverse to the interests of other states.¹⁶⁴

The rationale expressed by these comments reveal what may be a fatal weakness in the new Restatement section. By purporting to define the interests of the forum and then asserting that applying its own longer statute of limitations would disserve that interest, the comments leave the option open to the forum to refuse to implement the section because it sees its interests differently. If the Mississippi Supreme Court believes that Mississippi would benefit from allowing "homeless litigation" into its courts, it will not heed the Restatement. Likewise, as the New Hampshire Supreme Court has expressly noted, it is for the forum to determine whether claims are too stale for prosecution in its courts and the legislatures of the respective states can redress any adverse impact application of its own statute of limitations has on the state's interests.¹⁶⁵ Given a choice between following the Restatement and what it interprets as the intention of its state's legislature, a state court will certainly pick the latter. Finally, the comments to the Restatement also refer to recent decisions that have abandoned the traditional rule allowing the forum to apply its own procedural statute of limitations.¹⁶⁶ In those states where such decisions have in fact occurred the Restatement does indeed restate the law; in those, like Mississippi and New Hampshire, where they have not, the Restatement does nothing more than provide the courts of those

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* notes 6 and 98-104 and accompanying text.

¹⁶⁶ RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 142.

states a new statement of a rule they have already rejected. The Restatement, therefore, is not likely to bring any more rationality or consistency to the interstate application of statutes of limitations.

The Uniform Conflict of Laws-Limitations Act

Although it has been accepted in five states, the Uniform Act does not supply a rule any more palatable to the statute of limitations havens. This law provides for statutes to be treated as substantive in all cases and so for application of the statute of limitations of the state the substantive law of which governs the other aspects of the case.¹⁶⁷ In this way, the enacting state's "own conflicts law will always choose the limitations law that is substantively governing."¹⁶⁸ Section 4 of the law does provide an "escape clause" for those situations in which "the limitation period of another state . . . is substantially different from the limitation period" of the forum state and "has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim."¹⁶⁹ However, as the comment to this section states, it is only to be invoked in "extreme cases" wherein the "strong public policy" of a forum would warrant protection from the otherwise "harsh results" of application of the primary rule; the section "is not designed to afford an 'easy escape.'"¹⁷⁰

Eliminating as it does the traditional characterization of statutes of limitations as procedural, and presenting the same choice, this time to legislatures, between it and an existing borrowing statute, the Uniform Law does not appear to contribute a solution any more viable than the Restatement. While a legislature may not be as deferential to "established choice-of-law precedent" as the Supreme Court,¹⁷¹ it seems improbable that very many would make it impossible for their courts to apply a separate test for statute of limitations choice of law. The concept of a statute of limitations is simply too bound up with concepts of procedure to be wholly divorced from them.

Implementation of the "escape clause," possibly because it is so labeled, and certainly because it is to be very limited in application, may only highlight the scope of the departure from existing law. In a statute haven like Mississippi, utilization of the escape clause on those occasions when the statute has run in every other jurisdiction would require a court

¹⁶⁷ UNIFORM ACT, *supra* note 34, 12 U.L.A. 57 (Supp. 1989).

¹⁶⁸ *Id.* at § 2 comment, 12 U.L.A. 58 (Supp. 1989).

¹⁶⁹ *Id.* at § 4, 12 U.L.A. 59 (Supp. 1989)

¹⁷⁰ *Id.* comment.

¹⁷¹ See *Sun Oil v. Wortman*, 108 S.Ct. at 2125, and n.61 and accompanying text.

to not merely rely, as the Mississippi and New Hampshire courts do now, on a long-established rule the results of which in the instant case may be less than entirely rational, but to justify, in affirmative terms, why that state's courts should hear the case when the courts in every other state would not.¹⁷² The legislatures of neither Mississippi nor New Hampshire are likely to make this radical a change.

Conclusion

The ultimate determinant for the future of statute of limitations forum shopping is the continued existence of forum autonomy. Regardless of what unifying rules are posited, or the characterization given to them, the application of statutes of limitation will remain a matter for each forum to resolve. Even if the traditional Anglo-American view of such statutes as strictly procedural disappears entirely, each forum will still have the prerogative of deciding which statute applies; whether termed procedural or not, the application of the statutes will continue to be a function the forum performs as part of its "procedure." As much a product of federalism as an accident of history, this practice will not be changed by the force of criticism, no matter how enlightened, or by the recommendations of national committees, no matter how well considered.

It will continue as long as the only body able to change it, the United States Supreme Court, refuses to find it prohibited by the only truly unifying source of American law, the Constitution. Arguably, Congress could enact legislation, under the full faith and credit implementing clause,¹⁷³ compelling states to give effect to other states' statutes of limitations; however, this is an unlikely prospect, given the historical unwillingness of Congress to act in the field of conflict of laws.¹⁷⁴ Until the Court decides

¹⁷² According to Professor Leflar, who was a member of the committee assigned to prepare the Uniform Law, there was "vigorous argument" in the conference considering it over the section 4 "escape clause." The "point was persistently made" that with this clause forum shopping for statutes of limitations would continue, and a motion to strike the clause was "narrowly defeated." Leflar, *Conflicts-Limitations*, *supra* note 160, at 479.

¹⁷³ U.S. CONST. art. IV, § 1, cl. 2. The possibility of legislation creating a uniform federal statute of limitations is slim as well, since it would have little effect in diversity cases, statutes of limitation having been deemed substantive for *Erie* purposes. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). This distinction between statutes of limitations for *Erie* purposes and for conflict of laws remains operative. Justice Scalia used it in *Sun Oil* as grounds for rejecting the defendant's assertion that statutes of limitations are substantive law and entitled to full faith and credit. 108 S.Ct. 2124. However, at least one federal court has reached an anomalous result in this regard, holding that a federal statute of limitations applied to a contract containing an Illinois choice of law clause. The clause incorporated only substantive law, the court said, and could not, absent express intent, include a choice of statute of limitations because, in this context, such statutes are procedural. *Federal Deposit Ins. Corp. v. Petersen*, 770 F.2d 141 (10th Cir. 1985).

¹⁷⁴ W. REESE AND M. ROSENBERG, *CASES AND MATERIALS IN CONFLICT OF LAWS* 6 (8th ed. 1984.)

that a state may not apply its longer statute of limitations to actions which have no other relation to that state, the interstate and international application of statutes of limitations will remain complex and chaotic. Moreover, statute of limitations havens will continue to be important to plaintiffs who do their forum shopping after all the other forums are closed.