Is 28 U.S.C. § 1404(a) a Federal Forum-Shopping Statute?

Michaael B. Rodden
IS 28 U.S.C. § 1404(a) A FEDERAL FORUM-SHOPPING STATUTE?

Abstract: In 1948, Congress enacted section 1404(a) of Title 28 to allow transfers between federal district courts. Congress intended the statute to promote convenience in the federal courts. The statute does not specify which state's law applies following a transfer, but in 1964, in Van Dusen v. Barrack, the Supreme Court determined that the state law of the transferor court must apply following defendant-initiated transfers. The Van Dusen Court reasoned that application of the statute should promote convenience and uniformity and discourage forum-shopping in the federal courts. In 1990, in Ferens v. John Deere Co., the Supreme Court held that the state law of the transferor court must apply following all section 1404(a) transfers. The Ferens Court purported to base its decision on Van Dusen’s rationale and other considerations. The Ferens holding, however, violates these principles. This Comment analyzes the historical development of section 1404(a) and the Ferens decision, and proposes an application of the statute that increases both uniform application of state law and convenience in the federal courts.

In 1948, Congress enacted the federal change of venue statute.1 When a case is brought in a United States district court with proper, but not necessarily convenient venue, the statute allows the court to transfer the action to a more convenient district court. Congress enacted the statute to protect litigants, witnesses, and the public against unnecessary inconvenience, and to soften the sometimes harsh results afforded by the doctrine of forum non conveniens.2

Although the statute seems complete on its face, it fails to address which state’s law applies after a district court transfers an action to a district court in another state.3 In Ferens v. John Deere Co.,4 the United States Supreme Court addressed this issue and held that the state law of the transferor court governs all actions transferred under section 1404(a).5 The Ferens Court, however, failed to reconcile its ruling with the reasoning of Erie R.R. v. Tompkins,6 and Van Dusen v. Barrack.7 In Erie, the Court sought to encourage the uniform application of law in federal and state courts sitting in the same state.8 In Van Dusen, the Court determined that the prohibition of forum-shopping was a logical extension of Erie’s goal of uniformity.9 Ferens,

1. 28 U.S.C.A. § 1404(a) (West 1976) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).
3. See 28 U.S.C.A. § 1404(a); see also supra note 1.
5. Id. at 1277.
6. 304 U.S. 64 (1938).
8. See 304 U.S. at 74; see also infra note 17.
9. 376 U.S. at 636–37; see also infra note 40.
however, encourages manipulative plaintiffs to forum-shop and undermines the uniform application of state law by state and federal courts within each state.

This Comment discusses *Erie*, *Erie*’s progeny, section 1404(a), and Supreme Court cases addressing which state’s law applies following a section 1404(a) transfer. It examines the basic conflict that exists between the Court’s desire for uniformity and the *Ferens* Court’s interpretation of section 1404(a). It sets forth section 1404(a)’s legislative history and judicial interpretations and proposes the “proper” application of the statute in light of this background. The Comment advocates a rule that applies the law of the transferor court to defendant-initiated and sua sponte transfers, and the law of the transferee court to plaintiff-initiated transfers. It then suggests possible methods of putting this suggested rule into practice.

I. THE DEVELOPMENT OF THE CONFLICT BETWEEN SECTION 1404(a) AND THE SUPREME COURT’S GOAL OF UNIFORMITY

A. The *Erie* Doctrine and Choice of Law

1. The Origin of the *Erie* Doctrine

In *Erie R.R. v. Tompkins*, the Supreme Court found that in diversity actions, federal courts must apply state law unless the Constitution or a federal statute or treaty governs the action. In reaching its decision, the *Erie* Court expressly overruled the doctrine of *Swift v. Tyson*. *Swift* stated that, in diversity cases where no state statute governed the matter, federal courts were free to exercise independent judgment as to what the common law of the state was or should be. The *Erie* Court concluded that *Swift* hindered uniform application of law among federal courts as well as between the federal and state systems. This lack of uniformity prevented courts from equitably administering state law.

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10. 304 U.S. 64 (1938).
11. *Id.* at 78. The Court, however, did not reach the issue of which state’s law controls an action that is transferred to a new venue. *See* *Erie*, 304 U.S. 64. *See generally* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 4.2, at 194 (1985) (discussing *Erie*) [hereinafter CIVIL PROCEDURE].
12. 41 U.S. (16 Pet.) 1 (1842); *see also* 304 U.S. at 79–80.
14. 304 U.S. at 74.
15. *Id.* at 75.
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2. Choice of Law after Erie

Although the Erie Court concluded that federal courts could not disregard state common law, the Court failed to explain why Pennsylvania law, as opposed to New York law, governed the action.16 Three years after Erie, however, the Supreme Court resolved a choice of law issue by underscoring the importance of the Erie Court's goal of uniformity. In Klaxon Co. v. Stentor Elec. Mfg. Co.,17 the Supreme Court stated that federal courts must apply the choice of law rules of the states in which they sit.18 The Court reasoned that if federal courts had discretion to decide choice of law issues in diversity actions, plaintiffs could use the "accident of diversity of citizenship" to obtain decisions in federal courts that were unobtainable in state courts of the same state.19 The Court noted that this would undermine Erie's goal of uniformity within each state.20


Before section 1404(a)21 was enacted in 1948, parties faced with suits in inconvenient district courts had only one option: a motion for dismissal under the doctrine of forum non conveniens.22 Under that doctrine, courts with jurisdiction over an action could dismiss the suit if a more convenient forum in which to litigate the action existed.23 This provision for outright dismissal sometimes yielded harsh and inefficient results.24 Plaintiffs were not always able to sue in the "more convenient" forum because that state's statute of limitations had run.25 Even when plaintiffs were not time-barred, they were forced to file a new action in the more convenient forum.

16. See 304 U.S. 64; see also supra note 11.
17. 313 U.S. 487 (1941). Since Klaxon, the Supreme Court has repeatedly underscored the importance of Erie's goal of uniformity. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). Guaranty Trust concluded that Erie's primary purpose was to avoid the situation where state and federal courts within the same state reach substantially different results on the same issues. Id.; see also Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536–38 (1958).
18. 313 U.S. at 496.
19. Id.
20. Id.
21. 28 U.S.C.A. § 1404(a) (West 1976); see also supra note 1.
25. See, e.g., Callan v. Lillybelle, Ltd., 39 F.R.D. 600, 602 (D.C.N.Y. 1966). Some courts, however, conditioned the dismissal of a suit under forum non conveniens on the moving party's agreement not to challenge the suit on statute of limitations grounds in the new forum. See Civil Procedure, supra note 11, § 2.17, at 90 n.17.
In 1948, Congress enacted section 1404(a) to increase convenience in the federal courts by eliminating the inequities presented by the doctrine of forum non conveniens. Section 1404(a) allows federal courts to transfer suits among federal districts rather than dismissing the suits outright. Courts sua sponte, or parties by motion, may transfer actions to serve convenience and justice if the action could have originally been brought in the transferee forum.

Although courts agree that Congress intended section 1404(a) to make venue more convenient in diversity actions, neither the statute nor its legislative history indicates which state's law applies after a transfer. Thus, courts have been forced to determine which state's law applies following a transfer.

C. Choice of Law Following a Defendant-Initiated Section 1404(a) Transfer: Van Dusen v. Barrack and its Aftermath

I. Van Dusen v. Barrack

In Van Dusen v. Barrack, the Supreme Court decided which state's law applies following a defendant-initiated transfer under section 1404(a). The Van Dusen Court held that when a defendant initiates a transfer under section 1404(a), the transferee court must apply the law of the state in which the transferor court sits. The decision attempted to reconcile section 1404(a) choice of law issues in defendant-initiated transfers with the statute's goal of increasing conven-

26. See CIVIL PROCEDURE § 2.17, supra note 11, at 90.
27. 28 U.S.C.A. § 1404(a) (West 1976); see also supra note 1.
30. See 28 U.S.C.A. § 1404(a); see also supra note 1.
31. 376 U.S. 612.
32. Id. at 639.
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ience, the policy of discouraging forum-shopping, and Erie’s goal of increased uniformity.

First, the Van Dusen Court underscored the fact that section 1404(a) was enacted to increase convenience of parties and witnesses in the federal courts, by providing a mechanism for transfer to more convenient courtrooms. The Court determined that to satisfy the purposes of the statute, when a defendant initiates a transfer under section 1404(a), the law of the transferor court’s state must follow the defendant to the transferee forum. Applying the law of the transferee court’s state would decrease convenience, because courts would be reluctant to grant a transfer where the plaintiff’s claim could be prejudiced by the new law.

Second, the Van Dusen Court implied that the application of section 1404(a) should not increase forum-shopping. The Court concluded that if the law of the transferee court was applied following a defendant-initiated transfer, the statute could be used by defendants as a forum-shopping instrument.

Finally, the Van Dusen Court stated that its holding fully conformed with Erie’s goal of the uniform application of state law. Van Dusen concluded that the goal of uniformity was grounded in a desire to “ensure that the ‘accident’ of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.” The Court determined that if the state law of the transferee court were applied in defendant-initiated transfers, diverse defendants could obtain changes in the law that would be

33. Id. at 635-37.
34. Id. at 636.
35. Id. at 637.
36. See id. The Court recognized that increased judicial efficiency was an additional purpose of section 1404(a). Id. at 616.
37. Id. at 635-36.
38. See id. at 636.
39. Id. The Supreme Court has determined that Erie’s policy of uniformity is intertwined with the avoidance of forum-shopping. See id. at 638-39; see also Hanna v. Plumer, 380 U.S. 460, 467-68 (1965). The Hanna Court concluded that the Erie decision was “in part a reaction to the practice of ‘forum shopping’ ” that had arisen after Swift v. Tyson, and “is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal [as opposed to state] court.” Id. at 467; see also Ferens v. John Deere Co., 110 S. Ct. 1274, 1285 (1990) (Scalia, J., dissenting); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 39 (1988) (Scalia, J., dissenting).
40. 376 U.S. at 636.
41. Id. at 637; see also supra note 17.
42. 376 U.S. at 638.
unavailable to non-diverse defendants, and thereby undermine Erie’s goal of uniformity. Consequently, the Van Dusen Court held that the transferee court should apply the law of the transferor state following a defendant-initiated transfer.

2. The Aftermath of Van Dusen

Although the Van Dusen Court unequivocally restricted its holding to defendant-initiated transfers, several federal courts applied the holding following both plaintiff- and defendant-initiated transfers. These courts, therefore, determined that the state law of the transferor court must apply after any section 1404(a) transfer. The alternative view, however, was that Van Dusen’s express limitation of its holding to defendant-initiated transfers illustrated the fact that courts must deal with plaintiff-initiated transfers differently. Recently, in Ferens v. John Deere Co., the Supreme Court extended Van Dusen’s application of section 1404(a) to plaintiff-initiated transfers.


In March of 1990, the Supreme Court held in Ferens v. John Deere Co. that the state law of the transferor court applies following all section 1404(a) transfers. In Ferens, the plaintiff, a Pennsylvania resident, lost his hand after catching it in a harvester manufactured by the defendant, a Delaware corporation. The plaintiff filed a breach of warranty suit against the defendant in Pennsylvania district court based on diversity jurisdiction. Because Pennsylvania’s two-year

43. Id.
44. Id. at 639–40.
45. Id.
46. See, e.g., In re Bendectin Litig., 857 F.2d 290, 306 (6th Cir. 1988), cert. denied, 488 U.S. 1006 (1989); Consul Ltd. v. Solide Enter., Inc., 802 F.2d 1143, 1146 (9th Cir. 1986); see also 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3846, at 367 (1986).
47. See, e.g., Ferens v. Deere & Co., 862 F.2d 31, 35–36 (3d Cir. 1988), rev’d, 110 S. Ct. 1274 (1990); see also 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4506, at 79 (1982) (stating that the principal concern in determining section 1404(a) choice of law questions should be with preventing the use of the transfer statute as a forum-shopping instrument); AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1306(c) (1969).
49. Id. at 1277.
50. Id. at 1280.
51. Id. at 1277.
52. Id.
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statute of limitations on tort claims had run, the plaintiff filed his negligence claim in a Mississippi district court, where the applicable statute of limitations was six years. The plaintiffs then moved to transfer the Mississippi action to Pennsylvania under section 1404(a) for the sake of convenience. The suit's only connection to Mississippi was that the defendant did business there. The district court transferred the suit to Pennsylvania, where it was consolidated with the plaintiffs' breach of warranty action. The issue presented to the Supreme Court was whether the Mississippi or Pennsylvania statute of limitations governed the negligence claim.

I. The Majority Opinion in Ferens

The Ferens majority held that a transferee court must apply the state law of the transferor court regardless of who initiates the transfer. Ferens purported to base its holding on the rationale underlying the Van Dusen decision and "other considerations." Specifically, the Ferens Court found that Van Dusen mandated that choice of law under section 1404(a) must serve Erie's goal of uniformity, counter forum-shopping, and ensure that section 1404(a) transfer decisions serve convenience rather than fears of prejudice to the parties. The Ferens Court added the requirement that a section 1404(a) choice of law rule serve the administration of justice.

The Ferens Court determined that applying the law of the transferor state following a plaintiff-initiated transfer was consistent with Erie's desire for uniformity between the state and federal courts within each state. Ferens interpreted Erie to require that section 1404(a) not be

53. Id. at 1278. Mississippi had jurisdiction over the Delaware corporation by virtue of the fact that the company was a corporate resident of the state. Id.
54. Id.
55. Id.
56. Id. The district court dismissed the negligence claim, ruling that Pennsylvania law applied and that the state's two-year statute of limitations had run. Id. Ferens v. Deere & Co., 639 F. Supp. 1484, 1492 (W.D. Pa. 1986), aff'd, 862 F.2d 31 (3d Cir. 1988), rev'd, 110 S. Ct. 1274 (1990). The district court reasoned that the "interest of justice" would not be served if plaintiffs were allowed to forum-shop for a favorable limitations period. Id. The Third Circuit upheld the dismissal, Ferens v. Deere & Co., 862 F.2d 31, 36 (3rd. Cir. 1988), rev'd, 110 S. Ct. 1274 (1990), and the plaintiffs appealed. See 110 S. Ct. at 1278.
57. 110 S. Ct. at 1280.
58. Id.
59. Id. at 1280–81.
60. Id. at 1280, 1281–82.
61. Id. at 1282–83.
62. Id. at 1283–84.
63. Id. at 1280–81; see also Van Dusen v. Barrack, 376 U.S. 612, 637 (1964).
used to deprive parties of available state law advantages. The Court reasoned that applying the state law of the transferee forum would deprive plaintiffs of the benefits of the transferor state's law. Furthermore, the majority found that applying the transferee state's law would seriously undermine Erie's goal of uniformity by changing the applicable state law after a transfer.

The Ferens majority also concluded that applying the transferor state's law to plaintiff-initiated transfers did not violate Van Dusen's goal of preventing forum-shopping, because plaintiffs already have the power to forum-shop prior to bringing suit by virtue of the venue privilege. The Court reasoned, therefore, that applying the law of the transferor state did not offer plaintiffs any forum-shopping opportunities that were not already available under the Van Dusen rationale.

The Ferens majority also based its holding on a determination that section 1404(a)'s legislative and judicial histories compel the conclusion that the statute was enacted to increase the parties' convenience rather than to inhibit the plaintiff's ability to exercise his or her venue privilege. The Court reasoned that if the transferee state's law were applied to plaintiff-initiated transfers, plaintiffs considering transfer would have to balance concerns of convenience against the prospect of losing the transferor court's favorable law. This balancing of concerns was unacceptable, the Court found, because section 1404(a) transfers should be based on increased convenience for all of the parties rather than on potential changes in the law. The Ferens Court stated that the application of the transferee state's law might discourage courts from granting transfers where there is a possibility of a change in the law that could prejudice the defendant. The resulting inconvenient litigation would penalize the entire system for the plaintiff's poor forum choice.

Finally, the majority determined that, from an administrative standpoint, applying the law of the transferor court following all transfers is

64. 110 S. Ct. at 1280.
65. Id.
66. Id. at 1281.
67. Id. at 1281-82; see also Van Dusen, 376 U.S. at 636. The Ferens majority recognized that the plaintiffs were forum-shopping. 110 S. Ct. at 1278. Nonetheless, the Court determined that this type of forum-shopping was irrelevant, because the plaintiffs gained no legal advantage and could have brought suit in Mississippi regardless of the transfer. Id. at 1282.
68. 110 S. Ct. at 1282.
69. Id. at 1279, 1282; see also Van Dusen, 376 U.S. at 635.
70. 110 S. Ct. at 1283.
71. Id.
72. Id.
73. Id.
the most practical way of determining which state's law applies. The Court was concerned that a rule applying the law of the transferee court to plaintiff-initiated transfers would cause too much uncertainty in situations where the motion to transfer was made sua sponte, by both the plaintiff and the defendant, or by only one of several plaintiffs. The Court concluded, therefore, that establishing a firm rule prevents the type of uncertainty and confusion that could cause unnecessary litigation in the federal courts.

2. The Dissenting Opinion in Ferens

In dissent, Justice Scalia argued that the majority's opinion was flawed for several reasons, two of which are relevant to this Comment. First, Scalia maintained that the holding converts section 1404(a) into a forum-shopping device for manipulative plaintiffs, thereby decreasing the odds of uniformity within each state, contrary to the reasoning of Erie, Klaxon and Van Dusen. Second, the dissent asserted that the solution offered by the majority is not the most administratively efficient method of answering the question of which state's law applies after a transfer.

In discussing forum-shopping, Justice Scalia claimed that the majority's concern for protecting the plaintiffs' venue privilege was misplaced, because the plaintiffs actually had two venue choices, the temporary venue choice of Mississippi and the "actual" venue choice of Pennsylvania. Consequently, the dissent concluded that the majority's holding allows exactly the type of manipulation of federal diversity jurisdiction that is decried by Klaxon.

The Ferens dissent also concluded that, contrary to the majority's opinion, applying the state law of the transferor court will decrease convenience in the federal courts because of increased forum-shopping. The dissent predicted that the decision will cause inefficiency and confusion in the federal courts as plaintiffs dart in and out of various courts.

74. Id. The Ferens Court recognized that Van Dusen did not adequately address administrative concerns. Id.
75. Id.
76. Id. at 1283–84.
77. Ferens v. John Deere Co., 110 S. Ct. 1274, 1286 (1990) (Scalia, J., dissenting). Although Justice Scalia did not agree with the majority's holding, he did not specify which state's law he would have applied. 110 S. Ct. 1274.
78. Id. at 1286–87. Justice Scalia characterized the goal of Erie and Klaxon as the prevention of forum-shopping between the federal and state court systems. Id. at 1285.
79. Id. at 1287.
80. Id. at 1286.
81. Id.; see also supra notes 17–20 and accompanying text.
82. 110 S. Ct. at 1287.
ous forums on their way to their true choice of courtrooms. The dissent argued that rather than furthering section 1404(a)'s goal of increased convenience in the courts, the majority's decision will destroy it.

II. THE APPLICATION OF SECTION 1404(a) WITHIN THE PARAMETERS OF VAN DUSEN AND FERENS

The Ferens Court's application of section 1404(a) is incorrect in light of the reasoning behind Van Dusen. Ferens' decision to apply the law of the transferor court following all section 1404(a) transfers threatens to convert the statute into a forum-shopping tool that will undermine Erie's goal of the uniform application of law, contrary to Van Dusen's rationale. As Van Dusen demonstrated, however, section 1404(a) need not conflict with the policies underlying Erie. Had the Ferens Court properly applied Van Dusen's reasoning, the Court could have interpreted the statute so as to increase convenience in the federal courts, but not decrease uniformity. This Comment's interpretation of the rationale underlying Van Dusen demonstrates that the transferor court's law should be applied following court- and defendant-initiated transfers and the transferee court's law should be applied following plaintiff-initiated transfers.

A. The Van Dusen-Ferens Rationale

After Ferens and Van Dusen, choice of law rules under section 1404(a) must meet four important criteria. The Van Dusen rationale, on which the Ferens Court relied, established three of these criteria. First, the Van Dusen Court stated that the recognized purpose of section 1404(a) must be satisfied when determining which state's law applies. Second, the Court sought to discourage forum-shop-

83. Id.
84. Id.
85. The rule set forth in Ferens will be referred to as the "movant-independent" rule, because the Court chose to disregard who initiated the transfer in determining which state's law applies.
86. 110 S. Ct. at 1284-88 (Scalia, J., dissenting); see also Van Dusen v. Barrack, 376 U.S. 612, 637 (1964); supra notes 42-45 and accompanying text.
87. The rule advocated by the Comment will be referred to as the "movant-dependent" rule, because its determination of which state's law applies following a transfer depends upon who initiates the transfer.
88. 110 S. Ct. at 1280, 1283-84; see also supra note 59 and accompanying text.
89. 376 U.S. 612; see also supra notes 34-36 and accompanying text.
90. 376 U.S. at 635-37; see also supra notes 37-39 and accompanying text. The Court stated that the purpose of section 1404(a) is to increase convenience in the federal courts. 376 U.S. at 636-37.
ping. Third, the Court concluded that a choice of law rule under section 1404(a) should not undermine the goal of uniformity between state and federal courts within each state. The *Ferens* Court added that section 1404(a) choice of law rules should be administratively practical.

**B. The Conflict Between *Ferens*’s Movant-Independent Rule and the *Van Dusen* Rationale**

The *Ferens* Court’s holding that the law of the transferor court applies following all section 1404(a) transfers does not comply with the *Van Dusen* rationale, or with the Court’s own additional concern with the practical administration of justice. Although the *Ferens* majority claimed that its holding was in accord with *Van Dusen*, the *Ferens* decision will actually undermine *Erie*’s goal of uniformity between federal and state courts, decrease convenience in the federal courts, and hinder the administration of choice of law rules.

**I. The Movant-Independent Rule, Uniformity, and Forum-Shopping**

The *Ferens* Court asserted that the movant-independent rule does not violate *Van Dusen*’s goal of uniformity or encourage forum-shopping by plaintiffs. The majority in *Ferens* concluded that plaintiffs will not be able to engage in any extra forum-shopping as a result of the Court’s newly adopted rule, because the venue privilege already gives plaintiffs the opportunity to select any available forum prior to bringing suit. Common sense, however, indicates that the movant-independent rule will decrease uniformity by encouraging forum-shopping, because plaintiffs are no longer forced to balance convenience with favorable law when selecting a forum.

Prior to the *Ferens* decision, the ability of plaintiffs to forum-shop was somewhat circumscribed by the relative convenience of each available federal courtroom. Plaintiffs had to consider the convenience of a particular forum along with the substantive law, because, under the regime remaining after *Van Dusen*, many courts did not allow plaintiffs to transfer favorable law along with a transfer of the action. Before *Ferens*, therefore, plaintiffs balanced their desire to forum-shop

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91. 376 U.S. at 636; see also supra notes 40–41 and accompanying text.
92. 376 U.S. at 637; see also supra notes 42–45 and accompanying text.
93. 110 S. Ct. at 1283–84; see also supra notes 75–77 and accompanying text.
94. 110 S. Ct. at 1280; see also supra note 59 and accompanying text.
95. 110 S. Ct. at 1280–1282; see also supra notes 64–69 and accompanying text.
96. 110 S. Ct. at 1282; see also supra notes 68–69 and accompanying text.
97. See supra note 48 and accompanying text.
with a competing desire to find a reasonably convenient, and ostensibly permanent, venue in which to litigate the action. Following Ferens, however, the Van Dusen restraints no longer exist, because section 1404(a) can now be used to secure the law of any "jurisdictionally correct" forum, regardless of that forum's relative convenience. Convenience need not figure into the pre-filing concerns of plaintiffs given Ferens's implied sanction of the file-and-transfer forum-shopping strategy.

Furthermore, plaintiffs need only seek those forums that have the bare minimum of contacts necessary to obtain jurisdiction over the defendant, but which have no other connection to the case. Section 1404(a)'s goal of increasing convenience ensures a later change of venue. Any forum with minimum contacts and favorable law will now be fair game for a section 1404(a) pit-stop. Plaintiffs are free to forum-shop, secure in the knowledge that the Ferens decision will protect their "legal booty" when they are truly ready to select a forum.

By converting section 1404(a) into a forum-shopping instrument, the Ferens Court's application of the statute will decrease uniformity between the federal and state courts within each state, contrary to the reasoning underlying Van Dusen. Following a plaintiff-initiated change of venue, the transferee federal court will be forced to apply the state law of the transferor court. Plaintiffs are thereby able to achieve a result in federal court that they could not have obtained had they originally filed the suit in a state court of the transferee state. Contrary to the Ferens Court's claims, this result undermines Van Dusen's goal of uniformity between the federal and state courts within each state.

2. The Movant-Independent Rule and Convenience in the Federal Courts

The Ferens Court stated that the application of the transferee state's law would undermine convenience in the federal courts by forcing

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98. 110 S. Ct. at 1280; see also supra note 51 and accompanying text.
99. See 110 S. Ct. at 1284.
100. The majority in Ferens argued that manipulation of section 1404(a) by forum-shopping plaintiffs would be prevented by the fact that the statute does not provide for an automatic change of venue. 110 S. Ct. at 1284. The Court reasoned that plaintiffs receive no guarantees that an action will be transferred, and therefore should be hesitant to forum-shop. Id. As Justice Scalia noted in his dissent, however, the only impact of the majority's "no-guarantee" reasoning will be to encourage plaintiffs to select the most inconvenient favorable-law forum available, in order to maximize the likelihood of a later transfer. Id. at 1288 (Scalia, J., dissenting).
101. See 376 U.S. at 635-39; see also supra notes 40-45 and accompanying text.
102. See 376 U.S. at 635-39; see also supra notes 40-45 and accompanying text.
plaintiffs to sacrifice convenience for favorable law.\textsuperscript{103} In reality, however, the Court’s concern for potential sacrifices by plaintiffs is misguided. The Court failed to recognize that this so-called sacrifice only becomes necessary when plaintiffs are engaged in forum-shopping. If plaintiffs are motivated solely by convenience, they will choose the most convenient forum available prior to bringing suit. It is only when plaintiffs are motivated by a desire to forum-shop that they are “forced to choose” between convenience and favorable law. Therefore, the “sacrifice” that the majority seeks to prevent can actually be prevented by plaintiffs themselves by basing their venue selections on convenience rather than favorable law.

3. The Movant-Independent Rule and Administrative Concerns in the Federal Courts

Although the \textit{Ferens} Court found that applying the law of the transferor court’s state was the most practical rule from an administrative point of view,\textsuperscript{104} the decision may well result in a logistical logjam in the federal courts. As plaintiffs ride in and out of various forums selecting favorable state laws to bring back to their ultimate choice of courtrooms, federal courts with only the most tenuous connection to an action will be forced to consume valuable resources ruling on transfer motions.\textsuperscript{105} The courts may be faced with a stream of motions to change venue as forum-shopping begins to flourish. Although section 1404(a) will continue to offer relief to defendants in inconvenient forums by giving them an opportunity to transfer to more hospitable courtrooms, the statute will most likely find its greatest use among forum-shopping plaintiffs. This result would prove quite ironic given \textit{Van Dusen}’s statement that section 1404(a) was intended to promote convenience in the federal court system,\textsuperscript{106} and \textit{Ferens}’s determination that choice of law rules under the statute should be administratively practical.\textsuperscript{107}

C. How \textit{Ferens} Should Have Been Decided in Light of \textit{Van Dusen}: The Movant-Dependent Rule

\textit{Ferens} could and should have been decided in accordance with the \textit{Van Dusen} Court’s aim of forging a choice of law rule to promote

\textsuperscript{103} 110 S. Ct. at 1283; \textit{see also supra} notes 70–74 and accompanying text.
\textsuperscript{104} 110 S. Ct. at 1283; \textit{see also supra} notes 75–77 and accompanying text.
\textsuperscript{105} \textit{See} 110 S. Ct. at 1287 (Scalia, J., dissenting); \textit{see also supra} notes 83–85 and accompanying text.
\textsuperscript{106} 376 U.S. at 616; \textit{see also supra} notes 37–39 and accompanying text.
\textsuperscript{107} 110 S. Ct. at 1283; \textit{see also supra} notes 75–77 and accompanying text.
convenience and uniformity and to discourage forum-shopping, as well as with the Ferens Court's own concern with the practical administration of justice. Specifically, the Ferens Court should have developed the following "movant-dependent" rule: the law of the transferor court's state applies following defendant- and court-initiated transfers, and the law of the transferee court's state applies following plaintiff-initiated transfers. Ferens's shortcomings arise because the Court misapplied the reasoning behind Van Dusen when it directly extrapolated the Van Dusen holding to cover plaintiff-initiated transfers, contrary to Van Dusen's express limitation to defendant-initiated transfers.

I. The Effect of the Movant-Dependent Rule on Uniformity and Forum-Shopping

Although the Van Dusen Court limited its holding to defendant-initiated transfers, the Court's uniformity rationale suggests that following plaintiff-initiated transfers, the transferee court should apply the law of the state in which the court sits. Ferens, therefore, was wrongly decided.

a. The Movant-Dependent Rule Prevents Litigants From Using Section 1404(a) to Achieve Results in Federal Court that Are Unavailable in a State Court Sitting in the Same State

The Ferens Court directly extended Van Dusen's holding to plaintiff-initiated transfers without properly interpreting the rationale that supported the Van Dusen decision. The Van Dusen Court found that in order to achieve uniform application of state law, section 1404(a) must be applied so that a diverse litigant obtains no advantages unavailable to a non-diverse litigant. In Van Dusen's defendant-initiated transfer situation, this meant that the law of the transferor state must follow defendants to the transferee forum. In the case of a plaintiff-initiated transfer, however, the law of the trans-

108. 376 U.S. at 635-37; see also supra notes 37-39 and accompanying text.
109. 376 U.S. at 637; see also supra notes 42-45 and accompanying text.
110. 376 U.S. at 636; see also supra notes 40-41 and accompanying text.
111. 110 S. Ct. at 1283; see also supra notes 75-77 and accompanying text.
112. 376 U.S. at 640; see also supra note 46 and accompanying text.
113. 376 U.S. at 640; see also supra text accompanying note 46.
114. 376 U.S. at 640; see also supra text accompanying note 46.
115. 376 U.S. at 612; see also supra notes 34-36 and accompanying text.
116. 376 U.S. at 637-38; see also supra notes 42-45 and accompanying text.
117. 376 U.S. at 637-39; see also supra notes 42-45 and accompanying text.
feree court must be applied in order to prevent plaintiffs from obtaining a result in federal court that they could not have obtained in a state court of the transferee forum. The movant-dependent rule, therefore, complies with Van Dusen’s application of section 1404(a) and does not undermine uniformity between the federal and state systems.

b. The Movant-Dependent Rule Discourages Forum-Shopping

Unlike the Ferens rule, the movant-dependent rule prevents plaintiffs from forum-shopping after they have filed suit in a particular forum. If the Ferens Court had adopted the movant-dependent approach, plaintiffs would be faced with choosing a forum based on either convenience or favorable law. The resulting balancing of utility against legal advantage would place a limit on plaintiffs’ ability to forum-shop using the venue privilege. Plaintiffs could still choose venues based solely on their determination of which state offers the most favorable law, and, given the venue privilege, plaintiffs could still forum-shop before filing suit. If inconvenience proved too great after the suit was filed, however, and plaintiffs then moved for transfer, they would lose the favorable law.

This approach is supported by the Van Dusen decision, because it neither expands nor contracts the plaintiffs’ right to choose any proper venue. The movant-dependent rule limits plaintiffs to a single, realistic venue selection rather than the two venue selections allowed under Ferens. The proposed solution would therefore uphold Van Dusen’s goal of discouraging forum-shopping.

2. The Movant-Dependant Rule and Section 1404(a)’s Goal of Increased Convenience

The movant-dependant rule does not undermine section 1404(a)’s goal of convenience. The rule supports this goal by encouraging plaintiffs to file initially in the venue where they ultimately want to try the case. The movant-dependent rule, therefore, saves the parties and the courts the inconvenience of the interim filing and transferring that results from plaintiffs’ forum-shopping under the Ferens Court’s rule.

3. The Movant-Dependent Rule and Ferens’s Administrative Concerns

Applying the law of the transferee forum following a plaintiff-initiated section 1404(a) transfer does not undermine Ferens’s administrative concerns or section 1404(a)’s recognized aim of increasing judicial
efficiency. In fact, the movant-dependent rule may actually increase judicial efficiency, because it avoids the inefficiencies inherent in the \textit{Ferens} holding.\textsuperscript{118} Courts will not be forced to contend with transfer motions that arise simply because forum-shopping plaintiffs are passing through the forum. The fact that the movant-dependent rule prevents misuse of the transfer statute by either party\textsuperscript{119} ensures that those section 1404(a) motions that do come before the courts will be based on a good faith desire to transfer the suits to more convenient courtrooms, rather than a desire to forum-shop. Unlike the \textit{Ferens} rule, the movant-dependent rule promotes administrative efficiency in the federal courts.

\textbf{D. Given That the Supreme Court Decided \textit{Ferens} Wrongly, How Can the Correct Result be Achieved?}

Because the \textit{Ferens} decision incorrectly determined which state's law should apply following a plaintiff-initiated transfer, it is necessary to consider how the holding can be corrected. There are at least three potential means of achieving a proper result. First, the Supreme Court may realize the disadvantages of the movant-independent rule and reverse \textit{Ferens}, a 5 to 4 decision, at its first opportunity. This, however, seems highly unlikely due to the Court's deference to stare decisis. Second, Congress could amend section 1404(a) to specify which state's law applies after a change of venue, but this is also unlikely. Finally, the lower federal courts could limit \textit{Ferens} to its specific facts. Neither the \textit{Ferens} decision nor section 1404(a) prevents trial courts from effectively determining which state's law applies on a case-by-case basis. In light of the fact that it could be implemented immediately, the case-by-case approach is the best method for solving the problems caused by the \textit{Ferens} decision.

\textbf{1. The Supreme Court Is Unlikely to Overrule \textit{Ferens}}

The Supreme Court may be presented with an opportunity to overrule \textit{Ferens}. If the \textit{Ferens} decision causes inefficiency and confusion in the federal courts as suggested above,\textsuperscript{120} the Supreme Court may reconsider its conclusion that the \textit{Ferens} approach is the most practical method of applying section 1404(a). Given the Court's deference

\begin{itemize}
\item \textsuperscript{118} See supra notes 105-08 and accompanying text.
\item \textsuperscript{119} See supra notes 116–18 and accompanying text.
\item \textsuperscript{120} See supra notes 105–08 and accompanying text.
\end{itemize}
to stare decisis, however, it seems unlikely that it would overrule Ferens unless the damage caused by the decision is extensive.\textsuperscript{121}

2. \textit{Congress Could Amend Section 1404(a) to Specify Which State's Law Applies Following a Transfer}

The problems associated with section 1404(a) are in large part due to incomplete drafting.\textsuperscript{122} Therefore, Congress could correct the mistaken holding in Ferens, and complete the task of drafting section 1404(a) by amending the statute to stipulate that the transferee state's law applies following defendant- or court-initiated transfers, and that the transferor state's law applies following plaintiff-initiated transfers.

A congressional amendment offers the advantages inherent in the legislative process. Congressional committees can study alternative solutions and estimate their impact through testimony solicited from judges and attorneys affected by the decision. The opportunity for study and analysis that the legislative process offers would likely produce a fairly well-reasoned solution to the problem, such as the movant-dependent rule suggested above.

This approach, however, has disadvantages. First, a legislative discussion of modifying section 1404(a) could become muddled by competing special interests. Trial attorneys interested in the prospect of sanctioned forum-shopping may exert pressure on Congress to retain the flawed reasoning of Ferens. Their demands could drown out support from other groups for increased convenience in the federal courts.

Furthermore, statutory solutions, like judicial solutions, have the potential for misinterpretation in the lower courts. A congressional solution may cause other unforeseen conflicts within the federal courts.

3. \textit{Lower Federal Courts Could Confine Ferens to its Facts And Effectively Determine Which State's Law Applies on a Case-by-Case Approach}

The lower federal courts could offer an alternative solution to the dilemma presented by Ferens. District courts could limit Ferens to its

\textsuperscript{121} The Court's composition has changed since the Ferens decision was handed down. Justice Souter replaced Justice Brennan on the Court in October 1990. It is unlikely, however, that Justice Souter's presence will result in a different outcome should the Supreme Court reconsider the application of section 1404(a), because Justice Brennan joined the dissent in Ferens. During his tenure on the New Hampshire Supreme Court and the United States Court of Appeals for the First Circuit, Justice Souter did not address the issue of which state's law applies following a section 1404(a) transfer.

\textsuperscript{122} See supra notes 30–31 and accompanying text.
facts and achieve the practical result of the movant-dependent rule through a case-by-case approach. The courts could utilize the internal mechanisms of section 1404(a) to take into account the relative fairness of a transfer motion, and to specifically disallow any plaintiff-initiated transfer that is motivated by forum-shopping.

The “in the interest of justice” language of section 1404(a) offers an interesting guideline for a case-by-case approach to the problems presented by Ferens. Courts have determined that a decision to grant a transfer “in the interest of justice” lies within the broad discretion of the trial court. This language could be interpreted to mean that the court should consider the basic “fairness” of granting a change of venue. The fact that a plaintiff brought suit in a forum for the sole purpose of transferring the favorable law elsewhere could be one factor that influences a determination of fairness.

Although this approach achieves a practical result different than that contemplated by the Ferens Court, it does not violate the precedent established by the Supreme Court. Under this approach, Ferens’s rule that the law of the transferor court apply following all completed transfers could be maintained. Where the plaintiff is engaged in forum-shopping, however, the transfer would not be granted.

This case-by-case approach would prevent a conflict with the goal of uniformity, because the statute could no longer easily be used to forum-shop. Plaintiffs attempting to forum-shop would be faced with the uncertainty of whether their motion to transfer would be granted. This approach would encourage plaintiffs to be more careful in their initial choice of forums and might reduce the overall number of transfer motions. The case-by-case approach would entrust the balancing of section 1404(a) and uniformity concerns in individual cases to those who are the most capable of reaching a just result: federal district

123. Ferens requires that district courts apply the law of the transferor court’s state following all section 1404(a) transfers. Limiting Ferens to its facts would mean addressing the goals of convenience, efficiency, and uniformity prior to a transfer. See infra notes 125–27 and accompanying text.

124. 28 U.S.C.A. § 1404(a) (West 1976); see also supra note 1.


126. In fact, the Court somewhat cryptically suggested just such a possibility when it stated, “[n]o one has contested the justice of transferring this particular case, but the option remains open to defendants in future cases.” Ferens v. John Deere Co., 110 S. Ct. 1274, 1284 (1990). Ferens seems to suggest that defendants could challenge the justice of a transfer based on plaintiffs’ motivation for moving for that transfer. The dissent, however, dismissed the majority’s apparent suggestion as inconsistent with the reasoning behind the Court’s holding. Id. at 1288 (Scalia, J., dissenting).
court judges. Trial courts can assess the credibility of each party's motivation for transferring a suit and stop forum-shopping at its source.

Although the case-by-case approach is a possible alternative, it has inherent disadvantages. Determining whether plaintiffs are forum-shopping may be impractical. Requiring courts to rule on the legitimacy of plaintiffs' venue selections in each and every diversity action adds entirely new and time-consuming evidentiary requirements to the federal courts' already full dockets. Also, cases that are not transferred may cause inefficiency in the courts. Refusing to grant plaintiffs' motions to transfer based on a desire to "punish" the plaintiffs for forum-shopping will mean that additional cases might be tried in less than convenient forums. This result is attenuated somewhat by the ability of defendants and courts to initiate transfers, but in those cases forum-shopping plaintiffs would again be rewarded with favorable law. Also, the judicial process is limited to the case at hand. The judiciary's inherently fact-dependant approach is more limited in scope than the legislative process and, unless the problem is addressed by the Supreme Court, is open to potential conflicts among the various federal circuits. Finally, lack of predictability in the early application of a case-by-case approach could prove extremely unfair to parties who suddenly find themselves unable to transfer their claims.

4. The Case-by-Case Approach Is the Best Solution for Solving the Problems Created by Ferens

The case-by-case approach is the best way to address the problems raised by Ferens. Although the case-by-case method has disadvantages, it is the most reasonable method for correcting Ferens. Trial courts could immediately mitigate the potential damage resulting from the flawed reasoning of Ferens by applying such an approach. While some plaintiffs may be surprised by the suggested interpretation of section 1404(a), and some cases, therefore, may be litigated in less than

127. The majority in Ferens, however, had no difficulty in determining that the plaintiffs were engaged in forum-shopping. Id. at 1278.

128. Courts already must consider the "technical" propriety of venue selections. The case-by-case approach, however, would force courts to consider the motivation of litigants along with the mechanical aspects of the applicable venue statute.

129. This could occur where a plaintiff, relying on Ferens' invitation to forum-shop, files suit in an inconvenient, albeit legally friendly, forum. The district court would be faced with a choice of transferring the suit and, according to Ferens, allowing the plaintiff to appropriate the favorable law, or denying the transfer and decreasing judicial efficiency by litigating the suit in an inconvenient forum.
convenient forums, these problems should decrease as plaintiffs become aware that district courts will not allow forum-shopping.

III. CONCLUSION

The Ferens Court based its decision to apply the law of the transferor court's state following all section 1404(a) transfers on the mistaken belief that it was the most practical way to apply section 1404(a) so as to encourage uniformity and discourage forum-shopping. The Ferens rule is not a workable method for applying the federal transfer statute, however. In fact, Ferens turns section 1404(a) into a forum-shopping instrument that undermines uniformity and convenience in the federal courts.

A more attractive approach to balancing section 1404(a) with the goals of encouraging uniformity and discouraging forum-shopping is to follow the rationale of the Van Dusen Court and apply the law of the transferee court's state following plaintiff-initiated transfers. This approach avoids the problem of using section 1404(a) as a forum-shopping device and promotes greater uniformity than the approach utilized in Ferens. The Van Dusen rationale supports a system that prevents litigants in diversity cases from using section 1404(a) to achieve a result in federal court that is unavailable in a state court sitting in the same state.

Although the Ferens decision could be overruled by Congress or the Supreme Court, the case-by-case approach is the best way of correcting the decision's defects. Federal courts should consider plaintiffs' motivation in requesting transfers under section 1404(a). If the court determines that a transfer request is motivated by forum-shopping, the plaintiff's motion should be denied. If, however, the request is motivated solely by convenience considerations, then the motion should be granted and Ferens's rule that the law of the transferor court applies in the more convenient forum should be respected. The case-by-case approach would promote the goals of Erie, Van Dusen and Ferens by encouraging convenience and uniformity, and by discouraging forum-shopping.

Michael B. Rodden