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Forum Selection Clauses in Light of the *Erie* Doctrine and Federal Common Law: *Stewart Organization v. Ricoh Corporation*

Ricoh Corporation, a manufacturer of copy machines, and the Stewart Organization, a wholesale distributor, signed a dealer sales agreement that required that any litigation in connection with the contract be initiated in New York City.¹ In spite of the forum selection clause,² the Stewart Organization brought suit under the contract in an Alabama federal district court. Ricoh moved for transfer of the case to New York.³

The district court refused to transfer the case, holding that state law governed the forum selection clause and that the

1. *Stewart Org. v. Ricoh Corp.*, 779 F.2d 643, 645 (11th Cir. 1986), *aff'd per curiam on rehearing en banc*, 810 F.2d 1066 (11th Cir.), *cert. granted*, 108 S. Ct. 225 (1987). The actual clause read as follows:

Dealer and Ricoh agree that this Agreement, and all documents issued in connection therewith, shall be governed by and interpreted in accordance with the laws of the State of New York. Dealer and Ricoh agree that any appropriate state or federal district court located in the Borough of Manhattan, New York City, New York, shall have exclusive jurisdiction over any case or controversy arising under or in connection with this Agreement and shall be a proper forum in which to adjudicate such case or controversy.

Id. at 645 n.2. The clause included a choice of law provision requiring that litigation be governed by New York law. *Id.*

2. *Forum selection clause* is the most common term used to refer to contractual provisions specifying the place for litigation arising out of a contract. Forum selection clauses can be exclusive, nonexclusive, or applicable to one party only. Exclusive clauses require litigation to be brought only in the designated forum. *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148 (N.D. Tex. 1979). Nonexclusive clauses allow litigation in the designated forum but do not limit the parties to the designated forum. Nonexclusive clauses are often referred to as *consent to jurisdiction clauses*. *Hunt Wesson Foods v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987). Clauses limited to one party only generally seek to bind the party with multiple venue options and protect the other party from having to defend a lawsuit in a distant forum. *Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.*, 656 F. Supp. 464, 466 (S.D.N.Y. 1987), *aff'd*, 838 F.2d 656 (2d Cir. 1988). In the terminology of civil law, these clauses are referred to as *prorogation clauses* by the contractual forum state and *derogation clauses* by the excluded forum state. See Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 134-36 (discussing distinctions between exclusive, nonexclusive, and one-party forum selection clauses).

3. 779 F.2d at 645.

clause was invalid as against Alabama public policy.⁴ On interlocutory appeal, an Eleventh Circuit panel reversed and remanded, ordering transfer of the case to New York.⁵ The Eleventh Circuit reheard the case en banc and affirmed the panel decision.⁶ In *Stewart Organization v. Ricoh Corp.*,⁷ the en banc court held that in diversity cases federal law governs the enforceability of forum selection clauses and that the forum selection clause at issue was enforceable.⁸

The enforceability of forum selection clauses is an area of extensive litigation in federal and state courts.⁹ In addressing this question, the federal circuits have differed on whether state or federal law should govern in diversity cases.¹⁰ Although the *Ricoh* court applied federal law, two other circuits have held that state law governs the issue.¹¹

The Eleventh Circuit is the first appeals court to analyze the forum selection issue under the *Erie* doctrine.¹² Although application of federal law would lend stability and predictability to contracts between interstate or international parties and would minimize the impact of the states' nonuniform treatment

4. *Stewart Org. v. Ricoh Corp.*, 810 F.2d 1066, 1067 (11th Cir.) (en banc) (per curiam), cert. granted, 108 S. Ct. 225 (1987). The district court cited *Redwing Carriers v. Foster*, 382 So. 2d 554, 556 (Ala. 1980), in which the Supreme Court of Alabama refused to enforce a forum selection clause because it would completely divest Alabama courts of jurisdiction. See 810 F.2d at 1069-70. The *Redwing Carriers* court stated: "We consider contract provisions which attempt to limit the jurisdiction of the courts of this state to be invalid and unenforceable as being contrary to public policy." *Redwing Carriers*, 382 So. 2d at 556.

5. 779 F.2d at 651.

6. 810 F.2d at 1071.

7. 810 F.2d 1066 (11th Cir.) (en banc) (per curiam), cert. granted, 108 S. Ct. 225 (1987).

8. *Id.* at 1068. During the printing of this issue, the United States Supreme Court issued an opinion affirming and remanding the case. See *Stewart Organization v. Ricoh Corp.*, 56 U.S.L.W. 4659 (U.S. June 21, 1988) (No. 86-1908).

9. A WESTLAW search for cases just since 1980 on the topic produces 211 federal cases and 50 state cases. The query is: synopsis (forum /s choice selection) & date (after 1979).

10. See *infra* notes 31-35 and accompanying text.

11. See *infra* note 34 and accompanying text.

12. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The *Erie* Doctrine consists of *Erie* and its progeny. See *infra* notes 36-58 and accompanying text. Federal law will govern if the enforceability of forum selection clauses is a procedural issue, but state law governs if it is a substantive issue. See *infra* notes 38-40. Forum selection clauses are procedural to the extent that they affect the location of litigation. They are also substantive provisions of the contract about which the parties have bargained. See *infra* notes 15-16, 101 and accompanying text.

of forum selection clauses,¹³ adoption of the *Ricoh* court's *Erie* analysis would damage longstanding *Erie* principles and would risk an unwarranted expansion of the application of federal law in diversity cases.

While approving the result in *Ricoh*, this Comment critiques the Eleventh Circuit's *Erie* analysis and presents alternative grounds for the application of federal law to forum selection clauses. Part I reviews the history of the enforceability of forum selection clauses and sets forth the current scope and meaning of the *Erie* doctrine. Part II summarizes the Eleventh Circuit's decision in *Ricoh* and critiques the court's analysis. After finding that the en banc majority reached the correct result through flawed reasoning, the Comment proposes a new analysis of forum selection clause enforceability in diversity suits. The Comment concludes that courts should create limited federal common law enforcing forum selection clauses in diversity cases to best serve the underlying principles of the *Erie* doctrine and the expectations of contracting parties.

I. FORUM SELECTION CLAUSES AND THE RESOLUTION OF CONFLICTS BETWEEN FEDERAL AND STATE LAW IN DIVERSITY CASES

Parties to a contract normally seek to create the greatest possible predictability in their contractual relationship.¹⁴ Litigation over a contract dispute provides an area of potential uncertainty because under federal venue statutes, which prescribe where parties may initiate an action in federal courts, the forum for contract litigation could be in any of several different courts. As a result, contracting parties cannot predict safely either the location of the litigation or the applicable substantive law.

A forum selection clause creates predictability by specifying where litigation will take place in the event of a contract dispute. Most contracts containing a forum selection clause also contain a choice of law clause specifying that the forum's state

13. In 1972 the Supreme Court departed from the historical judicial disapproval of forum selection clauses when it decided that in admiralty cases forum selection clauses are prima facie valid. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). Many federal courts apply *The Bremen* in diversity cases as governing federal law. See *infra* notes 21-34 and accompanying text.

14. *The Bremen*, 407 U.S. at 13; see Covey & Morris, *The Enforceability of Agreements Providing for Forum and Choice of Law Selection*, 61 DENVER L.J. 837, 837 (1984); Gruson, *supra* note 2, at 133.

law will govern contract disputes.¹⁵ Specifying the forum and choice of law allows the parties to negotiate with certainty as to the cost and convenience of litigation. In addition, forum selection clauses affect the parties' substantive rights because the selected forum and law may dictate the outcome of contractual disputes. As a result, the clauses are normally a subject of bargaining at the contracting stage. Contractual agreement on forum is, consequently, a matter of convenience and a substantive provision affecting the consideration exchanged in the agreement.¹⁶

Whether the parties to the contract achieve their goals, however, depends on the enforceability¹⁷ of the forum selection clause. Enforceability may vary because some jurisdictions enforce forum selection clauses and others do not.¹⁸ When state law and federal law conflict¹⁹ on such an issue in a federal diversity case, the court must decide which law to apply by reference to the *Erie* doctrine.²⁰ Proper application of *Erie* to this issue, however, depends on an understanding of the state and

15. See Gruson, *supra* note 2, at 133-34; *supra* notes 1, 2 and accompanying text. Forum selection clause enforcement will assure the parties that the contractual choice of law will govern any disputes.

16. Because a forum selection clause is a term of the contract, the clause reflects the bargained-for agreement of the parties. The clause may have affected monetary consideration or other terms of the contract. If a court does not enforce the forum selection clause, the equities of the agreement may be shifted. See *The Bremen*, 407 U.S. at 13-14.

17. Courts usually prefer to refer to enforceability, rather than validity, of forum selection clauses. See Gruson, *supra* note 2, at 136 n.8.

18. The question of which law governs enforcement of a forum selection clause usually arises when a federal court hearing a diversity case is not located in the contractual forum and one party seeks a transfer to the contractual forum. See Covey & Morris, *supra* note 14, at 840. The party seeking to transfer the case to the contractual forum may invoke either the federal change of venue provision, 28 U.S.C. § 1404(a) (1982), or the federal provision for cure of defects in venue, 28 U.S.C. § 1406(a) (1982). Section 1404(a) provides, "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1982). Section 1406(a) provides, "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1404(a) (1982); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) (stating that "[t]he parties' agreement as to the place of the action . . . will be given effect unless it is unfair or unreasonable").

19. In this Comment, the term *conflict of laws* refers to the question of whether federal or state law should apply to a diversity issue. The term *choice of law* refers to the question of which state's law will govern the merits of a controversy.

20. See *infra* notes 36-58 and accompanying text.

federal rules governing enforcement of forum selection clauses and the policies underlying those rules.

A. FORUM SELECTION CLAUSE ENFORCEMENT

Historically, American courts disapproved of forum selection clauses as a matter of policy.²¹ The primary basis for refusing to enforce the clauses was the judicial conviction that prelitigation agreements ousting a court of jurisdiction were antithetical to the autonomy of the courts.²² In a 1972 admiralty case, *The Bremen v. Zapata Off-Shore Co.*,²³ the United States Supreme Court altered the traditional approach by holding that forum selection clauses are prima facie valid²⁴ and enforceable if reasonable.²⁵ In so holding, the Court emphasized that worries over court autonomy should not impair the freedom to contract or the expansion of trade.²⁶

21. See Gruson, *supra* note 2, at 138-39.

22. *Carbon Black Export v. The S.S. Monrosa*, 254 F.2d 297, 300-01 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959); see also Annotation, *Validity of Contractual Provisions Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4TH 404, 409 (1984) (noting some courts' view that forum selection clauses are invalid). Another rationale for disapproving forum selection clauses was that the clauses relate to the law of remedies that depends upon the law of the forum and hence cannot be altered by private contract. See Gruson, *supra* note 2, at 139.

23. 407 U.S. 1 (1972) (involving international towage contract).

24. See *supra* note 17.

25. 407 U.S. at 10. The Court noted that the argument that forum selection clauses are unenforceable because they "oust" a court of jurisdiction "is hardly more than a vestigial legal fiction." *Id.* at 12.

The shift toward enforcement of forum selection clauses was presaged in 1949 by Judge Learned Hand, who wrote:

[B]e the original reasons good or bad, courts have for long looked with strong disfavor upon contracts by which a party surrenders resort to any forum which was lawfully open to him. . . . In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement, they are invalid only when unreasonable. . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.

Krenger v. Pennsylvania R.R., 174 F.2d 556, 560-61 (2d Cir.) (L. Hand, J., concurring) (footnote omitted), *cert. denied*, 338 U.S. 866 (1949); see also *Wm. H. Muller & Co. v. Swedish Am. Line Ltd.*, 224 F.2d 806, 808 (2d Cir.) (enforcing forum selection clause), *cert. denied*, 350 U.S. 903 (1955), *overruled on other grounds*, *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 202 (2d Cir. 1967) (*en banc*).

26. 407 U.S. at 9. In rejecting the traditional approach, the Court in *The Bremen* said that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our law and in our courts." *Id.* The conflict between the preservation of the courts' jurisdiction

Since *The Bremen* the issue of forum selection clause enforceability has arisen in state courts and in federal diversity cases. Because federal admiralty law does not necessarily apply to a contract dispute in state court,²⁷ subsequent state decisions have reacted to *The Bremen* in a variety of ways. Some states continue to view forum selection clauses as unenforceable.²⁸ Other states have either enacted statutes or interpreted existing venue laws to enforce reasonable forum selection

and the goal of encouraging trade highlights the problematic nature of forum selection clauses as both procedural and substantive in nature.

The reasonableness test used in *The Bremen* established three grounds for denying enforcement of a forum selection clause. 407 U.S. at 15. The Court would enforce forum selection clauses when "[t]he choice of . . . forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts." *Id.* at 12. If the resisting party demonstrates that the contract is unreasonable under all the circumstances, a court can refuse to enforce the clause. *Id.* at 15. The Court explained that an opposing party will show unreasonableness only if "for all practical purposes [he] will be deprived of his day in court." *Id.* at 18.

In addition, a court can deny enforcement if the forum selection clause itself was the result of fraud or overreaching. *Id.* at 15. This affirmative defense is a standard basis for voiding a contract. See E. FARNSWORTH, CONTRACTS §§ 4.12, 4.20 (1982). The fraud must have induced the specific clause, not the contract as a whole, to trigger this exception to enforcement. See Covey & Morris, *supra* note 14, at 842, 855.

Finally, a court can deny enforcement if it would "contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15. The principal concern of the Court was that the law to be applied by the contractual forum should not create an outcome contrary to an important public policy or to a substantive right or protection for citizens of the state in which the federal court is located. Gruson, *supra* note 2, at 170-71. For example, when the law of the contractual forum had changed after the formation of a contract, enforcement of the forum selection clause might result in an outcome different from that which the parties anticipated at the time of contracting. Courts assume that parties know the law in the respective jurisdictions considered for selection as the exclusive forum for contract disputes as long as arms length negotiation created the contract. Cf. Hoffman v. National Equip. Rental, 643 F.2d 987, 991 (4th Cir. 1981) (noting that ignorance due to failure to read contract is not an excuse).

27. Federal substantive law governs admiralty matters. 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 256 (1982).

28. States that hold forum selection clauses unenforceable as against public policy include Alabama, Florida, Georgia, Missouri, and Texas. See *Redwing Carriers v. Foster*, 382 So. 2d 554, 556 (Ala. 1980); *Zurich Ins. Co. v. Allen*, 436 So. 2d 1094, 1095 (Fla. Dist. Ct. App. 1983) (per curiam), *review denied*, 446 So. 2d 100 (Fla. 1984); *Cartridge Rental Network v. Video Entertainment*, 132 Ga. App. 748, 748, 209 S.E. 2d 132, 133 (1974); *State ex rel. Gooseneck Trailer Mfg. Co. v. Barker*, 619 S.W.2d 928, 930 (Mo. Ct. App. 1981); *Dowling v. NADW Mktg.*, 578 S.W.2d 475, 475-76 (Tex. Civ. App. 1979).

clauses.²⁹ At least one state views forum selection clauses as merely one factor to consider when ruling on a motion to transfer venue on grounds of forum non conveniens.³⁰

Federal court use of *The Bremen* in diversity cases also has varied. As an admiralty case, *The Bremen* does not bind federal courts in other areas of law.³¹ Nevertheless, in some diversity cases, federal courts have applied *The Bremen* to determine the enforceability of forum selection clauses because they found no conflict between state law and the federal law expressed in *The Bremen*.³² In other diversity cases, courts have applied *The Bremen* despite a conflict between federal and state law.³³ In contrast, only the Third and Eighth Circuits have held that

29. See, e.g., *Deeb, Inc. v. Board of Pub. Instruction*, 196 So. 2d 22, 24 (Fla. Dist. Ct. App. 1967) (venue statute allows corporations to waive venue); N.Y. CIV. PRAC. L. & R. § 501 (McKinney 1976) (written agreement fixing place of trial, made before an action is commenced, shall be enforced); Annotation, *supra* note 22, at 441; see also Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 AM. J. COMP. L. 124, 135 (1973) (tracing development of law of forum selection clauses prior to *The Bremen*). The approach states and their courts take is relevant to the current status of forum selection clauses in diversity if state law is found to apply in diversity. See *infra* note 34.

30. See *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982) (using forum selection clause as factor in court's discretionary decision whether to exercise its legal jurisdiction).

31. See *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 279 (9th Cir. 1984); *Bense v. Interstate Battery Sys. of Am.*, 683 F.2d 718, 720-21 (2d Cir. 1982).

32. See *Mercury Coal & Coke v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 317 (4th Cir. 1982); *Hoffman v. National Equip. Rental Ltd.*, 643 F.2d 987, 991 (4th Cir. 1981); *Moretti & Perlow Law Offices v. Aleet Assocs.*, 668 F. Supp. 103, 106 (D.R.I. 1987); *D'Antuono v. CCH Computax Systems*, 570 F. Supp. 708, 711-12 (D.R.I. 1983); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 568 (S.D.N.Y. 1978).

Some courts have applied *The Bremen*, despite specifically holding that state law applies, because the state law was the same as *The Bremen*. See *Leasewell, Ltd. v. Jake Shelton Ford*, 423 F. Supp. 1011, 1015 (S.D.W. Va. 1976); *Davis v. Pro-Basketball*, 381 F. Supp. 1, 3 (S.D.N.Y. 1974).

33. See *Stewart Org. v. Ricoh Corp.*, 810 F.2d 1066, 1071 (11th Cir.) (en banc) (per curiam), *cert. granted*, 108 S. Ct. 225 (1987); *Visicorp v. Software Arts*, 575 F. Supp. 1528, 1532 (N.D. Cal. 1983); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147 n.1, 148 (N.D. Tex. 1979).

Federal courts applying *The Bremen* in diversity cases, without discussing whether state and federal law conflict, include *Pelleport Investors*, 741 F.2d at 279; *Bense*, 683 F.2d at 720-21; *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979) (per curiam); *Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296 (1st Cir. 1974); *In-Flight Devices Corp. v. Van Dusen Air*, 466 F.2d 220, 234 n.24 (6th Cir. 1972) (dictum); *Midwest Mechanical Contractors v. Tampa Constructors*, 659 F. Supp. 526, 530 (W.D. Mo. 1987) (dictum); *Gordonsville Indus. v. American Artos Corp.*, 549 F. Supp. 200, 205-06

when federal and state law conflict, state law determines the enforceability of forum selection clauses in diversity suits.³⁴

(W.D. Va. 1982); *Process & Storage Vessels v. Tank Serv.*, 541 F. Supp. 725, 732-33 (D. Del. 1982), *aff'd mem.*, 760 F.2d 260 (3d Cir. 1985).

Courts adopting the reasonableness test of *The Bremen* have recognized that the parties to a contract cannot oust the forum court of jurisdiction by their agreement. Based on such clauses, these courts have refrained from exercising their jurisdiction to give effect to the contractual intentions of the parties. *The Bremen* Court noted that the "ouster" argument is "hardly more than a vestigial legal fiction." 407 U.S. at 12; see *Quick Erectors v. Seattle Bronze Corp.*, 524 F. Supp. 351, 355 (E.D. Mo. 1981); *Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co.*, 519 F. Supp. 862, 863-64 (E.D. Pa. 1981); *Kline v. Kawai Am. Corp.*, 498 F. Supp. 868, 871 (D. Minn. 1980); *Hoes of Am. v. Hoes*, 493 F. Supp. 1205, 1208 (C.D. Ill. 1979); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 148-49 (N.D. Tex. 1979); *Public Water Supply Dist. No. 1 v. American Ins. Co.*, 471 F. Supp. 1071, 1072 (W.D. Mo. 1979); *Spatz v. Nascone*, 364 F. Supp. 967, 974 (W.D. Pa. 1973); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971); *supra* note 18; cf. *Central Contracting Co. v. C.E. Youngdahl & Co.*, 418 Pa. 122, 133, 209 A.2d 810, 816 (Pa. 1965) (stating that court having jurisdiction should decline to proceed with cause when forum selection clause is reasonable).

34. In *General Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352 (3d Cir. 1986), the Third Circuit held that state law governs the enforceability of forum selection clauses because no federal interest mandates displacing state law with the federal common law of *The Bremen*. *Id.* at 357. The Eighth Circuit, in *Farmland Indus. v. Frazier-Parrott Commodities*, 806 F.2d 848 (8th Cir. 1986), applied state law to the enforcement of a forum selection clause, holding that because of the close relationship between substance and procedure, the state public policy prohibiting enforcement of the clauses should be given effect. *Id.* at 852; see also *Snider v. Lone Star Art Trading Co.*, 672 F. Supp. 977, 984 (E.D. Mich. 1987) (citing *General Eng'g* to support the holding that state law governs enforceability of forum selection clauses), *aff'd mem.*, 838 F.2d 1215 (6th Cir. 1988); *Mutual Fire, Marine & Inland Ins. Co. v. Barry*, 646 F. Supp. 831, 833 (E.D. Pa. 1986) (clause governed by state law); cf. *Patten Sec. Corp. v. Diamond Greyhound & Genetics*, 819 F.2d 400, 407 (3d Cir. 1987) ("[a] forum selection clause . . . does not enjoy such federal favor" and should be unenforceable if it violates strong public policy in the forum where suit is brought). *But see Sun World Lines v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986) (stating in dicta that in diversity cases federal law governs forum selection clauses because they are procedural); *Midwest Mechanical Contractors*, 659 F. Supp. at 530 (holding that federal law determines validity of forum selection clause). The Second Restatement of Conflicts has adopted a test similar to *The Bremen* for resolving forum selection clause issues. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

If state law governs the enforceability of forum selection clauses, the ultimate decision of enforceability will depend on whether courts apply the contractual choice of law or the law of the state in which the deciding court is located. The *General Eng'g* and *Farmland Indus.* courts both applied the law of the state in which they were located. In the former the clause was enforceable, and in the latter it was not. Most courts applying state law to the question of enforceability have applied the contractual choice of law, resulting in uniform outcomes regardless of which circuit is deciding the matter. See Gruson, *supra* note 2, at 185-86.

Although recent court decisions in diversity cases have addressed the question of whether state or federal law applies to forum selection clauses, no circuit court before *Ricoh* employed a detailed *Erie* doctrine analysis.³⁵

B. THE EVOLUTION AND CURRENT SCOPE OF THE *ERIE* DOCTRINE

The current law governing conflicts between federal and state law in diversity cases is embodied in *Erie Railroad v. Tompkins*³⁶ and its progeny. The *Erie* decision, based on the Rules of Decision Act,³⁷ assures plaintiffs that the same law will apply to a case in state or federal court. *Erie* requires federal courts hearing diversity suits to apply state law to substantive issues³⁸ and abolishes general federal common law.³⁹

35. Most circuits have applied federal law to enforcement of forum selection clauses without using the *Erie* analysis. See *Andrews v. Heinold Commodities*, 771 F.2d 184, 187 (7th Cir. 1985) (dictum); *Pelleport Investors*, 741 F.2d at 279; *Mercury Coal & Coke v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 317 (4th Cir. 1982); *Bense*, 683 F.2d at 721; *In re Fireman's Fund Ins. Cos.*, 588 F.2d at 95; *Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co.*, 492 F.2d at 1296; *In-Flight Devices Corp.*, 466 F.2d at 234 n.24 (dictum); *Furbee v. Vantage Press*, 464 F.2d 835, 837 (D.C. Cir. 1972).

Although they failed to undertake a thorough *Erie* analysis, both the Third and Eighth Circuits mentioned *Erie*. The Eighth Circuit noted that the hybrid procedural and substantive nature of forum selection clauses complicated the *Erie* analysis. See *Sun World Lines*, 801 F.2d at 1069; see also *Taylor*, 474 F. Supp. at 147 (noting that forum selection clause is not purely procedural matter).

Although the convenience goals of forum selection clauses are characterized easily as procedural issues, the choice of law implications of the clauses and their creation through contractual negotiation are usually regarded as substantive issues. See *supra* notes 12, 15 and accompanying text.

36. 304 U.S. 64 (1938).

37. 28 U.S.C. § 1652 (1982). The Rules of Decision Act, authorized by Section 34 of the Federal Judiciary Act of 1789, provides that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1982).

38. 304 U.S. at 78. The *Erie* rule is:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State.

Id.

39. Common law is defined as "those principles, usages and rules of action . . . which do not rest for their authority upon any express and positive declaration of the will of the legislature." BLACK'S LAW DICTIONARY 144 (abridged)

After *Erie*, federal courts had difficulty distinguishing between substantive issues and procedural issues.⁴⁰ The Supreme Court attempted to clarify *Erie* in three subsequent decisions.⁴¹ In *Guaranty Trust Co. v. York*,⁴² the Court created an outcome-determinative test for issues that are arguably procedural.⁴³ Under the test, courts must apply state law when the case would be decided differently under federal law than under state law. Applying this test, the *Guaranty Trust* Court held that state statutes of limitations must apply in diversity suits.

The outcome-determinative test was modified in *Byrd v.*

5th ed. 1983); see also *infra* note 131 (further limiting definition of common law). The federal general common law is based on the fallacy that there exists "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

Erie overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). 304 U.S. at 79-80. *Swift*, in effect for almost 100 years, allowed federal courts to apply federal common law to issues of general law, but not to issues of local law. In *Swift* Justice Story interpreted the Rules of Decision Act to require application only of state statutes and state court decisions regarding "local" matters, for example, real estate and immovable property, but to leave to federal common law other "general" matters including "general commercial law," 41 U.S. at 18-19, and "obligations under contracts entered into and to be performed within the state," *Erie*, 304 U.S. at 75. The goal of the *Swift* decision, as interpreted in *Erie*, was increased uniformity in commercial law. *Id.*

40. The majority decision in *Erie* does not comment on this dichotomy but merely refers to "substantive rules of common law." 304 U.S. at 78. Justice Reed, however, concurring in part, stated, "The line between procedural and substantive law is hazy, but no one doubts federal power over procedure." *Id.* at 92.

The definition of procedural is also hazy. Procedural rules are "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Substantive law can be defined as law governing a right granted for some purpose not related to "the fairness or efficiency of the litigation process." Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724-25 (1974).

41. See generally C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4505 (containing extensive discussion of *Erie* Doctrine).

42. 326 U.S. 99 (1945).

43. *Id.* at 109. In *Guaranty Trust* the issue was whether state or federal statutes of limitations would be applied in a diversity case. *Id.* The Court held that statutes of limitations are substantive law and are governed by state law. *Id.* Although it found statutes of limitations to be at least arguably procedural, the Court applied state law because applying federal law would alter the outcome of the case. *Id.* at 109-10. The Court also noted that statutes of limitation bear "vitality" on a state-created right, "not merely formally or negligibly." *Id.*

The *Guaranty Trust* Court also held that the Rules of Decision Act applies to suits in equity as well as suits in law. The result is the *Erie* doctrine applies to all diversity cases, regardless of the claimed remedy. *Id.* at 105-07.

Blue Ridge Cooperative,⁴⁴ in which the Court added a balancing test weighing federal interests in uniform process against state interests in uniform results.⁴⁵ The Court suggested a strong federal interest could justify application of federal law to an issue despite the possibility that use of federal law would alter the outcome of the case.⁴⁶ In *Byrd* the Court found the requirement of a jury trial to be a "housekeeping function" of the federal courts with a sufficiently strong federal interest to justify rejection of state law.⁴⁷

In the third major post-*Erie* case, a direct conflict between a Federal Rule of Civil Procedure⁴⁸ and a state procedural rule⁴⁹ led to a refinement of the *Byrd* balancing test. In *Hanna v. Plumer*,⁵⁰ the Court held that in a direct collision between a valid⁵¹ federal procedural rule and a state rule, the federal rule

44. 356 U.S. 525 (1958); see also *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (Harlan, J., concurring) (Court was correct in finding outcome-determinative test proves too much); see *supra* note 43.

45. 356 U.S. at 537-38; see also *Stewart Org. v. Ricoh Corp.*, 779 F.2d 643, 646 (11th Cir. 1986), *aff'd per curiam on rehearing en banc*, 810 F.2d 1066 (11th Cir.), *cert. granted*, 108 S. Ct. 225 (1987). In *Byrd* federal law mandating a jury trial conflicted with state law calling for trial before a judge. 356 U.S. at 538. Applying the outcome-determinative test, the Court found that it could be argued that the jury would find differently than the judge alone. *Id.* at 538-40. Nevertheless, the Court concluded that the strong federal policy regarding jury decisions is to be followed in diversity cases because the likelihood of a different result is not great enough to outweigh the federal procedure of requiring the jury to decide disputed factual issues. *Id.* at 540. The Court's decision did not provide guidance as to how it found the federal rule more important than state law. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4504, at 33-34.

46. 356 U.S. at 537-40.

47. *Id.*

48. The Federal Rules of Civil Procedure are an implementation of Congress's mandate to the Supreme Court to establish rules of civil practice and procedure in federal courts. 28 U.S.C. § 2072 (1982).

49. For purposes of this Comment, the term *procedural rule* includes all legislatively enacted rules governing the method of court operation. Federal procedural rules include the Federal Rules of Civil Procedure and Title 28 of the United States Code. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* 382-83 (4th ed. 1983).

50. 380 U.S. 460 (1965). In *Hanna* Federal Rule of Civil Procedure 4(d)(1), allowing service of process at the residence of the person being served, conflicted with Massachusetts General Laws (Ter. Ed.) Chapter 197, Section 9, which required in-hand service of process. Applying Massachusetts law would have entitled the plaintiff to summary judgment in her favor and ended the lawsuit because the defendant was not served personally. Applying federal law, the litigation would have continued and the defendant might have prevailed. *Id.* at 473.

51. A federal procedural rule is valid when it is within the constitutional grant of power to the judiciary embodied in the Rules Enabling Act. The stan-

governs even though application of the federal rule might alter the outcome of the case.⁵² The Court, in dictum, added a further rule: When a federal-state procedural conflict exists, but no federal procedural rule is directly on point, courts should apply the outcome-determinative test.⁵³ The court noted the outcome-determinative test should be read "with reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁵⁴

Presently the *Erie* doctrine requires that in federal diversity cases, courts apply a valid federal procedural rule when the federal rule directly conflicts with a state rule.⁵⁵ In diversity cases in which procedure and substance cannot be clearly separated,⁵⁶ federal law must replace a competing state law only if the federal interest is strong and the federal law does not alter the outcome of the case in a manner that encourages forum shopping or that results in the inequitable administration of the laws.⁵⁷ When the conflicting federal and state laws are clearly

standard set forth by the Court for determining the validity of a federal procedural rule is "whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941); see also *Westen & Lehman, Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 360 (1980) (the federal rule must not abridge substantive rights as defined by applicable state law).

52. 380 U.S. at 471-72. The Court wrote: "To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the *mode* of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act." *Id.* at 473-74 (footnote omitted) (emphasis added).

The Court distinguished the issue in *Hanna* from prior *Erie* cases by noting that the Rules Enabling Act governs the validity of the Federal Rules of Civil Procedure and therefore the *Erie* doctrine was not the correct test. 380 U.S. at 470-71.

53. *Id.* at 470.

54. *Id.* at 468 (footnote omitted).

55. *Id.* at 470. As the *Hanna* Court noted:

[T]here have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and, therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

Id.

56. See *supra* note 40 and accompanying text.

57. *Hanna*, 380 U.S. at 468; see also C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4504, at 44. The Court has incorporated both *Guaranty Trust* and *Byrd* by considering outcome and balancing the state and federal law. The

substantive, *Erie* continues to mandate application of state law.⁵⁸

C. THE REINTRODUCTION OF FEDERAL COMMON LAW TO THE *ERIE* ANALYSIS

Although *Erie's* abolition of federal general common law in diversity cases⁵⁹ has been almost untouched by the evolution of the *Erie* doctrine, recent commentaries and cases have put forward arguments for limited reintroduction of federal common law in diversity suits. Several commentators have suggested that federal courts, in accordance with constitutional grants of power and the Rules of Decision Act, can establish federal common law which will prevail over conflicting state law.⁶⁰ In fact, federal courts have created substantive law applicable in diversity cases in three clearly defined areas.⁶¹ First, the United States Supreme Court has created common law to protect

Hanna decision does not clarify the balancing of state and federal interests, which is central to *Byrd*. Several courts since *Hanna* have explicitly balanced interests, relying on *Byrd*, especially in matters of judge and jury decisions. See *id.* § 4504, at 43.

58. Substantive law is defined as law bound up with the rights and obligations of the parties and which defines the remedies available for redress. See *Byrd*, 356 U.S. at 537-38. In *Erie* the issue was substantive because it involved the duty of care owed by a railroad to a trespasser or licensee. See *Hanna*, 380 U.S. at 472.

59. See *supra* note 40 and accompanying text.

60. See generally C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4505, at 44-61 (since *Erie*, federal courts have established rules of substantive law, even acknowledging they are creating federal common law); Ely, *supra* note 40, at 723 (federal rule can displace state law if state rule entails no substantive policy); Fields, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 923-46 (1986) (*Erie's* emphasis on transgressing bounds of federal power supports view that Court's concern was use of federal judicial power that exceeded congressional power); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (*Erie* has led to emergence of federal law in areas of national concern); Westen & Lehman, *supra* note 51, at 334-36 (courts must conform legislative policy to political morality for which it speaks).

61. The new federal common law differs from the court-made general common law in the pre-*Erie* cases because it has been limited to matters of federal importance over which the federal government has constitutional authority, but which Congress has not addressed. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4505, at 58, § 4514, at 223-24.

The Supreme Court has also held federal statutory law controlling when state and federal law conflict. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court applied the *Erie* analysis to the question of whether the United States Arbitration Act could be enforced in a diversity case. The Court upheld application of the Act because it is "based upon and confined to the incontestable federal foundations of 'control over interstate

uniquely federal interests, primarily when the United States is a party to an action.⁶² Second, the Court has invoked federal common law to protect strong national concerns, such as matters affecting foreign relations.⁶³ Third, federal courts have developed federal common law to fill the interstices of a pervasively federal system of substantive laws, such as the labor law area, when Congress has given the Court this power.⁶⁴

Building on these cases, the Rhode Island federal district court held in *Moretti & Perlow Law Offices v. Aleet Associates*⁶⁵ that the use of federal law to enforce a forum selection clause was justified as an instance of filling the interstices of the pervasively federal framework of venue law.⁶⁶ Despite its novel use of federal common law, however, *Moretti* failed to give more than passing attention to the constraints of the *Erie* doctrine. A detailed *Erie* analysis remained unexplored prior to *Ricoh*.

II. THE ELEVENTH CIRCUIT'S *ERIE* ANALYSIS IN *RICOH*

The decision in *Stewart Organization v. Ricoh Corp.*⁶⁷ is the first federal circuit court opinion to go beyond cursory men-

commerce and over admiralty.'” *Id.* at 405 (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924); S. REP. NO. 536, 68th Cong., 1st Sess. 3 (1924)).

Article III and the necessary and proper clause of article I may also give courts power to establish substantive law in areas in which the issues are arguably, but not clearly, procedural. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4505, at 47.

62. See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (holding that negotiability of United States government checks is matter of federal law).

63. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (concluding scope of act of state doctrine must be determined by federal law).

64. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (stating that federal interpretation of federal law will govern in suits derived from federal labor law).

65. 668 F. Supp. 103 (D.R.I. 1987).

66. *Id.* at 105; see also *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 711 (D.R.I. 1983) (applying federal law to determine enforceability of forum selection clause).

Venue in federal courts is governed by 28 U.S.C. §§ 1391-1407 (1982). 28 U.S.C. § 1391(a) provides: “A civil action wherein jurisdiction is founded only on diversity of citizenship, may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.” 28 U.S.C. § 1391(a) (1982). See *supra* note 18 for the text of statutes governing transfer of venue.

67. 810 F.2d 1066 (11th Cir.) (en banc) (per curiam), *cert. granted*, 108 S. Ct. 225 (1987).

tion of the *Erie* doctrine in analyzing conflicts between state and federal law regarding the enforceability of forum selection clauses. The Eleventh Circuit addressed the enforceability of a forum selection clause in diversity when such clauses violate the public policy of the state where the suit is initiated.⁶⁸ Identifying the threshold issue as whether state or federal law governs the enforceability of forum selection clauses, the court, in a per curiam opinion, applied the *Erie* doctrine and held that federal law governs.⁶⁹

Noting that the purpose of forum selection clauses is to designate venue for litigation, the opinion declared that venue in diversity is "manifestly within the province of federal law."⁷⁰ The court analogized the direct conflict of federal and state procedural rules in *Hanna v. Plumer*⁷¹ and found the existing federal venue rules equivalent to a federal procedural rule which directly conflicted with the Alabama common law rule against enforcement of forum selection clauses.⁷² Applying *Hanna*, the court held that the federal rule controlled and federal law governed the enforceability of forum selection clauses in diversity.⁷³ The court then applied the reasonableness test from *The Bremen*⁷⁴ and held the forum selection clause in *Ricoh* enforceable.⁷⁵

Judge Tjoflat, in a concurring opinion, agreed with the decision to transfer but rejected the need for traditional *Erie*

68. *Id.* at 1067.

69. *Id.* at 1068; see *supra* notes 36-58 and accompanying text.

70. 810 F.2d at 1068. The venue rules, however, are embodied in 28 U.S.C. §§ 1391-1490, not the Federal Rules of Civil Procedure. See *infra* note 90.

71. 380 U.S. 460, 470 (1965); see *supra* text accompanying notes 50-54.

72. 810 F.2d at 1068. The majority opinion specifically mentioned the federal venue rules at 28 U.S.C. § 1391 and Federal Rules of Civil Procedure 12(b)(3) & 4(b). *Id.*

73. 810 F.2d at 1069.

74. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-15 (1972); see *supra* notes 23-31 and accompanying text.

75. 810 F. 2d at 1071. In particular, the court held that Alabama's judicially created public policy against forum selection clauses did not justify denying enforcement of the clause under the reasonableness test because the policy did not protect substantive rights. *Id.* at 1069-70. The court noted:

A closer look at *Redwing* reveals, however, that the Alabama policy is for the protection of the jurisdiction of the state courts rather than the protection of the state's citizens. . . .

The Supreme Court of Alabama would not seem to be concerned with the protection of the jurisdiction of the federal district courts located in the state. . . . Since this case will be tried in federal court, the protection of state court jurisdiction is not involved. There are simply no federalism concerns

Id.

analysis on the basis that no conflict between state and federal law existed.⁷⁶ According to the concurring opinion, the Alabama policy against enforcing forum selection clauses was not a rule of decision which *Erie* would require a federal court to apply in diversity,⁷⁷ but merely an instruction to Alabama courts on the exercise of their jurisdiction.⁷⁸ Sidestepping *Erie*, Judge Tjoflat argued that the court should presumptively enforce a forum selection clause by transfer pursuant to the federal forum non conveniens statute.⁷⁹

The dissenting judge in *Ricoh*, relying on an *Erie* analysis, chose to apply state law and denied enforcement of the forum

76. *Id.* at 1071.

77. See *supra* notes 37-38 and accompanying text.

78. See 810 F.2d at 1075-76. Judge Tjoflat distinguished the rule in *Redwing Carriers* from substantive law, stating that "the decision merely prevents litigants from tying the jurisdictional hands of the state courts." *Id.* at 1076.

79. *Id.* at 1071-72. Judge Tjoflat rejected *Ricoh*'s motion for dismissal pursuant to 28 U.S.C. § 1406(a) (improper venue) because the federal district court had personal jurisdiction over *Ricoh* and was a proper venue. *Id.* at 1073; see *supra* note 18, *infra* notes 145-47 and accompanying text. The concurrence found the forum selection clause in *Ricoh* enforceable, however, under the reasonableness test from *The Bremen*. 810 F.2d at 1074-75. As a result, the concurrence would transfer pursuant to § 1404(a), the statute which allows a federal district court to transfer a case to another district "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a) (1982); see also *supra* note 18 (text of venue statutes). Judge Tjoflat reasoned that such a transfer comported with the aims of *Erie* because the outcome of the case would not be altered by the transfer. 810 F.2d at 1072-73.

The concurring opinion relied upon *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 318 U.S. 487, 496 (1941), guaranteeing a plaintiff that a federal court will apply the same substantive laws, including choice of law rules, as would courts of the state in which it sits. *Id.* Moreover, the concurrence noted that the Supreme Court, in *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964), held that when a defendant successfully moves to have a case transferred, the transferee court should apply the same substantive law that the transferor court would have applied, not the substantive law of the forum state of the transferee court. Therefore, reasoned the concurrence, if the *Ricoh* case was transferred pursuant to § 1404(a), the court in New York would apply Alabama law to decide whether to enforce the choice of law clause in the contract, and "if Alabama does not recognize such a provision, it will apply Alabama's conflict-of-laws rules to discover what state's law should provide the rule of decision." 810 F.2d at 1072-73.

The concurrence further justified transfer under § 1404(a) as being in the interest of justice, noting that transfer for convenience of the parties was not appropriate because the parties had been compensated for inconvenience in the process of negotiating for the forum selection clause. *Id.* at 1075.

The concurrence also found a conflict with supremacy clause concerns if a state's public policy were held to control federal court jurisdiction. *Id.* at 1076 & n.9; see also *Westen & Lehman, supra* note 51, at 316 (discussing supremacy clause).

selection clause.⁸⁰ Judge Godbold argued that the per curiam opinion's reliance on *Hanna* was unfounded because no direct conflict between procedural rules was at issue in *Ricoh*. He pointed out that the federal venue rules, relied on by the court to establish a *Hanna* conflict, are silent on the issue of antecedent agreements to limit venue.⁸¹ Applying the *Byrd* balancing test⁸² and the aims-of-*Erie* analysis from *Hanna*,⁸³ the dissent concluded that application of federal law would encourage forum shopping and the inequitable administration of state laws.⁸⁴

III. THE APPLICATION OF *ERIE* AND FEDERAL COMMON LAW TO FORUM SELECTION CLAUSE ENFORCEABILITY

The *Ricoh* per curiam opinion provides an unsatisfactory justification for enforcing forum selection clauses.⁸⁵ By applying federal law to forum selection clause enforceability in di-

80. 810 F.2d at 1077 (Godbold, J., dissenting).

81. *Id.* at 1076-77. In Judge Godbold's words, "28 U.S.C. § 1391 identifies the courts that Congress . . . has defined as *suitable to hear diversity cases.*" *Id.* (emphasis in the original). Judge Godbold pointed out that the federal rule in *The Bremen* conflicts with Alabama's rule against forum selection clause enforcement, but that *The Bremen* is decisional, rather than a federal rule of civil procedure or a statute, and therefore it cannot be employed in the *Hanna* analysis. *Id.*

82. See *supra* notes 44-45 and accompanying text. Judge Godbold's analysis is explicated more fully in the *Ricoh* panel decision. *Stewart Org. v. Ricoh Corp.*, 779 F.2d 643, 645 (11th Cir. 1986) (Godbold, J., dissenting), *aff'd per curiam on rehearing en banc*, 810 F.2d 1066 (11th Cir.), *cert. granted*, 108 S. Ct. 225 (1987).

83. See *supra* note 54 and accompanying text.

84. 810 F.2d 1066, 1076-77 (11th Cir.) (en banc) (per curiam), *cert. granted*, 108 S. Ct. 225 (1987).

85. The analysis of the concurring opinion offers an equally unsatisfactory solution to the issue before the court in *Ricoh*. Although the concurrence's conclusion that § 1404(a) can be used to give effect to the parties' contractual agreement on forum is appealing, it misses the mark in two ways. First, the substantive purpose of the forum selection clause, to protect the parties' choice of law, is not achieved by a § 1404(a) transfer because the transferee court must apply the law of the transferor court. *Van Dusen v. Barrack*, 376 U.S. 612, 636 (1964). In *Ricoh* this means that the New York court must apply Alabama law, despite the contractual agreement that the New York court would apply New York law. See *supra* note 1. Choice of law is important because it materially affects the interpretation of a contract. This is particularly true in interstate contracts because several states' laws may have equal application to the contract. Parties attempt to ensure predictability by including choice of law clauses in their contracts. If the enforceability of the choice of law clause is decided by choice of law rules in the original forum state, the forum selection clause loses one of its major values. In sidestepping *Erie* analysis, the con-

versity cases, the court reached the correct result, but its analysis in light of the current *Erie* doctrine is flawed. An al-

currence gives effect to only the convenience aspects of the *Ricoh* forum selection clause and destroys the contractual agreement on choice of law.

Second, use of § 1404(a) makes enforcement of the forum selection clause discretionary on the part of a judge in a noncontractual forum. Congress enacted the forum non conveniens statute to give district courts the discretion to transfer cases to another district where venue is also proper, despite the plaintiff's choice of forum, to increase the efficiency of the court system. See *Ricoh*, 810 F.2d at 1071-72 (Tjoflat, J., concurring). Therefore, the concern in *The Bremen* that giving effect to the legitimate expectations of the parties as "manifested in their freely negotiated agreement," 407 U.S. at 12, is not fully realized, nor is predictability of contracts appreciably increased. See *supra* note 15 and accompanying text.

Furthermore, by proposing the use of § 1404(a) to effect the expectations of contracting parties, the concurrence misapplies the "interest of justice" provision of the transfer rule. The section 1404(a) purpose of promoting the orderly and efficient disposition of litigation in federal courts is served by transfers due to the inability to obtain an impartial jury or to the availability of witnesses elsewhere, both of which provide grounds for granting a § 1404(a) transfer. Enforcing the contractual agreement is a substantive issue, however, which does not fall within the parameters of efficient court administration. Theoretically, the interests of justice could include, for instance, substantive concerns such as a federal court's preference for one state's law over another. The Supreme Court, however, has rejected this position. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the Court stated: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247.

Contrary to Judge Tjoflat's conclusion, the application of § 1404(a) to enforce forum selection clauses could also encourage forum shopping. If a § 1404(a) transfer is granted, a plaintiff who brought suit in a noncontractual forum may have succeeded in changing the substantive law applied to the contract. Plaintiffs may shop for a noncontractual forum where the substantive law will not enforce the contractual choice of law.

This form of forum shopping is anathema to the *Erie* doctrine. *Erie* was decided in response to abuse of the federal removal statute by out-of-state residents who removed to federal court to the detriment of state residents. *Erie* protects state residents in much the same way as diversity was created to protect nonresidents from unfair treatment by state courts. See 304 U.S. at 74-75. Section 1441 provides, in pertinent part: "[A]ny action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441 (1982).

The discussion of the evils of forum shopping may seem ludicrous in this context because the purpose of forum selection clauses is forum shopping. The precontractual shopping, however, is an arm's length agreement based on access to information and the weighing of comparative advantages and disadvantages of the various contract terms to the parties. Enforcing forum selection clauses and the contractual choice of law, once bargained for, would end postcontract, prelitigation forum shopping and would not involve the unilateral binding of one party after litigation begins. See *Westen & Lehman, supra* note 51, at 374.

ternative approach incorporating limited federal common law is necessary to achieve the *Ricoh* court's result without distorting the principles of *Erie*.

A. THE *RICOH* COURT'S APPLICATION OF *ERIE*

The *Ricoh* decision inaccurately applied the *Erie* doctrine in reaching the conclusion that federal law governs the enforceability of forum selection clauses in diversity. In particular, the court misapplied *Hanna v. Plumer*.⁸⁶ Under *Hanna*, when a valid federal procedural rule directly conflicts with a state procedural rule, the federal rule governs.⁸⁷ As the concurrence correctly noted, however, there is no direct conflict of state and federal rules relating to the enforcement of forum selection clauses.⁸⁸ The court relied on general federal venue statutes to establish the direct conflict between procedural rules required by *Hanna*.⁸⁹ Although the federal venue rules prescribe where venue is proper⁹⁰ and provide for transfer of venue,⁹¹ they do not say anything about the right⁹² of parties to choose an exclusive venue for litigation prior to the commencement of an action.⁹³ The majority inappropriately lumped all existing federal

86. 380 U.S. 460 (1965).

87. *Id.* at 473-74. The validity of the federal rule under the Rules Enabling Act is the only test necessary when a direct conflict of state and federal rules exists. *Id.* at 471. As provided by the Rules Enabling Act,

"The Supreme Court shall have the power to prescribe by general rules, the forms of process . . . and the practice and procedure of the . . . courts . . . of the United States in civil actions

Such rules shall not abridge, enlarge or modify any substantive right

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

28 U.S.C. § 2072 (1982); see Westin & Lehman, *supra* note 51, at 316 (suggesting federal rules must be both pertinent and valid).

88. See 810 F.2d at 1076 (Godbold, J., concurring); see *supra* notes 80-84 and accompanying text.

89. See *supra* notes 70-72 and accompanying text.

90. See 28 U.S.C. § 1391(a) (1982). In *Ricoh* federal courts in both Alabama and New York as well as New Jersey had proper venue to hear the case.

91. 28 U.S.C. §§ 1404(a), 1406(a) (1982); see *supra* note 18.

92. A central question is whether the right to use a forum selection clause to limit venue by specifying a single forum is a substantive or a procedural right. The setting of venue by contract, if enforceable, reduces uncertainty and allows litigation on substantive issues to proceed without extensive maneuvering about venue. In this respect it can be regarded as procedural; see *also supra* note 12 and *infra* text accompanying notes 98-102. Contractual forum selection, however, can be seen as substantive because the parties have bargained for the clause.

93. See 810 F.2d at 1076-77 (Godbold, J., concurring). The venue rules do

venue rules together to preempt the application of a state rule which relates to, but does not control venue, thereby bootstrapping the arguably procedural venue rules up to the level of a *Hanna* directly applicable procedural rule.⁹⁴ The majority's discussion fails to heed the warning in *Hanna* not to read federal procedural rules too broadly⁹⁵ and also gives courts the green light to disregard state rules, thus contravening *Erie*. Because there is no federal procedural rule which addresses the forum selection clause issue directly,⁹⁶ *Hanna* does not control the enforceability of forum selection clauses and the *Ricoh* holding applying federal law is unsupported.⁹⁷

The *Ricoh* court also characterized both forum selection

provide for voluntary waiver of jurisdiction by consent to venue, thereby expanding the number of possible forums. C. WRIGHT, *supra* note 49, at 239. Although the appellant *Ricoh* sought to analogize restriction of possible forums to expansion of possible forums, nothing in the rules explicitly allows voluntary restriction of forums. Brief for Appellant at 19-20, Stewart Org. v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987) (No. 85-7231), *cert. granted*, 108 S. Ct. 225 (1987).

94. See 810 F.2d at 1067-69.

95. See *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).

96. See *supra* note 81 and accompanying text. The court in *Hanna* noted that federal rules do not control if the issue is broader than the rule; but in *Ricoh*, the rule cited by the majority—the venue rules as a whole—is broader than the issue. *Hanna* leaves open the possibility that a direct rule conflict exists in this situation. A “directly on point” test for the conflicting rules, however, would better cover both situations.

97. Congress could make a rule to govern this issue but has not. Case law is clear that courts cannot act to make law in areas in which Congress has authority but has not acted. See *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981). Under the Rules Enabling Act, however, which mandates the Supreme Court to establish rules for procedure, the Court might find authority for common law rule-making. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514, at 217.

The majority also relied on case precedent in *The Bremen* and *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

[T]he contract [in *Szukhent*] contained in fine print both choice of forum and choice of law clauses, both favoring New York. . . . The Court held this clause enforceable because it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court.

Ricoh, 810 F.2d at 1068.

The court also contended that *The Bremen* was not binding but was “nevertheless instructive with respect to the growing judicial approval of choice of forum clauses,” *id.* at 1069, in support of the decision to apply federal law.

Bremen and *Szukhent* are inapposite as precedent that federal law should govern under *Hanna*. *The Bremen* is not a federal procedural rule but rather federal common law in admiralty with substantive and procedural aspects. See *supra* notes 23-26 and accompanying text. The *Szukhent* court explicitly stated that it was not deciding the enforceability of forum selection clauses under *Erie* in cases involving service of process on an agent.

clauses and venue as procedural rather than substantive without proper analysis. The *Erie* cases prohibit application in diversity of federal law that appears to be procedural but which in reality changes substantive rights of citizens.⁹⁸ Although a forum selection clause may appear to be procedural at first glance, it may well affect the substantive rights of parties, and it is the product of a bargained-for agreement which is normally a substantive matter. The clauses are decidedly more substantive than the service of process rules which were characterized as a procedural housekeeping function in *Hanna*.⁹⁹ Therefore, even if a direct conflict of rules had existed in *Ricoh*, application of federal law might still contravene *Erie*.¹⁰⁰

The procedural label is more easily applied to federal venue rules¹⁰¹ than to forum selection clauses because venue rules were enacted by Congress to regulate the operation of the

98. The Supreme Court has refused to apply federal rules in place of state statutes of limitation, finding that to do so would change substantive rights created by the states. *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945); see also *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980) (holding F.R.C.P. 3 does not toll state statute of limitations); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-33 (1949) (same). In *Walker* the Court noted that it was not the intended purpose of the federal rule to toll the state statutes, but merely to start the clock for timing requirements of the federal rule. 446 U.S. at 750-51.

The Court, however, has applied federal rules regarding judge and jury issues, *Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 540 (1958) (requirement of jury trial is "form and mode" of enforcing state-created rights and remedies, and service of process, *Hanna*, 380 U.S. at 473 (describing service of process as "housekeeping rule" of federal courts), when they relate to housekeeping functions of the federal courts and do not change state-created rights or remedies, despite some possibility of a difference in the outcome of the case. See *supra* notes 42-58 and accompanying text. *Byrd* spoke of balancing the interests of uniform process against uniform outcome. See 356 U.S. at 537-38.

Erie requires careful evaluation of the facts and issues as well as identification of the nature of the conflicting state and federal provisions. *Erie's* purpose is to define the bounds of federalism. See *supra* notes 44-47 and accompanying text. By extending to state decisional law the same controlling role in federal diversity cases as state statutory law enjoyed under *Swift v. Tyson*, *Erie* stands firmly for the idea that the outcome of litigation in a federal court should be the same as it would have been in a state court when federal jurisdiction is based solely on diversity of citizenship. See *Guaranty Trust*, 326 U.S. at 109.

99. See 380 U.S. at 463-64, 468. Forum selection clauses are included in contracts to guarantee the choice of law and for convenience, availability of witnesses, and costs of litigation. If the contractual choice of law is honored in all venues, the outcome of the case should not differ.

100. See *infra* notes 110-13 and accompanying text.

101. See *supra* note 18.

federal court system.¹⁰² As a result, there is a strong federal housekeeping interest in the venue statutes that argues for a procedural designation. Conversely, the statutory nature of venue rules raises doubts about their inclusion in the procedural category, which is normally reserved for judicially developed rules of procedure.¹⁰³ The *Ricoh* court's failure to adequately address this characterization problem diminishes the decision's persuasiveness.

B. AN ALTERNATIVE APPROACH USING LIMITED FEDERAL COMMON LAW UNDER *ERIE*

A satisfactory resolution of the forum selection clause quandary would promote uniformity to enhance contract predictability and would facilitate the fairness and federalism concerns that underlie the *Erie* doctrine. By reaching the right result—enforcing reasonable forum selection clauses—the Eleventh Circuit decision in *Ricoh* met the criteria of increasing predictability of contracts. By incorrectly applying *Hanna*, however, the court's holding opens the door to broad judicial discretion in using federal rules to preempt state law, a result which does violence to the fairness and federalism concerns of the *Erie* doctrine.

To satisfy the concerns of *Erie*, federal courts should create limited federal common law enforcing forum selection clauses to fill the interstices of the federal court system. Application of federal common law will resolve the forum selection clause enforceability issue in diversity. This approach is mandated by the federal interests in enforcing forum selection clauses in diversity and the inability of a traditional *Erie* analysis to resolve the issues raised by these clauses.

1. The Need for Uniform Enforcement of Forum Selection Clauses

State law has traditionally governed contract issues. With a continuing increase in interstate and international commerce, however, federal courts exercising diversity jurisdiction will hear contract issues more frequently.¹⁰⁴ Application of state

102. See *Stewart Org. v. Ricoh Corp.*, 810 F.2d 1066, 1068 (11th Cir.) (en banc) (per curiam), cert. granted, 108 S. Ct. 225 (1987).

103. See *supra* note 48.

104. The amount in controversy requirement for diversity jurisdiction will exclude increasingly fewer suits as inflation and commercial growth lead to larger contract values.

law in these diversity cases will result in widely varying enforcement of forum selection clauses because state law on the matter is not uniform.¹⁰⁵ Recognizing a need for uniformity to enhance the predictability of contracts and to effect the intent of the parties, the majority of federal courts use *The Bremen*¹⁰⁶ in favoring the prima facie enforcement of forum selection clauses.¹⁰⁷

The policy arguments in favor of uniform federal enforcement of forum selection clauses in diversity are strong. In addition to the interest of the contracting parties in predictable enforcement of their negotiated agreement, the strong federal interest in controlling venue in federal courts, as evidenced by the scope of the venue statutes, supports creation of a federal standard governing the ability of parties to contractually limit venue. The flexibility of the venue statutes in allowing transfer of cases for the convenience of parties and courts also demonstrates an accommodating approach to the location of litigation that should allow prelitigation agreements on forum. As further support, forum selection clause agreements to limit venue are not substantially different from the approved practice of allowing parties to consent to jurisdiction and thereby expand venue. Finally, uniform enforcement of the clauses will encourage international and interstate commerce.¹⁰⁸

In contrast, the arguments against uniformity are not compelling. In particular, a state court's parochial interest in preventing jurisdiction ousting is not the type of substantive right that *Erie* sought to protect because the *Erie* Court was concerned with protecting the rights of state citizens, not state courts.¹⁰⁹

2. The Incompatibility of *Erie* with Forum Selection Clauses.

Because state laws on forum selection clauses vary widely, uniform enforcement of forum selection clauses in diversity can only be accomplished by application of federal law. To reach this result, courts must find an approach which does not violate the *Erie* doctrine. Applying federal law in the manner employed by the *Ricoh* court, however, contravenes *Erie*. In fact,

105. See *supra* note 28.

106. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972).

107. See *supra* note 31.

108. See *The Bremen*, 407 U.S. at 12-14; C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3803.1, at 20.

109. See *Stewart Org. v. Ricoh Corp.*, 810 F.2d 1066, 1069-70 (11th Cir.) (en banc) (per curiam), cert. granted, 108 S. Ct. 225 (1987).

a closer look at *Erie* reveals that its application to conflicts over the enforceability of forum selection clauses in diversity may be incompatible with *Erie's* operational rules as well as its underlying goals.

Assuming that enforcement of forum selection clauses is a procedural issue,¹¹⁰ the three *Erie* tests for weighing federal and state interests do not provide an easy solution of the conflict presented in *Ricoh*. As demonstrated in the critique of the *Ricoh* opinion, the narrow *Hanna* holding does not support the application of federal law to forum selection clauses.¹¹¹ The *Byrd* balancing test¹¹² and the *Hanna* dictum,¹¹³ both of which modified the *Guaranty Trust* outcome-determinative test, are also unsatisfactory when applied to forum selection clause enforceability conflicts between state and federal law.

Byrd balances the federal interest in uniform process in all federal courts against the interest in uniform outcomes in all courts within a state. In particular, *Byrd* held that federal law governs in judge-jury conflicts because the judge-jury relationship is essential to the character and function of federal courts.¹¹⁴ Forum selection clauses, however, address only which court will hear the case and do not affect the character and function of federal courts.¹¹⁵

Attempts by federal courts to apply *Byrd* to balance state and federal policies underlying conflicting rules have produced

110. See *supra* notes 31, 35 and accompanying text. Viewed in light of the reasoning in other *Erie* cases, forum selection clause enforcement is a procedural issue. Enforcement of the clause in *Ricoh* does not threaten to bar action on the ultimate issue of breach of contract. See *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 107-08 (1945); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 147 (N.D. Tex. 1979). Venue is a procedural matter governed in federal courts by federal rules. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3804, at 28.

111. See *supra* text accompanying notes 88-97.

112. See *Byrd v. Blue Ridge Coop.*, 356 U.S. 525, 538 (1958); *supra* notes 44-45 and accompanying text.

113. 380 U.S. 460, 468 (1965). The Court modified the *Guaranty Trust* outcome-determinative test by superimposing the twin aims of *Erie*. *Id.*

114. See 356 U.S. 525, 537 (1958). The Court in *Byrd* also found the possibility of different outcomes to be minimal. *Id.* at 539-40. It is unclear whether *Byrd* balancing should apply to issues other than judge-jury determinations. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4504 at 37 (analyzing *Hanna* with reference to *Byrd*).

115. For the purposes of this Comment, the court process includes those rules governing the housekeeping procedures within federal courts. In contrast, the court system encompasses the various federal courts, their relationship to each other, and their jurisdiction.

confusing results.¹¹⁶ This confusion is compounded by the fact that *Byrd* is unclear on the type of federal interest that will justify disregarding a state rule. In *Ricoh* the federal concern for interstate and international commerce and the uniform operation of federal venue rules could constitute a federal interest that would prevail in diversity over a state rule that prohibits forum selection clause enforcement. This is especially true when the state interest is not bound up with substantive rights of citizens.¹¹⁷ On the other hand, the federal venue rules are not directly endangered by the state policy. In fact, rather than closing the door to a hearing of the substantive issues in *Ricoh*,¹¹⁸ the state policy of nonenforcement of forum selection clauses merely affects where the case is heard. Without further guidance, *Byrd*'s failure to delineate which federal interests outweigh state rules limits the usefulness of a pure balancing test in forum selection clause enforceability cases.

The *Hanna* dictum is also unhelpful in resolving the conflict of state and federal law in forum selection clause enforceability. According to the *Hanna* dictum, when faced with a nondirect conflict between state and federal procedural rules, courts should apply the *Guaranty Trust* outcome-determinative test considered in light of the twin aims of *Erie*.¹¹⁹ The first aim, discouraging forum shopping, is immediately problematic

116. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4504, at 32-35 (discussing ambiguities arising from *Byrd*).

117. See *supra* note 78 and accompanying text.

118. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4511, at 175-89 (discussing *Erie* and matters not covered by civil rules); see also Szantay v. Beech Aircraft Corp., 349 F.2d 60, 66 (4th Cir. 1965) (state statute barring suit not followed in diversity when state statute was not closely related to state-created rights and obligations).

119. 380 U.S. 460, 466-67 (1965). Enforcement of a forum selection clause does not necessarily affect the ultimate outcome of the case on the merits, although some change in outcome might result from differing resolutions of choice of law issues. See *Byrd*, 356 U.S. 525, 540 (1958) (possibility of different outcomes does not preclude application of federal law). The cases using outcome-determinative grounds to hold that state law governs have generally concerned statutes of limitations in which application of federal law would allow an action barred by state law to proceed in federal court. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 207-08 (1956) (Frankfurter, J., concurring); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532-34 (1949); *Guaranty Trust v. York*, 326 U.S. 99, 107 (1945); *supra* note 98. Viewed alone, the outcome-determinative test might support the application of federal law to forum selection clause enforceability when the probability of a change in outcome is low. Combined with the aims of *Erie*, however, the outcome-determinative test does not permit a cogent resolution of the federal-state rule conflict presented by the issue in *Ricoh*.

in the *Ricoh* context. On the one hand, forum selection clauses are the ultimate form of forum shopping. The parties explore all possible forums and negotiate and agree on a single forum to hear their potential contract disputes. On the other hand, once the forum is agreed to and the clause is enforced, the forum selection clause satisfies the *Erie* aim by prohibiting forum shopping. Forum shopping is only possible by bringing an action in contravention of the contractual agreement.

The *Erie* court was primarily concerned with forum shopping between federal and state courts.¹²⁰ Applying state law in diversity to enforcement of forum selection clauses will encourage forum shopping among federal courts as long as states differ in their enforcement of the clauses.¹²¹ Applying federal law to hold forum selection clauses prima facie enforceable, however, may encourage forum shopping between federal and state courts. In particular, nonresident plaintiffs who bring an action in a state where the defendant resides can bind the defendant to the state forum.¹²² A plaintiff who wishes to avoid a forum selection clause will thus shop for such a forum in a state which will refuse to enforce the clause. Thus some forum shopping is possible regardless of whether state or federal law is applied in diversity.

Avoiding inequitable administration of the laws, the second aim of *Erie*, is also difficult to assess in the forum selection clause context. *Erie* intended that the law of a state should be administered uniformly to provide equal protection of the law for citizens of the state in both state court and federal diversity court.¹²³ Application of federal law to the forum selection clause in *Ricoh* does not conform to this intention because it negates the protection of a state law which opposes enforcement of the clause. As was noted by the court in *Ricoh*, however, the state rule was intended for the protection of the state courts, not the protection of citizen rights. Protection of state courts

120. *Erie R.R. v. Tompkins*, 304 U.S. 64, 75-77 (1938).

121. See C. WRIGHT, *supra* note 49, at 369 (criticizing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), because it decreased forum shopping within states but increased forum shopping among states).

122. See *supra* note 85 and accompanying text. Under the federal removal statute, a nonresident plaintiff, by filing an action in state court, controls the forum because the resident defendant cannot remove the case to federal court. 28 U.S.C. § 1441 (1982). Resident plaintiffs, however, will have no incentive to disregard the contractual forum and file in state court because nonresident defendants are able to remove to federal court, where the contractual forum would be enforced. 28 U.S.C. § 1441 (1982).

123. 304 U.S. at 74-75.

raises few equal protection concerns of the kind *Erie* sought to avoid.¹²⁴

Another concern is that choice of law issues in forum selection clauses may create inequalities in the administration of the laws. If the enforceability decision alters which state law will be applied to the merits of the case, that change could be regarded as inequitably affecting the substantive rights of the parties.¹²⁵ Yet it could be argued that the only inequity to the contracting parties would be a failure to enforce a reasonable forum selection agreement with its accompanying choice of law.¹²⁶

It is apparent, then, that none of the available *Erie* tests, all of which were set forth by the Supreme Court prior to the decision in *The Bremen*, offers any conclusive guidance in analyzing which law should govern forum selection clause enforceability in diversity.

3. The Federal Common Law Approach

A new approach to the problem of forum selection clauses is needed that will preserve uniformity in the federal courts but avoid the entanglements of an *Erie* analysis. To preserve uniformity, the most useful approach is the application of federal common law to enforce forum selection clauses in diversity regardless of state policies on enforcement. Applying federal law to forum selection clause enforceability would also produce significant benefits for the federal court system. Although the

124. *Stewart Org. v. Ricoh Corp.*, 810 F.2d 1066, 1069 (11th Cir.) (en banc) (per curiam), cert. granted, 108 S. Ct. 225 (1987).

125. See *Guaranty Trust v. York*, 326 U.S. 99, 105 (1945) (federal courts cannot "deny substantive rights created by State law or create . . . substantive rights denied by State law").

126. These difficulties in applying the twin aims of *Erie* to contractual forum selection agreements are in part a result of differences between tort and contract cases. The purpose of forum selection clauses is forum shopping by the contracting parties which culminates in mutual agreement on the forum. See Ely, *supra* note 40, at 710-11 (discussing difficulties of applying *Erie*).

Erie and its progeny have involved torts, which present risks of forum shopping quite different from the risks arising from contracts negotiated at arm's length. In contracts, litigation is generally foreseen as a possibility. A tort action arises unexpectedly. As a result, the need to protect contractual parties from forum shopping is less than the need to protect unsuspecting tort defendants. Thus, the importance of the twin aims of the *Erie* doctrine is significantly weakened in cases involving contractual disputes. If the parties in a tort action had anticipated litigation, they would have entered into a contract to protect their interests and spell out remedies.

process within federal courts, the *Byrd* Court's concern,¹²⁷ is not necessarily affected, application of federal law will enhance the smooth operation of the federal court system by determining where cases can or will be heard. In addition, this expansion of the rule-making power of federal courts should reduce the amount of litigation regarding forum selection clause enforcement by adopting the uniform standard of the reasonableness test from *The Bremen*. Moreover, no significant substantive state interest opposes development of a federal rule. The state laws against enforcement of forum selection clauses were created to protect state court jurisdiction, which is not a concern for a case in federal venue. Uniform federal enforcement of forum selection clauses would, therefore, have only a minimal effect on the substantive rights and obligations of citizens under state law.¹²⁸

To create federal common law in this area, courts might draw from federal court precedent creating federal law to protect strong federal interests or to fill the interstices of a pervasively federal system of law.¹²⁹ Using this approach courts could declare that *The Bremen's* holding is a substantive federal common law rule, applicable to federal and state courts alike.¹³⁰ Such a declaration, however, would be an enormous departure from *Erie's* abolition of federal general common law in diversity cases. The *Erie* Court reacted negatively to the use of federal common law because the substantive outcome of a case would be different if decided in federal rather than state court. Since *Erie*, the Supreme Court has been willing to create substantive common law only in limited areas in which there is a

127. See *supra* note 45 and accompanying text; text accompanying notes 116-17.

128. See *supra* note 75 and accompanying text.

129. See *supra* notes 59-64 and accompanying text.

130. If forum selection clause enforcement is a substantive issue, federal courts in diversity can only apply federal law if they choose to create new federal common law. Although *Erie* prohibits federal general common law, it is established that federal courts can, in limited areas, develop common law which is applicable in diversity. One interpretation of *Erie* is that instead of abolishing all federal common law, *Erie* only limited it to areas in which the federal government has constitutional authority and also established that the grant of diversity jurisdiction and the Rules of Decision Act could not serve as grounds for creating federal common law. See Field, *supra* note 60, at 923-27, 982; C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514, at 257. Under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts made common law outside the sphere of authority granted to the federal government by the Constitution. See Field, *supra* note 60, at 923; see also *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (interstitial federal lawmaking).

strong national interest or legislative history supporting the development of substantive common law.¹³¹ In view of these limitations, creation of federal substantive common law, binding on the states, seems unwarranted in spite of its benefits.

A less intrusive approach is judicial creation of *procedural* common law enforcing forum selection clauses in federal courts but not in state courts.¹³² Adopting the reasoning in the *Moretti & Perlow Law Offices v. Aleet Associates* decision,¹³³ that

131. Post-*Erie* federal common law has been created in three major areas. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514, at 223-24; *supra* notes 61-64 and accompanying text. The creation of substantive federal common law to govern the enforceability of forum selection clauses does not fit within any of the three areas identified by the courts as appropriate for common law. The Third Circuit has noted that no strong federal interest or policy warrants displacing state law in interpreting forum selection clauses. *General Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 357 (3d Cir. 1986).

Significantly, when federal common law is created, it is binding on state courts through the supremacy clause of the Constitution. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514, at 219. Thus, the protection of the federalist dual court system requires limiting the areas in which federal common law is created so that interference with state lawmaking will be minimal.

To establish the holding in *The Bremen* as federal common law applicable in diversity suits, courts would have to exceed the current boundaries for common law. Although there are commentators who argue that it is not inconsistent with *Erie* for the courts to do so, the Supreme Court has indicated an unwillingness to expand federal common law. See *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 642-46 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 96-97 (1981); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514 at 274.

To find support for common law enforcement of forum selection clauses, the court could invoke the commerce clause, which grants the federal government authority over interstate commerce. Although this is a logical and desirable approach from a policy standpoint, it would undo a settled rule that, absent a significant national interest, courts will not make common law in an area in which Congress has power to legislate but has failed to do so. See *Texas Indus.*, 451 U.S. at 641; see also Field, *supra* note 60, at 976-77.

132. See *supra* note 60. Should Congress find such a judicially created federal law unacceptable, it can reverse the decision by statutory enactment. See *Westen & Lehman*, *supra* note 51, at 329 (holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1965), reversed in part by second Hickenlooper Amendment).

Although this creation of new rules exceeds the current range of common law development endorsed by the Supreme Court, it does not violate *Erie*. Congress has the power to make rules for the federal courts, as it has done in the venue rules. Congress also delegated to the Supreme Court the authority to develop the Federal Rules of Civil Procedure, which Congress later enacted as law. Should Congress disagree with common law or rules made by the courts, it has the power to modify those rules with appropriate legislation. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 4514, at 220.

133. 668 F. Supp. 103 (D.R.I. 1987); see *supra* notes 65-66 and accompanying text.

the courts can fill the interstices of a pervasively federal system of venue with procedural common law, federal courts should declare a new procedural federal common law rule that forum selection clauses are prima facie enforceable in federal courts and are to be evaluated under the reasonableness test of *The Bremen*. In effect, many federal circuits have already created such a procedural rule by applying the holding in *The Bremen* to forum selection clauses in diversity without analyzing the *Erie* question.¹³⁴ The procedural common law approach avoids the major drawback accompanying the creation of federal substantive common law by restricting the application of the federal law to federal courts only. Substantive federal common law is binding on the states through the supremacy clause of the Constitution. Courts could opt to restrict application of the proposed *procedural* common law rule, however, to suits in federal court as they do with other federal procedural rules. If the new common law rule that clauses are prima facie enforceable in all federal courts¹³⁵ is not binding on the states, the few states that currently refuse to enforce forum selection clauses¹³⁶ may continue their policy or choose to adopt the federal position to avoid putting their citizens at a disadvantage.¹³⁷ To promote necessary uniformity in the federal court system, federal courts should have the power to declare forum selection clauses prima facie enforceable.

The major drawback to a federal rule declaring forum selection clauses prima facie enforceable is the potential for inequity, particularly when an out-of-state resident brings suit in state court because the resident defendant cannot remove to federal court to take advantage of the federal rule. Similar inequity for resident defendants already exists in the federal system, however, because the federal removal statute bars removal by resident defendants in other types of actions.¹³⁸ The pro-

134. See *supra* note 35 and accompanying text.

135. All but two circuits apply federal law now. See *supra* notes 34-35 and accompanying text.

136. See *supra* note 28 (primarily southern states do not enforce forum selection clauses).

137. Because the Alabama rule is for the protection of the courts' jurisdiction, this virtual coercion is not to the detriment of the rights of citizens. Eventually the *Erie* issue in forum selection clauses could not only be settled but could disappear. An extension of this reasoning to other areas of law, however, would severely limit the federalist purpose of diversity jurisdiction to allow for creativity and experimentation in state lawmaking. See Field, *supra* note 60, at 968-70 n.386.

138. See Ely, *supra* note 40, at 712-13.

posed rule does not, therefore, increase the burden on defendants significantly. Moreover, the broad concern in the *Erie* doctrine is fairness to the parties, and enforcing a contractually agreed upon forum selection clause is fair if the clause itself is reasonable.¹³⁹

In conjunction with the creation of federal procedural common law enforcing forum selection clauses, a uniform method for implementing transfer of cases to the contractual forum is needed. Several courts, including the Eleventh Circuit in *Ricoh*, have failed to identify the method of transfer.¹⁴⁰ Other federal courts which have enforced forum selection clauses have differed on whether to use the improper venue statute or the forum non conveniens statute to transfer the case.¹⁴¹

The use of forum non conveniens transfer is not satisfactory because it does not effect the agreement of the parties in forum selection clause cases.¹⁴² Most forum selection clauses contain choice of law provisions in which the parties agree to the law that will govern contract disputes. In a transfer under forum non conveniens, however, the transferee court must use the law of the transferor court, a forced choice of law that will likely contravene the parties' intentions.

Judicial use of the improper venue statute, however, would permit transfer of the case while maintaining the parties' choice of law.¹⁴³ Unlike a forum non conveniens transfer, an improper venue transfer resolves choice of law issues according to the state law of the transferee court. In the case of forum selection clauses, this will be the court and law contractually chosen by the parties.¹⁴⁴

As a result, courts should hold that improper venue exists when the parties have stipulated a reasonable forum in advance of litigation and an action is brought in the nondesignated fo-

139. See *id.*; Westen & Lehman, *supra* note 51, at 374. Any unreasonableness in the clause itself can be evaluated using the test from *The Bremen*. 407 U.S. at 12-13. See *supra* notes 37-38 and accompanying text.

140. See *supra* notes 68-75 and accompanying text.

141. See *supra* notes 32-35 and accompanying text.

142. See *supra* note 85.

143. See *supra* note 18. Section 1406(a) allows transfer or dismissal of a case brought in the "wrong" district. Wrong district has traditionally been interpreted to mean that the transferor court does not have jurisdiction. See generally C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3827, at 169-76.

144. See *supra* note 143 and accompanying text. See *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341, 344-45 (3d Cir. 1966); *Moretti & Perlow Law Offices v. Aleet Assocs.*, 668 F. Supp. 103, 106 (D.R.I. 1987).

rum.¹⁴⁵ Several federal courts, in transferring a case based on a forum selection clause, have noted that the enforcement of the forum selection clause does not oust the noncontractual court of its jurisdiction, but rather gives it reason to decline to exercise its lawful jurisdiction.¹⁴⁶ This reasoning supports interpretation of improper venue to enforce forum selection clauses. Through application of federal procedural common law and improper venue transfer, courts can achieve uniformity and effect the intent of the contracting parties who include forum selection clauses in their contracts.¹⁴⁷

CONCLUSION

Forum selection clauses have received varied treatment by federal and state courts. Several federal circuits have sought uniformity by enforcing these clauses in diversity cases, but in doing so they have inexplicably avoided any analysis under the *Erie* doctrine. In *Stewart Organization v. Ricoh Corp.*, the only federal circuit court to apply *Erie* reached the right result in

145. See *Moretti & Perlow Law Offices*, 668 F. Supp. at 105-06; *D'Antuono v. CCH Computax Sys.*, 570 F. Supp. 708, 710 (D.R.I. 1983). The *D'Antuono* court argued that § 1406(a) applies to forum selection clause enforceability questions because the plaintiff's choice of a noncontractual forum is "wrong," not merely inconvenient, and should not be allowed to stand. 570 F. Supp. at 710. To invoke § 1406(a), venue must be improper—that is, in the wrong division or district. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3827, at 169; *Buhl v. Jeffes*, 435 F. Supp. 1149, 1151 (M.D. Pa. 1977) (filing in a district where venue is improper is a prerequisite to transfer).

Currently, improper venue can only be used as the basis for a § 1406(a) transfer when the transferor court has subject matter jurisdiction but lacks personal jurisdiction over the defendant. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 27, § 3827, at 169-71.

146. See *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273, 280 (9th Cir. 1984). The purpose of § 1406 when it was enacted was to avoid injustice. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962). The goal of the federal courts in seeking to apply federal law to enforcement of forum selection clauses falls within this purpose by seeking to protect the expectations of parties to a contract and to prevent one party from undermining those intentions through forum shopping.

147. Recognition of judicial power to create procedural law is preferable to mere statutory interpretation in resolving the forum selection clause issue, because it clarifies ambiguities in the development of the *Erie* doctrine. Combining the reasoning of the independent common law rule with the interpretation of the improper venue statute provides an even stronger basis for prima facie enforcement of forum selection clauses in diversity.

The combination of interpreting § 1406(a) so that suits brought in a noncontractual forum are improper with the development of a federal procedural law that forum selection clauses are enforceable would remove any doubt as to the method of transfer to the contractual forum and protect the parties' contractual choice of law.

applying federal law but violated *Erie* principles in reaching that result.

To enforce forum selection clauses while avoiding an inconclusive *Erie* analysis, federal courts should create limited federal common law. The newly created law should be procedural rather than substantive to avoid intrusive application to state courts. A procedural rule that forum selection clauses are prima facie enforceable is a necessary component of a uniform federal court system that recognizes the increased frequency of contract litigation in federal diversity courts and operates to further the promotion and expansion of trade and commerce.

To complete the protection of the contracting parties' intentions, courts should transfer forum selection clause cases pursuant to the improper venue statute, which requires application of the parties' contractual choice of law in their selected forum. Combined with the suggested interpretation of the improper venue statute, the new federal common law rule would provide strong guidance for the courts and increased predictability for contracting parties.

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