Conflict of Laws - Application of Forum State's Statute of Limitations to Litigation with Which the State Has No Significant Contacts Is Unconstitutional

David A. Ebby

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Conflict of Laws Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol33/iss3/7

This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
CONFLICT OF LAWS—APPLICATION OF FORUM STATE’S STATUTE OF LIMITATIONS TO LITIGATION WITH WHICH THE STATE HAS NO SIGNIFICANT CONTACTS IS UNCONSTITUTIONAL

Ferens v. Deere & Co. (1987)†

Under Klaxon Co. v. Stentor Electric Manufacturing Co.,¹ a federal district court sitting in diversity must apply the choice-of-law rules of the state in which it sits. If a diversity suit is transferred from one federal district court to another, Van Dusen v. Barrack² directs that the transfer does not result in the application of a new choice-of-law rule. Klaxon and Barrack, however, are subject to the restrictions that the due process³ and full faith and credit clauses⁴ impose on states’ choice-of-law decisions.⁵ “[F]or a State’s substantive law to be selected in a constitu-


At issue in Wortman was the constitutionality of the application of the Kansas statute of limitations to a claim having essentially no contacts with that state. Wortman, 108 S. Ct. at 2120. The Court held that “the Constitution does not bar the application of the forum State’s statute of limitations to claims that in their substance are and must be governed by the law of a different State.” Id. at 2121.

The Court based its decision on the founding fathers’ expectations that the full faith and credit clause would be interpreted according to the principles of international conflicts law and subsequent legal practice. Id. at 2123, 2125. Justice Brennan, joined by Justice Marshall and Justice Blackmun, concurred in the result because “the contact a State has with a claim simply by virtue of being the forum creates a sufficient procedural interest to make the application of its limitations period to wholly out-of-state claims consistent with the Full Faith and Credit clause.” Id. at 2129 (Brennan, J., concurring).

The Third Circuit must accept Wortman as binding precedent on the issue of the constitutionality of the application of a forum state’s statute of limitations to a claim having essentially no contacts with that state. However, it is the opinion of the author that the Third Circuit’s analysis in Ferens, as more fully set forth in this casebrief, is more consonant with the principles and policies of conflicts laws jurisprudence than the Wortman decision. In addition, if there existed only one possible basis for the Third Circuit’s decision in Ferens, Wortman would control and the Third Circuit would have no choice but to uphold the application of Mississippi’s statute of limitations to the Ferens’ claim. This casebrief, however, suggests an alternative basis for the result reached by the Third Circuit in Ferens. This alternative basis avoids the constitutional issue decided by Wortman. See infra notes 122-31 and accompanying text. Thus, on remand, the author suggests that the Third Circuit should affirm the result it reached in Ferens on the basis of the proposed alternative theory.

1. 313 U.S. 487 (1941).
3. U.S. Const. amend. V.
5. “We do not suggest that the application of transferor state law is free
tionally permissible manner, that State must have a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 6 The United States Supreme Court has never considered the constitutionality of the application of a forum state's statute of limitations to litigation with which the state has essentially no significant contacts. 7 However, the United States Court of Appeals for the Third Circuit recently considered precisely this


7. Regardless of the degree of contact between a forum and a cause of action, the forum, under traditional choice-of-law principles applies its own procedural rules to the litigation. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 n.10 (1984); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); R. LEFLAR, L. MCDUGAL, & R. FELIX, AMERICAN CONFLICTS LAW § 121, at 331 (4th ed. 1986) [hereinafter LEFLAR]; R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2, at 47 (3d ed. 1986). The common law has traditionally characterized statutes of limitations as procedural, and thus regardless of the contacts between a forum and a cause of action, the forum, subject to certain exceptions, imposes its own statute of limitations on the litigation. Keeton, 465 U.S. at 778 n.10; Wells v. Simonds Abrasive Co., 345 U.S. 514, 518 (1953); see also LEFLAR, supra, § 127, at 348; R. WEINTRAUB, supra § 3.2C2, at 56. In Keeton, the United States Supreme Court stated:

There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. . . .

But we find it unnecessary to express an opinion at this time whether any arguable unfairness rises to the level of a due process violation. Keeton, 465 U.S. at 778 n.10.

Three federal courts of appeals have ruled that the application of the forum state's statute in these circumstances is constitutional. See Goad v. Celotex Corp., 831 F.2d 508 (4th Cir. 1987) (forum traditionally applies forum state's statute of limitations; statutes of limitations are procedural; constitutional limits imposed on states' substantive choice-of-law decisions inapplicable); Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982) (same); Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) (same). For the Ferens court's treatment of Schreiber, see infra notes 38-45 and accompanying text. For criticism of Goad, Cowan and Schreiber, see infra notes 92-107 and accompanying text.
issue in *Ferens v. Deere & Co.*

*Ferens* involved a personal injury claim filed in Mississippi for the sole purpose of taking advantage of that state's six-year statute of limitations. The action was then transferred to the United States District Court for the Western District of Pennsylvania. On appeal, the Third Circuit held in *Ferens* that the due process and full faith and credit clauses of the United States Constitution prevented the application of Mississippi's statute of limitations to the claim, because Mississippi had no significant contacts with the occurrence or transaction giving rise to the claim.

On July 5, 1982, Albert Ferens became caught in the combine he was cleaning and his right hand was severed above the wrist. Deere & Co. (Deere), the manufacturer of the combine, was a Delaware corporation with its principal place of business in Moline, Illinois. Ferens had bought the combine in July, 1981, from a Pennsylvania vendor for use on his Dunbar, Pennsylvania farm.

On July 3, 1985, the Ferenses filed suit in the United States District Court for the Western District of Pennsylvania against Deere. The Ferenses sought compensation for Mr. Ferens' personal injuries on the grounds of breach of certain express and implied warranties.

---

8. 819 F.2d 423 (3d Cir. 1987).
9. Id. at 424. Under *Klaxon*, federal courts sitting in diversity must apply the choice-of-law rules of the state in which they sit. 313 U.S. at 487. Under Mississippi choice-of-law rules, the Mississippi statute of limitations would be applied to the Ferens' claim. For a discussion of the Mississippi choice-of-law rules, see infra notes 31-37 and accompanying text.
10. 819 F.2d at 424. Under *Van Dusen v. Barrack*, 376 U.S. 612 (1964), a transfer initiated by a defendant in a diversity case should be just a change of courtrooms; it does not result in the application of a new choice-of-law rule to the claim. Id. at 639.
11. 819 F.2d at 427. Three federal courts of appeals that have addressed this issue have ruled that the application of the forum state's statute in these circumstances is constitutional. See *Goad*, 831 F.2d 508 (forum traditionally applies forum state's statute of limitations, statutes of limitations are procedural, constitutional limits imposed on states' substantive choice-of-law decisions inapplicable); *Cowan*, 694 F.2d 104 (same); *Schreiber*, 611 F.2d 790 (same). For a comparison of *Goad*, *Cowan* and *Schreiber* to *Ferens*, see infra notes 92-107 and accompanying text. For a discussion of the *Ferens* court's treatment of *Schreiber*, see infra notes 38-45 and accompanying text.
12. 819 F.2d at 424.
13. Id.
14. Id. Ferens purchased the combine from the Uniontown Farm Equipment Company in Uniontown, Pennsylvania. Id.
15. Id. The district court had jurisdiction based on diversity of citizenship. Id.
On July 25, 1985, the Ferenses filed an additional diversity suit in the United States District Court for the Southern District of Mississippi against Deere, seeking identical damages as those sought in the Pennsylvania action. The Mississippi action was based on theories of negligence and strict liability in tort. The Ferenses filed in Mississippi because Deere was subject to personal jurisdiction there and because the Mississippi statute of limitations for personal injuries was six years. The Ferenses neither claimed that they had ever entered Mississippi, nor that Deere had designed or manufactured the combine in Mississippi.

After Deere filed an answer in the Mississippi suit, the Ferenses moved under section 1404(a) to transfer the case to the Western District of Pennsylvania. The Ferens’ transfer motion was granted on November 8, 1985, and on November 21, 1985, the Mississippi action was consolidated with the Pennsylvania action for all purposes.

On February 20, 1986, Deere moved for summary judgment on both claims, arguing that the Pennsylvania statute of limitations governing personal injuries barred the transferred Mississippi action and that the breach of warranty action was precluded by the terms of the written warranty that accompanied the combine. The district court denied Deere’s motion for summary judgment on the breach of warranty claim, ruling that there were material issues of fact. However, the

17. 819 F.2d at 424.
18. Id. Specifically, the Ferenses claimed that the combine was defective and that Deere failed to warn of its defects. Id.
19. Id. Deere was qualified to do business in Mississippi, having appointed a local registered agent for service of process. Id.
21. 819 F.2d at 424.
22. Id. In support of their § 1404(a) motion, the Ferenses claimed:
a) that they resided in Pennsylvania; b) that the accident occurred in Pennsylvania; c) that their claim had no connection with Mississippi; d) that a substantial number of material witnesses resided in the Western District of Pennsylvania, while none were in Mississippi; e) that a substantial number of necessary documentary exhibits were in the Western District of Pennsylvania, while none were in Mississippi; and f) that the breach of warranty action pending in the Western District of Pennsylvania, involving the same accident, presented common questions of fact and law.
Id. at 424-25.
23. Id. at 425.
24. Id.
court granted Deere's motion for summary judgment on the tort claim.\textsuperscript{26} The court held that when a plaintiff moves for a transfer under the federal transfer statute, the law of the transferee court applies.\textsuperscript{27} Thus, the tort claim was barred by the Pennsylvania statute of limitations.\textsuperscript{28} The Ferenses then appealed the summary judgment order to the United States Court of Appeals for the Third Circuit.\textsuperscript{29}

The court of appeals in Ferens\textsuperscript{30} initially observed that while the Ferens' argument that the Mississippi statute of limitations should apply to the transferred action was straightforward, such an argument ignored "the constitutional limits imposed upon the application of transferor state law."\textsuperscript{31} Examining the Ferens' claim under this framework, the court noted that Mississippi state law was unusual in two significant aspects.\textsuperscript{32} First, Mississippi had a six-year statute of limitations for personal injury actions, whereas most states had a two or three-year statute of limitations for such claims.\textsuperscript{33} Second, the Mississippi Supreme Court

\textsuperscript{26} Id.

\textsuperscript{27} Id. The federal transfer statute permits a district court, "[f]or the convenience of parties . . . in the interest of justice . . . [t]o transfer any civil action to any other district . . . where it might have been brought." 28 U.S.C. § 1404(a) (1982). Although the Supreme Court in Van Dusen v. Barrack held that when a defendant in a diversity suit motions for a transfer, the law of the transferor court applies, the Court expressly left open whether in all cases 1404(a) required the transferee court to apply the law of the transferor court. 376 U.S. 612, 639-40 & n.41 (1964). Thus, as the Third Circuit in Ferens acknowledged, it could have avoided the constitutional issue by deciding the case on a distinction between plaintiff- and defendant-initiated transfers. 819 F.2d at 426 n.4, 427 n.5. For a discussion of the potential alternative grounds of decision in Ferens, see notes 122-31 and accompanying text.

\textsuperscript{28} 639 F. Supp. at 1490-92. After summary judgment was granted on the tort claim, the district judge entered a final judgment order pursuant to Fed. R. Civ. P. 54(b). 819 F.2d at 425.

\textsuperscript{29} 819 F.2d at 425. The breach of warranty claim was stayed pending the resolution of this appeal. Id.

\textsuperscript{30} Chief Judge Gibbons authored the majority opinion for the panel, in which he was joined by Judge Aldisert. Id. at 423. Judge Seitz filed a dissenting opinion. Id. at 427-29 (Seitz, J., dissenting).

\textsuperscript{31} Id. at 425. The Ferenses argued that federal district courts sitting in diversity must apply the choice-of-law rules of the state in which they sit. See Klaxon, 313 U.S. 487 (1941). Additionally, under Barrack, 376 U.S. 612 (1964), when a diversity action is transferred pursuant to § 1404(a), the transfer does not result in the application of a new choice-of-law rule. Id. at 639.

The Ferenses therefore argued that the transferee court, the Pennsylvania federal district court, was bound to apply Mississippi's choice-of-law rule with respect to the statute of limitations governing the tort claim. 819 F.2d at 425. The Ferenses further argued that Mississippi, the forum state of the transferor court, would apply its own statute of limitations in their case, and thus the Pennsylvania federal district court must do likewise. Id.; see Cowan v. Ford Motor Co., 719 F.2d 785 (5th Cir. 1983) (applying Mississippi Supreme Court's interpretation of the Mississippi borrowing statute).

\textsuperscript{32} 819 F.2d at 425.

\textsuperscript{33} Id. As the court observed in a footnote, only five states have six-year statutes of limitations for personal injury claims. See Me. Rev. Stat. Ann. tit. 14,
had "made an exceptionally uncommon interpretation of its borrowing statute." 34 The Ferens court pointed out that, while on its face the Mississippi borrowing statute seemed to suggest that Mississippi would look to Pennsylvania for the statute of limitations governing the Ferens' tort claim, "the Mississippi Supreme Court has held that its borrowing statute 'only applies where a non-resident in whose favor the statute has accrued afterward moves into this state.' " 35 As Deere was qualified to do business in Mississippi at the time of the accident, Mississippi would treat Deere as a resident, and the Mississippi borrowing statute would thus be inapplicable. 36 Therefore, Mississippi would apply its six-year statute of limitations to the action. 37

The court next considered Schreiber v. Allis-Chalmers Corp., 38 in which the United States Court of Appeals for the Tenth Circuit faced the same issue that was before the Third Circuit in Ferens. 39 The Tenth Circuit, however, declined the opportunity to subject the application of Mississippi's statute of limitations to the constitutional limits imposed on states' choice-of-law decisions. 40 Rather, the Schreiber court applied the


34. 819 F.2d at 425. The Mississippi borrowing statute provides:

When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of a lapse of time, then no action thereon shall be maintained in this state.


35. 819 F.2d at 426 (quoting Louisiana & Mississippi R.R. Transfer Co. v. Long, 150 Miss. 654, 667, 131 So. 84, 88 (1930)). The court also cited Cowan v. Ford Motor Co., 719 F.2d 785 (5th Cir. 1983) (construing Mississippi Supreme Court's interpretation of Mississippi borrowing statute). 819 F.2d at 426.

36. 819 F.2d at 426 (citing Kershaw v. Sterling Drug, Inc., 415 F.2d 1009, 1011 (5th Cir. 1969)).

37. Id.

38. 611 F.2d 790 (10th Cir. 1979).

39. Id. at 792-94. In Schreiber, a Kansas plaintiff was injured in that state by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin. Id. at 791. After the Kansas statute of limitations had expired, but prior to the expiration of the six-year Mississippi statute, the plaintiff filed suit in federal district court in Mississippi. Id. Thereafter, the defendant filed a section 1404(a) motion and the case was transferred to a federal district court in Kansas, which refused to apply the Mississippi statute of limitations on the basis that Mississippi could not assume jurisdiction over the case. Id. at 791-92. The district court alternatively held that in the event that Mississippi had properly assumed personal jurisdiction over the parties, a Mississippi court, faced with the facts of Schreiber, would abandon the lex fori rule. Id. at 1007. Oddly enough, the district court also reached and denied defendant Allis-Chalmers' argument that application of Mississippi's statute of limitations to the litigation would violate due process. Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079, 1098 (D. Kan. 1978). The United States Court of Appeals for the Tenth Circuit, however, reversed the district court. 611 F.2d 790 (1979).

40. 611 F.2d at 792-94. The court of appeals in Schreiber acknowledged that
Mississippi statute on the grounds that Barrack was controlling.\footnote{41}

The \textit{Ferens} court disagreed completely with the analysis and result reached by the Tenth Circuit in \textit{Schreiber}, and concluded that the Tenth Circuit had ignored that "at most, Klaxon\footnote{42} and Barrack\footnote{43} require a federal diversity forum to apply a state choice-of-law rule which the state court could, as a matter of federal law, lawfully apply."\footnote{44} Further, the \textit{Ferens} court observed that "the Barrack Court reasserted the continuing authority of those cases which, under the due process and full faith and credit clauses, have established federal limits upon aberrational state choice of law rules."\footnote{45}

The court then subjected the choice of Mississippi law\footnote{46} to the constitutional limits imposed on states' choice-of-law decisions as enunciated in \textit{Home Insurance Co. v. Dick}\footnote{47} and \textit{Allstate Insurance Co. v. Hague}.\footnote{48}

\begin{quote}
its holding would result in the Kansas district court entertaining an action that could not have originally been brought in that court since the claim was filed after the expiration of the Kansas statute of limitations. However, the \textit{Schreiber} court "th[ought] it preferable to adhere to accepted legal principles rather than to strive to achieve, at the expense of those principles, a result which might appear to some as being more fair and just than the alternative." \textit{Id.} at 794.
\end{quote}

\begin{quote}
\begin{enumerate}
\item \textit{Id.} at 792-94. The Tenth Circuit held that Mississippi had properly assumed personal jurisdiction over the parties, that Mississippi would \textit{not} abandon the \textit{lex fori} rule, and that under \textit{Barrack}, the Kansas district court was obligated to apply the Mississippi statute of limitations. \textit{Id.} at 792-94. The Supreme Court held in \textit{Barrack}, that transfer of a diversity case did not result in a new choice-of-law rule. 376 U.S. at 612.
\item Klaxon, 313 U.S. 487 (federal district courts sitting in diversity must apply choice-of-law rule of state in which they sit).
\item Barrack, 376 U.S. 612 (when defendant makes section 1404(a) motion, transferee court must apply law of transferor court).
\item 819 F.2d at 426.
\item \textit{Id.} The \textit{Barrack} Court reaffirmed the line of cases which established federal limits on states' choice-of-law rules. For the line of cases establishing constitutional limits on states' choice-of-law decisions, see \textit{supra} note 6.
\item \textit{Id.} at 426-27. The \textit{Ferens} court included statutes of limitations in subjecting the choice of Mississippi law to the constitutional restrictions imposed on states' choice-of-law decisions. \textit{Id.}
\item 281 U.S. 397 (1930) (application of forum state's substantive law is unconstitutional absent significant contacts between the forum state and the litigation). For the facts of \textit{Dick} and its relevance to \textit{Ferens}, see \textit{infra} notes 108-13 and accompanying text.
\item 449 U.S. 302 (1981) (application of forum state's substantive law is unconstitutional absent significant contacts between the forum state and the litigation). For the facts of \textit{Hague} and its relevance to \textit{Ferens}, see \textit{infra} notes 115-17 and accompanying text. The \textit{Ferens} court also cited Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) (inadequate contact between claim and forum state to permit application of forum state's law voiding limitations provision in bond executed in Tennessee). 819 F.2d at 427. The court acknowledged that \textit{Dick} and \textit{Delta & Pine Land} involved contracts incorporating shorter limitations periods than those sanctioned by the governing state law rather than statutes of limitations. \textit{Id.} However, the court quoted \textit{Hague} as authority for the notion that the holdings of \textit{Dick} and \textit{Delta & Pine Land} are not limited to contractual situations:
\begin{quote}
\end{quote}
\end{enumerate}
\end{quote}
In the view of the *Ferens* court, the Ferens' case presented "the precise situation to which Justice Brennen refers in *Hague*—nominal residence, standing alone."49 Thus, the court concluded that because Mississippi's contacts with the parties and the accident were insignificant, application of Mississippi law in *Ferens* would be unconstitutional.50 Since Mississippi law could not be applied to the case, and since Pennsylvania had substantial contacts with the parties and the occurrence, application of Pennsylvania law was constitutional.51 Consequently, the court of appeals affirmed the district court's summary judgment in favor of Deere on the transferred tort action.52

Judge Seitz dissented from the majority on the grounds that the court's decision imposed unwarranted constitutional restraints on plaintiffs attempting to take advantage of section 1404(a).53 Judge Seitz suggested that the majority's holding ignored the distinction between the constitutional limitations on a forum's choice of substantive law and the traditional application by a forum of the forum state's procedural law.54

(1936)] stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. Dick concluded that nominal residence—standing alone—is inadequate; Yates held that post-occurrence change of residence to the forum State—standing alone—was insufficient to justify application of forum law.


_Delta & Pine Land_ has been criticized, however, as:

having scant relevance for today. It implied a choice-of-law analysis which, for all intents and purposes, gave an isolated event—the writing of the bond in Tennessee—controlling constitutional significance, even though there might have been contacts with another State (there Mississippi) which would make application of its law neither unfair nor unexpected.


49. 819 F.2d at 427. The court further stated:

Deere is nominally a resident of Mississippi because, in order to do business there, it has appointed a local resident agent. The lawsuit does not grow out of any business which Deere conducted in Mississippi. Mississippi has no interest in the injuries sustained by Mr. Ferens, or in the transaction by which he acquired the combine that injured him.

*Id.*

50. *Id.*

51. *Id.* at 427. The injury occurred in Pennsylvania, the Ferenses resided in that state at the time of the accident and the combine was bought and sold in Pennsylvania. *Id.* at 424.

52. *Id.* at 427. Because the court held that Mississippi could not constitutionally apply its law to the Ferens' claim, the court did not reach the issue whether, as Deere contended, the *Barrack* rule only applies when the defendant makes a section 1404(a) motion. *Id.* at 426 n.4, 427 n.5. For a discussion of the potential alternative grounds of decision in *Ferens*, see *infra* notes 122-31 and accompanying text.

53. *Id.* at 428 (Seitz, J., dissenting).

54. *Id.* (Seitz, J., dissenting). Judge Seitz stated:

The two Supreme Court cases relied on by the majority, *Allstate Insur-*
He also observed that the United States Supreme Court had declined to decide whether a forum's choice of its statute of limitations could rise to a due process violation.\textsuperscript{55} Reasoning that the forum has traditionally applied the forum state's own statute of limitations regardless of what state's substantive law applied,\textsuperscript{56} Judge Seitz concluded that application of Mississippi's statute of limitations to the Ferens claim would not violate due process.\textsuperscript{57}

Judge Seitz then addressed the district court's application of the Pennsylvania statute of limitations to the transferred tort action.\textsuperscript{58} Finding the reasoning of several federal courts of appeals persuasive,\textsuperscript{59} Judge Seitz concluded that the Mississippi statute of limitations should have been applied to the transferred tort action.\textsuperscript{60} He argued that the focus should be on whether the transferor court was a proper forum in terms of venue and jurisdiction, instead of on the identity of the party seeking the transfer.\textsuperscript{61} Focusing on whether the transferor court was a proper forum would prevent forum shopping because it would deny plaintiffs the power to obtain advantageous state law in a forum in which

\begin{quote}
\textit{ance Co. v. Hague...} and \textit{Home Insurance Co. v. Dick...} address only the constitutional limits on a forum's choice of substantive law. In \textit{Hague}, Justice Brennan [for a plurality] stated that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." ... Moreover, the Court in \textit{Dick} distinguished the case before it, which involved an attempt to apply Texas substantive law to a contractual limitation on the period in which the parties could sue, from a case in which the forum simply applied its procedural statute of limitations. ... \\
\textit{Id.} (Seitz, J., dissenting) (citations omitted).
\end{quote}

\textsuperscript{55} See, e.g., Gonzalez v. Volvo of Am. Corp., 734 F.2d 1221 (7th Cir. 1984); Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983); Martin v. Stokes, 623 F.2d 499 (6th Cir. 1980). For a discussion of these cases, see infra notes 129-31 and accompanying text.

\textsuperscript{56} See, e.g., Gonzalez v. Volvo of Am. Corp., 734 F.2d 1221 (7th Cir. 1984); Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983); Martin v. Stokes, 623 F.2d 499 (6th Cir. 1980). For a discussion of these cases, see infra notes 129-31 and accompanying text.
they could not properly have maintained an action. According to Judge Seitz, a factual inquiry into the plaintiff’s motives for transfer under section 1404(a) was not justified and "[w]hether there should be restrictions on plaintiff-initiated transfers under section 1404(a), however, is an issue that is best left to Congress." Therefore, Judge Seitz would have reversed the judgment of the district court.

Under Klaxon, federal courts sitting in diversity must apply the choice-of-law rules of the state in which they sit. The states’ choice-of-law rules, however, are limited by the due process and full faith and credit clauses of the Constitution. Traditionally, regardless of which state’s substantive law is selected to govern a case, a forum will apply the forum state’s rules of procedure. The selection of the forum state’s procedural law has never been subjected to the constitutional restrictions imposed on states’ choice-of-law rules. Statutes of limitations, subject to certain exceptions, are generally characterized as proce-

62. Id. (Seitz, J., dissenting).
At the same time, deciding the choice of law issue on the basis of the propriety of the plaintiff’s initial forum selection complies with the requirement in Barrack that a transfer from a proper forum does not "achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed."

Id. (Seitz, J., dissenting) (quoting Barrack, 376 U.S. at 638).
63. Id. (Seitz, J., dissenting). "Section 1404(a) permits both plaintiffs and defendants to initiate transfers 'for the convenience of the parties.'" Id. (Seitz, J., dissenting) (quoting 28 U.S.C. § 1404(a) (1982)).
64. Id. (Seitz, J., dissenting).
65. 313 U.S. at 487.
66. For a discussion of the constitutional limitations imposed on states’ choice-of-law decisions, see supra notes 5-6 and accompanying text.
68. Keeton, 465 U.S. at 778 n.10. There are good reasons for this rule: practicality and efficiency dictate that judges and lawyers not be required to learn the procedural rules of all fifty states, and states have a strong interest in the administration of their judicial systems. See Leflar, supra note 7, § 121, at 331.
69. There are both judicial and legislative exceptions to the traditional characterization of statutes of limitations as procedural. The judicial exception is based on the theory that when the statute of limitations is closely connected to the statute that creates the right, as is often the case in wrongful death statutes, the remedy is deemed to be part of the right. There are four such judicial exceptions: the "built-in" test, the "specificity" test, the "attributes" test, and the "foreign court" test. See Grossman, supra note 67, at 12-13. Under the "built-in" test, if the statute creating the cause of action also contains the statute of
limitations, the remedy is treated as part of the right. See The Harrisburg, 119 U.S. 199 (1886). The "specificity" test classifies a statute of limitations as part of the right if "it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." Davis v. Mills, 194 U.S. 451, 454 (1904); see also Bourjas v. Atlantic Maritime Co., 220 F.2d 152 (2d Cir. 1955). Under the "attributes" test the court examines how the foreign state classifies statutes of limitations, or, whether under the law of the foreign state the statute of limitations is considered as affecting the right. Grossman, supra note 67, at 13. If it affects the right, the statute of limitations is deemed substantive. See Wood & Selick, Inc. v. Compagnie Generale Transatlantique, 43 F.2d 941 (2d Cir. 1930). The "foreign court" test simply determines how the foreign state characterizes the particular statute of limitations. See Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970).

Borrowing statutes are the legislative exception to the traditional characterization. Borrowing statutes typically bar entertainment of a claim if it is barred in the state where the claim accrued or originated. For example, the Pennsylvania borrowing statute states: "The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim." 42 PA. CONS. STAT. ANN. § 5521 (Purdon 1981). The basic idea behind borrowing statutes is to prevent forum shopping and clogged docket by borrowing the statute of limitations of the state with the greatest interest in the action. For a discussion of borrowing statutes, see Estes, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. FLA. L. REV. 33 (1962) (discussing confusion caused by borrowing statutes); Vernon, Statutes of Limitation in the Conflict of Laws: Borrowing Statutes, 32 ROCKY MTN. L. REV. 287 (1960) (general discussion of borrowing statutes).

70. Keeton, 465 U.S. at 778 n.10; Wells v. Simonds Abrasive Co., 345 U.S. 514, 518 (1953); see also LEFLAR, supra note 7, § 127, at 348; R. WEINTRAUB, supra note 7, § 3.2C2, at 56. Courts and commentators alike have found it difficult to differentiate between substance and procedure:

   The words "substantive" and "procedural" or "remedial" are not talismanic. Merely calling a legal question by one or the other does not resolve it otherwise than as a purely authoritarian performance. But they have come to designate in a broad way large and distinctive legal domains... and to mark, though often indistinctly or with overlapping limits, many divides between such regions.

   ...[W]hether a particular situation or issue presents one aspect or the other depends upon how one looks at the matter. As form cannot always be separated from substance in a work of art, so adjective or remedial aspects cannot be parted entirely from substantive ones in these borderland regions.


Leflar suggests that the controlling consideration in separating substance from procedure in choice-of-law cases should be the degree of difficulty in applying another state's law since it is impractical to expect judges and lawyers to master the judicial procedure for every out-of-state case that is tried in their courts. LEFLAR, supra note 7, § 121, at 332. Professor Cook offers a similar test: "How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?" Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 344 (1933); see also Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y. U. L. REV. 813 (1962) (outcome determinative test); Choice of Law Governing Proof, 58 HARV. L. REV. 153 (1944) (student author Mor-
state and the litigation, the forum state's statute of limitations is applied to the litigation.\textsuperscript{71} If a diversity suit is later transferred, application of the transferor forum state's statute of limitations is unaffected.\textsuperscript{72}

Although three other federal courts of appeals have faced the issue of the constitutionality of a state's application of its statute of limitations to litigation with which the state has no contacts,\textsuperscript{73} the Third Circuit is the first court to hold such application unconstitutional.\textsuperscript{74} In \textit{Ferens}, the Third Circuit seems to have rejected the traditional characterization of statutes of limitations as procedural in favor of a modern analytical model that treats statutes of limitations as substantive, and therefore subject to the restrictions imposed by the due process and full faith and credit clauses on states' choice-of-law decisions.

The \textit{Ferens} court did not explain its analytical basis for subjecting statutes of limitations to the limits imposed on states' substantive

\textsuperscript{71} \textit{Keeton}, 465 U.S. at 778 n.10; \textit{Wells}, 345 U.S. at 518; see also \textit{Leflar}, supra note 7, § 127, at 348; R. \textit{Weintraub}, supra note 7, § 3.2C2, at 56. Thus, if a claim arising under a foreign state's law is barred by the forum's shorter statute of limitations, the forum will dismiss the claim. McElmoyle v. Cohen, 38 U.S. (15 Pet.) 312 (1839) (claim arising under South Carolina law barred by Georgia statute of limitations). If the claim is timely under the law of the forum state, then the forum will hear the claim, irrespective of whether the foreign state's statute of limitations is shorter. Townsend v. Jemison, 50 U.S. (9 How.) 406 (1850) (claim arising under Mississippi law not barred in Alabama court despite shorter Mississippi statute of limitations).

\textsuperscript{72} Van Dusen v. Barrack, 376 U.S. 612, 639 (defendant-initiated transfer of diversity suit should be in effect merely change of courtrooms).

\textsuperscript{73} See \textit{Goed v. Celotex Corp.}, 831 F.2d 508 (4th Cir. 1987) (application constitutional); \textit{Cowan v. Ford Motor Co.}, 694 F.2d 104 (5th Cir. 1982) (same); \textit{Schreiber v. Allis-Chalmers, Corp.}, 611 F.2d 790 (10th Cir. 1979) (same). For a discussion of \textit{Goed}, \textit{Cowan} and \textit{Schreiber}, see infra notes 92-107 and accompanying text.

\textsuperscript{74} \textit{Ferens}, 819 F.2d at 427. The Supreme Court of the United States has never considered the issue of the constitutionality of a contactless forum's application of its own longer statute of limitations. See \textit{Keeton}, 465 U.S. at 778 n.10 (1984).
choice-of-law decisions as enunciated in Allstate Insurance Co. v. Hague\textsuperscript{75} and Home Insurance Co. v. Dick.\textsuperscript{76} Therefore, the court's result is best understood as resting on an implicit characterization of statutes of limitations as substantive.\textsuperscript{77} Hague, Dick and their progeny\textsuperscript{78} direct "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."\textsuperscript{79} Thus in order for the Fersens court to have subjected the choice of the Mississippi statute of limitations to the restrictions enunciated in Dick and Hague, it must have characterized statutes of limitations as substantive.

Following this implicit characterization of statutes of limitations as substantive, the Fersens court subjected the choice of Mississippi substantive law to the test of Dick and Hague.\textsuperscript{80} Finding the contacts between Mississippi and the litigation insignificant, the Fersens court held that the application of Mississippi law would be "arbitrary, fundamentally unfair and therefore unconstitutional."\textsuperscript{81}

Although it was done implicitly, the Fersens court's characterization of statutes of limitations as substantive in the context of applying constitutional choice-of-law principles is appropriate for several reasons. First, while the common law justified characterization of statutes of limitations as procedural on the basis that they affected the remedy and not the right or cause of action,\textsuperscript{82} statutes of limitations have a significant

\textsuperscript{75} 449 U.S. 302 (1981) (state must have significant contacts with litigation for valid application of state's substantive law). For the facts of Hague, see infra note 116.

\textsuperscript{76} 281 U.S. 397 (1930) (state must have significant contacts with litigation for valid application of state's substantive law). For the facts of Dick, see infra note 108. For the Fersens court's treatment of Dick, see infra notes 108-13 and accompanying text.

\textsuperscript{77} The Fersens court's unexplained inclusion of statutes of limitations in the constitutional limits on states' substantive choice-of-law decisions was Judge Seitz' major criticism of the majority. 819 F.2d at 428 (Seitz, J., dissenting) (citing Hague and Dick).

\textsuperscript{78} For a list of cases establishing constitutional limits on states' choice-of-law decisions, see supra note 6.


\textsuperscript{80} 819 F.2d at 427.

\textsuperscript{81} Id.

\textsuperscript{82} McElmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 327 (1839).

[T]he point under consideration will be determined by settling what is the nature of a plea of the statute of limitations. Is it a plea that settles the right of a party on a contract or judgment, or one that bars the remedy? Whatever diversity of opinion there may be among jurists on this point, we think it is well settled to be a plea to the remedy; and consequently that the lex fori must prevail.

Id.; see also Townsend v. Jemison, 50 U.S. (9 How.) 406, 413 (1850). The characterization of statutes of limitations has its roots in seventeenth-century Dutch
substantive purpose in granting defendants repose.83 "Such purposes are ill-served by extending the time period determined by the only state with an interest in the litigation on the grounds that only the remedy, and not the right, was terminated by its statute of limitations."84 Furthermore, "can a right truly be said to exist . . . when all remedy upon it is legally extinguished?"85 Second, the rationale for the traditional writers on the conflict of laws. Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L.J. 492, 496 (1919).

83. See LEFLAR, supra note 7, § 127, at 349. "The forum's limitations rules represent its policy on the enforcement of stale claims, and a policy of repose may be relevant to all lawsuits filed in the forum's courts regardless of where the claims arose." Id.; see also Martin, Statutes of Limitations and Rationality in the Conflict of Laws, 19 Washburn L.J. 405, 420 (1980) [hereinafter Martin, Rationality]; Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 220-22 (1976) [hereinafter Martin, Constitutional Limitations].

84. Martin, Rationality, supra note 83, at 420. As Martin and other commentators point out, there is little justification for the procedural characterization because it increases the burden on the forum's judicial system and results in a forum adjudicating a claim in which it otherwise has no interest. Id. Professor Weintraub argues:

Nevertheless, it seems highly unreasonable for a forum that has no significant contact with the controversy to employ its own longer statute to extend the limitations period. Such conduct serves no substantial interest of the forum. Application of the foreign statute of limitations is not likely to enmesh the forum in the details of foreign procedure. Application of the forum's longer limitation period results in a judgment on the merits different from the judgment that could have been obtained in the jurisdiction with which the controversy is most closely connected. A state ought not to be able to apply its own law to a case on the sole ground that the law applied is "procedural" if application of forum law advances no relevant forum policy and if application of the relevant foreign rule would not be unduly burdensome on the forum when measured against the likelihood that failure to apply that foreign rule will change the outcome of the litigation.

R. WEINTRAUB, supra note 7, § 9.2B, at 539-40 (footnotes omitted).


A right for which the legal remedy is barred is not much of a right. It would have made better sense, as well as logic, if the limitations rule of the state whose substantive law is chosen to govern the right were deemed substantive also, so that both the original and the terminal existence of the right would be related to the same body of law.

LEFLAR, supra note 7, § 127, at 349. Another commentator has noted:

The proposition sounds lawyerlike but is one of those statements that is so patently silly that its acceptance can only be explained by the fact that it has been repeated often by conflicts scholars tied to a First Restatement conceptual approach. Though one is tempted to say, along with the Dickens character, "If the law supposes that . . . the law is a ass," a somewhat more analytical critique is possible. First, one does not have to be a legal realist or logical positivist to ask the meaning of a legal right without a remedy. But further, assuming that a naked right is possible, one would have to ask why a state like Kansas might wish to create a right limiting the remedy for the right in its own court to two years, but desire to see the right continue, subject to implementation
characterization is no longer valid. The common law originally characterized statutes of limitations as procedural in order to restrict the operation of foreign law in English courts. However, convenience as a rationale for the traditional characterization can no longer be justified. Modern courts frequently apply the law of other states, and statutes of limitations are easy to locate and apply.

Recognizing the validity of this reasoning, many courts are beginning to treat statutes of limitations as substantive and subject to the regular choice-of-law analysis utilized by a forum in conflicts cases. The 1986 proposed draft of the Restatement (Second) of Conflict of Laws takes this approach: "An action will be maintained if it is not barred by the statute of limitations of the forum unless the action would be barred in some other state which, with respect to the issue of limitations, has a more significant relationship to the parties and the occurrence."  88

through remedies in the courts of other states with longer statutes of limitations.

Martin, Rationality, supra note 83, at 419-20 (footnotes omitted). A further criticism has been offered:

There is no reason, as regards statutes of limitations ... why the internal test, which classifies them as procedural or as relating to the remedy, should be carried over into the conflict of laws. A right which can be enforced no longer by an action at law is shorn of its most valuable attribute.

Comment, supra note 82, at 496; see also Martin, Constitutional Limitations, supra note 83, at 220-22; Millhollin, Interest Analysis and Conflicts Between Statutes of Limitation, 27 HASTINGS L.J. 1, 5 (1975); Sedler, supra note 70, at 846-51; Developments in the Law—Statutes of Limitations, 63 HARV. L. REV. 1177, 1185-88 (1950).

86. Comment, supra note 82, at 492.

87. See Rosenberg v. Celotex Corp., 767 F.2d 197 (5th Cir. 1985); Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983); Tomlin v. Boeing Co., 650 F.2d 1065 (9th Cir. 1981); Schum v. Bailey, 578 F.2d 499 (3d Cir. 1978); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Dindo v. Whitney, 429 F.2d 25 (1st Cir. 1970); Farrier v. May Dep't Stores Co., 357 F. Supp. 190 (D.D.C. 1973); Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974); Heavner v. Uniroyal, Inc., 63 N.J. 130, 305 A.2d 412 (1973); Myers v. Cessna Aircraft Corp., 275 Or. 501, 553 P.2d 355 (1976); Central Mut. Ins. Co. v. H.O., Inc., 63 Wis. 2d 54, 216 N.W.2d 239 (1974); see also cases cited in Restatement (Second) of Conflict of Laws § 142 reporter's note, comments e, f & g (Proposed Official Draft 1986). For a discussion of proposed section 142, see infra note 88 and accompanying text. For citations to states adhering to the traditional lex fori approach, see R. WEINTRAUB, supra note 7, § 3.2C2, at 56 n.46.

88. Restatement (Second) of Conflict of Laws § 142 (Proposed Official Draft 1986). Where the forum state's statute of limitations is longer than the state's where the action accrued, such as in Ferens, the proposed Restatement rule will only permit the forum to hear the case "in situations where allowing the action would advance a substantial forum interest and would not seriously impinge upon the interests of other states. This will be so when the state of the forum is the one of most significant relationship to other important issues in the case." Id. comment g. The approach to statutes of limitations embraced by the old section 142 will definitely be replaced by a new approach treating statutes of limitation as subject to the regular choice-of-law analysis of the forum state. The American Law Institute is expected to vote on a new proposed section 142 in
Finally, a state with no interest in a claim should not entertain the claim when it is barred by the statute of limitations of the state whose substantive law otherwise governs the claim. When a state has a shorter statute of limitations than the state in which the action accrued, such as occurred in *Wells v. Simonds Abrasive Co.*, it has an interest in applying its own statute of limitations to reduce the burden on its dockets. However, there is no state interest to justify the application of a forum state's longer statute of limitations to a claim having nothing to do with the forum state and which is barred under the law of the state where the action accrued.

That the characterization of statutes of limitations as substantive in the context of constitutional choice-of-law principles is more appropriate than the traditional *lex fori* rule is also supported by an analysis of the reasoning and results of three cases in which other federal courts of appeals have faced this issue. In *Goad v. Celotex Corp.*, the defendant transferred a suit from a Texas to a Virginia federal district court, and the plaintiff moved for an order applying the Texas statute of limitations to his claim, rather than the shorter Virginia statute. Although in *Goad* the United States Court of Appeals for the Fourth Circuit held that

---


The Uniform Conflict of Laws-Limitations Act, which has been adopted in four states, has also abandoned the common law approach:

§ 2. Conflict of Laws; Limitations Periods;
   (a) Except as provided by Section 4, if a claim is substantively based:
      (1) upon the law of one other state, the limitation period of that state applies; or
      (2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflict of laws of this State, applies.
   (b) The limitation period of this State applies to all other claims.

§ 4. Unfairness

If the court determines that the limitation period of another state applicable under Sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this State applies.


90. 345 U.S. 514 (1953). For an explanation of *Wells*, see *supra* note 70.
91. *See* Martin, *Constitutional Limitations, supra* note 83, at 221.
92. 831 F.2d 508, 509 (4th Cir. 1987).
Barrack was controlling and that, therefore, the Texas statute of limitations governed the case, the defendant argued that the due process and full faith and credit clauses of the Constitution mandated that every choice-of-law decision made by a court must be supported by significant contacts between the litigation and the state whose law is chosen to govern it. The defendant argued further that, as the litigation was completely unrelated to Texas, the application of the Texas statute of limitations to the case was unconstitutional.

The Fourth Circuit, however, relying in part on a distinction between statutes of repose and statutes of limitations refused to discard the traditional characterization of statutes of limitation as procedural. Relying on Wells v. Simonds Abrasive Co. for the proposition that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitations of a foreign state," the Goad court rejected the defendant's full faith and credit claim. The Fourth Circuit similarly

93. 376 U.S. 612 (1964) (transfer of diversity suit by defendant should be, in effect, just a change of courtrooms).
94. 831 F.2d at 510.
95. Id.
96. Id. In reaching its holding, the Goad court attempted to distinguish statutes of repose, which it characterized as substantive, from statutes of limitations, which the court characterized as procedural. The court held that statutes of limitations are "primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability," and that the repose of defendants was "merely an incidental benefit of such statutes." Id. at 511 (citing Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)). Statutes of repose, however, according to the Fourth Circuit, "serve primarily to relieve potential defendants from anxiety over acts committed long ago." Id. In response to the defendant's argument that this was "exalt[ing] form over substance," the court wrote:

Contrary to defendants' assertion, this distinction does not exalt form over substance, nor does it subject the Constitution to the whims of the States in labeling their laws. Certainly, the labels applied by States do not control the outcome of constitutional adjudication. But, as the Supreme Court has recognized, the labels serve a useful purpose in describing the various interests underlying the two types of laws. "The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value."

Id. (quoting Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945)).
97. 345 U.S. 514 (1953) (full faith and credit clause does not compel forum to apply statute of limitations of state whose substantive law governed suit). For an explanation of Wells, see supra note 70.
98. 831 F.2d at 512. In reaching this conclusion, the Fourth Circuit offered a convoluted discussion of the respective interests of Texas and Virginia in entertaining the litigation. Although the Fourth Circuit acknowledged that the primary purpose of Virginia's statute of limitations was to prevent the entertainment of stale claims in its courts, the court did not agree that allowing the claim to be brought in Virginia after the expiration of the Virginia statute of limitations impaired any interest of that state. Id. at 512. Further, although the
dismissed the defendant's due process claim, reasoning that since the defendants had no right to have the Virginia statute of limitations applied to the litigation, there were no grounds for a due process violation. 99 Although the defendant cited Dick and Hague for its argument that a "contactless" state cannot constitutionally apply its statute of limitations to a claim, the Fourth Circuit in Goad refused to discard the traditional characterization of statutes of limitations, holding that the restrictions on state choice-of-law decisions set out in Dick and Hague were inapplicable because those cases were limited exclusively to substantive law. 100

Application of the Ferens court's analysis to the facts in Goad would have both promoted Texas' interest in docket control as well as prevented forum shopping. As Texas had minimal connections with the litigation, Dick and Hague would bar the application of Texas' statute of limitations. Thus, Texas courts would no longer entertain claims having essentially no contacts with Texas which would be barred under the limitations law of the state whose substantive law is selected to govern the claim. Further, under Ferens, plaintiff Goad would have had to file suit in a forum state with significant contacts to the litigation, rather than having been able to search the United States for a forum with a favorable statute of limitations. Goad, however, created in effect a six-year statute of limitations for national corporations. The Ferens court's analysis also recognizes the substantive purpose of statutes of limitations and avoids the unconvincing distinction between statutes of limitations and statutes of repose. Moreover, recognition of the substantive purpose of statutes of limitations restores a legitimate analytical basis to choice-of-law decisions involving statutes of limitations that is lacking in the traditional characterization. 101

The preceding criticism of the traditional characterization in the

99. Id. at 513. If Virginia had had a statute of repose, however, the court suggested that it might have reached a different result. Id.

100. Id. at 513-14. This is Judge Seitz' basic criticism of the majority's holding in Ferens. 819 F.2d at 428 (Seitz, J., dissenting). The Goad court also observed that the defendant could not have been surprised to have the Texas statute of limitations applied to the litigation since jurisdiction and venue were proper in that state and the claim was filed before the Texas statute had expired. 831 F.2d at 513-14.

101. For criticism of the right/remedy justification for the characterization of statutes of limitations as procedural, see supra note 85.
context of constitutional choice-of-law analysis is equally applicable to the United States Court of Appeals for the Fifth Circuit's decision in *Cowan v. Ford Motor Co.*\(^\text{102}\) In *Cowan*, after the court held that Ford was subject to personal jurisdiction and service of process in Mississippi, Ford raised the issue of the constitutionality of the application of Mississippi's statute of limitations to the litigation.\(^\text{103}\) Relying on *Dick* and *Hague*, Ford raised a due process claim on the basis that Mississippi had no contacts with Cowan's claim, relying on *Dick* and *Hague*.\(^\text{104}\) The Fifth Circuit, however, rejected Ford's argument on the same basis as did the Fourth Circuit in *Goad*: statutes of limitation are procedural and, therefore, are not governed by *Dick* and *Hague* because those cases are "concerned with the proper application of substantive law."\(^\text{105}\)

The wisdom of the *Ferens* court's approach is also made evident by comparing the result reached by the United States Court of Appeals for the Tenth Circuit in *Schreiber v. Allis-Chalmers Corp.*\(^\text{106}\) Because the *Schreiber* court spurned the opportunity to subject the choice of a statute of limitations to the restrictions of *Dick* and *Hague*, the plaintiff in *Schreiber*, through transfer, was able to circumvent the Kansas statute of limitations and bring suit in Kansas federal district court, even though the suit could not possibly have originally been brought in Kansas because it was filed almost four years after the expiration of the Kansas statute of limitations.\(^\text{107}\) Under the *Ferens* analysis, the claim in *Schreiber* could not have been brought after the expiration of the Kansas statute of limitations because Mississippi's lack of contacts with the claim would have prevented the application of that state's statute of limitations to the claim.

In *Ferens*, the Third Circuit expressly placed particular emphasis on *Dick* because of the similarity of its facts and issues to those in *Ferens*.\(^\text{108}\)

---

102. 694 F.2d 104 (5th Cir. 1982).
103. Id. at 107.
104. Id.
105. Id.
106. 611 F.2d 790 (10th Cir. 1979).
107. Id. at 792, 794.
108. *Ferens*, 819 F.2d at 426-27. In *Dick*, the plaintiff had acquired an insurance contract from a Mexican citizen which was issued by a Mexican insurance company and protected against the loss of a tug boat. 281 U.S. 397, 403-04 (1930). The insurance policy was applicable only while the boat was in Mexican waters, and was payable only at Mexico City in Mexican currency. Id. at 403. The policy also stated that no claim could be brought under it unless commenced within one year of any damage to the boat. *Id.* The limitations provision was in accord with Mexican law, to which the policy was expressly made subject. *Id.* At the time the plaintiff acquired the contract, he was living in Mexico. *Id.* at 403-04. After the boat was lost, the plaintiff moved back to Texas. *Id.* at 404. More than one year after the accident occurred, the plaintiff filed a claim on the policy in a Texas state court. *Id.* The defendants argued that the policy was expressly made subject to Mexican law and that the policy required all suits to be brought within one year of any damage to the boat. *Id.* at 403. The plaintiff successfully argued for the application of Texas law, because under that
Although *Dick* involved application of a forum state's law invalidating contractual provisions shorter than the forum state's statute of limitations, its holding is not limited, as the *Ferens* court observed, to contract cases. In both *Dick* and *Ferens*, the only contact between the forum and the litigation was that one of the parties nominally resided in the forum. In *Dick* the Supreme Court held that Dick's Texas residence was insignificant because he was present in Mexico at "all times material." Similarly, the *Ferens* court held that Deere's nominal residence in Mississippi, which had nothing to do with the Ferens' claim, was not a sufficient contact to constitutionally allow the application of state's law, any contractual provision modifying Texas' two year statute of limitations was void. *Id.* at 403-05. The United States Supreme Court, however, invalidated the Texas Supreme Court's decision to apply Texas law because that state did not have any significant contacts with the litigation. *Id.* at 408.

109. 281 U.S. at 403-05. In deciding *Dick*, the Court chose to ignore the Mexican statute of limitations and focus on the conflict between the contractual provision and the Texas statute of limitations despite the fact that the Mexican statute had the same effect on the action as the contractual provision. *Id.* at 406-07, 409. However, the Court did state that "in the absence of a contractual provision, the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." *Id.* at 409. The Court added: "Whether a distinction is to be drawn between statutes of limitation which extinguish or limit the right and those which merely bar the remedy, we need not now determine." *Id.* at 409.

The *Dick* Court's distinction between a foreign statute of limitations and a contractual provision has been criticized by at least one commentator as unconvincing. See Martin, *Constitutional Limitations*, supra note 83, at 210. This commentator has elsewhere noted that, given the terms of the agreement and the original parties, it was highly improbable that a dispute over the contract would ever be litigated outside Mexico, and thus it was unlikely that the clause could "have meant anything more to the parties than an overly cautious reiteration of the only rationally applicable law." Martin, *Rationality*, supra note 83, at 416.

Indeed, parties similarly situated but for the inclusion of such a clause in their contracts could complain, if they suffered a fate different from the *Dick* result, that they had agreed to a one-year limitation but relied on the only apparently applicable law to supply it. Taking the inclusion of the limitation in the contract as dispositive would also give curious importance to boilerplate choice-of-law clauses which could be said to "incorporate" all of the law of a given jurisdiction into the contract. Under the *Dick* rationale such a clause would overcome the forum's law even when the law was specifically intended to operate despite the parties' intent and even though the foreign law would not be entitled to prevail on its own.

*Id.* at 416-17. The author added in a footnote: "Of course the point being made concerning choice-of-law boilerplate is limited to cases, like *Dick*, where there are no contacts with the forum except a party's residence." *Id.* at 417 n.58.

110. For a discussion of the *Ferens* court's treatment of this issue, see supra note 48.

111. In *Dick*, the plaintiff acquired the insurance contract while he was in Mexico and moved back to Texas only after the boat was lost. 281 U.S. at 403-04. In *Ferens*, the only connection between Mississippi and the Ferens' claim was that Deere was a resident because he was qualified to do business in that state, having appointed an agent to receive service of process. 819 F.2d at 424.

112. 281 U.S. at 408.
Mississippi law to the case.\textsuperscript{113} Furthermore, whereas in \textit{Dick} Texas arguably had an interest in applying its own law to the case because the plaintiff was a Texas citizen, no such justification could have been made for the application of Mississippi law in \textit{Ferens}.

The Third Circuit's determination in \textit{Ferens} that Deere's nominal residency in Mississippi, standing alone, was inadequate to permit the application of that state's law to the Ferens' claim is appropriate in light of the Supreme Court's more recent decision in \textit{Phillips Petroleum Co. v. Shutts},\textsuperscript{114} which appears to reinvigorate \textit{Dick} and \textit{Hague}. The \textit{Dick} test itself has never been called into question, but prior to \textit{Phillips Petroleum}, there remained the issue of whether it had any continued vitality after \textit{Hague}. Although all the Justices in \textit{Hague} agreed that the due process and full faith and credit clauses required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair,"\textsuperscript{115} the \textit{Hague} plurality seemed to create the contacts out of thin air.\textsuperscript{116} Thus it appeared that if a forum had jurisdiction

\begin{itemize}
  \item \textsuperscript{113}819 F.2d at 427.
  \item \textsuperscript{114}472 U.S. 797 (1985). \textit{Phillips Petroleum} is the first case in thirty-eight years to hold unconstitutional the application by a forum of the forum state's substantive law. See \textsc{R. Weintraub}, supra note 7, § 9.2A, at 527. \textit{Phillips Petroleum} was a suit filed by a class of 28,000 royalty owners from all fifty states, possessing rights to leases in eleven states from which Phillips produced natural gas. 472 U.S. at 799. Despite the fact that 99\% of the leases and 97\% of the royalty owners had no connection with Kansas save the lawsuit, that state's law was applied to the suit. \textit{Id}. The Supreme Court reversed, holding that although in many cases a state may validly apply one of several states' laws, the constitutional limitations enunciated in \textit{Dick} and \textit{Hague} must still be met, even in a class action suit. \textit{Id}. at 823.
  \item \textsuperscript{115}\textit{Hague}, 449 U.S. at 312-13. While the dissenters argued that the plurality "found significant what appear... to be trivial contacts between the forum State and the litigation," they were in agreement with the principle that a state cannot validly apply its law to litigation with which it has no contacts. \textit{Id}. at 332 (\textsc{Powell}, J., dissenting).
  \item \textsuperscript{116}In \textit{Hague}, the Court addressed the question whether the Minnesota Supreme Court's decision to apply Minnesota substantive law to a claim involving an insurance policy violated the due process and full faith and credit clauses of the Constitution. \textit{Id}. at 804. The dispute arose in the following manner: Ralph Hague, a Wisconsin resident, was killed in an auto accident just inside the Wisconsin border while he was on his way home from work. \textit{Id}. at 305. Hague worked in Red Wing, Minnesota for fifteen years and he commuted there from his Wisconsin residence on a daily basis. \textit{Id}. Although neither the operator of the vehicle that struck him nor the driver of the motorcycle on which he was a passenger carried valid auto insurance, Hague had a policy with defendant Allstate covering three vehicles that contained an uninsured motorist clause. \textit{Id}. The coverage for an uninsured motorist claim was $15,000. \textit{Id}. Before filing suit, Hague's wife moved to Minnesota and established residency there. \textit{Id}. The move was completely unrelated to the litigation. \textit{Id}. at 319. After she was appointed personal representative of her husband's estate, she filed an action in Minnesota for a declaratory judgment. \textit{Id}. at 305. Under that state's law, the uninsured motorist coverage for each automobile may be "stacked" so that in
\end{itemize}
over the parties, the Court would not strictly scrutinize the proffered contacts between the forum state and the litigation, and therefore application of the forum state's law would be constitutional.117

Any doubts to the vitality of Dick, however, appear to have been put to rest by Phillips Petroleum, a seven-to-one decision invalidating the blanket application of Kansas law, despite that state's proper assertion of personal jurisdiction over the parties, to all claims in a class action suit.118 In support of its decision that Kansas law could be validly applied to the class action, the Kansas Supreme Court offered several contacts between that state and the litigation.119 The Supreme Court of the United States, however, strictly scrutinized these contacts and found them unable to meet the test of Dick and Hague.120 Thus it appears that Dick does retain some vitality, and that it was appropriate for the Ferens court to find unconstitutional the application of Mississippi law to the case.121

As the Ferens court acknowledged, it could have avoided deciding the case on constitutional grounds by distinguishing between plaintiff-

---

117. See R. Weintraub, supra note 7, § 9.2A, at 525.
118. 472 U.S. at 823. Professor Weintraub acknowledges that Phillips Petroleum may represent an invigoration of Hague and Dick, but he is less than sanguine about the decision. He argues that despite the Court's invalidation of the blanket application of Kansas law, Kansas law could still govern all the claims if on remand the Kansas Supreme Court determined there were only minor differences between Kansas law and that of Oklahoma and Texas—where a majority of the leased land was located. R. Weintraub, supra note 7, § 9.2A, at 527-29. Phillips Petroleum v. Shotts may indicate the start of greater constitutional control of choice of law, although it may not be an auspicious circumstance in which to embark on this venture .... [since Kansas law may end up governing the claim] Shotts may have used the cannon of constitutional limits on choice of law to slay a gnat—to teach the Supreme Court of Kansas conflicts etiquette rather than to prevent an arbitrary and unfair deprivation of rights clearly available under appropriate law. Id. at 527, 529.
119. 472 U.S. at 819-21. The Kansas Supreme Court noted the following contacts: 1) Kansas' interest in regulating Phillips, since Phillips conducted substantial business there; 2) protecting Kansas plaintiffs; 3) the plaintiffs desired to have the case adjudicated in Kansas; and 4) the suit was analogous to a claim over a common fund located in Kansas. Id.
120. Id. at 819-23.
121. The only contact between Mississippi and the Ferens' claim was that Deere was a resident of that state since it was qualified to do business there. 819 F.2d at 424. The Ferenses neither claimed that they had ever entered Mississippi, nor that Deere had designed or manufactured the combine in Mississippi. Id.
and defendant-initiated transfers under section 1404(a). \(^ {122}\) In *Barrack*, \(^ {123}\) the Supreme Court held that when a defendant in a suit based on state law makes a section 1404(a) motion for a change of venue, the law of the transferor court governs the case. \(^ {124}\) However, the *Barrack* Court expressly reserved judgment on whether in all cases section 1404(a) would require the transferee court to apply the law of the transferor court. \(^ {125}\) Thus, the *Ferens* court could have held as a matter of statutory interpretation that when a plaintiff initiates a transfer under 1404(a), the law of the transferee forum governs the case. Under the traditional classification of statutes of limitations as procedural law and, therefore, governed by the forum, Pennsylvania's two year statute of limitations would have applied and the *Ferens* tort claim would have been dismissed. \(^ {126}\) By deciding the case on this basis, the *Ferens* court could have avoided the necessity of deciding the constitutional issue and still have reached a similar result.

Under this suggested alternative analysis, forum shopping would be reduced by forcing plaintiffs to pick the most convenient forum from the outset, \(^ {127}\) rather than permitting plaintiffs to choose an inconvenient fo-

\(^ {122}\) 819 F.2d at 426 n.4, 427 n.5. The *Ferens* court stated: "Because we hold that Mississippi could not constitutionally apply its law in this case, we have no reason to consider whether, as Deere contends, the *Van Dusen v. Barrack* rule applies only when a defendant makes a section 1404(a) motion." *Id.* at 427 n.5.

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). For the factors to be considered in deciding a motion based on the principle of forum non conveniens, see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507-08 (1947). For the Court's interpretation of the "where it might have been brought" clause in section 1404(a), see Hoffman v. Blaski, 363 U.S. 335 (1960).

\(^ {123}\) 376 U.S. 612 (1964).

\(^ {124}\) *Id.* at 639. "A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Id.* The Court was primarily concerned with avoiding turning section 1404(a) into a forum shopping device for the moving party to gain favorable law. *Id.*

\(^ {125}\) *Id.* at 639-40. The Court stated:

In so ruling, however, we do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) . . .

*Id.* at 639-40 (footnote omitted). The court did add that it did "not suggest that the application of transferor state law is free from constitutional limitations." *Id.* at 639 n.41 (citing Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954); Hughes v. Fetter, 341 U.S. 609 (1951); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Home Ins. Co. v. Dick, 281 U.S. 997 (1930)).

\(^ {126}\) The Pennsylvania statute of limitations for personal injuries had expired at the time the Ferenses filed the tort claim in Mississippi. 819 F.2d at 424.

\(^ {127}\) In order to preserve the choice of favorable law, plaintiffs would choose a forum in which they were legitimately planning to litigate because if
rum with favorable law or statute of limitations, and then later transfer the suit to a more convenient forum. Further, application of the transferee forum state’s law after plaintiff-initiated transfers would also prevent the establishment of a de facto six-year statute of limitations for corporations doing business nationally. Plaintiffs would be prevented from circumventing statutes of limitations in diversity cases against national corporations under this approach because a plaintiff would be required to file suit before the expiration of the transferor forum state’s statute of limitations, and would only be able to transfer to a forum state with an equivalent or longer statute of limitations than the transferor forum state. Otherwise, the plaintiff would face dismissal of his claim based on the transferee forum state’s shorter statute of limitations.\(^{128}\)

The federal courts of appeals that have addressed the significance of the identity of the moving party in section 1404(a) motions have done so only in the context of a defendant-initiated transfer to a forum with a shorter statute of limitations than that of the transferor forum.\(^ {129}\) In these cases, the courts have consistently held that the identity of the party who initiates the transfer is irrelevant and have instead focused on whether the transferor forum was a proper one. If so, the law of the transferor forum has been applied even after transfer.\(^ {130}\) The problems with this rule, as discussed above, are that it promotes forum shopping\(^ {131}\) and that it extends the statute of limitations in all claims involv-

---

128. This rule is also in conformity with the purpose of section 1404(a): allowing defendants who have been sued in inconvenient forums to transfer to a more convenient one while at the same time permitting the plaintiff to retain the advantage of choosing favorable law.

129. *See Good*, 831 F.2d at 508; Gonzalez v. Volvo of Am. Corp., 734 F.2d 1221 (7th Cir. 1984); Nelson v. International Paint Co., 716 F.2d 640 (9th Cir. 1983); Roofing & Sheet Metal Serv., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982 (11th Cir. 1982); Ellis v. Great Southwestern Corp., 646 F.2d 1099 (5th Cir. 1981); Martin v. Stokes, 623 F.2d 469 (6th Cir. 1980); *Schreiber*, 611 F.2d 790. Thus the equities in allowing the transferor’s statute of limitations to apply to the case are very high. One district court has held that when a plaintiff initiates a transfer under section 1404(a), the law of the transferee forum applies. *See O’Brien* v. Lake Geneva Sugar Shack, Inc., 585 F. Supp. 273 (N.D. Ill. 1984). In *O’Brien*, the plaintiff initiated a transfer motion to a forum with a longer statute of limitations because she mistakenly filed after the forum’s statute had run. *Id.* at 274. The court held that the equities favored allowing the plaintiff a chance to have her claim litigated on its merits. *Id.* at 278.


131. Conversely, it can be argued that focusing on whether the transferor court was a proper forum as opposed to the identity of the party initiating the transfer prevents forum shopping because it denies plaintiffs the ability to gain
ing nationally active corporate defendants to six years, regardless of
where the action arose.

In conclusion, the Third Circuit's holding in *Ferens*, that a forum
cannot apply the forum state's statute of limitations to a suit unless the
forum state has significant contacts with the suit, has been long over-
due.132 Although no other court has yet reached this conclusion, many
courts are beginning to treat statutes of limitations as substantive and
subject to the regular choice-of-law approach utilized by a forum in con-
flicts cases.133 The traditional characterization of statutes of limitations
as procedural, and the right/remedy analysis used to justify that charac-
terization, are irrational and outdated in the modern litigation context.
The right/remedy justification does not rest on a legitimate analytical
basis, statutes of limitations are easy to locate and apply, and states often
apply the law of another state. Moreover, refusing to subject statutes of
limitations to the limits on states' choice-of-law decisions as enunciated
in *Dick* and *Hague* produces bad results—as *Goad*, *Cowan* and *Schreiber*
illustrate.134

The *Ferens* court could have decided the case on the distinction be-
tween plaintiff- and defendant-initiated transfers under section 1404(a).
This would not prevent, however, as the *Ferens* approach does, a state
with essentially no contacts with a suit from entertaining it when the suit
is otherwise barred under the statute of limitations of the state whose
substantive law governs the claim. Treating statutes of limitations as
substantive, and thus subject to the constitutional limitations on states'
choice-of-law decisions, prevents forum shopping and aids docket man-
agement. The Third Circuit acknowledged this with its decision in *Fer-
ens*, and hopefully, other courts will follow its lead.

David A. Ebby

favorable state law as a result of bringing an action where it could not have been
maintained. See Note, supra note 130.

132. It should be a violation of due process for a forum, by the device
of affixing a "procedural" label, to avoid the application of another
state's rule, if the policies underlying the other state's rule would be
advanced by applying that rule to the case at bar, the rule is of a kind
which has high potential for affecting the outcome on the merits, the
forum rule is not inordinately difficult for the forum to find and apply,
and application of the forum's different rule will not advance any ra-
tionally applicable policy of the forum.

(1964).

133. For cases subjecting statutes of limitation to the constitutional limits
imposed on states' choice-of-law decisions, see supra note 87.

134. For a discussion of these cases, see supra notes 92-107 and accompany-
ing text.