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ARTICLES

1 (WORTMAN) + 1 (FERENS) = 6 (YEARS): THAT CAN'T BE RIGHT—CAN IT? STATUTES OF LIMITATIONS AND SUPREME COURT INCONSISTENCY

David E. Seidelson*

Every virtue is laudable;
Kindness is a virtue;
Therefore *confusion* is laudable.¹

That syllogism can't be right. The conclusion simply doesn't follow from the major and minor premises.² That's a little bit like my reaction to two opinions of the Supreme Court, *Sun Oil Co. v. Wortman*³ and *Ferens v. John Deere Co.*⁴

In *Wortman* the Court held that a Kansas court, hearing an action to recover prejudgment interest on suspended gas royalties arising out of leased properties in Texas, Oklahoma and Louisiana, was free to apply the Kansas statute of limitations, under which the action was not barred. The Court concluded that neither the Full Faith and Credit⁵ nor the Due Process Clause⁶ required the forum to apply the statutes of limitations of the three states whose substantive law governed the claims, under which statutes the action would have been time-barred.

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¹ The quoted syllogism is from WEBSTER'S NEW INTERNATIONAL DICTIONARY, SECOND EDITION 2554 (1939). Of course, I have substituted "confusion" for the actual word "kindness."

² For a discussion of the syllogism and deductive reasoning in the law, see RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 53 (2d ed. 1989). Like all of Judge Aldisert's writing, the book is a delight to read.

³ 486 U.S. 717 (1988).

⁴ 110 S. Ct. 1274 (1990).

⁵ U.S. CONST. art. IV, § 1.

⁶ U.S. CONST. amend. XIV, § 1.

Justice Scalia, writing for the Court, determined that neither full faith and credit nor due process required the forum to abandon the traditional view that statutes of limitations are procedural and therefore the forum is always constitutionally free to apply its own statute.⁷ He declined Sun Oil's invitation to view statutes of limitations as reflecting substantive policies, fearing that to do so would compel the Court to "embark upon the enterprise of constitutionalizing choice-of-law rules, with no compass to guide us beyond our own perceptions of what seems desirable."⁸

Justice Brennan, concurring in the result achieved by the Court, did so "through a somewhat different path of analysis."⁹ He viewed statutes of limitations as having "mixed substantive and procedural aspects," reflecting a state's "balance between, on the one hand, its substantive interest in vindicating substantive claims and, on the other hand, a combination of its procedural interest in freeing its courts from adjudicating stale claims and its substantive interest in giving individuals repose from ancient breaches of law."¹⁰ Ultimately, he concluded that the forum's procedural interest made it constitutionally permissible for the Kansas court to apply its own statute of limitations.¹¹

Let's attempt our own analysis of *Wortman*. The appropriate backdrop for such an analysis is *Allstate Insurance Co. v. Hague*.¹² In *Hague* the Court concluded that the forum's application of its own local law (permitting the stacking of uninsured motorist coverage) rather than the potentially applicable local law of a sister state (precluding the stacking of uninsured motorist coverage) would be constitutionally permissible only if the forum had a significant interest in the application of its own law. Consequently, in analyzing *Wortman*, we should attempt to determine if Kansas had a significant interest in the application of its own statute of limitations. The most efficient (and in my opinion the only appropriate) method of attempting to answer that question requires the identification of the reasons underly-

⁷ 486 U.S. at 726, 730.

⁸ *Id.* at 727-28 (citations omitted).

⁹ *Id.* at 735.

¹⁰ *Id.* at 736.

¹¹ *Id.* at 738-39.

¹² 449 U.S. 302 (1981).

ing statutes of limitations.¹³ There are, I believe, three such underlying reasons, all arising out of a concern with stale claims: (1) to protect the economic integrity of the defendant by assuring that he will not suffer the imposition of liability based on stale evidence, where the passage of time may have made it difficult for him to generate defensive evidence; (2) to assure the defendant a period of repose, that is, a time beyond which he may know that if he hasn't been sued he isn't going to be sued, at least not successfully, so that he need not live forever under the cloud of possible litigation; and (3) to protect the integrity of the judicial process by assuring that the courts are not available instruments in which such stale claims may be pursued.¹⁴ With regard to the first two reasons, both aimed at protecting the defendant, it seems obvious that the defendant's state of domicile would have a significant interest in the application of its statute of limitations, reflecting that state's view of when the potential imposition of liability would unduly affect the defendant's economic integrity and repose. With regard to the third reason, the forum state would seem to have a significant interest in the application of its statute of limitations, reflecting that state's view of when entertaining the action would adversely affect the integrity of its judicial process.

If the forum's statute of limitations were to bar the action, it seems clear that the forum would have a significant interest in the application of its statute as a means of protecting the integrity of its judicial process. But if the forum's statute of limitations were not to bar the action (as was the case in *Wortman*), would the forum still have a significant interest in the application of its own statute? After all, in those circumstances, hearing the action would not threaten the integrity of the judicial process in the forum, in the forum's own view. The forum would seem to be left with only a negative "interest" in the application

¹³ In my opinion such a method is superior to labeling statutes of limitations as "procedural" for a couple of reasons. First, if the mere label were adequate justification for the forum's application of its own law, courts might be tempted to label the state law "procedural" as a means of circumventing the Full Faith and Credit and Due Process Clauses. Second, identifying the reasons for statutes of limitations permits a more specific determination of what the forum interest is in the application of its own statute.

¹⁴ See David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 Duq. L. REV. (forthcoming 1992) [hereinafter *Resolving Choice-of-Law Problems*].

of its own statute of limitations: its concern with protecting the integrity of its judicial process would not be jeopardized by hearing the action. That seems a slim interest on which to rest a constitutional right to apply the forum's statute.

Nevertheless, let's accept, at least *arguendo*, the Court's conclusion in *Wortman*: Kansas as forum was constitutionally free to apply its own statute of limitations. Such tentative acceptance is made more palatable since, as both Justices Scalia and Brennan noted, that conclusion does not mean that the forum's application of its own statute of limitations was the most appropriate choice-of-law result available.¹⁵ It means only that neither full faith and credit nor due process precluded Kansas from achieving that result.¹⁶ And the Court has never suggested that either clause requires the forum to achieve the best choice-of-law result attainable.¹⁷

Then came *Ferens*. Plaintiff-husband, domiciled in Pennsylvania, there lost a hand while operating a harvester manufactured by the defendant, a Delaware corporation having its principal place of business in Illinois. To recover for that injury and the ensuing loss of consortium, plaintiffs sued the defendant in a federal district court sitting in Pennsylvania and exercising diversity jurisdiction. That action was initiated more than two years after the cause had arisen. Under Pennsylvania's statute of limitations, both negligence and product liability actions in tort would have been time-barred.¹⁸ Consequently, in that action

¹⁵ [I]t is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another Today, for example, we do not hold that Kansas must apply its own statute of limitations to a claim governed in its substance by another State's law, but only that it may.

486 U.S. at 727 (Scalia, J.).

The issue, after all, is not whether the decision to apply forum limitations law is wise as a matter of choice-of-law doctrine but whether the decision is within the range of constitutionally permissible choices

Id. at 739 (Brennan, J., concurring).

¹⁶ See note 15 *supra*.

¹⁷ For a discussion of the method of weighing the forum's interest in applying its own statute of limitations against the interest of another state in having its different statute applied, for the purpose of achieving the most appropriate choice-of-law result, see *Resolving Choice-of-Law Problems*, *supra* note 14.

¹⁸ In *Williams v. West Penn Power Co.*, 467 A.2d 811 (Pa. 1983), the Supreme Court of Pennsylvania held that a product liability action would be governed by the state's two-year tort statute of limitations but that a personal injury action predicated on breach of implied warranty would be governed by the U.C.C.'s four-year statute of limitations

plaintiffs asserted only contract and warranty claims.¹⁹ However, the plaintiffs initiated a second action against the defendant in a federal district court sitting in Mississippi and exercising diversity jurisdiction. That action alleged negligence and product liability, neither time-barred under Mississippi's six-year statute of limitations.²⁰ Plaintiffs then filed a 1404(a)²¹ motion to transfer the Mississippi action to the district court in Pennsylvania. Defendant did not oppose the motion and the court granted it. The district court in Pennsylvania consolidated the transferred tort action with the pending warranty action. Then the court granted the defendant's motion to dismiss the tort action, holding that, "because the Ferenses had moved for transfer as plaintiffs, the rule in *Van Dusen [v. Barrack]*²² did not apply."²³ Consequently, the court imposed Pennsylvania's two-year statute of limitations under which the tort action was time-barred.

The Third Circuit affirmed, but on a different basis. The Third Circuit concluded that, "because Mississippi had no legitimate interest in the case," application of that state's six-year statute of limitations would violate the due process rights of the defendant.²⁴ The Supreme Court vacated that decision and remanded²⁵ in light of *Wortman*, "in which we held that a State may choose to apply its own statute of limitations to claims governed by the substantive laws of another State without violating either the Full Faith and Credit Clause or the Due Process

commencing on the date of sale. The effect of *Williams* is to give the plaintiff the option of asserting tort liability governed by a two-year statute or warranty liability governed by a four-year statute. In *Ferens* the plaintiffs opted for the second alternative in the action filed in the diversity court sitting in Pennsylvania.

¹⁹ See note 18 *supra*.

²⁰ "The Mississippi courts . . . would apply Mississippi's 6-year statute of limitations to the tort claim arising under Pennsylvania law and the tort action would not be time-barred under the Mississippi statute. See Miss. Code Ann. § 15-1-49 (1972)." 110 S. Ct. at 1278.

²¹ 28 U.S.C. § 1404(a) (1988) ("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.").

²² 376 U.S. 612 (1964). See text accompanying note 28 *infra* for an explanation of *Van Dusen*.

²³ 110 S. Ct. at 1278.

²⁴ *Id.*

²⁵ *Ferens v. Deere & Co.*, 487 U.S. 1212 (1988). The Court's order reads: "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Sun Oil Company v. Wortman*, 486 U.S. [717] (1988)." *Id.* at 1212-13.

Clause.”²⁶ On remand, the Third Circuit again affirmed the dismissal of the tort action, holding that *Van Dusen* was not applicable to a 1404(a) transfer initiated by a plaintiff.²⁷

In *Van Dusen* the Court had held that, in a diversity action in which the defendant secured a 1404(a) transfer, the transferee court was required to utilize the same conflicts rule as would have been employed by the transferor court.²⁸ The basic rationale for that decision was the Court’s conclusion that 1404(a) was not intended to permit the defendant to secure not only a more convenient forum but a more favorable choice-of-law result as well. In *Van Dusen* the Court “left open the question” of whether the same rule applied where the plaintiff had secured the transfer.²⁹ *Ferens* confronted the Court with that issue.

Before examining the method of resolution utilized and the conclusion achieved by the Court, we should note a preliminary matter: the propriety of the Court’s vacating the Third Circuit’s first ruling in light of *Wortman*. It’s true, as we have seen, that in *Wortman* the Court held that the forum was constitutionally free to apply its own statute of limitations to actions governed by the substantive laws of another state. But how did that holding apply to *Ferens*? There, Mississippi, and therefore the diversity court sitting in Mississippi, would have been free to apply that state’s six-year statute even though the tort action may have been governed by the substantive law of Pennsylvania. The rationale of that conclusion, as drawn from *Wortman*, would be the forum’s inherent interest as forum in applying its own statute of limitations as a means of protecting the integrity of its judicial process. But once the plaintiffs’ 1404(a) transfer motion was granted, Mississippi no longer enjoyed the status of forum. It was Pennsylvania and the diversity court in Pennsylvania upon whom the mantle of forum was draped. And rather clearly, given that state’s two-year statute of limitations, Pennsylvania and the diversity court sitting there had a significant interest in the application of that statute for the purpose of protecting the integrity of the judicial process. After transfer, Mississippi had

²⁶ 110 S. Ct. at 1278-79.

²⁷ 110 S. Ct. at 1279 (citing *Ferens v. Deere & Co.*, 862 F.2d 21 (3rd Cir. 1988)). This was the same ground on which the Pennsylvania district court had based its decision. See text accompanying notes 22-23 *supra*.

²⁸ 376 U.S. 612 (1964).

²⁹ *Id.*

no such interest since no court in Mississippi would any longer be implicated in the action. Absent such a Mississippi interest, imposing that state's six-year statute on a court sitting in Pennsylvania would appear to violate both the Full Faith and Credit Clause and the due process rights of the defendant. *Wortman*, after all, recognized the *forum's* constitutional right to apply its own statute of limitations. In *Ferens* the ultimate forum was Pennsylvania. Consequently, it is by no means clear that *Wortman* required vacating the Third Circuit's first decision in *Ferens*. Indeed, *Wortman* would seem to support, rather than prohibit, the conclusion that imposing Mississippi's six-year statute on a court sitting in Pennsylvania would be violative of both the Full Faith and Credit Clause and the due process rights of the defendant.

How did the Court in *Ferens* square this seemingly inappropriate application of *Wortman*? Justice Kennedy wrote the Court's opinion. Surprisingly (at least to me), he directed no attention to the propriety of the Court's having vacated the Third Circuit's first decision on the basis of *Wortman*. He simply stated the Court's earlier action as part of the procedural history of *Ferens*.³⁰ Then he moved directly to what he perceived to be the only issue presented:

Section 1404(a) states only that a district court may transfer venue for the convenience of the parties and witnesses when in the interest of justice. It says nothing about choice-of-law, and nothing about affording plaintiffs different treatment from defendants. We touched upon these issues in *Van Dusen*, but left open the question presented in this case.³¹

That question, in Justice Kennedy's view, was whether *Van Dusen* required the transferee court to apply the same choice-of-law rule that would have been applied by the transferor court when the transfer had been achieved by the plaintiff. He answered that question affirmatively, and therefore the Court, dividing 5-4, reversed the Third Circuit's second decision and remanded the case with instruction that the court apply Mississippi's six-year statute of limitations.

Again surprisingly (at least to me), the Court directed no significant discussion to the question of whether, in the circum-

³⁰ 110 S. Ct. at 1278-79. See note 27 and accompanying text *supra*.

³¹ 110 S. Ct. at 1279.

stances of *Ferens*, a 1404(a) motion should be available to a plaintiff.³² The Court simply assumed an affirmative answer to that question. There is nothing in the explicit language of 1404(a) or, so far as I can determine, in its "scant"³³ legislative history that would compel such a conclusion. Moreover, there is a certain facial incongruity in the conclusion that a plaintiff, after selecting the forum of his choice, can, without any change in the posture of the case or in the litigants involved, then move for transfer to a more convenient forum.³⁴ If, after initiation of the action, the defendant were to assert a counterclaim or a set-off or implead a third-party defendant, or if such a third-party defendant were to assert a cross-claim against the plaintiff, there might well be a rational basis for the plaintiff's assertion that the change in the posture of the case or in the litigants involved suggested that the convenience of the parties and witnesses and the interest of justice would better be served by a transfer to some other federal court. But there was no such change in *Ferens*. The action transferred was precisely the action initiated by the plaintiffs, and the only parties were the plaintiffs and the defendant sued by them. In those circumstances, I think it would have been sensible for the Court to conclude that a 1404(a) transfer was simply unavailable to the plaintiffs. That determination, of course, would have mooted the issue resolved by the Court. But, as already noted, the Court simply assumed

³² So far as I can determine, the Court has never directed significant inquiry into the circumstances in which a plaintiff may utilize 1404(a). In GENE R. SHREVE & PETER RAVEN-HANSEN, *UNDERSTANDING CIVIL PROCEDURE* 140 (1989), this language appears: "[U]nlike *forum non conveniens* dismissals, transfers of venue between federal courts are available to plaintiffs and defendants alike." There are no accompanying citations. In JOHN J. COUND ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS* 328 (5th ed. 1989): "Can plaintiffs as well as defendants transfer an action under Section 1404(a)? What circumstances might motivate a plaintiff to request a transfer of venue? See generally *Torres v. Walsh*, 221 F.2d 319 (2d Cir.), certiorari denied 350 U.S. 836 . . . (1955); *Philip Carey Mfg. Co. v. Taylor*, 286 F.2d 782 (6th Cir. 1961)" In *Torres* the court declined to find an abuse of discretion on the part of the district court in granting such a transfer, but devoted no significant discussion to the fact that plaintiff had sought the transfer. In *Taylor* the court wrote: "We find no abuse of discretion on the part of [the district court] in making the transfer. The right to a transfer under the statute is available to a plaintiff as well as a defendant. A plaintiff is not bound by his choice of forums, if he later discovers that there are good reasons for transfer." 286 F.2d at 784.

My own view as to when a plaintiff should be permitted to utilize 1404(a) is set forth in the text at notes 34-35 & 53 *infra*.

³³ 110 S. Ct. at 1280.

³⁴ See note 32 *supra*.

the availability of 1404(a) to the plaintiffs, thereby generating the issue resolved by the Court.

What led the Court to resolve that issue by holding that *Van Dusen* was applicable even when the transfer had been on the plaintiffs' motion? Justice Kennedy identified three distinct reasons for the Court's decision:

First, § 1404(a) should not deprive parties of state law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law.³⁵

As the Court noted, the first reason "has its real foundation in *Erie R. Co. v. Tompkins*"³⁶ The basic rationale of *Erie* is that the accident of diverse citizenship should not produce a result substantially different from that which would be achieved by the highest appellate court of the forum state. The *Erie* rationale, in turn, raises this question in *Ferens*: Which state, Mississippi or Pennsylvania, should be characterized as the forum state? Given that the underlying issue in *Ferens* was which state's statute of limitations should be applied, and given *Wortman*'s conclusion that the forum state is constitutionally free to apply its own statute of limitations because of the forum's interest in protecting the integrity of its judicial process, it would seem to follow that the state in which the action is to be tried should be characterized as the forum state. After all, it is that state whose judicial process, either in the form of a state court or of a diversity court sitting within that state, will be implicated. And, of course, in *Ferens* that state was Pennsylvania.

That conclusion, in turn, raises a subsidiary question: Does Pennsylvania's interest in protecting the integrity of its judicial process extend to a federal court sitting in Pennsylvania and exercising diversity jurisdiction? I suppose it could be asserted that in those circumstances Pennsylvania would be no more than an officious intermeddler should it attempt to impose its concern with protecting judicial integrity in that state on a federal court, even one sitting in Pennsylvania and exercising diversity jurisdiction. The assertion, however, should be rejected, for

³⁵ 110 S. Ct. at 1280.

³⁶ *Id.*

a couple of intimately related reasons. First, when a diversity court finds itself confronted with a choice-of-law problem, that court is required by *Klaxon Co. v. Stentor Electric Manufacturing Co.*³⁷ to resolve that problem precisely as it would be resolved by the highest appellate court of the forum state. If the choice-of-law problem goes to which state's statute of limitations should be applied, that of the forum or that of some other state, one of the reasons underlying the forum's statute is certain to be the protection of the integrity of the judicial process within that state. If the diversity court were free to disregard that underlying reason, the court might very well resolve the choice-of-law problem differently than would the highest appellate court of the forum state, perhaps applying the statute of the other state when the forum would apply its own statute. Clearly, that would violate the Supreme Court's mandate in *Klaxon*. Therefore, *Klaxon* suggests that the forum state's interest in protecting the integrity of the judicial process within that state does extend to a diversity court sitting within that state. Second, in *Ferens* it is obvious that the action will be tried before a diversity court sitting in Pennsylvania, not a diversity court sitting in Mississippi. If, in those circumstances, the court were compelled to apply Mississippi's six-year statute (as the Supreme Court's opinion in *Ferens* mandates), the accident of diverse citizenship would produce a result (nondismissal) substantially different from that which the highest appellate court of the actual forum state (Pennsylvania) would achieve (dismissal). Or, to put it more bluntly, the plaintiffs would be empowered to circumvent Pennsylvania's two-year statute because of the accident of diverse citizenship and the availability of a 1404(a) transfer from Mississippi to Pennsylvania. For both of those reasons, I am impelled toward the conclusion that Pennsylvania's interest in protecting the integrity of the judicial process within that state extends to a diversity court sitting within that state.

Moreover, that second consideration seems to refute the first reason for the Court's conclusion in *Ferens*. It seems fairly clear that, "absent diversity jurisdiction,"³⁸ the plaintiffs would have been unable to litigate the time-barred tort action in Pennsylvania. The defendant would have enjoyed the "state law ad-

³⁷ 313 U.S. 487 (1941).

³⁸ 110 S. Ct. at 1280.

vantage[]"³⁹ of having that action dismissed. Yet, by invoking a combination of diversity jurisdiction (in Mississippi) and a 1404(a) transfer (to the diversity court in Pennsylvania), the plaintiffs were permitted by the Court's opinion to "deprive"⁴⁰ the defendant of the Pennsylvania right to have the tort action dismissed.

The second reason for the Court's opinion identified by Justice Kennedy was that "§ 1404(a) should not create or multiply opportunities for forum shopping."⁴¹ But, of course, the Court's opinion does just that. By imposing Mississippi's six-year statute on the diversity court in Pennsylvania, the Court made it possible for the plaintiffs, by selecting a diversity court in Mississippi and then utilizing 1404(a), to circumvent Pennsylvania's two-year statute. That's the epitome of forum shopping.

Justice Kennedy's third reason was that "the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law."⁴² Since it was the plaintiffs who sought and secured the 1404(a) transfer, it seems appropriate to determine if their convenience and the convenience of their witnesses was served by imposing the Mississippi statute on the diversity court in Pennsylvania. Substantively, of course, the plaintiffs were significantly advantaged by that imposition: their tort action, time-barred by Pennsylvania's statute, could not be dismissed by the diversity court in Pennsylvania. But such a substantive advantage is clearly not within the "convenience" contemplated by 1404(a); the Court's first two reasons and *Van Dusen* itself indicate that 1404(a) is not intended to produce such a substantive advantage. Since the action transferred pursuant to the plaintiffs' motion was precisely the action the plaintiffs themselves had initiated in a diversity court in Mississippi, with no change in claims or parties, it would be spurious to suggest that the convenience of the parties or the witnesses would be served by the imposition of Mississippi's six-year statute on the diversity court in Pennsylvania.

A transfer, *timely* under Pennsylvania's law, from the diver-

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

sity court in Mississippi to the diversity court in Pennsylvania would of course have served the convenience of the plaintiffs and the witnesses. Such a transfer, leading to consolidation of the tort and contract actions before the diversity court in Pennsylvania, would have spared the plaintiffs and the witnesses the burden of duplicative litigation in two different courts and the Pennsylvania witnesses the onus of traveling to Mississippi. But the issue resolved by the Court in *Ferens* was not the propriety of the 1404(a) transfer; defendant offered no opposition to the plaintiffs' transfer motion, and the Court directed no consideration to such propriety. The issue in *Ferens* was whether the transfer required the imposition of the Mississippi statute on the diversity court in Pennsylvania. A negative answer to that question, rather than the affirmative answer given by the Court, would have deprived the plaintiffs of no right under Pennsylvania law and would have deprived them and the witnesses of no convenience in the sense contemplated by 1404(a). The second part of the Court's third reason was that transfer under 1404(a) "should turn on . . . the interest of justice."⁴³ It seems apparent that the Court's decision mandating the application of Mississippi's six-year statute frustrated, rather than served, the interest of justice. By that decision, the defendant was stripped of an otherwise appropriate defense because of the accident of diverse citizenship and the availability of 1404(a), the very kind of substantive disadvantage that *Van Dusen* had held was not intended by 1404(a). Even the Court's own three reasons seem to point toward a result contrary to that achieved by the Court. Yet, the Court compelled the application of Mississippi's six-year statute.⁴⁴

⁴³ *Id.*

⁴⁴ Justice Kennedy wrote:

Our rule may seem too generous because it allows the *Ferenses* to have both their choice of law and their choice of forum, or even to reward the *Ferenses* for conduct that seems manipulative. We nonetheless see no alternative rule that would produce a more acceptable result. Deciding that the transferee law should apply, in effect, would tell the *Ferenses* that they should have continued to litigate their warranty action in Pennsylvania and their tort action in Mississippi. Some might find this preferable, but we do not. We have made quite clear that "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Contaminated Grain [Co. v. Barge FBL-585]*, 364 U.S. [19], 26

Justice Scalia, writing for the dissent, wasn't having any. Instead of beginning and ending the inquiry with whether *Van Dusen* applied to a 1404(a) transfer initiated by plaintiffs, Justice Scalia recognized a more basic question: Which should enjoy precedence, *Van Dusen* or the Rules of Decision Act.⁴⁵ The Act provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.⁴⁶

The dissent treated the Act as the foundation on which *Erie* and *Klaxon* rest.⁴⁷ And, according to the dissent, both of those opinions exist to assure that the accident of diverse citizenship does not "disturb equal administration of justice in coordinate state and federal courts sitting side by side."⁴⁸ The dissent recognized that under *Van Dusen* a 1404(a) transfer resulting from a defendant's motion requires the transferee court to apply the same law that would have been applied by the transferor court, even though that law differs from that of the transferee state. The dissent identified two closely related reasons for the *Van*

[1960]

110 S. Ct. at 1284.

The specter of such duplicative litigation and the resulting waste of time, energy, and money is indeed haunting. But there are alternatives that would exorcise the demon. The most immediate alternative in *Ferens* would be the result achieved by the dissent: application of Pennsylvania's statute of limitations and dismissal of the tort action. Would that result really tell the *Ferenses* (and others similarly situated) to try the warranty action in Pennsylvania and the tort action in Mississippi? I doubt it. Absent the 1404(a) transfer and the Court's conclusion that the Mississippi statute was applicable, common sense and practicality would probably lead the *Ferenses* and others similarly situated to forsake the duplicative tort action in Mississippi. The Court's conclusion, however, seems likely to encourage others similarly situated to follow the path of the *Ferenses* and invoke the jurisdiction (and therefore the time and resources) of two different federal courts and then to burden one of those courts further by imposing on it consideration of a plaintiff's motion for 1404(a) transfer. That hardly seems calculated to achieve the efficiency sought by Justice Kennedy. Moreover, as the dissent noted early on in its opinion, the issue in *Ferens* did not begin and end with 1404(a) and judicial efficiency. *Ferens* also implicated the Rules of Decision Act and the basic concepts of federalism set forth therein and in *Erie* and *Klaxon*. See text accompanying note 45 *infra*.

⁴⁵ 110 S. Ct. at 1285 (Scalia, J., dissenting). See note 44 *supra*.

⁴⁶ 28 U.S.C. § 1652 (1988).

⁴⁷ See note 44 *supra*.

⁴⁸ 110 S. Ct. at 1285 (quoting from *Klaxon*, 313 U.S. at 496).

Dusen conclusion:

First, we thought it highly unlikely that Congress, in enacting § 1404(a), meant to provide defendants with a device by which to manipulate the substantive rules that would be applied. . . . Second, we concluded that the policies of *Erie* and *Klaxon* would be undermined by application of the transferee court's choice-of-law principles in the case of a defendant-initiated transfer . . . because then "the 'accident' of federal diversity jurisdiction" would enable the defendant "to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed." . . .⁴⁹

The dissent then concluded that "neither of those considerations is served—and indeed both are positively defeated—by a departure from *Klaxon* [where the 1404(a) transfer results from plaintiffs' motion]."⁵⁰ First, it seems equally unlikely that Congress in enacting 1404(a) intended to permit a *plaintiff* to manipulate the law that would be applied by filing in a court where he did not intend to litigate and then, by securing a 1404(a) transfer, to impose that law on the transferee court. Second, recognizing the plaintiffs' ultimate intent to have the action tried in a diversity court in Pennsylvania, the transferee state, it seems apparent that requiring the transferee court to apply the law of Mississippi, different from that of Pennsylvania, would generate a conflict between the diversity court and the state court "sitting side by side"⁵¹ in Pennsylvania, the true forum state. To the dissent, "[t]he significant federal judicial policy expressed in *Erie* and *Klaxon* is reduced to a laughingstock if it can so readily be evaded through filing-and-transfer."⁵²

As between the majority and the dissent, the latter, I believe, makes the more convincing case. First, the dissent recognizes the applicability of the Rules of Decision Act and its intimate relationship with *Erie* and *Klaxon*. Second, the dissent identifies the policy reasons underlying *Van Dusen*. And third, the dissent demonstrates that those reasons are disserved by the result achieved by the majority. Add to this the fact that the majority's own three reasons for its result tend to point to the conclusion achieved by the dissent, and the dissent seems to

⁴⁹ 110 S. Ct. at 1285 (quoting *Van Dusen*, 376 U.S. at 638.)

⁵⁰ *Id.* at 1286.

⁵¹ *Id.* at 1285.

⁵² *Id.* at 1286.

carry the day.

But there is another reason why the dissent's conclusion commends itself to reason: *Wortman*. Ironically, while the Court used *Wortman* to vacate the original opinion of the Third Circuit in *Ferens*, it made no further use of *Wortman* in achieving the ultimate result in *Ferens*. I think it should have. The essence of *Wortman* is that Kansas, the forum state, was constitutionally free to apply its own statute of limitations even though the actions may have been governed by the substantive law of three other states. Presumably, then, Pennsylvania, as the actual forum state in *Ferens*, should have been constitutionally free to apply its statute of limitations to that case. To compel the diversity court in Pennsylvania to apply the Mississippi statute seems to vitiate that constitutional freedom of Pennsylvania.

Indeed, there are two considerations that lend an a fortiori emphasis to that conclusion. First, in *Ferens*, unlike *Wortman*, Pennsylvania wasn't simply the forum; it was the state in which significant portions of the operative facts had occurred. It was in Pennsylvania that plaintiff-husband's use of the defendant's product caused injury to a Pennsylvania victim. And, of course, plaintiff-wife, seeking consortium damages, was also domiciled in Pennsylvania. Second, and perhaps more critical, in *Ferens*, unlike *Wortman*, the statute of limitations of the forum state (Pennsylvania) would have barred the tort action. The forum's interest in protecting the integrity of its judicial process is more seriously implicated when its limitations statute would preclude litigation of the stale action (*Ferens*) than when it would permit such litigation (*Wortman*). In *Ferens*, Pennsylvania's two-year statute of limitations, properly invoked by the defendant in the diversity court, stands as a rather emphatic "Thou shalt not." And one of the reasons underlying that commandment is Pennsylvania's desire to assure that the courts of that state will not be available as instruments for litigating such stale claims. As we noted earlier, Pennsylvania's concern with protecting the integrity of the judicial process in-state should be deemed applicable in a diversity court sitting in Pennsylvania.

Ferens is disappointing to me for several reasons. First, it's almost beyond belief that neither the majority nor the dissent gave serious consideration to whether or in what circumstances a plaintiff should be considered free to seek a 1404(a) transfer. It seems to me that in a case like *Ferens*, where the posture of the

litigation and the identity of the litigants remain exactly as they were when the plaintiff initiated the action, the plaintiff should be precluded from seeking such a transfer.⁵³ In those circumstances, there should arise a conclusive presumption that the forum selected by the plaintiff is the most appropriate one from the perspective of the plaintiff. Not to so hold is to invite the quandary created by *Ferens*. Second, it's inexplicable (at least to me) that the majority never devoted significant attention to the Rules of Decision Act, and perhaps as a consequence, offered three reasons for the Court's conclusion that seem to point more appropriately to the result achieved by the dissent. And finally, it's extraordinary that, after the Court had relied on *Wortman* to vacate the original Third Circuit opinion in *Ferens*, neither majority nor dissent considered the impact of the rationale of *Wortman* in ultimately resolving *Ferens*. Such confusion really is not laudable.

⁵³ See note 32 *supra*.