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### Defamation

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## VII. BOOKS AND MAGAZINES

### A. Defamation

#### 1. Jurisdictional Analysis: No Room For The First Amendment

The United States Supreme Court apparently didn't like the idea of reading old news twice and sent the first amendment to the back of the newsrack when it decided the case of *Calder v. Jones*.<sup>1</sup> The Court determined that California had personal jurisdiction over a reporter and an editor of the National Enquirer, who had written and published a story about entertainer Shirley Jones. As a result, both individual defendants were compelled to come to California to answer for their allegedly libelous and intentional actions, even though the story was written in Florida and Shirley Jones lived in California.<sup>2</sup>

The Enquirer published an article on October 9, 1979, which stated that Shirley Jones<sup>3</sup> drank so heavily that she was unable to work.<sup>4</sup> Jones and her husband subsequently filed suit in California Superior Court for libel, invasion of privacy, and intentional infliction of emotional distress. Iain Calder, John South, the Enquirer, and its local distributing company were named as defendants.<sup>5</sup>

At the time, John South was a reporter for the Enquirer. Although he had often visited California, he lived and worked in Florida.<sup>6</sup> South had written the first draft and did most of his research in Florida for the Jones article—relying only on telephone calls to California for his information. He had no other relevant contacts with California, though he did call Jones's husband prior to publication in order to elicit comments on the story.<sup>7</sup>

Iain Calder, South's co-defendant, was the president and editor of the Enquirer. Like South, Calder was a Florida resident. He had been to California only twice—once on a pleasure trip prior to the publication of the Jones article, and once to testify in an unrelated trial. He had no

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1. — U.S. —, 104 S. Ct. 1482 (1984).

2. *Id.* at 1488.

3. Shirley Jones is a professional entertainer who has appeared on stage, movie screen, and television. Many remember her from the motion picture musical, "Oklahoma," and her role as Mrs. Shirley Partridge in the TV musical series, "The Partridge Family."

4. 104 S. Ct. at 1487 n.9.

5. Shirley Jones's husband subsequently filed a voluntary dismissal of his complaint. *Id.* at 1484 n.1.

6. *Id.* at 1485.

7. *Id.*

other relevant contacts with California.<sup>8</sup>

Calder viewed and approved the initial evaluation of the story and edited its final form. In addition, he refused to reprint a retraction requested by Jones.<sup>9</sup>

Both men were employed by the Enquirer, a Florida corporation with its principal place of business in Florida. The Enquirer published a national weekly newspaper which had a total circulation of over five million at the time. Some 600,000 of those issues were sold in California—twice the amount of any other state.<sup>10</sup>

The defendants were served with process by mail in Florida and entered special appearances, moving to quash service of process for lack of personal jurisdiction.<sup>11</sup> The superior court dismissed the action. It reasoned that requiring reporters to defend a suit in a distant forum would create a chilling effect on the freedom of the press and impermissibly violate the first amendment.<sup>12</sup>

The California Court of Appeal reversed. It found that neither South nor Calder, by virtue of their status as members of the press, had special first amendment privileges.<sup>13</sup>

Furthermore, because of the allegedly intentional harm they had caused to Shirley Jones, it was reasonable and fair for the two defendants

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8. *Id.*

9. *Id.* In libel law:

a retraction is both an apology and an effort to set the record straight. At common law a prompt and honest retraction is usually relevant to the questions of whether the article was published with malice and whether the plaintiff's reputation was actually harmed. In several states which have retraction statutes, a plaintiff must give the publisher an opportunity to retract the libel before a suit may be started. If the publisher promptly honors the request for a retraction and retracts the libelous material in a place in the newspaper as prominent as the place in which the libel originally appeared, the impact will reduce and in some instances cancel any damage judgment the plaintiff might later seek in a lawsuit.

D. PEMBER, MASS MEDIA LAW 213-14 (1981).

10. The National Enquirer had a national and international circulation of over five million. *Jones*, 104 S. Ct. at 1485 n.2. The number of copies which reach a forum state and the manner in which they are distributed could be an important factor in a jurisdictional analysis. In addition, the total circulation may also be important. *See, e.g., New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978); *Sipple v. Des Moines Register and Tribune Co.*, 82 Cal. App. 3d 143, 147 Cal. Rptr. 59 (1978).

11. *Jones*, 104 S. Ct. 1484. The other defendants did not question jurisdiction and answered the complaint. *Jones v. Calder*, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982).

12. *Jones*, 104 S. Ct. at 1485.

13. *Jones v. Calder*, 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982). *See generally* Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COM. L.J. 19 (1980); Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975 (1982).

to appear in California.<sup>14</sup> The United States Supreme Court affirmed.<sup>15</sup>

In deciding the case, the Court used the standards articulated in *International Shoe Co. v. Washington*.<sup>16</sup> Pursuant to that standard, the due process clause of the fourteenth amendment to the Constitution permitted personal jurisdiction over a defendant in any state with which the defendant has "certain minimum contacts. . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>17</sup>

As such, the analysis of these "minimum contacts" focuses on the relationship between the defendant, the forum state seeking jurisdiction, and the litigation itself.<sup>18</sup> In light of these considerations, the Court found that California had jurisdiction over Calder and South. Here, California was the focal point of both the story and the injury; the defendants' activities directly targeted the plaintiff, and the suit arose from those very same activities.<sup>19</sup>

The Court found further support for its decision because the Jones story had certain "effects" in California.<sup>20</sup> The story concerned the activities of a California resident and impugned the reputation and professionalism of an individual whose career was centered in the state. Moreover, the article was drawn from California sources, and the brunt of the harm was suffered in California.<sup>21</sup>

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14. *Jones*, 104 S. Ct. at 1485-86.

15. On appeal to the Supreme Court, probable jurisdiction was postponed. — U.S. —, 103 S. Ct. 1766 (1983). The Court concluded that jurisdiction by appeal did not lie. However, treating the jurisdictional statement as a petition for writ of certiorari, the Court granted the petition. — U.S. —, 104 S. Ct. 1186.

16. 326 U.S. 310, 316 (1945).

17. In addition to the constitutional principles of due process, there must be an applicable state rule or statute which potentially confers jurisdiction over the defendant. See *Data Disc, Inc., v. Systems Technology Assoc. Inc.*, 557 F.2d 1280, 1286 (1977). California's "long arm" statute is Section 410.10 of the California Code of Civil Procedure. It permits an assertion of jurisdiction on any basis as long as it is consistent with the state and federal constitutions. *Jones*, 104 S. Ct. at 1485 n.5. Thus, the usual two-step analysis collapses into a single search for the outer limits of due process. See *Church of Scientology v. Adams*, 584 F.2d 893, 896 (1978).

18. *Jones*, 104 S. Ct. at 1486 (citing *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

19. *Jones*, 52 U.S.L.W. at 4351. See *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S. Ct. 1473 (1984). See also *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (holding that one contact with the forum state may be enough for the cause of action to arise from that contact).

20. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980). See also *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* Sec. 37 (1971) ("A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere. . .").

21. By analogy, it has long been established in products liability cases that jurisdiction can be based on the commission of an isolated act in the forum if the cause of action sued upon stems from the defendant's acts. See *Buckley v. New York Post Corp.*, 373 F.2d 175, 181 (2d

Calder and South ineffectively argued that they were not responsible for the circulation of the story, had no control over its marketing, and had no economic stake in sales of the Enquirer. Citing the case of *World-Wide Volkswagen v. Woodson*,<sup>22</sup> they contended that "the mere fact that they [could] foresee the article [would] be circulated and have an effect" in California was insufficient for jurisdiction.<sup>23</sup>

The two defendants also attempted to distinguish their situation from those of manufacturers held liable for shipping a product to another state where it subsequently malfunctions and causes injury.<sup>24</sup> They maintained that those particular cases were not controlling because Calder and South derived no direct benefit and had no supervision over sales in the distant state.<sup>25</sup>

The Court was unpersuaded and held that South and Calder were "not charged with mere untargeted negligence. Rather, their intentional and allegedly tortious actions were expressly aimed at California."<sup>26</sup> According to the Court, the defendants acted with the knowledge that the story would have a potentially devastating impact in California, the state of the Enquirer's largest circulation, and that the brunt of the injury would have its greatest effect in the state where Shirley Jones lived and worked.<sup>27</sup>

Although the Court agreed that each defendant's activities deserved an individual analysis apart from the Enquirer,<sup>28</sup> their status as employees did not shield them from jurisdiction where there had been joint participation in an intentional act of alleged libel. Thus, there was nothing unfair in compelling the defendants to answer in California for their actions,<sup>29</sup> and both Calder and South could "reasonably anticipate being haled into court there."<sup>30</sup>

Such a reaffirmation of the holding in *World-Wide Volkswagen*<sup>31</sup> is a

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Cir. 1967); Cf. *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977). See generally Scott, *Jurisdiction Over the Press: A Survey and Analysis*, 32 FED. COM. L.J. 19, 21 n.13 (1980).

22. 444 U.S. 286 (1980).

23. *Jones*, 104 S. Ct. at 1487 (citing *World-Wide Volkswagen*, 444 U.S. at 295).

24. *E.g.*, *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

25. *Jones*, 104 S. Ct. at 1487.

26. *Id.*

27. *Id.*

28. *Id.* See also *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

29. *Jones*, 104 S. Ct. at 1487.

30. *Id.* (citing *World-Wide Volkswagen*, 444 U.S. at 297) (foreseeability that a product will enter the forum less critical to the analysis than the defendant's conduct and connection with the forum such that he should "reasonably anticipate being haled into court there.").

31. 444 U.S. 286 (1980). It is questionable why the Court heard *Jones* in the first place. If

positive statement on behalf of allegedly libeled plaintiffs like Shirley Jones. Basically, jurisdiction will still be proper if a court can determine that the acts of the transgressor satisfy this test of "reasonable anticipation."<sup>32</sup>

Despite the Court's concentration on this concept, *Calder v. Jones* may be noted in the future for reasons only casually addressed by the decision.

In the process of holding *Calder* and *South* amenable to California's long-arm jurisdiction, the Supreme Court quickly dismissed any concerns that the first amendment was being compromised by infringing upon the freedom of the press. The Court completely eliminated the first amendment from the jurisdictional analysis. "The infusions of such considerations would needlessly complicate an already imprecise inquiry."<sup>33</sup> According to the Court, any "chill" on the first amendment was already taken into account in the substantive law governing libel.<sup>34</sup> The Court was explicitly worried about "double counting," that is, having to confront first amendment problems at both the procedural and substantive stages of the litigation.<sup>35</sup>

Such cavalier treatment of the first amendment holds serious implications for members of the media as it unwittingly trods on precarious Constitutional territory.<sup>36</sup> The substantive law upon which the Court relies is deceptively unprotective of most members of the media, and such a holding will undoubtedly have a detrimental effect on the first amendment.

Prior to *Calder v. Jones*, the interface between the first amendment and the jurisdictional analysis had suffered from inconsistent juggling by

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it stands for nothing more than a reaffirmation of *World-Wide Volkswagen*, then the Court's time was poorly spent. It cannot be discounted that this involved two high visibility litigants—Shirley Jones and *The National Enquirer*—who have definite good-guy/bad-guy images. Nevertheless, the final outcome should not have differed even if this case had involved *Newsweek* or *The New York Times*. Cf. *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S. Ct. 1423 (1984) (companion to the *Jones* case, *Keeton* involved Kathy Keeton, who was affiliated with "Viva" and "Penthouse" magazines, and who sued *Hustler Magazine* for libel.).

32. *World-Wide Volkswagen*, 444 U.S. at 297. There was a further indication that the defendants had actual knowledge that harm would result from their acts. When *South* telephoned Jones's husband, Marty Ingels, from Florida and read him the story, Ingels became emotionally upset and physically ill. *Jones v. Calder*, 138 Cal. App. 3d 128, 131, 187 Cal. Rptr. 825, 827 (1982).

33. *Id.* See generally Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975 (1982).

34. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

35. *Jones*, 104 S. Ct. at 1487.

36. Consider that this was a unanimous decision by the Court.

the lower courts leading to unpredictable results.<sup>37</sup> By completely eliminating the weight of the Constitution from the balance scale of the analysis, the Court expressly settled the controversy. As such, the Supreme Court held that adequate constitutional protections were already in place and that such cases as *New York Times v. Sullivan*<sup>38</sup> and *Gertz v. Welch*<sup>39</sup> maintained the standards which defended the press from impermissible attack.<sup>40</sup>

Despite such endorsement, the Court's faith in the "actual malice" test of *New York Times*, as modified by *Gertz*, is misplaced. The substantive law is flawed in its application.<sup>41</sup> First, it best protects those who need it least—the large institutional media organizations like the Los Angeles Times, Newsweek or CBS who can afford attorneys, costly litigation, travel to distant states and libel insurance to pay damages. Most members of the media do not enjoy those benefits. In order to survive, they often have to attract attention by covering controversial or unpopular issues and stories. Therefore, by taking these risks, they become much more susceptible to libel suits.<sup>42</sup>

Second, the substantive law has a built-in bias which favors the mainstream press. By its nature, the conventional media focuses on individuals and public officials who have already been elevated to the status of "public figures" as a result of media attention.<sup>43</sup> In many cases, since

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37. See *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964) (both giving special considerations to the first amendment); *Contra Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967) (rejecting first amendment considerations); *Anselmi v. Denver Post, Inc.*, 552 F.2d 316 (10th Cir. 1977) (leaving first amendment considerations until trial); *Church of Scientology v. Adams*, 584 F.2d 893 (9th Cir. 1978) (rejecting first amendment considerations and arguments and using a products liability standard).

38. 376 U.S. 254 (1964) (preventing damages against a newspaper for defamatory statements and placing the burden of proof on the victimized public official to show that the publisher acted with "actual malice"—that the statement was made with knowledge of falsity or reckless disregard for the truth). See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

39. 418 U.S. 323 (1974) (defining the scope of defamatory liability with respect to private individuals); See also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

40. *Jones*, 104 S. Ct. at 1448.

41. See generally Anderson, *The Selective Impact of Libel Law*, 14 COLUM. JOURNALISM REV. 38 (1975), reprinted in *MASS MEDIA AND THE SUPREME COURT* (K.S. DeVol, ed. 1979) at 237.

42. *Id.*

43. The term "public figure," includes artists, athletes, business people, dilettantes, and anyone who is famous or infamous because of who he is or what he has done. These public figures may have also assumed roles of special prominence in society by thrusting themselves into the spotlight of public controversy in order to influence the outcome. See generally D. PEMBER, *MASS MEDIA LAW* (2d ed. 1981).

these high profile individuals must prove "actual malice" on the part of the press, the mainstream media operate on safer ground<sup>44</sup> than their smaller counterparts which tend to spotlight less prominent individuals and issues.<sup>45</sup>

Third, wealthy litigants have better access to lawyers and the legal system. This enables them to prevent volatile situations, defend them when necessary and, when a victim is concerned, bring the full power of the legal system to bear on a defendant.<sup>46</sup>

The common denominator in each of the aforementioned factors is money. By ignoring these considerations in the jurisdictional analysis and misconstruing the effectiveness of constitutional protections, the Court increases the susceptibility of the media to law suits. Given today's six and seven figure judgments and the overall high cost of dealing with the legal system,<sup>47</sup> even the most frivolous complaint could imperil the very existence of certain members of the media. Taken to its logical conclusion, self-censorship by the media becomes an unattractive but foreseeable alternative to the possibility of litigation.

If publication is seen as a process by which an idea becomes disseminated, self-censorship prevents communication from ever rising to the level where the Court's so-called constitutional protections can take effect. "Actual malice" is a moot and toothless defense. If no communication ever takes place and the idea remains solely in the mind of the communicator,<sup>48</sup> this is nothing more or less than an unmistakable prior

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44. See generally Anderson, *The Selective Impact of Libel Law*, 14 COLUM. JOURNALISM REV. 38 (1975).

45. *Id.* See also *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) ("Those charged with defamation cannot, by their own conduct, create their own defense by making a claimant a public figure.") (quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167-68 (1979)).

46. See generally Anderson, *The Selective Impact of Libel Law*, 14 COLUM. JOURNALISM REV. 38 (1975).

47. *Herbert v. Lando*, 441 U.S. 153 (1979). Lando's deposition alone took more than one year, filled twenty-six volumes of nearly 3,000 pages and 240 exhibits—not to mention the cost to the journalists of being diverted from newsgathering. See Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975, 977 n.13 (1982). In 1975, the minimum cost of defending a libel suit was approximately \$20,000. The successful defense of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), was nearly \$100,000. In 1985, General William C. Westmoreland's case against CBS for \$120 million was abruptly dropped after 2 years of expensive pre-trial maneuvering, discovery, and 18 weeks of testimony. Although many felt Westmoreland was bound to lose, few media organizations could have sustained such an expensive, time consuming attack. Sharbutt, *Polling Jury After Libel Suit* L.A. Times, Feb. 21, 1985, § 6 at 1, col. 6. The General's expenses exceeded \$3 million. *The General's Retreat*, NEWSWEEK, March 4, 1985, at 59.

48. After *Herbert v. Lando*, 441 U.S. 153, 160 (1979), even the mental process of newsgathering is fair game for the courts. The ruling in this case allows the courts to examine an editor's psychological motivations.



restraint on the freedom of the press.<sup>49</sup>

Although truth has always been subject to the protections of the Constitution, falsity has not been accorded the same treatment. In fact, it has been said that anyone who is silenced by the law never had anything to say that was worth hearing.<sup>50</sup> Many would argue that the National Enquirer, Hustler Magazine,<sup>51</sup> and many other popular publications are within that scope. This note makes no such determination. Nevertheless, the very popularity of such publications only serves to magnify an already complicated debate as the courts attempt to draw bright lines of demarcation respecting the value of such printed and published materials to society's well-being. Any limitation must certainly have its cost on the first amendment.

Likewise, *Calder v. Jones* enacts its toll on basic freedom. It forces a wedge into the courtroom door and widens the crack for plaintiffs attempting to haul the press into court. Whether society will accept the cost remains to be seen. Nevertheless, this decision is especially dangerous to the small, independent members of the media who sometimes offer the only alternative to mainstream opinion and are already disadvantaged by the selectivity of current libel law. As disseminators of controversial and often unpopular views, these members of the press provide the public with information that stimulates the debate essential to our free market society of ideas.<sup>52</sup>

By emphasizing procedural form over Constitutional substance, the Court has ignored the very real impact of that procedure on first amendment rights. If self-censorship is the by-product of *Calder*, then the Court has indirectly accomplished what the first amendment expressly

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49. The first amendment prohibits the imposition of a restraint on a publication before it is published. *Near v. Minnesota*, 238 U.S. 697 (1931). The Nixon administration in 1971 accomplished what no other administration had dared to suggest. Even though the decision in *The New York Times Co. v. United States*, 403 U.S. 713 (1971), seemed an apparent victory for journalists by allowing the publication of "The Pentagon Papers," it was an illusory victory. The Nixon administration silenced some of the most respected newspapers in the country: The New York Times for 15 days, the Washington Post for 11 days, the Boston Globe for eight days, and the St. Louis Dispatch for four days. Furthermore, it had induced the Christian Science Monitor to censor itself with the threat of a lawsuit. Landau, *Free at Last, at Least*, 59 THE QUILL 7 (1971).

50. See generally Chafee, *Freedom of Speech as I See It*, 18 JOURNALISM Q. 158 (1941) reprinted in MASS MEDIA AND THE SUPREME COURT (K.S. Devol, ed. 1979) at 69-70; Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("no constitutional value in false statements of fact.").

51. See *Keeton v. Hustler Magazine, Inc.*, — U.S. —, 104 S. Ct. 1473 (1984).

52. See generally MASS MEDIA AND THE SUPREME COURT (K.S. Devol, ed. 1979); Note, *Jurisdiction Meets the Press: First Amendment Considerations in Jurisdictional Analysis*, 9 HASTINGS CONST. L.Q. 975, 978-80 (1982).

prohibits.<sup>53</sup>

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53. In the companion case of *Keeton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473 (1984), Kathy Keeton, who was associated with "Penthouse," "Viva," and "Omni" magazines, sued "Hustler," a "men's" magazine. Over the course of several years, Keeton had attempted to bring an action for defamation against Hustler—first in Ohio where Hustler was incorporated and later in New York. In each instance, she was barred by the statute of limitations. She finally brought suit in New Hampshire, the only state where the statute of limitations had not run. The Supreme Court held that jurisdiction was proper in New Hampshire, even though neither of the litigants had many contacts with the state and most of the injury had occurred elsewhere. The Court reasoned that Hustler's direct exploitation of the New Hampshire market, although minimal, placed the magazine under the auspices of the *World-Wide Volkswagen* doctrine, in that the defendant could "reasonably anticipate being haled into court there." 444 U.S. 286, 297-98 (1980). Nevertheless, by allowing Kathy Keeton to "forum shop" for a favorable statute of limitations, this seems to be a subtle about-face for the Court. In dismissing the argument against Keeton's actions, the Court chalked it up to mere "litigation strategy." *Keeton*, 104 S. Ct. at 1480. In a long line of cases including *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), and *Hanna v. Plumer*, 380 U.S. 460 (1965), the courts had felt that there was inherent discrimination in allowing a litigant, usually a plaintiff, to apply different rules of law against an opponent. If a litigant could get different results, this would lead to inconsistencies and inequitable protection under the law. *Erie*, 304 U.S. at 74-77.

