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I. Foreword—Federal Jurisdiction and Forum Selection

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FORUM SELECTION

DEVELOPMENT SYMPOSIUM

I. FOREWORD

*By: Georgene Vairo**

Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it's enemy territory: a jurisdiction where the prevailing law, available remedies, courtroom procedures, and juror attitudes are inimical to your client. A correct choice and, as Don Corleone once said, "They will fear you."¹

More and more, people and interest groups are becoming acutely aware of the practical significance of federal jurisdiction . . . the way in which technical jurisdictional matters do, in fact, affect substantive interests, policies, and values.²

A. Introduction

Year by year, the forum selection battle, particularly the struggle between plaintiffs' and defense attorneys over whether particular litigation should be conducted in state courts or federal courts,

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1. Gita F. Rothschild, *Forum Shopping*, LITIGATION, Spring 1998, at 40. See also Edward M. Mullins & Rima Y. Mullins, *You Better Shop Around: Appellate Forum Shopping*, LITIGATION, Summer 1999, at 32.

2. Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 19, 25 (2002-2003).

becomes ever more fierce, with the stakes in terms of winning or losing, and at what cost becoming ever higher.

I write a bimonthly column on forum selection for the *National Law Journal*, and it would be unseemly for the *National Law Journal* to run such a column if the practice were a bad or unethical thing. So, "forum selection," i.e., the process of choosing among various proper fora for resolving a case, must be a good thing. On the other hand, most of us picked up in law school the notion that somehow "forum shopping" is evil. Are forum selection and forum shopping the same thing? Or is forum shopping somehow different and really evil? To the extent that forum selection is a good thing, there are numerous technical rules and statutes to be mastered in order to obtain the forum of one's choice, and our conceptions of federalism often complicate the problem, as the student notes in this Developments Issue detail.

I have often written and tell my students all the time that a plaintiff's lawyer is guilty of malpractice if he or she does not consider which forum is the best for resolving a client's dispute. And, a defense attorney similarly diserves a client if she pays no attention to whether a case can be better resolved in a different jurisdiction. Forum selection analysis is thus not only an ethical practice, but it would be unethical not to engage in it because the client's cause may be better served in a different forum. Yet, we still see references to "outrageous" and "blatant" "forum shopping" that needs to be stamped out.

A decision in the *BankAmerica*³ securities fraud litigation demonstrates that where one pair of eyes sees forum shopping, another may simply see ethical conduct. Are there any lessons to be learned? Even if the *BankAmerica* case fails to provide guidance as to what is good forum selection practice as opposed to bad forum shopping, it will provide a good review of the forum maneuvering that characterizes much complex litigation today. Thus, in this Foreword, I will tell the story of *BankAmerica* in order to illustrate the problem and to show some of its complexities. I will then turn to a discussion of Congress's ongoing efforts in the area of federal

3. See *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d 1044 (E.D. Mo. 2000).

jurisdiction and conclude by introducing the student articles that address many of the myriad technical aspects of the federal-state forum selection battle that occupy the attention of the courts today.

B. A Forum Selection Story

In September 1998, BankAmerica Corporation and NationsBank Corporation merged to form a new BankAmerica.⁴ Within a month and a half, twenty-four class actions were filed in six federal district courts and seven class actions were filed in California state courts alleging fraudulent conduct in connection with the merger.⁵ One of the federal class action lawsuits was filed by a prominent securities class action firm, Milberg Weiss Bershad Hynes & Lerach, at the same time as it filed five of the California state court class actions.⁶ The Multidistrict Litigation Panel transferred the federal cases to the Eastern District of Missouri, and Judge John F. Nangle was appointed to handle the litigation.⁷ When it became apparent that Milberg Weiss could not be chosen as lead counsel because its clients lacked the financial stake necessary under the Private Securities Litigation Reform Act, it sought to dismiss the federal action in order to pursue the California actions, which had been consolidated in the federal multidistrict litigation as *Desmond v. BankAmerica Corp.*,⁸ where it would not be faced with the federal financial stake rules. The other federal plaintiffs and defendants objected to the dismissal because they feared that, at some point, the state court class actions would conflict with the federal proceedings.⁹ Finding no such current conflict, Judge Nangle allowed Milberg Weiss to dismiss its federal case.¹⁰

For the next nine months, Milberg Weiss sought class certification of the state court actions.¹¹ The first motion for

4. *See id.* at 1046.

5. *Id.*

6. *Id.*

7. *See id.*

8. *See Desmond v. BankAmerica Corp.*, 120 F. Supp. 2d 1201 (N.D. Cal. 2000).

9. *In re BankAmerica Corp. Sec. Litig.*, 95 F. Supp. 2d at 1046.

10. *Id.*

11. *See id.* at 1046-48.

certification was denied.¹² Just before the hearing on a second motion, the defendants filed a notice of removal, alleging that the state class action was removable under the Securities Litigation Uniform Standards Act of 1998 (SLUSA).¹³ The case was remanded to state court because the Northern District of California federal judge thought the removal was premature.¹⁴ He left the door open for removal, however. At this point, Milberg Weiss wrote the state court judge, Superior Court Judge William Cahill, indicating counsel's intention to restructure the proposed classes in order to make the case unremovable.¹⁵ A third motion for class certification was then filed, but taken off the calendar so that the state court cases could be mediated.¹⁶ The federal plaintiffs thereupon moved, in Judge Nangle's court, for an injunction barring the state proceedings.¹⁷

Finding that his trust that Milberg Weiss would cooperate with the federal litigants and would not create conflicts between the state and federal lawsuits was misplaced, Judge Nangle entered an injunction barring Milberg Weiss from prosecuting the state court actions.¹⁸ He found that Congress's intent to have those with the highest financial stake control securities class actions was frustrated by Milberg Weiss and the California plaintiffs, who "succeeded in having premature settlement negotiations ordered by the California court."¹⁹ Further, Judge Nangle excoriated Milberg Weiss' conduct:

Additionally, Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA [Private Securities Litigation Reform Act] was designed to prevent. Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at forum shopping. When the federal forum proved unsavory because Milberg Weiss would not be able to control that case, the firm simply took its marbles and

12. *Id.* at 1047.

13. *Id.*

14. *Id.* at 1047-48.

15. *Id.* at 1048.

16. *Id.*

17. *See id.* at 1045.

18. *See id.* at 1053.

19. *Id.* at 1050.

went to play in the state court. In that forum, they have filed numerous inadequate motions for class certification, overlooking potential conflicts of interest among classes and failing to propose class representatives which truly represent the entire class. Furthermore, one proposed class representative was highly inadequate due to his criminal record and history of participation in fraud. They have attempted to circumvent the prohibitions of the SLUSA by adding nonparty plaintiffs as class representatives, which would effectively create a new state securities law suit after the effective date of the SLUSA. When faced with the possibility that such an action would result in removal of the case to federal court, they indicated their intent to structure the classes, not in the best interests of the class members, but to avoid federal court at all costs. When that task proved difficult, they requested the state court to order mediation for settlement purposes, despite the fact that they do not represent the class and despite the fact that minimal discovery has been done either on the substantive issues or the damages available to class members. Clearly, the *Desmond* case is nothing more than a thinly-veiled attempt to circumvent federal law. The *Desmond* plaintiffs, and the law firm behind them, do not have the best interests of the class at heart and have proved themselves wholly inadequate to control the conduct of this suit. The Court finds their attempts to do so outrageous. Accordingly, under the facts of this case, the Court finds that an injunction is necessary to preserve the federal plaintiffs' rights under the PSLRA.²⁰

Obviously, Milberg Weiss was trying to avoid federal jurisdiction and the negative effects of federal law on the claims they sought to vindicate. Putting aside the question of problems with some of the proposed class representatives, we should ask whether an attorney seeking to achieve a better result in state court on state law claims is a bad thing. In *BankAmerica*, for example, potentially

20. *Id.*

billions of dollars that allegedly could be recovered only under state law were at stake.²¹

Let us begin by looking at the California state court's opinion of Milberg Weiss' conduct. In contrast to Judge Nangle's stinging rebuke, Judge Cahill issued an order addressing the injunction stating that Milberg Weiss and defendants' counsel were all "of the highest quality" and that they had "conducted themselves in a professional and ethical manner throughout this litigation in the California Superior Court."²² Judge Cahill's statement finding that Milberg Weiss' conduct was ethical is important for two reasons. First, it demonstrates that the evil of forum shopping exists more in the mind of the beholder than anywhere else. Second, it raises the point missed by Judge Nangle: if the state court does not view the proceedings before it as frivolous, why is it wrong for litigants to seek a better deal for their clients in state court? Ultimately, Judge Nangle may be correct that the federal law should and will trump the state court proceedings. But, the federal statutes invoked by the federal court were new. Why should plaintiffs' counsel be prevented from developing non-frivolous arguments for avoiding its negative consequences by trying to litigate in a better forum?

The next question then would be whether Judge Nangle was correct in enjoining Milberg Weiss from prosecuting the California state court actions. My response is yes. The *BankAmerica* case seemed to be a relatively clear case for invoking the exceptions to the Anti-Injunction Act²³ and All Writs Act²⁴ to prevent state court cases from interfering with federal court jurisdiction. Judge Nangle is correct that Congress is seeking to corral all litigation in the nature of securities fraud in the federal courthouses and to keep them out of state courts. He therefore quite clearly was correct that the recently enacted private securities litigation statutes were designed to be an exception to the Anti-Injunction Act. My quarrel with Judge Nangle is his unnecessary criticism of Milberg Weiss' conduct to reach his result.

21. See Dennis J. Opatrny, *Federal Judge Rips Into Milberg Weiss*, NAT'L L.J., May 22, 2000, at B5.

22. *Id.*

23. 28 U.S.C. § 2283 (2000).

24. 28 U.S.C. § 1651 (2000).

On a broader note, it is ironic that in our present days of the New Federalism championed by the conservative members of the Supreme Court, we see Congress trying to channel class actions raising state law claims away from state courts.²⁵ For example, although it has been taken off the legislative table for now, Congress came very close to enacting (and the President would have signed into law) the Class Action Fairness Act,²⁶ which would herd many state court class actions into federal court. It may well be that such legislation, like the Securities Litigation Reform and Uniform Act of 1998 (SLUSA), will prevent plaintiffs from vindicating their state rights in state court. But, so long as there is a reasonable argument for pursuing the claims in a particular forum, an attorney has a duty to consider whether to litigate there. Perhaps the downsides of defeat are too great to risk the necessary resources, but certainly there should be no ethical bar to doing so. Trying to stay in state court and out of federal court may appear manipulative, but it is nothing new. Indeed, as the Ninth Circuit stated:

A plaintiff is entitled to file both state and federal causes of action in state court. The defendant is entitled to remove. The plaintiff is entitled to settle certain claims or dismiss them with leave of the court. The district court has discretion to grant or deny remand. Those are the pieces that comprise plaintiffs' allegedly manipulative pleading practices. We are not convinced that such practices were anything to be discouraged.²⁷

Similarly, lawyers should not be chastised and punished for the evil of forum shopping unless the claims they bring are frivolous or the forum they have chosen plainly lacks jurisdiction over the matter.²⁸ Rather, they should be applauded for engaging in the

25. See generally Georgene M. Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation*, 33 LOY. L.A. L. REV. 1559 (2000) (discussing the federalism and comity problems with Congress's passage of bills that strip state courts of jurisdiction over mass tort and other complex class actions in favor of federal courts).

26. H.R. 1115, 108th Cong. (2003).

27. *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995).

28. See, e.g., *Sussman v. Bank of Israel*, 56 F.3d 450 (2d Cir. 1995) (holding that it was not sanctionable to file colorable claims in a proper but

appropriate and necessary practice of forum selection. To put it another way, forum shopping is bad and evil if we mean the bringing of claims in an improper forum. Unless that test is met, however, whether we call it forum shopping or manipulative pleading or forum selection, lawyers should not fear damage to their reputations or sanctions for engaging in it.

C. Congressional Action Bearing on Forum Selection

1. General Federal Jurisdictional Provisions

Perhaps the most important aspect of forum selection is the choice between federal or state courts. However, it is well-known that the law of federal courts and jurisdiction is quite confusing and difficult to understand. Congressional action during the past few decades in the area of federal civil practice has resulted in numerous important changes adding greater complexity and confusion. In addition to attempts to speed up litigation and find ways to reduce costs, Congress amended several basic federal subject matter jurisdiction statutes, including the removal statutes, and enacted a new supplemental jurisdiction statute in an effort to codify various judicially-created doctrines relating to federal subject matter jurisdiction. The student notes in this Developments Issue on the topics of diversity jurisdiction, federal question jurisdiction, removal jurisdiction, and supplemental jurisdiction will discuss the case law that has developed interpreting these amendments, as well as other problems raised by these jurisdictional provisions that have troubled the courts in recent years. When reading the discussion below of the recently amended and adopted statutes and the case law interpreting them, it may be useful to point out the apparent objectives of Congress. First, many of the changes, with some important exceptions for complex litigation, seem to be part of a continuing trend to limit diversity jurisdiction. Second, Congress provided expanded opportunities for asserting federal question jurisdiction. Third, Congress significantly changed removal procedures. A final observation, however, is that in many important respects, Congress's

inconvenient forum for the purpose of exerting settlement pressure on a related case).

action did little to clarify the law. Instead, its measures contributed to the confusion as the lower federal courts struggle to interpret the new statutes.

Against these overall trends that can be gleaned from the cases interpreting the general jurisdictional statutes, are other recent statutes enacted by Congress, including the Private Securities Litigation Reform Act of 1995 (PSLRA) involved in the forum selection story told above, that raise difficult federalism issues because of their effect of expanding federal jurisdiction at the expense of the states.

2. Special Federal Jurisdictional Provisions

a. private securities class actions

Congress passed and President Clinton signed into law the Securities Litigation Uniform Standards Act of 1998 (SLUSA),²⁹ which bars most securities class actions based on state law fraud theories. It supplements the PSLRA that was designed to heighten the standards for prosecuting such actions in federal court. SLUSA is designed to close a perceived loophole in the PSLRA. Supporters of SLUSA believed that the increased filing of class actions in state courts based on state law fraud theories of liability undermined the PSLRA. SLUSA amended section 16 of the Securities Act of 1933 and section 28 of the Securities Exchange Act of 1934 to prohibit class actions brought by private parties based on such theories.³⁰ It further provides that state court class actions brought on such theories are removable to the federal court in the district in which the state action was filed.³¹ Moreover, it permits federal courts to stay discovery in state court actions.

b. the Multiparty, Multidistrict Trial Jurisdiction Act

On November 2, 2002, Congress enacted the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA).³² For some

29. 15 U.S.C. § 77p(b) (2000).

30. 15 U.S.C. §§ 77p, 78bb.

31. 15 U.S.C. § 77p(c).

32. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020, 116 Stat. 1758 (2002).

time, Congress has been toying with the idea of enacting legislation that would provide for expanded federal jurisdiction over mass accident cases. The MMTJA does just that. It creates a new 28 U.S.C. § 1369, which provides:

(a) The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.³³

Subsection (b) creates an exception to the minimum diversity rule. The district court may not hear any case in which a “substantial majority” of plaintiffs and the “primary” defendants are all citizens of the same state; and in which the claims asserted are governed “primarily” by the laws of that same state. In such circumstances, only state courts may hear such cases. This feature was one of three changes proffered to the Senate in an effort to develop greater support for the prior version of the bill during the waning days of the 106th Congress. However, one wonders how much litigation will result over what a “substantial majority” of plaintiffs means—a difficult number to meaningfully quantify, or who the “primary defendant” is—the airline? The manufacturer of the defective part that led to a crash?

Subsection (c) sets forth certain “special rules” and definitions. Subsection (d) permits any person with a claim arising from an accident as defined by the terms of the bill to intervene as a party plaintiff, even if that person could not have brought an action in

33. *Id.*

district court as an original matter. Presumably, this means that persons who were injured as well as the estates of those killed may intervene.

Given other bills Congress had been considering since the Supreme Court ruled in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*³⁴ that the transferee judge of a multidistrict litigation under § 1407 may not transfer such cases to the transferee court for trial purposes, it is surprising that the MMTJA does not address the problem that the Court's ruling created. Subsection (e) of § 1369 is the only provision that concerns multidistrict litigation. A federal district court in which an action is pending under the terms of the bill must promptly notify the Multidistrict Litigation Panel of the pendency of the action. The footnote in the House Conference Report then makes it plain that the *Lexecon* fix is dead: "All things considered, the panel attempts to identify the one U.S. district court nationwide which is best adept at adjudicating pretrial matters. The panel then remands individual cases back to the districts where they were originally filed for trial unless they have been previously terminated."³⁵

Not surprisingly, the MMTJA also amends § 1441 to allow removal if:

(A) the action could have been brought in a United States district court under section 1369 of this title; or (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court. . . .³⁶

34. 523 U.S. 26 (1998).

35. 21st Century Department of Justice Appropriations Authorization Act, H.R. CONF. REP. NO. 107-685, at 201 n.4 (2002). In the Spring of 2004, Congress once again considered a *Lexecon* fix. The House of Representatives voted unanimously on March 24, 2004, to enact the 2004 Multidistrict Litigation Restoration Act (H.R. 1768), which would allow a multidistrict transferee judge to handle both pretrial matters and trials. However, the bill would exempt from transferee court jurisdiction the determination of compensatory damages. See *Bill Summary & Status for the 108th Congress: H.R. 1768*, at <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:h.r.01768>: (last visited April 12, 2004).

36. 21st Century Department of Justice Appropriations Authorization Act, H.R. 2215, 107th Cong., § 1369 (2002).

The MMTJA also creates new § 1441(e)(2)-(5), which set forth the procedure for removal, along with the terms by which an action is remanded back to state court for determination of damages, including appellate procedures governing liability.

The MMTJA also liberalizes § 1391, the general federal venue statute, by permitting any action to be brought in any district court in which any defendant resides or in which a substantial part of the accident giving rise to the action took place. The Act also contains service and subpoena powers similar to the 2001 Act.

The MMTJA, although a sensible piece of legislation in that it allows for federal consolidation and, thus, arguably an efficient resolution of mass disaster cases (such as commercial airplane crash cases), raises important federalism issues. It is noteworthy that the bill passed by a 400-4 House vote and overwhelming Senate vote as well.³⁷ Thus, it will be interesting to see whether the MMTJA is a sign of more drastic legislation that could alter the balance of state-federal jurisdiction.

c. proposed legislation—Class Action Fairness Act

Indeed, currently under consideration by Congress is even more drastic, general legislation. These bills would provide for expanded federal jurisdiction over class actions in which there is minimal diversity. They would amend § 1332 to allow original jurisdiction over class actions so long as any member of the class is diverse from any defendant. They would also enact a removal provision that allows for any such case filed as a class action in state court to be removed to federal court. The purpose of these amendments is to prevent plaintiffs filing state court class actions from preventing removal of such cases by naming local defendants. The description of the House version of the legislation states that it is designed:

To amend the procedures that apply to consideration of interstate class actions to assure fairer outcomes for class members and defendants, to outlaw certain practices that provide inadequate settlements for class members, to assure that attorneys do not receive a disproportionate amount of

37. *Senate Passes Conference Report on DOJ Authorization Bill*, TECH L.J. (Oct. 9, 2002), at <http://techlawjournal.com/alert/2002/10/09.asp>.

settlements at the expense of class members, to provide for clearer and simpler information in class action settlement notices, to assure prompt consideration of interstate class actions, to amend title 28, United States Code, to allow the application of the principles of Federal diversity jurisdiction to interstate class actions, and for other purposes.³⁸

Although the bills also would allow the federal district court to decline to exercise jurisdiction and remand under various circumstances such as when the amount in controversy is relatively small, when the number of class members is relatively small, when a substantial number of the purported class members are citizens of the same state as the primary defendants, or when the claims asserted would be governed primarily by the law of the state, it is plain that the Class Action Fairness Act will result in a flood of cases being removed to federal courts.

The House of Representatives passed the legislation last year, but the bill died in the Senate in the Fall of 2003.³⁹ However, discussions with key democratic senators have led to the possibility of compromise and enactment of the bill in the Spring of 2004.⁴⁰ Although, as mentioned above, Congress has postponed consideration of the Act,⁴¹ it is not hard to imagine that some form of the Class Action Fairness Act will be enacted by the 108th or 109th Congress.

In addition to these legislative developments, the American Law Institute recently completed its Federal Judicial Code Revision Project.⁴² As a part of that study, the American Law Institute issued its proposal for significant amendments to the problematic

38. H.R. 1115, 108th Cong. (2003).

39. See *Class Action Fairness Act of 2003 Fails to Clear Senate* (Oct. 24, 2003), available at http://www.hunton.com/pdfs/newsletter/ClassAction_Fairness_Bill.pdf.

40. See *id.*

41. See Mealey Publications, *Sources: Class Action Bill "Dead in Water"*, (Mar. 17, 2004), at <http://www.lexisone.com/news/nlibrary/m031704d.html>.

42. FEDERAL JUDICIAL REVISION PROJECT (John B. Oakley, Rep., American Law Institute 2004). See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855 (1998).

supplemental jurisdiction statute, 28 U.S.C. § 1367. It also proposed amendments to the removal statutes, 28 U.S.C. §§ 1441-1447.

The past decades have witnessed a flurry of change and proposals for change. Congress took a very active legislative role with respect to federal jurisdiction, and it is likely that this trend will continue. Let us now turn to the six student notes that detail problems arising under 1) diversity jurisdiction; 2) federal question jurisdiction; 3) supplemental jurisdiction; 4) removal jurisdiction and practice; 5) injunctions of state court cases under the Anti-Injunction and All Writs Acts; and 6) forum non conveniens.

Each of the articles begins with relevant background information, and then the first four articles provide a detailed analysis of the difficult problems raised by the federal subject matter jurisdiction statutes that the courts are struggling to resolve coherently. The injunctions and All Writs Act article delves into the difficult problems of federalism posed by our system of concurrent federal-state jurisdiction, and the forum non conveniens article provides a look at the evolving case law on forum non conveniens. Together, the articles provide lawyers engaged in forum selection battles with the tools they need to argue in the best interests of their clients while supplying judges with the relevant case law to decide where the battle will be fought.