University of Richmond Law Review

Volume 6 | Issue 2 Article 13

1972

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ERIE IN BALANCE—WILL EQUITY TIP THE SCALE?

A significant consequence of a federal system of government is that its court system derives its law from both state and national sources.[1] The effective resolution of the inevitable conflicts within that system is made increasingly important by the dramatic increase in interstate travel and commercial activity with the logical effect of increasing federal jurisdiction based upon diversity of citizenship. It is essential that litigants take note of a significant change in the federal court's approach to the rules applicable in diversity actions and modify their own judicial strategy accordingly.

I.

In 1938 the Supreme Court of the United States laid the modern cornerstone for the resolution of those conflicts inherent in a federal system of government. In the seminal case of *Erie Railroad Co. v. Tompkins*,[2] the Court decided that in cases involving diversity of citizenship, federal courts must apply the forum state's substantive law rather than a federal "general law." Failure to mention matters of procedure implied that such questions would remain within federal control.

Erie's purpose was to avoid the continuance of inequitable administration of the law between citizens and non-citizens of a state by discouraging the forum shopping[3] so prevalent under the previously applied doctrine of *Swift v. Tyson*.[4] *Erie* proposed to prevent such treatment by insuring uni-

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[1] H. M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM xi (1953).

[2] 304 U.S. 64 (1938). *Erie* has been referred to by a former member of the Supreme Court as "one of the most important cases at law in American legal history." Address by Justice Black, 13 Mo. B.J. 173, 174 (1942). Consequently it has given rise to voluminous literature concerning numerous aspects of federal law. For a selected bibliography see C. A. WRIGHT, LAW OF FEDERAL COURTS 223-53 (2d ed. 1970).

[3] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[4] 41 U.S. (16 Pet.) 166 (1842). Under the doctrine of *Swift v. Tyson* federal courts exercising jurisdiction through diversity of citizenship were not required to apply the unwritten law, as indicated by the forum state's highest court in matters of general jurisprudence. Instead the federal courts were "free to exercise an independent will as to what the common law of the state is—or should be. . . ." Erie R.R. v. Tompkins, 304 U.S. 64, 71 (1938).

Perhaps the most notorious embodiment of this philosophy is illustrated by Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928). Brown and Yellow and the Louisville and Nashville Railroad, both Kentucky corporations, wished to exclude Black and White from transporting passengers to or from the railroad's Bolling Green Station. As such an exclusionary contract would have been void under the common law of Kentucky, Brown and Yellow re-incorporated in Tennessee and there entered into the desired contract. Brown and Yellow then

formity of outcome. This uniformity was to be accomplished by requiring the application of state substantive law, regardless of whether a state or federal court entertained the action.[5] However, the troublesome problem of determining whether a particular question was one of substance or procedure remained unsolved.

The absence of a clear dichotomy between substance and procedure led to *Guaranty Trust Co. v. York*[6] in which the expressed purpose of the Supreme Court's ruling was to insure that a federal court sitting in a diversity case was in effect only another court of the forum state.[7] The determining factor was to be whether the outcome of a particular case depended on the rule in question. If so, then the rule was deemed to be a matter of substance and under the *Erie* doctrine, state law controlled.[8]

The outcome determinative test of *Guaranty Trust* came closer to attaining *Erie's* goal of uniformity of outcome between federal and state courts than any of its subsequent modifications. However, since most rules of procedure affect outcome to some degree, the application of a formula of outcome determination usually had the effect of insuring the application of state rules, thus effectively subjecting the federal courts to state control.[9]

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brought suit, on the basis of diversity of citizenship, in the United States District Court for the Western District of Kentucky to enjoin competition at the Bolling Green Station by Black and White. The injunction issued and was affirmed by the Sixth Circuit Court of Appeals and United States Supreme Court.

[5] 304 U.S. at 71-80.

[6] 326 U.S. 99 (1945). This was a suit in which the federal court acquired jurisdiction through diversity of citizenship. A divided court held a state statute of limitations to be not a procedural but a substantive matter because the application of that statute would affect the outcome of the case in question. Despite some erosion of the rigidity of *Guaranty Trust* and its test of outcome determination, the viewing of state statutes of limitation as substantive, rather than procedural, remains pervasive today. *See* note 32 *infra.*

For an interesting approach to the requirement that federal courts follow state statutes of limitation see Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 538 n.48 (4th Cir. 1970). The court indicates that in the absence of a constitutional requirement, federal courts would be forced to rely on state statutes of limitation as an institutional consideration.

[7] 326 U.S. at 109.

[8] *Id.*

[9] *See, e.g.,* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) holding that a federal court, having jurisdiction through diversity of citizenship in a stockholder's derivative action, must follow a forum state's statute requiring the plaintiff to post security for reasonable expenses incurred by the defendant in the event the action be unsuccessful.

In Woods v. Interstate Realty Co., 337 U.S. 535 (1949), it was concluded that a contract on which a foreign corporation could not sue in a state court by reason of a forum state's statute, could not be enforced in a federal court. The court apparently failed to consider Rule 17(b) of the Federal Rules of Civil Procedure: "The

The critical shortcoming of *Guaranty Trust* is that it failed to recognize important federal interests which might conflict with uniformity of outcome.

II.

A decision which marked a significant movement toward a workable criterion for determining the applicability of state or federal rules of procedure was *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[10] In *Byrd* a new element was introduced: the balancing of state and federal interests in the rule in question. This new factor was to have important ramifications in the determination of the applicable law. Although the Supreme Court prior to *Byrd* had consistently examined the legislative or judicial policy behind the state rule, it had done so in terms of its compatability with *Erie*, by placing primary emphasis on uniformity of outcome. Significantly, *Byrd* recognized the existence of federal interests in addition to, and arguably more critical than, uniformity of outcome.[11]

A clearer modification of the outcome determinative test came in *Hanna v. Plumer*.[12] For the first time since *Erie*, the Supreme Court was faced with a

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capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." For a discussion of another type of state "door closing" statute see note 30 *infra*.

In Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949), it was decided that in diversity actions the state statute of limitations was tolled for the federal courts not by filing as provided in the Federal Rules of Civil Procedure but by the state provision in which service of a summons tolls the statute.

See also, Merrigan, *Erie to York to Ragan—a Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 717 (1950).

[10] 356 U.S. 525 (1958). Basing his action on diversity of citizenship, the plaintiff, an employee of a contractor doing work for the defendant, sought recovery for an injury allegedly caused by the defendant's negligence. The defendant asserted as an affirmative defense the fact that under the state workmen's compensation act the plaintiff was his employee and consequently limited to the remedies provided by that act. The trial court rejected this defense as a matter of law and the jury returned a verdict for the plaintiff. The circuit court reversed, holding that as a matter of law the plaintiff was within the scope of the state workmen's compensation act. On certiorari the Supreme Court remanded for a determination by a jury whether as a factual matter the plaintiff came within the statute in question, notwithstanding state requirements that this decision be made by a judge.

[11] 356 U.S. at 536-39. Indeed, the federal interest in trial by jury, as a result of the seventh amendment, is so overriding that the value of *Byrd* as precedent has been questioned. *See* Weintraub, *The Erie Doctrine and State Conflicts of Laws Rules*, 39 IND. L.J. 228, 236-37 (1964). This observation would also apply to Nuccio v. General Host Corp., F. Supp. (E.D. La. 1971). See discussion pp. 367-68 *infra*.

[12] 380 U.S. 460 (1965). An Ohio citizen, basing his action on diversity of citizenship, brought an action in a district court in Massachusetts against the defendant executor for personal injuries. In compliance with Federal Rule of Civil Procedure 4(d)(1) service of process was made on the defendant executor's wife at his place

situation in which a Federal Rule of Civil Procedure was clearly in conflict with a state rule, and the choice of which to apply was obviously determinative of outcome.[13] Recognizing the often elusive line between substance and procedure, the Court required the application of the Federal Rules of Civil Procedure if the question is arguably procedural in scope. Reaffirming its position in *Byrd*, the Court noted that the outcome test of *Guaranty Trust* was "never intended to serve as a talisman." [14] In those cases in which a federal rule conforms to the requirements of the Rules Enabling Act and the Constitution, it is to be applied regardless of the effect on outcome.[15] Thus *Hanna*, as well as *Byrd*, rejected the formula of outcome determination as being definitive.

The problem with *Hanna's* test of whether a rule's scope is arguably precedural is that it suffers from the weakness implicit in all substance-procedure questions; the fact is that the courts have fluctuated widely and frequently in the interpretation of just how far the scope of a particular rule or policy extends.[16] As previously noted, in determining the scope of a rule the court has consistently examined the history and underlying interests of the rule in question. It is in this analysis that the courts have appeared, at times, to have succumbed to the allure of inductive reasoning. Inasmuch as *Hanna* recognized by implication that a limited interpretation of the scope of a particular rule may avoid a conflict otherwise present under a broader interpretation,[17] there seems to remain the inevitable balancing of interests which the Court should have acknowledged. Nonetheless, *Hanna* was a significant step toward assuring the procedural integrity and independence of the federal court system and modulating state control over federal procedure. Like *Byrd*, it recognized these interests to be paramount

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of residence. The district court granted summary judgment for the defendant, holding the Massachusetts' statute requiring hand delivery to be controlling. The First Circuit Court of Appeals, holding the question to be one of substance rather than procedure, affirmed. "Because of the threat to the goal of uniformity of federal procedure posed by the decision below," the Supreme Court granted certiorari. 380 U.S. at 463. For a discussion of *Hanna* see McCoid, *Hanna v. Plummer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965) and 13 U.C.L.A.L. REV. 413 (1966).

[13] 380 U.S. at 472.

[14] *Id.* at 466-67.

[15] *Id.* at 471. The Court went further, indicating that even if there were no federal rule requiring in-hand service it is doubtful that the federal court would have been compelled to follow the Massachusetts statute. *Id.* at 466.

[16] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 470 (1965); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537 (1958); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556 (1949); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949); Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945). *See also* 13 U.C.L.A.L. REV. 413 (1966).

[17] 380 U.S. at 470.

to the federal interest in uniformity of outcome and the state's interests in applying in its own rule of civil procedure.

III.

In *Atkins v. Schmutz Manufacturing Co.*[18] the Fourth Circuit Court of Appeals, relying on the increased flexibility provided by *Byrd* and *Hanna*, held that the fact that a suit was pending within the federal court system tolled the running of the applicable state statute of limitations with respect to that identical suit in other federal courts.[19]

In *Atkins* the plaintiff initially brought an action in the United States District Court of Western Kentucky[20] for personal injuries sustained in the state of Virginia. The action was filed within the two year Virginia statute of limitations[21] but after the expiration of the shorter Kentucky period.[22] During pretrial proceedings, the Kentucky Court of Appeals reversed its previous position by which the filing would have been timely,[23] and the district court, considering itself bound by *Erie*, dismissed the action as time-barred. Before the sixth circuit's ruling[24] affirming the dismissal became final, the plaintiff brought his action in a federal court in Virginia[25] where it was eventually considered by the fourth circuit.[26]

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18 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

19 *Id.* at 527.

20 Allegedly due to the negligent design and construction of a machine manufactured and sold by the defendant, the plaintiff suffered injuries which required the amputation of both feet. As Virginia had no long arm statute at that time, the plaintiff brought his action in Kentucky where the defendant maintained his only place of business. Atkins v. Schmutz Mfg. Co., 268 F. Supp. 406, 407 (W.D. Va. 1967).

21 VA. CODE ANN. § 8-628.1 (Cum. Supp. 1970).

22 KY. REV. STAT. ANN. § 413.140 (1969).

23 Seat v. Eastern Greyhound Lines, Inc., 389 S.W.2d 908 (Ky. App. 1965). The court required the application of the Kentucky statute of limitations within state courts if the period of limitation was longer in the state in which the action arose. This was a direct reversal of the rule existing in Kentucky at the time the action was originally filed. *See* Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362 (6th Cir. 1962); Koeppe v. Great Atl. & Pac. Tea Co., 250 F.2d 270 (6th Cir. 1957); Burton v. Miller, 185 F.2d 817 (6th Cir. 1950).

24 Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1967).

25 268 F.Supp. 406 (W.D. Va. 1967). The district court considered the Virginia two year statute of limitations to be untolled by the pendency of the Kentucky action and held the action to be time-barred.

26 When the case first came before the court of appeals a divided court upheld the summary dismissal. The majority considered the Virginia statute of limitations to be controlling and untolled by the pendency of the Kentucky action. These opinions were not published and were subsequently withdrawn. On reconsideration the court en banc concluded that equitable considerations partially precluded the bar of the statute and granted a subsequent petition for further consideration. 435 F.2d at 527.

In reaching the conclusion that the statute of limitations had been tolled, Chief Judge Haynsworth relied primarily on the unitary nature of the federal court system.[27] The system was viewed as one placing great emphasis on the functioning of the whole, with the United States District Courts "encompassing almost the whole of federal jurisdiction." [28] The opinion was supported by drawing an analogy between the tolling effect of transfers between federal courts under federal procedural rules, which is a federal question, and the present case, involving in effect a transfer between federal courts, albeit by different procedural means.[29]

In arriving at its decision, the court applied a method of analysis from a previous fourth circuit opinion[30] designed to determine which rule to apply in a diversity case:

> 1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.

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[27] *Id.* at 528.

[28] *Id.* at 533.

[29] *Id.* at 528, 537. The court relied on 28 U.S.C. §§ 1404(a); 1406(a) (1970). 28 U.S.C. § 1404(a) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406(a) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

The court also drew support from dictum in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962) which, holding a transfer under 28 U.S.C. § 1406(a) to toll the respective state statues, provided:

> When a lawsut is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitations were intended to insure.

See also Burnett v. New York Cent. R.R., 380 U.S. 424 (1965) (dealing with a federal statute of limitations); Van Dusen v. Barrack, 376 U.S. 612 (1964); Taylor v. Love, 415 F.2d 1118 (6th Cir. 1969), *cert. denied*, 397 U.S. 1023 (1970); Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967).

[30] Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965). In companion wrongful death actions resulting from a Tennessee airplane crash the plaintiffs, all Illinois citizens, brought suit against the manufacturer, Beech Aircraft Corporation, and the Dixie Aviation Company, who had serviced the plane during a stopover in South Carolina, under the Tennessee wrongful death statute. Beech Aircraft was incorporated in Delaware with its principle place of business in Kansas. Dixie Aviation was a South Carolina corporation. Beech Aircraft, contending that the *Erie* doctrine applied, moved to dismiss on the basis of a South Carolina "door closing" statute, precluding the consideration by South Carolina courts of suits brought by

2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing considerations . . . .[31]

In determining whether Virginia's tolling rule[32] was "intimately bound

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non-citizens against foreign corporations for foreign causes of action. The statute, S.C. CODE ANN. § 10-214 (1962), provided in relevant part:

> An action against a corporation created by or under the laws of any other state . . . may be brought in the circuit court: (1) By any resident of this State for any cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

The district court denied the motion and was affirmed by the Court of Appeals for the Fourth Circuit. On consideration the court found the state provision not to be a substantive right or a procedure intimately bound up with a state substantive right or obligation. Weighing several federal considerations against the state's interest in the rule the court concluded the federal considerations to be paramount and refused to be bound by the statute. See a discussion of Szantay and its effect on state "door closing" statutes in 66 COLUM. L. REV. 377 (1966).

[31] 435 F.2d at 536. The final consideration is not constitutionally controlling, but is a matter of comity. As clearly expressed in *Szantay* this analytical trilogy does not completley resolve the issue. "It is necessary to go on and inquire whether the . . . rule embodies important policies that would be frustrated by the application of a different federal jurisdictional rule and, if so, is this policy to be overridden because of a stronger federal policy?" Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64 (4th Cir. 1965).

[32] In determining what constituted Virginia's tolling rule, the *Atkins* court stated that it could not conclude with any certainty just what holding the Virgina Supreme Court would make with respect to the instant case.

The court first examined Jones v. Morris Plan Bank, 170 Va. 88, 195 S.E. 525 (1938). In that case the plaintiff filed an action against the defendants for malicious abuse of civil process which was dismissed for lack of venue. Subsequently, in another trial of the same cause of action against the same defendants, the trial court refused to allow the fourteen month pendency of the former suit to be excluded from the statutory period of limitations and held the action to be time-barred. The Virginia Supreme Court affirmed.

In Weinstein v. Glens Falls Ins. Co., 202 Va. 722, 119 S.E.2d 497 (1961), the plaintiff filed an action at law to recover on an insurance policy issued by the defendant company. While the action at law was pending, the plaintiff learned that in order to recover it would be necessary to reform the contract. Before the action at law had been dismissed but after the statutory period of limitations the plaintiff brought a suit in equity in the same court. The Virginia Supreme Court, without referring to *Jones* or tolling, held the equity suit to be but a continuation of the earlier law action. *Id.* at 729-30, 119 S.E.2d at 503.

In *Atkins* Judge Winter, specially concurring, considered *Weinstein* to be dispositive of the appeal as the suit was instituted in Kentucky before the running of the

up with the right being enforced," the court concluded that it was not, the rule being instead an institutional consideration "unrelated to the basic rights and obligations of the parties."[33] This allowed the "affirmative countervailing considerations" of a unitary and effective federal court system with the securing of expeditious disposition of cases on their merits to prevail.[34]

In addition to the above federal interests, it is clear that the court was strongly influenced by the equities of the immediate situation. A good faith litigant was, by procedural means, being denied an adjudication on the merits of his case.[35] Indeed, it would appear that the needs of the federal court system, as outlined in the majority opinion, were not alone sufficiently compelling to require redress since two circuit courts had rejected the initial request of the petitioner and the fourth circuit was prompted to reconsider due only to "equitable considerations."[36]

It would appear then, that, along with the federal interest in the uniform administration of the federal court system, equitable considerations may constitute a legitimate area of federal concern in diversity actions. As demonstrated in *Atkins*, the inclusion of equities could well tip the scale when balancing federal and state interests. The consequent potential impact within the federal system must not be ignored.

The present trend toward the balancing of federal and state interests finds perhaps its clearest expression in *Nuccio v. General Host Corp.*[37] In *Nuccio* the plaintiff, an injured employee of General Host, sought recovery under workmen's compensation statutes in a diversity action in the United States District Court of Eastern Louisiana. The Louisiana Code of Civil Procedure prohibited a jury trial in such cases. The issue resolved by the court was whether to follow the Federal Rule of Civil Procedure calling for a jury

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Virginia statute of limitations and then instituted in Virginia before judgment in the Kentucky courts became final. Thus the Virginia suit was "but a continuation" of the Kentucky action and timely under Virginia law. 435 F.2d at 538-39.

While Judge Winter concurred in the holding, he disagreed with the reasoning of the majority opinion and its implications with respect to federal law. Judge Winter had understandable difficulty seeing how, if a state statute of limitations is concedely a matter of substantive law, the tolling of that statute is not "so clearly the obverse of the same coin" as to render it substantive, and thus constitutionally controlling, as well. 435 F.2d at 539.

33 435 F.2d at 537.

34 *Id.*

35 *Id.* at 530.

36 The history of the *Atkins* litigation may be traced through reference to Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970); Atkins v. Schmutz Mfg. Co., 401 F.2d 731 (4th Cir. 1968); Atkins v. Schmutz Mfg. Co., 372 F.2d 762 (6th Cir. 1957).

37 F. Supp. (E.D. La. 1971).

trial[38] or the prohibition by state law. Weighing the policy considerations of strong federal support of jury trials in civil cases against Louisiana's interest in outcome preference and judicial economy, the court concluded that the state's interests were not of sufficient magnitude to justify denying the plaintiff a jury trial.[39]

With respect to outcome preference[40] the district court pointed out that in *Byrd* it was noted that the federal judge's power to comment on the evidence or grant a new trial minimized the possibility of a difference in outcome when tried by a judge rather than a jury.[41]

What would be the state's strongest interest—that of preventing costly and time-consuming trials in certain types of cases—would be unaffected by allowing a jury trial in a federal court where there would be an expenditure of federal rather than state resources. The strong federal interest obviously must prevail over the weaker state's interests when there was a finding that the latter would not be served in any event.[42]

While a simple reference to previous decisions[43] would have adequately disposed of the case with respect to the judge-jury relationship, the reasoning employed by the court plainly reflected the accelerating trend toward a predominance of federal policy and rules of procedure resulting from the propensity of federal courts to balance the relevant interests in diversity actions. *Nuccio* unambiguously balanced the state against the federal interests.

IV.

The balancing test as applied in *Nuccio* and *Atkins* appears to be a proper step toward a more realistic test to guide federal courts in the disposition

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38 FED. R. CIV. 38(a).

39 F. Supp. at .

40 Outcome preference refers to a belief by the legislature that the result of a trial will vary depending on whether it is tried by a judge or a jury and their preference for the judge's decision. F. Supp. at .

41 356 U.S. at 540.

42 F. Supp. . It would seem that if the court has correctly identified the state's interests in prohibiting jury trials in certain types of cases the arguments against them would apply in every case, as the interests involved would remain constant, and thus require the application of federal rules with respect to jury trials. For a similar observation concerning certain types of "door closing" statutes see 66 COLUM. L. REV. 377, 385 (1966).

43 In Simler v. Conner, 372 U.S. 221 (1963), the Supreme Court stated:

> We agree... that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The Federal policy favoring jury trials is of historic and continuing strength. *Id.* at 222.

See also Beacon Theaters Inc. v. Westover, 359 U.S. 500 (1959); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

of diversity cases: 1) by providing the flexibility needed in the consideration of numerous and often conflicting interests; 2) by taking into account the inevitable balancing of state and federal interests implicit in federalism; and 3) by providing a reasonable degree of uniformity and thus predictability required of any body of law.

The desirability that future litigants take proper notice of the propensity of the courts to balance various state and federal interests is apparent. Although the federal courts have inevitably explored the interests and policies behind conflicting rules, judges have consistently been forced to rely on their own experience and supposition, in determining that those interests may be.[44]

Thus in the increasingly flexible area of diversity jurisdiction it would appear to be of no little importance that the parties be properly prepared to protect their interests by providing the court with the information needed for an intelligent consideration of the state and federal interests in a rule on which the outcome of the case may depend.

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[44] The frequency of this occurence may be indicated by the court's specific reference in the last three cases considered in this Comment. Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (4th Cir. 1970), ". . . [I]t would be helpful to know with certainty the state policies underlying the tolling rule." *Id.* at 536. Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), "We are inhibited in our search for the state policy underlying the South Carolina "door closing" statute by the unavailability of any legislative history." *Id.* at 64. Nuccio v. General Host Corp., F. Supp. , "Although there is no authoritative legislative history or judicial exposition of Louisiana's limitation on the right to a jury trial, it must be concluded that this procedural article is supported by interests of outcome preference and judicial economy." *Id.* at .