INTERNAL AFFAIRS RULE IN THE FEDERAL COURTS—THE *ERIE* PROBLEM

One of the many problems posed by the pervasive doctrine of *Erie R.R. v. Tompkins*[1] is whether a federal court must apply a state rule of law which dictates that the state courts will not adjudicate a case involving the internal affairs of a foreign corporation.[2] The status of the internal affairs rule on the state level[3] presently varies from jurisdiction to jurisdiction, ranging from automatic dismissal[4] to a more flexible application which employs standards resembling those of the doctrine of forum non conveniens.[5] On the federal level, however, the relationship between the internal affairs rule and forum

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[1] 304 U.S. 64 (1938).

[2] The "internal affairs rule" has been thus defined by the Supreme Court:

> [A] court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the state of the domicile.

Rogers v. Guaranty Trust Co., 288 U.S. 123, 130 (1933).
Considerable difficulty has been encountered in attempting to determine what affects the internal affairs of a foreign corporation, and what does not. The most widely accepted definition was given by the Maryland supreme court:

> [W]here the act complained of affects the complainant solely in his capacity as a member of the corporation whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, . . . then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation, our Courts will not take jurisdiction.

North State Copper & Gold Mining Co. v. Field, 64 Md. 151, 154, 20 Atl. 1039, 1040 (1885). Mr. Justice Cardozo, in Travis v. Knox Terpezone Co., 215 N.Y. 259, 109 N.E. 250 (1915), termed such an attempted definition a "difficult and hazardous venture." *Id.* at 264, 109 N.E. at 251. See also Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683 (1910); Note, 46 COLUM. L. REV. 413, 423 n.57 (1946); Note, 33 COLUM. L. REV. 492 n.1 (1933).

[3] The historical development of the rule in the state courts will not be discussed in this Comment. For an excellent treatment of the topic, see Note, *The "Internal Affairs" Doctrine in State Courts*, 97 U. PA. L. REV. 666 (1949). For a general survey of the rule on both state and federal levels, see 17 FLETCHER, PRIVATE CORPORATIONS §§ 8425-45.1 (1959). The internal affairs decisions of the Supreme Court in 1933, 1946 and 1947, see text accompanying notes 6-21 *infra*, evoked considerable comment, much of which extensively summarized the development of the internal affairs rule up to the respective publication dates. See generally, Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Note, *Forum Non Conveniens—A New Federal Doctrine*, 56 YALE L.J. 1234, 1243 (1947) (Asserts that forum non conveniens has been "expressly substituted" for the internal affairs rule in many circumstances. The title of the article illustrates the fact that the forum non conveniens doctrine developed much later than the internal affairs rule—and, as the text indicates, literally overtook it.); Note, 46 COLUM. L. REV. 413 (1946); Note, 33 COLUM. L. REV. 492 (1933).

[4] See, *e.g.*, Wojtczak v. American United Life Ins. Co., 293 Mich. 449, 292 N.W. 364 (1940); O'Hara v. Frenkil, 155 Md. 189, 193, 141 Atl. 528, 530 (1928).

[5] See, *e.g.*, Sharp v. Big Jim Mines, 39 Cal. App. 2d 435, 439, 103 P.2d 430, 433 (1940); Cohn v. Mishkoff Costello Co., 256 N.Y. 102, 105, 175 N.E. 529, 530 (1931).

non conveniens has been established by three Supreme Court decisions. In each case, jurisdiction was based upon diversity of citizenship. These decisions effected a transition in the internal affairs rule, from one requiring automatic dismissal to one subsumed under the doctrine of forum non conveniens.

In the first case, *Rogers v. Guaranty Trust Co.*,[6] plaintiff alleged that certain officers of a foreign corporation had wrongfully diverted assets to their own use. The Supreme Court held that the facts of the case brought it within the purview of the internal affairs rule,[7] and justified the exercise of the district court's discretion in dismissing the action.[8] While the opinion did not explicitly mention forum non conveniens,[9] it did question the application of a hard and fast rule in all cases, and asserted that in the exercise of "sound discretion" courts should apply the "considerations of convenience, efficiency and justice." [10]

The second internal affairs case before the Court—*Williams v. Green Bay & W. R.R.*[11]—was a suit to recover amounts allegedly due on debentures which had been issued by the company with no fixed rate of interest. The district court, citing *Rogers*, granted the defendant's motion for dismissal on the basis of the internal affairs rule.[12] The Court of Appeals for the Second Circuit affirmed.[13] In reversing the dismissal and remanding the case to be tried on the merits, the Supreme Court explicitly recognized that it was deciding a forum non conveniens question.[14] The Court stated that jurisdiction should not be declined merely because the case involves complicated affairs of a foreign corporation,[15] and that dismissal might be granted only upon a showing that maintenance of a suit away from the domicile of the defendant would be vexatious or oppressive.[16] The Court, however, explicitly reserved decision on the question whether it was obliged by

[6] 288 U.S. 123 (1933).

[7] *Id.* at 132-33.

[8] The result reached in this case has been criticized in 1A MOORE, FEDERAL PRACTICE ¶ 0.204, n.18 (2d ed. 1965); Comment, 31 MICH. L. REV. 682, 694 (1933).

[9] Forum non conveniens was mentioned only by Mr. Justice Cardozo, in his dissent, in the now famous line: "The doctrine of *forum non conveniens* is an instrument of justice." 288 U.S. at 151.

[10] *Id.* at 131.

[11] 326 U.S. 549 (1946).

[12] 59 F. Supp. 98, 99 (S.D.N.Y. 1944). The district court also cited a New York case, Cohn v. Mishkoff Costello Co., 256 N.Y. 102, 105, 175 N.E. 529, 530 (1931), which had dismissed a similar complaint. 59 F. Supp. 100.

[13] 147 F.2d 777 (2d Cir. 1945). The Second Circuit in dismissing the case spoke in terms of forum non conveniens; the Supreme Court retained the forum non conveniens characterization, even though it decided that the case should not be dismssed.

[14] 326 U.S. at 554.

[15] *Id.* at 556-57.

[16] *Id.* at 554.

Erie to follow the New York rule[17] since the state law dictated the same result that it had reached.[18]

The third case, *Koster v. Lumbermens Mut. Cas. Co.*,[19] established that the internal affairs rule at the federal level was to be treated as a part of the federal forum non conveniens doctrine. *Koster* was a stockholder's derivative action brought against an Illinois corporation and its president in a New York court. Plaintiff requested an accounting for money which the president had allegedly diverted from corporate funds through breach of trust. The Supreme Court affirmed a dismissal on the grounds that the plaintiff's choice of forum was clearly inconvenient to the defendant, and was not justified by any corresponding benefit to the plaintiff. Every source of evidence necessary to the plaintiff's case, the Court noted, was to be found in Illinois.[20] The Court made clear that dismissal was not an automatic corollary of the fact that the case involved the internal affairs of a foreign corporation. Rather, internal affairs became "one, but only one" factor to be taken into consideration in determining the appropriateness of a forum.[21]

These decisions laid down guidelines for the lower federal courts to follow in determining when dismissal of a case involving the internal affairs of a foreign corporation would be appropriate.[22] Under the forum non conveniens doctrine, the court must balance any vexatiousness or oppressiveness to the defendant against those practical considerations which may prevent the plaintiff from maintaining his action elsewhere.[23] In effect, then, these decisions reduced the possibility that a

[17] The New York State rule has been characterized as an exercise of the state forum non conveniens doctrine rather than as a rule requiring a dismissal in every case. See Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 811, 816 & n.44 (1948). It would thus seem to be a "flexible" rule, applying forum non conveniens criteria similar to those laid down by the Supreme Court. *But see*, Harris v. Weiss Eng'r Corp., 267 App. Div. 96, 44 N.Y.S.2d 643 (1943).

[18] 326 U.S. at 559.

[19] 330 U.S. 518 (1947).

[20] *Id.* at 526.

[21] There is no rule of law, moreover, which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues that relate to the internal affairs of a foreign corporation. That is *one, but only one*, factor which may show convenience of parties or witnesses, the appropriateness of trial in a forum familiar with the law of the corporation's domicile, and the enforceability of the remedy if one be granted. But the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.

Id. at 527. (Emphasis added.)

[22] *But see*, Ellsworth v. Carr-Consol. Biscuit Co., 90 F. Supp. 586 (M.D. Pa. 1950). Dismissal without prejudice has been the traditional result of the application of forum non conveniens. One year after *Koster*, however, federal courts were given the power, by the passage of § 1404(a) of the Judicial Code, to transfer a case rather than dismiss it. 28 U.S.C. § 1404(a) (1964). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." See notes 53-55 *infra* and accompanying text.

[23] Even before the enactment of § 1404(a), the common law doctrine of forum non conveniens presupposed the existence of two forums in which both jurisdiction and venue were proper. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).

large corporation or its officers would be able to use the internal affairs rule as a wall behind which to hide from a plaintiff with a justiciable claim.[24]

As noted earlier, one question expressly reserved by the Supreme Court in the *Williams* case was whether the federal court should apply these forum non conveniens standards in all cases, or whether *Erie* required that, in some cases, state law be followed.[25] If the state rule and the federal standards dictate the same result, there is, of course, no problem.[26] But what of a situation where the result obtainable in state court is different from that which would be reached by application of forum non conveniens? This situation would arise either where the state rule is inflexible, or where it is flexible but, would, in some cases, yield a different result from the federal rule.[27]

The traditional doctrine has been that if a state rule has an articulated state policy behind it, the rule will be substantive for *Erie* purposes, and thus binding on the federal courts. The Supreme Court has looked to whether the policy behind the state rule would be frustrated by allowing suit in federal court. For example, in *Angel v. Bullington*,[28] a Virginia citizen brought suit in a North Carolina state court seeking a deficiency judgment against a North Carolina citizen. The North Carolina Supreme Court held that a state statute deprived its courts of jurisdiction to give deficiency judgments. The plaintiff then brought a new suit in the federal district court in North Carolina,

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This restriction on the operation of forum non conveniens was carried over into § 1404(a). In Hoffman v. Blaski, 363 U.S. 335 (1960), the Supreme Court held that transfer under § 1404(a) was not possible if the defendant were not subject to service of process in the transferee forum, even if he were willing to waive such defense. Moreover, a court can consider dismissal only where two forums are available in which suit can be brought.

[24] When a plaintiff names individual officers or directors of a corporation as parties defendant (to obtain a decree enjoining or ordering some action in an official capacity), the facts of the case may reveal that some or all of the individual defendants are not subject to service in the state of corporate domicile. See, *e.g.*, Lapides v. Doner, 248 F. Supp. 883 (E.D. Mich. 1965); Crandall v. Canole, 230 F. Supp. 705 (E.D. Pa. 1964); Ellsworth v. Carr-Consol. Biscuit Co., 90 F. Supp. 586 (M.D. Pa. 1950); Hall v. American Cone & Pretzel Co., 71 F. Supp. 266 (E.D. Pa. 1947). Thus dismissal under the internal affairs rule may mean that the plaintiff's case may never be heard on the merits.

[25] Even though the Court had before it the decision of Judge Learned Hand in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945) (see notes 44-45 *infra* and accompanying text), which held that the federal court was bound under *Erie* to follow the state rule, the Court explicitly reserved decision on that question. Williams v. Green Bay & W.R.R., 326 U.S. 549, 558 (1946). Because the Court refused to sanction the *Weiss* decision, but rather laid down guidelines for independent federal action, it has been suggested that the Supreme Court implicitly disapproved of the *Weiss* result. Lapides v. Doner, 248 F. Supp. 883, 890-91 (E.D. Mich. 1965); Hall v. American Cone & Pretzel Co., 71 F. Supp. 266, 269 (E.D. Pa. 1947).

[26] The Supreme Court found such to be the case in Williams v. Green Bay & W.R.R., *supra* note 25, at 559. The Court decided that it did not have to pass upon the question whether *Erie* compelled the application of state law, since "even if we assume the New York rule to be applicable here, we would reach no different result." *Ibid.*

[27] See text accompanying note 33 *infra*.

[28] 330 U.S. 183 (1947).

basing jurisdiction on diversity of citizenship, and seeking the same relief against the same defendant on the same claim. The federal district court granted relief, but was reversed by the Supreme Court. It was there held that the North Carolina statute was expressive of a state policy against deficiency judgments and that to allow such a suit to be maintained in a federal court would defeat this policy.[29]

One of the reasons given for the internal affairs rule during the early stages of its development was the existence of a state policy to protect foreign corporations from vexatious litigation in forums distant from the state of domicile.[30] This may reflect a state policy of encouraging foreign corporations to come into the state and transact their business there by guaranteeing that they will be free from vexatious internal affairs litigation. If it is apparent to the federal court that such a state policy would be frustrated were the federal court to disregard the state rule, then the federal court would be bound under *Erie* to apply it.[31]

Should, however, a federal court not find an articulated state policy for the state internal affairs rule, it does not invariably follow that the state rule may be disregarded. A further inquiry must be made into the character of the state rule. If, on the one hand, the state rule is flexible, admitting of refinements and exceptions that approach forum non conveniens criteria, a federal court should not infer that a state policy exists which must be effectuated in federal court. While it is possible that a state policy may exist even for a flexible internal affairs rule, it would not be of such a kind as to dictate that the federal court follow the state rule. A state policy of fairness or convenience to the parties would be protected equally as well by federal standards.

If, on the other hand, the state has an inflexible internal affairs rule which invariably dictates dismissal, a federal court should infer the existence of a substantive state policy which the federal court is bound to protect. The existence of such an inflexible rule indicates an attempt by the state to affect the pre-trial activity of the parties, and is thus substantive for *Erie* purposes.[32]

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[29] *Id.* at 191. Similarly, in Woods v. Interstate Realty Co., 337 U.S. 535 (1949), the Supreme Court held that a Tennessee corporation could not sue in the federal district court in Mississippi when a state statute did not permit an unregistered foreign corporation to bring suit in state courts. The state policy behind the statute was to encourage foreign corporations to register an agent for service of process within the state. *Cf.* Szantay v. Beech Aircraft Corp., 349 F.2d 60, 66 (4th Cir. 1965).

[30] See Grismer v. Merger Mines Corp., 43 F. Supp. 990, 993 (E.D. Wash. 1942), *modified* 137 F.2d 335 (9th Cir.), *cert. denied*, 320 U.S. 794 (1943); Lind v. Johnson, 183 Minn. 239, 241, 236 N.W. 317, 318 (1931); Beard v. Beard, 66 Ore. 512, 518, 133 Pac. 797, 799, *rehearing denied*, 66 Ore. 512, 134 Pac. 1196 (1913).

[31] The fact that in *Angel* and *Woods* state statutes were involved does not mean that these cases are distinguishable, since the express purpose of *Erie* was to bind federal courts by state judge-made decisional law as well as by state statutes.

[32] *Cf.* Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J. concurring). It may be possible, however, that there would be federal countervailing considerations

In those cases in which the state standards are flexible but the criteria the state court would apply differ from those a federal court would apply in similar circumstances, a further analysis is required. One case envisioned occurs when the state court would retain jurisdiction if the issue involves, for example, allegations of fraud, and would dismiss all other cases categorically. A federal court, in similar circumstances, would look to considerations such as the accessibility of corporate records or the extent of business transacted within the forum state, deciding, in a balance, what are the dictates of "fairness." In such a case the state law may be regarded as *inflexible* in all cases which would be categorically dismissed under state law, and, as noted above [33] the federal court should infer the existence of a state substantive policy behind the inflexible rule. On the other hand, in those cases in which the state and the federal courts would reach different results because, in balancing, the courts disagree as to the *weight* that should be given to certain factors in deciding what is "fair," no evidence of a state substantive policy is found. Such a difference in result between the state and federal court can be attributed only to the abstract and often subjective evaluations of what is in the best interests of "justice and expedience." In short, two applications of the doctrine of forum non conveniens are at work, each motivated by the same goal, but implemented by judicial discretion that emphasizes different elements. Consequently, a federal court should be free to apply its own standards since the mandate of *Erie* does not extend to the convenience of courts or parties. This result is in accord with a growing body of case law indicating that federal courts are not bound by *Erie* to apply state forum non conveniens criteria.[34]

The above analysis, based on the flexible-inflexible dichotomy, corresponds with the result that would be reached under *Hanna v. Plumer*,[35] the most recent of the landmark decisions construing *Erie*. The question before the Supreme Court in *Hanna* was whether state

which would outweigh the state policy and dictate independent federal action. In Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958), the question before the Court was the effect to be given to a state judge-made rule allocating the trial of a particular fact to the judge rather than a jury. The Supreme Court observed that there were "affirmative countervailing considerations at work" *id.* at 537, *i.e.*, the federal practice of allocating the function of determining such issues to the jury. It was held that the operative *Erie* policies were outweighed by the countervailing federal considerations, and that the federal practice should govern. It is possible that such federal considerations may be found in the federal venue statute, 28 U.S.C. § 1401, or the federal transfer statute, 28 U.S.C. § 1404(a). *Cf.* 50 MARQ. L. REV. 405, 409 (1966). Moreover, the federal forum may be the only one in which the suit may be maintained because the defendants are not subject to service of process elsewhere. Such was the case in Lapides v. Doner, 248 F. Supp. 883, 896 (E.D. Mich. 1965). See notes 41-49 *infra* and accompanying text. See also Hall v. American Cone & Pretzel Co., 71 F. Supp. 266, 268 (E.D. Pa. 1947). If such is the case, the general purpose of federal diversity jurisdiction—to provide a forum where a justiciable claim may be heard—may provide a sufficient federal interest to override state policies.

[33] See note 32 *supra* and accompanying text.

[34] See note 57 *infra*.

[35] 380 U.S. 460 (1965).

or federal law controlled the manner of service of process in a federal district court. The plaintiff had complied with Rule 4(d)(1) of the Federal Rules of Civil Procedure, which permits service at the dwelling house of the defendant, but he had not fulfilled the requirements of a Massachusetts statute requiring either personal in-hand service upon an executor of an estate or posting of notice at the courthouse. Addressing himself squarely to the conflict, Chief Justice Warren noted "that choices between state and federal law are to be made not by application of any automatic "litmus paper" criterion,[36] but rather by reference to the policies underlying the *Erie* rule." [37] The majority found these policies to be twofold. First, *Erie* was designed to prevent possible discrimination against in-state plaintiffs who would be deprived of access to federal courts—and a more favorable result—by the requirements of diversity jurisdiction.[38] Second, *Erie* was intended to correct the vice of forum shopping which had grown up in response to the rule of *Swift v. Tyson*.[39] Failing to find either of these policies frustrated by application of 4(d)(1) in this case, the Court held that the federal rule governed.[40]

Thus it is clear from the Court's opinion in *Hanna* that the federal courts must apply the state rule if disregarding it would frustrate the underlying policies of *Erie*. But federal courts which have held that they were not obligated by *Erie* to follow the state internal affairs rule have failed to examine these policy reasons. In one such recent case, *Lapides v. Doner*,[41] a stockholder of an Ohio corporation brought a derivative action in a federal court in Michigan for a declaration that a meeting of the board of directors and the resolutions adopted

[36] The Court was referring to the "outcome determinative" test of Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In that case the Court had held that where a state statute of limitations barred recovery in a state court, a federal district court was likewise precluded from granting relief. The "outcome" test was stated by Mr. Justice Frankfurter: "The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?" *Id.* at 109. The Supreme Court in *Hanna*, viewing *York*, within the perspective of the dual policy aims of *Erie*, stated that " 'Outcome-determination' analysis was never intended to serve as a talisman." 380 U.S. at 466-67.

[37] 380 U.S. at 467.

[38] Article III of the Constitution contains the grant of diversity jurisdiction to ensure equality of treatment for both residents and nonresidents. U.S. CONST. art. III, § 2; see Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

While it is true that an in-state plaintiff could bring an action against a "foreign" corporation in a federal court basing jurisdiction on diversity of citizenship, joinder of corporate officials resident within the plaintiff's home state may negate this possibility. Suits naming individual officers or directors whose residence may destroy diversity are not uncommon. See note 24 *supra*.

[39] 41 U.S. (16 Pet.) 1 (1842). See Hanna v. Plumer, 380 U.S. 460, 467 (1965).

[40] 380 U.S. at 465-69. In a concurring opinion, Mr. Justice Harlan framed the issue in slightly more traditional terms:

> To my mind the proper line of approach in determining whether to apply a state or a federal rule, whether "substantive" or "procedural," is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation. *Id.* at 475.

[41] 248 F. Supp. 883 (E.D. Mich. 1965). See also, Hall v. American Cone & Pretzel Co., 71 F. Supp. 266 (E.D. Pa. 1947).

at that meeting were null and void. The Michigan Supreme Court had long before held, in *Wojtczak v. American United Life Ins. Co.*,[42] that Michigan courts would not assume jurisdiction in matters which involved the internal affairs of a foreign corporation. The language used by the Michigan court in *Wojtczak* was a statement of the rule in its most intransigent form, admitting of no forum non conveniens considerations.

The primary issue before the court in *Lapides* was whether the rule of law in Michigan, as announced in *Wojtczak*, should control.[43] In deciding that question, the court considered at length the opinion by Judge Learned Hand in *Weiss v. Routh*,[44] the first case to consider whether *Erie* dictated the application of a state internal affairs rule. The Second Circuit had held in *Weiss* that the state rule must govern for two reasons: first, an in-state plaintiff would be restricted by diversity requirements to the state court and perhaps a different outcome; second, unless the court followed state law, the decision in each case would not appear to be controlled by a set principle, but rather by the whim of the judge.[45]

In declining to follow *Weiss*, the court in *Lapides* stated first, that the "outcome determinative" test had been "discredited" by the Supreme Court's decision in *Hanna*.[46] Second, the court observed that the principles which Judge Hand had found lacking in *Weiss* were supplied one year later by the Supreme Court in *Williams v. Green Bay & W. R. R.*[47]

After rejecting *Weiss*, the court in *Lapides* discussed the forum non conveniens treatment of the internal affairs rule in *Williams* and *Koster*. But the court failed to consider that when the Supreme Court in *Williams* held that the lower court should have retained jurisdiction, it noted that the state internal affairs rule would have dictated the same result.[48] The state law in that case was not, therefore, the inflexible type of internal affairs rule found in Michigan.[49]

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42 293 Mich. 449, 292 N.W. 364 (1940).

43 248 F. Supp. at 888.

44 149 F.2d 193 (2d Cir. 1945).

45 *Id.* at 195.

46 248 F. Supp. at 888. See note 36 *supra*.

47 248 F. Supp. at 888-91. See note 25 *supra*. In support of its holding, the court in *Lapides* also asserted that matters governed by federal statutes were exempt from the operation of the *Erie* doctrine, and that since questions of forum non conveniens in the federal courts are now governed by § 1404(a), *Erie* does not require the federal courts to follow the state forum non conveniens law. *Id.* at 892. There is now a growing body of case law outside the internal affairs area supporting this assertion. See note 57 *infra*. The difficulty with this reasoning as applied to the internal affairs situation is that it assumes that the standards enunciated in § 1404(a) were intended to govern even where there is a substantive policy behind the state rule. Such an assumption is unwarranted.

48 See note 26 *supra*.

49 Despite the fact that the court in *Lapides* found "that the Court in *Wojtczak* declined jurisdiction without regard to the convenience of the forum for the parties concerned," 248 F. Supp. at 886, it nevertheless attempted to characterize the Michigan state rule as one of forum non conveniens by analyzing language of the court in *Wojtczak* quoted from *Fletcher, Private Corporations*. *Ibid.*

Had the *Lapides* court considered the two-pronged test formulated in *Hanna v. Plummer,* rather than just noting that *Hanna* discredited the "outcome determinative" test, it could not have reached the result that it did. Since Michigan had developed an inflexible internal affairs rule, allowing the federal court to hear the case under the Supreme Court's forum non conveniens standards encourages future plaintiffs to choose the federal rather than the state forum. Moreover, an in-state plaintiff would be barred by diversity requirements from the federal courts under the factual situation in *Lapides*.[50] The *Lapides* result, therefore, would seem to contravene the two-fold *Erie* policies pointed out by *Hanna*: avoidance of forum shopping and discrimination against in-state plaintiffs.[51]

Thus if the state in which the federal court sits has an inflexible internal affairs rule, *Hanna* would dictate that the state rule be followed. However, even in following the state rule, a federal court has an option available to it which is not available to a state court. Under the provisions of section 1404(a) of the Judicial Code,[52] a federal district court is authorized to transfer an action to a more convenient forum rather than dismiss it.[53] Transfer of the suit rather than dismissal would not frustrate any state policy underlying the rule since the state policy provides only that the case is not to be heard within the state.[54]

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[50] The plaintiff in *Lapides* had joined as individual defendants corporate officers who, the court noted, lived in Michigan. 248 F. Supp. at 896. See note 38 *supra.*

[51] In the words of Mr. Justice Harlan's concurring opinion, if permitting the federal court to disregard the state rule would thus "affect those primary decisions respecting human conduct," the state internal affairs rule should be deemed substantive for *Erie* purposes and binding on the federal court. See note 40 *supra.*

One possible justification for the result in *Lapides* is that the Michigan Supreme Court might not today assume the same intransigent position as it did twenty-five years ago in *Wojtczak*. However, such speculation seems to be unwarranted in the absence of any indication that the Michigan courts have had a change of heart.

[52] 28 U.S.C. § 1404(a) (1964). See note 22 *supra.*

[53] Such a transfer would, however, be subject to the jurisdictional restrictions of Hoffman v. Blaski, 363 U.S. 335 (1960). See note 23 *supra.* To allow such a transfer would relieve the plaintiff of all the "harsh results" of dismissal: the running of the statute of limitations; dissolving of temporary injunctions; attachments; garnishments; new service of process problems. *Cf.* MOORE, FEDERAL PRACTICE, ¶ 0.204, at 2205 (2d ed. 1965).

[54] Such a transfer would, however, pose difficult—albeit interesting—conflict of laws problems for the transferee forum. The Supreme Court's decision in Van Dusen v. Barrack, 376 U.S. 612 (1964), which held that the law which the transferor forum would have applied would govern in the new forum, was limited by the Court to the facts in that case. *Id.* at 639. The Court also stated, "We do not attempt to determine whether . . . the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens.*" *Id.* at 640. See Note, Erie, *Forum Non Conveniens and Choice of Law in Diversity Cases,* 53 VA. L. REV. 380, 389 (1967).

Moreover, there may be a question whether the original forum would have applied its own law or the law of the corporate domicile had it heard the case on the merits. The liability of a corporate officer for an act done by him in his official capacity is usually determined by the laws of the incorporating state. See RESTATEMENT, CONFLICT OF LAWS §§ 187-88 (1934). It has been suggested, however, upon the application

When, however, the federal court sits in a state which has a flexible internal affairs rule, but the state standards for retention or dismissal of a case diverge from those delineated by the Supreme Court, the *Erie-Hanna* analysis will give a different result.[55] Since in both state and federal systems there will be latitude for the exercise of judicial discretion, a different outcome on the federal level will not be reasonably predictable and can not, therefore, be said to encourage forum shopping. Nor can it be said beforehand that the plaintiff will be better off in one forum rather than the other; hence, there will not be any discrimination against in-state plaintiffs.[56] Absent these factors of forum shopping or discrimination to in-state plaintiffs, the state rule should be deemed procedural for *Erie* purposes, and the federal court should be free to apply the federal standards in this area.[57]

of a weighing of interests theory, that the law of the forum should govern in a suit by minority stockholders for rescission of sale of stock based on an asserted violation of the fiduciary relationship between the corporate officers and the minority stockholders. Mansfield Hardwood Lumber Co. v. Johnson, 268 F.2d 317 (5th Cir. 1959).

[55] Once again, this parallels the pre-*Hanna* result. See text accompanying note 35 *supra*.

[56] Alternately phrased, the difference in outcome resulting from the application of different standards in state and federal courts could not be said to affect "primary decisions respecting human conduct." 380 U.S. at 475 (Harlan, J. concurring).

[57] There is a growing body of case law, not dealing with internal affairs, which indicates that federal courts are not bound by *Erie* to apply state forum non conveniens laws. See Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955); Gilbert v. Gulf Oil Corp., 153 F.2d 883 (2d Cir. 1946); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 835 (S.D.N.Y. 1957); Ultra Sucro Co. v. Illinois Water Treatment Co., 146 F. Supp. 393 (S.D.N.Y. 1956). If a state has an internal affairs rule that is not inflexible, then the *Hanna-Erie* analysis would indicate that the state rule would be procedural for *Erie* purposes and not binding on the federal court. If another forum were available, the state internal affairs rule could then properly be described as part of a state forum non conveniens doctrine. The resulting freedom of the federal court to apply its own standards would be consonant with the development of the law in the general forum non conveniens area.