FORUM NON CONVENIENS


INTRODUCTION

Where the interests of justice would best be served, a defendant may make a motion to employ one of two methods to have a case dismissed or transferred from an inconvenient forum. The common law doctrine of forum non conveniens, in essence, allows a court to dismiss an action in favor of a more convenient forum, either state or federal; whereas 28 U.S.C. section 1404(a) allows a district court to transfer an action to another federal forum in which the action might have been brought. The review by the Eighth Circuit Court of Appeals, in Lehman v. Humphrey Cayman, Ltd., involved many issues concerning the common law doctrine of forum non conveniens; however, these issues were not addressed in a manner which fully considered the underlying interaction between the common law doctrine of forum non conveniens and the potential application of 28 U.S.C. section 1404(a).

In Lehman the court of appeals specifically held that the district court should have exercised jurisdiction over this case rather

2. "For the convenience of the 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. § 1404(a) (1976).
3. 713 F.2d 339 (8th Cir. 1983).
4. Among the issues that this note will not address is the Eighth Circuit Court's determination that the district court abused its discretion by dismissing the case. Lehman, 713 F.2d at 347.
5. See note 1 supra.
6. The Eighth Circuit did, however, implicitly question the use of the common law doctrine of forum non conveniens. The court suggested that if personal jurisdiction was proper then the forum was also convenient. Lehman, 713 F.2d at 344-45 n.4. This suggestion either questions the continuing validity of the common law doctrine of forum non conveniens, or implies that the common law doctrine has been expanded beyond its original purpose of avoiding the plaintiff's harassment of the defendant. See notes 56-59 and accompanying text infra.
7. See note 2 supra.
than dismiss the action on the grounds of common law forum non conveniens.8 A simple application of common law precedent would lead the court of appeals to take this approach.9 The court of appeals limited its review in Lehman to the common law doctrine of forum non conveniens.10 The court of appeals reviewed only the elements of the test for the common law doctrine of forum non conveniens and the trial court's evaluation thereof.11 In applying either the common law doctrine of forum non conveniens or section 1404(a) an appellate court may reverse only upon finding an abuse of discretion by the trial judge.12 If section 1404(a) had been applied it is quite likely that the court of appeal's ultimate holding would have been the same—that Iowa was the appropriate forum.13 Without undertaking this evaluation, however, the court

8. Lehman, 713 F.2d at 347.
9. See note 117 infra.
10. See Lehman, 713 F.2d at 342-47.
11. Id.
12. The trial judge has great discretion when considering dismissal on a common law forum non conveniens motion. Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147, 158 (2d Cir. 1980) (en banc) (the trial judge's opinion demonstrated a sound exercise of discretion), quoting, Gulf Oil, 330 U.S. at 508; Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber, 513 F.2d 667, 670 (9th Cir. 1975) (the issue on appeal is whether the district court abused it discretion in granting the motion to dismiss). The appellate court can reverse only if it finds an abuse of discretion by the trial judge. Paper Operations, 513 F.2d at 670 ("An appellate court may only reverse the decision of the district court if it constitutes an abuse of discretion."); citing, The Belgenland, 114 U.S. 355, 368 (1885), Yerostathis v. A. Luisi, Ltd., 380 F.2d 377, 379 (9th Cir. 1967), The Kanto Maru, 112 F.2d 564, 565 (9th Cir. 1940).

The trial judge must have abused that broad discretion in applying 28 U.S.C. § 1404(a) before reversal is proper. Layne-Minnesota p. r., Inc. v. Singer Co., 574 F.2d 320 (8th Cir. 1978) (a motion for transfer under 28 U.S.C. § 1404(a) is addressed to the discretion of the trial court and its actions will not be disturbed on appeal unless there has been an abuse of discretion." Id. See Plum Tree, Inc. v. Stockment, 488 F.2d 754, 756 (3d Cir. 1973) (the district court's determination should rarely be disturbed); Nowell v. Dick, 413 F.2d 1204, 1212 (5th Cir. 1969) (the district court will be overturned only if it abused its discretion); Lykes Bros. S.S. Co. v. Sugarman, 272 F.2d 679, 682 (2d Cir. 1959) ("reviewing courts should not override findings of trial courts as to what the interests of justice require."); Southern Ry. v. Maddon, 235 F.2d 196, 201 (4th Cir.) (the district court did not use sound discretion in such a clear case), cert. denied, 352 U.S. 953 (1956); General Portland Cement Co. v. Perry, 204 F.2d 316, 319 (7th Cir. 1953) (the district court must be clearly erroneous); New York, C. & St. L. R.R. v. Vardaman, 181 F.2d 769, 771 (8th Cir. 1950) (the decision must "demonstrate arbitrary action by the trial court.")); Ford Motor Co. v. Ryan, 182 F.2d 329, 331 (2d Cir.) (the trial court must have abused its discretion), cert. denied, 340 U.S. 851 (1950). Cf. Dairy Indus. Supply Ass'n v. LaBuy, 207 F.2d 554, 558 (7th Cir. 1953) (strictly applying the three statutory factors of § 1404(a)); Blanning v. Tisch, 378 F. Supp. 1058, 1060 (E.D. Pa. 1974) (same). See generally Annot., 1 A.L.R. Fed. 15, 38-43 (1969) (further citation of cases on this point).

13. The test of 28 U.S.C. § 1404(a) actually differs very little from the common law doctrine of forum non conveniens, and under this test Iowa would most likely be found more convenient than Tennessee. The plaintiff and the witnesses would
overlooks important policy considerations of each method.

The purpose of this note is to describe and analyze the interaction of the common law doctrine of forum non conveniens and 28 U.S.C. section 1404(a). This analysis reviews and compares the application of the common law doctrine of forum non conveniens and section 1404(a) in various factual situations. Case comparisons aid in defining and describing this interaction. Two basic conclusions are drawn from the following analysis. First, the court of appeals addressed the appropriate issue according to precedent. Second, it failed to fully consider the underlying issue of the interaction of the common law doctrine of forum non conveniens and section 1404(a).

FACTS AND HOLDING

Robert Lehman was presumed dead after a sailing accident in November of 1980. While Lehman and his son were guests at the Grand Caymanian Holiday Inn, Lehman rented a sailboat from Bob Soto's Diving, Ltd., located on the hotel premises. Lehman and two others set sail on the Caribbean. Several hours later, a search was begun when the sailboat was no longer in sight, but only the wreckage of the sailboat was found.

Victoria Lehman filed a wrongful death action against the owner of the Grand Caymanian Holiday Inn in the Northern District of Iowa for the death of her husband. Both she and her husband were residents of Iowa. The defendant, Humphrey Cayman, Ltd., was a corporation organized under the laws of the

not have found Tennessee any more convenient than Iowa, and the only arguable greater convenience to the defendant would be from the fact that the defendant's corporate offices were in Tennessee. See Lehman, 713 F.2d at 340.

14. See notes 2, 6 and accompanying text supra. A broad review of personal jurisdiction and subject matter jurisdiction is beyond the scope of this note. See also note 19 infra.

15. See note 117 infra.

16. See notes 6-7 supra.

17. Lehman, 713 F.2d at 340.

18. Id. The defendant asserted that its need to implead Bob Soto's Diving, Ltd. and the inability to do so is a factor favoring dismissal. Id. at 343-44.

19. Id. at 340.

20. Id.

21. Id. Victoria Lehman claims that the defendant "breached express and implied warranties that the hotel and its facilities, including the rental shop and its sailboat, were safe for their intended uses, and that the defendants were negligent in failing to exercise the due care required of an innkeeper for the protection of its guests." Id.

22. Id. 28 U.S.C. § 1391(a) provides that venue is proper "in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." 28 U.S.C. § 1391(a) (1976).
Cayman Islands, British West Indies. Humphrey Cayman, Ltd. was a franchisee of Holiday Inns, Inc., and maintained corporate offices in Tennessee. Holiday Inns, Inc., a Tennessee corporation, maintained a registered agent in Iowa.

This case appeared before Chief Judge McManus of the United States District Court for the Northern District of Iowa. In his first opinion, Chief Judge McManus found jurisdiction to be proper. He held, however, that the defendant's motion to dismiss on the grounds of the common law doctrine of forum non conveniens should be granted. Lehman then filed a motion to reconsider that was denied by Chief Judge McManus.

The Eighth Circuit Court of Appeals reversed the dismissal. The court of appeals, in reversing the district court decision, held that the trial judge had abused his discretion in dismissing the action. The circuit court arrived at its decision by reexamining the criteria of the common law doctrine of forum non conveniens.

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24. Id. 25. Lehman, 713 F.2d at 340. Holiday Inns, Inc. was joined as a defendant. Id.
26. Id. Venue would therefore be proper in the state of Tennessee. See 28 U.S.C. § 1391(c) (1976). Section 1391(c) provides that a "corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." Id. Furthermore, under 28 U.S.C. § 1391(a) and (c) venue would be appropriate in Tennessee as to Holiday Inns, Inc. 28 U.S.C. § 1391(a), (c) (1976). Subsection (a) states that a "civil action wherein jurisdiction is founded only on diversity of citizenship may . . . be brought . . . in the judicial district where . . . all defendants reside. . . ." 28 U.S.C. § 1391(a) (1976). But see Lehman v. Humphrey Cayman, Ltd., No. C81-131, slip op. at 7 (N.D. Iowa Mar. 4, 1982) (the district court stated that Iowa was the only United States federal court where venue was proper).
27. Lehman, 713 F.2d at 340. Service of process was found to be valid. Lehman v. Humphrey Cayman, Ltd., No. C81-131, slip op. at 3-5 (N.D. Iowa Mar. 4, 1982). Personal jurisdiction was found to be proper. Id. at 5-7.
29. See note 26 supra.
30. See note 1 and accompanying text supra; notes 45-64 and accompanying text infra.
32. Lehman, No. C81-131, slip op. at 3 (N.D. Iowa Apr. 27, 1982).
33. Lehman, 713 F.2d at 347. Appellate jurisdiction is based upon 28 U.S.C. § 1291 (1976) which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." Id.
34. Lehman, at 340, 341. Reversal requires a finding of an abuse of discretion. See notes 9, 12 and accompanying text supra.
35. Lehman, 713 F.2d at 347.
as stated by the Supreme Court.\footnote{Id. at 340-47, citing, Gulf Oil, 330 U.S. at 508-09. See note 56 and accompanying text infra.}

The court of appeals took issue with the district court on six specific grounds.\footnote{See notes 37-42 and accompanying text infra.} The court of appeals noted that: (1) the trial judge failed to weigh the relevance of either the plaintiff's residence or the plaintiff's choice of forum, as required when applying the common law doctrine of forum non conveniens;\footnote{Lehman, 713 F.2d at 341-42, citing, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (although a plaintiff's residence is not dispositive, it is of significant concern and to be carefully considered by the trial court); Koster, 330 U.S. at 524 ("Where there are only two parties to a dispute, there is good reason why it should be tried in the plaintiff's home forum . . . ."); Gulf Oil, 330 U.S. at 508 ("[T]he plaintiff's choice of forum should rarely be disturbed."); Manu Int'l S.A. v. Avon Prod., Inc., 641 F.2d 62, 65 (2d Cir. 1981) (the plaintiff's forum is favored and particularly so given an increased ability to travel); Pain v. United Technologies Corp., 637 F.2d 775, 783 (D.C. Cir. 1980) ("[T]he plaintiffs' choice of forum is more than just one factor that the trial judge must consider . . . . Trial judges do not have unchecked discretion to dismiss . . . . simply because another forum, in the court's view, may be superior . . . . "); cert. denied, 454 U.S. 1128 (1981); Founding Church of Scientology v. Verlag, 563 F.2d 429, 435 (D.C. Cir. 1976) (it is greatly significant that the plaintiff and remaining defendant are residents of the United States); Hoffman v. Goberman, 420 F.2d 423, 426 (3d Cir. 1970) (the balance must strongly favor the defendant because plaintiff's choice should not be disturbed); Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir. 1955) (extreme circumstances ought to be shown before a citizen is denied access to American courts).}

(2) the defendant's burden of producing witnesses was not exceptionally greater than the burden on the plaintiff;\footnote{Lehman, 713 F.2d at 339, 342-43.} (3) the defendant's inability to implead Bob Soto's Diving, Ltd. was not due such great weight;\footnote{Id. at 343-44. The court reevaluated the element of impleader: It is certainly more efficient, from the viewpoint of the administration of justice, to have all disputes arising from an incident settled in one place and in one lawsuit. The liberal joinder of parties allowed by the Federal Rules of Civil Procedure is designed to achieve such efficiency. However, as the Second Circuit has held, "impleader practice is discretionary with the courts and care must be taken to avoid prejudice to the plaintiff or third-party defendant. . . ." In the present case, as in Olympic Corp., the difference between the plaintiff's claims against the defendants and the latter's claims against the third-party defendant is such that it is not likely that separate trials of the claims would require much duplication of proof or result in inconsistent judgements. In addition to the negligence count, Lehman is suing the defendants for the alleged breach of warranties contained in the defendants' advertising materials received by Robert Lehman in the United States. Whatever claim the defendants might have against Soto for indemnity or contribution based on the defendants' alleged breach of these warranties certainly would not involve the same issues as Lehman's warranty claim against the defendants, since the warranties were made by the defendants, not by Soto. Therefore, although trial of all claims in the Cayman Islands may be more expeditious from a viewpoint of judicial administration, this is so only to a slight degree, and does not take into account the convenience of all parties. Assuming judgment were rendered} (4) both the state of Iowa and the Cayman Islands had an
interest in the subject matter of the dispute, hence the Cayman Island's interest did not prevail over the interest of Iowa;\(^4\) (5) the law of Iowa may apply to part of the dispute, and a United States court is under no greater difficulty or burden in applying Cayman law than is a court of the Cayman Islands in applying Iowa law;\(^4\) (6) the district court failed to fully consider the consequences of forcing Mrs. Lehman to litigate in a foreign forum.\(^4\)

against the defendants, they would be free to pursue their claim for contribution or indemnity against Soto in an action in the Cayman Islands.

\(\text{Id.} \text{ (citations omitted).}\)

40. \(\text{Id. at 344.} \) In discussing the interested forums, the appellate court quoted the district court: "In addition to the interest of Iowa, in a case such as this where the only available United States venue lies in a single district, the United States itself has an interest in seeing that plaintiff is provided a forum in this country." \(\text{Id., quoting, Lehman, No. C81-131, slip op. at 7 (N.D. Iowa Mar. 4, 1982) (emphasis added).}\) However, if venue was proper in Tennessee, 28 U.S.C. § 1404(a) would have applied to Lehman, and hence irrespective of the result under 28 U.S.C. § 1404(a), its very application might preclude the consideration of dismissal under the common law doctrine of forum non conveniens. See note 127 and accompanying text infra. There are, however, cases that apply the common law doctrine of forum non conveniens even though there are other federal forums in which the action may have been brought originally. \(\text{Id.}\)

41. \(\text{See Lehman, 713 F.2d at 345 & n.6.}\)

42. \(\text{Id. at 345-46.} \) This very issue was raised in the motion to reconsider at the District Court. \(\text{Lehman, No. C81-131, slip op. (N.D. Iowa Apr. 27, 1982).}\) Chief Judge McManus held that:

On March 4, 1982, this court ordered the dismissal of this action for forum non conveniens. . . . Plaintiff now seeks to have the court reconsider that decision. Plaintiff makes essentially three arguments in support of her motion. First, she says that she will be unduly prejudiced if forced to litigate her claim in the courts of the Cayman Islands. Specifically, she asserts that a jury trial is unavailable under the law of the Cayman Islands, that attorneys in that jurisdiction do not work for a contingent fee and would require a retainer of approximately $5,000.00, that the courts there would require her, as a foreigner, to post a cost bond of at least $1,200.00, and that wrongful death recoveries there generally do not exceed $4,000.00 to $5,000.00. Second, plaintiff maintains that special weight should be accorded the fact that she is a resident and citizen of Iowa. Third, she asserts that the court's decision is without precedent.

The court is unpersuaded that its decision was incorrect. . . . With regard to the financial consequences of being forced to litigate in the Cayman Islands, the court is not convinced that plaintiff cannot afford the expense of doing so. By her own filing, it appears that she has available to her from her husband's estate approximately $14,750.00. As for her argument that the fact of her United States citizenship and residence deserves "special weight," such a proposition is not supported in the law. The court gave the consideration to this factor required by the Supreme Court in Reyno and was convinced that the balance of conveniences favored dismissal. The court is still so convinced. Lastly, plaintiff's assertion that the court's decision was without precedent is unfounded.

\(\text{Id. at 1-3 (citations omitted).}\)

This raises the question of abuse of discretion. See notes 2, 5-7, 12-13, 37 and accompanying text supra.
FORUM NON CONVENIENS

BACKGROUND

In 1821 Chief Justice Marshall asserted that a court must exercise jurisdiction over a case properly within its jurisdiction.1 The courts had no discretion over the choice of forum.2 Prior to Gulf Oil Corp. v. Gilbert4 and Koster v. Lumbermens Mutual Casualty Co.5 wherein the Supreme Court adopted the common law doctrine of forum non conveniens at law,6 plaintiffs had virtually no

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1. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821). The Court stated that:
   
   It is most true, that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. Wherever it is doubtful, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. But see Mason v. The Ship Blaureau, 6 U.S. (2 Cranch) 240, 264 (1804).


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3. See note 1 supra. The common law doctrine of forum non conveniens originated in Scotland. See Morley, Forum non Conveniens: Restraining Long-Arm Jurisdiction, 68 Nw. U.L. Rev. 24, 25 (1973) (the doctrine arose as a reaction against the process of arrest ad fundandam jurisdictionem); Barrett, The Doctrine of Forum Non Conveniens, 35 Calif. L. Rev. 380, 386-87 (1947) (as a doctrine its origin is obscure but the term was first used in Scotland to describe the refusal to hear cases which should be heard elsewhere in the interest of justice); Braucher, The Inconvenient Federal Forum, 60 Harv. L. Rev. 908, 909-11 (1947) (the Scottish plea of forum non competens was a doctrine of discretion, rather than jurisdiction as the term suggests). The common law doctrine of forum non conveniens has been applied in England as well, but in a narrow manner. See Barrett, supra, at 407 (it is used only to avoid a use of the court’s process for an improper motive of creating an injustice). American federal courts have developed the common law doctrine of forum non conveniens independently of the state courts. See Rea v. Hayden, 3 Mass. 24, 25 n.1 (1807) (a plea to the jurisdiction of the court must either plead no jurisdiction or plead jurisdiction to another court), citing, Robertson v. Kerr (1793) (unpublished opinion). See also Williams v. North Carolina, 317 U.S. 287, 294, n.5 (1942) (state decisions of common law forum non conveniens are binding and due full faith and credit); Broderick v. Rosner, 294 U.S. 629, 643 (1935) (state courts may apply the common law doctrine of forum non conveniens), citing, Anglo-Am. Provision Co. v. Davis Provision Co. No. 1, 191 U.S. 373, 374 (1903); Bickel, The Doctrine of Forum Non Conveniens As Applied in the Federal Courts in Matters of Admiralty, 35 Cornell L.Q. 12, 12 n.1 (1949) (“The doctrine has had an independent development in the state courts, and is in many, notably those of New York, firmly established.”). The application of the common law doctrine of forum non conveniens in federal courts can be traced at least to 1801. See Willliendson v. Forsoket, 29 F. Cas. 1285, 1284 (D. Pa. 1801) (No. 17,682) (it is a general rule not to take cognizance of suits between the masters and crews of foreign ships, they should be referred to their own courts). Admiralty cases were the first area of law to which federal courts applied the common law doctrine of forum non conveniens. See Bickel, supra, at 13 (as an admiralty practice of long standing, it has been used for at least 150 years). See, e.g., Charter Shipping Co. v. Bowring, Jones & Tidy Ltd., 281 U.S. 515, 517 (1930) (“The retention of jurisdiction of a suit in admiralty between foreigners is within
choice of forum. Today, however, plaintiffs have much greater freedom to choose the forum in which to sue.

In 1947 the United States Supreme Court adopted the common law doctrine of *forum non conveniens* in cases of law. See *Koster*, 330 U.S. at 531-32 ("We hold only that a district court, in a derivative action, may refuse to exercise its jurisdiction. . . ."); *Gulf Oil*, 330 U.S. at 506-07 (a court may decline to exercise its jurisdiction even though it is proper under a general venue statute). The common law doctrine of *forum non conveniens*, as applied at law, supplemented the attempt through federal statutes of general venue to provide a convenient forum. See Denver & Rio Grande Western R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 560 (1967) (venue is intended to promote convenience), see generally 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3801, 3828 (1976) (The basic purpose of venue is for the convenience of the litigants and witnesses. *Id.* at 4-5. The purpose of common law *forum non conveniens* is convenience generally. *Id.* at 176.). A dismissal on common law *forum non conveniens* is appealable as a final decision. See *Braucher*, *supra* note 47, at 938.

48. See *Bickel*, *supra* note 47, at 14.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

(f) A civil action against a foreign state as defined in section 1603(a) of this title [28 U.S.C. § 1603(a)] may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought
In *Gulf Oil* the Supreme Court announced that the common law doctrine of *forum non conveniens* allowed federal courts to dismiss suits in exceptional circumstances. The Supreme Court described the common law doctrine of *forum non conveniens* as a discretionary doctrine in which the trial judge looks at the overall circumstances relating to the appropriateness of the present forum rather than some specific, limited list of factors. The Court did, however, identify two sets of elements for a trial judge to balance when ruling on a motion to dismiss on the basis of the common law doctrine of *forum non conveniens*.

The first set of elements are those that affect the convenience of the forum to the litigants, and the court's capabilities. The sec-
ond set of elements are those that involve the public's interests in the forum. Justice Jackson more fully defined these elements in *Gulf Oil* when he stated that:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations [such as] access to proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, . . . and all other practical problems. . . . Questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. [T]he plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant. . . . But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have [a] place in applying the doctrine. Administrative difficulties follow for courts. . . . Jury duty is a burden that ought not to be imposed upon the people of a community which touch the affairs of many persons, there is reason for holding the trial in their view. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case. . . .

Thus, pursuant to *Gulf Oil*, dismissal under the common law doctrine of *forum non conveniens* is appropriate if the plaintiff is vexing, harassing, or oppressing the defendant with unnecessary expense, and imposing a burden on the court when the controversy is of greater significance to another locality. In determining whether to dismiss, courts may consider factors other than the fact that the plaintiff failed to choose the most convenient forum.

The court must have subject matter and personal jurisdiction, and venue must be proper before it may appropriately entertain a motion to dismiss on the basis of common law *forum non con-

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55. *Gulf Oil*, 330 U.S. at 508-09.
56. Id. at 508-09. One writer has described the common law doctrine of *forum non conveniens* test as follows: "The standard for forum non conveniens is thus a balance of the interests of the plaintiff, the defendant, and the forum, weighted strongly in the plaintiff's favor." Comment, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. Chi. L. Rev. 373, 376 (1980).
58. Id. at 508.
59. Id. As will be seen, the discretion to transfer, under 28 U.S.C. § 1404(a), is much broader. The need to show such a great inconvenience is much less. See note 77 and accompanying text *infra*. 
A federal court may decline to exercise its jurisdiction on the basis of common law _forum non conveniens_ only if there is an alternative forum in which the suit can be brought. Under this common law rule, it is irrelevant whether this alternative forum is a federal or state court. Dismissal may be conditioned upon requirements such as the alternate court's acceptance of jurisdiction, the defendant's submission to the alternate court's jurisdiction, and the defendant's waiver of a statute of limitations. The dismissal must, however, be based on the defendant's strong showing of inconvenience.

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60. _Gulf Oil_, 330 U.S. at 504. “Indeed the doctrine of _forum non conveniens_ can never apply if there is absence of jurisdiction or mistake of venue.” _Id._

61. _Id._ at 506-07. “In all cases in which the doctrine of _forum non conveniens_ comes into play, it presupposes at least two forums in which the defendant is amenable to process. . . .” _Id._ See _Pain v. United Technologies Corp., 637 F.2d 775, 779_ (D.C. Cir. 1980) (an adequate forum must be available), _cert. denied_, 454 U.S. 1128 (1981); _Calavo Growers of California v. Belgium_, 632 F.2d 963, 968 (2d Cir. 1980) (an alternative forum is presupposed), _cert. denied_, 449 U.S. 1084 (1981); _Schertenleib v. Traum_, 589 F.2d 1156, 1159-60 (2d Cir. 1978) (the defendant had the burden to prove the existence of an alternative forum); _Hodson v. A.H. Robins Co., 528 F. Supp. 809, 817_ (E.D. Va. 1981) (_forum non conveniens_ is available only if the defendant shows the existence of an alternative forum).

62. See _Pain v. United Technologies Corp., 637 F.2d 775, 780_ (D.C. Cir. 1980) (conditional dismissal was particularly appropriate in this case), _cert. denied_, 454 U.S. 1128 (1981); _Calavo Growers of California v. Belgium_, 632 F.2d 963, 968 (2d Cir. 1980) (the district court's dismissal should have been conditional), _cert. denied_, 449 U.S. 1084 (1981), _citing_, _Schertenleib v. Traum_, 589 F.2d 1156, 1163 (2d Cir. 1978).


In short, trial judges applying the common law doctrine of _forum non conveniens_ must walk a delicate line to avoid implicitly sanctioning forum-shopping by either litigant at the expense of the other. Defendants bear a heavy burden of establishing that the plaintiff's choice of forum is inappropriate and that the action should therefore be dismissed. At the same time, however, a plaintiff cannot merely argue that his forum choice deserves blind deference because it does not rise to the level of an abuse of process which is "vexatious" or "oppressive" to the defendant. As our colleague Judge Ginsburg has suggested:

"At the least, a plaintiff who chooses [a competent but clearly inappropriate forum in which to bring suit] should be required to show some reasonable justification for his institution of the action in the forum state rather than in a state with which the defendant or the res, act or event in suit is more significantly connected."

_Id._ (footnote omitted).

One year after *Gulf Oil*, Congress adopted 28 U.S.C. section 1404(a). Unlike the common law doctrine of *forum non conveniens*, section 1404(a) limits consideration of alternative forums to federal courts. Rather than dismiss the action in such a situation, the court may only transfer the case to a more convenient federal forum. The use of the common law doctrine of *forum non conveniens* may be diminished if held inapplicable when section 1404(a) controls.

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66. 28 U.S.C. § 1404(a) (1976). "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." *Id.*

The application of 28 U.S.C. § 1404(a) presupposes that venue is proper. See C. WRIGHT, THE LAW OF FEDERAL COURTS § 44, at 257 (4th ed. 1983) (§ 1406(a) provides for transfer to an alternative forum when the action is brought in an improper venue), *see also* 28 U.S.C. § 1406(a) (1976) which provides that: "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." *Id.* at 184. Subject matter jurisdiction also must be proper. See *Walsh* v. United States, 105 F. Supp. 816, 816-17 (E.D. Pa. 1952) (dismissed for lack of subject matter jurisdiction rather than transfer the action). There is, however, some difference of opinion about the effect of the lack of personal jurisdiction: some courts transfer under 28 U.S.C. § 1404(a) whereas others transfer under 28 U.S.C. § 1406(a). Compare United States v. Berkowitz, 328 F.2d 338, 361 (3d Cir. 1964) (reversed the district court's denial of § 1404(a) transfer when the district court found it lacked personal jurisdiction, holding that § 1404(a) authorized it without using § 1406(a)); Koehring Co. v. Hyde Constr. Co., 324 F.2d 295, 297-98 (5th Cir. 1963) (there is no need to distinguish between § 1404(a) and § 1406(a) on the basis of personal jurisdiction); Founds v. Shedaker, 278 F. Supp. 32, 33 (E.D. Pa. 1968) (the court does have the power to transfer under either § 1404(a) or § 1406(a) despite the lack of personal jurisdiction); McKee v. Anderson, 272 F. Supp. 684, 686 (W.D. Mo. 1967) (the court transferred under § 1404(a) despite the admitted lack of personal jurisdiction), *with* Taylor v. Love, 415 F.2d 1118, 1119-20 (6th Cir. 1969) (the court affirmed transfer under § 1406(a) for a lack of personal jurisdiction), *cert. denied*, 397 U.S. 1023 (1970); Peterson v. U Haul Co., 421 F.2d 837, 838 (8th Cir. 1969) (leave for defendant to file a proper motion under § 1406(a)); Mayo Clinic v. Kaiser, 383 F.2d 653, 655-56 (8th Cir. 1967) (§ 1406(a) applies when the improper forum transfers the case); Dubin v. United States, 380 F.2d 813, 816 (5th Cir. 1967) (§ 1406(a) applies to transfer a case when the improper forum was chosen whereas § 1404(a) transfers for the sake of convenience); Tillman v. Eattuck, 385 F. Supp. 622, 626 (D. Kan. 1974) (personal jurisdiction is not a prerequisite to transfer under § 1406(a)); Rozell v. Kaye, 276 F. Supp. 392, 393 (S.D. Tex. 1967) (the plaintiff incorrectly moved under § 1404(a), transfer should have been under § 1406(a) because personal jurisdiction was lacking).

67. *Id.*
68. *See* notes 123-29, 153-77 and accompanying text *infra*. *See generally* Annot., 10 A.L.R. Fed. 352, 364-69 (dismissal under the common law doctrine of *forum non conveniens*).
FORUM NON CONVENIENS

Forum non conveniens is diminished because it is limited to cases in which the only alternative court is a state or foreign court.70

The grant of power to transfer is consistent with the federal

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70. See Comment, supra note 56, at 377. In the application of § 1404(a), its language—"any civil action"—has been interpreted literally. See Kilpatrick v. Texas & Pacific Ry. Co., 337 U.S. 75, 77 (1949) (the language is clear on its face); Ex parte Collett, 337 U.S. 55, 58-59 (1949) (the language is not qualified); see generally 15 C. Wright, A. Miller & E. Cooper, supra note 47, § 3845, at 216. The application may be on the court's own initiative. See Kearney & Trecker Corp. v. Cincinnati Milling Mach. Co., 254 F. Supp. 130, 134 (N.D. Ill. 1966) (transfer was made on the court's own motion); I-T-E Circuit Breaker Co. v. Becker, 343 F.2d 361, 363 (8th Cir. 1965) (the statute has no limiting language as to who may move for transfer). Basically any party to the action may move to transfer on § 1404(a). See 15 C. Wright, A. Miller & E. Cooper, supra note 47, § 3844, at 208-09 (including the court, a defendant, or an additional party brought in after original pleadings).

No time limit within which the motion must be made has been expressly set. See Dill v. Scuka, 198 F. Supp. 808, 809 (E.D. Pa. 1961) (transfer was granted while awaiting a second trial); Sypert v. Bendix Aviation Corp., 172 F. Supp. 480, 481 (N.D. Ill. 1958) (motion after trial granted). Cf. Wilmington Trust Co. v. Gillespie, 397 F. Supp. 1337, 1340-41 (D. Del. 1975) (fact that interpleader had been granted and the nominal plaintiff discharged was no bar of transfer of the "second stage" of interpleader case); see also Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 515 (4th Cir. 1955) (before service of process); but cf. Adler v. McKee, 92 F. Supp. 613, 614 (S.D.N.Y. 1950) (the passage of time alone will not be enough to deny relief, but it is a negative factor). But see 15 C. Wright, A. Miller & E. Cooper, supra note 47, § 3844 n.18 (some courts have required reasonable promptness).

When § 1404(a) is considered, the parties ought to have their views heard, unless a party forfeits such an opportunity. See Wood v. Zapata Corp., 482 F.2d 350, 354-55 (3d Cir. 1973) (petitioner was not deprived of being heard, he failed to submit a motion when so requested); cf. Starnes v. McGuire, 512 F.2d 918, 934 (D.C. Cir. 1974) (it is not properly appropriate to transfer without the benefit of hearing the parties). If transfer is made, it must be to a forum "where it might have been brought," see note 71 infra, and it must have been in the original instance. See, e.g., Hoffman v. Blaski, 363 U.S. 335, 342-43 (1960) (venue must be proper); Lewis v. Hogwood, 300 F.2d 697, 697-98 (D.C. Cir. 1962) (subject matter jurisdiction must be proper). See generally 15 C. Wright, A. Miller & E. Cooper, supra note 47, § 3845 nn.5-8 at 218 (service of process must be available, therefore in personam jurisdiction must be proper).

Venue in the transferee court had to be proper as a matter of the plaintiff's right and not by defendant's waiver of venue. See Van Dusen v. Barrack, 376 U.S. 612, 617 (1964), wherein the Court stated:

In concluding that the transfer could not be granted, the Court of Appeals relied upon Hoffman . . . as establishing that "unless the plaintiff had an unqualified right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a)."

Id. See also Shutte v. Armco Steel Corp., 431 F.2d 22, 24 (3d Cir. 1970) (the plaintiff must have had an unqualified right, and the transferee court must have had jurisdiction over all of the defendants), cert. denied, 401 U.S. 910 (1971); Funnelcap, Inc. v. Orion Indus., Inc., 392 F. Supp. 938, 942 (D. Del. 1975) (the defendant must show he did business on a regular basis in that jurisdiction); McCool v. River Gulf Corp., 53 F.R.D. 484, 484-85 (N.D. Miss. 1971) (it is not enough that the defendant would
statutes regarding general venue, such as 28 U.S.C. section 1391,71 which are intended to provide a more convenient forum.72 The

71. 28 U.S.C. § 1391 (1976) (the general venue statute defining where venue is proper).

72. See 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 47, § 3801 n.3, at 4 and § 3841, at 200-02. "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by

voluntarily appear); Cooper v. Valley Line Co., 320 F. Supp. 483, 483 (W.D. Pa. 1970) (both venue and personal jurisdiction must have been proper originally).

A transfer under § 1404(a) does not end the action, rather it preserves the action for all purposes including the statute of limitations. See Norwood v. Kirkpatrick, 349 U.S. 28, 31-32 (1955), quoting, Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360, 362 (4th Cir. 1949). The Court reiterated that:

A dismissal in application of . . . [forum non conveniens] or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. The notion that 28 U.S.C.A. § 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.

Id.

Furthermore, on a defendant's motion to transfer, the law that would have been applied in the transferor court, is to be applied in the transferee court even when it is located in another state. Van Dusen v. Barrack, 376 U.S. 612 (1964). The Court stated:

We conclude, therefore, that in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.

Id. at 639. Accord Glick v. Ballentine Produce, Inc., 343 F.2d 839, 843 (8th Cir. 1965) (transferee court must apply law as if there had been no change of venue), cert. denied, 382 U.S. 891 (1965); Carr v. American Universal Ins. Co., 341 F.2d 220, 224 (6th Cir. 1965) (the law of the transferor state applies); Lehtonen v. E.I. DuPont DeNemours & Co., 389 F. Supp. 633, 634 (D. Mont. 1975) (New York law controlled even after transfer); Chance v. E.I. DuPont DeNemours & Co., 371 F. Supp. 439, 451 (E.D.N.Y. 1973) (the transferee court must apply the law that would have been applied by the transferor); Burger King Corp. v. Continental Ins. Co., 359 F. Supp. 184, 186-87 (W.D. Pa. 1973) (the transferee court applies the law of the transferor forum). But see Les Schwimley Motors, Inc. v. Chrysler Motors Corp., 270 F. Supp. 418, 419-20 (E.D. Cal. 1967) (plaintiff may reasonably invoke the favorable law of the transferee forum because the plaintiff may have filed there originally), criticized, Note, Transfers of Venue—Van Dusen v. Barrack Revisited: Les Schwimley Motors, Inc. v. Chrysler Motor Corp. (E.D. Cal. 1967), 56 GEO. L.J. 1004 (1968) (after the Court in Van Dusen seemingly resolved forum shopping and choice of laws the Les Schwimley decision illustrates a persistance of controversy). The determination of applicable law upon plaintiff's motion was not decided in Van Dusen, 376 U.S. at 639 ("[W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State."). It has been argued that the law of the transferee state should apply. See 15 C. WRIGHT, A. MILLER & E. COOPER, supra note 47, § 3846, at 234 (there is some case analysis for the author's assertion that the law of the transferee state should apply).

The issue of forum shopping per se is beyond the scope of this note.
purpose of obtaining convenience by transfer may be preferable to

the harsh result of dismissal under the common law doctrine of 

*forum non conveniens*. 73

Similar to motions under the common law doctrine of *forum non conveniens*, 74 the trial judge has discretion when considering section 1404(a) motions, 75 and reversal will be granted only upon finding an abuse of that discretion. 76 However, discretion in applying the statute is broader than the discretion in applying the common law doctrine of *forum non conveniens*. 77

The apparent policy underlying the common law doctrine of *forum non conveniens* is justice. 78 Justice is assumed to be promoted by settlement of the dispute in the most appropriate forum. 79 The Supreme Court, in *Gulf Oil*, 80 expressed that the common law doctrine of *forum non conveniens* may be used to avoid the harassment that is possible under general venue statutes. 81

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73. See notes 153-77 and accompanying text infra; Norwood v. Kirkpatrick, 349 U.S. 28, 32 (1955) (the harshest part of the common law doctrine of *forum non conveniens* is dismissal and that has been excised and eliminated by 28 U.S.C. § 1404(a); text at notes 132-33 infra; see also Note, supra note 70, at 1005 (section 1404(a) mitigates the harsh result of dismissal by providing the remedy of transfer).

74. See notes 12, 33, 50, 52 and accompanying text supra.

75. See note 12 supra.

76. See note 12 and accompanying text supra.

77. Norwood v. Kirkpatrick, 349 U.S. 29 (1955). The Court held:

The district judge in granting the motions to transfer stated that if he had been free to construe § 1404(a) . . . he would have denied the transfers because, in his view, it called for an application of the stricter rule of *forum non conveniens* as recognized in decisions of this Court . . . But since the Naughton case, the Circuit Court of Appeals for the Third Circuit had held, . . . that the district judge had a broader discretion in the application of the statute than under the doctrine of *forum non conveniens* . . . . We think the Court of Appeals correctly rejected the narrower doctrine of *forum non conveniens* and properly construed the statute.

Id. at 30 (citations omitted).

The court's discretion is limited to the statute. See Thomson v. Palmieri, 355 F.2d 64, 66 (2d Cir. 1966) (transfers are governed by federal law because a statute has been enacted), citing, Willis v. Weil Pump Co., 222 F.2d 261, 261 (2d Cir. 1955).

78. See notes 79-86 and accompanying text infra.

79. See Piper Aircraft, 454 U.S. at 240-41, 261 (upheld a dismissal based on *forum non conveniens* wherein the court that granted dismissal had received the case by transfer under 28 U.S.C. § 1404(a)).


81. Id. at 507-08. See notes 58-59 and accompanying text supra.
Beyond the avoidance of harassment, the common law doctrine of *forum non conveniens* serves justice in at least two other ways. First, dismissal in favor of another forum may be based upon reasons regarding the administration of the suit. A court considering dismissal may decide that greater justice will be obtained in the other court because witnesses, evidence, monetary considerations and the like are more available in the other jurisdiction. Second, a court may also decide that justice would be better served in another forum because (1) the other forum's docket is less congested; (2) the other forum has a more appropriate remedy or can enforce the remedy; and (3) the local interest is greater at the other forum.

Section 1404(a) was adopted in 1948 with much the same purpose as the common law doctrine of *forum non conveniens*. The language of section 1404(a) sets as the test not only the convenience of the parties and witnesses, but also the interest of justice. Section 1404(a) extends a step further in promoting justice than the common law doctrine of *forum non conveniens*. The Supreme Court, interpreting the statute, held that:

> [We] believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.

Section 1404(a) transfers jurisdiction to another federal court; the purposes behind federal jurisdiction over diversity actions

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82. *Gulf Oil*, 330 U.S. at 508. Dismissal, without proof of harrassment, requires the balance of the test to "strongly" favor the defendant because the plaintiff's choice of forum should rarely be disturbed. *Id.* See cases cited in note 63 *supra*.

83. See notes 52-56 and accompanying text *supra*.

84. *Id*.

85. *Id.* The first and third elements may be counter-balanced by the court. The court should consider the impact upon its docket by cases arising outside of its jurisdiction. *Id*.

86. *Id*.

87. See note 72 and accompanying text *supra*.

88. See note 2 *supra*.

89. *Norwood*, 349 U.S. 29, 32 (1955). See note 73 and accompanying text *supra*. Congress enacted 28 U.S.C. § 1404(a) as a venue statute. *Id*. Not only is 28 U.S.C. § 1404 designated "Change of Venue" but it also requires that the transferee court be one in which the action "might have been brought." *Id*.

90. See *Norwood*, 349 U.S. at 32 (emphasis added).

91. See C. WRIGHT, supra note 66, § 23, at 128. The purpose of diversity jurisdiction is to protect non-resident litigants from prejudice by state courts. *Id*. Professor Wright contends that the distinction between a non-resident and an alien is unimportant in most cases. *Id* at 127 n.1.
are not thwarted. The common law doctrine of forum non conveniens on the other hand allows a federal court to dismiss an action and thereby decline federal jurisdiction. A denial of an action properly within the court's jurisdiction, regardless of the availability of alternative state or foreign courts, would in general defeat the purpose of federal diversity jurisdiction. This is paradoxical in that the common law doctrine of forum non conveniens, which has a purpose of promoting justice, defeats diversity jurisdiction, which also has the purpose of promoting justice.

The interaction between 28 U.S.C. section 1404(a) and the common law doctrine of forum non conveniens is an important but neglected issue. The two situations that are simplest arise when (1) the only available alternative forum is federal, in which case the statute would apply and (2) the only available alternative forum is either a state or foreign court, in which case the common law doctrine of forum non conveniens would apply. There are more complex situations, such as cases in which there are alternative courts, both federal and state or foreign. When only one of the alternative forums is more convenient, the approach which supplies this forum should be applied according to precedent.

The two most controversial situations appear in the case at hand, Lehman, and the Supreme Court case of Piper Aircraft Co. v. Reyno. Lehman was an action with alternative forums both foreign and federal. The Federal District of Tennessee would most likely have been found to be no more convenient than the Northern District of Iowa, if tested, and hence there would have been no transfer. However, the foreign forum was poten-

92. Transfer to another federal court fulfills the purpose of safeguarding the parties against the harsh results of dismissal. See note 133 and accompanying text infra.
93. See note 1 and accompanying text supra.
94. See C. Wright, supra note 66, § 44, at 257. Lehman, 713 F.2d 339 (8th Cir. 1983) is a case in which the interaction between the common law doctrine of forum non conveniens and 28 U.S.C. § 1404(a) was overlooked. The purpose of 28 U.S.C. § 1404(a) and the purpose of diversity jurisdiction were not considered in the analysis.
95. See notes 79-86 and accompanying text supra.
96. See note 91 and accompanying text supra.
97. See C. Wright, supra note 66, § 44, at 262.
98. See id., at 260.
99. See notes 101-02 infra.
100. Id.
101. 713 F.2d 339 (8th Cir. 1983).
103. See notes 21-26 and accompanying text supra.
104. Lehman, 713 F.2d at 340. Tennessee would have clearly been less convenient than an Iowa forum. For example, there were no witnesses in Tennessee, it
tially more convenient.\textsuperscript{105} Dismissal by the lower court\textsuperscript{106} should not have been granted without determining if dismissal would defeat the purpose of diversity jurisdiction and the effectiveness of section 1404(a), and if it was otherwise proper.\textsuperscript{107}

\textit{Piper Aircraft} was an action in which there were alternative courts both federal and state or foreign.\textsuperscript{108} The alternative federal forum was found more convenient.\textsuperscript{109} Moreover, the alternative foreign forum was not only more convenient than the original federal forum but was also more convenient than the alternative federal court to which transfer might be made.\textsuperscript{110} The Court dismissed in favor of Scotland, the most convenient forum.\textsuperscript{111}

The policy underlying section 1404(a) arguably would allow several possible results in \textit{Piper Aircraft}. The original federal court might have been required to transfer, rather than dismiss in favor of a foreign court\textsuperscript{112} so that the transferee court would rule on its relative convenience for the common law motion of \textit{forum non conveniens}.\textsuperscript{113} Alternatively, the original court might have been allowed to immediately dismiss in favor of the foreign court.\textsuperscript{114} A third choice might have been to limit the entire situation to a transfer, without any chance to dismiss; the court may have found that section 1404(a) applies to the exclusion of common law \textit{forum non conveniens}.

This note focuses on the third possible response to the situation. The issue is whether the common law doctrine of \textit{forum non conveniens} should be held inapplicable, in favor of section 1404(a), whenever the statute applies.\textsuperscript{115} The question to be addressed is whether dismissal, in this situation, would defeat the purpose and effect of section 1404(a), and the purpose of diversity jurisdiction was not the situs of the incident, all of the parties would have had to travel to Tennessee, etc. \textit{Id.} See notes 13, 56 and accompanying text \textit{supra}.

\textsuperscript{105} See notes 27-30, 42 and accompanying text \textit{supra}.
\textsuperscript{106} See note 30 and accompanying text \textit{supra}.
\textsuperscript{107} See notes 94-95 and accompanying text \textit{supra}; notes 153-77 and accompanying text \textit{infra}.
\textsuperscript{108} 454 U.S. at 240.
\textsuperscript{109} \textit{Id.} at 240-41.
\textsuperscript{110} \textit{Id.} at 261. The action had already been removed from state to federal court.
\textit{See} notes 156-58 and accompanying text \textit{infra}.
\textsuperscript{111} 454 U.S. at 261.
\textsuperscript{112} \textit{Id.} at 240-41.
\textsuperscript{113} \textit{Id.} at 241, 261.
\textsuperscript{114} \textit{See} Pain v. United Technologies Corp., 637 F.2d 775, 780 (D.C. Cir. 1980) (although there were other federal forums in which the action might possibly have been brought the court held that conditional dismissal was particularly appropriate).
\textsuperscript{115} \textit{See} notes 132-33, 153-77 and accompanying text \textit{infra}. 
of federal courts. 116

ANALYSIS

The proper relationship between the common law doctrine of forum non conveniens and section 1404(a) is not at all clear in the two situations presented in Lehman and Piper. 117 It is uncertain which applies in a particular case and under certain circumstances. 118 Section 1404(a) is assumed 119 to apply when the alternative forum is another federal court in which the action might have been brought. 120 The uncertainty arises in cases where the

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116. See notes 153-77 and accompanying text infra.

117. Compare Piper Aircraft Co. v. Reyno, 454 U.S. 235, 240-41, 261 (1981) (wherein all of the plaintiffs with a real interest were citizens of Scotland, and the court allowed the dismissal on common law forum non conveniens to be made by the transferee court which had received the case under § 1404(a)); Miskow v. Boeing Co., 664 F.2d 205, 206-07 (9th Cir. 1981) (wherein all of the plaintiffs were citizens of Canada, and the court held dismissal on common law forum non conveniens when the action should have been brought abroad); Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber, 513 F.2d 667, 669-70 (9th Cir. 1975) (wherein the plaintiff was a Bahamian corporation, with its principal office in Palm Beach, Florida, the court held that federal courts retained inherent rights to refuse jurisdiction after § 1404(a) was adopted); Nai-Cho v. Boeing Co., 555 F. Supp. 9, 10, 12 (N.D. Cal. 1982) (wherein some of the plaintiffs were American citizens the court held that the common law doctrine of forum non conveniens still applies when the action should have been brought abroad); Latimer v. S/A Industrias Reunidas F. Matarazzo, 91 F. Supp. 469, 470-71 (S.D.N.Y. 1950) (wherein the plaintiff was an American citizen the court held that common law forum non conveniens has not been limited to cases for transfer under § 1404(a), with Harbolt v. Carpenter, 536 F.2d 791, 792 (8th Cir. 1976) (authority is limited to transfer, not dismissal, when it is believed that another forum is more convenient); Collins v. American Auto. Ins. Co. of St. Louis Missouri, 230 F.2d 416, 418 (2d Cir. 1956) (if the forum is found to be inconvenient the remedy is transfer under § 1404(a), not dismissal); Dangerfield v. Bachman Foods, Inc., 515 F. Supp. 1383, 1390 (D. N.D. 1981) (transfer under § 1404(a) is exclusive remedy when another federal court is more convenient, dismissal under common law forum non conveniens is inappropriate); Mars, Inc. v. Standard Brands, Inc., 386 F. Supp. 1201, 1204 (S.D.N.Y. 1974) (in situations where there is another federal court where the action could have been brought, § 1404(a) controls and common law forum non conveniens dismissal is inappropriate).

118. See note 117 supra.

119. It is only assumed from the clear language of the statute. See note 2 supra. Yet, it is not really so clear. See also note 131 and accompanying text infra.

120. The language, “where it might have been brought,” has been interpreted as requiring the jurisdiction to have been originally available to the plaintiff as a right, the defendant could not make a forum eligible by waiving venue. See Hoffman v. Blaski, 363 U.S. 355, 340-44 (1960) (the language does not mean where it might have been brought with the defendant’s consent, the language is clear); McLouth Steel Corp. v. Jewell Coal & Coke Co., 432 F. Supp. 10, 11 (E.D. Tenn. 1976) (venue, subject matter jurisdiction, and personal jurisdiction must all be proper); Jaffe v. Dolan, 264 F. Supp. 845, 846-47 (E.D.N.Y. 1967) (the defendant’s consent to jurisdiction is not enough). But cf. Troyer v. Karaci, 488 F. Supp. 1200, 1206 (S.D.N.Y. 1980) (transfer proper even though transferee court lacked personal jurisdiction); Baron & Co. v. Bank of New Jersey, 497 F. Supp. 534, 539 (E.D. Pa. 1980) (“Despite the lack of personal jurisdiction, I do have the power to transfer [under § 1404(a)]”), citing,
alternative forums consist of one or more federal courts and a state or foreign court.\textsuperscript{121} It is at least certain that section 1404(a) applies when the most convenient forum is an alternate federal court.\textsuperscript{122} Yet another difficulty arises when the alternate federal forum is no more convenient, but the foreign court or state court is more convenient.\textsuperscript{123} If the statute applies only when the alternate federal forum is more convenient, then the common law doctrine of \textit{forum non conveniens} potentially applies in all cases where there also exists an alternative state or foreign forum.\textsuperscript{124} In this situation, the question of dismissal as well as transfer would have to be addressed.\textsuperscript{125}

The resolution of this issue has not been consistent.\textsuperscript{126} Although few courts have expressly recognized the issue and dealt with it directly, there have been basically two approaches utilized.\textsuperscript{127} Under the first approach, many courts have held that dismissal under the common law doctrine of \textit{forum non conveniens} is appropriate when there is another federal forum in which the action might have been brought, but the most convenient forum is an alternative state or foreign court.\textsuperscript{128}

\begin{thebibliography}{27}
\bibitem{121} See \textit{Piper Aircraft}, 454 U.S. at 261. Although the alternative federal court was more convenient than the original federal court, and the transfer was in fact made under § 1404(a), the transferee federal court dismissed on the basis of common law \textit{forum non conveniens} because it found the foreign forum of Scotland to be the most convenient forum. \textit{id.}
\bibitem{122} See \textit{Harbolt}, 536 F.2d at 792.
\bibitem{123} See notes 25, 103 and accompanying text \textit{supra}.
\bibitem{124} See note 121 \textit{supra}.
\bibitem{125} \textit{id.}
\bibitem{126} See note 117 \textit{supra}.
\bibitem{127} Compare \textit{Collins v. American Auto. Ins. Co. of St. Louis Missouri}, 230 F.2d 416, 418-19 (2d Cir. 1956) (transfer is the appropriate remedy, rather than dismissal, when a forum is found to be inconvenient), \textit{with Latimer v. S/A Industrias Reunidas F. Matarazzo}, 91 F. Supp. 469, 471 (S.D.N.Y. 1950) "Sec[ton] 1404(a) has not limited the application of forum non conveniens to cases which are capable of being transferred. . . . Otherwise, it would be a denial of a Federal Court's inherent power to refuse jurisdiction in cases which should not have been brought in the United States . . . ." \textit{id.}
\bibitem{128} See \textit{Piper Aircraft}, 454 U.S. at 240-41, 261 (although specifically holding that a change of law does not bar dismissal the effect was to allow dismissal by a court to which the action had been transferred under § 1404(a)); \textit{Miskow v. Boeing Co.}, 664 F.2d 205, 207 (9th Cir. 1981) (section 1404(a) was not intended to entirely replace the common law doctrine of \textit{forum non conveniens}); \textit{Mizokami Bros. of Arizona, Inc. v. Mobay Chem. Corp.}, 660 F.2d 712, 719 (8th Cir. 1981) (dismissal may be granted without regard to other possible federal forums), \textit{cert. denied}, 454 U.S. 1128 (1981); \textit{De Mateos v. Texaco, Inc.}, 562 F.2d 895, 899 (3d Cir. 1977) (even when other federal forums are available, common law \textit{forum non conveniens} may still be applicable); \textit{Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber}, 513 F.2d 667, 670 (9th Cir. 1975) (courts retain the inherent power to dismiss cases not within
Under the second approach, some courts have held that section 1404(a) is applicable, to the exclusion of the common law doctrine of forum non conveniens, whenever there is another federal court in which the action might have been brought, regardless of the other federal court being more convenient and one to which the transfer would be made. The Supreme Court has stated that "[t]he legislation was announced to be a revision as well as a codification" of the common law doctrine of forum non conveniens. The Court has also stated, in Norwood v. Kirkpatrick, that:

When Congress adopted § 1404(a), it intended to do more than just codify the existing law on forum non conveniens. Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer. These statements call attention to the need for further interpretation of section 1404(a). This need should have been addressed by the Eighth Circuit Court of Appeals in Lehman.

The Ninth Circuit, in Miskow v. Boeing Co., dealt directly with the interaction between section 1404(a) and the common law doctrine of forum non conveniens. The court stated that the issue on appeal was to "determine only whether the district court abused its discretion in dismissing this action instead of transfer-

§ 1404(a)); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir. 1956) (courts retain the inherent right to dismiss cases not within § 1404(a)); Nai-Chao v. Boeing Co., 555 F. Supp. 9, 12 (N.D. Cal. 1982) (common law forum non conveniens is still available when the action should be brought abroad); Hodson v. A.H. Robins Co., 528 F. Supp. 809, 816-17 (E.D. Va. 1981) (when the more convenient alternative court is state or foreign, regardless of other federal courts, dismissal may be proper); La-timer v. S/A Industrias Reunidas F. Matarazzo, 91 F. Supp. 469, 471 (S.D.N.Y. 1950) (there is an inherent power to refuse jurisdiction).

129. See Mars, Inc. v. Standard Brand, Inc., 386 F. Supp. 1201, 1204 (S.D.N.Y. 1974) ("It is fairly clear that, in situations in which there is another federal district court where the action could have been brought, § 1404(a) controls and dismissal of the action under the common law doctrine of forum non conveniens is inappropriate."). See also 1 J. Moore, Federal Practice ¶ 0.145[6-1], at 1636, n.6 (1982) (see cases cited therein).


131. Id. at 62 (section 6 of the Federal Employer's Liability Act is subject to § 1404(a)).


133. Id. at 32 (citation omitted). See Note, supra note 70, at 1005 ("Section 1404(a) was enacted . . . to replace the doctrine of forum non conveniens.").

134. 664 F.2d 295 (9th Cir. 1981).

135. Id. at 207.
ring it to another district or division."  

This implicitly assumes that the statute did not replace the common law doctrine. The court then stated the test to be applied and concluded that "[w]eighing these factors, a district court may decide that transfer to another district or division will not significantly alleviate the burden that retention of jurisdiction would impose on private and public interests and that dismissal is appropriate."  

The District Court for the Southern District of New York, in Latimer v. S/A Industrias Reunidas F. Motarazzo, reasoned in dicta that a court may still dismiss under the common law doctrine of forum non conveniens when there is no federal court that is more convenient, though there is one to which the action might have been transferred. The court stated:

Section 1404(a) has not limited the application of forum non conveniens to cases which are capable of being transferred from one Federal district to another. Otherwise, it would be a denial of a Federal Court's inherent power to refuse jurisdiction in cases which should not have been brought in the United States, but rather in the courts of a foreign jurisdiction.  

The Second Circuit has suggested another reason for maintaining the common law doctrine of forum non conveniens. This reason goes beyond the logic that there are cases which should have been brought in a foreign (or presumably a state) jurisdiction. The Second Circuit, in Vanity Fair Mills v. T. Eaton Co., reiterated the notion that "[a]n American citizen does not have an absolute right under all circumstances to sue in an American court."
In *Piper Aircraft Co. v. Reyno*, the United States Supreme Court indirectly confronted the issue of whether an American citizen has an absolute right to sue in an American court. *Piper Aircraft* was an action in which the plaintiff was an American citizen acting as representative for the estates of the decedents, all of whom were Scottish citizens and residents. The defendants obtained a transfer under section 1404(a), and then obtained a dismissal under the common law doctrine of *forum non conveniens* which was ultimately upheld by the Supreme Court.

In *Piper Aircraft* the Supreme Court stated that "section 1404(a) transfers are different than dismissals on the grounds of the common law doctrine of *forum non conveniens*."

It should be determined if the reasons supporting the common law doctrine of *forum non conveniens* justify the effect the doctrine has on the purpose of diversity jurisdiction.

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147. Id. at 261. See Note, *Forum Non Conveniens—The Likelihood of a Change in Substantive Law Will Not Defeat a Motion for A Forum Non Conveniens Dismissal Nor Is It to Be Given Substantial Weight in the Balancing of Relevant Factors*. Piper Aircraft Co. v. Reyno, — U.S. —, 102 S. Ct. 252 (1981), 17 Tex. Int'l L.J. 242 (1982) (one may question the justifications of convenience and judicial economy when denying defendants the protection of United States law); Note, *Jurisdiction and Procedure—Forum Non Conveniens—The Foreign Plaintiff is Entitled to Less Deference in His Choice of Forum Than is a Citizen or Resident Plaintiff; A Change of Law Resulting From Dismissal is not a Substantial Factor in the *Forum Non Conveniens* Analysis*, 15 Vand. J. of Transnat'l L. 583, 594 (1982) (residency and citizenship may not affect convenience and justice, as a change of substantive law would, and yet the Court instructed courts to consider residency and citizenship).
148. 454 U.S. at 239 (the representative filed wrongful death actions on behalf of the decedent’s estates). The representative was appointed by a California probate court as representative of the five passengers’ estates but was in no way related to or acquainted with the decedents or their survivors. Id. The representative was the legal secretary of the attorney who brought the action. Id. The fact that none of the real parties in interest for the plaintiff were United States citizens makes this case unique and distinguishable from a case such as *Lehman*. The case arose out of the crash of a private airplane in Scotland. Id. at 238. All six people in the airplane were killed. Id. at 239. Piper Aircraft Co. manufactured the plane in Pennsylvania. Id. At the time of the crash, the plane was owned by a corporation organized in the United Kingdom and operated by a Scottish airport service which was also a corporation organized in the United Kingdom. Id. The plane’s propellers were manufactured in Ohio by Hartgel Propeller, against whom suit was also filed. Id. at 239-40.
149. Id. at 240. The defendants had already invoked removal from state court in California to federal court. Id. See 28 U.S.C. § 1441(a) (1976); note 157 infra.
152. 454 U.S. at 253 (the Court was dealing with the issue of the effect a substantive change of law would have on determining *forum non conveniens*).
153. See notes 128, 134-52 and accompanying text supra.
154. See notes 91-96 and accompanying text supra.
federal court refuses to exercise jurisdiction, thereby forcing a plaintiff to sue in a state or foreign court, the legislative purpose for federal diversity jurisdiction is undermined.\footnote{155}

One illustration of the undermining effect is seen in \textit{Piper Aircraft}.
\footnote{156} The statutory right\footnote{157} to remove a case from state to federal court is defeated.\footnote{158} A second illustration of such a consequence is seen in the effect of common law \textit{forum non conveniens} on section 1404(a).\footnote{159} Section 1404(a), in effect, mitigates the extremes of (1) the broad discretion of the plaintiff under a general venue statute,\footnote{160} and (2) the harshness of the common law doctrine of \textit{forum non conveniens}.\footnote{161} Rather than having dismissal be the only remedy for abuses of the liberal venue statute, Congress provided courts the power to transfer under section 1404(a).\footnote{162} Yet, in cases where both the statute and the common law doctrine potentially apply, the common law doctrine of \textit{forum non conveniens} diminishes, if not completely undermines, the effectiveness of section 1404(a).\footnote{163} Arguably, the most objectionable use of the common law doctrine of \textit{forum non conveniens} is exemplified by \textit{Piper Aircraft}.\footnote{164}

\textit{Lehman} raises this same issue.\footnote{165} Under the facts of \textit{Lehman}, transfer to Tennessee may not have mitigated the inconvenience, and, hence, section 1404(a) would not have been utilized,\footnote{166} thereby leaving the purpose of section 1404(a) unaltered.\footnote{167} Regardless of the fact that section 1404(a) would not have been used, the court of appeals should have determined its applicability, since

\footnotesize{\begin{itemize}
\item[155.] See note 91 supra.
\item[157.] 28 U.S.C. § 1441(a) (1976). Subsection (a) provides:
\begin{quote}
Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
\end{quote}
Id.
\item[158.] Removal jurisdiction may allow a defendant to exercise the protection of federal diversity jurisdiction. Yet, a dismissal under common law \textit{forum non conveniens} defeats this statutory right. See notes 91, 149, 155 and accompanying text supra.
\item[159.] See notes 160-62 and accompanying text infra.
\item[160.] See note 49 and accompanying text supra.
\item[161.] See note 132 and accompanying text supra.
\item[162.] See note 2 supra.
\item[163.] See \textit{Piper Aircraft}, 454 U.S. at 240-41, 261; see also notes 108-110, 146-52 and accompanying text supra.
\item[164.] 454 U.S. at 240-41, 261.
\item[165.] 713 F.2d 339 (8th Cir. 1983).
\item[166.] See notes 13, 104 and accompanying text supra.
\item[167.] See notes 160-61 and accompanying text supra.
\end{itemize}}
it may preclude the application of the common law doctrine of *forum non conveniens*. Specifically, it should have determined if Tennessee was an alternative federal forum under section 1404(a) and how the common law doctrine of *forum non conveniens* interacts with the statute.\(^{168}\)

There is uncertainty over the present interpretation of the interaction between section 1404(a) and the common law doctrine of *forum non conveniens*.\(^{169}\) It is not clear that the decisions in this area are consistent with the earlier interpretations.\(^{170}\) It can reasonably be argued that the Reviser's Note to section 1404(a)\(^ {171}\) suggests the statute adopts the elements of the common law doctrine's test for convenience.\(^ {172}\) If this is what Congress intended, then the common law doctrine of *forum non conveniens* may no longer be a valid doctrine, or at least be invalid in cases where the statute applies. This interpretation of the interaction between the common law doctrine of *forum non conveniens* and section 1404(a) would encompass *Lehman*\(^ {173}\) and would restrict the application of the common law doctrine of *forum non conveniens* to the two simplest situations.\(^ {174}\)

Arguably, the common law doctrine of *forum non conveniens* should be limited,\(^ {175}\) at least, to situations in which there is no alternate federal forum, because section 1404(a) does not apply in those situations. This is a plausible argument because it would be consistent with the purpose\(^ {176}\) and hence the usefulness, of section 1404(a). Section 1404(a) may have been intended to replace the common law doctrine of *forum non conveniens* at law because of

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168. See notes 153-59 and accompanying text *supra*.
169. See notes 127-33 and accompanying text *supra*.
170. See notes 130-33 and accompanying text *supra*.
171. See note 72 and accompanying text *supra*.
172. See note 56 and accompanying text *supra*.
173. 713 F.2d 339 (8th Cir. 1983).
174. See notes 97-98 and accompanying text *supra*. Admiralty may be another area in which common law *forum non conveniens* should survive. See Bickel, *supra* note 47. But this aspect is beyond the scope of this note.
175. There may be some question as to the inherent power of federal courts, particularly inferior federal courts, to refuse to exercise jurisdiction. See notes 131-33 and accompanying text *supra*. Except for the original jurisdiction of the Supreme Court, Congress controls the jurisdiction of all federal courts, and the very existence of inferior federal courts. See U.S. Const. art. III, § 2, cl. 2. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction." *Id.*; U.S. Const. art. I, § 8. "The Congress shall have Power ... To constitute Tribunals inferior to the supreme Court. . . ." *Id.* U.S. Const. art. III, § 1. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*
176. See notes 87-96 and accompanying text *supra*. 
the doctrine's effect on diversity jurisdiction.\textsuperscript{177}

CONCLUSION

The Eighth Circuit's approach in \textit{Lehman} is consistent with the majority of jurisdictions.\textsuperscript{178} There are, however, several conclusions that may be drawn from the above analysis. There is a great need for further, more careful interpretation of section 1404(a). There is a great need for further delineation of the interaction of section 1404(a) and the common law doctrine of \textit{forum non conveniens}. An increased awareness of the potential role of 28 U.S.C. section 1404(a) in the areas of venue and jurisdiction is greatly needed; it would lead to a more coherent policy that promotes the purpose and use of diversity jurisdiction.

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\textsuperscript{177} See notes 90-95 and accompanying text \textit{supra}.

\textsuperscript{178} See note 128 and accompanying text \textit{supra}. This note makes no conclusion as to the Eighth Circuit's finding of an abuse of discretion.