Res Judicata and Forum Non Conveniens in International Litigation

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Introduction

Traditionally, the doctrine of forum non conveniens requires a balancing of interests to determine whether the current forum is appropriate.[1] The outcome of the balancing is a determination of whether to continue the current litigation or to litigate in an alternative, more convenient, forum.[2] What if the more convenient forum is outside the United States? When a motion for dismissal is filed in these circumstances, is the question whether a forum in the United States is inconvenient or whether a

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1. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).
2. *Id.* at 506.

specific forum in the United States is inconvenient? The answer will have res judicata implications. If the former question is answered, then suit may be brought in another forum and the defendant may choose to raise the issue of forum non conveniens a second time. If the latter question is answered, then the plaintiff may not bring suit in any other district in the United States since the original ruling will have preclusive effect.

For domestic claims, this question may appear strange since the fundamental rights and procedures in many jurisdictions are similar, and it is likely that a plaintiff will have an adequate recovery should he prevail in his action. For international claims, however, the stakes can be much higher.[3] If a dismissal on forum non conveniens grounds and suggestion of a foreign forum is binding, a dismissal not on the merits by a single court in the United States could potentially foreclose suit in any other forum in the country.[4] This result, while not preventing recovery to a plaintiff, may close out other potential forums that may be more favorable to him than the foreign jurisdiction. Conversely, if the finding is non-binding, a plaintiff could potentially bring suit in any United States forum and relitigate the issue of forum non conveniens time and time again.[5] Both outcomes have their merits. As a society, we do not necessarily want to drive plaintiffs out of the country for wrongs perpetrated by our citizens. At the same time, allowing defendants to travel around the country litigating similar issues multiple times is inefficient and puts a strain on both court and defendant resources.

At its core, forum non conveniens serves two purposes. The first is to prevent a plaintiff from using a forum to "'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[6] The second is to prevent litigation that would add to administrative problems in a court—for example, an overloaded docket.[7] In essence, the doctrine exists to benefit both defendants and the courts. When a motion to dismiss is raised, we can then ask the following question: is the requested dismissal for the convenience of the defendant or is it for the convenience of the court? In general, when the defendant files the motion to dismiss, it is likely that the dismissal is for the convenience of the defendant.[8]

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3. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 240 (1981) (stating that damages available in Scotland are less than those available in the United States); David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction,"* 103 L. Q. REV. 398, 418–20 (1987) (showing that the majority of international cases dismissed on forum non conveniens grounds are either not pursued further or settle for substantially less than their estimated value).

4. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) [hereinafter JUDGMENTS].

5. For a single plaintiff and two defendants from two different states, the issue may be litigated four times (twice in state court and twice in federal court). *See* FED. R. CIV. P. 4(k)(1).

6. *Gilbert*, 330 U.S. at 508.

7. *See* Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947).

8. *See* Robertson, *supra* note 3, at 407–08 (noting that early forum non conveniens jurisprudence focused on fairness to the defendant, with docket congestion becoming more prevalent in the 1970s); Allan R. Stein, *Forum Non Conveniens and the Redundancy*

Res judicata in the form of issue preclusion, in some ways, is also a doctrine of convenience. Issue preclusion prevents the waste of relitigating issues and ensures certainty in legal relations to the benefit of both courts and parties.[9] Simply stated, the rule is that "an issue of law or fact actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies."[10] Much turns, however, on whether issue preclusion applies in a specific instance.[11] When invoked, issue preclusion reduces litigation time and allows parties to litigate the remaining unresolved issues.

The intersection of res judicata and forum non conveniens therefore represents the meeting of two doctrines of convenience and efficiency. This situation arises in the following circumstance: Plaintiff brings an initial claim against a defendant in Forum One. Defendant moves to dismiss based on forum non conveniens grounds, arguing that Forum Two would be more appropriate and succeeds. Plaintiff then refiles in Forum Three. Defendant now moves to dismiss based on res judicata, again insisting that Forum Two is the appropriate forum. The question before the court in this instance is not whether Forum Two is more convenient, but whether Forum Three should be bound by Forum One's finding that Forum Two is a more appropriate forum for the litigation.

In this situation, the core question for a res judicata dismissal will be whether the issues in Forum One and Forum Three are identical. Generally, determining the identity of the issues can be one of the most difficult problems in an issue preclusion analysis.[12] Consequently, a number of tests exist to make this determination. The most stringent test requires that the issues be identical in all respects.[13] A more flexible approach allows the use of a balancing test in the absence of total equivalence between issues.[14] For issues of fact, the stricter test will, in most circumstances, likely provide appropriate results. Forum non conveniens dismis-

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of Court-Access Doctrine, 133 U. PA. L. REV. 781, 788–89 (1985) (stating that forum non conveniens is "ostensibly available to protect a defendant from a burdensome or otherwise inconvenient choice of forum by the plaintiff").

9. United States v. Alcan Aluminum Corp., 990 F.2d 711, 719 (2d Cir. 1993).

10. *Id.* at 718–19 (emphasis removed).

11. *See* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4417 (2d ed. 2002). In general, courts look to see if four elements are met: (1) The issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity for litigation in the prior proceeding; and (4) the issues previously litigated were necessary to support a valid and final judgment on the merits. Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986).

12. JUDGMENTS, *supra* note 4, § 27 cmt. c.

13. *E.g.*, Moore v. Labor & Indus. Review Comm'n, 499 N.W.2d 288, 290 (Wis. Ct. App. 1993) (requiring identity "in all respects"); District of Columbia v. Gould, 852 A.2d 50, 56 (D.C. Cir. 2004) (stating that "similarity between the issues is insufficient").

14. Issues in the analysis may include whether there is a substantial overlap between the evidence or argument to be advanced in the second proceeding and those advanced in the first, whether the new evidence or argument involves application of the same rule of law, and how closely the claims are related in the two proceedings. Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th Cir. 1995); First Union Nat'l Bank v. Penn Salem Marina, Inc., 921 A.2d 417, 424 (N.J. 2007); JUDGMENTS, *supra* note 4, § 27 cmt. c.

sals, however, are not questions of pure fact.[15] Rather, they involve mixed questions of law and fact specific to the forum where a party raises the defense.[16] Consequently, this means that the issue of whether a more convenient forum exists can never involve "application of the same rule of law" between two forums.

At first glance, it would therefore seem that a dismissal on forum non conveniens grounds would never preclude the issue from being relitigated in another forum; rather, it would only preclude relitigation in the same forum as the dismissal. However, this result would not be optimal since defendants would never be sure that the issue of the most convenient forum is settled. Until suit is brought in another forum, defendants would be constantly wondering where they would litigate the question next. To prevent this reading of the res judicata doctrine and this result, courts must necessarily cast the litigated issue as broadly as possible in order to dismiss the second claim. This implies that there is an element of discretion in how the court proceeds with the analysis.[17]

The formulation of the issue in the second forum will therefore be the crucial factor in determining whether a dismissal on forum non conveniens grounds in the first forum will be binding on the second. The question then becomes one of how the issue is defined. Generally, the second court will determine which issue the first court decided.[18] The court makes this determination through an investigation of the first court's record.[19] Since the second court has the ability to define the issue within the confines of the original record, it becomes important that the issue be well-defined and understood by the parties in the first litigation and be well-formulated in the record. If the issue formulation was unclear, then there is an increased likelihood that the second court will decide that the original issue and the current issue before the court are not identical. It is therefore crucial that a well-defined issue is built-in to any forum non conveniens dismissal. The plaintiff in the litigation will want the issue to be as narrow as possible, while the defendant will want it to be as broad as possible.

Both sides have the opportunity to define the issue in both oral arguments before the court and submitted memoranda. However, though the briefs and oral statements may be persuasive as evidence in subsequent litigation, final authority will rest with the judge.[20] Ultimately, the judge

15. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 237 (1981) (noting that the lower court examined the differences in law between Scotland and the United States).

16. *See id.*

17. *But see* NAACP, Minneapolis Branch v. Metro. Council, 125 F.3d 1171, 1174 (8th Cir. 1997) (stating that review of a res judicata dismissal should be de novo), *vacated*, 522 U.S. 1145 (1998); Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464, 1467–68 (10th Cir. 1993) (indicating that a de novo standard is applied in reviewing res judicata claims).

18. *See* Litton Indus., Inc. v. Litronix, Inc., 577 F.2d 709, 711 (C.C.P.A. 1978); Haize v. Hanover Ins. Co., 536 F.2d 576, 579 n.2 (3d Cir. 1976).

19. *See Haize*, 536 F.2d at 578–79.

20. *See id.* at 579 n.2 (indicating that the lower court had misunderstood the issue by examining evidence rather than relying on judicial findings of fact).

will define the issue in his oral and written opinions.[21]

In forum non conveniens litigation, a clear issue statement is not necessary when there is only a choice of two forums.[22] When more forums are available, however, a clear, concise issue is necessary to foreclose additional litigation outside the convenient forum.[23] When the convenient forum is an international venue, the choice must be between the United States and the foreign country as an appropriate forum. A decision indicating that the domestic forum being considered is not the entire country would allow a plaintiff to restart litigation in another domestic forum rather than force him to bring suit abroad.[24]

Unfortunately, issue statements of this sort will be unusual in opinions. In raising a forum non conveniens motion, the burden is on the defendant to provide an "adequate alternative forum."[25] As such, much of the court's analysis centers around the foreign forum, rather than what forum the domestic choice represents.[26] This initial hurdle must be cleared before a comparison of the relative conveniences of the two forums may even be considered. If a defendant can overcome this hurdle, a court will dismiss the case in almost half of all cases.[27] When the plaintiff is foreign, a court will dismiss the case almost two-thirds of the time.[28] The issue decided by the courts, therefore, will become important if the plaintiff decides to refile a previously dismissed case in a different district.

Can v. Goodrich Pump & Engine Control Systems, Inc.[29] and *Meijer v. Qwest Communications International*,[30] cases decided within three months of one another, took opposing interpretations of the forum non conveniens issue. In *Can*, the court held that the deciding court's analysis had preclusive effect since it answered the question of whether litigation should pro-

21. *See id.* at 579 n.3.

22. A dismissal in one forum would force litigation to be in the second forum.

23. In theory an unlimited number of forums are available if the defendant were to consent to jurisdiction. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 341–43 (3d ed. 1996). An available forum in this case will be a forum where defendants would be amenable to process without consenting to jurisdiction.

24. For a foreign or corporate defendant, another domestic forum could potentially be any district in the United States. *See* 28 U.S.C. §§ 1391 (b)(3), (c)(2)–(3) (2012).

25. *E.g.*, Galustian v. Peter, 591 F.3d 724, 731 (4th Cir. 2010); Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 423–24 (1st Cir. 1991).

26. *See* Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059, 1080 (2010) (stating that the question of what makes an alternative forum available to the plaintiff "lies at the heart" of whether a dismissal on forum non conveniens grounds is appropriate); *see also* Laker Airways Ltd. v. Pan Am. World Airways, 568 F. Supp. 811, 814 (D.D.C 1983) ("In the final analysis, what reason is there to ascribe to a British court the responsibility to hear and decide this matter?").

27. Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 502–03 (2011) (showing that dismissal occurs 47.1% of the time in published federal forum non conveniens decisions).

28. *Id.*

29. Can v. Goodrich Pump & Engine Control Sys., Inc., 711 F. Supp. 2d 241 (D. Conn. 2010).

30. Meijer v. Qwest Comm'ns Int'l, Inc. No. 09-cv-00162-REB-KLM, 2010 WL 1348668 (D. Colo. Mar. 31, 2010).

ceed in the United States or Turkey.[31] Conversely, in *Meijer*, the court held that although the Third Circuit and New Jersey courts included a comparison of the United States and the Netherlands, the courts did not analyze the question of forum non conveniens from Colorado's perspective, thus requiring a new analysis.[32]

In this Note, I attempt to analyze the doctrine of forum non conveniens in international litigation to determine what question courts are answering and, by extension, what preclusive effect a court's decision to dismiss on forum non conveniens grounds should have. In Part I, I look at previous cases where an international venue was suggested in forum non conveniens motions and examine how the court approached the analysis. In Part II, I analyze *Can* and *Meijer*, respectively, to determine which question the courts answered. In Part III, I analyze the doctrine of forum non conveniens from both state and federal perspectives. In Part IV, I suggest a framework for motions to dismiss on forum non conveniens grounds in international litigation that would clearly establish the issue to be determined and would serve to improve certainty in international litigation in this country.

I. Historic Forum Non Conveniens Cases

Though the doctrine of forum non conveniens is relatively new,[33] there have been a number of developments through the years that serve to illustrate many of the issues associated with this doctrine.[34] The issues stem from a number of sources, such as whether a court should apply state or federal law, and what considerations courts use in making a final determination for a motion. The following cases show the difficulty courts have experienced in defining the issue in a forum non conveniens motion and, furthermore, the trouble they have had in determining exactly what the issue was when presented with a case which had already been dismissed by another court on forum non conveniens grounds.

A. The Dow Chemical Cases

The relationship between res judicata and forum non conveniens was front and center in the dispute between Dow Chemical (Dow) and Costa Rican agricultural workers.[35] In the 1970s, Shell Oil (Shell) and Dow furnished pesticides to Costa Rica containing dibromochloropropane (DBCP),

31. *Can*, 711 F. Supp 2d at 251–52.

32. *Meijer*, 2010 WL 1348668 at *3.

33. At the federal level, the Court recognized forum non conveniens as a valid tool in 1947. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947). Rhode Island, on the other hand, did not officially recognize the doctrine until 2008. Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1179 (R.I. 2008).

34. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 429–30 (2007).

35. Cabalceta v. Standard Fruit Co. (*Cabalceta II*), 883 F.2d 1553 (11th Cir. 1989); Sibaja v. Dow Chem. Co., 757 F.2d 1215 (11th Cir. 1985); Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987), *aff'd in part, rev'd and remanded in part*, 883 F.2d 1553 (11th Cir. 1989); Aguilar v. Dow Chem. Co., No. 86-4753 JGD (C.D. Cal. filed Dec.

a chemical that the Environmental Protection Agency (EPA) banned in the United States.[36] Costa Rican workers who handled the pesticide claimed to have been sterilized as a result of their exposure to the chemicals.[37]

1. Procedural History

The workers first brought suit in Florida state court for their injuries.[38] The defendants Shell and Dow promptly removed the case to federal court and moved to dismiss on forum non conveniens grounds.[39] At the time, forum non conveniens was not recognized in Florida state courts, but was recognized in federal courts.[40] In making its ruling, the trial court found that the considerations in favor of dismissal were "overwhelming."[41] In its analysis, the court took a decidedly narrow view of the choice of forums. Specifically, it noted that Dow and Shell would not be "able to implead potential third party defendants located in Costa Rica in this action in *Florida*."[42] In addition, the court stated that maintaining the action would inconvenience the court since the action would congest its docket and force "the [c]ourt to conduct a complex exercise in comparative law and consider a foreign law with which the [c]ourt is not familiar and which is in a foreign language."[43] Lastly, it stated that the action would require "local jurors to hear and decide a dispute that has no connection with *this community*."[44]

On appeal, the plaintiffs did not argue the merits of the dismissal, but rather challenged its appropriateness under *Erie Railroad Co. v. Tompkins*.[45] This approach proved unsuccessful.[46] The Costa Rican workers next brought an action in Texas state court.[47] After an unsuccessful attempt to remove the action to federal court, Dow and Shell successfully moved to dismiss the action on forum non conveniens grounds.[48] In making its determination, the Texas trial judge did not specify on the record "the factors which he considered and the way in which those considerations influenced his determination."[49] As such, it is impossible to determine the issue that was at play in this case (whether the decision was between courts in Texas and Costa Rica or the United States and Costa

23, 1986); Dow Chem. Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008).

36. *Alfaro*, 786 S.W.2d at 681 (Doggett, J., concurring).
37. *Sibaja*, 757 F.2d at 1216.
38. *Id.*
39. *Id.*
40. *See Id.* at 1217.
41. *Id.* at 1217 n.5.
42. *Id.* (emphasis added).
43. *Id.*
44. *Id.* (emphasis added).
45. *Id.* at 1217–18.
46. *Id.* at 1219. For a discussion of the *Erie* question, see *infra* Part III.C.
47. Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 675 (Tex. 1990), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008).
48. *Id.*
49. *Id.* at 696 (Gonzalez, J., dissenting).

Rica). Having made a forum non conveniens decision, however, it can be inferred that the issue of direct estoppel was not a factor. The Texas Supreme Court ultimately overruled the Texas trial court dismissal, concluding that forum non conveniens was not available in the state.[50]

While the action in Texas was pending,[51] the workers then brought an action in California state court, adding Amvac Chemical, a California-based producer of DBCP, as a codefendant in order to prevent removal.[52] At that time, though the California state courts recognized the doctrine of forum non conveniens, it would typically be precluded in cases where at least one defendant was domiciled in the state.[53] In response, the defendants successfully attempted to remove the case to federal court and remove Amvac as a codefendant, thereby restoring federal jurisdiction.[54] As they had in Florida, Dow and Shell successfully moved to dismiss on forum non conveniens grounds.[55] In performing its forum non conveniens analysis, the court first determined that, as it had in the Florida action, federal law should govern.[56] Similar to the Florida court, the California court took a narrow view of the forum non conveniens issue, framing it as a choice between a court in California and one in Costa Rica.[57] Though the court ostensibly looked to federal law for its analysis, it used California forum non conveniens law in determining the weights to accord various factors.[58]

After the California case had been dismissed, the workers brought a second action in Florida state court, now adding Florida-based Dole Fresh Fruit Company (Dole) as an additional defendant in order to prevent removal.[59] Dow, Shell, and Dole once again attempted removal to federal court.[60] In the removed action, the defendants asserted that Dole had been fraudulently joined to defeat jurisdiction and that direct estoppel prevented plaintiffs who were parties in the prior California and Florida actions from relitigating the issue of forum non conveniens.[61] For the remaining plaintiffs, the defendants argued that the same forum non conveniens holding should apply as it had in the prior Florida action through collateral estop-

50. *Id.* at 679 (majority opinion).

51. *See* Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 837 (S.D. Fla 1987), *aff'd in part, rev'd and remanded in part*, 883 F.2d 1553 (11th Cir. 1989).

52. Aguilar v. Dow Chem. Co., No. 86-4753 JGD, slip op. at 2 (C.D. Cal. Dec. 23, 1986).

53. Goodwine v. Super. Ct. Los Angeles County, 407 P.2d 1, 1 (Cal. 1965).

54. *Aguilar*, slip op. at 2–4.

55. *Id.* at 3, 13.

56. *Id.* at 13 ("This Court finds the reasoning of *Sibaja* persuasive and therefore applies federal forum non conveniens standards to this action.").

57. *Id.* at 14 ("It is undisputed that much of the proof, including their medical records is found in Costa Rica. . . . Neither the plaintiffs nor the defendants are citizens of this forum, and plaintiffs' alleged injuries did not occur in the State of California.").

58. *Id.* at 15 ("[W]here the defendants were California residents, the site of the accident was California, and the plaintiffs had chosen California as their forum[,] the court held that California law applied.").

59. *See* Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 837 (S.D. Fla 1987), *aff'd in part, rev'd and remanded in part*, 883 F.2d 1553 (11th Cir. 1989).

60. *See id.* at 834.

61. *See id.* at 836–37.

pel.[62] The court determined that Dole had been fraudulently joined and asserted that both the prior Florida and California dismissals had preclusive effect on plaintiffs who were a party to them, stating that a previous dismissal not on the merits did not preclude the use of res judicata.[63]

Having found no privity between these and the remaining plaintiffs, the court performed a new forum non conveniens analysis.[64] As with the analysis in the original Florida action, the court appeared to take a narrow view of the choice of forums, balancing between Florida and Costa Rica.[65] On appeal, the Eleventh Circuit affirmed, approving of the lower court's forum non conveniens analysis.[66]

2. Discussion

These cases serve to illustrate the issues at play for wrongs committed outside the United States. The defendants at one point referred to the Costa Rican workers' actions as "one of the most wide-ranging efforts at forum shopping in legal history."[67] Justice Cook of the Supreme Court of Texas also leveled this accusation at the plaintiffs.[68] Though not directly accusing the plaintiffs of forum shopping, the Eleventh Circuit also acknowledged that the cases represented repeated efforts to "obtain state court jurisdiction in the United States."[69] Throughout the process, the parties litigated the issue of forum non conveniens four times. Since each court appeared to take a narrow view of the issue being litigated, it may be inferred that the issue could have been further litigated in any other forum where Dow and Shell were amenable to service of process.[70] This process could then potentially continue until either the plaintiffs brought suit in Costa Rica, or the defendants chose not to challenge a venue.

Though the litigation eventually took place in Texas, the Florida District Court's res judicata assertion[71] requires further scrutiny. Relying on *Pastewka v. Texaco, Inc.*,[72] the court asserted that "a district court was

62. *Id.*
63. *Id.* at 836, 838.
64. *Id.* at 838–39.
65. *Id.* ("The witnesses and evidence available in the United States are primarily in places other than the Southern District of Florida, and so would not be more conveniently obtained in Miami than in *Costa Rica or other places in this country*." (emphasis added)).
66. Cabalceta v. Standard Fruit Co. (*Cabalceta II*), 883 F.2d 1553, 1562 (11th Cir. 1989).
67. *Cabalceta*, 667 F. Supp. at 837.
68. Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 697 (Tex. 1990) (Cook, J., dissenting) ("Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. Through three courts they moved, filing their lawsuits on one coast and then on the other. By each of those courts the plaintiffs were rejected, and so they continued their search for a more willing forum."), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008).
69. *Cabalceta II*, 883 F.2d at 1556.
70. Since both Dow and Shell do business nationally, they would be amenable to service in any district in the country.
71. *Cabalceta*, 667 F. Supp. at 838.
72. Pastewka v. Texaco, Inc. (*Pastewka II*), 565 F.2d 851 (3d Cir. 1977).

bound by an earlier forum non conveniens dismissal entered by another district court where identical objective criteria were relied upon by the appellants and identical material facts underlied the application of those criteria in each case."[73] This cannot be the full story. In its own forum non conveniens decisions, the district court took a decidedly narrow view of the issue.[74] Furthermore, the California court took a similarly narrow view of the issue, going so far as to incorporate California law in its decision.[75] This means that a Florida court was bound by a decision that was only relevant to California in both convenience and law.

To avoid this result, stress needs to be placed on the "objective criteria" prong of the test. The question then becomes one of how the criteria are similar or different in the cases. In its decision, the court explicitly listed witness availability *in Florida* as one of the criteria.[76] The California court did not use this fact in its analysis, but did consider witness availability *in California*.[77] Despite this difference, however, the court assumed identity of criteria.[78] This assumption cannot stand. If witnesses were in fact residing in Florida, and the California court was aware of this, the court's only taking Costa Rica into account as an alternative forum should not create a situation that would bind the Florida court. However, according to the court's reasoning, this situation would not create different material facts nor would it create different objective criteria. Thus, the Florida court would be bound by the California court's ruling.

Alternatively, stress may be placed on the "material fact" prong. To achieve the proper result in this case, the material fact would not be that the witnesses resided in Florida, but rather that they did *not* reside in California. Again, this would mean that the Florida court would never be bound by California's determination, a result that would be suboptimal.

B. The Bhopal Gas Plant Disaster

Since much turns on the determination of the issue in a forum non conveniens motion, an analysis may turn out to either be too broad or too narrow. Even in cases where the question should be clear, a court may still struggle with the tension between a forum's convenience and a country's convenience. This tension is on display in the Bhopal Gas Plant Disaster case.[79]

In 1984, a toxic gas leaked out of a chemical plant owned and operated by Union Carbide India Limited (UCIL), killing—according to one

73. *Cabalceta*, 667 F. Supp. at 838 (emphasis removed). For a more thorough discussion of *Pastewka*, see *infra* Part I.C.

74. *See Cabalceta*, 667 F. Supp. at 838–39.

75. Aguilar v. Dow Chem. Co., No. 86-4753 JGD, slip op. at 14–16 (C.D. Cal. Dec. 23, 1986).

76. *Cabalceta*, 667 F. Supp. at 838–39.

77. *Aguilar*, slip op. at 14 ("It may thus be impossible for this Court to compel the attendance of vital witnesses or to compel the production of sources of proof.").

78. *See Cabalceta*, 667 F.Supp. at 838–39.

79. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984 (*Union Carbide II*), 634 F. Supp. 842 (S.D.N.Y. 1986).

estimate—more than 2,100 people.[80] Afterwards, American lawyers and the Union of India filed suits in the United States against UCIL's parent corporation, Union Carbide Corporation.[81] When the number of pending actions reached eighteen, the plaintiffs moved to consolidate the actions.[82] While all the parties agreed that consolidation was appropriate, there was a dispute as to the district where litigation should continue to take place.[83] In making a determination, the judicial panel on multidistrict litigation noted that though none of the suggested forums could be considered as the "nexus of [ ] litigation," the Southern District of New York would be most appropriate since Union Carbide was incorporated in New York and headquartered in Danbury, Connecticut.[84]

Once the litigation was underway in New York, Union Carbide moved to dismiss on forum non conveniens grounds.[85] In its analysis, the court framed the issue as a choice of forums between India and the United States.[86] While analyzing witness availability, the court made reference to witnesses residing in the United States, not New York.[87] Similarly, in its public interest analysis, the court referenced the interest of the United States.[88] At the same time, however, when examining administrative difficulties, the court stated that "a court in Bhopal, rather than New York, should bear the load."[89] This would indicate that though ostensibly performing an analysis of the relative benefits of India versus the United States for litigation, the court was still concerned about its own docket and not the dockets of all American courts. Ultimately, the court dismissed the case and claimed that the litigation would "unfairly tax . . . any American tribunal," implying that the court intended to foreclose any new litigation in the United States.[90]

The framing of the issue as a choice between the United States and India would appear to be a logical choice. The case did not represent one action, but at the time of the decision, 145 actions across the country.[91] In a sense, the prior consolidation action served to answer the question of *which* American court would be appropriate should the litigation proceed in this country. The only question left was *whether* an American court would be appropriate at all. Though subsequent suits were not brought in the United States,[92] it is likely that if a subsequent action were brought in

80. *Id.* at 844.
81. *See id.* at 844–45.
82. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 601 F. Supp. 1035, 1036 (J.P.M.L. 1985).
83. *Id.*
84. *Id.*
85. *Union Carbide II*, 634 F. Supp. at 845.
86. *See id.*
87. *Id.* at 859–60.
88. *Id.* at 863.
89. *Id.* at 861.
90. *See id.* at 867.
91. *Id.* at 844.
92. *See* Union Carbide v. Union of India, 1991 1 S.C.R. Supp. 251, 276–77 (India) (Ranganath Misra, C.J., concurring).

another federal district court, the action would have been dismissed on either res judicata or forum non conveniens grounds.

C. The Texaco Cases

1. Procedural History

The Texaco cases,[93] relied on by the district court in *Cabalceta*,[94] provide one of the most comprehensive analyses of the interplay between direct estoppel and forum non conveniens in the federal arena. In 1971, a German vessel struck the wreckage of a Texaco-owned vessel off the coast of England, killing twelve German seamen.[95] The German owner of the vessel and the estates of the seamen brought actions against Texaco in England and in federal courts in New York and Delaware.[96] Since the New York and Delaware suits were between the same parties and involved the same subject matter, the parties agreed to stay the actions in Delaware pending the outcome of the action in New York.[97]

The New York court dismissed the action on forum non conveniens grounds.[98] In its analysis, the court appears to have taken into account factors relevant to both New York and to the United States as a whole. Initially, the court put weight into the fact that it was unlikely that witnesses would be willing to travel to New York, which appears to be a narrow concern.[99] At the same time, the court analyzed the differences between the substantive laws of England and those of the United States.[100] Because the suit was brought under a general maritime law and a federal statute,[101] while other federal venues were available, the analysis may be said to have had a New York focus.

The dismissal in New York then served to activate the Delaware litigation.[102] The court there raised the issue of issue preclusion regarding the New York dismissal and held that it was bound by the prior dismissal.[103] In its analysis, the court noted that the plaintiffs could "point to no favorable factors or factual considerations which would differentiate the Delaware district from the Southern District of New York for purposes of a forum non conveniens inquiry."[104] The court then determined that "[f]ailure to differentiate any objective criteria or material facts . . . crie[d]

93. Pastewka v. Texaco, Inc. (*Pastewka II*), 565 F.2d 851 (3d Cir. 1977); Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975); Pastewka v. Texaco, Inc., 420 F. Supp. 641 (D. Del. 1976).

94. Cabalceta v. Standard Fruit Co., 667 F. Supp. 833, 838 (S.D. Fla 1987), *aff'd in part, rev'd and remanded in part*, 883 F.2d 1553 (11th Cir. 1989).

95. *Fitzgerald*, 521 F.2d at 449.

96. *Pastewka II*, 565 F.2d at 852.

97. *Id.*

98. *Fitzgerald*, 521 F.2d at 449.

99. *Id.* at 451–52.

100. *Id.* at 452–53.

101. *Id.* at 449.

102. Pastewka v. Texaco, Inc., 420 F. Supp. 641, 643 (D. Del. 1976).

103. *Id.* at 644, 646.

104. *Id.* at 644.

for application of judicial preclusion."[105] The court also emphasized that not every forum non conveniens dismissal would be preclusive since its ruling turned on the "peculiar facts" of the case, namely that the parties, complaints, and legal theories were, "for all practical purposes," identical.[106]

On appeal, the Third Circuit affirmed the decision, approving of the district court's analysis.[107] In its decision, the Third Circuit further articulated that there was no "objective fact establishing that, unlike New York, Delaware would be a more convenient forum than England or that Delaware would be even as convenient as New York."[108]

2. Discussion

Though the court did not find any objective criteria or material facts to be different in the New York and Delaware matters, it did provide some guidance as to what differences may look like.[109] The court noted that judicial convenience and an overloaded docket, for example, may be factors that would serve to differentiate two forums.[110] Furthermore, the court indicated that complete identity is not required between the facts considered, but rather, that they be identical "for all practical purposes."[111] The doctrine as laid out, therefore, has a fair amount of flexibility for courts.

In reaching its decision, the district court's core concerns were finality and prevention of forum shopping.[112] The court characterized the Delaware suit as a forum shopping attempt.[113] The fact that the forum non conveniens dismissal was a reviewable decision, though not dispositive, seems to have persuaded the court that it was in the best interests of both the litigants and the courts for the dismissal to be binding on all the parties.[114] Mere "disagreement" with the prior ruling was therefore insufficient.[115]

The implication of the Third Circuit decision appears to be that after the first forum non conveniens dismissal, the burden is on the party contesting a finding of issue preclusion to show that the new forum is more convenient than the forum in the prior action, but not necessarily more convenient than the alternate forum from the prior action. It is not clear what facts a court will find identical for all practical purposes, but it may

105. *Id.* at 645.
106. *Id.* at 646.
107. *See* Pastewka v. Texaco, Inc. (*Pastewka II*), 565 F.2d 851, 854 (3d Cir. 1977).
108. *Id.* at 103.
109. *See Pastewka*, 420 F. Supp. at 644 n.18.
110. *See id.*
111. *See id.* at 646.
112. *See id.*
113. *Id.* at 646 n.20 ("[T]he attempt here to bring suit in a jurisdiction which is concededly no more convenient can only be characterized as forum shopping.").
114. *See id.* at 646 ("[T]he federal system, heavily overburdened with litigation which must be heard, should not countenance, and cannot afford the luxury of permitting the same plaintiff to litigate the same issue with no demonstration of changed circumstance which would affect the outcome.").
115. *Id.*

be assumed that analogous situations in two forums will likely be treated in the same fashion. This means that if the witnesses for a case are in England, the issue of witnesses being unwilling to travel to New York would be identical to the issue of witnesses being unwilling to travel to Delaware. If, however, the witnesses are residents of Delaware, then the issues would not be identical.

II. Recent Cases

The doctrine of forum non conveniens in international cases is still evolving, and the fundamental issues and decisions have yet to be settled. The courts in the following cases, decided within three months of each other, made startling assertions regarding both the doctrines of forum non conveniens and res judicata. Though the cases were different in nature, both courts had to determine the particular forum non conveniens issue had been decided in a prior action.

A. *Can v. Goodrich*

Similar to the cases discussed in Part I, *Can v. Goodrich* concerned harm that occurred outside of the United States.[116] A helicopter containing components that the defendants manufactured crashed in Turkey, killing a number of people.[117] Plaintiffs initially brought an action in the Superior Court in Marion County, Indiana.[118] The defendants moved for dismissal on forum non conveniens grounds, arguing that the action was better suited to a Turkish court, and succeeded.[119] Plaintiffs next brought an action in federal court in Connecticut,[120] where the defendants moved to dismiss, asserting that the prior Indiana state court ruling should have preclusive effect on the action.[121] The court agreed and granted the motion.[122]

In its analysis, the court first looked to the prior Indiana litigation to determine what question of forum non conveniens was at issue.[123] To determine identity of criteria between the Indiana dismissal and the defendants' motion, the court did not ask whether the Indiana forum was inconvenient; rather, it asked if the deciding court had used Indiana or federal forum non conveniens law.[124] According to the court, federal forum non conveniens law is an inquiry into whether the United States or a foreign forum is better suited to hear a case.[125]

116. Can v. Goodrich, 711 F. Supp. 2d 241, 245 (D. Conn. 2010).
117. *Id.*
118. *Id.*
119. *Id.* at 248.
120. *See id.* at 245.
121. *Id.*
122. *Id.* at 257.
123. *See id.* at 253.
124. *See id.* at 252. The court sidestepped the issue of whether to apply Connecticut or federal forum non conveniens law. *Id.* at 252 n.17.
125. *Id.* at 255 (stating that it was "beyond question" that forum non conveniens is restricted to cases where the alternate forum is abroad). *But see* Mizokami Bros. of Ariz.,

The court then determined that Indiana had used federal forum non conveniens law in making its decision.[126] Since the same forum non conveniens law was at issue, the court asserted that the same factors used in the Indiana litigation would be used in its analysis and that the Indiana judgment therefore had preclusive effect.[127] In the words of the court, "a state court's determination of the best forum *country* is entitled to full faith and credit."[128] Implicit in this statement is that the deciding Indiana state court performed a full analysis from the perspective of the United States, and not just Indiana.

While it may be argued that the court's decision was correct, its analysis may not appear to be well-reasoned. Rather than providing evidence that issue preclusion should attach, the court simply dismissed the plaintiffs' assertions without first giving deference to their choice of forum.[129] This may be considered to be at odds with the traditional burden in motions to dismiss, which typically lies with the defendant.[130] In its decision, the court began by stating that the plaintiffs did "not appear to disagree with the premise that if they raised their claims in another Indiana Superior Court, collateral estoppel would apply to bar their claims."[131] This appears to put the burden directly on the plaintiffs to prove that the issue decided in Indiana was different from the issue before the Connecticut court. To be consistent with the traditional burden in other motions to dismiss, the burden would have been better placed on the defendants to prove that the claims were different, rather than on the plaintiff to prove that the claims were the same.

Furthermore, the court failed to cite a single opinion stating that issue preclusion should attach in this case.[132] This failure to cite legal authority is more surprising since the court had precedent from the Third Circuit from *Pastewka v. Texaco Inc.*[133] Having already determined that Indiana used the same criteria as the court would have used, the court could have simply extended *Pastewka* to assert that a prior ruling on forum non conveniens using federal law in any court had preclusive effect in other federal courts. Without any authority, the court's opinion, while binding on the

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Inc., v. Mobay Chem. Corp., 660 F.2d 712, 716 (8th Cir. 1981) (noting that a prior federal dismissal on forum non conveniens grounds only took into account the convenience of the state in which the deciding court sat and not the entire country).

126. *Can*, 711 F. Supp. 2d at 253 n.19 ("[I]t appears from the transcript that the general trend in this litigation was to look to federal cases on *forum non conveniens*.").

127. *Id.* at 256.

128. *Id.*

129. *See, e.g.*, *id.* at 256 (stating that a holding referred to by the plaintiff was "simply inapplicable").

130. *See, e.g.*, Mortensen v. First Fed. Sav. & Loan, 549 F.2d 884, 891 (3d Cir. 1977) (indicating that the burden is on the defendant for motions to dismiss for failure to state a claim).

131. *Can*, 711 F. Supp. 2d at 255.

132. *See id. passim.*

133. Pastewka v. Texaco, Inc. (*Pastewka II*), 565 F.2d 851, 853 (3d Cir. 1977). For a discussion of *Pastewka*, see *supra* Part I.C.

parties, may not be as persuasive to other districts and may lack precedential value.

B. *Meijer v. Qwest*

Unlike *Can*, which began in state court, *Meijer v. Qwest Communications International* began in federal court.[134] Furthermore, while *Can* and the cases discussed in Part I were tort-related, *Meijer* was a Racketeer Influenced and Corrupt Organizations Act (RICO) action and was brought under federal question jurisdiction in New Jersey.[135] There, the plaintiffs simultaneously brought an action in the Netherlands on allegations of corporate mismanagement.[136] The defendants successfully moved to dismiss on forum non conveniens grounds, asserting that the Netherlands was the more appropriate forum.[137] After an unsuccessful appeal,[138] the plaintiffs refiled in federal court in Colorado.[139] The defendants then moved to dismiss, asserting that the New Jersey dismissal should have preclusive effect and, in the alternative, forum non conveniens.[140]

Here, the court determined that a new analysis of forum non conveniens was appropriate, despite the earlier New Jersey ruling.[141] In its analysis, the court relied heavily on a single sentence from the Third Circuit's prior opinion.[142] In deciding the appeal, the Third Circuit had stated that "the conclusion . . . in this case does not necessarily mean that this action may not be maintainable in another federal district."[143] The *Meijer* court took this to mean that the action *would* be maintainable.[144] The court then proceeded to do its own forum non conveniens analysis, though it did note that the analysis applied in the prior action translated "readily" to the case as it was postured in Colorado.[145] Ultimately, the case was dismissed on forum non conveniens grounds, as it had been in New Jersey.[146]

By choosing to rely on the Third Circuit's assertion, which, it may be argued, invited a further comparison between the issues in each forum, the court refrained from determining which issue was actually litigated and decided in the prior action. The court did, however, acknowledge that the New Jersey court had analyzed "most of the relevant factors" by comparing

134. *See* Meijer v. Qwest Commc'ns Int'l, Inc., No. 09-cv-00162-REB-KLM, 2010 WL 1348668, at *2 (D. Colo. Mar. 31, 2010).
135. *Id.* at *1.
136. Windt v. Qwest Commc'ns Int'l, Inc., 544 F. Supp. 2d 409, 414–15 (D.N.J. 2008).
137. *Id.* at 434.
138. Windt v. Qwest Commc'ns Int'l, Inc. (*Windt II*), 529 F.3d 183, 198 (3d Cir. 2008).
139. *See Meijer*, 2010 WL 1348668, at *2.
140. *Id.* at *3.
141. *Id.*
142. *See id.*
143. *Windt II*, 529 F.3d at 192.
144. *Meijer*, 2010 WL 1348668, at *3.
145. *Id.*
146. *Id.* at *12.

the United States generally and the Netherlands.[147] The court went on to give these portions of the analysis great weight.[148] Though the court appears to have covered ground already covered in the prior analysis, ultimately, it was correct in determining that the issue of forum non conveniens should be relitigated, even though the court did not fully articulate why.

It is worth noting that the appeal of the New Jersey action took place in the Third Circuit, which had previously decided *Pastewka v. Texaco, Inc.*[149] The Third Circuit was therefore aware of the precedent that it had set earlier. However, the court did not state that the precedent would be inapplicable in this case; rather, it stated that the issue of forum non conveniens *may* need to be relitigated.[150] In its analysis, the court noted that it would be "problematic if granting a motion to dismiss for *forum non conveniens*, based on *local considerations*, precluded a plaintiff from filing the suit in another, more convenient district."[151] Though the court noted that the lower court found litigating in New Jersey to be inconvenient, it did not note the weight that local considerations had been given compared to national considerations.[152]

To determine whether the Colorado court came to the correct conclusion, it is necessary to examine which local considerations the New Jersey court found relevant to its forum non conveniens inquiry and how it had phrased the issue to be determined. In examining the balance of the public and private interests, the court initially appeared to take the view that the decision was between a forum in the United States and a forum in the Netherlands.[153] Though the court discussed the implications of its decision on the federal court system, it stated that "the United States *and the community of the District of New Jersey* ha[d] little interest in the resolution of this case."[154] The court went on to assert that "the local New Jersey community ha[d] virtually no interest in the dispute," indicating a focus on New Jersey and not the United States.[155] Finally, the court itself referenced the plaintiff's decision to file an action with "this [c]ourt" rather than the plaintiff's decision to file an action in the United States, indicating a narrow view of the issue to be determined.[156]

While taking this narrow view of the issue, the court seems to have relied on purely national concerns in coming to its decision.[157] This is not necessarily unreasonable since both the venue and the cause of action were

147. *Id.* at *4.
148. *Id.*
149. Pastewka v. Texaco, Inc. (*Pastewka II*), 565 F.2d 851 (3d Cir. 1977). For a discussion of *Pastewka*, see *supra* Part I.C.
150. *See* Windt v. Qwest Commc'ns Int'l, Inc. (*Windt II*), 529 F.3d 183, 192 (3d Cir. 2008).
151. *Id.* at 191–92 (second emphasis added).
152. *See id.* at 197.
153. *See* Windt v. Qwest Commc'ns Int'l, 544 F. Supp. 2d 409, 423 (D.N.J. 2008).
154. *Id.* (emphasis added).
155. *Id.* at 425.
156. *Id.* at 421.
157. *See id.* at 423, 426–27.

federal, meaning that most factors to be considered would be identical regardless of which federal venue had been selected. If there was a possibility that the court considered the United States as a whole as a forum, the appellate court removed this possibility by making it clear that New Jersey's interests were paramount in the analysis.[158] Since both the district and appellate courts narrowly defined the forum non conveniens issue, their determinations could not be binding on other districts, which may have been more convenient. Therefore, the Colorado court was likely correct in its decision to relitigate the issue of forum non conveniens.

Though the Colorado court had the correct analysis, the issue could have been avoided if the Third Circuit had acted differently. In beginning its discussion, the circuit court stated that though it should consider the relationship between the United States as a whole and a case, local considerations may be so strong as to outweigh considerations of "national convenience."[159] Although the court phrased the choice as one between dismissal and allowing litigation to continue, a third choice was available. This was to transfer the action to another federal district for the convenience of parties and witnesses.[160] The district court did not consider this option.[161] If the appellate court was concerned about local considerations preventing the forum non conveniens dismissal from being binding on other districts, then it could have remanded the proceedings and ordered that the district court transfer the case rather than dismiss it outright.[162]

C. Comparison

The courts in both *Can* and *Meijer* assumed that the prior forum non conveniens decisions had been decided under federal law.[163] It is therefore striking that the two courts took drastically different views of the relationship between the initial and alternate forums. Where the *Can* court asserted that a federal forum non conveniens dismissal may only be used in comparisons between the United States and a foreign forum,[164] the Third Circuit dismissed this reading and stated that local considerations can play a part.[165] Furthermore, the Third Circuit stated that a reading of

158. *See* Windt v. Qwest Commc'ns Int'l (*Windt II*), 529 F.3d 183, 193–94 (3d Cir. 2008) ("Although we recognize that the United States has an interest in redressing wrongful conduct engaged in by a U.S. corporation and American executives, this general national interest does not outweigh the limited connection between New Jersey and this dispute.").

159. *Id.* at 191.

160. 28 U.S.C. § 1404(a) (2012).

161. *See Windt II*, 529 F.3d at 192 (indicating that a preclusion analysis must take into consideration whether the deciding court considered transfer under 28 U.S.C § 1404).

162. Choice of law issues would not come into play since the case was a federal question case brought into federal court and not a diversity action.

163. *See* Can v. Goodrich Pump & Engine Control Sys., Inc., 711 F. Supp. 2d 241, 253 n.19 (D. Conn. 2010); Windt v. Qwest Commc'ns Int'l, 544 F. Supp. 2d 409, 415–16 (D.N.J. 2008).

164. *See Can*, 711 F. Supp. 2d at 255.

165. *See Windt II*, 529 F.3d at 191–92.

federal forum non conveniens law that does not take local considerations into account "misconstrues" the doctrine.[166] Given these alternate readings of the doctrine, it is not surprising that the *Can* court, which asserted that the choice is between the United States and a foreign forum, found itself bound by a prior forum non conveniens decision; and that the *Meijer* court, which used an interpretation that took local considerations into account, did not find itself bound by the prior decision.

While both courts likely came to the right decision, it is surprising that the court finding issue preclusion was bound by a state court decision and the court that did not find preclusion looked to a federal court decision. One may expect the opposite result. Since state and federal forum non conveniens laws may be different,[167] it would be reasonable to assume that a decision by a state court under state law would not be binding on a federal court deciding a similar issue under federal law. Part of the confusion may stem from the *Erie* question that the Supreme Court has deliberately left open.[168] Without clear guidance on this point, it is difficult to determine whether a federal court sitting in diversity should apply state or federal forum non conveniens law.

The *Can* court, which was sitting in diversity,[169] chose to apply federal law before stating that there would be no difference in the outcome whether it chose state or federal law.[170] The *Meijer* court, which dealt purely with federal issues,[171] would ostensibly not have had to deal with the state law question. Even so, the *Meijer* court acknowledged that there may have been "minor differences" in forum non conveniens law between the Third Circuit and the Tenth Circuit.[172] These differences likely come from state concerns.[173] Though the *Meijer* court claimed that the differences were "inconsequential," it still decided that the differences between the Third Circuit's analysis and its own analysis were significant enough to prevent res judicata from attaching.[174] Since both the *Can* court and the *Meijer* court were unable to articulate a clear formulation of the forum non conveniens doctrine to apply, it is again not surprising that they reached different conclusions, even if both courts ultimately reached the proper decision given the specific facts of each case.

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166. *See id.*

167. *See* Kevin M. Clermont, *The Story of* Piper*: Forum Matters*, *in* CIVIL PROCEDURE STORIES 199, 221 (Kevin M. Clermont ed., 2d ed. 2008).

168. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981). For a discussion of the *Erie* question, see *infra* Part III.C.

169. Can v. Goodrich Pump & Engine Control Sys., Inc., 711 F. Supp. 2d 241, 245 (D. Conn. 2010).

170. *Id.* at 252–53 n.17.

171. Meijer v. Qwest Commc'ns Int'l, Inc., No. 09-cv-00162-REB-KLM, 2010 WL 1348668, at *1 (D. Colo. Mar. 31, 2010).

172. *Id.* at *3.

173. *See* Windt v. Qwest Commc'ns Int'l, 544 F. Supp. 2d 409, 425 (D.N.J. 2008).

174. *Meijer*, 2010 WL 1348668, at *3.

III. The Forum Non Conveniens Issue

As evidenced by the lack of conformity in the issue definitions of the forum non conveniens analyses in *Can* and *Meijer*, it may be said that the doctrine itself is problematic at best. Without consistency between state and federal courts, and among federal courts, in defining the issue raised by a forum non conveniens motion, it becomes difficult to predict whether a decision will be binding on other courts or even if those courts will give it any weight. In order to determine which issue should be addressed when a party files a forum non conveniens motion, it is necessary to examine the federal and state forum non conveniens doctrines and the interplay between them.

A. Federal Law

In federal courts, the doctrine of forum non conveniens exists entirely in the realm of federal common law.[175] As such, the doctrine and its appropriateness to situations may change depending on recent court decisions or statutory enactments.[176] In addition, the Supreme Court, while indicating factors courts should consider in making forum non conveniens rulings,[177] has refrained from stating the relative weight that each factor should be accorded in all circumstances.[178] Consequently, each circuit has some degree of freedom in determining how to go about performing the balancing of interests inherent in a forum non conveniens ruling.[179] The Court, however, has made one overarching statement on the applicability of the doctrine: on the federal level, forum non conveniens is only applicable in cases where the alternate forum is abroad, or, in some instances, where a state or territorial court is involved.[180] In other words, the choice of forums is between a foreign jurisdiction and an American federal district court.[181]

This assertion stems from the existence of the federal venue transfer statute.[182] This statute allows a federal court to transfer a case to another

175. U.S.O. Corp. v. Mizuho Holding Co., 547 F.3d 749, 749 (7th Cir. 2008).

176. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 722 (1996) (stating that federal venue transfer statute has superseded the venue transfer function of the doctrine); Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994) (indicating that the federal venue transfer statute may make forum non conveniens inappropriate in situations where it had previously been used); Hoffman v. Blaski, 363 U.S. 335, 341–42 (1960) (indicating that the federal venue transfer statute "superseded" the doctrine of forum non conveniens), *superseded by statute*, Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011).

177. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508–09 (1947).

178. *See* Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001); Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 519–20 (2009); Samuels, *supra* note 26, at 1080–81.

179. *See, e.g.*, *Iragorri*, 274 F.3d at 71 (instituting the use of a sliding scale in determining the amount of deference to give a plaintiff's choice of forum).

180. Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 430 (2007); *Am. Dredging Co.*, 510 U.S. at 449 n.2.

181. Samuels, *supra* note 26, at 1081.

182. *Sinochem*, 549 U.S. at 430.

district for "the convenience of parties and witnesses . . . ."[183] Though a judge ruling on a transfer motion will apply criteria similar to those in a traditional forum non conveniens analysis,[184] the criteria are not by any means identical.[185] The differences have not, however, prevented judges from characterizing the statute as something akin to forum non conveniens.[186]

The Court has seemed to indicate that the similarities and interplay between forum non conveniens and the federal venue statute should create a system by which use of the statute affects domestic transfers and use of forum non conveniens affects international transfers.[187] This dichotomy in issues of convenience seems to imply that when a forum non conveniens motion is brought in federal court, the issue before the court is simply a choice between the United States as a forum and an international forum as the alternate forum. This is the view clearly espoused by the First Circuit.[188]

Assuming the First Circuit's view is uniform and correct, this would indicate that in any federal court the issue regarding a forum non conveniens motion is always a choice between a domestic and international forum. This view would also indicate that a single district court's ruling on a forum non conveniens motion should have preclusive effect throughout

183. 28 U.S.C. § 1404(a) (2012).

184. *See* Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 72 (1963) (per curiam).

185. For example, when a diversity case is transferred under the statute, the transfer is viewed, from the perspective of state law, as a "change in courtrooms." Van Dusen v. Barrack, 376 U.S. 612, 639 (1964). A case refiled after a forum non conveniens dismissal, on the other hand, will be subject to the substantive law of the transferred court. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 247 (1981). Similarly, where a court may require a defendant to consent to jurisdiction in an alternate forum before dismissing on forum non conveniens grounds, Hoffman v. Blaski, 363 U.S. 335, 364 (1960) (Frankfurter, J., dissenting), *superseded by statute*, Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011), it had been the rule that a defendant *must* be amenable to jurisdiction in the alternate forum under the transfer statute, *id.* at 344 (majority opinion). Congress, however, amended 28 U.S.C. § 1404 in 2011 to allow the parties to consent to jurisdiction in another forum. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764 (2011).

186. *See, e.g.*, *Van Dusen*, 376 U.S. at 623 (referring to the federal venue statute as the "forum non conveniens statute"); Lynch v. Vanderhoef Builders, 237 F. Supp. 2d 615, 616–17 (D. Md. 2002) (referring to a motion under 28 U.S.C. § 1404 as a "Motion to Transfer Based on Forum Non Conveniens"); Lii, *supra* note 178, at 516 (stating that the statute is a "codification of the doctrine of forum non conveniens for transfers between federal district courts"). It should be noted that though this kind of conflation occurs, and the two doctrines are similar, they ought to be kept legally distinct. 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2007).

187. *See Piper*, 454 U.S. at 252–55. Recently, Congress has attempted to make the distinction clearer by emphasizing that 28 U.S.C. § 1404 only applies to transfers between district courts and may not be used to transfer between district courts and territorial courts. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764 (2011).

188. Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 947–48 (1st Cir. 1991).

the country. Not all circuits, however, share the First Circuit's view.[189] Since there is a lack of agreement among the circuits as to the issue to be decided, only some forum non conveniens dismissals, at best, will have preclusive effect; the remainder, which may have been dismissed for local considerations, will not. This lack of uniformity has directly resulted in an inability of the courts to articulate exactly when a prior forum non conveniens dismissal should have preclusive effect.[190]

B. State Law

Unlike federal forum non conveniens law, state principles of forum non conveniens may stem from state common law[191] or statutes.[192] Fundamentally, each state is free to decide whether forum non conveniens should be available and how it should be applied according to its own notions of justice and fair play.[193] Regardless of the source of a court's authority to dismiss on forum non conveniens grounds, the decision is generally viewed as a choice between the state and an alternate forum.[194]

Whereas a federal district court may transfer a case anywhere in the country, state courts do not have the authority to transfer a case to a different state.[195] For states, a forum non conveniens dismissal is essentially the only way for a state to have proceedings moved from one state to either federal court or another state. The doctrine, therefore, plays a crucial role in allowing courts to manage their dockets and ensures that state resources are not wasted on cases that are better litigated elsewhere.[196]

Since the goals of state courts in using the forum non conveniens doctrine are not necessarily to force plaintiffs to file suit in a foreign country, a dismissal by a state court should not foreclose suit in the courts of a different state.[197] Furthermore, such a dismissal may not foreclose suit in a federal district court, even one in the same state.[198] On the state level, the choice of forum in a forum non conveniens analysis can be seen as a choice

189. *E.g.*, Windt v. Qwest Commc'ns Int'l, Inc. (*Windt II*), 529 F.3d 183, 191–92 (3d Cir. 2008); Mizokami Bros. of Ariz., Inc. v. Mobay Chem. Corp., 660 F.2d 712, 716 (8th Cir. 1981).

190. Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 HARV. L. REV. 2178, 2181 (2008).

191. *E.g.* Price v. Atchison, Topeka & Santa Fe Ry. Co., 268 P.2d 457, 460–61 (Cal. 1954) (in bank); Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1179 (R.I. 2008).

192. *E.g.* LA. CODE CIV. PROC. ANN. art. 123 (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2011).

193. Mo. *ex rel.* Southern Ry. v. Mayfield, 71 S.Ct. 1, 5 (1950).

194. *See, e.g.*, LA. CODE CIV. PROC. ANN. art. 123 (1999) (referring to "a more appropriate forum outside of this state"); TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008) (referring to the alternate forum as being "outside this state"); *Price*, 268 P.2d at 461 (discussing "transitory causes of action" that are better brought in other states); *Kedy*, 946 A.2d at 1187–88 (discussing the merits of allowing a case to continue in Rhode Island).

195. Cook v. Soo Line R.R. Co., 198 P.3d 310, 315 (Mont. 2008); Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 259 (1989).

196. *Price*, 268 P.2d at 461.

197. *See Cook*, 198 P.3d at 314.

198. *See* Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 73–74 (1963).

between a state court and a court outside of the state court system, which may be another state court, a federal court, or a foreign country.

Unfortunately, such a formulation of the issue causes difficulties when the defendant is amenable to service of process in a number of states and when the most convenient forum is outside the country. This situation may arise in a number of ways. For example, the suit may concern a civil wrong that occurred outside the country, or it may concern a suit brought under a federal statute (such as a securities case) that, for reasons of national policy, is better brought outside the country. In cases such as these, state courts may be fundamentally ill-equipped to route a suit to the appropriate (foreign) forum. Ideally, a single dismissal by a state court in these circumstances should foreclose suit nationally.

Such a result, however, would imply that a state, taking only local considerations into account, could effectively enjoin any other court from hearing a case that it would normally have authority to hear. The practical result would be to create two kinds of forum non conveniens dismissals—those that should have preclusive effect and those that should not. If a plaintiff were to refile a case that had been dismissed on forum non conveniens grounds in another U.S. court, the new court would have to determine which type of dismissal ended the prior action, arguably wasting judicial time and resources.[199]

C. Choosing State or Federal Forum Non Conveniens Law

Given that there are clear differences between federal and state approaches to forum non conveniens, a related problem arises in determining which law to apply in a given case. There are four primary situations where a court must decide which version of the doctrine to use: (1) a federal court deciding a federal question; (2) a federal court sitting in diversity; (3) a state court applying state law; and (4) a state court deciding a federal question. In the first and third of these four situations, the choice is relatively simple. A court applying federal substantive law should apply federal forum non conveniens law as well. Similarly, a state court applying state substantive law should apply state forum non conveniens law.

In the second case, the decision for federal courts sitting in diversity, the question falls under the *Erie* doctrine.[200] However, the Court has avoided explicitly answering the *Erie* question for forum non conveniens.[201] Consequently, courts have not consistently applied either state

199. There is evidence to indicate that courts are currently going through just such an exercise when dealing with cases that had previously been dismissed in other jurisdictions on forum non conveniens grounds. *See* Note, *supra* note 190, at 2181.

200. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). *Erie* has generally been interpreted to create a procedural/substantive divide in the choice of state or federal law when a court is sitting in diversity; if the law is substantive in nature, a court will apply state law, otherwise it is procedural and the court will apply federal law. Hanna v. Plumer, 380 U.S. 460, 465–66 (1965).

201. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 248 n.13 (1981).

or federal forum non conveniens law in this situation.[202] Though the Court claimed in *Piper Aircraft Co. v. Reyno* that the *Erie* question was not decided,[203] it may be argued that *Piper* actually did decide the *Erie* issue in favor of federal law.[204]

One issue which makes a choice of forum non conveniens law difficult in diversity cases is a dismissal's impact on subsequent litigation. If a court were to apply federal law and dismiss the case, the implication would be that a plaintiff would be foreclosed from filing suit in any other district in the country, but would still be able to file suit in other state courts, essentially allowing plaintiffs to engage in forum shopping behavior.[205] At the same time, a federal court would have the option of simply transferring a case rather than dismissing it.[206] The Court has indicated that a prior dismissal by a state court for forum non conveniens does not divest a federal court of the authority to hear a case.[207] Allowing this kind of preclusion in conjunction with the existence of the transfer statute would potentially create some very odd situations.

For example, a plaintiff who files in Florida state court when Illinois is a more convenient forum would likely have his case dismissed on forum non conveniens grounds. If he were to then file in federal court in Florida and have his case transferred to a district court in Illinois, the defendant may attempt to raise the issue of forum non conveniens. Since the Illinois federal court is a transfer court, it would be bound to apply Florida forum non conveniens law.[208] This would mean that the court in Illinois would dismiss a case because Illinois was the more convenient forum. After the dismissal, the plaintiff would then have to refile in Illinois to allow the suit to progress. This result would make the transfer statute useless in such cases. In addition, the Court consistently treats forum non conveniens as a threshold question, akin to subject matter jurisdiction and personal jurisdiction, indicating that it views forum non conveniens as a purely procedural matter.[209] This would imply that courts should apply federal forum non conveniens law in all circumstances.[210]

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202. *See, e.g.*, Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985) (applying federal forum non conveniens law); Weiss v. Routh, 149 F.2d 193, 195 (2d. Cir. 1945) (applying state law in determining whether to accept jurisdiction); McAllen, *supra* note 195, at 263.

203. *Piper*, 454 U.S. at 248 n.13.

204. Since *Piper* was a diversity case, and the Court decided a federal matter of forum non conveniens, the *Erie* question was implicitly decided in favor of federal law. Clermont, *supra* note 167, at 221.

205. Bestor v. Costa Crociere, S.P.A., 128 F. Supp. 2d 1356, 1365 (S.D. Fla. 2000), *rev'd sub nom.* Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300 (11th Cir. 2002).

206. 28 U.S.C. § 1404(a) (2012).

207. *See* Parsons v. Chesapeake & Ohio Ry. Co., 375 U.S. 71, 73–74 (1963).

208. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

209. *See* Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 549 U.S. 422, 432 (2007); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 721–23 (1996).

210. In *Sinochem*, the Court appears to have been more explicit than it had been in the past in explaining when forum non conveniens should be used in federal courts. *Sinochem*, 539 U.S. at 430. The Court's adoption of the maxim that forum non conveniens only applies in cases where the alternate forum is abroad, or in state or territo-

The fourth case, a state court deciding a federal issue, presents similar problems. If a claim is better brought in a different district or state, a state court, unlike its federal district counterpart, has no way to transfer the case to the more convenient district.[211] The only way to affect this transfer is through a forum non conveniens dismissal. This would imply that in this situation, a state court dismissal on forum non conveniens grounds should not be preclusive on a state or federal court in a different district. At the same time, if the more convenient forum is abroad, this would imply that the same federal issue could be raised in multiple states and once in federal court. Again, such a situation is arguably inefficient.

IV. Proposed Solution

Based on how the doctrine currently stands, there are a number of issues with the operation of forum non conveniens in international litigation. At the moment, neither the Supreme Court nor Congress has explicitly stated when a court should apply federal forum non conveniens law and when it should apply state forum non conveniens law. Furthermore, the states' current inability to transfer cases between themselves creates an implicit lack of finality in any forum non conveniens dismissal in state court. In situations where a new case is filed in either another state or another district, courts tend to define the issue in awkward ways to satisfy res judicata considerations.[212] Any solution should therefore address three issues: (1) how federal courts should handle forum non conveniens; (2) how states should handle forum non conveniens; and (3) how state and federal courts should apply the doctrine in cases where they are not applying their own law (i.e., a federal court applying state law or a state court applying federal law).

Ideally, there should be symmetry and consistency between state and federal courts. To this end, there should be a state-level analog to the federal transfer statute. The existence of such a statute would alleviate the need of state courts to use forum non conveniens to transfer litigation from one state to another. Furthermore, the transfer statute could either allow the new forum to apply the original state law or to apply its own state law. In all likelihood, the statute would mirror its federal analog in all ways, including choice of law. The Court seems to approve of this approach, stating that there should not be a change of law "bonus" for a change of venue.[213] Otherwise, the statute may be used as a forum shopping instrument.[214]

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rial court, calls a number of prior decisions into question. *Id.* Any decision which relied on a forum non conveniens dismissal in federal court for purely local considerations may effectively be overruled by *Sinochem*.

211. *See* McAllen, *supra* note 195, at 259.

212. *See, e.g.*, Pastewka v. Texaco, Inc., 420 F. Supp. 641, 646 (D. Del. 1976). For a more thorough discussion of *Pastewka*, see *supra* Part I.C.

213. Van Dusen v. Barrack, 376 U.S. 612, 635–36 (1964).

214. *See id.*

There is, however, the question of how such a state-level transfer statute could be implemented. One option would be for the states to independently agree to such an arrangement. In this case, each state would need to pass its own venue-transfer statute, allowing a transfer from the state into any other state that has passed a similar venue-transfer statute and allowing the transfer of any case into the state. Such a measure would likely be difficult to pass since a single state could conceivably scuttle the process.[215] Alternatively, the federal government could pass a universal venue-transfer law. Such a law could likely be passed under the Necessary and Proper Clause of the Constitution.[216]

Once such a uniform venue-transfer statute is in place, there would be no need for a bifurcated forum non conveniens issue on the state level—either the United States is the appropriate forum or the appropriate forum is abroad. This would create a situation where states would always apply federal forum non conveniens law. The practical consequence of this would be that a single dismissal in any forum in the United States on forum non conveniens grounds would preclude suit in any other forum in the country. This would create a national, uniform system that courts could use to route cases to the appropriate court. If the appropriate court is domestic, a defendant or the court would be able to move the case from state court to any other court in the country without the need for the plaintiff to re-file the claim.

On the federal level, the federal venue transfer statute already takes the place of forum non conveniens for domestic transfers. Though a number of courts and the Supreme Court already look at the transfer statute in this way,[217] some courts have ignored it in the context of forum non conveniens.[218] In order to harmonize the transfer statute and forum non conveniens, the plaintiff, when faced with a motion to dismiss on forum non conveniens grounds, should have the opportunity to move for transfer under the federal transfer statute. If another district is indeed more convenient than the foreign forum, then the court may simply transfer the case. Otherwise, the court may choose to dismiss the case in its entirety. Such a dismissal would then foreclose action in any other state or federal district. If a plaintiff fails to raise the option of transfer, then it may be presumed to be waived. This is consistent with other procedural defenses, such as lack of personal jurisdiction or improper venue.[219]

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215. There is precedent to indicate that, when necessary, states can pass uniform laws consistent with one another. *See, e.g.*, BLACK'S LAW DICTIONARY 1668 (9th ed. 2009) ("The [Uniform Commercial] Code has been adopted in some form by every state and the District of Columbia.").

216. U.S. CONST. art. 1, § 8, cl. 18. Alternatively, it may be possible to pass such a law under the Full Faith and Credit Clause or the Commerce Clause. *See* McAllen, *supra* note 195, at 259.

217. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (referring to the federal venue transfer statute as a "'federal housekeeping measure'").

218. *See, e.g.*, Windt v. Qwest Commc'ns Int'l, Inc. (*Windt II*), 529 F.3d 183, 192 (3d Cir. 2008).

219. *See* FED. R. CIV. P. 12(h).

This approach of having state and federal courts apply the same forum non conveniens law would also eliminate the *Erie* question. If there is no state forum non conveniens law at all—the effective result of enacting a national venue-transfer statute—then there can never be a choice between state and federal law. Though it may be considered unusual for a state to have a federal doctrine inserted into its procedural jurisprudence, it would be beneficial for purposes of justice, judicial economy, and international relations. Under such a unified approach, the issue of the most convenient forum would be litigated exactly once. The decision would be binding on both parties and would serve to discourage forum shopping. It would not allow a plaintiff to attempt to bring suit in his "second choice" of forum. In addition, the certainty created by the decision would allow both parties to stop litigating the venue and begin litigating the merits of a case, serving to bring cases to conclusion in a timely manner.

As applied to the cases discussed above, the proposed solution would create some different results. The most striking impact would be on the Dow Chemical Cases.[220] There, the case had first been dismissed in Florida district court on forum non conveniens grounds.[221] The plaintiffs then refiled two more times before having the case end up in Texas.[222] Under the proposed solution, the first dismissal in Florida would have preclusive effect in every subsequent case. It is notable that at the time of the suit, Texas did not allow forum non conveniens dismissals in state courts.[223] This was one of the primary reasons why the plaintiffs opted to file suit there.[224] As applied, the proposed solution would not allow a state to be able create a blanket prohibition on forum non conveniens dismissals. As noted above, this would give priority to national interests and judicial conformity for international issues.

While not affecting the outcome, this solution would also impact some of the core reasoning in the Texaco Cases.[225] In its decision, the *Pastewka* court focused on whether the previous and current forum non conveniens issues were the same "for all practical purposes."[226] This framing of the issue was effectively a tool to create identity when there had not been any identity before. While creating this legal fiction, the court was quick to emphasize that preclusion would not attach in all cases and that whether or not two issues were identical was a fact-specific inquiry.[227] Under the proposed regime, there would be no need for a court to embark on such an inquiry because the issues will always be identical. While the outcome here would remain unchanged, a stronger rule could emerge which removes much uncertainty from the equation.

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220. *See supra* Part I.A.
221. Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1217 (11th Cir. 1985).
222. Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 697 (Tex. 1990) (Cook, J., dissenting), *superseded by statute*, TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 2008).
223. *Id.* at 679 (majority opinion).
224. *See id.* at 697 (Cook, J., dissenting).
225. *See supra* Part I.C.
226. Pastewka v. Texaco, Inc., 420 F. Supp. 641, 646 (D. Del. 1976).
227. *Id.*

The results in *Can v. Goodrich Pump & Engine Control Systems, Inc.*[228] and *Meijer v. Qwest Communications International*,[229] while both likely rightly decided given the initial forum non conveniens rulings in each case,[230] would also change under the proposed regime. As discussed above, each court likely framed the forum non conveniens issue incorrectly. The original court in *Can*, which was a state court, should have dismissed the case on purely state-based concerns. The *Meijer* court, which was a federal court deciding a federal question, should have dismissed the case based on national concerns. Instead, the *Can* court opted to dismiss its case based on national concerns,[231] and the *Meijer* court dismissed its case based on local concerns.[232] Application of the new approach would result in the dismissal of both cases based on national concerns. The net result would be that any subsequent cases would be precluded.

If state and federal courts were to adopt this solution, which allows for transfers between state and federal court, and among state courts, courts at all levels could then reserve the doctrine of forum non conveniens for purely international matters. This would result in creating certainty in litigation, predictability for court access, and consistency in court treatment of foreign plaintiffs and defendants.

Conclusion

As it currently stands, the doctrine of forum non conveniens has served to frustrate both plaintiffs and defendants while failing to serve the goals of justice. As shown above, a forum non conveniens dismissal may either foreclose suit in the United States or simply foreclose suit in a single court. Given that determining where a subsequent suit is foreclosed tends to be difficult, a defendant's use of forum non conveniens may have the effect of increasing the duration of a single suit and adding uncertainty to the proceedings. Neither effect is desirable. Limiting forum non conveniens to international cases, while simultaneously introducing mechanisms to transfer cases between state courts, as well as federal courts, would introduce certainty into forum non conveniens litigation. The doctrine's use would then serve its fundamental purposes of preventing a plaintiff from using a forum to vex, harass, or oppress a defendant and of limiting administrative issues in courts.

228. Can v. Goodrich Pump & Engine Control Sys., Inc., 711 F. Supp. 2d 241 (D. Conn. 2010).

229. Meijer v. Qwest Commc'ns Int'l, Inc., No. 09-cv-00162-REB-KLM, 2010 WL 1348668 (D. Colo. Mar. 31, 2010).

230. *See supra* Part II.

231. *Can*, 711 F. Supp 2d at 256.

232. *See Meijer*, 2010 WL 1348668, at *3.