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Papciak v. Richardson-Merrell Inc.--The Case for a Borrowing Statute

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PAPCIAK V. RICHARDSON-MERRELL INC.— THE CASE FOR A BORROWING STATUTE

I. SCOPE

In *Byrd v. Blue Ridge Rural Electric Co-operative*[1] the Supreme Court of the United States established a new test for determining if state procedural rules were to be followed in federal courts. The test comprehended the doctrine of "countervailing federal considerations:" state procedure would be followed in federal courts if the state policy reasons for such procedure outweighed the federal considerations against applying it and in favor of using another procedure.

The Fourth Circuit in *Szantay v. Beech Aircraft Corp.*[2] applied the rationale of *Byrd* and concluded that a state statute[3] designed to close the door of the state courts to non-residents suing foreign corporations on causes of action arising outside the state, the subject matter of which is also outside the state, would not bar such an action from a federal court sitting within the state. This decision was relied upon in *Papciak v. Richardson-Merrell Inc.*,[4] a recent unreported case in the District Court of South Carolina. In *Papciak* the court followed *Szantay* in allowing a plaintiff to choose a favorable statute of limitations and at the same time to bar the application of the state door closing statute.

The problem is best posed by assuming the following facts. Doe, a resident of Pennsylvania, was struck by a truck in Kentucky. The truck belonged to Acme Movers, a Delaware corporation doing business in all states. By the time Doe brought an action against Acme in Kentucky, the Kentucky statute of limitations had run. In the Kentucky forum, therefore, Doe had no remedy: likewise, in Pennsylvania, his residence, the statute of limitations had run. The practical question remaining is

1. 356 U.S. 525 (1958).
2. 349 F.2d 60 (4th Cir. 1965).
3. In South Carolina the "door closing" statute provides:
> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) By any resident of this State for any cause of action; or (2) By a plaintiff not a resident of this State when the cause of action shall have arisen or the subject of the action shall be situated within this State.

S.C. CODE ANN. § 10-214 (1962).
4. No. 67-219 (D.S.C., Jan. 24, 1968).

whether Doe may now choose another forum to bring his suit. It is this consideration which illustrates the implications of *Szantay* and *Papciak*.

It is the purpose of this note to bring these implications to light and to explore alternatives to the reasoning and solutions offered in these cases.

II. BACKGROUND

The necessary foundation for a grasp of this problem of choosing state forums includes at the minimum some understanding of *Erie Railroad v. Tompkins*[5] and *Guaranty Trust Co. v. York*.[6] *Erie* held that state substantive law is controlling upon a federal court sitting in that state whether or not the law was formulated by the legislature or the courts of the state. A great deal of confusion evolved from the elusive distinction between substantive and procedural law. In *York* the Supreme Court held that if the outcome of the case would be substantially affected by following state procedure, then the federal court could not apply federal procedure but must adhere to state procedure.[7]

Byrd v. Blue Ridge Rural Electric Co-operative[8] modified the position taken in *York*. In *Byrd* the question was whether, in a workmen's compensation case, a judge rather than a jury was to make certain factual determinations. The South Carolina court had ruled that in such cases[9] it was reversible error to allow the questions in dispute to be determined by a jury. The question in *Byrd* was whether the federal court should follow the state procedure and allow the presiding judge to decide the factual issues or to turn this duty over to the jury as was the procedure in federal courts.

The Supreme Court could find no strong state policy reason for the South Carolina court's holding. Since the outcome of this case was not substantially affected by allowing the jury rather than the judge to be the trier of fact, the countervailing

5. 304 U.S. 64 (1938).
6. 326 U.S. 99 (1945). For a discussion of this problem see Ziegler, Knowlton, Gibbs & Randall. *Erie Railroad v. Tompkins, Revisited,* 17 S.C.L. REV. 467 (1965): C. WRIGHT, FEDERAL COURTS 187-218 (1963).
7. 326 U.S. at 109-10.
8. 356 U.S. 525 (1958).
9. *E.g.,* Horton v. Baruch, 217 S.C. 48, 59 S.E.2d 545 (1950); Younginer v. J.O. Jones Constr. Co., 215 S.C. 135, 54 S.E.2d 545 (1949); Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 51 S.E.2d 744 (1949); Gordon v. Hollywood-Beaufort Package Corp., 213 S.C. 438, 49 S.E.2d 718 (1948).

federal considerations which were present would take precedence. The countervailing federal consideration in this case was the federal constitutional right to a jury trial. This doctrine can be more easily understood upon an examination of *Szantay*.

Szantay involved a suit against Beech Aircraft Corporation, a Delaware corporation, by non-residents of South Carolina in the United States District Court for the Eastern District of South Carolina. On April 1, 1962, Szantay and all the passengers aboard his private airplane were killed when the plane crashed in Tennessee. The plane was en route to Chicago, Illinois, from a servicing stopover in Columbia, South Carolina. All of the victims were citizens of Illinois.

It was alleged that the deaths were caused by the negligence of Beech in both the manufacture and design of the aircraft and the negligent servicing of Dixie Aviation Co. while the plane was in Columbia. Beech moved for a dismissal "on the ground that a federal diversity court sitting in South Carolina lacks jurisdiction over Beech because of South Carolina's 'door-closing' statute . . . ."[10] The Fourth Circuit Court of Appeals, in an opinion by Judge Sobeloff considered this question of following state procedure in federal courts and in so doing made the following conclusions:

1. If the state provision, (here the door closing statute) whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.
2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity.[11]

Both sides in the litigation conceded that the "door closing" statute was procedural and that since the substantive rights

10. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 62 (4th Cir. 1965).
11. *Id.* at 63, 64.

asserted arose under Tennessee law, according to a South Carolina conflict of laws rule,[12] the South Carolina procedural rule could therefore not be intimately bound up with that right. These conclusions left open only alternative number three: would applying the state procedural provision "substantially affect the outcome of the litigation?"

It is obvious that in using the state procedural rule the outcome will be substantially altered: the "door closing" statute would prevent the plaintiff from maintaining his suit in any state court and if applied in federal court would have the same result. However, this analysis requires the application of one more criterion —the test of "countervailing federal considerations." In applying that test the fourth circuit could find no state policy reason underlying the South Carolina "door closing" statute. The court suggested several policy reasons which could have been the basis of the statute but found that at most "the state's reason for enacting its 'door closing' statute is uncertain."[13] Balanced against this uncertainty were explicit federal considerations, the strongest being the purpose of Article III, section 2 of the United States Constitution to avoid discrimination against nonresident litigants. The court conceded that South Carolina's "door closing" statute did not violate the Constitution, but this was not enough to deter the court from determining that the federal considerations more than countervailed the unclear state policy.

From *Byrd*, which decided what procedural rule would be followed in a federal court, to *Szantay*, which using the same reasoning as *Byrd*, determined that a case could in fact be entertained in federal court although it would not be heard in the state court, was a determinative step in the progression toward the problem which was ultimately to be framed in *Papciak*.

III. DEVELOPMENT

Papciak involved the sale of drugs in the state of Pennsylvania by Richardson-Merrell, a national drug firm. Papciak, a citizen of Pennsylvania, was injured when he took one of the drugs

12. *See generally* Randall, *The Erie Doctrine and State Conflict of Laws*, 17 S.C.L REV. 494 (1965). On the South Carolina rule see Rauton v. Pullman Co., 183 S.C. 495, 191 S.E. 416 (1937); Smith v. Southern Ry. Co., 87 S.C 136, 69 S.E. 18 (1910), which state generally that recovery on tort is determined by the law of state wherein injury was sustained.

13. Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965).

manufactured by Richardson-Merrell. He failed to bring suit in Pennsylvania within that state's two year statute of limitations for torts.[14] Sometime after the Pennsylvania statute had run but before six years had elapsed, the action was brought in the District Court of South Carolina. The court ruled that it had jurisdiction over the cause of action and issued an order to that effect. An interlocutory appeal to the fourth circuit was refused.[15] The result, which was to allow a federal court to use one state procedural rule and seemingly ignore another state procedural rule, seemed to present an unjustifiable situation.

The district court's basis for its order was found in alternative number three of Judge Sobeloff's *Szantay* opinion. The "door closing" statute was "countervailed" by federal considerations. The federal considerations were the same as in *Szantay;* particularly the concern of the federal court about discrimination between residents and non-residents in a state's courts. In its immediate impact *Papciak* seems to mirror the *Szantay* determination as to which procedure is to be followed. On closer examination, however, the issue of which state's statute of limitations is to prevail, while present in *Papciak*, never arose in *Szantay* and operates to distinguish the two cases.

To more fully understand the situation, a discussion of the two "door closing" cases which have been decided in the Supreme Court will be helpful. In *Angel v. Bullington*,[16] Bullington, a citizen of Virginia, sold land situated in Virginia to Angel, a citizen of North Carolina. The transaction involved a series of notes running from Angel to Bullington, which were secured by a deed of trust on the land transferred. Upon default by Angel, Bullington called upon the trustees to sell the land and apply the proceeds to the notes due. After this was done, Bullington sued for the deficiency still remaining in the Superior Court of Macon County, North Carolina, and was met by a demurrer on the grounds that North Carolina law precluded recovery of such a deficiency judgment. The statute prohibited obtaining a deficiency judgment after the execution of powers in a deed of trust.[17] The North Carolina Supreme Court[18] held that the

14. PA. STAT. ANN. tit. 12 § 34 (1953). This two year statute was held applicable, rather than the six year limitation under title 12, § 31 for breach of warranty or contract, in an action for claims resulting from the injection of an allegedly defective antibiotic supplied for injection into the bodies of human beings. Ravetz v. Upjohn Co., 138 F. Supp. 66 (E.D. Pa. 1956).
15. Misc. No. 500 (4th Cir., filed March 5, 1968).
16. 330 U. S. 183 (1947).
17. *Id.* at 185.
18. Angel v. Bullington, 220 N.C. 18, 16 S.E.2d 411 (1941).

statute barred Bullington's suit, even though such a result effectively shut the doors of all North Carolina state courts to Bullington. Bullington then brought his action to federal court, where he was allowed to prosecute the suit.[19] The Fourth Circuit Court of Appeals affirmed.[20] The Supreme Court reversed on certiorari.[21]

The High Court's decision was based on two distinct elements, the first being that the North Carolina Supreme Court decision was res judicata. In its second line of reasoning the court stated that it would be "incongruous" to assume that the North Carolina court and legislature intended to close all remedies in state courts to its citizens in similar cases while leaving the door open to citizens of other states in the federal courts of North Carolina. Another reason given for reversal was that a statute upheld by the highest court of the state is expressive of state policy and that

> [t]he essence of diversity jurisdiction is that a federal court enforces state law and state policy . . . . What is more important, diversity jurisdiction must follow state law and policy. A federal court in North Carolina, when involved on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction . . . is not to effect discrimination against the great body of local citizens.[22]

The second case, *Woods v. Interstate Realty Co.*[23] involved an action in the district court sitting in Mississippi, by a Tennessee corporation, against a resident of Mississippi for brokers commission allegedly due for sale of real estate situated in Mississippi. The district court held that since the Tennessee corporation had not qualified to do business in Mississippi it could not avail itself of Mississippi state courts. The district court dismissed with prejudice. The court of appeals reversed, relying upon *David Luptons' Sons Co. v. Automobile Club of America*,[24] a case which the Supreme Court in *Angel* had announced as "obsolete."[25]

19. *Id.*, 56 F. Supp. 372 (W.D.N.C. 1944).
20. *Id.*, 150 F.2d 679 (4th Cir. 1945).
21. *Id.*, 326 U.S. 713 (1946).
22. *Id.*, 330 U.S. 183, 191-192 (1947).
23. 337 U. S. 535 (1949).
24. 225 U.S. 489 (1912).
25. 330 U.S. at 192.

The Supreme Court reversed, holding that the suit by the Tennessee corporation was barred in federal as well as state courts in Mississippi. The Court went on to say that to hold otherwise would be to discriminate in favor of a non-citizen in diversity actions and that "it was that element of discrimination that Erie R. Co. v. Tompkins was designed to eliminate."[26]

In *Szantay* and *Papciak* the South Carolina "door closing" statute was held to limit state jurisdiction over *all* causes of action arising outside of the state against foreign corporations, not for all plaintiffs, but only for *non-resident* plaintiffs; whereas the same law was applied to all litigants in *Angel*.[27] In *Woods* the non-resident plaintiff corporation was made subject to the same burdens as a domestic corporation as a prerequisite to entertain a suit in the courts of Mississippi. To hold otherwise than to disallow the suit in federal court would permit the action, and thereby result in discrimination in favor of non-resident corporations, allowing them to enjoy an immunity unavailable to domestic corporations.

It was also contended that there was no practical reason for diversity jurisdiction in *Papciak* as there was in *Szantay*. In *Szantay*, South Carolina was the only forum in which all parties to the action could be joined, for no other forum could obtain jurisdiction over Dixie Aviation, the South Carolina corporation. No such consideration was present in *Papciak;* yet this type of reasoning, although persuasive on its face, has no basis when applied to the tests set forth by Judge Sobeloff in *Szantay*.

The defendant, after failing to distinguish *Papciak* from *Szantay* in order to apply *Angel*, *Woods* and similar cases, attempted to establish the position that

> [i]n any event, the plaintiff can suggest no plausible basis for his incongrous contention that he is entitled to ignore one South Carolina statute to revive his action, otherwise barred under the law of his home state of Pennsylvania where it arose.[28]

Trying still another tack, the defendant submitted that South Carolina's "door closing" statute may be an expression of a rule of *forum non conveniens*, which if true could require the federal

26. Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949).
27. Plaintiffs' Supplemental Brief on Motion to Dismiss at 5, Papciak v. Richardson-Merrell, Inc., No. 67-219 (D.S.C., Jan. 24, 1968).
28. Defendants' Supplemental Brief on Motion to Dismiss at 3, Papciak v. Richardson-Merrell, Inc., No. 67-219 (D.S.C., Jan. 24, 1968).

court sitting in Pennsylvania, due to change in venue, to apply Pennsylvania law rather than South Carolina law. To apply South Carolina law would be to ignore the manifest state desire not to entertain the case in any manner. This application of Pennsylvania law would result from the obligation of the federal court to determine how the South Carolina court would dispose of a case, jurisdiction over which had been pointedly denied. Would South Carolina in such a situation apply its own statute of limitations? The defendant contended it would not and that it would be reasonable to assume the "contact of action theory"[29] would be applicable. This theory advances the proposition that the law of the site of the greatest number of "contacts" with the action should prevail.

Perhaps the stronger argument is based on the federal policy against forum shopping. This policy was evident in *Erie*. "The Erie decision was also in part a reaction to the practice of 'forum shopping' which had grown up in response to the rule of Swift v. Tyson."[30]

Logically, a "forum shopping" argument would give strong support for enforcing a state "door closing" statute. However, to assert this position on the basis of previous cases which had dealt with the matter of forum shopping would be to build on a flawed foundation. In the past the forum shopping discussion has referred to the choice between federal and state courts sitting within a given state and not federal courts sitting in different states.

Federal court forum shopping has apparently been approved, at least after a fashion. In *Van Dusen v. Barrack*[31] it was stated:

> Of course these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing however, in the language or policy of Section 1404(a)[32] to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient was a proper venue . . . .

29. For a complete discussion of this theory see Note, *The Grouping of Contacts—An Innovation In The Conflict of Laws*, 18 S.C.L. Rev. 453 (1966).
30. Hanna v. Plumer, 380 U.S. 460, 467 (1965).
31. 376 U.S. 612 (1964).
32. 28 U.S.C. § 1404(a) (1964). For the convenience of parties and witnesses and 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.

> In passing Section 1404(a) Congress was primarily concerned with the problems arising where, despite the propriety of the plaintiffs' venue selection, the chosen forum was an inconvenient one . . . . Section 1404(a) was not designed to narrow the plaintiffs' venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege . . . .[33]

This apparent approval was not rendered in a situation analogous to *Papciak;* however, it seemed to be persuasive in the district court order:

> Having selected South Carolina as the forum for bringing his action, plaintiff is entitled to whatever benefits may flow from the laws of the state. Under South Carolina law the law of the forum governs the statute of limitations to be applied. Accordingly, in changing venue to Pennsylvania, the South Carolina Statute of Limitation should apply.[34]

IV. CONCLUSION

Restating briefly the controlling view of *Szantay* and *Papciak*: When a non-resident plaintiff sues a foreign corporation on a cause of action arising outside of the forum state and that state has a "door closing" statute, that statute will not be effective in keeping the litigation out of federal courts in the state because of countervailing federal considerations, *i.e.*, discrimination between residents and non-residents. Once the case is in a federal court, that court must look to the state's conflict of laws rule to determine what law is to be applied. So even in ignoring the state's procedural "door closing" statute, the federal court may, depending upon the state conflicts rule, enforce the forum state's statute of limitations. This will remain true even if for some reason venue is changed in accordance with section 1404(a).

A practical solution to this problem in South Carolina lies in the state's adopting different conflict of laws rules to apply

33. Van Dusen v. Barrack, 376 U.S. 612, 633-34 (1964).
34. Order at 4, Papiak v. Richardson-Merrell, Inc., No. 67-219 (D.S.C., Jan. 24, 1968).

when litigation is solely between non-residents.[35] Such different conflict of laws rules could be effected by means of what is commonly called a "borrowing statute." In this case a borrowing statute would have operated to make the Pennsylvania statute of limitations applicable in the federal court in South Carolina and thereby to have barred the action in the federal court.

Based upon existing law, however, the outcome of *Papciak* is eminently correct. Although at first blush it seems unreasonable to allow the fifty states of the United States to become market places for favorable statutes of limitations, this is not necessarily the result. Each state may adopt "borrowing statutes," but until they do, the right of the plaintiff to choose the forum and all benefits flowing to the plaintiff because of that choice must be upheld. The right of "forum choosing" must not be confused with the abuse of "forum shopping."

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35. Another solution could possibly have been obtained had the court in *Szantay* followed the earlier South Carolina case of Lightfoot v. Atlantic Coast Line R.R., 33 F.2d 765 (E.D.S.C. 1929). In that case an action was brought in the state court by a non-resident against a foreign railway company. Defendant demurred on jurisdictional grounds on removal to the federal court and the demurrer was sustained. The court held that it would consider itself bound by the interpretation of the South Carolina Supreme Court in Central R.R. & Banking Co. v. Georgia Constr. & Inv. Co., 32 S.C. 319, 11 S.E. 192 (1890), which held that a non-resident could sue a foreign corporation only in the two instances specified in the door closing statute. The jurisdiction granted to the federal courts was said to be derivative and therefore that federal courts should adhere to South Carolina law.