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A silhouette of a man in a suit and tie, pointing with his right hand towards a coordinate system. The coordinate system consists of a horizontal axis and a vertical axis, both with tick marks. Several circular icons, each containing a stylized building with columns (representing a court), are scattered around the axes. The background is a light yellow grid pattern.

**When Does  
Forum 'Selection'  
Become 'Shopping'?**

# 'Forum Selection' or 'Forum Shopping': Framing the Divide



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**I**N WAYS LARGE AND SMALL, the forum selected for a commercial dispute can affect the course of a litigation.

Where the federal courts of appeals are divided on the meaning of an essential element of a federal statutory claim, the venue of an action can determine its outcome. Where the dispute involves parties from opposite sides of the nation, the venue can affect the relative disruption the lawsuit will bring to each side.

And, since litigation generally signals that acrimony has displaced cooperation in a business relationship, the venue secured by the plaintiff upon commencing the action or by

the defendant if successful in a challenge to that venue can affect the psychological "momentum" in the ongoing dispute.

For these and other reasons, "forum selection" should be an essential element in the strategy decisions made by the litigator responsible for commencing a commercial action and by the litigator responsible for responding to a newly filed action. Yet, in assessing the available alternative forums and in weighing the likelihood of securing the preferred one, a litigator will likely encounter the strain in the case law that speaks of "forum shopping" in a pejorative manner.

Are "forum selection" and "forum shopping" two ways of describing the same process, or do these phrases describe two different practices? The inquiry is complicated by how courts use the words "forum shopping," sometimes to describe conduct that is predictable and proper (or, at least, tolerable) but other times to describe conduct that is disfavored if not unacceptable.

This article attempts to frame the divide between venue strategies that courts accept (which can be called "forum selection") and

those that they decry (and appropriately label as "forum shopping").

The starting point is the exploration of options. The current federal general venue statute provides two principal bases for establishing venue: (a) "a judicial district where any defendant resides, if all defendants reside in the same State," and (b) "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."<sup>1</sup>

The Second Circuit has confirmed that "the civil venue statute permits venue in multiple judicial districts as long as 'a substantial part' of the underlying events took place in those districts."<sup>2</sup> Commercial disputes often unfold with substantial events taking place in two or more districts around the country, setting up a choice between different federal districts.

For a host of state law claims, a party may choose between a state court and a federal district court if subject matter jurisdiction exists for a federal action; for a variety of federal claims, there is concurrent jurisdiction in state and federal courts.

The federal venue statute not only creates options; it imposes limits. As stated by the U.S. Supreme Court, "the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial."<sup>3</sup> Put more directly as to the current venue statute, the requirement that at least "substantial" events or omissions occurred in a district protects a defendant against being "haled into a remote district having no real relationship to the dispute."<sup>4</sup>

Apart from these limits, Congress enacted the transfer statute, which permits a defendant sued in a proper venue to seek to move the action to a district preferred by the defendant "[f]or the convenience of parties and witnesses, in the interest of justice."<sup>5</sup>

Courts occasionally state that the venue statute permits a plaintiff to choose a forum that has the most favorable law and/or is most convenient for the plaintiff. In *Van Dusen v. Barrack*, decided in 1964, the Supreme Court held that where a diversity action is transferred for convenience "the transferee district court must be obligated to apply

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the state law that would have been applied if there had been no change of venue.”<sup>6</sup> The Court found nothing “in the language or policy” of the transfer statute “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 forum.”<sup>7</sup>

The Court revisited the transfer statute in 1990, this time holding that the rule of *Van Dusen* applied even when a plaintiff brought the transfer motion; the Court noted that “[a]n opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws” and that a plaintiff who brought suit and then sought transfer “already has the option for shopping for a forum with the most favorable law.”<sup>8</sup>

Quite recently, the Second Circuit commented that “[a]ny lawyer who files a case on behalf of a client must consider which of the available fora might yield some advantage to his client, and thus, to that degree, engages in ‘forum shopping.’”<sup>9</sup> And here is some practical advice from a South Dakota district court: “When an actual controversy exists and cannot be resolved by a settlement, someone is going to walk, if not run, to the courthouse” and that the “only thing worse than being sued is being sued away from home.”<sup>10</sup>

### Further Words From the High Court

The Supreme Court last term in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* issued a decision of great practical importance in New York that “will produce forum shopping.”<sup>11</sup>

In *Shady Grove*, a purported class action was brought in the Eastern District of New York seeking to recover statutory interest under New York’s Insurance Law on overdue insurance payments. Had the action been brought in state court, CPLR 902(b) would have precluded the recovery of the statutory interest “penalty” on a class basis.

The district court, applying CPLR 902(b)’s preclusion to the state claim brought in federal court, dismissed the action for lack of subject matter jurisdiction on the basis that, without the statutory penalty, the amount-in-controversy requirement for diversity jurisdiction could not be met. The Second Circuit affirmed, treating CLPR 902(b) as “substantive” within the meaning of *Erie R. Co. v. Tompkins*.<sup>12</sup>

The Supreme Court reversed without a majority opinion, but Justice Antonin Scalia’s

plurality opinion makes the point for present purposes: “We must acknowledge the reality that keeping the federal-court door open to actions that cannot proceed in state court will produce forum shopping.”<sup>13</sup> *Shady Grove* excellently illustrates how a choice of forum can affect the outcome of an action: a statutory penalty created by New York’s Legislature might be sought on a class-wide basis in federal court but not in New York state court.

Just a month before *Shady Grove*, the High Court directed district courts to be vigilant against manipulation of federal statutes that affect the choice of forum. *Hertz Corp. v. Friend*<sup>14</sup> concerned the federal diversity jurisdiction statute, rather than the venue statute.

The Court resolved a conflict among the circuits on the meaning of a corporation’s “principal place of business” for diversity jurisdiction, holding that the proper test is the corporation’s “nerve center,” typically its corporate headquarters. The Court rebuffed an argument that a corporation might establish its nerve center merely by the address used for securities law filings. Justice Stephen Breyer, for the unanimous Court, stated:

Such possibilities would readily permit jurisdictional manipulation, thereby subverting a major reason for the insertion of the “principal place of business” language in the diversity statute. Indeed, if the record reveals attempts at manipulation...the courts should instead take as the “nerve center” the place of actual direction, control, and coordination, in the absence of such manipulation.<sup>15</sup>

### The Line of Demarcation Emerges

Against this background, some lines begin to emerge as to when courts will treat “forum selection” as “forum shopping.”

Evidence of “manipulation” will lead a court to question the propriety of a plaintiff’s choice of forum. A recent spate of decisions by the Federal Circuit on petitions for a writ of mandamus to direct transfer of a patent action from the Eastern District of Texas provides some examples.<sup>16</sup>

In *In re Microsoft Corp.*, plaintiff Allvoice brought suit in the Eastern District of Texas against Microsoft Corporation (which is headquartered in the Western District of Washington). The Federal Circuit noted that “Allvoice is operated from the United Kingdom by the patent’s co-inventor” and “does not employ individuals in [its Texas] offices or anywhere in the United States”; Allvoice incorporated in Texas “sixteen days before

filing suit.”<sup>17</sup>

Citing *Hertz Corp.*, the court rejected Allvoice’s argument in favor of the Texas forum, observing that “Allvoice’s argument... rests on a fallacious assumption: that this court must honor connections to a preferred forum made in anticipation of litigation and for the likely purpose of making that forum appear convenient.”<sup>18</sup>

The case law under 28 U.S.C. §1406(a), governing motions to dismiss for improper venue, emits a similar theme. Where venue is improper, a district court is empowered under the statutory language to dismiss, “or if it be in the interest of justice, transfer such case to any district...in which it could have been brought.”

Courts most often transfer, rather than dismiss, especially when the statute of limitations has run by the time the motion is being decided. When courts have held that a transfer would not be in the “interest of justice,” the facts most frequently suggest that a plaintiff’s original choice of venue evidenced bad faith, harassment, or negligence.

For example, the Second Circuit affirmed a district court’s dismissal of an action in *Spar Inc. v. Information Resources Inc.*, holding that “allowing a transfer in this case would reward plaintiffs for their lack of diligence in choosing a proper forum and thus would not be in the interest of justice,” since the plaintiffs knew or should have known that their action was time-barred under the applicable statute of limitations period.<sup>19</sup>

### The ‘Race to the Courthouse’ Rulings

The greatest concentration of decisions addressing “forum selection” and “forum shopping” respond to a literal “race to the courthouse,” where each party brings suit in a different federal district at roughly the same time and where courts have to resolve which of two actions should go forward.

Federal courts have typically invoked the “first-filed rule:” as framed by the Second Circuit, “the first suit should have priority, absent the showing of balance of convenience in favor of the second action, or unless there are special circumstances which justify giving priority to the second.”<sup>20</sup> It is those “special circumstances” that often translate to “forum shopping.”

In *Employers Insurance of Wausau v. Fox Entertainment Group Inc.*, the Second Circuit identified as one special circumstance the “improper anticipatory declaratory judgment action:” that is, an action “in response to a direct

threat of litigation that gives specific warnings as to deadlines and subsequent legal action.”<sup>21</sup> The court was careful to explain that this “does not mean that any evidence of forum shopping will suffice”; “the first filing plaintiff must engage in some manipulative or deceptive behavior, or the ties between the litigation and the first forum must be so tenuous or de minimus that a full ‘balance of convenience’ analysis would not be necessary to determine that the second forum is more appropriate than the first.”<sup>22</sup>

The first-filed rule has been found inapplicable “where the plaintiff in the first-filed action was able to file first only because it had misled the filer of the second-filed action as to its intentions regarding filing suit in order to gain the advantages of filing first.”<sup>23</sup> Again, a court is more likely to deem a filing as forum shopping “where a suit bears only a slight connection to the [forum].”<sup>24</sup>

In *Piper Aircraft Co. v. Reyno*,<sup>25</sup> the Supreme Court acknowledged in the forum non conveniens context the attention plaintiffs give to the governing law when choosing a forum. The forum non conveniens doctrine entrusts to the sound discretion of a district court whether to dismiss an action brought in that district in favor of litigation in a foreign country.

The concerns and considerations attendant to the selection of a domestic forum among competing federal districts and between a state and federal court are magnified where the alternative venue is an entirely different legal system in some corner of the world. The Court stated: “Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous.”<sup>26</sup>

The Court many years earlier in *Gulf Oil Corp. v. Gilbert* provided a list of relevant private and public interest factors that courts consider in exercising their discretion in a forum non conveniens motion.<sup>27</sup> Either as a private interest factor, or as a preliminary inquiry in advance of applying the factors, courts consider how much weight to give the plaintiff’s choice of forum. In *Iragorri v. United Technologies Corp.*, the Second Circuit, sitting en banc, reviewed “the relevance [for a forum non conveniens motion] of the plaintiff’s residence in the United States but outside the district in which an action is filed.”<sup>28</sup>

Any effort to delineate the boundaries of “forum shopping” should include *Iragorri*’s test for determining the amount of deference to be

accorded by a district court to a U.S. resident bringing suit outside of his home district. The Second Circuit established a sliding scale:

The more it appears that a domestic or foreign plaintiff’s choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff’s forum choice. Stated differently, the greater the plaintiff’s or the lawsuit’s bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for forum non conveniens. On the other hand, the more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff’s case, the habitual generosity of juries in the United States or in the forum district, the plaintiff’s popularity or the defendant’s unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff’s choice commands and, consequently, the easier it becomes for the defendant to succeed on a forum non conveniens motion by showing that convenience would be better served by litigating in another country’s courts.<sup>29</sup>

These cases, drawn from the gamut of venue motions, show that courts will accept a plaintiff’s opportunity for “forum selection” so long as venue is proper in the chosen district without acts of manipulation by the plaintiff (subject, of course, to a defendant’s transfer motion).

In contrast, the cases show that a plaintiff’s selection might be treated as disfavored “forum shopping” where there is evidence of harassment or deception, where the propriety of venue in the district is highly questionable, and perhaps where the relationship between the district and the facts or parties in the case is, at best, tenuous.

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1. 28 U.S.C. §§1391(a)(1)-(2), 1391(b)(1)-(2). See generally, Gary P. Naftalis and Michael S. Oberman, “Venue, Forum Selection, and Transfer” in COMMERCIAL AND BUSINESS LITIGATION IN FEDERAL COURTS (2d ed., Thomson/West in cooperation with ABA Section on Litigation, 2005) (discussing general and special venue statutes; motions to dismiss for improper venue or forum non conveniens; transfer motions; and the “first-filed rule” related to parallel actions pending in different districts).

2. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 356 (2d Cir. 2005).

3. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 183-184 (1979); see also *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432 (2d Cir. 2005) (confirming *Leroy*’s continuing importance as a source of guidance).

4. *Cottman Transmission Sys. Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994).

5. 28 U.S.C. §1404(a).

6. 376 U.S. 612, 640 (1964).

7. *Id.* at 633-34.

8. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (1990); see also *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770, 779 (1984) (“Petitioner’s successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive procedural rules of sympathetic local populations”).

9. *Employers Ins. of Wausau v. Fox Entm’t Group Inc.*, 522 F.3d 271, 276 (2d Cir. 2008).

10. *Dakotah Inc. v. Tomelleri*, 21 F. Supp. 2d 1066, 1072 (D.S.D. 1998).

11. 130 S. Ct. 1431, 1447-48 (2010).

12. 304 U.S. 64 (1938).

13. 130 S. Ct. at 1447.

14. 130 S.Ct.1181, 1195 (2010).

15. *Id.* at 1195.

16. The Federal Circuit granted writs of mandamus in *In re Microsoft Corp.*, 2011 WL 30771 (Fed. Cir. 2011); *In re Acer America Corp.*, 626 F.3d 1252 (Fed. Cir. 2010); *In re Zimmer Holdings Inc.*, 609 F. 3d 1378, 1381 (Fed. Cir. 2010) (finding “a classic case where the plaintiff is attempting to game the system by artificially seeking to establish venue by sharing office space with another of the trial counsel’s clients”); *In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009); *In re Genentech Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Hoffmann-LaRoche*, 587 F.3d 1333 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F. 3d 1315, 1322 (Fed. Cir. 2008), but denied such petitions in *In re Apple Inc.*, 2010 WL 1922942 (Fed. Cir. 2010); *In re Affymetrix Inc.*, 2010 WL 1525010 (Fed. Cir. 2010); *In re Pfizer Inc.*, 2010 WL 375112 (Fed. Cir. 2010); *In re VTech Communications Inc.*, 2010 WL 46332 (Fed. Cir. 2010); *In re Wi-Lan Inc.*, 2009 WL 4906521 (Fed. Cir. 2009); and *In re Telular Corp.*, 319 F. App’x 909 (2009).

17. 2011 WL 30771 at \*1.

18. *Id.* at \*2.

19. 956 F.2d 392-394 (2d Cir. 1992). See also *Stanifer v. Brannan*, 564 F.3d 455, 460 (6th Cir. 2009) (“In this case, we have little hesitation in affirming the district court’s order dismissing the plaintiff’s complaint for lack of personal jurisdiction rather than transferring the case to the district that the plaintiff’s attorney undoubtedly knew was the correct one all along.”); *Wood v. Santa Barbara Chamber of Commerce Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983) (“Justice would not have been served by transferring Wood’s claims back to a jurisdiction that he purposefully sought to avoid through blatant forum shopping”).

20. *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Las Vegas Prof’l Football Ltd.*, 2010 WL 5141229, at \*3 (2d Cir. 2010) (citation omitted).

21. 522 F.3d at 275-76.

22. *Id.* at 276.

23. *Aventure Communications Tech., L.L.C. v. Nextel Tech. West Corp.*, 2008 WL 73657, at \* 7 (N.D. Iowa 2008) (citations omitted).

24. *Toy Biz Inc. v. Centuri Corp.*, 990 F. Supp. 328, 332 (S.D. N.Y. 1998).

25. 454 U.S. 235 (1981).

26. *Id.* at 250.

27. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 509 (1947). 28. 274 F.3d 65, 68 (2d Cir. 2001).

29. *Id.* at 71-72 (footnote omitted). The Second Circuit also stated that courts should “arm themselves with an appropriate degree of skepticism in assessing whether the defendant has demonstrated genuine inconvenience and a clear preferability of the foreign forum.” *Id.* at 75. In *Vivendi v. T-Mobile USA Inc.*, 586 F. 3d 689, 694-95 (9th Cir. 2009), the Ninth Circuit adopted the Second Circuit’s *Iragorri* formulation in finding that the plaintiff engaged in forum shopping in seeking a U.S. forum, in part by acquiring bonds of a U.S. company to attempt to strengthen its connections with the United States.