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## Applicability of the Federal Rules in Diversity Cases

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son for a different result, the issuer should have to bear the loss for all unauthorized purchases in cases where there is no risk-allocation provision in the credit card contract. This rule should apply unless the holder is negligent in handling his card and his negligence does in fact contribute to the fraudulent purchases. But where there is a risk-allocation provision in the credit card contract the strict objective intent of the parties as expressed in the contract should control.

PETER W. MARTONE

### APPLICABILITY OF THE FEDERAL RULES IN DIVERSITY CASES

The extent to which a federal court in diversity actions will apply federal procedural law when it affects the outcome of the case is one of the most confusing problems presently facing an attorney.<sup>1</sup> A particularly important aspect of this problem occurs when a state statute clashes directly with a Federal Rule of Civil Procedure.<sup>2</sup>

In *Hanna v. Plumer*,<sup>3</sup> the Supreme Court of the United States recently faced an unavoidable clash between the Federal Rules and a conflicting state statute. The plaintiff filed her negligence complaint in a federal district court in Massachusetts on diversity grounds. Service was made by leaving a copy of the complaint and summons with the defendant's wife *at the defendant's house* as provided by Federal Rule 4 (d)(1). Defendant was executor of the alleged tortfeasor's estate. The relevant Massachusetts statute, however, requires *personal* service on a decedent's personal representative to be *in hand*.<sup>4</sup> Two

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"It is unquestionably true that up to now *Erie* and the cases following it have not succeeded in articulating a workable doctrine governing choice of law in diversity actions." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (concurring opinion); Wright, Federal Courts § 55, at 194 (1963); "Every important step in a federal diversity case is taken today at a calculated risk. Litigants must constantly decide whether this procedure, or that procedure, should be taken in accordance with the Rules or as prescribed by state law." Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 Vand. L. Rev. 711, 712 (1950); compare *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) with *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In these three decisions handed down on the same day, only a minority of four justices could agree on what *Erie* meant in all three cases.

<sup>1</sup>Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, in *Procedure—The Handmaid of Justice* 170, 193 (1965); Wright, Federal Courts § 59, at 208 (1963).

<sup>2</sup>380 U.S. 460 (1965).

<sup>4</sup>Mass. Ann. Laws ch. 197 § 9 (1956).

days before the running of the Massachusetts statute of limitations defendant filed his answer, in which he alleged improper service of process. The District Court granted defendant's motion for summary judgment and held that service of process substantially affected the outcome of the case, hence was a substantive matter governed by state law.<sup>5</sup> The Circuit Court affirmed<sup>6</sup> and the Supreme Court granted certiorari.<sup>7</sup>

The Supreme Court reversed and held that the Federal Rules were exempt from the general distinction between substance and procedure which is usually applied to determine whether state or federal law governs.<sup>8</sup> Early in its opinion the Court revised the old distinction between substance and procedure and indicated that "outcome determination" is no longer the proper test.<sup>9</sup> The fact that an action may be barred in a state system will not necessarily bar it in the federal system. A difference in the outcome of a case between state and federal forums is substantial only when the discrepancy is important enough to promote that kind of forum-shopping which results in inequitable administration of the law.<sup>10</sup> This alone would be enough to decide the case, assuming, as the Court seems to, that the action would be barred in the Massachusetts courts.<sup>11</sup>

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<sup>5</sup>Hanna v. Plumer, 380 U.S. 460, 462 (1965).

<sup>6</sup>331 F.2d 157 (1964).

<sup>7</sup>379 U.S. 813 (1964).

<sup>8</sup>"There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. . . . The line between 'substance' and 'procedure' shifts as the legal context changes. . . . It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice. . . . Hanna v. Plumer, 380 U.S. 460, 469-70, 471 (1965).

<sup>9</sup>Technically, as pointed out by the majority on pages 467-68 and by the concurring opinion on page 475, the distinction now adopted by the court is not novel but implicit in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>10</sup>Although the Court talks as though these are two distinct policies, it should be apparent that they are but different sides of the same coin. There seems to be nothing wrong with forum shopping per se, which, after all is the basis of diversity jurisdiction. As Justice Harlan points out on p. 475, litigants frequently choose the federal forum just for the procedural conveniences of Federal Rules, and this type of forum shopping is sanctioned by the Court. The Court will strike down forum shopping of the kind which allows one party to take unfair advantage of the other, i.e. inequitable administration of the law.

<sup>11</sup>If the action were not barred in Massachusetts then the *Erie-Guaranty* test would be met and there would be no controversy for the Court to decide. On p. 466, the court cites defendant-respondents' contention that the action was barred

The Court went further, however, and distinguished for the first time two mutually exclusive lines of cases in this area: the line of cases following *Erie R.R. v. Tompkins*<sup>12</sup> which defines substance and procedure in areas not covered by the Rules, and the cases following *Sibbach v. Wilson & Co.*,<sup>13</sup> which test the validity of the Rules under the Rules Enabling Act.<sup>14</sup> If a rule is found valid and applicable in any particular case, then the federal rule prevails over any conflicting state rule.<sup>15</sup> With this pronouncement the Supreme Court has expressly defined, for the first time, the relation of the Federal Rules to the *Erie* doctrine: The Rules are exempt from the *Erie* distinction of substance and procedure.<sup>16</sup> If a Federal Rule can rationally be classified as involving procedure, then it is applied regardless of any incidental substantive effects.

The relation of the Federal Rules to the *Erie* doctrine has been the subject of much conjecture<sup>17</sup> since 1938 when the Supreme Court

in Massachusetts and nowhere states that that premise is incorrect. Mass. Ann. Laws ch. 260 § 32 (1956) provides:

"If, in an action duely commenced within the time limited in this chapter, the writ fails of a sufficient service or return by reason of unavoidable accident, or of a default or neglect of the officer... plaintiff... may commence a new action for the same cause within one year after the abatement or other determination of the original action..."

<sup>12</sup>304 U.S. 64 (1938). E.g., *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

<sup>13</sup>312 U.S. 1 (1941); see also *Gertler v. United States*, 18 F.R.D. 307 (S.D.N.Y. 1955); *Bowles v. Tankar Gas, Inc.*, 5 F.R.D. 230 (D. Minn. 1946).

<sup>14</sup>28 U.S.C. § 2072 (1964).

<sup>15</sup>*Hanna v. Plumer*, 380 U.S. 460, 476 (1965) (concurring opinion); see majority opinion at 472. The problem arises however as to when a particular rule does apply to a given fact situation. According to the Court, Rule 3, "A civil action is commenced by filing a complaint with the court," does not, for the purpose of statutes of limitations, apply to determine when a civil action commences. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), as interpreted by footnote 12 of the principal case. See also note 32 *infra*.

<sup>16</sup>This statement of what the court says the rule is, should be taken with a grain of salt considering the Court's elastic view of what the rules cover. See *supra* note 15.

<sup>17</sup>E.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, in *Procedure—The Handmaid of Justice* 170 (1965); Clark, *The Tompkins Case and the Federal Rules*, 24 J. Am. Jud. Soc'y 158 (1941); Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins*, 24 J. Am. Jud. Soc'y 57 (1940); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 Vand. L. Rev. 711 (1950); Symposium—*Federal Trials and The Erie Doctrine*, 51 Nw. U.L. Rev. 338 (1956); Note, 38 Geo. L.J. 115 (1949); Note 39 Geo. L.J. 600 (1951); Note, 62 Harv. L. Rev. 1030 (1949).

decided *Erie R.R. v. Tompkins*.<sup>18</sup> In *Erie* the Supreme Court overruled the ninety-six year old *Swift v. Tyson*,<sup>19</sup> in which the Court had held that a federal district court was not bound to apply the state *decisional* substantive law which would govern the same action in a state court. The purpose of *Swift* was to protect non-residents from discrimination in a foreign court by providing an impartial arbiter and by subjecting both citizen and non-citizen to the uniformity of the common law in areas involving "general" law.<sup>20</sup> However, enforcement of the latter policy created new problems. The co-existence of separate bodies of state and federal law often gave the non-citizen the advantage of selecting the more favorable law of the federal forum while a citizen in an identical action against another citizen was confined to the less favorable law of the forum state.<sup>21</sup> The nadir of this policy was reached in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,<sup>22</sup> in which a Kentucky corporation successfully dissolved and reincorporated just across the state line, thereby gaining diverse citizenship in order to seek against a competitor an injunction allowed under federal but not state law.

In *Erie* the Court tried to cure these defects in our legal system by holding that a federal district court must apply the substantive law of the state in which it sits, as defined by that state's highest court.<sup>23</sup> *Erie's* thesis is to provide equal treatment for all regardless of their state citizenship.<sup>24</sup> In 1938 the Court also promulgated the nationally uniform Rules of Civil Procedure.

Any inconsistency in adopting both the *Erie* and the Federal Rules

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<sup>18</sup>304 U.S. 64 (1938); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, in *Procedure—The Handmaid of Justice* 170, 171 (1965), quotes Judge Learned Hand as saying, "I don't suppose a civil appeal can now be argued to us without counsel sooner or later quoting large portions of *Erie Railroad v. Tompkins*." See also *Id.* at 172; Wright, *Federal Courts* § 55, at 191 & 193 (1963).

<sup>19</sup>41 U.S. (16 Pet.) 14 (1842).

<sup>20</sup>See *Guaranty Trust Co. v. York*, 326 U.S. 99, 111-12 (1945); *Swift v. Tyson*, 41 U.S. (16 Pet.) 14, 18-19 (1842).

<sup>21</sup>Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Cornell L.Q.* 499, 524 (1928); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 *Ill. L. Rev.* 271, 277-78 (1939).

<sup>22</sup>276 U.S. 518 (1928).

<sup>23</sup>This statement is admittedly an oversimplification of the many other inherent problems of *Erie* such as the determination of which state law—the conflicts problem—and the determination of what the decisional law of a particular state is, but a discussion of all the problems posed by *Erie* is a better subject for a treatise than a comment.

<sup>24</sup>See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

policies was not noticed at first. The courts attempted to combine the two policies into the widespread maxim that federal courts sitting in diversity cases apply their own procedural law and the substantive law of the state in which the federal court sits.<sup>25</sup> In other quarters an awareness was growing that *Erie* could pose a threat to the Federal Rules, but the general outlook was optimistic.<sup>26</sup> Judge Charles Clark, in a characteristic statement of the times, suggested that the Supreme Court would not overthrow most of the Federal Rules or even, perhaps an unusual number.<sup>27</sup>

In the next leading case on the subject, however, *Guaranty Trust Co. v. York*,<sup>28</sup> the Court drew the following distinction between substance and procedure:

[D]oes is significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court? . . . The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.<sup>29</sup>

This extension by *Guaranty* constitutes what is generally referred to as the *Erie-Guaranty* doctrine, which is, that the outcome of a case in a federal court sitting in diversity should be the same as though the case had been brought in a state court.<sup>30</sup> "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law."<sup>31</sup> The rather obvious implication for the Federal Rules was generally ignored until three years

<sup>25</sup>E.g., *Jessen v. Aetna Life Ins. Co.*, 209 F.2d 453 (7th Cir. 1954); *Deupree v. Levinson*, 186 F.2d 297 (6th Cir. 1950); *Turner County v. Miller*, 170 F.2d 820 (8th Cir. 1948).

<sup>26</sup>E.g. Clark, *The Tompkins Case and the Federal Rules*, 24 J. Am. Jud. Soc'y 158 (1941); Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad Co. v. Tompkins*, 24 J. Am. Jur. Soc'y 57 (1949).

<sup>27</sup>Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, in *Procedure—The Handmaid of Justice* 170, 187 (1965).

<sup>28</sup>326 U.S. 99 (1945); *Wright, Federal Courts* § 55, at 193 (1963).

<sup>29</sup>326 U.S. at 109.

<sup>30</sup>Quite obviously the 'Erie doctrine' as it is now modified by *Hanna* no longer means exactly this. "'Outcome determination' analysis was never intended to serve as a talisman." 380 U.S. at 466-67, where the *Hanna* court discusses the *Byrd* case. However, it is submitted that this definition is the one generally, even if loosely, used now by most attorneys when they speak of the 'Erie doctrine.' "The governing doctrine might be better described if it took its name from [*Guaranty Trust Co. v. York*] than *Erie*." Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 187-88 (1957).

<sup>31</sup>*Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945).

later<sup>32</sup> when the Supreme Court dropped a judicial bombshell on the hopes of the Federal Rules supporters.

On June 20, 1949, the Supreme Court handed down two decisions which held a Federal Rule inapplicable and applied a state statute to determine the procedure in question.<sup>33</sup> Both cases said that since the liability imposed was created by state law, the procedures prescribed for enforcing that liability were important (i.e. substantive) enough to be governed by state law.<sup>34</sup> These decisions raised many doubts about

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<sup>32</sup>See e.g., Note, 21 Ind. L.J. 228 (1946); 44 Mich L. Rev. 165 (1945); Note, 44 Mich. L. Rev. 477 (1945); 21 N.Y.U.L.Q. Rev. 145 (1946); Note, 13 U. Chi. L. Rev. 195 (1946); 31 Va. L. Rev. 948 (1945).

<sup>33</sup>Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (Statute requiring bond in a stockholder's derivative action held substantive despite Rule 23 which provided for procedure in stockholder's derivative action and which made no mention of bond); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (For purposes of limitation of actions, a state statute which stated that an action was commenced when process was served was the governing rule instead of Federal Rule 3 which stated that an action was commenced when complaint was filed.) The Court attempted to distinguish these two cases from Hanna by holding that in Ragan and Cohen "the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." See Hanna at 470. See also supra note 12. The validity of this distinction is doubtful to say the least, and one prominent district court has agreed with Justice Harlan that Ragan was wrongly decided. "The case at bar cannot be distinguished from Ragan v. Merchants Transfer & Warehouse Co.... Study of Hanna v. Plumer, above, convinces me that its reasoning points away from Ragan. Hazardous though it be, I must therefore conclude that the Supreme Court after Hanna would no longer follow Ragan.... [H]ere, Rule 3 is plainly applicable. [Query, why wasn't it also in Ragan?] As to 'forum shopping'... there was ample time to satisfy the requirements in either court. Rule 3, therefore, could not possibly have influenced the choice of forum. . . . The spirit of the Hanna decision—if not its letter—indicates that this motion must be denied." *Sylvestri v. Warner & Swasey Co.*, 244 Fed. Supp. 524, 527 (S.D.N.Y. 1965).

<sup>34</sup>"Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defences in the federal court as in the state court.... It accrues and comes to an end when local law so declares.... Where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

"We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co. v. Tompkins*." *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533-34 (1949).

"[T]his statute is not merely regulation of procedure.... [I]t creates a new liability where none existed before.... If all the Act did was to create this liability it would clearly be substantive. But this new liability would be without meaning and value in many cases if it resulted in nothing but judgment for expenses at or after the end of the case. Therefore, a procedure is prescribed by which the liability is insured.... We do not think a statute which so conditions the stockholder's action can be disregarded by the federal court as a mere procedural device." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 555-56 (1949).

the future of the Federal Rules,<sup>35</sup> and suggestions ranged from abolishing the Federal Rules in diversity cases<sup>36</sup> to always applying the more restrictive of the state or federal rule.<sup>37</sup> Another suggestion was to balance the policies of each particular rule with *Erie* and work out a point-by-point compromise.<sup>38</sup>

In the last important case before *Hanna*, *Byrd v. Blue Ridge Rural Elec. Co-op.*,<sup>39</sup> the Court indicated that the outcome-determinative policy of the *Erie-Guaranty* doctrine was not to be the sole test and incorporated into the concept of "substantive" law any "integral" part of a statute defining the rights of the parties. A rule not intended to be bound up with the definition of the rights and obligations of the parties is not a matter of substantive law to be governed by state statute.<sup>40</sup> The implicit rejection in *Hanna*<sup>41</sup> of the integral-relations test seems to indicate that *Byrd* was decided purely on the federal policy of right to a trial by jury.<sup>42</sup>

Assuming that the court has, as it says it has, defined the relation of the Federal Rules to *Erie*,<sup>43</sup> the question remains whether this definition will provide the workable doctrine sought by Justice Harlan in his concurring opinion.<sup>44</sup> It appears that it will not. The judicial standard that federal courts sitting in diversity cases apply the substantive law of the state and their own procedural law is to a certain extent a self-defeating proposition resulting from an attempt to achieve two goals which are not necessarily consistent with each other:

<sup>35</sup>See e.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins in Procedure—The Handmaid of Justice* 170, 195 (1965); Gavit, *States' Rights and Federal Procedure*, 25 Ind. L.J. 1 (1949); Horowitz, *Erie R.R. v. Tompkins—A Test to Determine Those Rules of State Law to which Its Doctrine Applies*, 23 So. Cal. L. Rev. 204 (1950); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 Vand. L. Rev. 711 (1950); Weary *Erie*, 34 Cornell L.Q. 494 (1949); Note, 30 B.U.L. Rev. 104 (1950); Clark, *Book Review*, 36 Cornell L.Q. 181 (1950).

<sup>36</sup>Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 Vand. L. Rev. 711, 727 (1950).

<sup>37</sup>Note, 35 Cornell L. Q. 420 (1950).

<sup>38</sup>Symposium—*Federal Trials and the Erie Doctrine*, 51 Nw. U.L. Rev. 338 (1956).

<sup>39</sup>356 U.S. 525 (1958); Wright, *Federal Courts* § 55, at 194 (1963).

<sup>40</sup>356 U.S. at 536.

<sup>41</sup>"The purpose of the *Erie* doctrine, even as extended in *York* and *Ragan*, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers..." *Lumbermen's Mut. Cas. Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963), quoted with approval in *Hanna* at 473. (Emphasis added.)

<sup>42</sup>*Byrd* was based on two grounds: (1) Federal policy of right to trial by jury and (2) integral-relation of statutes. Subtract "*integral-relations*" and the policy basis is all that is left.

<sup>43</sup>Note that this is an assumption, since the Court left itself the power to extend *Erie* and restrict the Federal Rules by the *Cohen-Ragan* approach.

<sup>44</sup>380 U.S. at 474-78.



(1) the judicial establishment of a good federal procedure which is uniform, and (2) the prevention of substantial advantage-taking by one party's forum shopping.

The Court's adherence to the second policy is obvious. Prevention of substantially advantageous forum shopping has been the basis of the *Erie-Guaranty* policy from its inception to the present.<sup>45</sup> Even in *Hanna* the Court implied that the plaintiff was not motivated by an intent to gain an unfair advantage in his choice of forum, and, in fact, had not obtained any advantage in the federal forum which was not available in the state court.<sup>46</sup> The Court's adherence to the first policy is demonstrated by the reason given for granting certiorari: "Because of the threat to the goal of uniformity of federal procedure posed by the decision below. . . ."<sup>47</sup>

At the present time two facts make these two policies potentially incompatible. First, a majority of jurisdictions have procedural processes which differ significantly from the Federal Rules of Civil Procedure.<sup>48</sup> Second, procedure does have some affect on the outcome of

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<sup>45</sup>See cases in note 12, esp. *Guaranty*. However, the Court's approach cannot be explained by this factor only. This principle was certainly violated in *Ragan* and arguably in *Hanna*. In *Ragan* the plaintiff was not forum shopping, while the defendant certainly seemed to be taking advantage of a procedural device to win the case, see facts of *Ragan*, 170 F.2d 987 at 988-90. The Court's judgment for the defendant is impossible to reconcile with the notion that the sole underlying approach of the Court is prevention of substantially advantageous forum shopping. Although, as the Court implied in *Hanna*, the plaintiff was not motivated by a forum shopping motive and in fact did not achieve any initial advantage; nevertheless, the Court did grant her a judgment to which she was not then, or maybe ever, entitled in the state system.

<sup>46</sup>See *Hanna* at 469, 463 n.1.

<sup>47</sup>*Id.* at 463. This approach emphasizes the other goal of the Court: the judicial creation of a modern, viable, consistent judicial system which is uniform throughout. Thus *Hanna* could be read as one of several cases where in borderline areas the courts are deciding cases on some unarticulated theory analogous to the federal supremacy theory. This approach could consistently explain both *Hanna* and *Ragan*. The apparent anomaly in *Ragan* could be explained by this approach as an attempt by the Court to maintain a consistent procedural nicety (outcome-determination analysis established by *Guaranty*) which has since been abandoned. This approach alone, however, can explain neither *Guaranty* nor *Cohen* where the Court apparently prevents forum shopping at the expense of uniform procedure. Thus the best approach seems to be that the Court is trying to implement both policies.

<sup>48</sup>14 states have no provision comparable to Federal Rule 35a order for physical examination; Ala., Conn., Ind., Mass., Miss., N.H., N.J., N.C., Okla., Ohio, Ore., S.C., Tenn., Texas (provision for physical or mental exam repealed, Tex. R. Civ. P. 168), and three others restrict such exams to actions for personal injury, Hawaii Rev. Law § 225-2 (1955) (provision for physical exam only), R.I. Gen. Laws Ann. § 9-17-21 (1956) (provision for physical and mental examination), Wis. Stat. Ann. § 269.57 (2) (1963) (provision for physical exam only). 5 States have pretrial and other discovery device differences which are 'significant' at least in the way "significant" is used in *Hanna*; see Ala. Code tit. 7 §§ 474(1)-474(18) (1958) (no pro-

a case.<sup>40</sup> Given the same case, therefore, its outcome must vary between

vision for production of documents, requests for admissions, written interrogatories or other discovery devices except depositions); Ark. Stat. Ann. §§ 29-201 (1947) (very restrictive provision for pretrial disposition of case, no summary judgment, no enforcement provision comparable to Federal Rule 37 to enforce pretrial disposition of case); Deering, Cal. Civ. Proc. §§ 2016-2034 (discovery provisions "made for the express purpose of creating in California a system of discovery procedures less restrictive than those employed in the Federal Courts," *Greyhound Corp. v. Superior Court*, 56 Cal. App. 355, 364 P.2d 266, 274, 15 Cal. Rptr. 90, 98 (1961) (holding an attorney's work product not to be privileged). Ill. Ann. Stat. ch. 110, § 53 (Smith-Hurd 1956) ("Illustrative of federal provisions which the committee rejected are. . . . That part of federal rule 26 (b) permitting a deponent to be examined on matter inadmissible at the trial 'which appears reasonably calculated to lead to the discovery of admissible evidence' is omitted from [the] new Illinois rule. . . ." Symposium, 50 Nw. U.L. Rev. 586, 594 (1955); Mont. Rules 56 (affidavits may not be considered on motion for summary judgment).

10 states have rules which differ 'significantly' from the federal rules in pleading and joinder. See *Senter v. B. F. Goodrich*, *infra* note 52, *Gerber v. Schutte Inv. Co.* 354 Mo. 1246, 194 S.W.2d 25 (1946) (traditional fact pleading retained in Missouri), *Sellman v. Haddock*, 62 N.M. 391, 310 P.2d 1045 (1957) (abolishing the difference between parties and indispensable parties); Ind. Rules 1:1-3:26 ("[T]he rules so adopted [by the Indiana Supreme Court in 1954 as rules of civil procedure] have made little significant change in procedure. A rule providing for pre-trial conferences [1:1-4] is the only rule seemingly derived from the federal rules." 1 Barron & Holtzoff, *Federal Practice and Procedure* § 9.15 (1960, Supp. 1965); Iowa Rules 67-120 ("the most marked difference [between Iowa rules and the Federal Rules] is in the section on pleadings where 'fact pleading' as developed under the [Field] code was retained." 1 Barron & Holtzoff, *Federal Practice and Procedure* § 9.16 (1960, Supp. 1965); Me. Rule 38 (Plaintiff required to assert any claim he has against a third party defendant on penalty of being barred from later suit on it); Mass. Ann. Laws ch. 231 § 59 (1961) ("Changes in Massachusetts practice to conform to modern developments elsewhere seem to be limited principally to provision, by rule [58], for pretrial conferences, and statutory adoption [supra] of a rather rudimentary summary judgment procedure, available only in contract actions." 1 Barron & Holtzoff, *Federal Practice and Procedure* § 9.22 (1960, Supp. 1965); Mich. G.C.R. 208.4 (provision for protection of parties by bond in class action); N.C. Gen. Stat. § 1-123 (1953) (In a suit involving multiple plaintiffs or defendants, all causes must affect all parties); Pa. R. Civ. P. 1001-1458 (retention of forms of action, with limited or no joinder of different forms); Ohio Rev. Code Ann. § 2309.05 (Baldwin 1964) (in action involving multiple defendants all causes of action must affect all defendants).

Although the Federal Rules have influenced most if not all jurisdictions to a degree, the influence has been in different areas of procedure with the result that even though a state may have adopted some or even many of the Federal Rules in some area (e.g., discovery), there may be other procedural processes (e.g., bond as in the Cohen case) which differ "significantly," as that word is used in either Guaranty or Hanna, from the federal rules. A leading text lists only nineteen jurisdictions which have adopted rules "substantially similar" to the federal rules. See 1 Barron & Holtzoff, *Federal Practice and Procedure* § 9, at 44 (1960, Supp. 1965).

<sup>40</sup>Wright, *Federal Courts* § 55, at 194; cf. *Mississippi Pub. Corp. v. Murphree* 326 U.S. 438, 445 (1945) as quoted in *Hanna* at 465. The most obvious examples are the discovery devices and the right to physical examination. In an actual case, plaintiff alleged that he slipped on an oil slick on defendant's train, wrenched a back muscle badly, and immediately checked into a hotel where he remained for

state and federal forums in the same state to the extent that state procedures which affect substantive rights of the parties vary from the Federal Rules.

This result can be antagonistic to the policy of prevention of substantially advantageous forum shopping since the subtle interrelationship between substance and procedure, by its very nature prohibits the policy seemingly adopted by the Court, of allowing procedural but not substantive forum-shopping. The Court has given no way to predict the result when one party goes to the federal forum with the avowed intent of getting a real procedural, outcome-affecting, advantage not allowed by state law when to deny him that advantage in the federal court would completely or substantially gut a federal rule and by implication the Federal Rules as a body of procedural law.

The Court did not have to face this ultimate conflict in *Hanna* between a compelling reason for systematic uniformity against an equally compelling case of advantage-seeking forum shopping since the underlying purpose of both the state and federal rule had been fulfilled, leaving no reason to worry about forum shopping. The purpose of the Massachusetts statute and the Federal Rule is to give the defendant actual notice.<sup>50</sup> "In this case the goal seems to have been achieved. . . . [T]he affidavit filed by respondent. . . does not allege lack of actual notice."<sup>51</sup> Had the application of either the state or the federal rule resulted in frustration of the purpose of the other rule thereby creating an actual advantage not provided by the state court, for example, had Mr. Plumer not received actual notice, then a far more difficult problem would have been presented to the Court.<sup>52</sup>

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two weeks, thereby losing two weeks work as well as having to pay medical expenses and suffering great bodily pain. Defendant sprang two "surprise" witnesses: the plaintiff's army doctor who testified that plaintiff had a long history of back troubles, and the hotel clerk who testified that plaintiff did not check into the hotel immediately after the time of the alleged injury but four hours later. Thereupon plaintiff was nonsuited. Under the same fact situation in a federal court, plaintiff could have "discovered" defendant's knowledge of both the medical history and the time variance. An amended complaint of aggravation of a pre-existing injury with delayed reaction to the injury would have at least gotten plaintiff to the jury. Quite obviously procedure can affect rights beyond the "incidental effects" cited by the Court.

<sup>50</sup>380 U.S. at 463, n.1.

<sup>51</sup>Ibid.

<sup>52</sup>The courts may avoid the question by pretending that the conflict doesn't exist. Cf. *Senter v. B. F. Goodrich*, 127 F. Supp. 704, 707 (1954) ("Federal Rule 18 . . . does not alter the state substantive law which prohibits the simultaneous urging of inconsistent claims. . . ." The court then said there was no conflict because a claim in tort was not inconsistent with a claim in contract covering the same transaction.)

It should be noted that the present inconsistency in the policies of equal pro-