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# Section 1404(a), "Where It Might Have Been Brought": Brought By Whom?

Michael J. Waggoner\*

## I. INTRODUCTION

Section 1404(a)<sup>1</sup> of Title 28 authorizes one federal district court to transfer a civil action to another such court "[f]or the convenience of parties and witnesses, in the interest of justice." The transferee court must be one "where [the action] might have been brought."<sup>2</sup> The usefulness of the transfer mechanism depends in significant part on the interpretation of that limitation. Perfectly sensible transfers may be precluded by an overly strict interpretation; too generous a construction may give too little guidance to litigants and judges so that at best time is wasted litigating transfers and at worst transfers are improvidently granted. For over a quarter century the federal courts have suffered from the overly-strict interpretation given this limitation in *Hoffman v. Blaski*,<sup>3</sup> rejecting the overly-generous interpretation proposed by the dissent. This article proposes a new interpretation not considered in *Blaski* to make that limitation operate in a more principled fashion.

The new interpretation is based on answering the question suggested by the "where it might have been brought" restriction: "Brought by whom?" The answer should be, "Brought by the party seeking the transfer,"<sup>4</sup> rather than the superficially ap-

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1. 28 U.S.C. § 1404(a)(1982). Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. *Id.*

3. 363 U.S. 335 (1960). *Blaski* was decided with a companion case, *Sullivan v. Behimer*. There were two issues in *Blaski*, the meaning of section 1404(a), and a question about appellate procedure. The dissenters in *Blaski* did not reach the former because they believed the latter dispositive. The *Blaski* dissenters did address the meaning of section 1404(a) in their dissent to *Behimer*. In the interest of clarity the dissent in *Behimer* will be called the *Blaski* dissent.

4. In the rare case of neither party requesting the transfer, where the judge sua

pealing "Brought by the plaintiff," the answer assumed without examination by both the majority and the dissent in *Blaski*. Of course in the rare case of plaintiff seeking a transfer the interpretations are identical; the differences become significant in the more common case of a defendant seeking transfer.

There are two versions of the proposed interpretation, one supplementing and the other replacing the prevailing interpretation.

As a supplement, the proposed interpretation will permit many transfers which would be in the interests of justice but which are arbitrarily precluded by the prevailing interpretation. The list of transferee forums (limited under the prevailing interpretation to those in which plaintiff could have brought this action against this defendant) would be expanded when the defendant seeks the transfer to include those where the defendant could have brought an action on the same subject matter against the plaintiff. Thus the supplementing version of the proposed interpretation expands the "where it might have been brought" restriction.

If the proposed interpretation replaces that now prevailing, the restriction will be redirected. Many transfers will be newly allowed, as under the supplemental version. Many transfers now allowed will be precluded. Transfers requested by defendant would be allowed only to places where defendant could have brought an action on the same subject matter against the plaintiff, not to places where plaintiff could have brought this action against the defendant. The two versions should be evaluated separately. A possible rejection of the more radical replacing version should not require rejection of the more modest supplementing version.

This article will first describe the operation and purpose of section 1404(a), then discuss three possible interpretations of "where it might have been brought." Briefly, these interpretations interpolate after that phrase, "by the plaintiff without the defendant's consent," "by the plaintiff with the defendant's consent," or "by the party seeking the transfer." These three interpretations are those of the *Blaski* majority, of the *Blaski* dissent, and of this article, respectively. The proposed interpretation will

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sponte orders the transfer, either party could object that the transferee forum is not one where an action on that subject matter could have been brought against the objecting party.

be shown to be consistent with the statute's purpose, language, legislative history, and judicial interpretation.

## II. SECTION 1404(a)

Section 1404(a) authorizes transfer of civil actions from one federal district court to another, even though venue and personal jurisdiction<sup>5</sup> were proper where the action was filed. Such transfers are to be made, much as under the common law doctrine of *forum non conveniens*,<sup>6</sup> "for the convenience of parties and witnesses, in the interest of justice."<sup>7</sup> Under *forum non conveniens* a court dismisses or stays an action; under section 1404(a) the court transfers the action.

The decision to transfer is more complicated than the decision to dismiss or stay. To dismiss or stay an action, a court need only determine that the action should not proceed in that court. To transfer requires a further inquiry: "If not here, where?" Section 1404(a) provides that an action may be transferred only to a court "where it might have been brought."<sup>8</sup> That last requirement, the subject of this article, "has engendered much controversy in the courts."<sup>9</sup>

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5. *Cf. Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962) (interpreting what is now 28 U.S.C. § 1406(a) (1982)) (transfer allowed although transferring court lacked both personal jurisdiction and venue); *Smith v. Peters*, 482 F.2d 799 (6th Cir. 1973) (transfer allowed although transferring court lacked personal jurisdiction), *cert. denied*, 415 U.S. 989 (1974).

6. The federal rule of *forum non conveniens* prior to enactment of section 1404(a) is discussed in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The circumstances for applying section 1404(a) and *forum non conveniens* may differ. *See Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71 (1963) (section 1404(a) transfer not required, even though state court in same state as federal court had earlier dismissed under *forum non conveniens* a case concerning the same subject between the same parties); *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) (section 1404(a) transfer upheld even though *forum non conveniens* dismissal would have been improper); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (application of *forum non conveniens* where the more convenient forum is a foreign court).

7. 28 U.S.C. § 1404(a) (1982). Consideration of the "convenience" and "justice" requirement is beyond the scope of this article.

8. *Id.*

9. *Blaski v. Hoffman*, 260 F.2d 317, 321 (7th Cir. 1958) (on rehearing, withdrawing earlier opinion), *aff'd*, 363 U.S. 335 (1960). That case's history reflects the controversy: a transfer was ordered by a Texas district court, which was upheld by the Fifth Circuit. *Ex parte Blaski*, 245 F.2d 737 (5th Cir.), *cert. denied*, *Blaski v. Davidson*, 355 U.S. 872 (1957). It was then reluctantly accepted by an Illinois district court, and initially upheld by the Seventh Circuit, before being rejected by the Seventh Circuit on rehearing and by the Supreme Court.

## III. INTERPRETING "WHERE IT MIGHT HAVE BEEN BROUGHT"

The United States Supreme Court in *Blaski* divided over the two interpretations adopted by various lower courts of "where [the action] might have been brought." The majority held that that phrase refers to the time the action was commenced, not later when the motion to transfer was made. Transfer would be allowed only to districts in which, at the time the action was commenced, plaintiff could have satisfied personal jurisdiction and venue over the defendant.<sup>10</sup> The dissent would have extended the phrase to the time when the motion to transfer was made. Because a defendant may create personal jurisdiction and venue by consent,<sup>11</sup> the dissent would allow the defendant, via a consent in his motion to transfer, to make a particular district one "where [the action] might have been brought."<sup>12</sup>

Let us examine these two interpretations, taking first the common ground and then the areas of disagreement. The common ground concerns transfers sought by plaintiff. In this situation restricting transfer of an action to courts "where it might have been brought" would seem to be intended to preserve normal concepts of personal jurisdiction and venue. There would be little point in having those concepts if plaintiff could, after filing in a court satisfying them, transfer to any other court without regard to them.<sup>13</sup> Thus, transfers sought by plaintiffs should be allowed only to courts where venue and personal jurisdiction would be satisfied for this plaintiff's assertion of this claim against this defendant. This is the interpretation adopted in the circuit courts of appeal even before *Blaski*,<sup>14</sup> and it would seem

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10. This interpretation had previously been adopted in the circuit courts of appeal only by the Seventh Circuit in the two cases affirmed in *Blaski*. 363 U.S. at 342-44.

11. See, e.g., *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964).

12. 363 U.S. at 369 (Frankfurter, J., dissenting). Decisions of circuit courts of appeal adopting this interpretation were, in chronological order, *Paramount Pictures, Inc. v. Rodney*, 186 F.2d 111 (3rd Cir. 1950), *cert. denied*, 340 U.S. 953 (1951); *Anthony v. Kaufman*, 193 F.2d 85 (2d Cir. 1951), *cert. denied*, 342 U.S. 955 (1952); *In re Josephson*, 218 F.2d 174 (1st Cir. 1954); *Ex parte Blaski*, 245 F.2d at 737.

13. It would still be necessary to satisfy the "convenience" and "justice" requirements, but more than that would be required for venue and personal jurisdiction. See 28 U.S.C. § 1391 (1982); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

14. See *Blackmar v. Guerre*, 190 F.2d 427 (5th Cir. 1951), *aff'd on other grounds*, 342 U.S. 512 (1952); *Shapiro v. Bonanza Hotel Co.*, 185 F.2d 777 (9th Cir. 1950); *Foster-Milburn Co. v. Knight*, 181 F.2d 949 (2d Cir. 1950).

to be acceptable to both majority and dissent. The disagreement concerns transfers sought by the defendant.

#### A. *The Blaski Majority*

The majority would allow transfers at defendant's request only to courts where plaintiff might have brought the action, i.e., where plaintiff could have satisfied personal jurisdiction and venue. This approach does not always produce a sensible result.

In order to illustrate, let us consider a hypothetical dispute between two corporations, Interstate and Local. A claim between the two corporations satisfies federal subject matter jurisdiction. Interstate, let us suppose, is engaged in continuous and substantial business in every state of the Union; in each state it has factories, offices, stores, and employees. Local is a retail store (not franchised<sup>15</sup>) which sells over the counter to the ultimate consumer and which buys from local wholesalers. Assume further that the claim arose at Local's place of business.

If Local is the plaintiff, the case would have satisfied personal jurisdiction<sup>16</sup> and venue<sup>17</sup> in every district, so "where it might have been brought" would include all federal district courts. Interstate can have the case transferred anywhere. This is true even though plaintiff Local has no contacts with any other district and might be seriously inconvenienced by the transfer. Thus the majority's interpretation provides no protection to a local plaintiff suing an interstate defendant.

If Interstate is the plaintiff, personal jurisdiction will be satisfied only in Local's state,<sup>18</sup> so Local cannot have the case transferred. This is true, even though plaintiff Interstate has substantial contacts in all other districts and would not likely be seriously inconvenienced by any transfer. Thus the majority's interpretation allows an interstate plaintiff, even with no apparent

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15. Cf. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (court at franchisor's headquarters may obtain personal jurisdiction over out-of-state franchisee).

16. If defendant's contacts with the forum are sufficiently continuous and substantial, defendant may be subject to personal jurisdiction even for claims unrelated to those contacts. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

17. 28 U.S.C. § 1391(c) (1982) provides, "A corporation may be sued . . . [where] it is incorporated or licensed to do business or is doing business . . . ."

18. Venue, but not personal jurisdiction, would be satisfied in plaintiff Interstate's residence if subject matter jurisdiction is based on diversity. See 28 U.S.C. § 1391(a) (1982).

interest in resisting a transfer, to prevent transfer sought by a local defendant. This result—an interstate defendant sued by a local plaintiff has many potential transferee districts to which it may force the plaintiff to go, but a local defendant sued by an interstate plaintiff has few or none—seems anomalous.

“These hypotheticals may be interesting,” the reader may be thinking, “but are they realistic? Why would a local defendant want a transfer? Would a court transfer a local plaintiff suing an interstate defendant?” Yes, the hypotheticals are realistic, they are based (within normal limits of poetic license) on two leading Supreme Court decisions interpreting section 1404(a), *Blaski*<sup>19</sup> and *Van Dusen v. Barrack*.<sup>20</sup> A local defendant might want to transfer a case to consolidate it with others to spread the costs of defense. A court might similarly transfer a local plaintiff to ease consolidation.

The preceding analysis considered only the “where it might have been brought” restriction. Might the problem of anomalous transfer opportunities, created by the *Blaski* majority’s interpretation of that restriction, be solved by the “convenience” and “justice” requirement?

In the “local plaintiff v. interstate defendant” hypothetical, “convenience” and “justice” might have been adequate safeguards, as any transfer of such a plaintiff is likely to cause the plaintiff substantial inconvenience, since by hypothesis that plaintiff has contacts only in the forum. Congress was not content to rely solely on a court’s estimate of “convenience” and “justice,” however, because it added the “where it might have been brought” restriction. Yet that restriction is given no purposeful content under the prevailing interpretation. The proposed interpretation, if it replaced that now prevailing, would provide such purposive content.

A different situation is presented when a local defendant seeks transfer of an action brought by an interstate plaintiff. Here some transfers might well satisfy the “convenience” and “justice” requirement, yet no transfer is allowed under the prevailing interpretation of “where it might have been brought,” even though no policy is served by such an interpretation. The

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19. A patent holder sued a small business for infringement. A patent holder may be viewed as interstate because of the nation-wide rights the patent creates.

20. 376 U.S. 612 (1964). A personal injury action was held transferable from plaintiff’s residence to the accident site, without inquiry as to the extent of plaintiff’s interstate activities or contacts with the accident site.

proposed interpretation provides a consistent and coherent policy to the two requirements, "convenience" and "justice" on the one hand and "where it might have been brought" on the other, a consistency and coherence which are lacking under the *Blaski* majority's interpretation of "where it might have been brought."

Thus far we have considered only a two-party action. Might the advantages of consolidating multi-party litigation justify the conventional *Blaski* interpretation over the proposed interpretation? Consider the facts of *Van Dusen v. Barrack*.<sup>21</sup> An airliner bound from Boston to Philadelphia crashed on takeoff. Over 100 wrongful death actions were filed in the federal court for Massachusetts; over 45 were filed in the federal court for the Eastern District of Pennsylvania.<sup>22</sup> Defendants in the Pennsylvania cases sought a transfer to Massachusetts.<sup>23</sup> Because it is clear that the Pennsylvania plaintiffs could have satisfied personal jurisdiction and venue in the Massachusetts court, the transfer would satisfy the "where it might have been brought" requirement as conventionally interpreted. However, it is uncertain whether an accused tort-feasor can assert personal jurisdiction at the accident site over non-resident victims and their estates.<sup>24</sup> If not, the replac-

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21. *Id.*

22. *Id.* at 614.

23. *Id.*

24. Limits on service of process from federal courts generally follow those of the state in which the federal court sits. See FED. R. CIV. P. 4(e), (f); see also *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (en banc). But see *National Equip. Rental v. Szukhent*, 375 U.S. 311 (1964) (federal law determines who is "an agent authorized by appointment or by law to receive service of process" under FED. R. CIV. P. 4(d)(1)). Thus determination of federal personal jurisdiction requires reference to the personal jurisdiction of state courts.

State assertions of jurisdiction must satisfy both the state long-arm statute and the due process clause of the fourteenth amendment. State long-arm statutes often permit the assertion of jurisdiction based on the commission of a tortious act. See, e.g., ILL. ANN. STAT. ch. 110 ¶ 2-209(2) (Smith-Hurd 1983). Such statutes would allow the victim to assert jurisdiction over the tort-feasor, but they would not help the tort-feasor assert jurisdiction over the victim (unless the tort-feasor had a counterclaim against the victim). The provisions of such statutes for the transaction of any business might be applicable, see, e.g., ILL. ANN. STAT. ch. 110 ¶ 2-209(1) (Smith-Hurd 1983), based on the victim's purchase or use of the product or service which produced the injury, but that would require an expansive reading of the statute. Other statutes authorize jurisdiction to the extent allowed by the Constitution. E.g., CAL. CIV. PROC. CODE § 410.10 (West 1973), and thus present no statutory problems in asserting personal jurisdiction.

State assertions of jurisdiction must also satisfy the due process clause of the fourteenth amendment. While a tort victim might seem to lack "minimum contacts." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Court has approved assertion of jurisdiction against multiple claimants in circumstances such that no other forum seemed available. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306



ing version of the proposed interpretation would not permit the Pennsylvania cases to be transferred to Massachusetts.<sup>25</sup> The proposed interpretation thus may reduce the potential of section 1404(a) as an aid to consolidation of multiple-district litigation.

This argument for the conventional interpretation must be put in perspective. The inability of section 1404 to deal with problems of multi-district litigation is hardly surprising because that section was not designed for that purpose. There are other methods of dealing with the problems of multi-district litigation. For example, section 1407<sup>26</sup> allows increased judicial control of complex litigation. Other developments have increased the incentives for the parties to consolidate litigation.<sup>27</sup> In addition, consolidation may be impractical without regard to section 1404(a). Barriers such as lack of federal subject matter jurisdiction as to some of the related cases may prevent complete consolidation. Differences in substantive law applied to cases originally filed in different courts may eliminate any benefits from consolidation.<sup>28</sup> Finally, the starting point should be remembered. If, as a matter of normal rules of venue and personal jurisdiction, we do not permit the tort-feasor to summon the victim to the accident site, why should such a result be permitted through a transfer under section 1404(a)? To put the

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(1950) (upheld assertion of jurisdiction over non-resident beneficiaries of a trust in an action by trustee to settle accounts, in effect an action for a declaratory judgment of no liability). Whether this case would be extended to tort victims is unclear. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (in an action for damages, a state court may exercise personal jurisdiction over non-resident members of plaintiff class who lack minimum contacts with the state if the court provides such procedural protections as notice to known class members, opportunities to be heard and to opt-out, and assurances of adequate representation).

25. The transfers would be authorized under the supplementing version of the proposed interpretation, because that version allows all transfers allowed under the prevailing interpretation, and this transfer is allowed under the prevailing interpretation. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

26. 28 U.S.C. § 1407 (1982). This section authorizes transfer of cases without any restriction equivalent to Section 1404(a)'s "where it might have been brought," but it applies only to pretrial. Decisions on transfers are made by the judicial panel on multidistrict litigation, rather than by a district judge.

27. A few examples: The high costs of litigation encourage consolidation. The incentive for plaintiff(s) to pursue separate actions, each hoping to use another's victory as non-mutual collateral estoppel, has been reduced by *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (courts should be reluctant to let a plaintiff who could have joined in a prior action use the results of that action as non-mutual collateral estoppel). There may even be some risk that the waiting plaintiff may be estopped by another's defeat. *See Note, Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485 (1974).

28. *See Van Dusen v. Barrack*, 376 U.S. 612, 643-46 (1964).

question another way, if the need to facilitate consolidation is so great as to justify transfer, is it not also sufficient to justify personal jurisdiction at the accident site? If so, the proposed interpretation will present no problems to consolidation. Thus, for complex litigation as for simple litigation, the majority's interpretation is undesirable.

### B. *The Blaski Dissent*

The interpretation suggested by the dissent in *Blaski* is even less satisfactory. They would interpret "where [the action] might have been brought" as including districts for which—after the action has begun—defendant waives objections to personal jurisdiction or venue.<sup>29</sup> This interpretation would, as a practical matter, eliminate that restriction whenever it is the defendant who seeks a transfer (as is normally the case). Of course an interpretation of a provision of a statute which effectively eliminates that provision should not be favored.

There is a fundamental incongruity in the dissent's interpretation of the "where it might have been brought" restriction. That statutory restriction protects the party resisting the transfer, normally the plaintiff; yet the dissent would allow the defendant to waive the restriction. It is nonsensical to allow one party to waive the opposing party's rights.

While the dissent may be quite persuasive in suggesting that the question is not as simple as portrayed by the majority,<sup>30</sup> the dissent fails to think through its proposed alternative.

### C. *The Proposed Interpretation*

This article proposes a third interpretation of "where [the action] might have been brought." That phrase, this article suggests, refers to any district where the party seeking the transfer might have brought the action. If it is the plaintiff who is seeking the transfer, this proposed third interpretation is the same as that of the *Blaski* majority and dissent: Transfers are authorized to districts in which personal jurisdiction and venue of the original action would have been satisfied when that action was commenced. If it is the defendant who is seeking the transfer, this proposed third interpretation is different from those of both

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29. 363 U.S. at 369 (Frankfurter, J., dissenting).

30. Scholars too have criticized the *Blaski* majority. See 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3845 (1986).

the *Blaski* majority and the dissent: Transfers would be authorized to districts in which personal jurisdiction and venue would have been satisfied for a hypothetical action on the same subject matter brought by the true defendant against the true plaintiff. For example, if the true plaintiff were seeking damages or an injunction, in the hypothetical action the true defendant would be seeking a declaratory judgment of non-liability.<sup>31</sup>

The proposed interpretation may be illuminated by applying it to the facts of *Blaski*. In that case Illinois plaintiffs brought an action for patent infringement against Texas defendants in a federal court in Texas. The Texas defendants' motion for transfer under section 1404(a) to an Illinois federal court ultimately was rejected by the U.S. Supreme Court because the Illinois plaintiffs could not have brought an action in Illinois against the Texas defendants. Because the Texas defendants might have brought an action in an Illinois federal court against the Illinois plaintiffs for a declaratory judgment that the patent was invalid or was not infringed, this proposed third interpretation would authorize the transfer.<sup>32</sup>

To interpolate "by the party seeking the transfer" at the end of the phrase "where it might have been brought" may not be the reading which first comes to mind. However, this interpretation produces more sensible results than do the interpretations of majority and dissent in *Blaski*. It is an interpretation

31. Under the proposed interpretation, the concern is not whether such a hypothetical action would be appropriate as a matter of declaratory judgment practice; the question is only whether personal jurisdiction and venue would be satisfied for such an action.

32. Another example is *Sullivan v. Behimer*, 363 U.S. 335 (1960), companion case to *Blaski*. Residents of New York and Illinois brought a shareholder derivative action in Illinois federal court, on behalf of a Utah corporation, against an Indiana corporation which controlled the Utah corporation. *Id.* at 338. Because the Indiana corporation was not subject to Utah personal jurisdiction, the *Blaski* majority rejected a transfer to Utah.

Because the action was on behalf of a Utah corporation, most of whose "independent" stock was held by Utah residents, there is a reasonable argument that the Indiana corporation defendant (as a hypothetical plaintiff) could have satisfied personal jurisdiction and venue over all shareholders in Utah in an action for a declaratory judgment of non-liability. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (a state court has jurisdiction to settle a trustee's accounts in regard to non-resident beneficiaries, in effect a declaratory judgment that the trustee is not liable to the beneficiaries). If that argument is accepted, the proposed interpretation would permit the transfer. Cf. *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524-26 (1947) (headquarters of organization on whose behalf derivative action is brought is frequently the most appropriate forum, contrary to normal presumption in favor of plaintiff's choice of forum).

the language will bear, it is consistent with the available legislative history, and it is not precluded by judicial interpretation.<sup>33</sup>

#### IV. POLICY

Let us consider first the results of the competing interpretations.

Allowing defendants to obtain transfers only to a court in which they could have brought mirror-image actions, as would be the case if the proposed interpretation were to replace the *Blaski* majority's, has a certain natural appeal. Under either a section 1404(a) transfer or an original service of process, a litigant is forced to go to a particular court or else forfeit the litigation. Why should a plaintiff, who could not be forced into a particular court by someone filing a complaint and seeking service of process, be forced to go there by a defendant invoking section 1404(a)?

The anomalous results produced by the majority's interpretation—an interstate defendant can transfer a local plaintiff anywhere, but a local defendant can transfer an interstate plaintiff nowhere<sup>34</sup>—disappears if “where it might have been brought” means where the moving party [here, the defendant] can satisfy personal jurisdiction and venue in regard to the other party. In an action by Local against Interstate,<sup>35</sup> Interstate could obtain a transfer only to districts in which it could satisfy personal jurisdiction and venue as to Local (if the proposed interpretation replaces that now prevailing). This would most probably allow transfers only to Local's residence and to where the claim arose, a substantial reduction in potential transferee districts. In an action by Interstate against Local, in contrast, Local could obtain a transfer to any district (if the transfer would promote convenience and justice) because Interstate is subject to personal jurisdiction and venue in all districts. Thus, if the proposed interpretation replaces the prevailing interpretation, a litigant can be forced to go to a particular court by a 1404(a) transfer only if that litigant could be forced to go there by service of process in an original action. Whether the proposed interpretation replaces

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33. Again it should be noted that there are two arguments here. The proposed interpretation may either supplement or replace the *Blaski* majority's.

34. This dichotomy was discussed *supra* text accompanying notes 15-18.

35. The Local-Interstate hypothetical was introduced *supra* text accompanying note 15.

or supplements the current interpretation, if a party could be forced there by service of process, that party could also be forced there by a 1404(a) transfer.

As would that of the *Blaski* dissenters, the proposed interpretation creates additional potential transferee forums (subject of course to the convenience and justice requirement), in accord with the canon that remedial statutes should be broadly construed.<sup>36</sup> Because the new potential transferee forums are those where an action could have been brought against the party resisting transfer, one would expect that these forums would tend not to be inconvenient for the resisting party. In contrast, the interpretation of the *Blaski* dissenters (that "where it might have been brought" includes wherever defendant now consents) would impose no principled limit on transferee forums, many of which might be quite inconvenient for plaintiff. The proposed interpretation does increase potential forums, but the increase is limited and principled, so that "where it might have been brought" continues to be a substantial restriction. In contrast, the interpretation of the *Blaski* dissenters would, as a practical matter, eliminate that restriction whenever it is defendant (as it most commonly is) who seeks the transfer.

Thus the proposed interpretation responds to the concerns of the *Blaski* dissenters. Yet it avoids the problems the dissent would create and accordingly is responsive to the majority's concerns. Thus as a matter of policy, the proposed interpretation is sensible, much more so than that of either majority or dissent.

## V. LANGUAGE

Is the proposed interpretation one the language of the statute will bear? Two problems are apparent. First, the statute is written in terms of an "action." Can that term include, not only the action that was in fact filed, but also a hypothetical mirror-image of that action, the hypothetical action brought by the defendant in the true action? There has been some judicial flexibility in interpreting the term "action" in section 1404: That term has been held to include a part of an action.<sup>37</sup> Thus if cer-

36. See *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964).

37. See *Wyndham Assocs. v. Bintliff*, 398 F.2d 614 (2d Cir.), cert. denied, 393 U.S. 977 (1968); see also *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984). See generally 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3845 (1986).

tain claims or parties could not be transferred because they would not satisfy the "where it might have been brought" requirement, they may be severed and retained and the remainder of the case transferred. This flexibility might suggest that an "action" could include the real action's hypothetical mirror-image.

Statutes and even the Constitution in many analogous areas have been interpreted to include within the term "action" the true action's hypothetical mirror-image. For example, in determining whether or not an action arises under federal law so as to satisfy federal subject matter jurisdiction,<sup>38</sup> a declaratory judgment action is treated as a hypothetical action for mandatory relief.<sup>39</sup> Similarly, in determining whether the amount in controversy requirement<sup>40</sup> was satisfied in an action by an insurance company to set aside a workmen's compensation award, the Court looked to the amount of the claim the defendant employee was expected to assert in a hypothetical action for an increased award.<sup>41</sup> In determining right to jury trial<sup>42</sup> in an action for declaratory relief, it appears that the Court looks to a hypothetical action for mandatory relief and asks whether that action would be legal or equitable.<sup>43</sup> In light of these analogies, it does not strain the term "action" to have it include a hypothetical mirror-image action brought by the defendant in the true action.

Second, the statute refers to where an action "might have been brought." Is one restricted to interpolating at the end "By the plaintiff," or might one ask, "Brought by whom?" and then interpolate, "By the party seeking the transfer." As above, if "action" includes a hypothetical mirror-image action, "Brought by whom?" should be a permissible question, and its answer should in appropriate cases be the defendant. Suggesting a novel

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38. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

39. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908).

40. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, and [diversity or alienage is satisfied]." 28 U.S.C. § 1332(a) (1982).

41. See *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961).

42. "In suits at common law . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

43. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Similarly, that case also held that a legal counterclaim (somewhat analogous to a hypothetical mirror-image action) may create a right to jury trial.

answer, to an unarticulated question with an apparent answer, may be a sensible method of statutory interpretation. For example, Justice Harlan suggested that the requirement that "the complaint [in a shareholder derivative action] shall be verified by oath,"<sup>44</sup> although apparently contemplating verification by the plaintiff, could also be satisfied by verification by counsel.<sup>45</sup>

In other areas courts have departed from a statute's words to achieve its purposes. In the tax area, for example, the Court held that a transaction literally within the statutory definition of a corporate reorganization would not be so treated.<sup>46</sup> Lower courts have held that transactions not literally within the corporate reorganization provisions would nonetheless be subject to them.<sup>47</sup> To reject the initially appealing interpretation of "where it might have been brought" produces a sensible result and is consistent with the general concerns the Congress expressed in enacting section 1404(a), and is thus in accord with these examples.<sup>48</sup>

Thus, the language of section 1404(a) may be reasonably interpreted as including a mirror-image action, brought by the party seeking the transfer, to supplement the prevailing interpretation. It is more difficult but still possible to have that proposed interpretation replace the *Blaski* majority's.

## VI. LEGISLATIVE HISTORY

We turn now from the statute's language to its legislative history. Section 1404(a) was enacted as part of the 1948 revision of the Judicial Code.<sup>49</sup> Because of the magnitude of the revision, particular provisions may have little legislative history. The substance of the legislative history of section 1404(a) is contained in the reviser's notes:

Subsection (a) was drafted in accordance with the doctrine of

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44. Now Rule 23.1 of the Federal Rules of Civil Procedure.

45. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 374 (1966) (Harlan, J., concurring).

46. See *Gregory v. Helvering*, 293 U.S. 465 (1935).

47. See, e.g., *Davant v. Commissioner*, 366 F.2d 874, 886 (5th Cir. 1966), *cert. denied*, 386 U.S. 1022 (1967); *Answering Serv. Co. v. Commissioner*, 63 T.C. 423 (1974), *aff'd*, 546 F.2d 423 (4th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977).

48. Hart and Sacks suggest that words in a statute may be given more unusual meanings if addressed to judges (as Section 1404(a) is) than if addressed to private persons (as the tax code is). H. HART & A. SACKS, *THE LEGAL PROCESS* 1412-13 (Tent. ed. 1958).

49. 62 Stat. 869, 937 (1948).

*forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. Co. v. Kepner*, 62 S. Ct. 6, 314 U.S. 44, 86 L.Ed. 28 (1941), which was prosecuted under the Federal Employer's [sic] Liability Act in New York, although the accident occurred and the employee resided in Ohio. [*Kepner* held that a state court could not enjoin an employee's prosecution in a federal court of an action under FELA, and it strongly suggested that federal courts could not apply *forum non conveniens* to FELA actions.] The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.<sup>50</sup>

These notes do not address the "where it might have been brought" limitation, but they do suggest that general guidance might be obtained by examining the doctrine of *forum non conveniens* as it then stood. The late Professor Braucher in an article published the year before the revision was enacted discussed two contrasting themes contained in the doctrine of *forum non conveniens*: an original theme of abuse of process and a developing theme of trial convenience.<sup>51</sup>

Let us examine a case where plaintiff's choice of forum constitutes an abuse of process: the forum is not plaintiff's residence, nor where the claim arose, nor defendant's principal place of business, nor the residence of any witnesses; it is rather selected solely for improper reasons such as the reputed generosity of its juries or its proximity to plaintiff's attorney's office.<sup>52</sup> In

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50. H.R. REP. NO. 308, 80th Cong., 1st Sess. A 132 (1947); H.R. REP. NO. 2646, 79th Cong., 2d Sess. A 127 (1946). There is a discussion of the legislative history of section 1404(a) in *Ex Parte Collett*, 337 U.S. 55, 58-71 (1949).

51. Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947). For more general discussions see Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929) Foster, *Place of Trial in Civil Actions*, 43 HARV. L. REV. 1217 (1930) [hereinafter *Place of Trial I*]; Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 HARV. L. REV. 41 (1930) [hereinafter *Place of Trial II*]. "Abuse of process" is used here for its general, non-technical meaning, not as a term of art referring to a particular tort. See, e.g., W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 121 (5th ed. 1984).

52. This description could reasonably be applied to several of the inconvenient forum cases decided by the Supreme Court. See *Ex Parte Collett*, 337 U.S. 55 (1949) (Kentucky was plaintiff's residence and accident site, but case was filed in Illinois); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (Virginia was plaintiff's residence and accident site, but case was filed in New York); *Baltimore & O.R.R. Co. v. Kepner*, 314 U.S. 44 (1941) (Ohio was plaintiff's residence and accident site, but case was filed in New York); see also Barrett, *supra* note 51, at 382 n.13, 383 n.16.



such a case—it may be argued—a dismissal or stay under forum non conveniens, or a transfer under section 1404(a), in effect says: This is not a proper forum, although it technically satisfies venue and personal jurisdiction, because it was so abusively chosen.<sup>53</sup> Plaintiff thus not having properly begun the action, the action may be sent to a forum which would be proper. To transfer rather than dismiss saves the plaintiff having to refile. In such circumstances it is sensible to interpolate “by the plaintiff” after “where it might have been brought.” Thus interpolating “by the party seeking transfer” should not replace the prevailing interpretation.

There are two responses to this argument. First, it is unlikely that section 1404(a) is based on the “abuse of process” concept of forum non conveniens. Neither the statute nor the reviser’s notes use the language of abuse of process: terms such as vex, harass, oppress, or impose and their derivatives.<sup>54</sup> Rather, both statute and notes use the terms of trial convenience: “convenience” and “justice.”<sup>55</sup> At most the preceding argument would apply only to the relatively few cases under section 1404(a) in which plaintiff’s initial choice of forum may fairly be characterized as abusive, a narrow sub-class of the “trial convenience” cases.

Second, even if there has been an abuse of process, the preceding argument merely shows why the case cannot proceed in the forum plaintiff initially chose. It does not dictate the choice among transferee forums. If an action were dismissed under forum non conveniens, plaintiff could refile it only in one of the courts where the original action “might have been brought,” but the choice among those courts would be plaintiff’s (subject, of course, to a second application of forum non conveniens). As forum non conveniens operated, the only court in which plaintiff could be forced to be was a court in which plaintiff was subject to personal jurisdiction and venue for a mirror-image action brought by the defendant.

Alternatively, defendant, rather than asking the abusively-chosen forum to dismiss, might ask another court to enjoin

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53. See *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 532 (1947).

54. See Braucher, *supra* note 51, at 930-31.

55. Braucher suggests that the focus of Section 1404(a), under consideration by the Congress at the time he wrote his article, is trial convenience. *Id.* at 933; see also *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955) (section 1404(a) allows transfer even when forum non conveniens dismissal would be improper).

plaintiff from proceeding in that forum.<sup>56</sup> This approach, too, would require defendant going to a court having venue and personal jurisdiction over plaintiff.

Thus there is a fair argument that even if plaintiff's choice of forums constituted an abuse of process, transferee forums should be limited to those in which plaintiff was subject to venue and personal jurisdiction.

The "trial convenience" concept did permit consideration of forums other than those in which the action "might have been brought" by the plaintiff. An action might be stayed or dismissed in a particular forum, even though plaintiff had no other forum available at the time the action was commenced, if defendant would consent to jurisdiction in the more convenient forum.<sup>57</sup> Thus the "trial convenience" concept of forum non conveniens, suggested by the legislative history to be the basis of section 1404(a), is inconsistent with interpolation of "by the plaintiff" after "where it might have been brought."

The silence in the legislative history of Section 1404(a) in regard to the "where it might have been brought" restriction is noteworthy. A court in applying forum non conveniens before the enactment of section 1404(a) could only dismiss or stay an action, not transfer it. While the court would consider the availability of other possible forums, it could not send the case to any of them. Of course a restriction on transfer becomes relevant only with the authorization of transfers. Full appreciation of the problems of transfers and the need for restrictions may take time to develop.<sup>58</sup> The silence in the legislative history on the

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56. See *Place of Trial I*, *supra* note 51, at 1240-41.

57. Several cases had approved forum non conveniens dismissals based on defendant accepting service of process in the more convenient forum. See, e.g., *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 424 (1932); *Strassburger v. Singer Mfg. Co.*, 263 A.D. 518, 33 N.Y.S.2d 424 (1942). Additional cases are cited in the dissent to *Hoffman v. Blaski*, 363 U.S. 335, 351, 364 (1960), and in *Braucher*, *supra* note 51, at 932 n.139; see also, *Foster*, *Place of Trial II*, *supra* note 51, at 50-51. *Gulf Oil Corp. v. Gilbert Storage & Transfer Co.*, 330 U.S. 501, 507 (1947), states that forum non conveniens "presupposes at least two forums in which the defendant is amenable to process . . ." This terse statement could be satisfied if the second forum were created by the defendant's consent, and thus need not be inconsistent with the position stated in the text. If the statement is inconsistent with the text, it may be noted that the statement is dictum and is without citation of authority. See also *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), in which defendants consented to jurisdiction and to waive the statute of limitations in the more convenient forum.

58. The sequence of thinking about transfers on defendant's motion might begin with the thought that making provision for transfer would seem to aid the plaintiff. Plaintiff is spared the expense of commencing another action, the risk of not being able

matter of restricting transfers suggests that Congress did not focus on this problem.

What can one conclude that Congress decided? Congress enacted a broad concept of forum non conveniens, trial convenience rather than abuse of process.

Congress decided to have transfers, rather than dismissals or stays. By providing for transfer rather than dismissal, Congress would seem to have been moved by concern for certain legitimate interests of the plaintiff. A transfer avoids the risks of difficulty in serving process or of the running of the statute of limitations, which are present in a dismissal. It would seem inconsistent with that concern to allow plaintiff to be transferred to a distant forum with which plaintiff has no connection, merely because defendant has sufficient contacts with that forum to satisfy personal jurisdiction and venue.

Congress chose not to leave transfers to the trial judge's discretion under the loose "convenience" and "justice" requirement, nor to tempt parties into litigating about all sorts of possibly convenient or just forums, but instead imposed the additional "where it might have been brought" requirement. The proposed interpretation—if it replaces that now prevailing—provides that additional protection to a local plaintiff suing an interstate defendant; the conventional interpretation does not.

But Congress did not focus on the content of the "where it might have been brought" restriction. It did not address the question, "Brought by whom?" It did not determine that the restriction must be interpreted according to the initially apparent meaning of the words, rather than in a more principled and sensible manner. To interpret the restriction as referring *only* to where the moving party could have brought an action would provide principled protection to the party resisting transfer; to interpret the restriction as *also* including where the moving party could have brought that action increases available transferee forums in a principled manner. The *Blaski* majority's in-

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to obtain jurisdiction over the defendant in the new action, and the risk that the statute of limitations may run. Upon further reflection, one might perceive that transfer also creates a burden on the plaintiff. Plaintiff is forced to go to the transferee forum. Only a still deeper understanding will reveal that a limit cast in terms of where plaintiff might bring an action will be arbitrary. Those places are dictated by concepts of venue and personal jurisdiction created to protect the defendant, yet it is plaintiff who needs protection when the action is being transferred.

terpretation, in contrast, imposes an arbitrary limit on transferee forums unrelated to any interest of the party. Moreover, the majority's interpretation is inconsistent with the cases where dismissal under forum non conveniens was conditioned on defendant consenting to jurisdiction in a more convenient forum, a forum in which the action could not have been brought by the plaintiff.<sup>59</sup> Yet, unlike that of the *Blaski* dissent, the proposed interpretation gives the limitation significant content. The legislative history, while too sparse to provide more than general guidance, is more in accord with the interpretation proposed here than with the interpretations chosen by either the majority or the dissent in *Blaski*.

## VII. JUDICIAL INTERPRETATION

The *Blaski* majority interpolates "by the plaintiff" at the end of "where it might have been brought":

But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action "might have been brought" by the plaintiff.<sup>60</sup>

Such an interpolation seems at first blush to reject the argument advanced here. That statement, however, was made for another purpose, as the context makes clear. The reference to "by the plaintiff" is not in contrast to, "by the party seeking the transfer," the interpretation proposed here, but to "by the wish or waiver of the defendant," the interpretation unsuccessfully advanced there by petitioners. This reading is made clear by the majority's statement of the issue to be decided: "Petitioners' 'thesis' and *sole claim* is that . . . 'where it might have been brought' should be held to relate not only to the time of the bringing of the action, but also to the time of the transfer . . ."<sup>61</sup>

The majority accepts the issue as tendered by petitioners, then rejects the petitioners' interpretation. The majority is stating, not what the statute means, but that the statute does not mean what petitioners contend. The words chosen by the majority reflect, not a consideration of the various possible interpreta-

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59. See *supra* note 57.

60. 363 U.S. at 343-44 (emphasis added).

61. *Id.* at 342 (emphasis added).

tions of "where it might have been brought," but merely use of one natural meaning of that phrase as a short-hand for rejecting petitioners' interpretation. Not having considered other possible interpretations, the majority did not reject them.<sup>62</sup> Words chosen by the Court for one purpose are likely to mislead if applied without analysis to another.

It should be noted that the concerns raised by the *Blaski* majority are resolved by the proposed interpretation. The theory the majority rejected was that "where it might have been brought" referred, not only to the time the action was commenced, but to the time of the motion to transfer as well.<sup>63</sup> The proposed interpretation looks only to the time the action was commenced. The *Blaski* majority expressed concern that the theory it was rejecting would "inject gross discrimination," because that theory would allow the defendant, merely because he was the defendant, to qualify for transfer (subject to the convenience and justice requirement) to a district to which plaintiff could not obtain transfer (no matter how convenient).<sup>64</sup> The proposed interpretation does indeed provide different treatment for plaintiff and defendant, but the difference is principled rather than discriminatory. Either party may obtain a transfer to a district in which that party could have brought the action (or its mirror-image) under the supplemental version of the proposed interpretation, and under the replacing version those are the only districts to which transfers are allowed. Because the proposed interpretation responds to the concerns of the *Blaski* majority, and because the language in that opinion superficially hostile to the proposed interpretation was intended for another purpose, *Blaski* at least is not authority against the proposed interpretation, and it might even provide a little support.<sup>65</sup>

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62. See *United States v. Ross*, 456 U.S. 798, 824 (1982).

Our decision today is inconsistent with the disposition in *Robbins v. California* [453 U.S. 420 (1981)]. . . . Nevertheless, the doctrine of *stare decisis* does not preclude this action. . . . [A]lthough we reject the precise holding in *Robbins*, there was no Court opinion supporting a single rationale for its judgment, and the reasoning we adopt today was not presented by the parties in that case.

*Id.* (emphasis added).

63. 363 U.S. at 342-43.

64. *Id.* at 344.

65. Research has uncovered one judicial statement that defendant cannot obtain a transfer to a district in which plaintiff was not subject to personal jurisdiction. *Arvidson v. Reynolds Metals Co.*, 107 F. Supp. 51 (W.D. Wash. 1952). This statement, while not quite the interpretation proposed here, is close enough to provide some support for that

The proposed interpretation finds some support by analogy from a case such as *A.J. Industries, Inc. v. United States District Court*<sup>66</sup> holding that "where [an action] might have been brought" includes districts where it might have been asserted as a counterclaim in an action then pending there. That the plaintiff in the transferred action was defending another action in the transferee district suggests that that plaintiff was subject to personal jurisdiction and venue in the transferee district. Thus a transfer in these cases would satisfy the interpretation proposed here. That interpretation is broader than these cases because it does not require that there be another action pending in the transferee district with the parties reversed (a relatively unlikely circumstance, it would seem). It is enough that personal jurisdiction and venue would be proper for such an action.

### VIII. CONCLUSION

We have considered the policies of three possible interpretations of "where it might have been brought."

The *Blaski* majority would interpolate at the end, "by the plaintiff." This interpretation provides no protection to some parties needing protection against transfer, while allowing other parties to veto transfers not objectively harmful to their interests. The *Blaski* dissent would interpolate "with defendant's consent." This interpretation allows transfer based on defendant's waiver, although it is normally the plaintiff's interest a transfer jeopardizes. The proposed interpretation interpolates "by the party seeking the transfer," normally the defendant. This interpretation by replacing the *Blaski* majority's would provide to the person being forced into a particular court the normal protection of the right to insist venue and personal juris-

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interpretation. Unfortunately the statement was by a district court rather than a higher court; it was an alternative ground; there was no explanation or citation of relevant authority, and the only judicial citations to this case on this issue revealed by shepardizing is by the dissenters in *Blaski*. 363 U.S. at 357 n.8. Thus the support provided is slight.

66. 503 F.2d 384 (9th Cir. 1974); see also *A.T.& T. v. Milgo Elec. Corp.*, 428 F. Supp. 50 (S.D.N.Y. 1977). Simplifying the facts in *A.J. Industries*, a California resident brought an action against a Delaware resident in Delaware. Thereafter the Delaware resident brought an action against the California resident in California. 503 F.2d at 385-86. Normally the California action could not have been brought by the Delaware resident in Delaware for lack of personal jurisdiction over the California defendant. However, the California action could have been asserted as a counterclaim in the Delaware action. That the claim could have thus been asserted was held to satisfy the "might have been brought" requirement. *Id.* at 387.

diction be satisfied; as a supplement to the *Blaski* majority's, it would allow a party to be transferred to any court to which that party could be summoned. Thus as a matter of policy the proposed interpretation produces the most sensible results, perhaps the only sensible results.

Statutory analysis is, of course, more than a choice of social policies. One must look to the statute's language and to its legislative history to see what policy the legislature chose; one must look to judicial interpretation to see what the judges have determined that choice to have been. Each of these factors at the very least permits, and on balance they support the proposed interpretation.

Two related versions of the proposed interpretation have been presented: the proposed interpretation merely supplements, or it totally replaces, the prevailing interpretation. The first may be accepted although the second is rejected, but the second too is sensible and supportable. Perhaps, however, the validity of the second or replacement version need not be addressed. Appropriate judicial sensitivity to plaintiff's convenience may in most cases preclude transfers to places to which plaintiff could not be summoned under the normal rules of personal jurisdiction and venue.

Finally, although this article has addressed how a court might interpret section 1404(a)'s "where it might have been brought" limitation, the analysis would be equally appropriate for legislation amending that limitation by adding at the end "by the party seeking the transfer."