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Refracting Domestic and Global Choice-of-Forum Doctrine Through the Lens of a Single Case

*Richard D. Freer**

There is nothing new under the sun, but there are lots of old things we don't know.

— Ambrose Bierce, The Devil's Dictionary

Large portions of the civil procedure curriculum are devoted to the question of forum selection. Doctrines of personal jurisdiction, subject matter jurisdiction, removal, venue, transfer, and forum non conveniens all address the single issue of whether the litigation is proceeding in a proper place.[1] In law school, students soon see that parties sometimes engage in titanic litigation over where the case should proceed.[2] Why do the parties care about the forum? Everyone can understand why a plaintiff might want to litigate at home—to be in familiar surroundings, to employ her own lawyer in that lawyer's locus of familiarity and influence, and to put her fate in the hands of local jurors who may understand and sympathize with her plight.

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1. The requirement of notice through service of process is also related to the same general topic, because it deals with perfecting the court's personal jurisdiction.

2. Even in such cases, the real forum selection battle may not be what it appears to be. In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), for example, the Court was concerned with whether two minor defendants were amenable to personal jurisdiction in Oklahoma. But the real forum selection fight lay elsewhere. The plaintiffs sued the minor defendants simply to defeat removal, and to keep the case in state court in a county in which juries had shown great largesse to plaintiffs. The principal defendants wanted the minor defendants dismissed so they could remove the case to federal court and have a more diverse (and presumably less beneficent) jury drawn from the entire federal district. *See* Charles Adams, World-Wide Volkswagen v. Woodson—*The Rest of the Story*, 72 NEB. L. REV. 1122, 1128 (1993). *World-Wide Volkswagen* was decided before Congress amended 28 U.S.C. § 1446(b) to provide that a diversity of citizenship case cannot be removed more than one year after it is commenced. So once the minor defendants were dismissed for lack of personal jurisdiction, the principal defendants were able to remove the case on the bases of alienage and diversity of citizenship.

Moreover, everyone can appreciate that the plaintiff might choose a forum that forces the defendant to travel or forces the defendant's lawyer to work in unfamiliar surroundings, or that enhances the possibility of having favorable law apply. What is less obvious at the outset is that the defendant has an impressive array of tools to override the plaintiff's forum selection, and that strategic use of these tools may have a profound effect on the progress[3]—and even the outcome—of the litigation.

On its face, *Piper Aircraft Co. v. Reyno*[4] concerns only one forum-selection doctrine—the forum non conveniens dismissal in favor of a foreign tribunal.[5] While professors have their own views on whether the *Piper* opinion is a good effort in this regard,[6] they recognize it as a canonical case; it is the staple forum-non-conveniens case in the casebooks.[7] A close inspection of its facts, however, reveals that *Piper*'s instructional value vastly exceeds its use as a vehicle for discussing forum non conveniens. The fact pattern permits a review of virtually the whole of forum-selection—an impressive array of issues relating to personal jurisdiction, subject matter jurisdiction, venue, transfer, choice of law, and, as a bonus, a nice exercise in statutory interpretation. It also opens the door to discuss the role of American courts and American law in a global

3. Throughout civil procedure, professors note why litigants might prefer federal or state court. For example, pleading and discovery rules may differ, and the jury pool will differ. It is worth pointing out to students that there may be different evidentiary rules. Federal courts may be seen as less hospitable to plaintiffs on matters of expert testimony. *Daubert v. Merrell Dow*, 509 U.S. 579 (1993), imposes strict requirements on admission of scientific testimony in federal court. The holding has been expanded to cover all expert witnesses, and not just those used to present scientific evidence. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

4. 454 U.S. 235 (1981).

5. Of course, state court cases can be dismissed under forum non conveniens in favor of litigation in a different state. *Piper* establishes federal law of forum non conveniens; states are not required to apply *Piper* in deciding whether to dismiss in favor of a more convenient forum in another state.

6. Some scholars have criticized *Piper*'s forum non conveniens reasoning. *See, e.g.*, Kevin M. Clermont, *The Story of* Piper*: Fracturing the Foundation of Forum Non Conveniens*, *in* CIVIL PROCEDURE STORIES 193–216 (Kevin M. Clermont ed., 2004); Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 369–70 (2002).

7. *See, e.g.*, RICHARD H. FIELD, BENJAMIN KAPLAN & KEVIN M. CLERMONT, CIVIL PROCEDURE 611 (8th ed. 2003); RICHARD D. FREER & WENDY C. PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 297 (4th ed. 2005); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES AND MATERIALS 349 (9th ed. 2005); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 847 (4th ed. 2005).

perspective. Ultimately, it demonstrates that the party who controls forum selection may control outcome. So while *Piper* is nothing new under the sun, its use as a didactic tool may be; it permits professors to demonstrate to students why these doctrines—that may seem so dry and technical—matter to real-world lawyers.

In an era of decreased credit hours, a vehicle that allows professors to cover so much ground and to integrate so much material is a worthy friend. Though *Piper* is assigned in the section of the course on forum non conveniens, in class I surprise students by not addressing that topic until we have examined—expressly for purposes of review—a panoply of other issues, most of which the Court was not required to address. I do so by recounting the facts of the litigation as though they were facts on an examination and by asking sixteen questions, none of which relates to forum non conveniens. At the end of the day, in my opinion, *Piper* is the greatest teaching case in the civil procedure curriculum. But its greatness has surprisingly little to do with the doctrine for which it is famous.

I. THE FACTS OF *PIPER* WITHOUT FORUM NON CONVENIENS

Imagine the facts of *Piper* as an exam hypothetical.[8] A twin-engined airplane manufactured by Piper Aircraft Company in Lock Haven, Pennsylvania, crashed in Scotland. The airplane was fitted with propellers manufactured by Hartzell Propeller, Inc. in Piqua, Ohio. The plane was owned by Air Navigation and Trading Co., Ltd., of Great Britain.[9] Air Navigation maintained the plane in England. McDonald Aviation, Ltd., another British corporation, operated a commercial air taxi service. When one of its planes was inoperable, it leased the plane in question from Air Navigation to take a charter group of five passengers from Blackpool, England to Perth, Scotland. About an hour after take-off, the plane crashed in the highlands of Scotland, killing all aboard. All victims were citizens of Scotland. Their next-of-kin were also Scottish.

A lawyer in Scotland referred the passengers' next-of-kin to the

8. For the facts of *Piper* as stated by the Supreme Court, see 454 U.S. at 238–41.

9. Piper originally sold the plane to a dealer in Ohio, who ultimately sold it to Air Navigation. No one seems to know the chain of ownership between the Ohio dealer and Air Navigation. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 729 (M.D. Pa. 1979). It does not matter for our fact pattern.

well-known plaintiff's air-crash lawyer Daniel C. Cathcart in Los Angeles.[10] Cathcart arranged to have a probate court in Los Angeles appoint his legal assistant, Gaynell Reyno, to be administratrix of the estates of the five deceased passengers. Reyno was an American citizen, domiciled in California. Reyno instituted wrongful death litigation in state court in Los Angeles court on behalf of the estates of the five passengers.

Some evidence supported a claim that the crash was caused by mechanical problems with the plane or with its propeller. Other evidence supported the conclusion that the crash was caused by pilot error. Reyno named two defendants: Piper and Hartzell.[11] Piper is a Pennsylvania corporation with its principal place of business in that state. Hartzell is an Ohio corporation with its principal place of business in that state. The amount-in-controversy was millions of dollars. Hartzell manufactures propellers in Ohio and sells them to various aircraft manufacturers, including Piper. It ships the props bought by Piper directly to Piper's manufacturing plant in Lock Haven, which is in the Middle District of Pennsylvania. Piper uses the props in building airplanes there, including the plane involved in the crash with which we are concerned.

Assume that Piper is subject to general personal jurisdiction in California, either because it has qualified to do business and thus appointed an agent for service there or because it does substantial and continuous business there by marketing and selling aircraft in that state. Assume that Hartzell's contact with California arises only from the use of its propellers in airplanes manufactured by Piper and sold by Piper in California.[12] Piper and Hartzell removed the case to federal court for the Central District of California. They then moved for transfer from that court to the federal district court for the

10. Cathcart's firm, Magaña, Cathcart & McCarthy, has a great deal of experience in air crash cases and is widely respected in the profession. *See generally* Magaña, Cathcart & McCarthy, http://www.mcmc-law.com.

11. A third defendant, Avco Lycoming Engine Group, which manufactured the engines on the plane, was dismissed from the suit early. *Piper*, 454 U.S. at 240 n.1. The potential Scottish defendants (including the owner of the plane, the charter company that operated it, and the estate of the pilot) were not subject to personal jurisdiction in California and were not named in Reyno's suit.

12. In fact, Hartzell undoubtedly has other contacts with California. Its props are used on other aircraft sold in California, on planes manufactured by other aircraft manufacturers. In addition, Hartzell may sell propellers directly to consumers in California. But I prefer to state the facts to raise the stream-of-commerce issue, as discussed in Question 2.

Middle District of Pennsylvania. The court granted the motion to transfer.[13]

II. SIXTEEN QUESTIONS: DOMESTIC FORUM-SELECTION LAW IN A NUTSHELL

Though *Piper* was decided in 1981, we treat the fact pattern as arising today, and apply current law. Sixteen questions probe the students' understanding of the voyage Reyno's case took from a state court in Los Angeles to a federal court in Harrisburg.

A. *Regarding Reyno's Suit in State Court in Los Angeles*

Question 1: Did the state court in Los Angeles have subject matter jurisdiction over the case? The simple answer to this question is worth reviewing: state courts have general subject matter jurisdiction. They can hear any case not falling within exclusive federal question jurisdiction. Reyno's claims are for wrongful death, based upon various common law tort theories. There is no federal substantive issue at all, let alone an exclusive federal question. So yes, the state court in Los Angeles had subject matter jurisdiction.[14]

Question 2: Could Reyno plausibly argue that the state court in Los Angeles had personal jurisdiction over Hartzell? In *Piper*, the Supreme Court assumed that Hartzell was not subject to personal jurisdiction in California.[15] The facts stated above, however, raise the possibility of an interesting argument concerning jurisdiction under a stream-of-commerce theory. The leading case is *Asahi Metal Industry Co. v. Superior Court*,[16] which was decided after *Piper*. Professors love *Asahi* because it provides no majority theory regarding when the stream-of-commerce might create a relevant

13. It is in the Middle District of Pennsylvania, of course, that forum non conveniens came into play. The district court dismissed under that doctrine, conditioned on the defendants waiving any personal jurisdiction and statute of limitations defenses. *Piper*, 479 F. Supp. at 738. The Third Circuit reversed, in part because litigation in Scotland would subject the plaintiff to less favorable law. Reyno v. Piper Aircraft Co., 630 F.2d 149, 164 (3d Cir. 1980). The Supreme Court reversed and gave us the opinion for which *Piper* is famous. *Piper*, 454 U.S. 235.

14. Of course, this fact does not affect whether the case could be removed to federal court, since removal jurisdiction is no longer derivative of the state court's having subject matter jurisdiction. *See* 28 U.S.C. § 1441(e) (2000).

15. *Piper*, 454 U.S. at 240 n.5.

16. 480 U.S. 102 (1987).

contact between a defendant and a forum under *International Shoe Co. v. Washington*.[17] Accordingly, professors can expect students to argue both the Brennan and the O'Connor views on the subject (as well as any other reasonable position).

In our statement of the facts above, Hartzell propellers enter California only as components of Piper aircraft.[18] Accordingly, students may employ the Brennan approach from *Asahi* to argue that there is a relevant contact between Hartzell of Ohio and the forum of California; specifically, when Hartzell sells its propellers to Piper in Pennsylvania, it can reasonably anticipate they will get to California, and that Hartzell makes money from the fact that there is a market for airplanes (with its props) in California.[19] On the other hand, the O'Connor approach might counsel that there was no relevant contact with California. This is because the O'Connor theory requires some additional conduct that indicates an intent or purpose to serve the market in California.[20] The outcome would depend upon whether Hartzell did anything, such as advertising or giving advice to customers, that could be seen as additional conduct aimed at California.

If Hartzell does have a relevant contact with California, the focus would then turn to whether jurisdiction in California would comport with fair play and substantial justice. The fact pattern does not give us much to work with here, but students should readily see the problem with relatedness. Hartzell may have contacts with California, but those contacts have nothing to do with this case; the plane that crashed in Scotland had never been in California. This makes it difficult to uphold personal jurisdiction unless Hartzell's contacts are so continuous and systematic as to justify general in personam jurisdiction.

After this exercise, I tell students to assume for the remainder of the hypothetical that the state court in Los Angeles had personal jurisdiction over Piper and did not have personal jurisdiction over Hartzell.

17. 326 U.S. 310 (1945).

18. *See supra* note 12.

19. *Asahi*, 480 U.S. at 116–20 (Brennan, J., concurring).

20. *Id.* at 110–12 (O'Connor, J., plurality opinion).

B. Regarding Removal to the Central District of California

Question 3: Why did the Central District of California have federal subject matter jurisdiction? As noted above, the case certainly presented no basis for federal question jurisdiction; Reyno asserted state-law tort claims that did not implicate federal law in any way. Thus jurisdiction might be based upon diversity of citizenship or alienage. For either, the amount-in-controversy requirement is met, as Reyno claimed more than $75,000 for the survivors of each victim. But would the case invoke diversity or alienage? The answer depends upon the next question.

Question 4: Whose citizenship is relevant on the plaintiff's side? If it is Reyno, the case would invoke diversity, because she was a citizen of California and sued citizens of Pennsylvania and Ohio. On the other hand, if the court looks to the citizenship of the Scottish decedents, there would be alienage, because the case would be brought by citizens of Scotland against citizens of Pennsylvania and Ohio. But which is it? This question leads to an interesting and rarely-encountered question of statutory construction.

Question 5: Does § 1332(c)(2) govern? At first blush, we are tempted to reach for § 1332(c)(2), which instructs courts to ignore the citizenship of the personal representative and use the citizenship of the decedent.[21] Doing so would make this an alienage case, because the court would employ the citizenship of the Scottish decedents. But note that § 1332(c)(2) provides that the representative is deemed to be a citizen of "the same State" as the decedent, minor, or incompetent. Under § 1332(e), "State" includes only states of the United States and specific federal enclaves; the definition plainly does not include foreign countries.[22] On its face, then, § 1332(c)(2) appears to apply *only* when the decedent was a citizen of a State, and not—as here—when the decedent was an alien.[23] If this is so, the court would look to the citizenship of the representative Reyno and the case would invoke diversity of citizenship and not alienage.

21. "The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent . . . ." 28 U.S.C. § 1332(c)(2) (2000).

22. 28 U.S.C. § 1332(e) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.").

23. *See* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 257 n.82 (2005) (positing this argument).

On the other hand, case law supports the proposition that § 1332(c)(2) applies even when the decedent was an alien.[24] In the leading case on the issue, the court reasoned that it would be inconsistent to look to the decedent's citizenship if the decedent were an American but to the representative if the decedent were an alien; thus, the court concluded, Congress "clearly intended" that the court look to the citizenship of the alien decedent.[25] Under this case law, Reyno's case would invoke alienage jurisdiction. Though the case invokes federal subject matter jurisdiction either way, the exercise of statutory interpretation is worthwhile.

Question 6: Is there a "probate exception" problem? We teach our students to watch each fact in a hypothetical and to ask why it is there and whether it raises an issue. The assiduous student might note that Reyno was appointed by a "probate court" and wonder whether the case fails to invoke diversity of citizenship because of the exception for probate cases. Quite readily, the students should conclude that the exception does not apply. Reyno's claim is for wrongful death and does not require the federal court to dispose of estate assets. Accordingly (and on no less authority than the late Anna Nicole Smith[26]) the court may proceed under alienage or diversity of citizenship jurisdiction.

C. *Regarding Transfer to the Middle District of Pennsylvania: The Relevant Statute and Characteristics of the Transferor Court*

Question 7: Was the transfer from the Central District of California to the Middle District of Pennsylvania effected under § 1404 or § 1406? Section 1404 is used when the original federal court (the transferor court) is a proper venue;[27] section 1406 applies

24. *See, e.g.*, Jungil Lee v. ANC Car Rental Corp., 220 Fed. App'x 493, 493 (9th Cir. 2007); Velazquez v. Broesche, No. SA-06-CA-144-FB, 2006 U.S. Dist. LEXIS 59400, at *5 (W.D. Tex. June 13, 2006); Miller v. Morocho Bros. Constr., Inc., No. 1:03CV00924, 2004 U.S. Dist. LEXIS 5443, at *7 (M.D.N.C. Mar. 31, 2004); Kato v. County of Westchester, 927 F. Supp. 714, 716 (S.D.N.Y. 1996).

25. Geler v. Nat'l Westminster Bank U.S.A., 763 F. Supp. 722, 726 (S.D.N.Y 1991).

26. Marshall v. Marshall, 547 U.S. 293 (2006) (holding Anna Nicole Smith's claim for interference with her husband's ability to amend his estate plan to provide for her did not fall within the probate exception).

27. "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." 28 U.S.C. § 1404(a).

when that court is an improper venue.[28] The Central District of California determined that its transfer of the case as to Piper was effected under § 1404, while its transfer as to Harzell was effected under § 1406. I believe the court was wrong on the latter point, and that the transfer as to both defendants was based upon § 1404. Why? Because venue in the Central District was proper as to both defendants. This is true even though venue was not proper in that court under § 1391.

Question 8: Why was the Central District of California not a proper venue under § 1391? Section 1391(a)(1) permits venue in a district where all defendants reside.[29] Under § 1391(c), corporations are deemed to reside in all districts in which they are subject to personal jurisdiction when the case is filed.[30] The facts make it clear that Piper was subject to personal jurisdiction in the Central District and that Hartzell was not. Accordingly, only one of the defendants resides in the Central District and § 1391(a)(1) is not satisfied.

Section 1391(a)(2) permits venue in a district where a substantial part of the claim arose.[31] Nothing relating to this case occurred in California. Neither the plane nor any component was manufactured there, the plane was never present in the state, and none of the persons aboard had any connection with California. The plane was manufactured in Pennsylvania and sold to a corporation in Great Britain and crashed in Scotland. So venue was not proper in the Central District under § 1391.[32]

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28. "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." *Id.* § 1406(a).

29. "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State . . . ." *Id.* § 1391(a).

30. "[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." *Id.* § 1391(c).

31. *Id.* § 1391(a)("(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated . . . .").

32. Section 1391(a)(3) is relevant only if there is no district anywhere in the United States that satisfies either § 1391(a)(1) or (a)(2).

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in

Question 9: So why was the Central District of California a proper venue? The case was removed from state to federal court in Los Angeles. Section 1391 is irrelevant to removed cases; it provides the venue choices only for cases in which the plaintiff files initially in federal court.[33] In a case removed from state court, § 1441 provides that venue is proper only in the federal district embracing the state court in which the case was originally filed.[34] That makes the Central District the proper venue.

Question 10: Why was the Central District of California arguably wrong when it characterized the transfer as to Hartzell as effected under § 1406? As noted, § 1406 applies only when the transferor court is an improper venue. Because the Central District was a proper venue, the transfer could only have been under § 1404. The court in *Piper* (and some other courts[35]) concluded, however, that transfer is effected under § 1406 when the original court lacks personal jurisdiction over the defendant. This conclusion finds no support in the transfer statutes, which make clear that the distinction between them is based entirely on whether the transferor court is a proper *venue*. Nothing in either statute even remotely refers to personal jurisdiction.[36] As discussed in Question 9, the Central District of California was a proper venue, notwithstanding its lack of personal jurisdiction over Hartzell.

Question 11: But how could the Central District of California transfer as to Hartzell if it lacked personal jurisdiction over Hartzell? The Supreme Court upheld a § 1406

> which the action may otherwise be brought.

Id. The Middle District of Pennsylvania would be a proper venue under either § 1391(a)(1) or (a)(2), as we will see in Question 13, so § 1391(a)(3) is inapplicable to this case.

33. Polizzi v. Cowles Magazines, Inc., 345 U.S. 663, 665–66 (1953).

34. > [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id. § 1441(a).

35. *See, e.g.*, Pittock v. Otis Elevator Co., 8 F.3d 325, 329 (6th Cir. 1993).

36. *See, e.g.*, Muldoon v. Tropitone Furniture Co., 1 F.3d 964, 967 (9th Cir. 1993) (transfer under § 1404). *See generally* FREER, *supra* note 23, at 246 ("Some courts have muddied the waters by holding that venue is improper—even if the relevant venue statute is satisfied—if the original court lacks personal jurisdiction over the defendant . . . .The statutes clearly speak only to whether the original court is a proper *venue*, not whether it has personal jurisdiction.").

transfer by a court lacking personal jurisdiction over the defendant in *Goldlawr, Inc. v. Heiman*.[37] The majority view correctly applies *Goldlawr* to § 1404 transfers as well.[38] That is the situation here. The Central District erred by concluding that its lack of personal jurisdiction over Hartzell made the case a § 1406 transfer. Instead, it was a § 1404 *Goldlawr* transfer. Though *Goldlawr* permits the court to transfer, the lack of personal jurisdiction will affect the choice-of-law provisions to be applied, as we will see in Questions 15 and 16.

D. Regarding Transfer to the Middle District of Pennsylvania: The Transferee Court

Question 12: Why was transfer to the Middle District of Pennsylvania proper under *Hoffman v. Blaski*? Section 1404 permits transfer only to a district where the action "might have been brought."[39] In *Hoffman v. Blaski*,[40] the Supreme Court held that this language means that the transferee court must be a proper venue and must have personal jurisdiction over the defendants, and that both of these requirements must be satisfied independently, without waiver by the defendant. Accordingly, transfer to the Middle District of Pennsylvania was proper only if that court was a proper venue and has personal jurisdiction over both defendants.

Question 13: Why was the Middle District of Pennsylvania a **proper venue?** To answer this question, the court must apply § 1391(a). As we saw above, under § 1391(a)(1), venue is proper in any district where all defendants reside. And under § 1391(c), corporations reside in all districts in which they are subject to personal jurisdiction when the case is filed. Piper is a Pennsylvania corporation and its headquarters and principal place of business is in Lock Haven, which is in the Middle District. It is plainly subject to general in personam jurisdiction there. (Even if it were not, specific jurisdiction would attach because the plane involved in the crash which is the basis of this suit was manufactured there.) Hartzell manufactures its propellers in Ohio but ships a large percentage of

37. 369 U.S. 463, 466 (1962).

38. *See, e.g.*, *Muldoon*, 1 F.3d at 967.

39. 28 U.S.C. § 1404(a). Section 1406 permits transfer to a district where the case "could have been brought." *Id.* § 1406(a). The language of the two statutes, though thus slightly different, is interpreted as equivalent. *See, e.g.*, Minnette v. Time Warner, 997 F.2d 1023, 1026 (2d Cir. 1993).

40. 363 U.S. 335, 343–44 (1960).

them to Piper in Pennsylvania. This direct sale and shipping into the Middle District of Pennsylvania easily establishes personal jurisdiction there. It ships these goods directly and purposefully to Pennsylvania; they are not carried there by the vagaries of the stream of commerce. Thus, both defendants reside in the district.

In addition, venue is probably proper under § 1391(a)(2) because a substantial part of the claim arose in the Middle District of Pennsylvania. It is there that the allegedly faulty aircraft was manufactured (with the allegedly defective propeller).

Question 14: Why did the Middle District of Pennsylvania have personal jurisdiction over both defendants? *Hoffman* also requires that the transferee court have personal jurisdiction over the defendants. Because the residence of a corporation for venue purposes equates with personal jurisdiction, as we saw in Question 13, this requirement has already been discussed.

Question 15: What choice-of-law rules will the Middle District of Pennsylvania apply as to the claim against Piper? After the case was transferred, the judge in the Middle District of Pennsylvania was required to determine what choice-of-law principles to apply. Under *Van Dusen v. Barrack*,[41] the transferee court in a § 1404 non-*Goldlawr* transfer is required to apply the choice-of-law rules that the transferor court would have applied. The transfer as to Piper was effected under § 1404 and there was no *Goldlawr* issue (because the transferor court had personal jurisdiction over Piper), so the Middle District of Pennsylvania must apply the choice-of-law rules that the Central District of California would have applied. Because this is a diversity of citizenship case, and there is no federal choice-of-law provision, *Klaxon v. Stentor Electric Manufacturing Co.*[42] requires application of California law to determine what substantive body of law will govern the liability of Piper.

Question 16: What choice-of-law rules will the Middle District of Pennsylvania apply as to the claim against Hartzell? As to Hartzell, the transfer was also undertaken under § 1404—but pursuant to *Goldlawr*, because the transferor court did not have personal jurisdiction over Hartzell. *Van Dusen* simply does not apply

41. 376 U.S. 612 (1964).

42. 313 U.S. 487 (1941).

in *Goldlawr* cases,[43] for the common-sense reason that it "would be outrageous to permit a plaintiff to sue a defendant where she is not subject to personal jurisdiction and capture favorable choice of law rules for determining the outcome of the case."[44] Thus, the Middle District of Pennsylvania, under *Klaxon*, will apply Pennsylvania choice-of-law rules to determine the liability of Hartzell.[45]

Though actual choice-of-law rules are beyond the ken of a civil procedure course, it is worth noting that the Middle District of Pennsylvania used California choice-of-law principles to determine that Pennsylvania substantive law would govern the liability of Piper. It used Pennsylvania choice-of-law principles to determine that Scottish substantive law would apply to Hartzell.[46] So if the litigation went forward in that court, the court would have to deal with two bodies of substantive law. At this point, long before application of forum non conveniens, one must admire the defense strategy of attacking the plaintiff's choice of forum.

III. THE INCREMENTAL ASSAULT ON PLAINTIFF'S FORUM SELECTION

Students have no trouble understanding that the plaintiff in *Piper* was forum shopping. The reasons should be equally obvious: plaintiffs, especially tort plaintiffs, want to sue in the United States to take advantage of substantive and procedural opportunities not usually available elsewhere.[47] Substantively, cutting-edge theories of strict and product liability and the availability of damages for mental

43. This is the clear majority view. *See, e.g.*, *Muldoon*, 1 F.3d at 967; Manley v. Engram, 755 F.2d 1463, 1467 n.10 (11th Cir. 1985). Apparently, one court has concluded to the contrary and applied *Van Dusen* to a *Goldlawr* transfer. Myelle v. Am. Cyanamid Co., 57 F.3d 411, 412 (4th Cir. 1995).

44. FREER, *supra* note 23, at 251.

45. In Question 10, we saw that the Central District of California concluded that its lack of personal jurisdiction over Hartzell meant that transfer as to that defendant was effected under § 1406. The result is the same in terms of choice of law, since *Van Dusen* does not apply to § 1406 transfers. *See, e.g.*, Davis v. La. State Univ., 876 F.2d 412, 413 (5th Cir. 1989).

46. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 n.22 (1981).

47. *See, e.g.*, Lory Barsdate Easton, *Getting Out of Dodge: Defense Pointers on Jurisdictional Issues in Aviation Torts Litigation*, 20 AIR & SPACE LAW. 9, 9 (2006) ("One very clear trend in U.S. products liability litigation over the past several years has been an increase in litigation brought by overseas plaintiffs arising from overseas incidents and injuries."); Russell Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 322 (1994) ("'As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.'") (quoting Lord Denning).

anguish and (possibly) punitive damages are powerful magnets to courts in the United States. Procedurally, broad discovery and the right to jury trial on fact issues relating to claims for damages are equally attractive to plaintiffs. All of this was manifest when Reyno chose to vindicate wrongful death claims of Scottish citizens for an air crash in Scotland by suing in a state court in California.

It was equally obvious at the outset that Piper and Hartzell would want dismissal under forum non conveniens. The center of gravity of the litigation was Scotland, and the defendants knew they had little to fear from litigation there. First, Reyno could not pursue the action there, because only next-of-kin can sue for wrongful death in Scotland.[48] Second, the plaintiff's lawyer could not practice law in Great Britain. Third, litigation in Scotland would not include American-style discovery. Fourth, and most importantly, Scottish courts would not permit recovery of damages for anguish and would not employ American tott theories of liability.[49] It was probably clear to all involved that a dismissal under forum non conveniens would effectively seal victory for Piper and Hartzell. Indeed, after the Supreme Court approved dismissal by the Middle District of Pennsylvania, apparently no suit was ever brought against the American manufacturers in Great Britain concerning this crash; evidently no lawyer thought the potential recovery worth the effort.[50]

The brilliance of the defendants' litigation strategy, however, was its incremental assault on the plaintiff's forum selection. Piper and Hartzell did not move for dismissal under forum non conveniens in Los Angeles for one very good reason: they did not want to put all their eggs in the forum non conveniens basket in California. Because a state court in California cannot transfer to a court in Pennsylvania, there would have been no possibility of seeking lesser relief than outright dismissal. And defense counsel likely did not want a California court deciding whether a case filed by one of the leading lawyers in the state against two out-of-state corporations should be

48. Of course, Reyno personally had little interest in the litigation, as she was the named plaintiff at the behest of her law firm employer.

49. Clermont, *supra* note 6, at 208.

50. E-mail from Daniel C. Cathcart to author (October 24, 2003) (on file with author) ("When we lost the case I sent it back to the referring attorneys in Scotland and urged them to go forward there. As far as I know they did not do so. I sent a letter asking what happened to the case and never got an answer.").

dismissed in favor of foreign litigation. Instead, the defense strategy consisted of a series of steps, each of which constituted a partial victory for the defendants because it reduced the attractiveness of the forum for Reyno and her lawyer.

Removal put the case in federal court, which was an immediate, though small, victory for the defendants. Aftet all, if plaintiff's counsel had wanted to be in federal court, he could have sued there. So removal put the litigation in a forum that Reyno's lawyer did not consider optimal. But the major advantage of getting the case into federal court is that it opened the possibility of transfer from California to Pennsylvania.[51] Accordingly, the defendants never had to convince a judge in California (state or federal) to take the draconian step of dismissing or staying the litigation. By transferring to the Middle District of Pennsylvania, the federal court in Los Angeles reduced its case load without denying the plaintiff access to an American court. And it did so with a clear conscience. Pennsylvania was clearly a more appropriate venue than California; all of the evidence relating to construction of the aircraft, including witnesses with information relevant to the construction, was in Lock Haven, while no one with relevant information was in California.

Transfer to the Middle District of Pennsylvania constituted a substantial victory for the defendants. At this point, the balance of power in the case shifted demonstrably. Reyno was no longer litigating at home. Her lawyer was forced to litigate in a federal court in a state in which he was not a member of the bar. In contrast, Piper was at home, using counsel familiar with the judges of the Middle District, and it was litigating in a district in which it is a respected and important member of the local community and economy (and where jurors would understand that fact). But the defendants had one more weapon in the forum-selection battle, the trump card—the one for which *Piper* is famous.

IV. THE FACTS OF *PIPER* WITH FORUM NON CONVENIENS: LITIGATION IN GLOBAL PERSPECTIVE

The Supreme Court decision in *Piper* is most noted for its

51. While a case in California state court cannot be transferred to a Pennsylvania state court, because those courts are in different judicial systems, a transfer across state lines is possible in the federal system. *See generally* FREER, *supra* note 23, at 243-45.

discussion of whether a change in the law should be determinative in ruling on a motion to dismiss for forum non conveniens. In other words, should the fact that the plaintiffs in Scotland would not be able to recover damages for anguish and would not otherwise be able to rely on American tort law impel a court to refuse to dismiss? The Court gave something of a non-answer by saying that the change in law should not "ordinarily" be given "substantial weight."[52] Only if the remedy in the foreign tribunal was so inadequate as to constitute "no remedy at all" might the change in law be given substantial weight.[53] Beyond that, the Court confirmed that forum non conveniens is a doctrine of great discretion, to be guided by a series of commonsense public and private factors.[54] Importantly, a district judge's decision to dismiss under the doctrine is reviewed only for abuse of discretion, which effectively shields it from monitoring by appellate courts.

In terms of doctrine, the preceding paragraph largely sums up *Piper*. But students (and courts) should appreciate the practical importance of dismissing in favor of a foreign tribunal. Data, such as they are, suggest that forum non conveniens dismissals are equivalent to outright defense victories. One survey of eighty-five cases dismissed under that doctrine in favor of a foreign tribunal demonstrated that every one was abandoned or settled for paltry amounts.[55] And in *Piper*, as we saw, no lawyer found it worthwhile to pursue litigation in the United Kingdom. In practice, then, granting forum non conveniens is often tantamount to granting substantive dismissal, without the presentation of one shred of evidence on the merits.

In the bigger picture, we must wrestle with this question: should American courts be open to foreign plaintiffs for claims arising overseas against American manufacturers? Fulsome embrace of forum non conveniens would counsel that the answer be no. And if that is so, the next question is whether such dismissals constitute an

52. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981).

53. *Id.*

54. *Id.* at 241 n.6.

55. There are not many data on this point. The leading study appears to be David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L.Q. REV. 398, 418–20 (1987); *see also* Jacqueline Duval-Major, *A One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

abdication of judicial function. Forum non conveniens may be seen as a kind of abstention, and professors should ask whether abstention, as Professor Redish has argued, constitutes a violation of separation of powers.[56] After all, it is Congress's job (for cases falling within Article III judicial power) to determine what cases will be heard by the federal courts. What right has the judicial branch to ignore the legislative directive?

On the other hand, if American courts are open to such cases, foreign plaintiffs are afforded substantive and procedural advantages unavailable to similarly situated compatriots who are injured by non-American defendants. Professors and students should debate the role of American courts in this era of globalization. Other nations are certainly free to give their citizens modern tools of procedure, including wide-ranging discovery, to provide for jury trials, cutting-edge theories of liability, and expansive remedies. If they do not, should American courts provide these things for the foreign citizen?[57] Should American interests doing business abroad be subjected to American justice for claims arising overseas with an alien plaintiff?

In an era in which many express concern about American global influence and the export of American power and policies, these issues may be especially pointed. We should all recognize that permitting courts in the United States to entertain cases such as *Piper* might in essence export American law in a way that affects other countries. As one scholar, in the context of claims arising from a chemical discharge in India, explained:

> [I]f an American court, even one applying Indian "substantive" law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India's ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable

56. *See* MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 47–74 (1991).

57. *See* Michael Wallace Gordon, *Forum Non Conveniens Misconstrued: A Response to Henry Sait Dahl*, 38 U. MIAMI INTER-AM. L. REV. 141, 149 (2006) ("It remains one of the mysteries of comparative political theory why so many legislatures are unable to pass legal reforms for the benefit of their people, while they enact laws to assist litigation immigration, the movement of their people to reap the benefits of foreign laws their own legislatures seem incapable of adopting.").

price to pay for attracting an American company to build a plant there and stimulate a depressed economy.[58]

V. CONCLUSION

Piper has always been there, a part of the civil procedure curriculum. But it has generally been locked in one small corner of forum selection doctrine, serving to teach forum non conveniens. The case can do a great deal more. Considering the facts of *Piper* enmeshes us in virtually every aspect of domestic forum-selection law. It also enables us to ponder fundamental issues about the role of American courts in the world community. It does so in the context of a litigation strategy that demonstrates compellingly why forum selection matters. Few of these things are obvious on the face of the opinion. *Piper*'s potential is unlocked by using this familiar case in an unfamiliar way in the classroom.

58. William Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1708 (1992).