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Conflict of Laws -- Enforcement of Foreign Judgments in Federal Courts

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the matter of exemptions exclusively to the states.[54] The prospect of the Court, and not the Congress, fashioning a "national, uniform exemption policy by placing limitations on the meaning of the word 'property' as used in section 70a(5) of the Act"[55] on a piecemeal basis is hardly appealing. Unfortunately, however, such a prospect would appear likely in the wake of the *Lines* decision.

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Conflict of Laws—Enforcement of Foreign Judgments in Federal Courts

In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,[1] a federal court was recently called upon to decide whether to apply the state or federal rule on enforcement of foreign judgments. The court had jurisdiction by reason of international diversity,[2] held that the choice of law was governed by *Erie Railroad Co. v. Tompkins*,[3] and applied the state rule. This note will explore the issue of whether *Erie* should be controlling with respect to enforcement of foreign judgments when the court has jurisdiction by reason of international, as opposed to intra-national, diversity of citizenship.

The *Somportex* case has a rather complex background. Somportex originally brought suit against Philadelphia Chewing Gum Corporation for an alleged breach of contract. The suit was brought in England, and the defendant was served at its offices in Pennsylvania. The defendant made a conditional appearance in the English court and sought an order

[54] AM. BANKR. L.J. 117. *See* United States v. Sharpnack, 355 U.S. 286 (1958); Eaton v. Boston Trust Co., 240 U.S. 427 (1916); Dixon v. Koplar, 102 F.2d 295 (8th Cir. 1939). In the last case it was observed that

> the rights of a bankrupt to property as exempt are those given him by the state statutes; and the federal courts, sitting as courts in bankruptcy, will determine exemptions according to those statutes, and the decisions of the courts of last resort of the states construing and applying those statutes.

Id. at 297.

[55] AM. BANKR. L.J. 117.

[1] 318 F. Supp. 161 (E.D. Pa. 1970).

[2] "The district court shall have original jurisdiction of all civil actions . . . between—(1) citizens of different States; (2) citizens of a State, and foreign states or citizens or subjects thereof. . . ." 28 U.S.C. § 1332 (1964). The first clause provides for intra-national diversity jurisdiction, and the second for international diversity jurisdiction.

[3] 304 U.S. 64 (1938). In *Erie*, the Court held that in a diversity case a federal court must apply the substantive law of the state in which it is sitting.

setting aside the original writ for lack of jurisdiction,[4] alleging that none of the English grounds for extraterritorial service of process existed. The defendant then withdrew from his own hearing and suffered a default judgment on the issue of jurisdiction. When the defendant petitioned to withdraw his original conditional appearance because of mistake, he won in the lower court but lost on the plaintiff's appeal. Thereupon the defendant completely withdrew from the case and suffered a default judgment on the merits.[5] *Somportex* involved the plaintiff's attempt to enforce this judgment in the federal court.

The *Somportex* court analyzed this situation as one in which the default judgment was based on personal jurisdiction over the defendant obtained through his appearance in the English court.[6] Therefore, the English court's determination that the defendant made a knowing appearance was given full effect.[7]

The court then held state law controlling as to whether reciprocity was required for enforcement of foreign judgments,[8] and "found" that, were the state court to be confronted with this problem, it would not require reciprocity.[9] Finding no genuine issue as to any material fact, the court

[4] 318 F. Supp. at 162.

[5] *Id.* at 163.

[6] The court characterized the fact situation in *Somportex* as a hybrid of the two usual foreign-judgment cases. The first is the case in which a defendant has taken no action in the foreign court and is free to attack collaterally the foreign court's determination of jurisdiction. The second arises when the defendant makes a conditional appearance to litigate the issue of jurisdiction, loses on this issue, and withdraws. The court reasoned that in the latter situation the jurisdictional issue cannot be re-examined by the court asked to enforce the judgment. The court said:

> Unlike the first situation, the defendant has taken some action in England. Philadelphia Chewing Gum entered a conditional apearance, which after final litigation . . . has since become a general appearance. However, unlike the second situation, the defendant has not litigated the underlying jurisdictional basis for the suit.

318 F. Supp. at 164. The court noted that "full faith and credit" would prevent an inquiry into the issue of jurisdiction if the judgment were that of a sister state, Sherrer v. Sherrer, 334 U.S. 343 (1948), and that the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 (Proposed Official Draft, May 2, 1967) called for recognition and enforcement of foreign judgments. 318 F. Supp. at 164.

[7] 318 F. Supp. at 165. Because of some unfortunate choices on the defendant's part, the plaintiff never had to prove even the jurisdictional aspects of his original suit.

[8] In Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966), another lower federal court cited *Erie* and held that state law controlled whether a foreign judgment would be enforced without reciprocity. However, in that case the state law concurred with the federal rule, giving the foreign judgment only prima facie weight.

[9] Pennsylvania had not ruled directly on the issue of whether reciprocity was

granted the plaintiff's motion for summary judgment.[10]

The court recognized that the federal rule, as stated in *Hilton v. Guyot*,[11] requires reciprocity as a condition precedent to enforcement of foreign judgments; the United States will not enforce a foreign judgment unless a court of the nation rendering the judgment would give like effect to an American judgment. However, the court noted that *Hilton* was decided before *Erie* and went on to say: "It is clear . . . that the law governing the enforceability of foreign judgments by a federal court is the law of the state where the court is located."[12] It does not seem entirely "clear" that *Erie* requires this conclusion. *Erie* involved intra-national, rather than international, diversity jurisdiction.[13] Moreover, the question of enforcement of foreign judgments involves federal interests, and later cases explaining *Erie* have tended to limit its reach in areas involving federal interests.[14]

Thus there are two important and distinct questions which the court in *Somportex* could have considered but did not: first, whether *Erie* was intended to apply in cases of international diversity where there is a special federal interest involved; and second, whether enforcement of foreign judgments is of such federal importance that it might be considered a "federal question." Although the resolution of these two issues would involve similar considerations of the federal interest, a decision for one or the other would bring about completely different results. If it were found that *Erie* simply did not apply, the federal courts could apply federal law but the state courts could apply different state law. If this were held to be a federal question, then the federal decision would be binding on the state courts as well.[15]

Whether *Erie* should have applied in *Somportex* turns upon the reach of the *Erie* rule and the policies behind it. At first blush, not to apply the state law would seem to fly directly in the face of the *Erie* rule. In *Erie*, the Court said that where jurisdiction is based on diversity, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the

required, so the federal court was forced to decide as it felt the Supreme Court of Pennsylvania would. Were the Supreme Court of Pennsylvania to confront this problem later and reach a different conclusion, the federal courts in Pennsylvania would then be bound by that decision.

[10] 318 F. Supp. at 169.

[11] 159 U.S. 113 (1895).

[12] 318 F. Supp. at 167.

[13] Erie R.R. v. Tompkins, 304 U.S. 64, 65 (1938).

[14] *See, e.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[15] C. WRIGHT, LAW OF FEDERAL COURTS § 60 (2d ed. 1970).

law to be applied in any case is the law of the State."[16] There was no exclusion for international diversity and an examination of the policies underlying *Erie* shows that such an exclusion would normally be undesirable.[17] The *Erie* Court wanted to prevent nonresidents from having a choice of law which they could exercise simply by bringing suit in the most favorable forum, whether state or federal. If the court in *Somportex* had not applied the state law as to reciprocity, it would have created a situation in which a nonresident could choose between a federal and state forum and thus decide whether reciprocity would be required.[18] However, with respect to the enforcement of foreign judgments, there may be a federal interest sufficient to justify the application of federal law. Although in *Erie* the Court felt that uniformity of the substantive law applied by the courts located in a state was more important than national federal uniformity,[19] in a *Somportex* situation the Court might feel otherwise. The inequities of forum shopping within a state may be outweighed by the desire to have a uniform federal rule in international dealings.[20] The Court in *Erie* said that the state law "rests expressly on a local policy . . . dictated by local conditions."[21] A state law dealing with enforcement of foreign judgments obviously has other than local ramifications.

Several cases decided subsequent to *Erie* have shed light on the question of whether *Erie* should apply. *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[22] cited in *Somportex*,[23] held that the federal courts must apply state choice-of-law rules when jurisdiction is based on diversity of citizenship. In *Guaranty Trust Co. v. York*[24] the Court interpreted the *Erie* rule very broadly and held that the federal courts in diversity cases

[16] 304 U.S. at 78.

[17] The fact that diversity between the parties was international rather intranational should not, in itself, require a different choice of law rule. In the ordinary contracts action, as opposed to one for the enforcement of a foreign judgment, there is no rational reason for having a different choice of law in the federal court simply because one of the parties is an alien.

[18] If the nonresident brought the suit in state court, the resident defendant could not remove if jurisdiction was based on diversity. 28 U.S.C. § 1441(b) (1964).

[19] 304 U.S. at 75.

[20] Reciprocity in enforcement of the judgments of the United States and a foreign country would best be obtained by a treaty. Then the supremacy clause of the Constitution would require all courts in the United States to give that treaty effect. U.S. CONST. art. VI. However, if state law controls both the state and federal courts, and state laws do not require reciprocity, there will be little incentive to a foreign country to make any such treaty.

[21] 304 U.S. at 68.

[22] 313 U.S. 487 (1941).

[23] 318 F. Supp. at 164.

[24] 326 U.S. 99 (1945).

must operate as just another court of the state in which the federal courts are situated. *Guaranty Trust* introduced the "outcome-determinative" test for deciding when state law must be applied—whenever the use of a particular rule can significantly affect the outcome of the litigation, state law must be applied.[25] *Klaxon* and *Guaranty Trust* tend to support the proposition that *Erie* should apply, but later cases have defined the *Erie* rule more narrowly and have expanded the situations in which federal courts will use federal law. *Byrd v. Blue Ridge Electric Cooperative*[26] held that outcome is not the only consideration, and that when there is a strong federal policy against the application of the state rule the federal court may apply the federal rule, even though it has an effect on the outcome. Then, in *Hanna v. Plumer*,[27] the Court held that the Federal Rules of Civil Procedure are controlling on the federal courts, even in the face of conflicting and outcome-determinative state rules. In *Hanna* the Court cited *Byrd* for the proposition that the *Guaranty Trust* outcome-determinative test "was never intended to serve as a talisman,"[28] and that the choice between federal and state law can not be made by " 'litmus paper' criterion but rather by reference to the policies underlying the *Erie* rule."[29] This statement and the *Byrd* holding (permitting the application of outcome-determinative federal rules in some instances) indicate that in the Court's view the *Erie* policies do not foreclose the application of federal law just because to do so might encourage forum shopping between the state and federal courts.

In *Clearfield Trust Co. v. United States*,[30] the Court held that federal courts do not have to apply state law regarding liability on commercial paper issued by the United States because, on the *Clearfield* facts, the "application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty,"[31] and "[t]he desirability of a uniform rule is plain."[32] The jurisdiction in *Clearfield* was based on the United States being a party and thus the federal interest is more readily apparent, but *Clearfield* still tends to show that the Court does not mean for *Erie* to apply where national uniformity is an important factor. Therefore, if enforcement of foreign judgments were considered by the

[25] *Id.* at 109.
[26] 356 U.S. 525 (1958).
[27] 380 U.S. 460 (1965).
[28] *Id.* at 466-67.
[29] *Id.* at 467.
[30] 318 U.S. 363 (1943).
[31] *Id.* at 367.
[32] *Id.*

Court to be an area of substantial federal concern, in which federal uniformity was an important consideration, *Byrd* and *Clearfield* could be cited to support the contention that *Erie* is inapplicable in that area. However, the fact remains that to allow federal courts to apply federal law is an affront to the most basic policy of *Erie*—discouraging forum shopping.

Finally, it must be considered whether the reciprocity issue is a federal question. As previously noted, this inquiry involves many of the same considerations underlying the issue of whether *Erie* applies at all, but it is different in effect. If the issue of whether to require reciprocity for enforcement of foreign judgments is a federal question, the rule of decision would be the same in all courts of the nation—state and federal—and forum shopping would be eliminated entirely.

The reciprocity issue certainly does not fit the classical mold of a federal question, since it is not controlled by the Constitution and there is no applicable federal statute or treaty.[33] Therefore, if federal law is to control it must be federal common law, which the Court has applied in several other instances. On the same day that *Erie* was handed down, the Court held in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*[34] that federal common law must be applied to determined the rights of two states through which an interstate stream passed. Federal common law was used in *Clearfield*, in which the United States was a party and government paper was involved. In *Sola Electric Co. v. Jefferson Electric Co.*[35] and *Textile Workers Union of America v. Lincoln Mills*,[36] the Court applied federal common law in areas related to those dominated by federal statutory law. And, in cases of admiralty and maritime law, the Court has used federal common law to achieve uniformity.[37]

The case closest to the *Somportex* fact pattern in which the court has applied federal common law is *Banco Nacional de Cuba v. Sabbatino*.[38] Therein the Court refused to be bound by *Erie* and made its own interpretation of the "act of state" doctrine,[39] saying, "the Court did not have

[33] Note 20 *supra*. Judgment-enforcing treaties are clearly legal under international law. France has several, though none with the United States. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188, 194 n.33 (1919).

[34] 304 U.S. 92 (1938).

[35] 317 U.S. 173 (1942).

[36] 353 U.S. 448 (1957).

[37] *E.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 215-17 (1917).

[38] 376 U.S. 398 (1964).

[39] The "act of state" doctrine has it that " 'the courts of one country will not

rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*."[40] The Court also stated that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[41] There is in this statement at least the implication that questions concerning foreign relations are issues of federal common law.[42]

Arguably, *Banco Nacional* affords a springboard for the application of federal common law in *Somportex*. The Court in *Banco Nacional* used federal common law because the rule it was concerned with affected our affairs with foreign nations, and it saw in the Constitution and federal laws a concern for uniformity in this area.[43] *Somportex*, too, could be thought to have international ramifications. Encouraging nations to give our judgments effect in their courts is a legitimate federal objective which would be advanced by a national policy of reciprocity. In *Banco Nacional*, there was no federal law directly involved nor any firm indication from Congress that federal decisions were desired in this area, but the Court applied federal common law nevertheless.[44]

If the court in *Somportex* had considered the course indicated by *Banco Nacional*, it could have decided that the issue of whether to require reciprocity for enforcement of foreign judgments is a federal question. The states would then be bound by the federal rule, forum shopping would be prevented, and a uniform approach in an area of national interest would be facilitated.

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Constitutional Law—Equal Protection and Residence Requirements

The United States Supreme Court in *Shapiro v. Thompson*[1] held that a one-year residence requirement which denied otherwise qualified

sit in judgment on the acts of the government of another done within its own territory.'" *Id.* at 416.

[40] 376 U.S. at 425.

[41] *Id.*

[42] See Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325 (1964).

[43] 376 U.S. at 427 n.25.

[44] *Id.* at 416-27.

[1] 394 U.S. 618 (1969).