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Venue Transfer When a Court Lacks Personal Jurisdiction: Where are Courts Going with 28 U.S.C. § 1631?

Jeremy Jay Butler

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VENUE TRANSFER WHEN A COURT LACKS PERSONAL JURISDICTION: WHERE ARE COURTS GOING WITH 28 U.S.C. § 1631?

I. INTRODUCTION

Courts use venue to balance the plaintiff's choice of forum with protections of fairness and convenience for defendants.¹ Venue transfer is one aspect of venue that Congress created to improve the efficient change of courtrooms when either the public or the defendant demands a more convenient forum.² The original venue transfer provisions, 28 U.S.C. § 1404(a)³ and 28 U.S.C. § 1406(a),⁴ are meant to be easy to follow, but they have created complications when courts have used them to transfer cases when they lack jurisdiction over the defendant.⁵ As a result, venue transfer lacks the certainty that lawyers typically rely on, wastes judicial time, and wastes resources.⁶ Courts have tried to use 28

¹ See 17 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 110.01 (3d ed. 2004). Venue statutes are concerned with convenience. *Id.* For example, § 1406(a) "was in keeping with the general trend in legislative changes affecting federal court procedure 'of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies.'" *Id.* § 111.31. Congress meant for § 1404(a) to have a broad remedial purpose to prevent wasted time, energy, and money. *Id.* § 111.11. Further it protects litigants, witnesses, and the public against inconvenience. *Id.*; see also David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 452 (1990) ("The section 1404 transfer assumes that the long-run efficiency gains resulting from the litigation of a case in a more convenient forum will outweigh the immediate costs that accompany a transfer.").

² "While there is no definitive list of factors that must be considered, courts typically look to some or all ... 'public' 'and private' interest factors to determine whether the proposed alternative forum would better serve the convenience and interest of justice requirements." MOORE ET AL., *supra* note 1, § 111.13.

³ See *infra* note 52 and accompanying text (providing the language of § 1404).

⁴ See *infra* note 69 and accompanying text (providing the language of § 1406).

⁵ See *infra* Part II.B (explaining how the function of § 1404(a) and § 1406(a) changed as courts utilized them when a court lacked personal jurisdiction over the defendant).

⁶ See MOORE ET AL., *supra* note 1, § 111.02.

What sounds like a simple exercise in determining which of the two statutes properly applies often can be complicated because, even though venue is technically proper because it complies with the applicable venue statute . . . some courts nonetheless define venue as "wrong" if some other procedural obstacle in the original court, such as lack of personal jurisdiction over the defendant, would have prevented the action from proceeding there. In such a case, the courts also disagree as to which of the two statutes properly applies to effect transfer Thus, what should be a straightforward exercise in determining which transfer statute applies, however, frequently is complicated by the courts' use of different standards to determine when venue is "wrong."

Id.

790 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40

U.S.C. § 1631⁷ to solve these problems, but again, inconsistent court opinions prevent the statute from making venue transfer efficient.⁸ The result is that practicing attorneys have difficulty predicting the results following a venue transfer.⁹ This phenomenon is best illustrated by the following hypothetical.¹⁰

Imagine that Kate, a defense lawyer, represents an Iowa citizen and Sally, a plaintiff lawyer, represents an Illinois citizen. Kate's client was served with a summons to an Illinois federal court one year and nine months after the occurrence of a cause of action with a two-year statute of limitations. Initially, Kate is not worried because she knows that Illinois has no personal jurisdiction over her client, and hence, she will easily be able to dispense of the claim. Kate first moves to quash service, which the court grants. However, when Kate files a motion to dismiss for lack of personal jurisdiction, Sally moves for a change of venue. Kate is still not worried. She knows the only permissible forum is Iowa, where the statute of limitations is two years, and she will still be able to defeat the claim because two years have passed since the incident giving rise to the complaint. By the time the action gets to Iowa and her client is re-served as required by Iowa law, the appropriate statute of limitations will have run.

However, Sally specifically asks the court to transfer under § 1631. Sally asserts that § 1631 has superceded § 1404(a) and § 1406(a) in transfers by a court that lacks jurisdiction over the defendant. Further, she explains that § 1631 demands that the action be deemed filed in Iowa on the day it was filed in the impermissible Illinois forum. Kate realizes

Courts have struggled with the application of the federal transfer of venue statutes since their enactment in 1948. Simply worded and widely invoked, these provisions have proved difficult to interpret less for what they say than for what they omit. The resulting case law has, in the words of one judge, produced a "nearly hopeless muddle of conflicting reasoning and precedent."

Robert Finzi, *The 28 U.S.C. § 1406(a) Transfer of Time-Barred Claims*, 79 CORNELL L. REV. 975, 977 (1994). Mr. Finzi also asserts that more than 2,000 claims were transferred under § 1404(a) alone in 1982. *Id.* at 977 n.9.

⁷ See *infra* note 174 and accompanying text (setting out the language of § 1631).

⁸ See *infra* Parts II.C, III.B (explaining the inconsistent application of § 1631 and discussing the effects of the inconsistent applications).

⁹ See *infra* Part II.B (discussing the scattered results of venue transfer when a court lacks personal jurisdiction).

¹⁰ The following hypothetical is loosely based on the factual situation that occurred in *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967). However, the names, laws of the states, and the lawsuit are purely fictional, and it is purely coincidental to the extent that such a fact pattern does exist.

that this transfer means the Iowa statute of limitations no longer bars Sally's claim. The court responds to Sally that § 1631 will not be used because the court believes that § 1631 only works when a court lacks subject matter jurisdiction. Instead, the court determines that the transfer will take place under § 1406(a). Kate lets out a sigh of relief because she knows that under § 1406(a) the new forum applies its own state law when the case arrives. As a result, Sally will have to re-serve Kate under Iowa law and her action will be barred by the Iowa statute of limitations.

However, the court surprisingly determines that the Iowa court must apply the longer Illinois statute of limitations of four years. Therefore, Sally's claim will not be barred by the statute of limitations. Kate cannot believe the result and only wonders when and how a simple venue transfer became so complicated and unfair.

This hypothetical represents the problems today with venue transfer when a court lacks personal jurisdiction over a defendant.¹¹ Not even experienced attorneys can accurately predict what will happen with a cause of action after a venue transfer has been requested when the court lacks personal jurisdiction over the defendant.¹² The purpose of this Note is to advocate that § 1631 must be amended to (1) clearly establish that it is the transfer provision to use when transferring to a different venue due to a lack of personal or subject matter jurisdiction,¹³ and (2) it must be amended to take into account fairness to defendants so that a plaintiff's claim is not preserved indefinitely.¹⁴ Part II of this Note focuses on the background of venue transfer.¹⁵ Specifically, Part II explains the purpose of venue transfer,¹⁶ why and how its purpose changed,¹⁷ how that change created an inefficient system,¹⁸ and how

¹¹ See *infra* Part III (explaining the efficiency problems caused by venue transfer when a court lacks jurisdiction).

¹² See *infra* Parts II.B-C (discussing the scattered results that courts have reached in applying venue transfer provisions, which has created a system with uncertain rules).

¹³ See *infra* Part IV (proposing an author-created amendment to § 1631 that will make venue transfer efficient again).

¹⁴ See *infra* Part IV (proposing an author-created amendment to § 1631 to be more fair to defendants).

¹⁵ See *infra* Part II (discussing the legal background of venue transfer, venue transfer when a court lacks personal jurisdiction, and the application of § 1631).

¹⁶ See *infra* Part II.A (explaining the function and purpose of venue transfer from *forum non conveniens* to the transfer provisions of § 1404(a) and § 1406(a)).

¹⁷ See *infra* Part II.B (discussing how the purpose and function of venue transfer changed as a result of the *Goldlawr* decision).

¹⁸ See *infra* Part II (discussing § 1404(a), § 1406(a), *forum non conveniens*, and case law applying § 1404(a) and § 1406(a) when a court lacks jurisdiction).

792 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

courts tried to utilize § 1631 to restore efficiency to venue transfer.¹⁹ Finally, Part II explores the different interpretations of § 1631.²⁰ Part III of this Note analyzes the problems with lack of personal jurisdiction venue transfer,²¹ the reasons that § 1631 was used in an attempt to resolve those flaws,²² why § 1631 fails to resolve those flaws,²³ and the flaws of § 1631 itself.²⁴ Part IV of this Note proposes amendments to § 1631 that will restore efficiency to venue transfer and alleviate the problems with the statute itself.²⁵ Specifically, the amendment incorporates language that clearly establishes § 1631 as the venue transfer statute to use when a court transfers to a different venue because it lacks personal jurisdiction over a defendant, which will conserve court resources and provide a reliable, certain rule for lawyers to follow.²⁶ Additionally, the amendment strikes particular language that is detrimental to defendants.²⁷ Taken as a whole, the amended statute will preserve valid plaintiff claims, account for fairness to the defendant, and apply uniformly and efficiently.²⁸

II. LEGAL BACKGROUND OF VENUE TRANSFER WITHOUT PERSONAL JURISDICTION

This Part explains that if a court lacks personal jurisdiction over the defendant, a venue transfer wastes judicial time and resources and also creates uncertainty for lawyers.²⁹ First, Part II.A explores the original purpose and function of venue transfer beginning with *forum non*

¹⁹ See *infra* Part II.C.1 (presenting why the *Ross* court felt the need to utilize § 1631 because venue transfer had become so complicated and inconsistent).

²⁰ See *infra* Part II.C (explaining some of the various applications, narrow and broad, of § 1631).

²¹ See *infra* Part III (outlining the problems with venue transfer when a court lacks personal jurisdiction over the defendant).

²² See *infra* Part III.B (describing that § 1631 almost remedied the problems with venue transfers when a court lacks personal jurisdiction over the defendant).

²³ See *infra* Parts III.B.1–3 (displaying the problems with § 1631 and setting the groundwork for the amendment).

²⁴ See *infra* Part III (analyzing the reasons that § 1631 needs to be amended to reclaim efficiency with venue transfer).

²⁵ See *infra* Part IV (providing the suggested amendments to § 1631 to resolve the problems that venue transfers have caused when a court lacks personal jurisdiction).

²⁶ See *infra* Part IV (explaining the need for such an amendment so that § 1631 will apply uniformly and make venue transfer more efficient).

²⁷ See *infra* Part IV (explaining the need for such an amendment because § 1631 takes away defendant protections with choice of law, specifically the statute of limitations).

²⁸ See *infra* Part V (providing a brief conclusion that details the reasons the proposed amendments to § 1631 balance the interests involved with venue transfer).

²⁹ See *infra* Part II (discussing the legal background of venue transfer provisions and their application when a court lacks personal jurisdiction over the defendant).

conveniens and ending with the most common venue transfer provisions of § 1404(a) and § 1406(a).³⁰ Second, Part II.B explains that the function of § 1404(a) and § 1406(a) changed when courts began to transfer cases in which they lacked personal jurisdiction over the defendants.³¹ Part II.B also discusses the reasons that venue transfer became inefficient as lack of personal jurisdiction transfers intersected with choice of law doctrines pertaining to § 1404(a) and § 1406(a).³² Finally, Part II.C explores why courts began using § 1631 as well as the different interpretations of how § 1631 should function.³³

A. Purpose and Function of Venue Transfer

The purpose of congressionally created venue³⁴ rules is to promote convenience and fairness for both the parties and the court.³⁵ In terms of

³⁰ See *infra* Part II.A (discussing the general transfer provisions § 1404(a) and § 1406(a) and their ancestor, *forum non conveniens*).

³¹ See *infra* Part II.B (discussing the application of § 1404(a) and § 1406(a) after the *Goldlaw v. Heiman*, 369 U.S. 463 (1962), decision).

³² See *infra* Part II.C (showing that courts are split on whether to apply *Goldlaw* to overcome choice of law obstacles as well).

³³ See *infra* Part II.C (exploring the various applications of § 1631 in the post-*Goldlaw* era).

³⁴ Venue is defined as: “The proper or a possible place for the trial of a case.” BLACK’S LAW DICTIONARY 745 (2d Pocket ed. 2001).

³⁵ Mitchell G. Page, Comment, *After the Judicial Improvements Act of 1990: Does the General Federal Venue Statute Survive as a Protection for Defendants?*, 74 U. COLO. L. REV. 1153, 1160 (2003). The author asserts that both venue and personal jurisdiction are characterized as protections for the defendant, and he notes a distinction between the purpose of personal jurisdiction and venue. *Id.* at 1159–60. Personal jurisdiction is a guarantee that defendants receive treatment in a manner consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 1158. Thus, personal jurisdiction is a question of whether a court has power over a person. *Id.* at 1159. On the other hand, venue regulations do not raise constitutional concerns and are only thought of as additional protections for the defendant. *Id.* This particular comment argued that the *International Shoe* test for personal jurisdiction, which provides that a defendant must have certain minimum contacts with a state to avoid offending traditional notions of fair play and substantial justice, only focuses on the minimum contacts aspect of due process. *Id.* at 1159–60. The author noted that the only time in the past sixty years that a court relied on the “fair play and substantial justice inquiry” was in *Asahi Metal Industrial Co. v. Superior Court*. *Id.* at 1160; *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113–16 (1987). Thus, the author concludes: “It is the venue rules promulgated by Congress, and not the Due Process requirements of the Constitution, that primarily take into account the issues of convenience and fairness.” Page, *supra*, at 1160; see also Jeffrey J. Kanne, Note, *The Doctrine of Forum Non Conveniens: History, Application, and Acceptance in Iowa*, 69 IOWA L. REV. 975, 980–81 (1984). This author determined that a decision in *Gulf Oil Corp. v. Gilbert*, dealing with *forum non conveniens*, addressed the opposite interest of *International Shoe v. Washington*. Kanne, *supra*, at 980; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Int’l Shoe v. Washington*, 326 U.S. 310 (1945). *International Shoe* recognized that a state has an interest in adjudicating actions closely connected to the state and expanded plaintiff rights by increasing the possible number of

fairness, venue statutes protect defendants against the risk that plaintiffs will select an unfair or inconvenient place for trial.³⁶ The venue rules also account for the public interest, which may demand that the trial take place in a different forum.³⁷ Although venue provisions protect defendants and the public, plaintiffs retain the privilege of choosing the venue.³⁸ As a result, plaintiffs hold a distinct advantage with venue because they determine both the location and the applicable law.³⁹ Congress passed venue transfer provisions, such as § 1404(a) and

forums. Kanne, *supra*, at 980–81. Meanwhile, *Gulf Oil Corp.* recognized that a state has an interest in not adjudicating actions that are loosely connected to the state and expanded defendants' rights because it determined that a defendant's right not to be burdened with an inconvenient and unjust forum must be balanced with a plaintiff's choice of forum. *Id.* at 981.

³⁶ Page, *supra* note 35, at 1161 (quoting the language from *Leroy v. Great West United Corp.*, "the purpose of statutory venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial").

³⁷ *Id.* While venue protects both the defendant and the public, this Note specifically focuses on the protection it offers to defendants; therefore, the protection it offers to the public and how that has changed through the years is beyond the scope of this Note.

³⁸ See *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). The Supreme Court declared that a court should consider the plaintiff's choice of forum under a transfer. *Id.* at 29. District and circuit courts further stated that unless a forum is extremely inconvenient for a defendant, the plaintiff's forum should rarely be disturbed. See *Gen. Portland Cement Co. v. Perry*, 204 F.2d 316 (7th Cir. 1953); *Sun Oil Co. v. Lederle*, 199 F.2d 423 (6th Cir. 1952); *Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir. 1950); *Bergeron v. Sabine Dredging & Constr. Co.*, 281 F. Supp. 223 (D. La. 1968); *Benrus Watch Co. v. Bulova Watch Co.*, 126 F. Supp. 470 (D.R.I. 1954); *Sherman v. Baltimore & Ohio R.R.*, 122 F. Supp. 492 (D. Pa. 1954).

³⁹ Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 709–10 (1995). Professor Ragazzo argues that a plaintiff's venue privilege is well founded, and he points to *Van Dusen v. Barrack*, where the Supreme Court indicated that a court should give great deference to a plaintiff's choice of forum. *Id.*; see also *Van Dusen*, 376 U.S. 612, 628–31 (1964). Professor Ragazzo asserts that in the interest of efficiency and saving resources, plaintiffs, instead of judges, are given wide latitude to determine the initial forum. Ragazzo, *supra*, at 710. Also, allowing the plaintiff to select venue involves fewer steps because the process would be much slower if the plaintiff had to communicate with the defendant to determine the proper venue before the litigation process even started. *Id.* Professor Ragazzo also asserts that defendants are protected by such concepts as personal and subject matter jurisdiction, and venue should only be reconsidered in very rare instances. *Id.* at 708–09. To do otherwise would undermine the goal of efficiency in allowing plaintiffs to choose in the first place. *Id.* at 710. Still, Professor Ragazzo admits that plaintiffs have an advantage with being able to choose the forum because they essentially influence the choice of law. *Id.*

This Note discusses later how this advantage, although given credence, sometimes becomes known as forum shopping, which courts tend to dislike. See *infra* note 74 and accompanying text (discussing why courts are concerned with some instances of plaintiff forum shopping).

§ 1406(a), to promote efficiency with venue in the federal procedural scheme.⁴⁰

The common law doctrine of *forum non conveniens* is the ancestor for § 1404(a) and § 1406(a).⁴¹ Exploring *forum non conveniens* provides deeper insight into the specific purpose behind venue transfer and the reasons that Congress passed § 1404(a) and § 1406(a).⁴²

1. *Forum Non Conveniens*: The First Form of Venue Transfer

Prior to the existence of the federal transfer statutes, *forum non conveniens* was the only protection defendants had against plaintiffs who abused the venue provisions.⁴³ Under *forum non conveniens*, a court can dismiss a case despite the fact that venue and jurisdiction are proper because a more convenient and proper forum exists for adjudication.⁴⁴

⁴⁰ The general venue statute is 28 U.S.C. § 1391 (2000). This statute states:
(a) a civil action wherein jurisdiction is founded only on diversity of citizenship may, . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (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, or (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 which the action may otherwise be brought.

Id. Both § 1404(a) and § 1406(a) allow for transfer from one venue to another and are arranged under title 28, which is the same title where the general venue provisions such as § 1391 are located, and so it appears that § 1404 and § 1406 are members of the venue family. See 28 U.S.C. § 1391 (2000); 28 U.S.C. § 1404 (2000); 28 U.S.C. § 1406 (2000).

⁴¹ See *infra* Part II.A.1 (discussing the history, background, and generalities of *forum non conveniens*).

⁴² Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 679–80 (1984). Professor Marcus notes that even though it requires a court to dismiss an action, *forum non conveniens* is meant for situations in which a more convenient forum exists. *Id.* Thus, in 1948, Congress provided § 1404(a) as an alternative to *forum non conveniens* and dismissal, but it allowed for transfer to a court that was more convenient so long as venue and personal jurisdiction were proper. *Id.* Thus, although it included more than the common law doctrine of *forum non conveniens*, the driving premise of § 1404(a) was to allow the case to be brought to a more convenient forum. *Id.*; see also Annotation, *Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provisions of Judicial Code (28 USC § 1404(a))*, 1 A.L.R. FED. 15, 30 (1969) (“The *forum non conveniens* provision of the Judicial Code of 1948, [is] in 28 USC § 1404(a).”).

⁴³ Marcus, *supra* note 42, at 679. “Until 1948, transfer of cases among federal courts was impossible. Dismissal on grounds of *forum non conveniens* was the only remedy for abuse of venue provisions. In 1947 the Supreme Court confirmed the availability of such dismissal as a matter of federal common law.” *Id.*

⁴⁴ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (superseded by 28 U.S.C. § 1404); see also Kanne, *supra* note 35, at 980–82. In *Gulf Oil Corp.*, the Supreme Court endorsed the doctrine and determined that a court could decline jurisdiction and dismiss an action in a

The doctrine presupposes that another forum exists where personal jurisdiction and venue are proper for the case to be adjudicated.⁴⁵ Courts still give the plaintiff's original choice of forum great deference, but *forum non conveniens* gives defendants the opportunity to acquire a better forum if the original forum is unreasonable.⁴⁶

However, federal courts encountered problems when they applied *forum non conveniens*.⁴⁷ For example, *forum non conveniens* could not

forum that was proper if a more proper forum existed, but only if jurisdiction and venue were initially proper. 330 U.S. at 504 ("This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline jurisdiction in exceptional circumstances.").

⁴⁵ *Gulf Oil Corp.*, 330 U.S. at 506-07 ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process.").

⁴⁶ For a particularly good summary of aspects a court considers under this doctrine, see Kanne, *supra* note 35, at 982-83. However, the Court in *Gulf Oil Corp.* specifically stated some considerations and factors that would make a plaintiff's choice unreasonable. 330 U.S. at 508.

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. . . . Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Id. at 508-09.

⁴⁷ See *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941); *Ex parte Collett*, 337 U.S. 55, 58 (1949).

apply in some controversies because of certain federal law restrictions.⁴⁸ As a result, sometimes a defendant would have to defend himself in an expensive and inconvenient forum, even when the necessary resources existed in an alternative forum.⁴⁹ Also, the doctrine could be especially harsh and inconvenient to plaintiffs because courts had to dismiss the case, which forced plaintiffs to re-file in a new forum.⁵⁰ These problems spurred Congress to pass laws that promoted efficient change to a new courtroom.⁵¹

⁴⁸ See, e.g., *Baltimore & Ohio R.R.*, 314 U.S. at 52. In *Baltimore & Ohio R.R.*, respondent Kepner originally filed his Federal Employer Liability Act claim in the United States District Court for the Eastern District of New York under a special venue provision within that Act that allowed the respondent to file a claim either where defendant resided or where he did a substantial amount of business. *Id.* at 48–49. Petitioner, an interstate railroad, tried to enjoin the respondent in a state court in Ohio, claiming that suitable local courts, both state and federal, existed besides the one where the respondent filed his claim, which was over seven hundred miles from most of the witnesses and evidence. *Id.* The petitioner claimed that the huge cost it would take to defend the suit in the New York District Court was of no benefit to the respondent and that the respondent actually filed the case in New York to haggle and vex the petitioner. *Id.* at 51–52. The Supreme Court found that the supremacy clause prevented the Ohio state court from enjoining Kepner’s action because it was based on a matter of federal law. *Id.* at 52. Hence, the state could not stop Kepner’s New York action. *Id.* The doctrine of *forum non conveniens* was inapplicable because the Federal Employers’ Liability Act only allowed Kepner to bring his action in New York, where the defendant was an inhabitant. *Id.* at 51. Because *forum non conveniens* would have caused dismissal of Kepner’s claim, Kepner would have had to re-file. *Id.* His action essentially would have been barred because the Federal Employer’ Liability Act prevented him from bringing a new Ohio action. *Id.* at 50–53. Therefore, this complex situation demonstrated the need for a transfer provision rather than *forum non conveniens*. *Id.*; see also *Gulf Oil Corp.*, 330 U.S. at 505; *Ex parte Collett*, 337 U.S. at 58.

⁴⁹ See *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. at 48, for an example of a defendant being forced to defend in an inconvenient forum:

It was stated the federal court chosen was seven hundred miles from the residence of the respondent and numerous witnesses; that to present the case properly required the personal attendance of approximately twenty-five locally available witnesses . . . at a cost estimated to exceed the cost of the presentation of the case . . . with no resulting benefit to the injured employee.

Id. However, due to the lack of a venue transfer provision, the defendant in *Baltimore & Ohio R.R.* was forced to defend in such a forum. *Id.* at 52–53.

⁵⁰ See *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955). The Supreme Court indicated that Congress did more than simply codify *forum non conveniens*. *Id.* at 32. The Court indicated that § 1404(a) replaced the harshest result of *forum non conveniens*, dismissal, with transfer. *Id.*; see, e.g., *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952) (indicating that *forum non conveniens* is much different from § 1404(a) because *forum non conveniens* finds the action to be so inappropriate and inconvenient that it is best to stop the litigation and let it begin elsewhere).

⁵¹ See 28 U.S.C. § 1404(a) (2000); see also *Ex parte Collette*, 337 U.S. at 57. The Supreme Court specifically quoted the reviser’s notes that went along with § 1404(a):

2. Section 1404(a)

One law Congress passed was § 1404(a).⁵² Section 1404(a) accounts for defendants, preserves legitimate plaintiff claims, and promotes efficiency.⁵³ Section 1404(a) operates like *forum non conveniens* because it allows for a venue change if the original forum is unreasonable, and it presupposes that two legitimate forums exist where both personal jurisdiction and venue are proper.⁵⁴ Further, the Supreme Court has

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

Ex parte Collette, 337 U.S. at 58.

To relieve against what was apparently thought to be the harshness of dismissal, under the doctrine of *forum non conveniens*, of an action brought in an inconvenient one of two or more legally available forums, . . . and concerned by the reach of *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44, . . . Congress, in 1948, enacted 28 U.S.C. § 1404(a).

Hoffman v. Blaski, 363 U.S. 335–36 (1960).

⁵² 28 U.S.C. § 1404(a). “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.” *Id.* The remainder of § 1404, which is not within the scope of this Note, is as follows:

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term “district court” includes the District of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

Id. § 1404(b)–(d).

⁵³ See *MOORE ET AL.*, *supra* note 1, § 111.11.

Recognizing that the “broad venue provisions in federal Acts often resulted in inconvenient forums,” Congress intended Section 1404(a) to remedy this situation by authorizing easy transfer of actions to a more convenient federal forum. It has a broad remedial purpose: “to prevent the waste ‘of time, energy and money’ and ‘to protect litigants.’”

Id.

⁵⁴ See *supra* note 45 and accompanying text (stating *forum non conveniens* presumes two permissible forums); see also *Hoffman*, 363 U.S. 335. The Supreme Court determined that the

determined that § 1404(a) applies to all federal civil actions.⁵⁵ As a result, § 1404(a) even applies to those actions where *forum non conveniens* could not be used, and thus, it solves the problems of *forum non conveniens* because it applies uniformly to all federal actions.⁵⁶ However, the biggest improvement over *forum non conveniens* is that § 1404(a) does not dismiss a case like *forum non conveniens*.⁵⁷ Instead, it simply transfers the case to a new court, which preserves valid plaintiff claims because the case does not have to be re-filed.⁵⁸ Thus, § 1404(a) is a more efficient codification of *forum non conveniens* because it applies uniformly and does not result in dismissal.⁵⁹

“might have been brought” language in § 1404(a) meant that the case could only be transferred to a forum where the plaintiff could have brought the action at the time that he filed suit. *Hoffman*, 363 U.S. at 344. The dispute originated because the defendant wanted to transfer the action to a district court in Illinois from the district court in Texas. *Id.* at 336. Even though the court was an improper venue and lacked jurisdiction in that forum, the trial court granted the motion to transfer “for the convenience of the parties and witnesses in the interest of justice” because the defendant had waived both the personal jurisdiction and venue requirement by requesting the transfer. *Id.* at 337. Restricting § 1404(a) to its precise language, the Supreme Court ruled that the transfer was not proper because the action could not originally have been brought in the Illinois district court, even though the defendant waived his right to challenge venue and personal jurisdiction after the fact. *Id.* at 343.

⁵⁵ *Ex parte Collett*, 337 U.S. at 58. The Supreme Court interpreted the words “civil action” to mean all civil actions. *Id.* “The reviser’s notes make clear that the phrase was substituted for ‘suit,’ formerly used in various venue statutes, in the light of Federal Rule of Civil Procedure, rule 2, 28 U.S.C.A: There shall be one form of action to be known as ‘civil action.’” *Id.* at 58 n.6.

⁵⁶ *Id.* at 59. This interpretation resolved the problem *forum non conveniens* encountered in *Baltimore & Ohio R.R.*, in that § 1404(a) did not apply to only some federal laws like *forum non conveniens*, but rather, it applied to all federal laws. *See supra* Part II.A.1 (describing the problems with *forum non conveniens*). The Supreme Court has also asserted that the relevant factors a court was to look at under *forum non conveniens* for the plaintiff’s choice of forum were not to be considered. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). The Court indicated that a transfer could take place under § 1404(a) with a lesser showing of inconvenience than *forum non conveniens*. *Id.*; *cf.* *Rogers v. Baltimore & Ohio R.R.*, 219 F. Supp. 598, 600 (W.D. Pa. 1963) (denying the plaintiff’s contention that a transfer under § 1404(a) required a clear and compelling reason for transfer because § 1404(a) was a revision of *forum non conveniens* and required only a lesser showing of convenience).

⁵⁷ *See Norwood*, 349 U.S. at 32; *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952). The Supreme Court indicated that § 1404(a) was not meant to be a mere codification of *forum non conveniens*; rather, it was meant to be a revision. *Norwood*, 349 U.S. at 32. As proof, the Court looked to the fact that the harshest part of the doctrine, dismissal, was replaced. *Id.*

⁵⁸ *See supra* notes 54–56 and accompanying text (indicating how the Court interpreted that § 1404(a) resolved the problems caused by *forum non conveniens*: dismissal and inapplicability to all federal statutes).

⁵⁹ *See supra* note 56 and accompanying text (describing § 1404(a) as an improvement over *forum non conveniens* because it allowed an easier transfer).

800 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

However, § 1404(a) conflicts with the *Erie* Doctrine⁶⁰ because it inevitably involves two different state forums with different state laws.⁶¹

⁶⁰ See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 21 (Fall 1998–1999). *Erie* overturned the earlier Supreme Court decision of *Swift v. Tyson*, 41 U.S. 1 (1842), which allowed a federal court to ignore a state's common law and apply its own independent judgment of what the law should be. 304 U.S. at 90. *Erie* stated, among other things, that this interpretation was improper because it prevented uniformity of the law throughout the state even though it attempted to promote uniformity in the federal court system. *Id.* at 91. Therefore, *Erie* determined that federal courts had to utilize state common law from the state in which it was located in diversity cases. *Id.*

In developing the *Erie* doctrine, the Supreme Court has focused on distinguishing between substance and procedure. See *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945); 17A JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 124.01 (3d ed. 2004) [hereinafter 17A MOORE ET AL.]. In *Guaranty Trust Co.*, the Court noted that the difference between substance and procedure depends on the context in which the question arises because a rule of law may be procedural for one purpose and substantive for another. 326 U.S. at 108–12. Thus, *Guaranty Trust Co.* defined substantive as something that would “significantly affect the result of a litigation for a federal court to disregard [the law].” *Id.* at 109. This principle became known as the “outcome determinative” test. *Id.*

This standard was developed more in later cases. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). In *Byrd*, the Court developed a test for balancing competing state and federal laws by using outcome as only one factor. See 17A MOORE ET AL., *supra*, § 124.06. The *Byrd* analysis recognizes three elements: “(1) the state's interest in having federal courts recognize and uphold its substantive rules and policies, (2) the federal court's interests in adhering to significant federal principles in the administration of justice, and (3) the litigants' interests in having [a] uniform outcomes regardless of where the plaintiff sues.” *Id.* Although it is difficult to apply, the *Byrd* test is still applicable in cases that do not involve federal rules. See *Gasperini v. Ctr. for Humanities, Inc.*, 516 U.S. 415 (1996).

Hanna provided federal courts with a guide to determine whether to apply the state or federal law under the Rules Enabling Act, which “provides that the Supreme Court has power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the United States district courts in civil actions.” See 17A MOORE ET AL., *supra*, § 124.04. The *Hanna* test requires courts to ask whether “(1) the scope of the rule is ‘sufficiently broad to cover the situation’; and 2) the rule is (a) constitutional and (b) a valid exercise of the Supreme Court's rule-making power under the federal Rules Enabling Act.” *Id.* § 124.02. If the scope of the federal rule is too broad for the Rules Enabling Act to apply, the court must look to other standards that the Supreme Court has developed, such as the *Byrd* test. *Id.*

The Supreme Court determined later which law to apply between states in a given case. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Choice of law is defined as “the question of which jurisdiction's law should apply in a given case.” BLACK'S LAW DICTIONARY 258 (8th ed. 2004). After *Erie*, *Klaxon* determined that a federal court must apply the choice of law rules of the state in which the federal court is located in diversity suits rather than applying the state law where most of the incident at issue took place. Fruehwald, *supra*, at 26. The rationale behind this decision was to promote uniformity within a state; otherwise diversity of citizenship would result in different laws being applied between a federal court and a state court that were located in close proximity to each other. *Id.*

⁶¹ See *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

The Court determined how the *Erie* doctrine applies with § 1404(a) in *Van Dusen v. Barrack*.⁶² In *Van Dusen*, the Supreme Court held that when a defendant moves for change of venue under § 1404(a), the state law of the court where the action was brought, the transferor court, applies.⁶³ The Court later found, in *Ferens v. John Deere Co.*,⁶⁴ that even if a plaintiff initiates the transfer, the state law of the transferor court applies.⁶⁵ In sum, § 1404(a) applies when venue is initially proper in any civil action,

[I]n our opinion the underlying and fundamental question is whether . . . a change of venue within the federal system is to be accompanied by a change in the applicable state law. Whenever the law of the transferee State significantly differs from that of the transferor state . . . it becomes necessary to consider what bearing a change of venue, if accompanied by a change in state law, would have on “the interest of justice.”

Id. at 625–26.

⁶² *Id.* at 636–37. In *Van Dusen*, the respondents were representatives of approximately forty Pennsylvania decedents who instituted an action for wrongful deaths in a Pennsylvania district court based on a plane crash in Boston, Massachusetts. *Id.* at 613–14. More than one hundred total actions had been instituted against the array of defendants including the airline, various manufacturers, the United States, and even the Massachusetts Port Authority. *Id.* The petitioners moved to transfer the Pennsylvania action to a district court in Massachusetts under § 1404(a). *Id.* at 614. The Pennsylvania district court granted the transfer and determined that the law of Pennsylvania would apply in the Massachusetts district court. *Id.* The respondents then sought a writ of mandamus from the court of appeals and successfully contended that the district court erred in allowing the transfer. *Id.* The court of appeals found that the § 1404(a) transfer could only be granted if the respondents had been able to sue in Massachusetts at the time the suit was brought. *Id.* The Supreme Court granted certiorari. *Id.* at 615.

⁶³ *Id.* at 639.

We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms. . . . We conclude, therefore, . . . where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. *A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms.*

Id. at 636–37, 639 (emphasis added).

⁶⁴ 494 U.S. 516 (1990).

⁶⁵ *Id.* The Supreme Court determined that the transferor court law should apply pursuant to a plaintiff initiated transfer under § 1404(a). *Id.* Therefore, sound reason suggests decisions such as that in *United States v. Berkowitz*, 328 F.2d 358 (3d Cir. 1964), would be compelled to apply the transferor law as outlined from *Ferens* in transfers where a court lacks personal jurisdiction and transfers under § 1404(a). See *infra* Part II.B (discussing the problem with choice of law following transfers where a court lacked jurisdiction).

802 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

and a court is to utilize the state law of the transferor court following the transfer.⁶⁶

Despite the improvement that § 1404(a) provided over *forum non conveniens*, it was not the only law that Congress passed.⁶⁷ The other venue transfer provision, § 1406(a), is more enigmatic, but Congress apparently enacted it to improve efficiency of venue transfer as well.⁶⁸

3. Section 1406(a)

Unlike both § 1404(a) and *forum non conveniens*, which are used generally when venue is proper, § 1406(a)⁶⁹ allows transfers to a proper federal forum from a court where venue is initially improper.⁷⁰ Under § 1406(a), the transfer must be to a court where the action could have been brought, which requires both proper jurisdiction and proper venue.⁷¹ It also requires a law other than § 1404(a) to apply after a

⁶⁶ See *supra* Part II.A.2 (providing that § 1404(a) has commonly been accepted to work).

⁶⁷ See 28 U.S.C. § 1406(a). Section 1406(a) allows a transfer of venue when it is initially found to be improper, as long as it is “in the interest of justice.” 28 U.S.C. § 1406(a).

⁶⁸ See *infra* Part II.A.3 (indicating that the lack of legislative history and apparent codification of *forum non conveniens* in § 1404(a) suggest that § 1406(a) did not have a purpose).

⁶⁹ “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.” 28 U.S.C. § 1406(a) (2000). The remainder of § 1406, which is not within the scope of this Note follows:

(b) Nothing in this chapter [28 U.S.C.S. §§ 1391 et seq.] shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

(c) As used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

Id. § 1406(b)-(c).

⁷⁰ See *Van Dusen*, 376 U.S. at 634; see also *Nelson v. Int’l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983); *Woodward Park Imaging, Inc. v. Iwamoto*, 955 F. Supp. 1006, 1008 (N.D. Ill. 1997); *Skilling v. Funk Aircraft Co.*, 173 F. Supp. 939, 941-42 (W.D. Mo. 1959); cf. *Clayton v. Swift & Co.*, 132 F. Supp. 154, 158 (D. Va. 1955) (holding that a transfer could be made under § 1406(a) if it was doubtful venue was proper without actually determining if it was improper). See generally *Schiller v. Mit-Clip Co.*, 180 F.2d 654 (2d Cir. 1950) (indicating that a transfer under § 1406(a) does not depend upon the inconvenience of trying the action where it was brought but simply that venue was improper).

⁷¹ See *Orion Shipping & Trading Co. v. United States*, 247 F.2d 755, 757 (9th Cir. 1957) (remanding the case but suggesting that it be transferred to a district with proper venue); *French Transit v. Modern Coupon Sys.*, 858 F. Supp. 22, 28 (S.D.N.Y. 1994) (holding that a case should be transferred to a district where it could have been brought); *Zumft v. Doney Slate Co.*, 698 F. Supp. 444, 446-47 (E.D.N.Y. 1988) (determining that a case would be transferred to a venue that was proper and had jurisdiction over the defendants).

transfer.⁷² *Van Dusen* did not address what state law should apply following a § 1406(a) transfer, but most courts have stated that a court should apply the state law of the state to which the case is transferred, or the transferee law, instead of the state law of the transferor court.⁷³ If the state law of the transferor court followed a plaintiff from the transferor forum to the transferee forum, the result would be the epitome of forum shopping because the action was not technically allowed to be in the transferor court in the first place.⁷⁴ Such a result would encourage plaintiffs to file claims in any state that had beneficial law, regardless of whether venue was proper, simply to capture that state law after the transfer.⁷⁵ Hence, most courts have settled on applying the law of the transferee court to avoid this result.⁷⁶ Therefore, § 1406(a) applies when venue is improper and the transferee court should apply the state law of the state in which it sits.⁷⁷

Besides the function of § 1406(a), however, the purpose of § 1406(a) is not entirely clear.⁷⁸ Prior to the enactment of § 1406(a), only dismissal

⁷² See *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1109–10 (5th Cir. 1981); *Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980).

⁷³ See *Ellis*, 646 F.2d at 1109–10; *Martin*, 623 F.2d at 473; *Tillman v. Eattock*, 385 F. Supp. 625, 627 (D. Kan. 1974). Compare *Bealle v. Nyden's, Inc.*, 245 F. Supp. 86, 88–89 (D. Conn. 1965) (transferring a case to district court where the state statute of limitations had run and allowing the state law to apply resulting in the case's dismissal), with *Viaggio v. Field*, 177 F. Supp. 643, 648 (D. Md. 1959) (disallowing a transfer because the state statute of limitations of the transferee court had run and rendering it a waste of time to transfer simply to dismiss the action). But see *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1966) (applying the transferor court law following a § 1406(a) transfer).

⁷⁴ *Ellis*, 646 F.2d at 1109. There are three main types of forum shopping: shopping for location, law of the case shopping, and shopping for choice of law. Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea," *A Survey of Section 1404(a) Transfer in the Federal System*, 67 N.Y.U. L. REV. 612, 634 (1992). Courts have primarily been concerned with the third type of forum shopping, or trying to capture favorable law with § 1406(a), because it would be unfair for the defendant to be subject to the state law where adjudication could not take place. See *Nelson*, 716 F.2d at 643; *Ellis*, 646 F.2d at 1110–11; *Parahm v. Edwards*, 346 F. Supp. 968, 973 (D. Ga. 1972).

⁷⁵ See *Nelson*, 716 F.2d at 643; *Ellis*, 646 F.2d at 1110–11; *Parahm*, 346 F. Supp. at 973; see also 28 U.S.C. § 1406(a). The word "may" was purposely put into the statute to allow discretion to consider whether plaintiffs were forum shopping and determine to either dismiss the case or transfer it. *Skilling*, 173 F. Supp. at 942.

⁷⁶ See *supra* note 73 and accompanying text (displaying support for courts that have determined the law of the transferee state should apply after a § 1406(a) transfer).

⁷⁷ See *supra* notes 69–75 and accompanying text (explaining the function of § 1406(a)).

⁷⁸ *Finzi*, *supra* note 6, at 979 n.22. Mr. Finzi expresses that the primary reason that the purpose of § 1406(a) is unknown is mainly because the legislative history of § 1406(a) does not state a purpose for the statute. *Id.* Instead, most of the purpose for § 1406(a), including its extensive protection of plaintiffs, stems from case law. *Id.* at 984.

804 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

was available when venue was improper.⁷⁹ Apparently, Congress passed § 1406(a) to alleviate these rare instances because dismissal was harsh and sometimes caused unjust results.⁸⁰ Some courts have stated that the purpose of § 1406(a) is to remove any obstacles, such as judicial technicalities and time constraints, that obstruct efficient adjudication.⁸¹ In *Goldlawr v. Heiman*,⁸² the Supreme Court utilized similar analysis when it determined that a case could be transferred under § 1406(a) when a court lacked personal jurisdiction over the defendant.⁸³ The *Goldlawr* decision was the first major case that defined the purpose of § 1406(a), but it had direct ramifications upon the function of not only § 1406(a) but also upon § 1404(a).⁸⁴

B. Venue Transfer When a Court Lacks Jurisdiction

Sections 1404(a) and 1406(a) had distinct applications and were passed to make specific instances of courtroom change easier and more

⁷⁹ See MOORE ET AL., *supra* note 1, § 111.31. “Prior to the enactment of Section 1406(a), if the plaintiff lay venue in the wrong district, the district court’s sole option was to dismiss the action. Although the dismissal was without prejudice, it . . . often had the harsh result of divesting the plaintiff of his . . . cause of action.” *Id.*

⁸⁰ *Id.* § 111.02.

Prior to the enactment of Section 1406(a), if the plaintiff filed an action in an improper venue, the defendant could make a motion to dismiss for improper venue under Rule 12(b)(3). The only option available to the district court, if the defendant’s argument proved correct, was to dismiss the claims against the defendant. Unless the dismissed defendant was a party who had to be joined under Rule 19(b), if the plaintiff had filed claims against other defendants, the action would continue on as to those defendants and the plaintiff would be forced to file another action against the dismissed defendant. This obviously inefficient result is cured by Section 1406(a).

Id.

⁸¹ See *Aguacate Consol. Mines, Inc. v. Deeprock, Inc.*, 566 F.2d 523, 524 (5th Cir. 1978) (stating that the purpose of § 1406 is “to remove obstacles that impede expeditious and orderly adjudication”); see also *Fuente v. ICC*, 451 F. Supp. 867, 872 (N.D. Ill. 1978) (stating that § 1406(a) “was designed to avoid the ‘time consuming and justice defeating technicalities’ to which dismissal for improper venue necessarily gives rise”).

⁸² 369 U.S. 463 (1962).

⁸³ See *infra* Part II.B.1 (explaining how *Goldlawr* defined the purpose of § 1406(a) and expanding its use to trump personal jurisdiction); see also *Goldlawr v. Heiman*, 369 U.S. 463 (1962); *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967); *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967).

⁸⁴ See *infra* Parts II.B, III (explaining how courts split in the application of *Goldlawr* to § 1404(a) and how this had direct ramifications on which choice of law to apply and ultimately led courts to use § 1631).

efficient.⁸⁵ However, when courts used the statutes to transfer a case when a court lacked personal jurisdiction over the defendant,⁸⁶ the distinction between the two began to dissipate.⁸⁷ *Goldlawr* determined that the purpose of venue transfer was to remove all obstacles that kept a court from adjudicating a claim, and consequently, the *Goldlawr* court determined that when both venue was improper and a court lacked

⁸⁵ See *supra* Parts II.A.2-3 (discussing that § 1404(a) is meant for transfers to a permissible forum from a permissible forum and that § 1406(a) is meant for transfers to a permissible forum from an impermissible forum).

⁸⁶ Initially, although the Supreme Court has never spoke on the matter, lower courts found that without subject matter jurisdiction, a court could not transfer a case. See *Grubisic v. Esperdy*, 229 F. Supp. 679 (S.D.N.Y. 1963). One federal court stated that a lack of subject matter renders the court powerless to grant any relief and that no statutory authority could be exercised without such jurisdiction. *Id.* at 680. However, this finding was differentiated from instances, like *Goldlawr*, where a court lacked personal jurisdiction. 369 U.S. at 463.

⁸⁷ Personal jurisdiction refers to a court's power to bring an individual within its adjudicative process. BLACK'S LAW DICTIONARY 384 (2d Pocket ed. 2001). The idea was first exemplified in the landmark Supreme Court case *Pennoyer v. Neff*, 95 U.S. 714 (1887). Personal jurisdiction was further elaborated in later cases and involves a complex process in itself. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, the underlying principle is that the Due Process Clause of the Fourteenth Amendment limits the power of a state court to render personal judgments valid against a defendant when the court lacks personal jurisdiction. See, e.g., *World-Wide Volkswagen Corp.*, 444 U.S. at 294 ("[T]he Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); *Hanson*, 357 U.S. at 250 (holding that a state is forbidden to enter judgment attempting to bind a person over whom it has no jurisdiction); *Int'l Shoe Co.*, 326 U.S. at 319 ("Whether due process is satisfied . . . [d]oes not contemplate that a state may make a binding judgment *in personam* against an individual or corporate defendant with which the state has no contacts."). *Pennoyer* laid the groundwork for the concept of personal jurisdiction. 95 U.S. at 732. In *Pennoyer*, the Court held that the validity of court judgments could be questioned and resisted and does not constitute due process of law when a court lacks jurisdiction. *Id.* at 732-33.

Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

Id. at 733. Other courts would build upon this ideal. For instance, in *World-Wide Volkswagen Corp.*, the Court reiterated that judgments rendered in violation of due process were void and not entitled to full faith and credit. 444 U.S. at 291. Further, due process does not allow a state to make a binding judgment against individuals when that state lacks personal jurisdiction over them. *Id.* at 294. Thus, the common idea has stood strong through the years that a court may not render judgments over a person when that court lacks personal jurisdiction and should dismiss the case. *World-Wide Volkswagen Corp.*, 444 U.S. 286; *Hanson*, 357 U.S. 235; *Int'l Shoe Co.*, 326 U.S. 310.

personal jurisdiction over the defendant, § 1406(a) was broad enough to allow the transfer.⁸⁸ However, when the circuit courts attempted to apply this rule to instances where a court was a proper venue but lacked personal jurisdiction over the defendant, the courts split on whether to utilize § 1404(a) or § 1406(a).⁸⁹ This split, in turn, was immensely significant because whether a court used § 1404(a) or § 1406(a) affected which choice of law would apply following the transfer.⁹⁰ As a result, many interpretations emerged as to what choice of law to apply, courts expended unneeded time and resources in making such interpretations, and uncertainty existed regarding the exact function of both § 1404(a) and § 1406(a).⁹¹ One court aptly labeled the problem as “a merry chase through the murky area in which the Erie doctrine and the federal change of venue statutes intersect.”⁹² *Goldlawr* was the beginning.⁹³

1. The Beginning of Venue Transfer Without Jurisdiction

In *Goldlawr*, the United States Supreme Court used language that suggested courts should strongly attempt to preserve a plaintiff’s claim with a venue transfer due to a court’s lack of personal jurisdiction over the defendant.⁹⁴ The main issue in *Goldlawr* was whether to transfer or

⁸⁸ See 369 U.S. at 466–67 (“The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.”).

⁸⁹ See *infra* Part II.B.2 (showing the difficulty courts had in transferring venue when venue was proper but the court lacked jurisdiction, which resulted in a circuit split in whether to use § 1404(a) or § 1406(a)).

⁹⁰ See *infra* Parts II.A.2–3 (explaining how courts are supposed to apply the state law of the transferor court with § 1404(a) and the state law of the transferee court with § 1406(a)).

⁹¹ The first rule of the Federal Rules of Civil Procedure suggests that uniformity and efficiency should be a strong consideration in procedure with federal courts: “These rules govern the procedure in the United States district courts . . . they shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” FED. R. CIV. P. 1; see also Michael D. Bayles, *On Legal Reform: Legal Stability and Legislative Questions*, 65 KY. L.J. 631, 637 (1977). “Five important considerations support the principle of stability: *The need for certainty*; fairness to those who have relied upon the extant rule; *the efficiency of following precedent*; the need for continuity in the law; and equality in treating similar cases similarly.” *Id.* (emphasis added).

⁹² *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1100–01 (5th Cir. 1981).

⁹³ See *infra* Part II.B.1 (showing how *Goldlawr* provided analysis that would be used by courts later to split on whether to transfer under § 1404(a) when venue was proper but a court lacked personal jurisdiction).

⁹⁴ *Goldlawr v. Heiman*, 369 U.S. 463, 466 (1962). The Court stated:

The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind

dismiss an action when a court lacked personal jurisdiction over the defendant and when a court was also an improper venue.⁹⁵ The *Goldlawr* Court held that a federal district court could transfer a case under § 1406(a) if venue was improper, even if that court lacked personal jurisdiction over the defendant.⁹⁶ According to the Court, § 1406(a) was amply broad to allow transfers when a court lacked personal jurisdiction, so long as it was “in the interests of justice.”⁹⁷ The *Goldlawr* Court was particularly concerned with the injustice that would occur if plaintiffs’ actions were dismissed simply because they had made a mistake with venue or personal jurisdiction, and it further stated: “The section is thus in accord with the general purpose . . . that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.”⁹⁸ *Goldlawr* did not determine

upon which venue provisions often turn. Indeed, this case is itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff’s losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be “found” or that they “transact . . . business” in the Eastern District of Pennsylvania. . . . The language of § 1406 (a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.

Id. at 466–67.

⁹⁵ *Id.* at 464. The case originally was filed in the United States District Court for the Eastern District of Pennsylvania based on an antitrust action in accordance with the Sherman and Clayton Acts. *Id.* The district court found that venue was improper as to two of the defendants and that the district court lacked personal jurisdiction, and it then transferred the action to the Southern District of New York pursuant to § 1406(a), which is a court that had both personal jurisdiction over the two defendants in question and was a proper venue. *Id.* The defendants then appeared in the New York district court and motioned to dismiss the case under the theory that the original district court in Pennsylvania lacked personal jurisdiction over them and thus lacked the power to transfer the case. *Id.* at 464–65. The New York court granted this motion, the Second Circuit affirmed, and the case then went to the Supreme Court. *Id.* at 465.

⁹⁶ *Id.* at 466 (finding the language of § 1406(a) amply broad to allow such a transfer).

⁹⁷ *Id.* at 465 (“Nothing in that language indicates that the operation of the section was intended to be limited to actions in which the transferring court has personal jurisdiction over the defendant.”).

⁹⁸ *Id.* at 466. This language would become the root of the problem. *See infra* Part III.A. Also, it was the language relied upon by countless other courts in allowing venue transfer in factually different circumstances from *Goldlawr*. *See Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967); *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967); *United States v. Berkowitz*, 328 F.2d 358 (3d Cir. 1964).

whether the same analysis would apply when venue was proper, but other federal courts wrestled with this question as time passed.⁹⁹

2. Venue Transfer Without Jurisdiction but Proper Venue

Goldlawr did not answer whether § 1404(a) could be used when the court lacked personal jurisdiction over the defendant.¹⁰⁰ Some courts found the *Goldlawr* analysis applied to § 1404(a) because it was the companion section to § 1406(a).¹⁰¹ Other courts held that only § 1406(a) applied when a court lacked jurisdiction because venue was technically improper when a court lacked personal jurisdiction.¹⁰² One court did not even specify if § 1404(a) or § 1406(a) applied, but it transferred the case anyway.¹⁰³ However, every court relied heavily on the language from

⁹⁹ See *Goldlawr*, 369 U.S. at 468 (Harlan, J., dissenting).

And it is incongruous to consider, as the Court's holding would seem to imply, that in the 'interest of justice' Congress sought in § 1406(a) to deal with the transfer of cases where both venue and jurisdiction are lacking in the district where the action is commenced, while neglecting to provide any comparable alleviative measures for the plaintiff who selects a district where venue is proper but where personal jurisdiction cannot be obtained.

Id.

¹⁰⁰ See *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980); *Corke v. Sameiet M.S. Song*, 572 F.2d 77 (2d Cir. 1978); *Mayo Clinic*, 383 F.2d at 655-56; *Dubin*, 380 F.2d at 815-16; *Berkowitz*, 328 F.2d at 361.

¹⁰¹ See *Berkowitz*, 328 F.2d at 361 (transferring under § 1404(a) when venue was proper but the court lacked personal jurisdiction because it was the companion section of § 1406(a) and should function equivalently).

¹⁰² All of these courts indicated that a transfer was to be made under § 1406(a) when venue was proper but jurisdiction was lacking because the lack of jurisdiction made venue technically improper. See *Martin*, 623 F.2d 469; *Mayo Clinic*, 383 F.2d 653; *Dubin*, 380 F.2d 813.

¹⁰³ See *Corke*, 572 F.2d 77 (not specifying whether the transfer was utilized under § 1404(a) or § 1406(a) when venue was proper but the court lacked personal jurisdiction).

Goldlawr.¹⁰⁴ *United States v. Berkowitz*¹⁰⁵ was the first federal appellate case to encounter this problem.¹⁰⁶

In *Berkowitz*, the Third Circuit held that a court could transfer under § 1404(a) when a court lacked personal jurisdiction over the defendant.¹⁰⁷ The *Berkowitz* court lacked personal jurisdiction over the defendant, but venue was proper.¹⁰⁸ The *Berkowitz* court determined that the analysis from *Goldlawr* should apply to both § 1404(a) and § 1406(a) because they were companion sections.¹⁰⁹ Relying heavily on the language from *Goldlawr*, the *Berkowitz* court indicated that § 1406(a) was amply broad to preserve a plaintiff's claim by removing any obstacles that impede an

¹⁰⁴ See *supra* Part II.B.1; *supra* note 94 (providing the *Goldlawr* language that courts relied upon).

¹⁰⁵ 328 F.2d at 361. The case arose when the United States filed a tax evasion claim against Morton Berkowitz in a district court in Pennsylvania. *Id.* at 359. Berkowitz was the officer that was responsible for the delinquent payments of a large corporation. *Id.* The suit was filed just seventeen days before the applicable statute of limitations would expire. *Id.* Berkowitz then moved to dismiss because he was a citizen of New York and had not been properly served. *Id.* The government moved for transfer pursuant to § 1404(a). *Id.* The district court did not grant transfer under § 1404(a), and the government filed another motion to transfer pursuant to § 1406(a). *Id.* However, the district court also denied that motion and the government appealed. *Id.* at 360.

¹⁰⁶ See 328 F.2d at 361.

¹⁰⁷ *Id.* The *Berkowitz* court found that a court reserved discretion in considering whether the action should be transferred pursuant to § 1404(a) because § 1404(a) still retained the words "in the interests of justice," which inherently granted the court discretion on whether to transfer a claim, even when venue was proper. *Id.* A district court decision presents the rationale for applying § 1404(a) when a court lacks jurisdiction. See *Selsby v. Vecchione*, 216 F. Supp. 207 (S.D.N.Y. 1963). In *Selsby v. Vecchione*, the court specifically found that § 1406(a) could not be used when venue was proper. *Id.* The plaintiff in *Selsby* tried to move for a change of venue pursuant to § 1406(a) using the *Goldlawr* analysis. *Id.* However, the court limited *Goldlawr* specifically to situations where venue was initially wrong, and in *Selsby* venue was proper and therefore *Goldlawr* did not apply. *Id.* This decision seemed to suggest that transfer without personal jurisdiction was limited to instances only when venue was improper. *Id.*

¹⁰⁸ 328 F.2d at 360. The district court determined that tax liability arose in the Eastern District of Pennsylvania, and the tax returns were filed there; hence, venue was technically proper and § 1406(a) could not be used because the language indicated that it should be used when venue was improper. *Id.* at 359; see also *supra* Part II.A.3 (indicating general support that § 1406(a) only applies when venue is initially improper). Further, personal jurisdiction was improper because Berkowitz was a citizen of New York and service of process was not properly obtained. *Berkowitz*, 328 F.2d at 360.

¹⁰⁹ *Berkowitz*, 328 F.2d at 361.

It is true that *Goldlawr* involved an interpretation of § 1406(a). Nevertheless, we think that its rationale applies equally to § 1404(a), for these are companion sections, remedial in nature, enacted at the same time, and both dealing with the expeditious transfer of an action from one district or division to another.

Id.

810 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

expeditious trial.¹¹⁰ Therefore, because § 1406(a) was amply broad to allow transfers when a court lacked personal jurisdiction over the defendant, its companion section, § 1404(a), was also amply broad to allow a court to transfer a case when it lacked personal jurisdiction even though venue was proper.¹¹¹ Despite the Third Circuit's holding, other courts did not find that § 1404(a) was applicable in instances where a court lacked personal jurisdiction over the defendant when venue was proper.¹¹²

The Eighth Circuit encountered the exact same situation as the Third Circuit did in the *Berkowitz* case, but it concluded that § 1406(a) applied even when venue was proper if a court lacked personal jurisdiction over the defendant.¹¹³ In *Mayo Clinic v. Kaiser*,¹¹⁴ the Eighth Circuit found the common problem when a court lacked personal jurisdiction over a defendant was that the case could not proceed to trial on its merits, regardless of whether venue was proper.¹¹⁵ The *Mayo Clinic* court found

¹¹⁰ *Id.*

The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendants or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits.

Goldlawr v. Heiman, 369 U.S. 463, 466–67 (1962).

¹¹¹ *Berkowitz*, 328 F.2d at 361. “We find it unnecessary to consider the Government’s novel and intricate contention that venue may be properly laid in a district and, yet, the case may be one ‘laying venue in the wrong district’ under § 1406(a), for . . . § 1404(a) clearly authorizes the transfer of this civil action.” *Id.*

¹¹² See *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980); *Corke v. Sameiet M.S. Song*, 572 F.2d 77 (2d Cir. 1978); *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967); *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967).

¹¹³ See *Mayo Clinic*, 383 F.2d 653. Edward Kaiser brought a medical malpractice suit in an Illinois federal district court against Mayo Clinic, an association of individuals, and three doctors of the Mayo Clinic. *Id.* at 653. All defendants were residents of Minnesota and they moved to dismiss for lack of jurisdiction. *Id.* Kaiser moved to transfer the case instead. *Id.* The district court found that the action was transferable under either § 1404(a) or § 1406(a). *Id.* The Eighth Circuit found that only § 1406(a) could be used for a proper transfer when a court lacked jurisdiction. *Id.*

¹¹⁴ 383 F.2d 653.

¹¹⁵ *Id.* at 655–56.

Certainly a party who has been totally wrong in selecting the forum would have no greater right of transfer under § 1406(a) than a party who has selected a forum which is wrong only because service of process cannot be obtained. In either event, the case could not proceed to trial on its merits.

that § 1406(a) was amply broad to remedy either situation.¹¹⁶ Ironically, it relied on the exact same language from the *Goldlawr* case that the Third Circuit relied on in *Berkowitz*.¹¹⁷ The Sixth Circuit followed similar reasoning when it found that a court could transfer pursuant to § 1406(a) when it lacked personal jurisdiction over the defendant.¹¹⁸

In *Martin v. Stokes*,¹¹⁹ the Sixth Circuit considered the analysis from the *Berkowitz* case but found that § 1404(a) was simply a codification of *forum non conveniens*, and thus, § 1404(a), like *forum non conveniens*, presumed the existence of two permissible forums.¹²⁰ Section 1404(a)

Id. The *Mayo Clinic* court followed the rationale set out in an earlier decision. *Id.* at 655; *see also Dubin*, 380 F.2d at 814–16. *Dubin* was a tax case in which the defendant appealed a previous judgment found against him. 380 F.2d at 814. Tax liability accrued and returns were filed in Ohio, and so the government sued *Dubin* on the belief that he was a resident of Ohio, specifically in the Northern District of Ohio. *Id.* However, the Ohio court could not obtain personal jurisdiction over the appellant because he had recently moved to Florida. *Id.* The government was faced with being barred by the statute of limitations if it commenced the action again, so the government moved for transfer under § 1406(a). *Id.* The *Dubin* court found that § 1406(a) was couched in terms of “laying venue in the wrong division or district.” *Id.* at 815. Therefore, because § 1406(a) used that language instead of “wrong venue,” the *Dubin* court found that “wrong division or district” meant anytime there was an obstacle to an expeditious and orderly adjudication on the merits. *Id.* at 815–16. Thus, the Fifth and Eighth Circuits relied on promoting efficiency in using § 1406(a), just as *Berkowitz* relied on efficiency in promoting the use of § 1404(a). *Id.*; *Mayo Clinic*, 383 F.2d at 655; *see also Miles v. Charles E. Smith Cos.*, 404 F. Supp. 467 (D. Md. 1975) (stating specifically that the presence of venue does not remove a court’s discretionary authority to pursue a transfer under § 1406(a) in the interest of justice).

¹¹⁶ 383 F.2d at 655.

Looking to the language of § 1406, the statute is couched in terms of “laying venue in the wrong division or district.” The statute does not refer to “wrong” venue but rather to venue laid in a “wrong division or district.” We conclude that a district is “wrong” within the meaning of § 1406 whenever there exists an “obstacle [to] . . . an expeditious and orderly adjudication on the merits.

Id. (quoting the decision in *Dubin*, 380 F.2d 813).

¹¹⁷ *Id.* at 655–56; *see supra* note 94 and accompanying text (language essentially stating however wrong a plaintiff was in filing, a case could always be preserved).

¹¹⁸ *See, e.g., Martin v. Stokes*, 623 F.2d 469, 475 (6th Cir. 1980) (determining that § 1406(a) was the proper mode of transfer when a court lacked jurisdiction because venue was technically wrong); *Taylor v. Love*, 415 F.2d 1118, 1120 (6th Cir. 1970) (holding that transfer would be proper under § 1406(a) when a court lacked personal jurisdiction over the defendant because venue was wrong).

¹¹⁹ 623 F.2d 469.

¹²⁰ *Id.* at 473–74. In *Martin*, the plaintiff was injured in an automobile accident in Kentucky. *Id.* at 470. The defendant was the mother of a child who struck the plaintiff. *Id.* After settlement negotiations failed, the plaintiff learned that the applicable statute of limitations in Kentucky was one year. *Id.* Therefore, the plaintiff filed a suit in federal court based on diversity in the defendant’s home state of Virginia. *Id.* The defendants motioned to transfer the case to Kentucky and to quash for improper service. *Id.* The

812 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

was to be limited to instances when both personal jurisdiction and venue were proper because only then was the original court where the action was filed a permissible forum.¹²¹ Thus, the *Martin* court found that the proper means of transfer was a broad interpretation of § 1406(a) because § 1406(a) was to be applied whenever there was an obstacle to expeditious adjudication such as lack of personal jurisdiction over the defendant, which was the analysis from *Goldlawr*.¹²² Despite all of these varying interpretations, the Second Circuit came up with its own analysis.¹²³

In *Corke v. Sameiet M.S. Song*,¹²⁴ the Second Circuit did not use § 1404(a) or § 1406(a), but instead utilized a judicial gloss of the statutory language of both.¹²⁵ The *Corke* court concluded that transfer would be proper in any given case so long as it was in the “interest of justice” when a court lacked personal jurisdiction.¹²⁶ The *Corke* court used this reasoning because a court did not need to determine what venue

Virginia district court transferred the case; however, the district court that transferred the case did not specify if it was transferred for convenience under § 1404(a) or for legal impediment under § 1406(a). *Id.* Following the transfer, defendants filed for a motion to dismiss the action, asserting that it was barred by the Kentucky statute of limitations. *Id.* The Kentucky district court granted the defendant’s motion to dismiss, and the plaintiff appealed. *Id.* at 471.

¹²¹ *Id.* at 474 n.7 (referring to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947), where the Supreme Court defined the doctrine of *forum non conveniens*, which “presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them”).

¹²² *Id.* at 474. The *Martin* court noted the inconsistencies among the circuits in whether to utilize § 1404(a) or § 1406(a) when transferring where personal jurisdiction is unobtainable. *Id.* However, the court concluded that precedent demanded it apply § 1406(a) broadly. *Id.*

¹²³ See *Corke v. Sameiet M.S. Song*, 572 F.2d 77 (2d Cir. 1978) (failing to specify whether § 1404(a) or § 1406(a) authorized the transfer when a court lacked personal jurisdiction over the defendant but venue was proper).

¹²⁴ *Id.*

¹²⁵ *Id.* at 80. The action was originally filed in the federal district court in the Western District of New York. *Id.* at 78. Corke sued for personal injuries sustained during a cruise on the defendant’s ship based on negligence in maintenance of the vessel and malpractice by the ship’s doctor. *Id.* Corke moved for transfer. *Id.* However, the defendants moved for dismissal on the grounds that the court lacked jurisdiction over them, which was granted. *Id.* Corke then appealed. *Id.*

¹²⁶ *Id.* at 80. Specifically, the *Corke* court cited a federal district court decision from the Southern District of New York where the judge said a court “has power to transfer the case even if there is no personal jurisdiction over the defendants, and whether or not venue is proper in [the] district, if a transfer would be in the interest of justice.” *Id.* (quoting *Volk Corp. v. Art-Pak Clip Art Serv.*, 432 F. Supp. 1179, 1181 (S.D.N.Y. 1977)).

provision was needed, which was a simpler and more efficient approach.¹²⁷

In sum, courts were split on whether to transfer a case under § 1404(a) or § 1406(a) when venue was proper but personal jurisdiction over the defendant was lacking.¹²⁸ Courts after *Goldlawr*, like *Berkowitz*, *Mayo Clinic*, *Martin*, and *Corke*, used different transfer provisions to reach the same end.¹²⁹ The *Berkowitz* court utilized § 1404(a), while other courts, such as *Mayo Clinic* and *Martin*, found that only § 1406(a) could be used when a court lacked personal jurisdiction.¹³⁰ However, despite the use of different statutes, the end result was the same in *Berkowitz*, *Mayo Clinic*, *Martin*, and *Corke*, in that a case could be transferred when a court lacked personal jurisdiction over the defendant but was also a proper venue.¹³¹ Essentially, the *Corke* court, rather than pretending that a distinction between § 1404(a) and § 1406(a) was important, stated the rule then in existence: When a court lacks jurisdiction the court should preserve the plaintiff's claim in a venue transfer.¹³²

¹²⁷ *Id.* at 81. The court did not specifically say efficiency was the goal for its decision, but it did note with regards to the particular facts of the case at hand that “[b]ecause transfer is so clearly warranted by the facts at hand, it is unnecessary to waste the district court’s valuable time by requiring a hearing on transferability.” *Id.* Thus, efficiency seemed to be in the court’s mind when it made its decision. *Id.*

¹²⁸ See *supra* Part II.B.2 (exemplifying the circuit split as to whether § 1404(a) or § 1406(a) applied when a court transferred a case even though it lacked personal jurisdiction).

¹²⁹ See *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980); *Corke*, 572 F.2d at 78-79; *Mayo Clinic*, 383 F.2d at 655-56; *Dubin*, 380 F.2d at 815-16; *Berkowitz*, 328 F.2d at 361; *Finzi*, *supra* note 6, at 988.

Goldlawr held that section 1406 could be used to transfer claims defective as to both personal jurisdiction and venue. It did not address the applicability of section 1406 to claims defective only as to personal jurisdiction. Courts confronted with claims that met venue requirements but fell outside their territorial jurisdiction thus faced a dilemma. They could have remained faithful to the language of section 1406 and refused to transfer a claim filed in a proper venue. This, however, would have placed the plaintiff who had erred as to both personal jurisdiction and venue in a better position than the plaintiff who had erred only as to personal jurisdiction. Unwilling to sanction this obvious injustice, courts universally rejected this approach. Instead, courts resorted to various interpretations of both transfer provisions to reach the result desired.

Finzi, *supra* note 6, at 986.

¹³⁰ See *supra* Part II.A.2 (discussing the language, purpose, and application of § 1404(a)).

¹³¹ See *supra* notes 119-22 and accompanying text (indicating that because venue was technically improper when a court lacked jurisdiction, the venue was improper).

¹³² See *supra* notes 119-22 and accompanying text. However, even if a court were to utilize the *Corke* approach, finding that it is proper to transfer under either § 1404(a) or § 1406(a), this decision does not solve the enigma of which choice of law follows from a

814 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

However, this dilemma merely planted the seed for problems in venue transfer.¹³³ *Goldlawr* and its progeny had determined that § 1404(a) and § 1406(a) functioned equivalently when venue was proper but a court lacked personal jurisdiction over the defendant.¹³⁴ The next question was which choice of law to apply following a transfer when a court lacked personal jurisdiction over the defendant.¹³⁵ Because of the inherent differences in the choice of law that was supposed to follow each of the venue transfer provisions, transferor state law with § 1404(a) and transferee state law with § 1406(a), a court's decision to use either § 1404(a) or § 1406(a) would be significant.¹³⁶

3. Intersection of "Proper Venue but Improper Jurisdiction Transfers" and "Choice of Law"

When *Goldlawr* analysis intersected with choice of law analysis, courts were unsure of whether to follow choice of law standards for § 1404(a) and § 1406(a) or to circumvent choice of law rules because following the established standards would be unfair to either defendants or plaintiffs.¹³⁷ Some courts deviated from established principles of choice of law with § 1404(a) and § 1406(a) and some courts did not.¹³⁸

transfer under circumstances where jurisdiction is improper. See MOORE ET AL., *supra* note 1, § 111.02.

¹³³ See *infra* Parts II.B.3, III.B (showing how courts that used the *Goldlawr* analysis ran into difficulties with what choice of law to apply).

¹³⁴ See *infra* Parts II.B.3, III.B (indicating that courts used both statutes to perform the same function: transfer a case when the court lacked personal jurisdiction but venue was proper).

¹³⁵ See *infra* Part II.B.3 (discussing how courts inconsistently determined which choice of law to apply following a transfer when venue was proper but the court lacked personal jurisdiction over the defendant).

¹³⁶ See *supra* Parts II.A.2-3 for a general discussion on which choice of law was supposed to apply following a venue transfer under § 1404(a) and § 1406(a).

¹³⁷ See *Nelson v. Int'l Paint Co.*, 716 F.2d 640 (9th Cir. 1983); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099 (5th Cir. 1981); *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967).

¹³⁸ See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 523-25 (1990) (showing that even when a plaintiff moves for a transfer under § 1404(a), courts shall apply the law of the transferor court); *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (indicating that in a transfer under § 1404(a), the law of the transferor court shall apply when defendants move for a transfer); *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1141 (5th Cir. 1992) (indicating that regardless of who made the transfer under § 1406(a), transferee court law must apply); *LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n*, 830 F.2d 522, 526 (4th Cir. 1987) (citing *Manley v. Engram*, 755 F.2d 1463 (11th Cir. 1985)) (indicating that courts have generally concluded that a transferee court must apply the law of its own state following a transfer to avoid forum shopping by plaintiffs). Even though the Sixth Circuit, in *Martin v. Stokes*, remanded the case without holding on to the issue of which statute of limitations to apply, the Sixth Circuit did comment that choice of law principles should apply. 623 F.2d 469, 475 (6th Cir. 1980). The *Martin* court indicated that the trial court had to determine

Essentially, courts would decide which choice of law to apply following a transfer based on lack of personal jurisdiction over the defendant on a case-by-case basis.¹³⁹ The Eighth Circuit was the first to deviate from established choice of law principles.¹⁴⁰

The *Mayo Clinic* court encountered a problem with choice of law based on venue transfer when a court lacked personal jurisdiction over the defendant.¹⁴¹ In *Mayo Clinic*, the case was originally filed in a district

whether the original transferor court had personal jurisdiction over the defendant and then decide which law to apply based on that determination. *Id.* The *Martin* court said that if the transferor court did have jurisdiction, then the transfer would have to have been made under § 1404(a) and the transferor court law would apply, but if the transferor court lacked jurisdiction, then the transfer would have to be made under § 1406(a) and the transferee court law would apply. *Id.* However, the inconsistencies among the courts in which transfer device to use, either § 1404(a) or § 1406(a), when a court lacked jurisdiction, caused later courts to deviate from the standard that *Martin* expressed. *See Ellis*, 646 F.2d 1099; *Mayo Clinic*, 383 F.2d 653.

¹³⁹ *See Bayles*, *supra* note 91, at 639.

Considerations of efficiency relate to the allocation of judicial resources. A heavy burden would be placed upon courts if each case were to be treated as one of first impression. In the complete absence of the principle, each case could presumably be taken all the way to the court of final review—at least there would be no clear reason not to do so. Moreover, in each case courts would have to raise anew all the arguments for and against each rule, even though they would continually arrive at the same conclusion when one rule is clearly preferable over another . . . Utilization of the principle of stability insures that few previously settled issues will be appealed . . . thereby enabling courts to devote their time and energy to issues of first impression and those involving rules which create serious injustice or disutility.

Id. However, plaintiffs should be concerned about the inconsistent results of the courts with venue transfer because it will delay litigation of issues on the merits, and extended time between the start of the law suit and trial allows a defendant to retain the value of judgment during the delay. *See Carrie E. Johnson, Comment, Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CAL. L. REV. 225, 231 (1997). Also, delaying resolution disadvantages plaintiffs with a low economic status because they may lack the means to support themselves and continue the litigation. *Id.* Lastly, such high court costs may prevent plaintiffs from bringing valid claims in the first place to avoid the time-consuming and expensive process of litigation. *Id.* Thus, plaintiffs should be just as concerned about the inefficiency of venue transfer as defendants. *Id.*

¹⁴⁰ *See Mayo Clinic*, 383 F.2d 653.

¹⁴¹ *Id.* at 653. There are more problems than just the statute of limitations with choice of law in a venue transfer when a court lacks personal jurisdiction that undermine efficiency and defendant rights. *See infra* notes 142, 145 and accompanying text (showing that the true problem in *Mayo Clinic* was the difference of when an action commenced to begin the running of the statute of limitations). However, those problems are often associated or linked to the statute of limitations. *See Mayo Clinic*, 383 F.2d 653. This Note often refers only to the statute of limitations because it serves as a particularly good example of how inefficient the system has become, other choice of law differences are often incorporated in

816 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

court where venue was proper but the court lacked personal jurisdiction over the defendant.¹⁴² The *Mayo Clinic* court transferred under § 1406(a).¹⁴³ The statute of limitations had not run in either state when the case was filed, but it had run in both states by the time the transfer was made.¹⁴⁴ However, the *Mayo Clinic* court faced a problem where the case would be barred if the state law of the transferee court applied as § 1406(a) demanded, but it would not be barred if the state law of the transferor court applied.¹⁴⁵

As a result of this dilemma, the *Mayo Clinic* court ignored the established principle that transfers under § 1406(a) should apply the state law of the transferee court, and the *Mayo Clinic* court determined that the appropriate state law to apply was the state law of the transferor court.¹⁴⁶ The *Mayo Clinic* court acknowledged that:

the statute of limitations, and it is a protection often relied upon by defendants. *See id.* (showing that a difference in choice of law service of process affects the statute of limitations); Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015, 1021 (1997) (describing the common viewpoint that the statute of limitations is to protect defendants from litigating old claims). Further, § 1631 deals specifically with the issue of the statute of limitations based on the commencement of actions. 28 U.S.C. § 1631 (2000). Therefore, this Note focuses on the statute of limitations. *See infra* Part II.C (providing the language and interpretation of § 1631, which incorporates statute of limitations problems).

¹⁴² 383 F.2d at 653. More specifically, the case was originally filed in Illinois where venue was proper but the court lacked personal jurisdiction over the defendant. *Id.* The defendant moved to quash the service of process issued by the Illinois court, which was granted. *Id.* The plaintiff then moved to transfer the case to Minnesota where both venue and jurisdiction were proper. *Id.* Summons was re-issued out of the Minnesota court and the plaintiff had to serve the defendant again. *Id.* By this time the statute of limitations had run. *Id.*

¹⁴³ *Id.* at 655; *see supra* notes 113–18 (explaining the *Mayo Clinic* decision in further detail).

¹⁴⁴ 383 F.2d at 653.

¹⁴⁵ The particular problem was purely based on choice of law. *See Kaiser v. Mayo Clinic*, 260 F. Supp. 900, 908 (D. Minn. 1966). In Illinois, “every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint.” 735 ILL. COMP. STAT. 5/2-201 (2004). In Minnesota, “[a] civil action is commenced against each defendant: a) when the summons is served upon that defendant.” MINN. R. CIV. P. 3.01 (2004). Thus, if the transferee law of Minnesota applied, the case would be barred by the statute of limitations, whereas it would not be if the transferor court law of Illinois applied. *Kaiser*, 260 F. Supp. at 908. Because the Illinois court quashed the original service of process, the problem arose. *Id.* at 653; *see also supra* note 124 and accompanying text (describing this complex fact pattern in more detail).

¹⁴⁶ *Mayo Clinic*, 383 F.2d at 656. (“We have reached the conclusion that under the facts here the law of the transferor forum should govern and that the question of commencement of the action is, therefore, governed by the law of Illinois.”); *cf.* *Taylor v. Love*, 415 F.2d 1118, 1120 (6th Cir. 1970) (“[W]e conclude that a district is ‘wrong’ within the meaning of § 1406 whenever there exists an ‘obstacle [to] . . . an expeditious and orderly

It has been stated before that the purpose for making transfers would be obliterated in many cases if the statute of limitations of the transferee forum were applied at the date of transfer, and that if such were the rule there would be little purpose in transferring the case instead of dismissing it.¹⁴⁷

Therefore, the *Mayo Clinic* court held that the foundation of which state's law to apply with a § 1406(a) transfer, which was typically the transferee court, could be changed depending on the factual situation because the ultimate purpose of the venue statutes was to preserve claims.¹⁴⁸

The *Mayo Clinic* court essentially used the *Goldlawr* analysis to deviate from the established rules of § 1406(a), which was to apply the state law of the transferee court.¹⁴⁹ Other courts deviated from choice of law principles with § 1404(a) as well when transferring a case under § 1404(a) when a court lacked personal jurisdiction over the defendant.¹⁵⁰

For example, the Fifth Circuit held that the state law of the transferee court should apply when the court lacks personal jurisdiction over the defendant but transfers pursuant to § 1404(a).¹⁵¹ In *Ellis v. Great*

adjudication' on the merits. Inability to perfect service of process on a defendant in an otherwise correct venue is such an obstacle."); *Kinergy Corp. v. Conveyor Dynamics Corp.*, No. Civ.A.3: 99CV-407-S, 2001 WL 1774435, at *2 (W.D. Ky. Feb. 6, 2001) (holding that a case should be transferred to another district court when the transferor court lacked personal jurisdiction over the defendant to preserve the claim even though the statute of limitations had run in the transferee court). *But cf.* *Froelich v. Petrelli*, 472 F. Supp. 756, 763 (D. Haw. 1979) (refusing to transfer a case under § 1406(a) because it was not in the plaintiff's interests to do so when the statute of limitations had run in the transferee forum before the plaintiff filed in the transferor forum).

¹⁴⁷ 383 F.2d at 656; *see* *Porter v. Groat*, 840 F.2d 255, 257 (4th Cir. 1988) (determining that a transfer under § 1406(a) is in the interests of justice when the statute of limitations bars the action in the transferor court but would not bar it in the transferee court). *But see* *Spar, Inc. v. Informational Res., Inc.*, 956 F.2d 392, 394 (2d Cir. 1992) (prohibiting a transfer when the statute of limitations has run in the transferor forum because diligent plaintiffs should be aware of it).

¹⁴⁸ 383 F.2d at 656. "Also, in *Goldlawr*, . . . it was held that jurisdiction was not necessary to toll the statute of limitations." *Id.*

¹⁴⁹ *See* MOORE ET AL., *supra* note 1, § 111.02 ("Several circuits maintain that procedural obstacles other than lack of personal jurisdiction that prevent an action from proceeding in the original court, such as statute of limitations, make venue 'wrong' and thereby make, theoretically, Section 1406(a) the proper vehicle for transfer.").

¹⁵⁰ *See* *Ellis v. Great Sw. Corp.*, 646 F.2d 1099 (5th Cir. 1981) (utilizing a transfer under § 1404(a) even though it lacked jurisdiction over the defendant because precedent demanded it).

¹⁵¹ *Id.* at 1108. In *Ellis*, the plaintiff filed a wrongful death action in Arkansas two years after his wife fell off of a "log ride" at the Six Flags Amusement Park in Arlington, Texas,

818 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Southwestern Corp.,¹⁵² the Fifth Circuit determined that allowing a plaintiff to capture the state law of the transferor court when the court lacked personal jurisdiction over the defendant would be unfair to the defendant.¹⁵³ Therefore, the *Ellis* court held that the state law of the transferee forum should apply regardless of whether § 1404(a) or § 1406(a) was used when a court transferred a case because the court lacked personal jurisdiction over the defendant.¹⁵⁴ The *Ellis* court avoided the possible injustice to defendants, and it also deprived plaintiffs of a possible forum shopping mechanism.¹⁵⁵ The *Ellis* court,

which caused her death. *Id.* at 1101. The named defendants had no minimum contacts with Arkansas, and therefore *Ellis* moved for transfer. *Id.* However, it was ambiguous as to whether the Arkansas district court used § 1404(a) or § 1406(a) when it transferred. *Id.* at 1102. Arkansas had a three-year statute of limitations and Texas had a two-year statute of limitations. *Id.* Thus, the *Ellis* court had to determine which choice of law applied under the venue transfer provisions to determine which statute of limitations to apply because if the Arkansas statute applied, the plaintiff's claim endured, whereas if the Texas statute applied, it would be barred. *Id.*

¹⁵² 646 F.2d 1099 (5th Cir. 1981).

¹⁵³ *Id.* at 1108.

When the venue in the district in which the action is brought is proper, but service of process cannot be had there, . . . [i]n such a situation plaintiff could not maintain his action in the district in which he filed it, and therefore could not take advantage of the law governing that district, since he could not obtain jurisdiction of the defendant. Therefore he should not be permitted to file his action there for the purpose of capturing the law of that jurisdiction for transportation to the jurisdiction in which service can be obtained.

Id. (quoting MOORE ET AL., *supra* note 1, § 111.02).

¹⁵⁴ *Id.* at 1109–10.

[W]e hold that following a 1406(a) transfer, regardless of which party requested the transfer or the purpose behind the transfer, the transferee court must apply the choice of law rules of the state in which it sits. . . . [W]e hold that following a section 1404(a) transfer from a district in which personal jurisdiction over the defendant could not be obtained, the transferee court must apply the choice of law rules of the state in which it sits, regardless of which party requested the transfer. . . . We are not presented with, and need not resolve, the question of which state's choice of law rules should be applied when, upon the motion of a plaintiff a section 1404(a) transfer has been made from a district in which venue was proper and personal jurisdiction over the defendant had been or could have been obtained.

Id. at 1110–11.

¹⁵⁵ *Id.* at 1110 (“The result of our holding will be to ensure that the ‘accident’ of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed.”). *But see* Callan v. Lillybelle, Ltd., 39 F.R.D. 600, 603 (S.D.N.Y. 1966) (determining that the *Hanna* outcome determinative test demands that the law of the transferor court should apply following a transfer under § 1404(a) when a court lacked jurisdiction over the defendant; otherwise the action would be barred and contravene the

like the Eighth Circuit in *Mayo Clinic*, still departed from established choice of law principles with venue transfer, except with § 1404(a) instead of § 1406(a).¹⁵⁶

Thus, courts deviated from established principles in choice of law with § 1404(a) and § 1406(a) and they disagreed on the purpose for straying from those principles.¹⁵⁷ For example, *Mayo Clinic* averted from the typical choice of law application of § 1406(a), which was to apply the law of the transferee court, because it was compelled to preserve the plaintiff's claim.¹⁵⁸ Further, the *Mayo Clinic* court could not rely on § 1404(a) standards, which were to apply the transferor court law, because it decided to use § 1406(a); consequently, it differed from established principles.¹⁵⁹ Conversely, the *Ellis* court utilized § 1404(a) to transfer a case when a court lacked personal jurisdiction over the defendant and also departed from established choice of law principles just like the *Mayo Clinic* court, but its purposes for doing so was to

remedial purpose of § 1404(a)). For a short explanation of the *Hanna* outcome determinative test see *supra* note 60 and accompanying text.

¹⁵⁶ 646 F.2d at 1110. The Fifth Circuit truly wished to follow the logic outlined in *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980). *Id.*; see *supra* note 137 and accompanying text (explaining the *Martin* analysis in applying choice of law after a venue transfer when a court lacks personal jurisdiction). However, the Fifth Circuit was compelled to follow its own precedent, which allowed for a transfer under § 1404(a) when a court lacked jurisdiction. *Ellis*, 436 F.2d at 1109. Therefore, the Fifth Circuit utilized transfers under § 1404(a) when a court lacked jurisdiction but deviated from which choice of law to apply as established in *Van Dusen v. Barrack*, 376 U.S. 612 (1964). *Id.*; see *supra* notes 63–64 and accompanying text (describing the principle that a court should apply the state law of the transferor court following a transfer). However, the Fifth Circuit did so to prevent plaintiff forum shopping rather than to protect plaintiff claims, as the Eighth Circuit did in *Mayo Clinic*. 646 F.2d at 1108–09; see *supra* note 74 and accompanying text (discussing forum shopping and particular concerns with it in choice of law).

¹⁵⁷ See *supra* Part II.C; see also Marcus, *supra* note 42, at 696.

Van Dusen did not articulate any theoretical basis for concluding that, by exercising the venue privilege, plaintiff acquires the right to have a certain state's law apply. Analysis ultimately leads to the conclusion that there is none. Instead, the Court's emphasis on the venue privilege appears to result from the absence of federal principles for choice of state law, turning the selection of law into a game of chess in which the plaintiff gets the opening move.

Id.

¹⁵⁸ See *supra* notes 113–17 and accompanying text (discussing the analysis and application of the *Mayo Clinic* decision in relation to § 1406(a)).

¹⁵⁹ See *supra* notes 107–12 and accompanying text (discussing the *Berkowitz* decision). However, even if *Berkowitz* did such an action, applying the transferor law after a lack of jurisdiction venue transfer, this result would encourage plaintiffs to forum shop because they could capture a state's law that lacked jurisdiction over the defendant, and hence, the dilemma of the post-*Goldlawr* decisions. See *supra* Part II.B.1.

820 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

preserve fairness to the defendant.¹⁶⁰ *Nelson v. International Paint Co.*¹⁶¹ sets precisely the standard for what courts were doing when they encountered this situation.¹⁶²

The *Nelson* court acknowledged and directly declined to follow the *Mayo Clinic* analysis.¹⁶³ The *Nelson* court found that instances where transfer had been made to cure a lack of personal jurisdiction under either § 1404(a) or § 1406(a) required a court to apply the state law of the transferee court in order to prevent forum shopping and deny advantages to a plaintiff that he should not be entitled to have.¹⁶⁴ Thus, the *Nelson* court transferred under § 1406(a) and held, following established choice of law rules with § 1406(a), that the law of the transferee court should apply.¹⁶⁵ The *Nelson* court acknowledged *Mayo Clinic* but found its decision was factually distinguishable; thus, two courts applied § 1406(a) with a different choice of law decision following

¹⁶⁰ See *supra* notes 150–55 and accompanying text (discussing the *Ellis* decision and analysis).

¹⁶¹ 716 F.2d 640 (9th Cir. 1983). The plaintiff, Alfred Nelson, was injured when he inhaled toxic fumes while painting over a weld at a construction site in Alaska. *Id.* at 642. Nelson then sued the paint manufacturer and distributor in Texas. *Id.* The named defendant was International Paint Company, but the plaintiff learned that the actual manufacturer was Calco. *Id.* Calco moved to dismiss the complaint based on lack of personal jurisdiction. *Id.* The district court then ordered the claim against Calco to be transferred to a court that had jurisdiction, a district court in California. *Id.* After transfer, Calco moved to dismiss because the appropriate statute of limitations in California had run. *Id.*

¹⁶² See *infra* notes 163–67 and accompanying text (discussing the *Nelson* decision and analysis).

¹⁶³ 716 F.2d at 643–44 (“We decline to follow *Mayo Clinic*; it is a minority view and is factually distinguishable.”).

¹⁶⁴ *Id.* at 643.

In determining whether the laws of the transferor or the transferee state apply to a diversity action that was transferred from one state to another . . . we distinguish between cases transferred for the convenience of one of the parties under 28 U.S.C. § 1404(a), and cases transferred under 28 U.S.C. §§ 1404(a) or 1406(a) to cure a lack of personal jurisdiction in the district where the case was first brought. In the former cases, we must apply the law of the transferor court to prevent parties from seeking a change in venue to take advantage of more favorable laws in another forum In the latter type of cases, however, it is necessary to look to the law of the transferee state, also to prevent forum shopping, and to deny plaintiffs choice-of-law advantages to which they would not have been entitled in the proper forum.

Id.

¹⁶⁵ *Id.*

the transfer.¹⁶⁶ The end result was that courts were determining which choice of law to apply on a case-by-case basis.¹⁶⁷

Thus, *Goldlawr* led some courts to diverge from established principles of choice of law while others did not.¹⁶⁸ The result was confusion in which choice of law to apply with venue transfer provisions.¹⁶⁹ The irony, of course, was venue transfer that was supposed to promote efficiency was actually producing the antithesis because courts were wasting resources, wasting time, and attorneys could not be certain of the rules.¹⁷⁰ Courts recognized this problem, and they attempted to remedy it by using a new transfer provision, § 1631.¹⁷¹

¹⁶⁶ *Id.* at 643–44. The *Nelson* court noted the *Mayo Clinic* decision but distinguished itself on the fact that one of the defendants in *Nelson* had not been served until the statute of limitations had run in both states prior to the transfer. *Id.* Despite the fact that the *Nelson* court distinguished its case from *Mayo Clinic*, it is important to note that it strongly held that transfers due to lack of personal jurisdiction should apply the transferee court law, and thus, the contrary results between *Nelson* and *Mayo Clinic* show the wide latitude courts assumed when a transfer took place. *Id.* at 644.

¹⁶⁷ See *supra* Part II.B.3 (recapping how courts' decisions were extremely varied in determining which state law to apply following a venue transfer when a court lacked personal jurisdiction).

¹⁶⁸ See *supra* Part II.B.3; see *infra* Part III.A (showing the background and the analysis that *Goldlawr* was the reason courts diverged from established principles of choice of law).

¹⁶⁹ See *supra* note 91 and accompanying text (discussing how a lack of uniformity undercuts certainty and efficiency). The history of the Fifth Circuit's decisions on venue transfer when a court lacks personal jurisdiction is so confusing and inconsistent that the decisions are worth discussing to accentuate this point. First, the Fifth Circuit reasoned by analogy from *Goldlawr* that § 1404(a) could be applied when a court lacked personal jurisdiction. See *Koehring Co. v. Hyde Constr. Co.*, 324 F.2d 295 (5th Cir. 1963). Later, in *Dubin* the court held that § 1406(a) could be a proper transfer provision when jurisdiction was lacking and venue was proper. See *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967). Ironically, the *Dubin* court criticized the *Berkowitz* court for authorizing the use of § 1404(a) in such situations, even though it had done so several years earlier. *Id.* at 816. Then, of course, *Ellis* and the decision it relied on, *Aguacate Consol. Mines, Inc. v. Deeprock, Inc.*, 566 F.2d 523 (5th Cir. 1978), suggested that either § 1404(a) or § 1406(a) could be used. See *Ellis v. Great Sw. Corp.*, 646 F.2d 1099 (5th Cir. 1981). Thus, the history of the Fifth Circuit shows how tumultuous the application of venue transfer can become, even to the point of the court, in essence, criticizing itself when it criticized *Berkowitz*. Clearly, this example shows the lack of efficiency.

¹⁷⁰ See *supra* Part II.B; *infra* Part III; see also AUSTRALIAN LAW REFORM COMMISSION, THE JUDICIAL POWER OF THE COMMONWEALTH: A REVIEW OF THE JUDICIARY ACT OF 1903 AND RELATED LEGISLATION, Report no. 92 (2001), available at <http://www.austlii.edu.au>. The Australian Law Reform Commission ("ALRC") found that transfer procedures that are too complex or structurally deficient might increase litigation, result in delays, and increase costs. AUSTRALIAN LAW REFORM COMMISSION, *supra*. The ALRC also notes venue transfer is an integral part of a federal system to ensure that proceedings are heard as soon as possible. *Id.*

¹⁷¹ See 28 U.S.C. § 1631 (2000).

822 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

C. Section 1631: A Possible Redemption

In 1982, Congress passed the Federal Courts Improvement Act of 1982, which reformed parts of the federal civil procedure and practice.¹⁷² One of the laws in the Federal Courts Improvement Act of 1982 was 28 U.S.C. § 1631.¹⁷³ Some argue that § 1631's focus on defects made at the time of the complaint suggests that § 1631 was meant purely for instances where the court lacked subject matter jurisdiction.¹⁷⁴ However,

¹⁷² Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. § 1631*, 29 S. TEX. L. REV. 189 (1987). The main purpose of the 1982 Act was to create a new federal appellate court known as the United States Court of Appeals for the Federal Circuit. *Id.* at 200. This court was to be a specialized court with limited subject matter jurisdiction possessed by the former United States Court of Customs and Patent Appeals and Appellate Division of the Court of Claims. *Id.* Mr. Tayon asserts that § 1631 was enacted at the same time to correct the problem of involuntary dismissal of actions due to specific subject matter requirements. *Id.*

¹⁷³ 28 U.S.C. § 1631.

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Id. The emerging differences in the interpretation of § 1631 can best be described as a range of gradations rather than a circuit split. See John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 978-82 (1998). The most expansive approach states that § 1631 can cure any type of jurisdictional defect, including in rem jurisdiction. See *United States v. Am. River Transp., Inc.*, 150 F.R.D. 587 (D.C. Ill. 1993). Some courts have utilized § 1631 when there is absolutely no defect in personal jurisdiction at all. See *Dornbusch v. Comm'r*, 860 F.2d 611, 614 (5th Cir. 1988) ("1631 could not reasonably be read as an implied denial of power to transfer . . . rather . . . 1631 was impliedly confirmatory of the inherent power to transfer in such an instance."); see also *Alexander v. Comm'r*, 825 F.2d 499, 501-02 (D.C. Cir. 1987) (providing that § 1631 did not revoke the power of the court to transfer a case when jurisdiction was proper but venue was not, even though it did not specifically warrant it). However, this Note focuses just on the analysis by courts that § 1631 authorizes transfer when a court lacks personal jurisdiction or subject matter jurisdiction, and the other analysis that § 1631 is not applicable in instances when a court lacks personal jurisdiction because *Goldlawr* and its progeny dealt primarily with allowing a transfer when a court lacked personal jurisdiction. See *supra* Part II.B.

¹⁷⁴ Tayon, *supra* note 172, at 224. Mr. Tayon suggests that § 1631 was passed to remedy a specific problem dealing with subject matter jurisdiction. *Id.* He illustrates what § 1631 solved by presenting a hypothetical:

A nonpatent attorney represents corporate and individual defendants in a patent infringement suit. As one might expect, the patent is held valid and infringed, and the defendants are found liable for substantial

the first interpretation of § 1631 by a circuit court applied a broader interpretation and declared that § 1631 was to be utilized specifically to alleviate the certainty and efficiency problems that *Goldlawr* and its progeny caused.¹⁷⁵

1. The Broad Interpretation

In *Ross v. Colorado Outward Bound School*,¹⁷⁶ the court was concerned specifically with how complicated venue transfer had become because of the decisions following *Goldlawr*.¹⁷⁷

sums in damages. Sometime after . . . trial counsel files a timely notice of appeal with a regional circuit court of appeals. Subsequent to this event, trial counsel is replaced by a patent specialist to conduct the appeal. Upon review of the file, new counsel realizes that the notice of appeal has recited the wrong appellate court; that the appeal has been noticed naming the wrong appellate court; that exclusive subject matter jurisdiction resides in the Federal Circuit; and that the time for filing a notice of appeal naming the Federal Circuit had lapsed. In order preserve the defendants' rights and avoid a malpractice action against the nonpatent trial counsel, can dismissal of the appeal be avoided?

Id. at 190. Mr. Tayon suggests that § 1631 was meant to specifically resolve this type of situation because the result was that litigants were sometimes denied access to federal courts because of an attorney's error or ambiguity in the jurisdictional statute. *Id.* at 187, 201. Specifically, Mr. Tayon notes that Judge Leventhal suggested the need for such a statute as § 1631 in a similar type of case as the problem presented above, and Judge Leventhal specifically requested congressional action. *Id.* at 198-99. Shortly thereafter, Congress passed § 1631 in the 1982 Act. *Id.* at 199-201. Thus, the timeliness of the statute suggests that it was passed for this sort of reason, but Mr. Tayon provides other reasons to suggest that § 1631 applies only to instances of subject matter jurisdiction as well. *Id.* at 224. Mr. Tayon notes that because jurisdiction is determined at the time the complaint is filed in the transferor court, subsequent events have no effect on the subject matter determination. *Id.* Therefore, because personal jurisdiction depends on service of process and other issues subsequent to the filing of the complaint, and § 1631 seems to focus on jurisdictional defects apparent at the time the complaint was filed, § 1631 apparently seems to deal only with subject matter jurisdiction. *Id.* Further, § 1631's legislative history specifically states "subject matter jurisdiction" in its language. *Id.* at 201 n.60; see also *infra* note 189 and accompanying text (providing the legislative history of § 1631).

¹⁷⁵ See *Ross v. Colo. Outward Bound Sch.*, 822 F.2d 1524 (10th Cir. 1987).

¹⁷⁶ *Id.* at 1524.

¹⁷⁷ *Id.* at 1526. ("We hold that the proper vehicle for the transfer of this action was 28 U.S.C. § 1631."). The action arose when Sonya Ross died in a mountain climbing accident in Colorado. *Id.* at 1525. Sonya was a New York resident who was attending the Colorado Outward Bound School. *Id.* Sonya's mother brought this wrongful death action against the school in New York. *Id.* The case was originally filed in state court, but it was removed because there was diversity of citizenship. *Id.* In *Ross*, the defendant moved to dismiss an action in a New York district court due to lack of personal jurisdiction. *Id.* Rather than dismissing the action, the district court ordered a transfer to the district in Colorado pursuant to § 1406(a). *Id.* Once the case arrived there, the defendant moved to dismiss the

Prior to that date, in determining whether the laws of the transferor or the transferee state applied in diversity cases transferred from one state to another, it was necessary to distinguish between cases transferred under § 1404(a) and cases transferred under § 1406(a) — an often difficult task. In the former, the law of the transferor state was applied In the latter, the law of the transferee state was applied.¹⁷⁸

To alleviate the complex problem with choice of law, the *Ross* court snatched the opportunity to use a different venue transfer provision, § 1631, so that § 1404(a) and § 1406(a) could function as they did before *Goldlawr*.¹⁷⁹ Specifically, the *Ross* court stated: “By statute, courts now know *what* law to apply and, more importantly in view of the facts of this case, *when* that law applies.”¹⁸⁰ Hence, the *Ross* court held that the proper vehicle for transfer when a court lacked personal jurisdiction was § 1631 rather than § 1404(a) or § 1406(a).¹⁸¹

More recently, the Sixth Circuit agreed with the Tenth Circuit in *Roman v. Ashcroft*.¹⁸² The Sixth Circuit expanded § 1631 further by stating that it was broad enough to cover a transfer when a court lacked either personal jurisdiction or subject matter jurisdiction.¹⁸³ The *Roman*

action on that ground that Colorado law should govern because the transfer took place under § 1406 and was therefore barred by the Colorado statute of limitations. *Id.* at 1526. The Colorado court then dismissed the action. *Id.* Upon appeal, the Tenth Circuit found a different solution. *Id.*

¹⁷⁸ *Id.* at 1527.

¹⁷⁹ *Id.* The transferor court law was supposed to apply in situations utilizing § 1404(a) and transferee court law with § 1406. *Id.* The court also noted the broad construction of § 1406(a), specifically pointing to those cases that utilized it where venue was proper and personal jurisdiction was lacking. *Id.* In a short summary, the court outlined the problem described in Part II of this text. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1526 (“That statute requires . . . an action is transferred from one federal court to another federal court to cure want of jurisdiction, the action shall proceed as if it had been filed in the transferee court on the date upon which it was actually filed in the transferor court.”).

¹⁸² 340 F.3d 314 (6th Cir. 2003).

¹⁸³ *Id.* at 328. *Roman* was a native citizen of the Dominican Republic. *Id.* at 316. In September of 1999, *Roman* pled guilty to fraud and misuse of visas, permits, and other documents. *Id.* Hence, the INS filed charges to remove him based on (1) conviction related to document fraud, (2) conviction of a crime that involved moral turpitude within five years of entry, and (3) conviction of an aggravated felony. *Id.* 316–17. The case was initially filed in the Northern District Court of Ohio, but the court lacked personal jurisdiction over the defendant. *Id.* at 317. The district court granted the defendant’s motion to dismiss, which was then appealed to the Sixth Circuit where it determined

court determined that Congress intended to give broad authority to permit transfers of any action between federal courts, and that courts like the *Ross* court have followed that intent by construing § 1631 broadly.¹⁸⁴ Further, the language of § 1631 was amply broad to support a broad interpretation because it only mentioned “jurisdiction” instead of any specific type of jurisdiction.¹⁸⁵

Therefore, some courts have read § 1631 broadly to allow transfer of a case when a court lacks personal jurisdiction over the defendant to alleviate the problems that *Goldlawr* caused with venue transfer and choice of law.¹⁸⁶ However, other courts have construed § 1631 narrowly to apply only to instances where a court lacks subject matter jurisdiction.¹⁸⁷

2. The Narrow Interpretation

Despite the broader interpretations of § 1631, other courts were not willing to grant such an expansive role to § 1631.¹⁸⁸ The legislative history of § 1631 specifically states that § 1631 “adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where subject matter jurisdiction is proper.”¹⁸⁹

whether venue could be changed upon finding the court lacked personal jurisdiction over a defendant pursuant to § 1631. *Id.* at 317, 327–28.

¹⁸⁴ *Id.* at 328.

Through § 1631, Congress “gave broad authority to permit the transfer of an action between any two federal courts,” *Ross*, 822 F.2d at 1526, and courts have effectuated Congress’s intent by broadly construing the statute Moreover, a broad construction of the statute is consistent with Congress’s intent to “protect a plaintiff against either additional expense or the expiration of a relevant statute of limitations in the event that the plaintiff makes an error in trying to select the proper court within the complex federal court system.”

Id.

¹⁸⁵ *Id.* (“The literal language of the statute . . . is broad enough to encompass either [lack of subject matter or personal jurisdiction].” (citing Tayon, *supra* note 172, at 224)).

¹⁸⁶ See *supra* Part II.C.1 (explaining the broad interpretation of § 1631 where courts utilize it to transfer a case when a court lacks personal jurisdiction).

¹⁸⁷ See *infra* Part II.C.2 (describing the narrow interpretation of § 1631).

¹⁸⁸ See *Pedzewick v. Foe*, 963 F. Supp. 48 (D. Mass. 1997); *Levy v. Pyramid Co.*, 687 F. Supp. 48 (N.D.N.Y. 1988); see also *Mortensen v. Wheel Horse Prods. Inc.*, 772 F. Supp. 85 (N.D.N.Y. 1994); *McTyre v. Broward Gen. Med. Ctr.*, 749 F. Supp. 102 (D.N.J. 1990).

¹⁸⁹ S. REP. NO. 97-180, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 1, 40. Specifically the legislative history follows:

Because of the complexity of the Federal court system and of special jurisdictional provisions, a civil case may on occasion be mistakenly filed in a court—either trial or appellate—that does not have jurisdiction. By the time the error is discovered, the statute of

Other courts acknowledged this language and used it to assert that § 1631 could only be used in instances where a court lacked subject matter jurisdiction.¹⁹⁰

In *Levy v. Pyramid Co.*,¹⁹¹ a Second Circuit district court rejected the idea that § 1631 applied to instances where the court lacked personal jurisdiction over the defendant.¹⁹² The *Levy* court declined to use § 1631 because neither the legislative history of § 1631 nor a majority of cases supported that idea.¹⁹³ Despite the broad language of § 1631, the *Levy* court found that it only applies when a court lacks subject matter jurisdiction and not when a court lacks personal jurisdiction over the defendant.¹⁹⁴ The *Levy* court even recognized *Ross* but specifically decided not to follow that holding.¹⁹⁵

limitations or a filing period may have expired. Moreover, additional expense is occasioned by having to file the case anew in the proper court.

Section 301 adds a new chapter to title 28 that would authorize the court in which a case is improperly filed to transfer it to a court where *subject matter jurisdiction* is proper. The case would be treated by the transferee court as though it had been initially filed . . . in the transferor court. The plaintiff will not have to pay any additional filing fees. This provision is broadly drafted to allow transfer between any two Federal courts. Although most problems of misfiling have occurred in the district and circuit courts, others have occurred in the Court of International Trade and the Temporary Emergency Court of Appeals. The broadly drafted provisions of section 301 will help avoid all of these situations.

Id. (emphasis added).

¹⁹⁰ See *supra* note 188 and accompanying text.

¹⁹¹ 687 F. Supp. 48. Although the Second Circuit has never specifically held whether § 1631 applies to both instances of personal and subject matter jurisdiction, it did apparently give some indication of its inclinations on the issue in *Songbyrd Inc. v. Grossman*, 206 F.3d 172 (2d Cir. 2000). The *Songbyrd* court specifically stated in a footnote that “[t]he Tenth Circuit has ruled that authority to transfer for lack of personal jurisdiction is provided by 28 U.S.C. § 1631 . . . but the legislative history of section 1631 provides some reason to believe that this section authorizes transfers only to cure lack of subject matter jurisdiction.” *Id.* at 179 n.9.

¹⁹² 687 F. Supp. at 51. The action arose when Sophie Levy filed a personal injury action in New York. *Id.* at 50. The action was originally filed in the Maryland District Court, which was found to not have jurisdiction over the defendant. *Id.* The action was transferred to New York where, again, the statute of limitations had run and the defendant motioned to dismiss the action. *Id.*

¹⁹³ *Id.* at 51.

¹⁹⁴ *Id.* (“Even though that statute can be interpreted to apply to cases such as the present one where personal jurisdiction is lacking in the transferee court, the legislative history does not support such an interpretation.”).

¹⁹⁵ *Id.* at 51 n.3.

Hence, the inconsistent applications of § 1631 cause venue application to be an extremely muddled area of civil procedure, where uncertain rules make venue transfer inefficient.¹⁹⁶ The vague language of the *Goldlawr* decision split courts on whether to transfer under § 1404(a) or § 1406(a) when a court lacked personal jurisdiction,¹⁹⁷ which in turn caused choice of law problems.¹⁹⁸ Courts attempted to use § 1631 to alleviate these problems.¹⁹⁹ However, the lack of uniformity in the statute's application resolves nothing, and furthermore, problems exist with the language of the statute itself.²⁰⁰ Part III addresses these problems.²⁰¹

III. SECTION 1631 MUST BE AMENDED TO MAKE VENUE TRANSFER EFFICIENT

The purpose of this Part is to prove that § 1631 needs to be amended for three reasons. First, because different interpretations exist with the application of § 1631,²⁰² the statute should be amended to achieve a uniform application.²⁰³ Second, it should be amended to clearly establish choice of law rules that courts should apply following a transfer under § 1631.²⁰⁴ Last, because the language of § 1631 indefinitely preserves a

The court recognizes that in *Ross v. Colorado Outward Bound School, Inc.* . . . the court held that where the transferee [sic] court lacks personal jurisdiction, the transfer should be made pursuant to 28 U.S.C. section 1631. In the court's opinion, however, the *Ross* decision is untenable in light of the explicit legislative history. Thus, the court declines to follow the Tenth Circuit in that regard.

Id.

¹⁹⁶ See *infra* Part III (discussing the problems with the inconsistent applications of § 1631).

¹⁹⁷ See *supra* Parts II.B.1-3 (discussing the problems *Goldlawr* caused in the application of § 1404(a) and § 1406(a) when a court lacked personal jurisdiction).

¹⁹⁸ See *supra* Part II.B.3 (discussing how courts split on which state law to apply following a venue transfer when a court lacked personal jurisdiction over the defendant).

¹⁹⁹ See *infra* Part III.B (exploring how § 1631 resolves some of the problems caused by *Goldlawr* and its progeny).

²⁰⁰ See *infra* Part III.B.3 (determining the problems that exist with the language of the statute itself).

²⁰¹ See *infra* Part III (providing a detailed discussion of § 1631).

²⁰² More than two interpretations exist, but this Note focuses on the interpretation that § 1631 overrules *Goldlawr* and its progeny and the starkest counterpart, that § 1631 is not applicable, to illustrate the problem that inconsistent results have been reached because of the vague language of the statute. See *supra* note 172 and accompanying text (looking at some of the other interpretations of § 1631).

²⁰³ See *supra* Part II.C (describing both the narrow and broad interpretations of § 1631).

²⁰⁴ See *supra* Part II.C.2 (presenting the analysis and utilization of the narrow interpretation of § 1631).

plaintiff's claim, it must be amended to eliminate this detriment to the defendant.²⁰⁵

In order to understand the need for revising § 1631, one must first understand the problems that *Goldlawr* caused that caused courts to use § 1631. Hence, Part III.A identifies § 1406(a) and *Goldlawr* as the root of the venue transfer efficiency problem.²⁰⁶ Next, Part III.B discusses how § 1631 could have resolved these problems, why it fails, and therefore, why it needs revision.²⁰⁷

A. *The Root of the Problem*

Congress and the courts have attempted to balance three goals with venue transfer: convenience and fairness for defendants, preservation of valid plaintiff claims, and efficiency.²⁰⁸ Courts first tried to hold this balance with *forum non conveniens*, but due to its inefficiency, Congress attempted to make venue transfer more efficient when it passed § 1404(a) and, to some extent, § 1406(a).²⁰⁹ However, courts were unsure of

²⁰⁵ See *supra* Part II.C.1 (presenting how the broad interpretations works).

²⁰⁶ See *infra* Part III.A.

²⁰⁷ See *infra* Part III.B (discussing the problems with § 1631).

²⁰⁸ See MOORE ET AL., *supra* note 1; *supra* note 35 and accompanying text (outlining the balance of venue). Justice Frankfurter explained the balance between two extremes as follows:

Two extremes are possible . . . (1) All venue may be determined solely by rigid rules, which the defendant may invoke and which work for convenience in the generality of cases. In such an extreme situation there would be no means of responding to the special circumstances of particular cases when the rigid venue rules are inappropriate. (2) At the other extreme there may be no rigid venue provisions, but all venue may be determined, upon the defendant's objection to the plaintiff's choice of forum, by a finding of fact in each case of what is the most convenient forum from the point of view of the parties and the court. The element of undesirability in the second extreme is that it involves too much preliminary litigation; it is desirable in that it makes venue responsive to actual convenience. The first extreme is undesirable for according too little, in fact nothing, to actual convenience when the case is a special one; it is desirable in that it does away with preliminary litigation.

Hoffman v. Blaski, 363 U.S. 335, 367 (1960) (Frankfurter, J., dissenting). Thus, Justice Frankfurter essentially suggests that the appropriate place to focus venue transfer is somewhere between rigid rules focusing purely on efficiency and lenient rules focusing on plaintiff or defendant rights. *Id.* Essentially, Justice Frankfurter's balance seems similar to finding the middle point among efficiency, plaintiff's rights, and defendant's rights, which is the balance that this author suggests courts struggle to apply.

²⁰⁹ See *supra* Part II.A.2. More specifically, it respected plaintiffs' rights when it allowed transfer without having to re-file, preserved the law of plaintiffs' choice of forum after *Van Dusen*, applied uniformly to respect efficiency, and protected defendants' rights much like

§ 1406(a)'s limits or its purpose, even though courts knew it applied when venue was improper.²¹⁰ The main reason for this confusion is likely the lack of legislative history regarding the purpose of § 1406(a).²¹¹ Another cause for this confusion was the codification of *forum non conveniens* in § 1404(a).²¹² Whatever the reason, the root of the problem is with the enigmatic § 1406(a) and the case that defined its purpose, *Goldlawr*.²¹³

The *Goldlawr* Court defined the purpose of § 1406(a) with vague language, which in turn resulted in later courts interpreting *Goldlawr* as setting out a new purpose for all venue transfers.²¹⁴ The new purpose was to remove any obstacle that prevented a plaintiff's claim from expeditious and orderly adjudication.²¹⁵ *Goldlawr* could be read as a limited decision only outlining the purpose of § 1406(a) and only pertaining to cases in which venue was improper.²¹⁶ However, later courts determined that the lack of personal jurisdiction over the defendant was the obstacle that *Goldlawr* was referring to with its vague language.²¹⁷ As a result, the vague purpose that *Goldlawr* asserted allowed other courts to determine that § 1404(a) and § 1406(a) performed

forum non conveniens by granting them the ability to transfer a case if a plaintiff was trying to claim an inconvenient forum. *Id.*

²¹⁰ See *supra* notes 77–83 and accompanying text. Section 1406(a) makes no mention of the law to be applied once transfer has occurred. Moreover, the statute does not detail the precise jurisdictional requirements of either the transferee or transferor courts.

²¹¹ See *supra* notes 77–83 (pointing out that the legislative history of § 1406 provides no purpose for the statute).

²¹² See *supra* notes 50, 52–58 (stating that § 1404(a) appeared to be a codification of *forum non conveniens*).

²¹³ See MOORE ET AL., *supra* note 1, § 111.02. “The difficulty that the courts have had in determining which transfer statute to apply stems from a confusion regarding the relationship between venue and personal jurisdiction resulting from the Supreme Court’s decision in *Goldlawr, Inc. v. Heiman*.” *Id.*

²¹⁴ See *supra* note 94 and accompanying text. The Court specifically mentioned § 1406(a) in one sentence: “The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case.” See *supra* note 94 and accompanying text. However, the next sentence says nothing of any statute, either § 1404(a) or § 1406(a), and instead simply asserts a purpose of procedure, which is the sentence all courts relied upon following *Goldlawr*. See *supra* note 94 and accompanying text; see also *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980); *Corke v. Sameiet M.S. Song*, 572 F.2d 77 (2d Cir. 1978); *Mayo Clinic v. Kaiser*, 383 F.2d 653 (8th Cir. 1967); *Dubin v. United States*, 380 F.2d 813 (5th Cir. 1967).

²¹⁵ See *supra* note 94 and accompanying text (stating the language that was the basis for this idea).

²¹⁶ See *supra* note 94 and accompanying text (specifically mentioning only § 1406(a) and not § 1404(a)).

²¹⁷ See *supra* Part II.B.1 (discussing that the *Goldlawr* decision only mentions § 1406(a) and never mentions § 1404(a)); see also *Goldlawr v. Heiman*, 369 U.S. 466 (1962).

830 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

the same function when a court lacks personal jurisdiction over the defendant.²¹⁸ The ensuing disagreement among courts over whether to use § 1404(a) or § 1406(a) to transfer a case when a court lacked personal jurisdiction over the defendant created inefficiency because there were differences in which state's law applied following each respective transfer provision.²¹⁹

Sections 1404(a) and 1406(a) used varying language and functioned differently,²²⁰ but they were functioning equivalently when a court transferred a case in which it lacked personal jurisdiction over the defendant.²²¹ Congress passed two distinct statutes, and it is illogical for them to function identically; yet, the circuits have remained divided on which transfer provision applies when a court lacks personal jurisdiction over the defendant.²²² The decision between whether to use § 1404(a) or § 1406(a) is crucial because each statute dictates a specific state's law to apply after the transfer.²²³ Hence, § 1404(a) and § 1406(a) should function differently because they have different consequences.²²⁴ However, because § 1404(a) and § 1406(a) were functioning similarly, the consequences that followed these statutes after *Goldlawr* resulted in

²¹⁸ See Finzi, *supra* note 6, at 986-87. *Goldlawr* did not specify whether the lack of jurisdiction or lack of venue was the basis for allowing the transfer; hence, courts faced a dilemma when they heard cases where venue was proper but they lacked jurisdiction because *Goldlawr* did not provide the answer. *Id.* As stated, being faithful to the language of the statutes and established principles placed a more incompetent plaintiff in a better position than a less incompetent plaintiff, and courts were simply not willing to allow this inequity to happen. *Id.* Hence, courts searched for various approaches to extend *Goldlawr* to this situation to alleviate this injustice, like the *Berkowitz* court did in applying *Goldlawr* to §1404(a). *Id.* What all these courts failed to recognize is that while they alleviated one injustice, they were creating another injustice by cutting into efficiency by deviating from concrete rules.

²¹⁹ See *supra* note 94 and accompanying text (setting forth the language used in *Goldlawr*); see also Part II.B.2 and accompanying notes (stating how courts applied § 1404(a) and § 1406(a)).

²²⁰ See *supra* notes 51, 69 and accompanying text (providing the specific language of each statute).

²²¹ See *supra* Part II.B.2 (explaining how courts used both § 1404(a) and § 1406(a) to transfer a case when a court lacked jurisdiction but venue was proper).

²²² See *supra* Part II.B.2.

²²³ See *supra* Parts II.A.2-3 (explaining that under § 1404(a) courts generally apply the state law of the transferor court, while under § 1406(a) courts generally apply the state law of the transferee court); see also Part II.B.3 (explaining how complicated and inconsistent courts were in determining which state law followed a transfer under either § 1404(a) or § 1406(a) when those provisions were used to transfer a case when venue was proper but a court lacked personal jurisdiction).

²²⁴ See *supra* Part II.A (explaining the general function of both § 1404(a) and § 1406(a) in how they are used and the choice of law that follows each in a transfer).

choice of law issues that made venue transfer unworkable.²²⁵ Therefore, courts used § 1631 in an attempt to remedy the problems that *Goldlawr* and its progeny caused.²²⁶

B. Section 1631: The Near Remedy of Goldlawr and Its Problems

Section 1631 almost remedied the problems that *Goldlawr* and its progeny caused.²²⁷ *Goldlawr* did not take into account that courts would use § 1404(a) and § 1406(a) for venue transfer when they lacked personal jurisdiction over the defendant.²²⁸ Furthermore, *Goldlawr* did not predict the effect its decision would have upon choice of law following venue transfer.²²⁹ With § 1631, whether it used § 1404(a) or § 1406(a) in a transfer in which a court lacked personal jurisdiction over the defendant was irrelevant because § 1631 would supercede the application of both § 1404(a) and § 1406(a).²³⁰ Thus, § 1631 abolished the question of which venue transfer provision to use.

Section 1631 also cleared up some of the choice of law problems; specifically, it dealt with the statute of limitations problem.²³¹ Courts were unsure whether to use *Goldlawr* to deviate from established choice of law rules with § 1404(a) and § 1406(a), or more specifically, courts

²²⁵ See Bayles, *supra* note 91, at 640 (“If courts were to decide each case afresh without regard to precedent, they might reach opposite conclusions in relevantly similar cases.”). Such a result would undermine certainty and efficiency. See Paul E. Loving, *The Justice of Certainty*, 73 OR. L. REV. 743, 746 (1994) (“Certainty achieves fairness to those who rely upon the law, efficiency in following precedent, continuity and equality in treating similar cases equally.” (quoting *McGregor Co. v. Heritage*, 631 P.2d 1355, 1366 (Or. 1981))).

²²⁶ See *supra* Part II.C.1 (explaining how the *Ross* court used § 1631 to alleviate the inefficient venue transfer system).

²²⁷ Justice Harlan suggested from the start that the problem encountered in *Goldlawr* was a problem best left to Congress, and ironically, the *Ross* court may have recognized Justice Harlan’s idea when it determined that § 1631 would be the dominating transfer statute when personal jurisdiction was lacking. See *Goldlawr v. Heiman*, 369 U.S. 463, 468 (1962) (Harlan, J., dissenting) (“In these circumstances I think the matter is better left for further action by Congress.”).

²²⁸ See *supra* Part II.B (discussing how several courts varied in whether to use § 1404(a) or § 1406(a) in a transfer when the court lacked personal jurisdiction over the defendant when venue was proper).

²²⁹ See *supra* Part II.B.1 (covering the *Goldlawr* opinion).

²³⁰ See *supra* Part II.C.1 (presenting the *Ross* court’s analysis of the application of § 1631 and explaining that it supercedes § 1404(a) and § 1406(a) in transfers when a court lacks personal jurisdiction); see also Oakley, *supra* note 173, at 981 (“If section 1631 permits transfer to cure a lack of personal jurisdiction, it moots the need for a strained construction of either section 1404 or section 1406 to permit such a transfer in ‘the interests of justice.’”).

²³¹ See *supra* Part II.B.3 (discussing the split in whether to apply *Goldlawr* to overcome choice of law problems that would result in dismissal and hence be an obstruction to efficient adjudication).

832 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

were unsure whether to apply the statute of limitations of the transferee state or transferor state.²³² Section 1631 rendered this question irrelevant because the language of § 1631 assumed the action in the transferee forum was technically filed on the day it was initiated in the transferor forum.²³³ Hence, the concern of the *Mayo Clinic* court, in which a plaintiff's claim could be barred by the transferee statute of limitations if the transferee law applied, evaporated.²³⁴

Finally, § 1631 allowed § 1404(a) and § 1406(a) to operate in the capacity that they did before *Goldlawr*, which reinforced certain, uniform venue transfer rules.²³⁵ Because § 1631 applied when a court lacked personal jurisdiction, § 1406(a) would apply only when venue was improper and § 1404(a) would apply only when venue was proper.²³⁶ Further, each venue transfer provision would suggest that certain state law be applied following the respective transfer of each transfer provision.²³⁷ Despite these remedies, § 1631 has three major problems: (1) inconsistent applications of the statute, (2) a lack of clarity regarding choice of law following transfer, and (3) inherently unfair application toward defendants.²³⁸

²³² See *supra* Parts II.B.2-3 (discussing the choice of law problems that resulted from the analysis of *Goldlawr*).

²³³ See *supra* Part II.C.1 (discussing the *Ross* court's application of § 1631 and that the transferee forum had to assume the action was filed there the same day it was filed in the transferor forum).

²³⁴ See *supra* notes 140-49 and accompanying text (discussing the concern of the *Mayo Clinic* court).

²³⁵ Loving, *supra* note 225, at 763-64.

Justice Peterson's certain rule is a just rule because certainty enables an individual to conform his or her conduct to the law This promotes business innovation and development by letting firms know what they can and cannot do. Further, by eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency for businesses and individuals The certain rule allows an individual to contemplate his or her actions based on an understanding that he or she knows will not change when he or she reaches the courtroom doors.

Id.

²³⁶ See *supra* Part III.B.1 (identifying the problem where courts split on using § 1404(a) and § 1406(a) in applying transfers when a court lacks personal jurisdiction).

²³⁷ See *supra* Parts II.A.2-3 (explaining how § 1404(a) and § 1406(a) function and that different choice of law follows a venue transfer under each provision).

²³⁸ See *infra* Parts III.B.1-3 (discussing the problems with § 1631 in detail).

1. Problem One: Inconsistent Results of § 1631

The first problem with § 1631 is that courts currently disagree over whether § 1631 even applies when courts lack personal jurisdiction because the legislative history specifically mentions “subject-matter jurisdiction” while the statute mentions only “jurisdiction.”²³⁹ Thus, currently there is no uniformity in the application of § 1631 or certainty in how to interpret § 1631.²⁴⁰ If § 1631 cannot be used to transfer a case when a court lacks personal jurisdiction, the only process left to use is the old inefficient system stemming from *Goldlawr*, which utilizes both § 1404(a) and § 1406(a).²⁴¹ Moreover, because courts cannot agree on § 1631’s application, matters are confused further because courts must also consider whether to use § 1631 on top of the analysis of *Goldlawr* and its progeny.²⁴²

The district courts that do not apply § 1631 convincingly argue that § 1631 only applies to instances of subject matter jurisdiction.²⁴³ The legislative history of § 1631 only mentions subject matter jurisdiction, and these courts cannot be criticized for utilizing legislative history as a tool for determining the function of § 1631 because legislative history is a major tool courts use when analyzing the function of statutes.²⁴⁴ Even though no court has applied the old analysis under *Goldlawr*, this narrow

²³⁹ See *infra* Part II.C; see also Oakley, *supra* note 173, at 979 (“Rather than constituting a simple binary circuit split, the cases construing section 1631 can best be described as encompassing a range of gradations.”).

²⁴⁰ See *supra* note 91 and accompanying text (explaining why lack of certainty and uniformity erode efficiency).

²⁴¹ See *supra* Part II.B.3 (discussing the inefficiency that resulted when courts were unsure of whether to extend *Goldlawr* past choice of law protections).

²⁴² See Bayles, *supra* note 91, at 639 (“When cases at the trial level clearly fall within the boundaries of a precedent, it saves time and money for all involved to follow precedent.”).

Unless the Courts establish and maintain certainty and stability in the law, businessmen cannot safely and wisely make contracts with their employees or with each other; the meaning of wills, bonds, contracts, deeds, and leases will fluctuate and change with each change in the personnel or in the changing views of a Court; property interests will be jeopardized and frequently lost or changed; Government cannot adequately protect law-abiding persons or communities against criminals; private citizens will not know their rights and obligations; and public officials will not know from week to week or month to month the powers and limitations of government.

Id. at 637–38 (quoting Chief Justice Bell of Pennsylvania).

²⁴³ See *supra* Part II.C.2 (explaining that the courts that do not follow § 1631 do so because the legislative history of § 1631 only mentions that a case may be transferred when it lacks subject matter jurisdiction).

²⁴⁴ See *supra* note 189 and accompanying text (providing the legislative history of § 1631).

834 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40

interpretation of § 1631 means that the old case law and process still exist, which reveals that venue transfer problems remain unresolved.²⁴⁵ Therefore, once again, efficiency is undermined due to uncertainty and lack of uniformity in venue transfer application.²⁴⁶

2. Problem Two: Section 1631 Does Not Specify Which Choice of Law to Apply

The second problem is that the statute itself does not specify which state's law applies following a venue transfer.²⁴⁷ The language of the statute provides that the case should be treated as if it were originally filed in the transferee court, but there is no specific language that suggests that the law of the transferee court should apply.²⁴⁸ Hence, the opportunity exists for varied interpretation due to the lack of specificity in the statute. This problem should be corrected to establish a clear rule, allowing courts to determine, and attorneys to expect, which law will apply following a venue transfer.²⁴⁹

3. Problem Three: The Language of § 1631 is too Detrimental to Defendants

The third problem is that § 1631 allows a plaintiff to manipulate the system, which is unfair to defendants.²⁵⁰ Section 1631 overrides the choice of law protections that courts like the *Nelson* court tried to extend to avoid plaintiff forum shopping.²⁵¹ From the plaintiff's perspective, courts throwing out valid claims through bars such as personal jurisdiction and the statute of limitations are legitimate concerns.²⁵²

²⁴⁵ See *supra* Part III.A (discussing the problems *Goldlawr* caused).

²⁴⁶ See *supra* note 91 and accompanying text (indicating why lack of uniformity results in inefficiency).

²⁴⁷ See *supra* note 173 and accompanying text (providing the exact text of § 1631).

²⁴⁸ See *supra* note 173 and accompanying text.

²⁴⁹ See *supra* Part II.B.3 (indicating the difficulty courts have when it is unclear which choice of law to apply following a venue transfer).

²⁵⁰ See *supra* Part II.C (discussing the specific application of § 1631). It should be noted that this Note focuses on the application of choice of law between competing states based on transfers from diversity jurisdiction. A completely separate issue is a transfer pursuant to § 1404(a) or § 1406(a) based on a federal question. For an application of choice of law and venue transfer pursuant to federal question issues, see MOORE ET AL., *supra* note 1, § 111.20(2). While application of § 1631 to instances of federal question cases would further promote efficiency, the analysis of that situation is simply too large of an issue and is beyond the scope of this Note.

²⁵¹ See *supra* notes 163-67 and accompanying text (discussing the *Nelson* court opinion and concerns).

²⁵² See *supra* notes 94-99 and accompanying text (showing the concerns for plaintiff claims by the *Goldlawr* Court). This was the concern the *Goldlawr* Court was worried about

However, plaintiffs and courts like *Goldlawr* fail to notice that these “elusive facts” exist to protect defendants.²⁵³

Even though Congress eliminated the harsh results of dismissal with *forum non conveniens* by passing § 1404(a),²⁵⁴ the *Goldlawr* court wrongly interpreted § 1406(a) as a device that trumped the requirement that a court dismiss a case for lack of personal jurisdiction over the defendant.²⁵⁵ With *forum non conveniens*, the forum is valid and the problem is that mere inconvenience warrants a dismissal.²⁵⁶ Congress deemed this to be a harsh result and passed § 1404(a) and § 1406(a) to remedy such situations with *forum non conveniens*.²⁵⁷ However, with personal jurisdiction, dismissal is justified because the court has no power over the defendant.²⁵⁸ The *Goldlawr* court failed to state the reason for dismissal when a court lacks personal jurisdiction over the defendant, which is to protect the defendant.²⁵⁹ The Court justified its

when a plaintiff’s claim could be dismissed because of an erroneous guess to an elusive fact such as jurisdiction, but what the Court failed to notice is that this “elusive fact” was there for a reason: to protect defendants. See *supra* notes 94–99 and accompanying text; see also *supra* notes 138–47 and accompanying text (discussing the *Mayo Clinic* analysis with choice of law). The *Mayo Clinic* court took these worries even further past the statute of limitations. See *supra* notes 138–47 and accompanying text. Other arguments that plaintiffs worry about is that they may be lulled into a false sense of security by negotiations with defendants that may cause a plaintiff to refrain from bringing a claim, which warrants the result of *Goldlawr*. See *Froelich v. Petrelli*, 472 F. Supp. 756, 761 (D. Haw. 1979). A court should only utilize such estoppel when the defendant, by words, acts, and conduct, led the plaintiff to believe it would pay the claim and then breaks off negotiations when the time for the suit has passed. See *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1071 (7th Cir. 1978).

²⁵³ See *supra* note 87 and accompanying text (describing personal jurisdiction generally and the protections it offers to defendants); see also Page, *supra* note 35, at 1158–60 (describing personal jurisdiction as a guarantee that defendants receive treatment in a manner consistent with the Due Process Clause).

²⁵⁴ See *supra* notes 52–59 and accompanying text (discussing why Congress passed § 1404(a)).

²⁵⁵ See *supra* Part II.B.1 (observing the *Goldlawr* opinion).

²⁵⁶ See *supra* Part II.A.1 (discussing the function of *forum non conveniens*).

²⁵⁷ See *supra* Part II.A.1 (discussing *forum non conveniens*, how it operated, and why § 1404(a) was passed to supercede its general operation among federal courts).

²⁵⁸ See *supra* note 87 and accompanying text (discussing personal jurisdiction and why it is a protection for defendants and normally warrants dismissal).

²⁵⁹ Clearly the lower court’s analysis was much more sound:

Section 1406(a) provides for the transfer of cases when venue is improper. It does not mention jurisdictional defects. Whatever be the desirability of a rule that a district court may transfer a case when venue is mislaid and jurisdiction over the person of the defendant is lacking, it is an unwarranted exercise of judicial interpretation to find that a statute, expressly providing for transfer to cure a venue defect,

836 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

decision by stating that it was more efficient to preserve a plaintiff's claim rather than dismiss a case.²⁶⁰ Hence, after *Goldlawr*, some courts determined that a plaintiff's claim should be preserved indefinitely, which is simply taking venue transfer too far.

The broad interpretation of § 1631 essentially codifies this interpretation because it first allows a transfer and then considers the action filed in the transferee court on the day it was originally filed in the transferor court.²⁶¹ Thus, with the broad interpretation of § 1631, if the statute of limitations had run after the action was filed in the improper court, it would not matter, and defendants essentially lose the protection of the statute of limitations.²⁶² This interpretation removes too many protections for defendants.²⁶³

Despite the fact that plaintiffs may lose valid claims when a case is dismissed due to lack of jurisdiction or choice of law concerns, allowing a plaintiff's claim to inevitably be preserved removes protections that defendants rely on and undermines the adversarial system.²⁶⁴ Further, it

impliedly provides for a transfer to cure a more basic jurisdictional defect. *The lesser does not by implication include the greater.*

Goldlawr v. Heiman, 288 F.2d 579, 582 (2d Cir. 1961), *rev'd* 369 U.S. 463 (1962) (emphasis added). Also, the *Goldlawr* dissent, written by Justice Harlan, probably best describes the problem with *Goldlawr*. 369 U.S. 463, 467-68 (1962) (Harlan, J., dissenting). Justice Harlan argued:

The notion that a District Court may deal with an *in personam* action in such a way as possibly to affect a defendant's substantive rights without first acquiring jurisdiction over him is not a familiar one in federal jurisprudence. No one suggests that Congress was aware that 28 U.S.C. § 1406(a) might be so used when it enacted that statute. The "interest of justice" of which the statute speaks and which the Court's opinion emphasizes in support of its construction of § 1406(a) is assuredly not a one-way street.

Id.

²⁶⁰ See *supra* note 94 and accompanying text (setting out the language in *Goldlawr* that creates this problem).

²⁶¹ See Part II.C.1; see also 28 U.S.C. § 1631 (2000) ("[T]he action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.").

²⁶² See *supra* Part II.C.1 (discussing the broad interpretation).

²⁶³ See *supra* Part III.B.3 (discussing the competing concerns between courts on whether to extend protection to plaintiffs or defendants).

²⁶⁴ See Richardson, *supra* note 141, at 1021 ("Statutes of limitations, it has been said, 'are designed to prevent unreasonable delay in the enforcement of legal rights.' . . . This viewpoint specifically acknowledges that plaintiffs should be permitted to enforce their rights, provided that they do so without unreasonable delay."). Allowing plaintiffs to have their claims preserved over defects in personal jurisdiction and the statutes of limitations drastically decreases the diligence a plaintiff is expected to practice when filing a claim. *Id.*; see also *supra* note 74 (discussing the problems and concerns with forum shopping).

encourages plaintiffs to forum shop because their claims are preserved indefinitely.²⁶⁵ Both the *Ellis* and *Nelson* courts determined that it was unfair for a plaintiff to circumvent the statute of limitations through venue transfer when jurisdiction was improper.²⁶⁶ If a plaintiff's claim was preserved indefinitely, a plaintiff would have no reason to practice diligence when he knows that his claim will always be preserved, and he could forum shop to capture the law he wanted.²⁶⁷ Courts like *Nelson* and *Ellis* recognized this problem and were unwilling to make the adversary system so lopsided.²⁶⁸ Therefore, at least in some circuits, indefinite preservation of a plaintiff's claim was stopped before courts even used § 1631.²⁶⁹ The problem is that the inherent language of § 1631 essentially codifies the principle that plaintiff claims will be preserved indefinitely.

However, the counterargument to this analysis is that if a defendant has already prepared to adjudicate a claim, the claim is not "stale," and the protection of the statute of limitations is irrelevant.²⁷⁰ Yet, allowing plaintiffs to circumvent the statute of limitations promotes forum shopping and undermines the adversarial system because a plaintiff can also capture more favorable choice of law benefits besides the statute of limitations.²⁷¹ Further, it remains much easier and more certain to dismiss a claim that fails to meet the statute of limitations than it is to

²⁶⁵ See *supra* notes 140–49 and accompanying text (discussing the *Mayo Clinic* case where analysis was set forth that essentially preserved a plaintiff's claim indefinitely).

²⁶⁶ See *supra* notes 150–67 and accompanying text (discussing the opinions of the *Ellis* and *Nelson* courts).

²⁶⁷ See *supra* note 264 and accompanying text (discussing why plaintiffs would need to file less diligently).

²⁶⁸ See *supra* notes 150–67 and accompanying text (providing that both the *Ellis* and *Nelson* courts stated that it would be unfair to allow plaintiffs to capture choice of law and forum shop by applying the transferor court law based on a transfer when a court lacked jurisdiction over the defendant).

²⁶⁹ See *supra* notes 150–67 and accompanying text.

²⁷⁰ See Richardson, *supra* note 141, at 1020. Mr. Richardson states:

[T]he objective of limitations law is to protect defendants from the difficulty of defending against "stale," i.e., old, claims. Such protection is generally viewed as a simple matter of fairness to defendants. . . . Some cases have stated that the statutes of limitations are intended to protect would be "defendants from stale claims brought after memories have faded" or evidence and witnesses have been lost According to other cases, statutes are enacted to "encourage the prompt presentation of claims to assure fairness to defendants."

Id. However, it is difficult to say that a claim has "faded" after the defendants have already prepared to litigate.

²⁷¹ See *supra* note 74 and accompanying text (discussing forum shopping); see also *supra* note 263 and accompanying text (discussing the lack of diligence problem).

838 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

create exceptions “in the interests of justice” to preserve a plaintiff’s claim following transfer.²⁷² By once again looking to the purpose of venue transfer, which is efficiency, § 1631 should be amended to err on the more certain and efficient result of not circumventing the statute of limitations.²⁷³

In conclusion, although § 1631 sought to resolve the *Goldlawr* problems, the statute must be revised to operate effectively.²⁷⁴ First, the current inconsistencies with § 1631 do not allow it to resolve the problems *Goldlawr* and its progeny caused in venue transfers when a court lacks personal jurisdiction over the defendant.²⁷⁵ Second, § 1631 is not specific enough in stating which law will apply following a transfer, and this uncertainty may lead to discrepancies among courts in the future.²⁷⁶ Third, allowing transfers by a court that lacks personal jurisdiction over a defendant permits courts to remove additional defendant protections in order to preserve a plaintiff’s claim.²⁷⁷ The language of § 1631 essentially codifies this problem.²⁷⁸

Clearly, the purpose of venue transfer has come a long way since *forum non conveniens*.²⁷⁹ Section 1631 has the potential to fix the *Goldlawr* problems, but it must be amended to (1) resolve the discrepancy on whether § 1631 should be used, (2) specify which choice of law is to apply, and (3) better protect defendants.²⁸⁰

²⁷² See *supra* note 173 and accompanying text (providing the language of § 1631, which includes the words “in the interest of justice”).

²⁷³ See *supra* notes 235, 242 and accompanying text (discussing how certain and uniform rules promote efficiency); see also *supra* note 35 and accompanying text (discussing the purpose of venue transfer and generally promoting efficiency).

²⁷⁴ See *supra* Parts III.A–B.

Although the ultimate application of the appropriate statute of limitations is a comparatively simple business, the intermediate inquiry of which state’s statute of limitations should be applied leads us on a merry chase through the murky area in which the *Erie* doctrine and the federal change of venue statutes intersect.

Ellis v. Great Sw. Corp., 646 F.2d 1099, 1100–01 (5th Cir. 1981).

²⁷⁵ See *supra* Part III.B.1 (discussing this particular problem with § 1631).

²⁷⁶ See *supra* Part III.B.2 (discussing the second problem with the application of § 1631).

²⁷⁷ See *supra* Part III.B.3 (discussing the third problem with the application of § 1631).

²⁷⁸ See *supra* note 173 (providing the language of § 1631).

²⁷⁹ See *supra* Part II.A.1 (discussing the purpose of *forum non conveniens*).

²⁸⁰ See *infra* Part IV (providing the reasoning for the amendments as well as the amendments to § 1631 themselves).

IV. CONTRIBUTION

Venue transfer has clearly lost its focus of promoting efficient transfer of claims. Courts took the appropriate action by using § 1631 to provide a clear standard for transfer when a court lacks jurisdiction, but because courts are unclear regarding whether it applies and the statute takes too much away from defendants, the statute must be amended. This Note proposes that several amendments be made to § 1631. First, § 1631 must be amended to clearly indicate that it is the applicable statute to be used for venue transfer when a court lacks personal jurisdiction over the defendant. Second, § 1631 must be amended to specifically outline the choice of law following a § 1631 transfer. Last, § 1631 must be amended so as not to allow plaintiffs to manipulate the venue transfer system. Thus, Congress should amend § 1631 as follows and label it subsection (a):

*(a) Whenever a district court in which a case is filed a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of subject matter or personal jurisdiction, whether venue is proper or improper, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the court to which it is transferred shall apply the substantive law of the state in which it sits to the action or appeal as if it were filed the day of transfer to such a court and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.*²⁸¹

Commentary

The amended § 1631 makes the necessary changes to (1) create three separate venue provisions that do not appear to function the same way, (2) specifically define which choice of law to apply following a transfer,

²⁸¹ 28 U.S.C. § 1631. The normal font is the language of the original statute. The text that appears in italics is the proposed language the author wishes to add, and the language with a line through it is the language the author wishes to strike from the original statute.

and (3) protect defendant rights by setting a limit of how far a court must go to preserve a plaintiff's claim.

First, this change will improve the efficiency of venue transfer because courts will have three separate venue transfer provisions to use in distinct situations. The change in the language from stating "jurisdiction" to "want of subject-matter or personal jurisdiction" clears up any discrepancies as to when the statute should be used and thus resolves the inconsistencies in dealing with § 1631.²⁸² This change will provide courts with three separate venue transfer provisions to use in distinct situations, and it will clear up the blurred purpose of venue transfer created by *Goldlawr*.²⁸³ The effect of this change on § 1404(a) and § 1406(a) would be beneficial because they will each function distinctly. Section 1404(a) will be used when venue is proper but a more convenient forum exists for the litigation to take place.²⁸⁴ Section 1406(a) will be used only when venue is improper and justice demands a transfer take place, and § 1631 will be used when either subject matter or personal jurisdiction is lacking, regardless of whether venue is proper.²⁸⁵ All three statutes retain the discretionary language "in the interest of justice" to allow courts to dismiss the action if they determine that justice demands it.²⁸⁶ The problem of *Goldlawr* and its progeny, where it made § 1404(a)

²⁸² See *supra* Part III.C.

²⁸³ See *supra* Part III.B.1.

²⁸⁴ See Oakley, *supra* note 173, at 972, for a similar reasoning by proposing a change to § 1404(a).

This prospectus recommends curing the problem of overlap by revising subsection 1404(a) to make clear that it authorizes transfer only when dictated by convenience interests, not the need to save the plaintiff from the prejudicial consequences of having brought suit in a court without proper subject-matter jurisdiction, venue, or personal jurisdiction over the defendant.

Id.

²⁸⁵ *Id.* Professor Oakley provides a different approach to fixing the *Goldlawr* problems. "Section 1631 . . . should be revised to make clear that it is the vehicle for transfer to cure a lack of subject-matter jurisdiction. Section 1406 should be broadened to make express what some courts have implied: that it permits transfer for lack of personal jurisdiction as well as improper venue." *Id.* The only problem with this amendment to § 1406(a) and § 1631 is that § 1406(a) does not take into account choice of law following a transfer, and thus the problem identified in Part III.B.2 would not be resolved. Hence, the author's proposed amendment to § 1631 widens the application of § 1631 to both subject matter and personal jurisdiction, allows the choice of law clause included in the statute to apply to both instances, and clears up the problem with choice of law created by *Goldlawr* because courts know they have to apply the transferee court law as ordered by Congress.

²⁸⁶ See 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interests of justice, a district court may transfer."); 28 U.S.C. § 1406(a) ("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.").

and § 1406(a) function equivalently, is resolved.²⁸⁷ Therefore, thinking back to our friend Kate, because the court lacked personal jurisdiction over Kate's client, there should be no discrepancy in which venue transfer provision to use, and the applicable statute would clearly be § 1631.²⁸⁸

Second, the amended changes will make all cases that applied the *Goldlawr* analysis in either choice of law or venue transfer obsolete, including *Goldlawr* itself, because the new § 1631 tells courts which law to apply.²⁸⁹ Hence, the original purpose of venue transfer, the promotion of efficiency, is reinstated, and any claim that involves issues like that between Kate and Sally would use § 1631 if the court lacked jurisdiction, § 1406(a) if the court was an improper venue, and § 1404(a) if the original venue was proper but inconvenient.²⁹⁰

Third, this change still respects the preservation of plaintiffs' claims because a plaintiff is permitted to make a transfer even when the court lacks jurisdiction over the defendant.²⁹¹ Hence, the concern of the *Goldlawr* court that such dismissals are inefficient or unfair is preserved.²⁹² However, the amended § 1631 also protects defendant rights by not allowing circumvention of all actions that would result in dismissal.²⁹³ The change in the language at the end of the statute requires that the transferee court apply the state law where it sits upon the day it arrives. The amended § 1631 removes the original language that allows the action to commence in the transferee court as if it were filed on the day it was filed in the transferor court. The amendment essentially codifies the decision of the *Nelson* court.²⁹⁴ This change allows the statute of limitations in the transferee forum to continue running even after the plaintiff has filed his claim in the improper forum. Plaintiffs will no longer be able to gamble at acquiring beneficial law because their claims will not necessarily be preserved indefinitely. Most importantly, this change reinstates important defendant rights contained in choice of law analysis such as the statute of limitations. A claim like

²⁸⁷ See *supra* Part III.B.1.

²⁸⁸ See *supra* Part I.

²⁸⁹ See *supra* Part III.B.2.

²⁹⁰ See *supra* Part I.

²⁹¹ See *supra* Part III.B.3.

²⁹² See *supra* Part II.B.1.

²⁹³ See *supra* Part III.B.3.

²⁹⁴ See *Nelson v. Int'l Paint Co.*, 716 F.2d 640, 643 (9th Cir. 1983) ("[I]t is necessary to look to the law of the transferee state, also to prevent forum shopping, and to deny plaintiffs choice-of-law advantages to which they would not have been entitled in the proper forum.").

842 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40

Sally's would be barred, and Kate's client would not have to worry about losing the protection of the Iowa statute of limitations.²⁹⁵ Hence, the amended § 1631 respects the balance between plaintiff and defendant rights.

Further, in order to avoid any confusion on the definition of "district court," the following language should be added as subsection (b) to § 1631:

(b) As used in this section, the term "district court" includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.²⁹⁶

Commentary

This proposed section simply transports the language used in both § 1404(a) and § 1406(a) into § 1631.²⁹⁷ Hence, the use of identical language in all three statutes will solidify them as companion sections to be applied to transfer cases. Further, it will promote uniformity and

²⁹⁵ See *supra* Part I.

²⁹⁶ This subsection is the verbatim language used in both § 1404(d) and § 1406(c). See *supra* notes 52, 69 and accompanying text. It appears nowhere in the original text of the statute, nor does the original statute contain a subsection (b). Adding this subsection clears up exactly what courts should use the new § 1631(a) when making a transfer, and it is meant to clear up the language from the beginning of the old § 1631, which stated: "Whenever a civil action is filed in a court *as defined in section 610 of this title*." See *supra* note 173 and accompanying text (emphasis added). The change is meant to alleviate the concern raised by Mr. Tayon, that "[t]his definition of 'courts' excludes certain courts. Therefore, the express legislative intent to provide a provision which 'is broadly drafted to permit transfer between any two federal courts' has not been realized." See Tayon, *supra* note 173, at 225. Mr. Tayon's amendment, which differs, reads as follows:

(b) The term "court" as employed by this provision shall include any state or federal administrative, legislative or judicial tribunal.

Id. at 231.

²⁹⁷ See 28 U.S.C. § 1404(d).

As used in this section, the term "district court" includes the District of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

Id.

As used in this section, the term "district court" includes the District of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term "district" includes the territorial jurisdiction of each such court.

28 U.S.C. § 1406(c).

certainty by outlining that all district courts can use the new § 1631 transfer statute to transfer a case when a court lacks jurisdiction, just like all courts can use § 1404(a) and § 1406(a) to transfer a case when venue is proper or improper.²⁹⁸

V. CONCLUSION: A BRICK IN THE WALL

Kate would have much less of a headache if § 1631 were amended in a way that properly balanced the plaintiff's choice of forum, defendant protections, and efficiency. Not all problems with venue transfer efficiency would be resolved, but at least the problems caused by *Goldlawr* and its progeny would disappear. With courts unsure of whether to use § 1404(a) or § 1406(a) and which choice of law to apply, it is no wonder that Kate's lawsuit became so confusing before even reaching the merits. Further, the varied application of § 1631 undermined Sally's attempt to resolve the lawsuit. The proposed amendment to § 1631 would make Kate and Sally's action proceed in a more efficient fashion, as Kate would expect, because the court would have to transfer under § 1631. Furthermore, Kate would not have to worry about venue transfer being so unfair because the statute of limitations could no longer be circumvented. Essentially, both Sally and Kate could predict the court's decision and whether the action could continue. Amending § 1631 would be one small step in making venue transfer more efficient, but at least every Sally and every Kate would know where courts were going with 28 U.S.C. § 1631.

Jeremy Jay Butler*

²⁹⁸ See *supra* Parts II.A.2-3 (discussing how § 1404(a) and § 1406(a) function).

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