A Solution in Search of a Problem

It is time to abolish intrastate forum non conveniens

by Thomas Q. Keefe III

In 1948 the Illinois Supreme Court adopted *forum non conveniens*,[1] which provides that if otherwise proper venue is inconvenient for a defendant, and a different appropriate venue is more convenient for everyone, the court can transfer or dismiss the case. It is an equitable doctrine designed to prevent the plaintiff from "forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself."[2]

The doctrine is applied using a private/public interest factors test, with plaintiff's choice of forum generally accorded substantial deference. Private interest factors are: (1) the convenience of the parties; (2) access to pertinent evidence; and (3) all other practical considerations in streamlining trial - - things like the availability of compulsory process, cost of witness attendance, and the potential to view the premises. Public interest factors are: (1) the interest in deciding localized controversies locally; (2) unfairness of imposing trial and jury duty on a county scarcely connected to the litigation; and (3) the administrative difficulties inherent in adding to already-congested dockets.[3]

Until 1983, Illinois solely recognized *forum non conveniens* on an interstate basis. It largely cropped up in railroad cases, which made sense: If a Texas resident working on a Missouri train gets hurt in Dallas, the case probably doesn't belong in Madison County.[4]

But then the court handed down *Torres v. Walsh*, which endorsed the doctrine in intrastate cases: "If the reasons for applying the doctrine in certain interstate situations are good ones and in the best interest of justice, and we believe they are, then such reasoning is also persuasive where a comparable situation exists within the boundaries of this State."[5] The court explained that the ruling was designed "to promote fair play between plaintiffs and defendants and discourage the incessant jockeying for a more sympathetic jury likely to come forward with a more substantial award."[6]

For some reason, the court thought that empowering defendants to seek transfer within the state would curtail forum litigation. That didn't happen. Instead, it exploded.

And why wouldn't it? The defendant has every incentive to file. Not only is there the potential for a friendlier forum, but a motion to transfer halts substantive discovery. If the defendant loses, they appeal. If they win, plaintiff must either appeal and prolong the wait, or cede her chosen forum.

Each forum motion will ultimately put an injured plaintiff to the choice of whether to fight on and starve, or relent and accept a quicker but diminished recovery. That isn't fair.

It would be one thing if there were sound reasons for the doctrine. But there aren't - - not anymore. The technological advances and pragmatic considerations underpinning today's practice renders intrastate *forum non conveniens* a feckless relic.

Torres didn't level the venue playing field. It gifted the defense a procedural weapon.

Because the court has declined all invitations to overrule it, it is time for the Illinois General Assembly to abolish intrastate *forum non conveniens*.

I. Forum Shopping

Everyone forum shops. It is malpractice not to.

Everyone also accuses everyone else of forum-shopping, while feigning indignation when being counter-accused of the same.

Courts have always known this, but their response has changed over time.

In 1958, the court said this: "If it is "shopping" for a plaintiff to bring suit in a great metropolis where a large verdict is anticipated, why is it not also "shopping" for a defendant to attempt to have the case dismissed on the ground that it should have been brought in a small community where the defendant anticipates a smaller verdict would result."[7]

Then, in *Torres*, the court employed the language quoted earlier: "we hope to promote fair play between plaintiffs and defendants and discourage the incessant jockeying for a more sympathetic jury likely to come forward with a more substantial award."[8]

Identical principle, but now it is the plaintiff who is to blame.

Twenty-three years later, in *Langenhorst*, they stated: "Plaintiff's counsel argued that defendants want the case transferred to Clinton County because they thought the verdict would be smaller there, and acknowledged wanting the case to remain in St. Clair County because he believed the verdict would be larger there."[9]

So now both sides do it, and nobody is to blame.

The truth is that we have a check

on forum-shopping already: the venue statute. "The Illinois venue statute is designed to insure that the action will be brought either in a location convenient to the defendant, by providing for venue in the county of residence, or convenient to potential witnesses, by allowing for venue where the cause of action arose."[10]

The Illinois General Assembly long ago enacted rules to curtail the precise "forum-shopping" *Torres* endeavored to prevent. The decision fixed something that wasn't broken.

II. Convenience

Let's talk about convenience, the "touchstone" of the doctrine.[11]

In 1958, our supreme court broadly defined inconvenience as something which 'vexed, harassed or oppressed' the defendants.[12] The doctrine was originally designed to save a defendant from defending in a state hundreds of miles from the accident simply because their railroad tracks run through a plaintiff-friendly county.

But that isn't really a concern within the four corners of Illinois. And it is particularly difficult to claim inconvenience in a forum where the defendant is already sufficiently present to invoke the venue statute. Nevertheless, defendants persisted, and by 1991 had convinced the court that the 30-mile distance between the adjoining counties of Madison and Bond was "inconvenient."[13] This was pretty absurd, and the court knew it. Later, in *Langenhorst*, they stated that "When adjoining counties are involved, "'[t]he battle over the forum results in a battle over the minutiae.'"[14]

Three years later, in *Peile v. Skelgas, Inc.*, the court acknowledged that intrastate application of the doctrine had become a "quagmire," but they declined an invitation to overrule it.[15] They went further, although still not far enough, in *Guerine*: "We live in a smaller world than that contemplated by the *Gulf Oil* Court, or even this court in *Torres*. Today, we are connected by interstate highways, bustling airways, telecommunications, and the world wide web. Today, convenience - the touchstone of the *forum non conveniens* doctrine - has a different meaning."[16]

Simply put, modernization has nullified the notion of 'inconvenience' within the confined space of Illinois, further defanging the reasoning of *Torres*.

III. Access of Evidence

That "interconnected world" takes on particular import with respect to another factor, ease of access to evidence.

We used to haul crates of documents and other complicated exhibits to the courthouse, often setting up anterooms as staging areas for particularly complex trials. Now we have computers, thumb drives, wireless courtrooms, iPads and TrialSmith. We simply don't try cases the way we did in 1948, which courts are starting to recognize.

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As the fifth district recently observed, "The issue of convenience, in a world where everything is available instantaneously and remotely, now blurs even further the lines of convenience. In our view, the technological advances in the practice of medicine render many of the usual convenience-of-the-parties arguments antiquated and implausible."[17]

IV. Congestion

What about court congestion?

Upon pronouncing the doctrine, the court suggested this factor was of little consequence, observing that filing fees more than offset the cost of jurors for trial of those same cases.[18]

By 1981, the court felt differently: "In these times of constantly increasing litigation ... delay in disposing of cases is a critical factor. It is, of course, elementary that, as more cases are filed, delay in disposition will increase unless facilities and personnel are also increased. And, if facilities and personnel are increased, budgets, appropriations and taxes must likewise expand."[19]

Two decades later, the court felt differently yet again: "Court congestion is a relatively insignificant factor, especially when the record does not show the other forum would resolve the case more quickly."[20]

Moreover, as every lawyer knows, the overwhelming percentage of cases no longer go to trial.

V. Going to Trial

And that's the real point. The doctrine is designed to facilitate more convenient **trials**, but they don't happen anymore. According to the 2016 Annual Report of Illinois Courts, there were 31,731 Law cases over $50,000 which were resolved that year. A mere 671 of those cases went to verdict, which is 2.1 percent[21] In 2017, it was 2.8 percent.[22] In 2015, it was an even 2 percent.[23]

Things like the burden of jury service, witness attendance (including compulsory process), a premises view - - they certainly mattered when Illinois adopted *forum non conveniens*, and they mattered when *Torres* was handed down. But they are immaterial if nobody is going to verdict.

With jury trials a rarity, *forum non conveniens* is a solution in search of a problem.

The doctrine itself is a problem - - both for plaintiffs, and for the courts. Because even though nobody goes to trial anymore, the motions keep getting filed, losing parties keep appealing, and the appellate courts keep deciding these cases.[24]

From 1982-1999, appellate courts averaged 16.2 *forum non conveniens* opinions per year,[25] and they've barely slowed down - - ten were handed down in 2017, and another twelve in 2018 - - which means that a doctrine devised to help alleviate court congestion is instead contributing to the clog.

VI. The Cure

As a result of all this, the Illinois

General Assembly must act, to protect both plaintiffs and the courts. The solution lies within Section 2-108 of the venue statute.[26] The court already alluded to it within their refusal to overturn the doctrine in *Peile*:

> "We hold that the venue provision of section 2-108 is not in conflict with the rules of this court concerning intrastate forum non conveniens motions. Nothing in section 2-108 prevents this court from exercising its constitutional authority to supervise the administration of the court system in this State. We acknowledge the legislative prerogative to enact, repeal, and amend the venue statutes of this State. The legislature may choose to amend the Illinois venue provisions if changes in the existing statutes are deemed necessary or desirable."[27]

Such a change is, in fact, both necessary and desirable.

What would it look like? It's simple. Section 2-108 currently provides: "Place of trial. All actions shall be tried in the county in which they are commenced, except as otherwise provided by law."

The legislature need only rewrite the second clause, so that it instead reads: "Place of trial. All actions shall be tried in the county in which they are commenced, unless a statute specifically requires transfer to a different county." They could then add, "The doctrine of intrastate *forum non conveniens* is abolished."[28]

Then-Justice Gordon E. Maag proposed as much in a 2001 law review article, and he's right. As he explains: "This amendment would still allow motions to transfer venue to a proper county if the venue statute was not followed. It also would make clear that only statutes would be the basis for a transfer. Interstate forum non conveniens motions would be unaffected because in such motions a transfer of venue is not at issue. Instead, a declination of jurisdiction is what is requested."[29]

Supreme Court Rules 187 and 306(a)(2) would still be in play - - no need to step on the court's closely-guarded procedural rulemaking prerogative. Amending the venue statute is, of course, within the legislative purview. The statutory change merely sets some bounds. In place of the current, inordinate *forum non conveniens* motion practice, we would have intrastate *forum non conveniens* motions only where the statute underlying plaintiff's action so-prescribes. The end result would be an unburdened judiciary and undiminished plaintiffs.

Conclusion

The aims of *forum non conveniens* are fundamental fairness and sensible, effective judicial administration.[30] The best way to accomplish those goals is to get rid of the doctrine.

Endnotes

1 *Whitney v. Madden*, 400 Ill.185

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(1948).

[2] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

[3] *First American Bank v. Guerine*, 198 Ill.2d 511, 516-17 (2002).

[4] *Fender v. St. Louis Southwestern Ry. Co.*, 49 Ill.2d 1 (1972).

[5] *Torres v. Walsh*, 98 Ill.2d 338, 350 (1983).

[6] *Id.* at 351.

[7] *Cotton v. Louisville & N. R. Co.*, 14 Ill.2d 144, 174 (1958).

[8] *Torres*, 98 Ill.3d at 351.

[9] *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill.2d 430, 438 (2006).

[10] *Baltimore & O. R. Co. v. Mosele*, 67 Ill.2d 321, 328 (1977).

[11] *Guerine*, 198 Ill.2d at 525.

[12] *Cotton*, 14 Ill.2d at 160.

[13] *Washington v. Illinois Power Co.*, 144 Ill.2d 395, 402 (1991).

[14] *Langenhorst*, 219 Ill.2d at 450, *citing Guerine*, 198 Ill.2d at 519-20.

[15] *Peile v. Skelgas, Inc.*, 163 Ill.2d 323, 335 (1994).

[16] *Guerine*, 198 Ill.2d at 525.

[17] *Foster v. Hillsboro Area Hosp., Inc.*, 2016 IL App (5th) 150055, ¶ 45.

[18] *Cotton*, 14 Ill.2d at 169.

[19] *Espinosa v. Norfolk & W. Ry. Co.*, 86 Ill.2d 111, 116-17 (1981).

[20] *Langenhorst*, 219 Ill.2d at 451-52, *citing Guerine*, 198 Ill.2d at 517.

[21] http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2016/2016_Statistical_Summary.pdf (last visited September 4, 2019).

[22] http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2018/2017_Statistical_Summary_Final.pdf (last visited September 4, 2019).

[23] http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Statistical_Summary.pdf (last visited September 4, 2019).

[24] *Peile*, 163 Ill.2d at 346 (Harrison, J., dissenting)("The litigation of those motions in the circuit courts and the appeals that inevitably follow consume an increasing share of scarce judicial resources.").

[25] Gordon E. Maag, Forum Non Conveniens in Illinois: A Historical Review, Critical Analysis, and Proposal for Change, 25 S. Ill. U. L. J. 461, 517 (2001).

[26] 735 ILCS 5/2-108.

[27] *Peile*, 163 Ill.2d at 334-35.

[28] Hat tip, Keith Hebeisen.

[29] Maag, 25 S. Ill. U. L.J. at 524.

[30] *Adkins v. Chicago, R. I. & P. R. Co.*, 54 Ill.2d 511, 514 (1973).

Thomas Q. Keefe, III *is a partner at Keefe, Keefe, & Unsell, P.C. in Belleville, IL.*