

NOTES

PROCEDURAL FENCING IN RETIREE BENEFITS DISPUTES: APPLICATIONS OF THE FIRST-FILED RULE IN FEDERAL COURTS

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I. INTRODUCTION

Basil Chapman retired from ACF Industries, a railroad-car maker, after thirty-eight years of service.¹ In December 2003, he received an unexpected phone call at his West Virginia home from a union representative, who informed him that an ACF executive wanted to speak with him.² When they spoke, the executive informed Mr. Chapman that ACF was planning on changing its retirees' health coverage plan.³ The ACF plan would now have a lifetime maximum benefit cap on hospital and surgical expenses for each participant and would require retirees to make monthly contributions.⁴ According to court papers filed later, Mr. Chapman responded, "We have a contract. You can't do that."⁵ Then, he said that he would "file in federal court" against ACF.⁶ The next business day, ACF filed a declaratory judgment action in the United States District Court for the Eastern District of Missouri asking the court to rule that retiree benefits were not vested and that ACF accordingly could alter benefits unilaterally.⁷ On January 26, 2004, Mr. Chapman, other named plaintiffs, and their union sued ACF in the United States District Court for the Southern District of West Virginia.⁸

Thus began a jurisdictional struggle. Both cases involved ACF, the union, and the dispute over the retiree benefits.⁹ Which should proceed?

1. Ellen E. Schultz, *End Run: Companies Sue Union Retirees to Cut Promised Health Benefits*, WALL ST. J., Nov. 10, 2004, at A1. Schultz and Theo Francis won the 2005 Loeb award in the Business Beat Writing category for their series in the *Wall Street Journal*, "The Short Life of 'Lifetime' Health-Care Benefits." The Gerald Loeb Awards, <http://www.businessjournalism.org/content/4772.cfm?print=yes> (last visited Aug. 23, 2007).

2. Schultz, *supra* note 1.

3. *Id.*

4. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *1 (E.D. Mo. Aug. 26, 2004).

5. Schultz, *supra* note 1.

6. *Id.*

7. *ACF Indus. LLC*, 2004 WL 3178257, at *1.

8. *Id.*; see also Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 1, *Chapman v. ACF Indus. LLC*, 430 F. Supp. 2d 570 (S.D. W. Va. 2006) (No. 3:04-0062), 2006 WL 498859 (listing other named plaintiffs, including the United Steelworkers of America, AFL-CIO, and CLC).

9. The parties were similar but not exactly the same. The declaratory suit named Mr. Chapman, the USW, and Local Union No. 1652 of the USW as defendants. *ACF Indus. LLC*, 2004 WL 3178257, at *1. The plaintiffs in the retirees' suit included Mr. Chapman, Lowell Ward, William Spears, Willie Jackson, Jr., and the USW as a class action against ACF, Program of Insurance Benefits for Retired Bargaining Employees of AMCAR Division of ACF Industries, and Does one through twenty. Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, *supra* note 8, at 1.

Should the first-filed rule apply, allowing ACF's declaratory judgment action to proceed in Missouri (the Eighth Circuit), where ACF had its headquarters?¹⁰ Or should the retirees' suit, alleging that ACF's conduct was actionable under federal law, go forward in West Virginia (the Fourth Circuit), where ACF operated one of its two plants,¹¹ and where most ACF retirees lived?¹² Allowing both to proceed would result in inefficient duplicative litigation.¹³ Not coincidentally, the early sparring over the forum would likely have a huge impact on the outcome of the case. The retirees believed that ACF chose the Eighth Circuit because of its more favorable relevant substantive law; the retirees preferred the Fourth Circuit in part because of a prior ruling favoring retirees in a similar case.¹⁴

Under the first-filed rule, a court may decline jurisdiction over an action when another suit involving the same parties and issues has already been filed in another district.¹⁵ Where two courts have concurrent jurisdiction, the court with the first-filed case has priority to consider it.¹⁶ Judges are charged with using their discretion in exercising this rule, which should not be applied in a "rigid" or "mechanical" fashion.¹⁷ This policy helps conserve judicial resources and promote comprehensive disposition of multiple, related cases.¹⁸

The application of this rule provoked a procedural battle in Mr. Chapman's case, as well as in other cases involving changes to retiree benefits plans.¹⁹ These cases highlight the difficulties of applying the first-filed rule in concurrent federal court litigation. Choosing whether or not to apply the first-filed rule is particularly important in retiree benefits litigation because the federal courts of appeals have adopted several different interpretations of the substantive law underlying these cases.²⁰ This Note

10. ACF Indus. LLC, About ACF, http://www.acfindustries.com/acf_information.asp (last visited Aug. 23, 2007).

11. *Id.* The other plant is located in Pennsylvania. *Id.*

12. Schultz, *supra* note 1.

13. See James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 785-86 (1999). Federal law "disfavors" concurrent federal litigation concerning the same matter in multiple federal courts. Courts facing duplicative federal litigation may transfer and consolidate cases, dismiss or stay one of the cases, or issue an injunction. *Id.* at 786; see also *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993) (stating that parallel litigation would result in duplicative efforts, costs, and inconveniences to the two parties, as well as a waste of judicial resources).

14. Schultz, *supra* note 1; see also *infra* Section IV.A.

15. See, e.g., *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1984).

16. *Id.*

17. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952).

18. *Id.* at 183.

19. See *infra* Section IV.B.

20. See *infra* Section IV; see also William T. Payne, *Lawsuits Challenging Termination or*

focuses on the “procedural fencing” that precedes the substantive litigation in federal district courts.²¹ It does not address at length the circuit splits that inspire litigants to seek so vigorously the forum of their choice.²² Briefly stated, some circuits apply a presumption that favors retirees, while others apply a presumption that favors employers. Retirees prefer circuits where the presumption is in their favor; companies, preferring other venues, file declaratory judgment actions elsewhere.²³ (This Note, which deals with inter-circuit disputes dealing with questions of federal law, does not address district courts dealing with pending state court litigation.²⁴)

Mr. Chapman, the ACF retiree surprised by changes to his health benefits plan, found himself a defendant in the Missouri case.²⁵ “I can’t understand why they’re picking on me,” Mr. Chapman said. “I’m just a retired guy who was sitting on my porch.”²⁶ One month later, he became a plaintiff as well when he filed suit, along with his union, in West Virginia.²⁷ Thus, application of the first-filed rule in these cases necessarily involves the question of who should be the plaintiff and who should be the defendant.

The concept of the “natural plaintiff” has informed district court rulings in cases like the dispute between ACF and its retirees.²⁸ Under a traditional

Modification of Retiree Welfare Benefits: A Plaintiff’s Perspective, 10 LAB. LAW. 91, 93-94 (1994); Jason Blumberg, Comment, *Bringing Back the Yard-Man Inference*, 4 U. PA. J. LAB. & EMP. L. 195, 201-13 (2001); Debra J. Linder, Note, *As Corporations Are Forced to Honor Postretirement Health Benefit Promises, a Chorus Rises: Where, Oh Where, Has My Equity Gone?*, 15 J. CORP. L. 763, 765-79 (1990); Douglas Sondgeroth, Note, *High Hopes: Why Courts Should Fulfill Expectations of Lifetime Retiree Health Benefits in Ambiguous Collective Bargaining Agreements*, 42 B.C.L. REV. 1215, 1231-43 (2001).

21. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *3 (N.D. Ohio Dec. 6, 1999). The district court in *Dana*, when discussing the application of the first-filed rule, approvingly cited a Seventh Circuit statement that “[t]he wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.” *Id.* (citing *Tempco Elec. Heater Corp. v. Omega Eng’g, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987)).

22. *See supra* note 20.

23. William T. Payne, John Stember & Stephen M. Pincus, *Battling for Benefits*, TRIAL, Dec. 2005, at 31; *see also* Blumberg, *supra* note 20, at 201 (describing the *Yard-Man* inference and its importance in retiree benefits cases); Sondgeroth, *supra* note 20, at 1231-42 (discussing various appellate court interpretations of the substantive issues).

24. Other commentators have discussed federal-state parallel litigation issues. *See, e.g.*, George, *supra* note 13, at 849-97.

25. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *1 (E.D. Mo. Aug. 26, 2004).

26. Schultz, *supra* note 1.

27. *ACF Indus. LLC*, 2004 WL 3178257, at *1; *see also* Plaintiffs’ Memorandum in Opposition to Defendants’ Motion for Summary Judgment, *supra* note 8 (listing other named plaintiffs in the retirees’ class action suit against ACF).

28. *See infra* Section IV.

conception of a party-initiated pleading system, the natural plaintiff is the aggrieved party who chooses when, where, and how to go about bringing suit to seek redress for her injuries.²⁹ This type of suit, a “coercive” one, involves a more “traditional” form of relief, such as compensatory damages or an injunction.³⁰ Retirees and their unions claim that they are the natural plaintiffs, since they are the ones seeking redress for an injury—the impact of benefits reductions—through a coercive suit. They argue that, as the natural plaintiffs, their choice of forum should prevail, even if they file their coercive suit after the company files a declaratory judgment action seeking a determination of the legality of the benefits cuts.³¹

This strategy has proved successful in some cases where courts have found a natural plaintiff and allowed that party’s suit to proceed, even though it was not the first-filed one.³² In this Note, I argue in favor of this approach. District courts already face a long list of factors when resolving first-filed disputes. The concept of the natural plaintiff belongs on this list. When considering the application of the first-filed rule, courts should look for a natural plaintiff. If there is one, and that party is not the first-filer, courts should be especially wary of applying the first-filed rule. They should look skeptically at attempts to procedurally fence natural plaintiffs out of their choice of forum.

Such an analysis may require courts to undertake a more detailed factual examination than would be required with a strict application of the first-filed rule—a perhaps unwelcomed burden on overcrowded federal court dockets.³³

29. See *infra* Section III for a discussion of the natural-plaintiff concept. See also Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168-70 (2000).

30. LARRY W. YACKLE, *FEDERAL COURTS* 257 (2d ed. 2003); see also *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 WL 1182883, at *1 (N.D. Ohio Mar. 22, 2000) (characterizing the relationship between a union and an employer in a first-filed dispute in terms of the aggrieved party). In that case,

the union is the aggrieved party: it asserted and continues to assert that Dana violated the agreement. It sought and continues to seek remedies for that breach. Dana simply is responding to the union’s complaint with a denial of any wrongdoing. The union, to the extent that it prevailed, seeks to enforce the arbitrator’s decision. Dana, on the other hand, seeks to enforce no affirmative rights; it, rather, seeks to have the award vacated. . . . Dana has the right . . . to seek to have an arbitrator’s award vacated. . . . But neither that opportunity nor that practice alters the basic relationship between the parties. In this case, the union, as the party seeking a remedy, stands in the posture of a plaintiff, while Dana, the putative wrongdoer, finds itself defending against that claim.

Id. (citation omitted).

31. See *infra* Section IV.B.1 (discussing the retirees’ approach in their memorandum to the court in the *ACF* case).

32. See *infra* Section IV.B.

33. See *As Workload and Resources Head in Opposite Directions, Crisis Looms for Federal Courts*, THE THIRD BRANCH, Mar. 2004, at 1, available at <http://www.uscourts.gov/ttb/mar04ttb/crisis/index.html>

However, this effort is justified to serve the interests of justice. A skeptical approach to first-filers who potentially are seeking to usurp the role of the natural plaintiff would avoid rewarding parties who race to the courthouse. Moreover, this approach would serve the interests of justice in retiree benefits disputes without adversely affecting determinations in first-filed disputes where there is no natural plaintiff.

Section II of this Note provides background to the first-filed rule and recognized exceptions to it, especially those relevant to retiree benefits litigation. After Section III introduces the concept of the natural plaintiff, Section IV reviews the application of the first-filed rule in selected company-union disputes and highlights the use of the natural-plaintiff concept throughout the cases. Section V presents an argument for using the concept of the natural plaintiff as a factor in resolving first-filed disputes.

II. THE FIRST-FILED RULE AND ITS EXCEPTIONS IN CONCURRENT FEDERAL LITIGATION

A. *The Purpose of the Rule and Guidance from Kerotest and Wilton*

In an 1824 case involving a dispute over jurisdiction between a court of law and a court of equity, the United States Supreme Court stated that “[i]n all cases of concurrent jurisdiction, the court which first has possession of the subject matter must decide it.”³⁴ Since then, the first-filed rule has guided the disposition of litigation involving the same (or similar) parties and issues by giving a preference to the suit filed first in time.³⁵ Usually, the court with the first-filed suit decides where the case should be tried by determining whether to enforce the first-filed rule or to allow an exception.³⁶ Courts applying the first-filed rule also consider other relevant issues, such as venue or transfers

(describing increasing workloads and constrained funding for federal courts).

34. *Smith v. McIver*, 22 U.S. (9 Wheat.) 532, 535 (1824).

35. Michael Cavendish, *Understanding the First-to-File Rule and Its Anticipatory Suit Exception*, 75 FLA. B.J. 24, 25 (2001). For the rule to apply, the issues in the two suits must be essentially the same. *Id.*

36. See *George*, *supra* note 13, at 789; see also *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 96 (9th Cir. 1982) (“[T]he forum non conveniens argument should be addressed to the court in the first-filed action.”); *Schnabel v. Ramsey Quantitative Sys., Inc.*, 322 F. Supp. 2d 505, 510-11 (S.D.N.Y. 2004) (“This District has laid down a bright-line rule for situations such as this: ‘The court before which the first-filed action was brought determines which forum will hear the case.’”); *Daimler-Chrysler Corp. v. Gen. Motors Corp.*, 133 F. Supp. 2d 1041, 1044 (N.D. Ohio 2001) (“Leaving the decision of the first to file dispute to the court in which the first case was filed makes good sense, as it establishes a bright line rule, which is as easy to apply as it is to understand.”).

based on forum-selection agreements.³⁷ The first-filed (or first-to-file) rule furthers important policy goals.³⁸ One goal is comity, which requires federal district courts “to exercise care to avoid interference with each other’s affairs.”³⁹ Another function is promoting efficiency by avoiding duplicative litigation.⁴⁰ Applying the first-filed rule also avoids “piecemeal resolution of issues that call for a uniform result.”⁴¹ All of these goals are applicable to retiree benefits litigation.

In *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, the Supreme Court cautioned lower courts not to apply the first-filed rule in a “rigid mechanical” fashion.⁴² But the more that courts allow exceptions to the rule, the more that the rationale for the rule evaporates. A rule that is too flexible would not serve purposes of judicial economy and predictability for litigants because courts would have to balance “innumerable factors” and conduct extensive inquiries in each challenged situation.⁴³ At the same time, the more rigid the rule, the less it serves the core purpose of furthering the interests of justice.⁴⁴

One of the suits in *Kerotest* was a declaratory judgment action.⁴⁵ The federal Declaratory Judgment Act allows a party to ask a court to “declare the rights and other legal relations of any interested party seeking such declaration.”⁴⁶ *Kerotest* involved two cases concerning a patent dispute.⁴⁷ In the first-filed case, the C-O-Two Fire Equipment Company filed suit in federal court in Illinois alleging patent infringement.⁴⁸ Later, the *Kerotest*

37. George, *supra* note 13, at 789-91.

38. See, e.g., *id.* at 785-86; *Rohm & Haas Co. v. Brotech Corp.*, 770 F. Supp. 928, 935 (D. Del. 1991); see also Ryan, *supra* note 29, at 168-70. The first-filed rule is sometimes called the “first-in-time” rule.

39. *W. Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985).

40. *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 930 (3d Cir. 1941) (“The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. . . . [P]ublic policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other’s work in cases involving the same issues and the same parties.”); see also Ryan, *supra* note 29, at 169.

41. *W. Gulf Mar. Ass’n*, 751 F.2d at 729.

42. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 184 (1952).

43. *Berisford Capital Corp. v. Cent. States, Se. & Sw. Areas Pension Fund*, 677 F. Supp. 220, 225 (S.D.N.Y. 1988).

44. *Id.* at 225.

45. *Kerotest*, 342 U.S. at 181-82.

46. Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2006).

47. *Kerotest*, 342 U.S. at 181-82.

48. *Id.* at 181.

Manufacturing Company filed a declaratory judgment action under 28 U.S.C. § 2201(a) in federal court in Delaware to have two of C-O-Two's patents declared invalid.⁴⁹ After protracted procedural litigation, the Third Circuit eventually upheld a stay of the later-filed Delaware suit in favor of the first-filed Illinois suit.⁵⁰ In affirming that ruling, the Supreme Court recognized that the Declaratory Judgment Act "has created complicated problems for coordinate courts."⁵¹ In these types of situations, either party may file suit. According to the Court, "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems."⁵² Instead, district court judges should have "an ample degree of discretion" in resolving these disputes.⁵³

The Supreme Court re-emphasized the extent of judges' discretion in the context of declaratory judgment actions in *Wilton v. Seven Falls Co.*⁵⁴ In *Wilton*, the Court stressed that the Declaratory Judgment Act confers "unique and substantial discretion" on federal courts, which may decide whether or not to accept jurisdiction over the action.⁵⁵ *Wilton* also established that district court procedural rulings on declaratory judgment actions are reviewed on an abuse-of-discretion standard.⁵⁶

B. How Courts Apply the First-Filed Rule and Its Exceptions

Generally, the first-filed rule applies unless (1) the balance of convenience "strongly favors" the forum of the second-filed suit, or (2) there are special or "compelling" circumstances that justify an exception to the

49. *Id.* at 181-82.

50. *Id.* at 182.

51. *Id.* at 183.

52. *Id.*

53. *Id.* at 183-84.

54. *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995).

55. *Id.* at 286.

56. *Id.* at 289; see also Russell B. Hill, *Should Anticipation Kill Application of the Declaratory Judgment Act?*, 26 T. JEFFERSON L. REV. 239, 245 (2004) (explaining that, prior to *Wilton*, circuit courts were "widely divided regarding the standard of review" regarding district court application of the first-filed rule, but that *Wilton* "settled the issue"). But see Keith B. Hall, *Federal Jurisdiction and Procedure*, 46 LOY. L. REV. 101, 124-25 (2000) (stating that the Fifth Circuit generally reviews application of the first-filed rule for abuse of discretion but will review the district court decision de novo, when the plaintiff raises issues regarding the nature and scope of the doctrine, rather than its application on the facts, and citing *Cadle Co. v. Whataburger, Inc.*, 174 F.3d 599 (5th Cir. 1999)).

rule.⁵⁷ If the court with the first-filed suit decides that an exception to the rule applies, the court can dismiss, enjoin, or transfer the first action, or allow both suits to proceed.⁵⁸

The four employer-union cases discussed in detail in Section IV of this Note draw on cases applying the first-filed tests in a variety of settings, including tort actions⁵⁹ and contract disputes.⁶⁰ One often-cited case involved a dispute between two competitors over hiring practices.⁶¹ Another important case centered on a constitutional challenge to a federal agency's subpoena.⁶² The four employer-union cases discussed in this Note sometimes cited decisions involving declaratory judgment and coercive actions in trademark or patent litigation.⁶³ Patent cases, while not always applicable to other types of disputes, are also relevant to retiree benefits litigation.⁶⁴ Sometimes these

57. George, *supra* note 13, at 786-87; *see also* *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir. 1993) (holding that the first-filed rule "yields to the interests of justice" and is not applied where a court finds "compelling circumstances" that support its abrogation).

58. George, *supra* note 13, at 786-87.

59. *See, e.g.*, *BASF Corp. v. Symington*, 50 F.3d 555 (8th Cir. 1995), *cited in* *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *2 (D. Minn. Oct. 30, 2003); *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119 (8th Cir. 1985), *cited in* *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *3 (E.D. Mo. Aug. 26, 2004).

60. *See, e.g.*, *Plating Res., Inc. v. UTI Corp.*, 47 F. Supp. 2d 899 (N.D. Ohio 1999), *cited in* *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *2 (N.D. Ohio Dec. 6, 1999).

61. *Nw. Airlines, Inc.*, 989 F.2d at 1002 (8th Cir. 1993), *cited in* *ACF*, 2004 WL 3178257, at *2, and *Rexam, Inc.*, 2003 WL 22477858, at *4-5.

62. *EEOC v. Univ. of Pa.*, 850 F.2d 969 (3d Cir. 1988), *cited in* *Dana Corp.*, 1999 WL 33237054, at *2, and *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *3 (W.D. Pa. Jan. 9, 2004).

63. *See, e.g.*, *Rexam, Inc.*, 2003 WL 22477858, at *5 (citing *Anheuser-Busch, Inc. v. Supreme Int'l Corp.*, 167 F.3d 417 (8th Cir. 1999) (trademark dispute)); *Dana Corp.*, 1999 WL 33237054, at *3 (citing *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987) (patent dispute)). There are many other circuit court cases involving the first-filed rule in the context of patent or trademark disputes. *See, e.g.*, *Serco Servs. Co. v. Kelley Co.*, 51 F.3d 1037 (Fed. Cir. 1995) (patent dispute); *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931 (Fed. Cir. 1993) (patent dispute); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622 (9th Cir. 1991) (trademark dispute); *Tempco*, 819 F.2d 746 (trademark dispute); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93 (9th Cir. 1982) (patent dispute); *Codex Corp. v. Milgo Electronic Corp.*, 553 F.2d 735 (1st Cir. 1977) (patent dispute); *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177 (2d Cir. 1969) (patent dispute).

64. *See* George, *supra* note 13, at 804-05 (noting that tests and remedies for the first-filed rule that are applied in patent cases are not always applicable to other types of cases, and that patent cases "appear to make up a greatly disproportionate number of federal parallel cases and have developed somewhat distinct rules"); *see also* *Daimler-Chrysler Corp. v. Gen. Motors Corp.*, 133 F. Supp. 2d 1041, 1043 n.2 (N.D. Ohio 2001) (explaining the distinction between application of the first-filed rule in patent cases versus other kinds of cases). The Northern District of Ohio court noted that the Federal Circuit applies the first-filed rule more rigorously in patent cases "to enable alleged infringers to relieve themselves of the uncertainty that can result from a patent-holder's delay in filing suit, and, as well, in view of the consideration that all appeals in patent cases go to that court, thereby reducing the impetus to forum-shop."

cases underlie a circuit's adoption of the first-filed rule.⁶⁵ They also provide an example of contrasting approaches, since the courts of appeals vary in how strictly they interpret the first-filed rule in patent cases.⁶⁶

1. *The Balance of Convenience Test*

The first test, balancing the conveniences between two forums, is similar to a forum non conveniens analysis.⁶⁷ The doctrine of forum non conveniens allows a court to decline to hear a case, even when jurisdiction is authorized.⁶⁸ Under that doctrine, the court will weigh relative advantages and obstacles to trial in the forum and not allow a plaintiff to “vex,” “harass,” or “oppress” the defendant by choosing an inconvenient forum.⁶⁹

Venue transfer in the federal courts can be accomplished through 28 U.S.C. § 1404(a), which allows a district court, considering “the convenience of parties and witnesses” and “in the interest of justice,” to transfer a case “to any other district or division where it might have been brought.”⁷⁰ Federal courts are generally deferential to the plaintiff's choice of venue, and defendants' motions under § 1404(a) are usually denied.⁷¹ Differences do

Id. (citing *Genentech, Inc.*, 998 F.2d at 937). As a result, “decisions involving a race to the courthouse between a declaratory judgment plaintiff and a patent holder probably are not of much precedential value except in patent cases.” *Id.*

65. See, e.g., *Univ. of Pa.*, 850 F.2d at 971 (stating that the Third Circuit adopted the first-filed rule in *Crosley Corp. v. Hazeltine Corp.*, 122 F.2d 925, 929 (3d Cir. 1941), a case that involved a patent dispute).

66. See *infra* Section II.B.2 for a further discussion of first-filed cases in the patent context. See also *Daimler-Chrysler Corp.*, 133 F. Supp. 2d at 1044 (noting differences between circuits in terms of the strictness with which courts apply the first-filed rule). Referring to briefs and arguments filed by the defendants in its case, the *Daimler-Chrysler* court noted that the defendants “believe that this circuit applies the first to file rule rigidly (*i.e.*, in their favor), while the Seventh Circuit is less receptive, if not hostile, to first-filed declaratory judgment actions.” *Id.* In support of this distinction, the court compared two first-filed cases involving patent disputes, one in the Sixth Circuit and one in the Seventh Circuit. *Id.*

67. *George*, *supra* note 13, at 787.

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

69. *Id.* at 508.

70. 28 U.S.C. § 1404(a) (2006); see also *Hoffman v. Blaski*, 363 U.S. 335 (1960) (interpreting the “where it might have been brought” clause).

71. *Ryan*, *supra* note 29, at 176; see also *Star Lines, Ltd. v. P.R. Mar. Shipping Auth.*, 442 F. Supp. 1201, 1207 (S.D.N.Y. 1978) (“The burden of persuasion regarding the appropriateness of a discretionary transfer lies with the movant.”). Transfers are granted only with “a clear cut and convincing showing by defendant that the balance of convenience weighs strongly in favor of the transferee court” *Id.* (quoting *Gen. State Auth. (of Pa.) for Benefit of Crompton-Richmond Co. v. Aetna Cas. & Sur. Co.*, 314 F. Supp. 422, 423 (S.D.N.Y. 1970)).

persist among federal courts in how much weight to give the various factors that apply to an inconvenient transfer motion.⁷²

In first-filed disputes, district courts have discretion in applying the inconvenient forum balancing test.⁷³ *William Gluckin & Co. v. International Playtex Corp.* is a leading example of the application of a convenience test in the context of two concurrently litigated federal cases.⁷⁴ In *William Gluckin & Co.*, the Second Circuit reviewed the long list of factors that a New York district court cited as support for its decision to allow a case to proceed in New York instead of Georgia.⁷⁵ These factors included, among others, the identity of the “primary” party; the location of the main offices; where the product was designed, produced, and advertised; and the location of counsel and witnesses.⁷⁶ In summary, the “whole of the war and all the parties to it” were located in New York.⁷⁷ The Second Circuit affirmed the district court’s decision as not “unreasonable” given the circumstances.⁷⁸

One recent retiree benefits case squarely addressed an inconvenient-venue argument.⁷⁹ In *Rexam, Inc. v. United Steel Workers of America*, Rexam, a manufacturer of beverage cans, sought a declaratory judgment on whether it could lawfully amend its retiree health benefits plan.⁸⁰ Rexam filed in federal court in Minnesota.⁸¹ By filing in the Eighth Circuit, Rexam chose a court that rejects the *Yard-Man* inference, an approach that generally favors plan participants.⁸² Seven days later, the union that had represented the retirees

72. Ryan, *supra* note 29, at 176-77.

73. *William Gluckin & Co. v. Int’l Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969).

74. *Id.* at 177.

75. *Id.* at 179-80.

76. *Id.*

77. *Id.* at 180 (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

78. *Id.*

79. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858 (D. Minn. Oct. 30, 2003).

80. *Id.* at *1.

81. *Id.*

82. William T. Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits* 26 (unpublished manuscript, on file with University of Pittsburgh Law Review) (citing *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512 (8th Cir. 1988)). In *Anderson*, the Eighth Circuit stated that “we disagree with *Yard-Man* to the extent that it recognizes an inference of an intent to vest. . . . We believe that it is not at all inconsistent with labor policy to require plaintiffs [retirees] to prove their case without the aid of gratuitous inferences.” 836 F.2d at 1517. *But see* *Sloan v. BorgWarner Diversified Transmission Prods. Inc.*, No. 06-10861, 2006 WL 1662634, at *2 n.1 (E.D. Mich. June 9, 2006) (“The [*Yard-Man*] inference exerts a fair amount of influence in how these types of cases are resolved. . . . However, under *Yard-Man*, there is no legal presumption. . . . Rather, the inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits.” (citations omitted) (internal quotations omitted)).

sued Rexam in federal court in Ohio.⁸³ By filing in the Sixth Circuit, the union chose a court that applies the *Yard-Man* inference.⁸⁴ Rexam sought to enjoin the union's parallel proceedings; the union moved to dismiss Rexam's claim or, alternatively, to transfer venue to Ohio.⁸⁵

The district court in Minnesota retained jurisdiction over Rexam's action for multiple reasons.⁸⁶ In its discussion of the first-filed rule, the court held that there were no "compelling circumstances" to justify an exception to the first-filed rule.⁸⁷ It did not address the convenience issue.⁸⁸ The court analyzed the convenience issue later, when it denied the motion to transfer venue to the Northern District of Ohio.⁸⁹ First, the court examined the convenience to the parties. Rexam had offices in Chicago and Charlotte.⁹⁰ Thus, Minnesota was not a logical venue choice, but the court noted that "Minneapolis is easily accessible by air travel."⁹¹ Transferring to Ohio would not be significantly more convenient for the defendants' unions, which were based in Washington, D.C., and Pittsburgh.⁹² Next, the court considered the convenience for witnesses. The union suggested that it would call retirees living in Pittsburgh and Toledo; the court noted, however, that Rexam's retirees lived in forty-eight states and Puerto Rico, so that factor was not compelling.⁹³ The only argument left under an inconvenient-venue argument would be one to further "the interests of justice,"⁹⁴ but the court referred to its earlier exposition of the compelling circumstances factors for denying the motion on those grounds.⁹⁵

In *Rexam*, neither party had a strong argument for its choice of venue. With retirees living throughout the United States, Rexam could have filed its declaratory action in many different districts. Minnesota suited it, though, and the union did not have a compelling argument under § 1404(a) for moving the case to Ohio. Other large American companies seeking to amend retiree

83. *Rexam, Inc.*, 2003 WL 22477858, at *4.

84. Payne et al., *supra* note 23, at 31.

85. *Rexam, Inc.*, 2003 WL 22477858, at *1.

86. The *Rexam* court considered more than just the first-to-file issue; among other topics, it considered subject matter jurisdiction and ripeness of the retirees' claims. *Id.* at *2, *6.

87. *Id.* at *5. See *infra* Section II.B.2 for a discussion of the "special circumstances" exceptions.

88. *Rexam, Inc.*, 2003 WL 22477858, at *4-5.

89. *Id.* at *8.

90. *Id.* at *3.

91. *Id.* at *7.

92. *Id.*

93. *Id.*

94. 28 U.S.C. § 1404(a) (2006).

95. *Rexam, Inc.*, 2003 WL 224778658, at *8.

benefits programs are likely to be similarly situated to *Rexam*, with a wide range of venue choices, since their retirees live in many different states.⁹⁶ When the *Rexam* court applied the balance-of-convenience test, it did so after already having decided that there were no compelling circumstances to justify a departure from the first-filed rule.⁹⁷ Likewise, a balance-of-convenience argument may appear in other retiree benefits cases, but as in *Rexam*, it is not likely to determine the outcome. Instead, the real battles lie in the special circumstances exceptions to the first-filed rule.

2. *The Special Circumstances Test*

A variety of special circumstances could apply to a first-filed dispute.⁹⁸ These factors include:

- (1) the similarity of the claims, though perfect identity is not required;
- (2) the relative progress of the two cases;
- (3) the existence of a forum selection clause;
- (4) a plaintiff's need to litigate that claim individually rather than join a class;
- (5) the need to consolidate related actions;
- (6) multidistrict litigation transfer for pretrial purposes;
- (7) lack of notice of the first-filed claim;
- (8) having jurisdiction over necessary or desirable parties;
- (9) discouragement of forum shopping;
- (10) the bad faith filing of a declaratory judgment action; and
- (11) "state interest" of the second forum.⁹⁹

The party challenging the first-filed rule has the burden of proving special circumstances.¹⁰⁰

96. See Schultz, *supra* note 1 ("In the past two years, employers have sued union retirees across the country."); see also KAISER FAMILY FOUNDATION, CURRENT TRENDS AND FUTURE OUTLOOK FOR RETIREE HEALTH BENEFITS: FINDINGS FROM THE KAISER/HEWITT 2004 SURVEY ON RETIREE HEALTH BENEFITS (2004), available at <http://www.kff.org/medicare/7194/upload/Current-Trends-and-Future-Outlook-for-Retiree-Health-Benefits-Findings-from-the-Kaiser-Hewitt-2004-Survey-on-Retiree-Health-Benefits.pdf>. The Kaiser Family Foundation surveyed large employers, most of them multi-state employers, that offered retiree health benefits. *Id.* at vi. The survey found that 79 percent of the large employers had increased retiree contributions to premiums in the past year. *Id.* at xii. The "vast majority" indicated that they planned to increase retiree contributions for premiums, or raise cost-sharing requirements, or both, in the coming year. *Id.* at xiii.

97. *Rexam, Inc.*, 2003 WL 22477858, at *7-8, *4-5.

98. Hill, *supra* note 56, at 239. Hill describes the test for deciding first-filed disputes as one composed of a "hodgepodge of factors." *Id.*

99. George, *supra* note 13, at 787-88 (footnotes omitted).

100. *Id.* at 788.

In the context of first-filed disputes involving declaratory judgment actions, the factors of bad faith, forum shopping, and the related anticipatory lawsuit exception stand out.¹⁰¹ Courts are likely to accept a bad faith argument when it appears that the plaintiff in the first-filed suit unfairly won a race to the courthouse, such as when a declaratory plaintiff pretends to engage in settlement negotiations while it stealthily prepares to file suit in the forum of its choice.¹⁰² The anticipatory or imminent lawsuit exception often appears when the plaintiff in the second-filed, coercive action—one seeking a more traditional form of relief, such as compensatory damages or an injunction¹⁰³—claims that the first-filed declaratory action was filed in anticipation of that suit.¹⁰⁴ The possibility of forum shopping runs through each of these factors, since a party might rush to file in order to select a more desirable forum.¹⁰⁵

The *Kerotest* recommendation of “wise judicial administration” serves as the basis for determining when a court should or should not exercise its discretionary jurisdiction over a declaratory judgment action.¹⁰⁶ In *Kerotest*, the Supreme Court specifically referenced the possibility of forum shopping and plainly disapproved of this tactic: “The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the

101. See Hill, *supra* note 56, at 247-48; see also *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991).

102. Hill, *supra* note 56, at 248.

103. See YACKLE, *supra* note 30, at 257; see also *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 19 (1983) (“Federal courts have regularly taken original jurisdiction over declaratory judgment suits in which, if the declaratory judgment defendant brought a coercive action to enforce its rights, that suit would necessarily present a federal question.”).

104. See Hill, *supra* note 56, at 248. In patent cases, a company charged with infringing on another’s patent might seek a declaratory judgment that its actions do not violate that patent. *Id.* at 242-43. “Uncertainty, insecurity and controversy can be crippling to a company as it decides whether to pursue a course of conduct alleged to violate the rights of another. Typically, the company has to choose between capitulating to the demands of the accuser or possibly accruing significant damages—perhaps even enhanced or punitive damages.” *Id.* at 239. A declaratory judgment action thus affords an alleged violator the opportunity to have its rights declared, without having to wait for the alleged patent holder to sue it first. *Id.*

105. *Id.* at 248.

106. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952); see also George, *supra* note 13, at 785-86. The “wise judicial administration” concept also underlies the *Colorado River* doctrine, which applies to state-federal parallel litigation, not to federal-federal litigation. *Id.* at 803. The dual use of this principle “has led to confusion for courts that might be tempted to apply the multi-factored *Colorado River* test in an intrafederal setting.” *Id.* For example, the Seventh Circuit once cited *Colorado River* in an intrafederal situation, but later corrected that reliance. *Id.*

courthouse, not a headstart.”¹⁰⁷ Courts analyzing first-filed disputes regularly cite *Kerotest*.¹⁰⁸ They also apply appellate first-filed precedents that vary in how strictly they follow the first-filed rule and in the weight given to the presence of an anticipatory suit and the likelihood of forum shopping.¹⁰⁹

The Eighth Circuit’s “two red flags” test, which focuses on declaratory judgment actions, is particularly applicable to retiree benefits cases.¹¹⁰ The dispute in *Northwest Airlines, Inc. v. American Airlines, Inc.* began when Northwest sought a declaratory judgment in federal district court in Minnesota that it was competing lawfully by hiring former American employees.¹¹¹ Six weeks later, American sued for injunctive relief in federal district court in Texas.¹¹² The district court in Minnesota applied the first-filed rule, enjoining the American suit in Texas and allowing the Northwest suit to proceed.¹¹³ On appeal, the Eighth Circuit noted that “[t]wo factors here send up red flags that there may be compelling circumstances.”¹¹⁴ The “two red flags” test looks for (1) an anticipatory lawsuit and (2) the fact that one of the actions is a declaratory judgment, since those actions “may be more indicative of a preemptive strike than a suit for damages or equitable relief.”¹¹⁵

The Eighth Circuit held that neither factor presented a compelling circumstance in the case. First, Northwest’s action did not fit the anticipatory suit exception, since communications between the parties had given no indication that American was imminently pursuing a suit.¹¹⁶ Second, Northwest had a good argument for filing a declaratory judgment action, since it claimed that its hiring practices had been “chilled by American’s intimation

107. *Kerotest*, 342 U.S. at 185.

108. See George, *supra* note 13, at 802-04; see also *Cadle Co. v. Whataburger, Inc.*, 174 F.3d 599, 603 (5th Cir. 1999); *Serco Servs. Co. v. Kelley Co.*, 51 F.3d 1037, 1039 (Fed. Cir. 1995); *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 627-28 (9th Cir. 1991); *W. Gulf Mar. Ass’n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985); *EEOC v. Univ. of Pa.*, 850 F.2d 969, 977 (3d Cir. 1988); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982); *William Gluckin & Co. v. Int’l Playtex Corp.*, 407 F.2d 177, 178 (2d Cir. 1969).

109. Compare, e.g., *Nw. Airlines, Inc. v. Am. Airlines, Inc.* 989 F.2d 1002 (8th Cir. 1993) (applying the first-filed rule after considering the possibility that the first-filed suit was an anticipatory one), with *Univ. of Pa.*, 850 F.2d at 969 (rejecting the application of the first-filed rule when the first-filed suit was filed in anticipation of an imminent enforcement action).

110. *Nw. Airlines, Inc.*, 989 F.2d at 1007.

111. *Id.* at 1003.

112. *Id.* at 1003-04.

113. *Id.* at 1004.

114. *Id.* at 1007.

115. *Id.*

116. *Id.*

that Northwest was violating the law.”¹¹⁷ The court expressly contrasted Northwest’s predicament with that in another case where the defendant in the first-filed suit could be considered the true plaintiff in the second-filed suit.¹¹⁸ In its final conclusion, the Eighth Circuit implicitly addressed the concept of forum shopping when it stated that Northwest, “in filing first, had neither acted in bad faith nor raced to the courthouse to preempt a suit by American in Texas.”¹¹⁹

The Second Circuit, which is known for weighing the balance of conveniences,¹²⁰ also considers anticipatory filings and forum shopping.¹²¹ In *Factors Etc., Inc. v. Pro Arts, Inc.*, Factors threatened to sue Pro Arts for allegedly infringing its exclusive commercial rights to the name and likeness of Elvis Presley.¹²² Pro Arts responded by immediately filing an action seeking a declaratory judgment that it had not infringed those rights.¹²³ According to the court, the anticipatory nature of the declaratory judgment filing could factor into the decision to allow an exception to the first-filed rule.¹²⁴ By permitting an exception to the first-filed rule, the Second Circuit prevented the winner of the race to the courthouse from enjoying the forum of its choice.¹²⁵ Other Second Circuit cases explicitly mention forum-shopping considerations.¹²⁶

A leading Third Circuit case gave great weight to the possibility of forum shopping.¹²⁷ In *EEOC v. University of Pennsylvania*, the University

117. *Id.*

118. *Id.* (citing *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 489 (8th Cir. 1991)).

119. *Id.*

120. *See, e.g.*, *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177, 178-79 (2d Cir. 1969).

121. *See, e.g.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215 (2d Cir. 1978); *see also* *Schnabel v. Ramsey Quantitative Sys., Inc.*, 322 F. Supp. 2d 505, 507, 511 (S.D.N.Y. 2004) (holding that the defendant had not met its “heavy burden” of proving there were “special circumstances,” such as forum shopping or a determination that the first suit was the result of an anticipatory lawsuit, justifying the dismissal of the first-filed action).

122. *Factors Etc., Inc.*, 579 F.2d at 217.

123. *Id.* at 217.

124. *Id.* at 219.

125. *Id.* The Second Circuit quoted Justice Brennan in support of its holding. As Mr. Justice Brennan had observed, “[t]he federal declaratory judgment is not a prize to the winner of a race to the courthouses.” *Id.* (citing *Perez v. Ledesma*, 401 U.S. 82, 119 n.12 (1971) (Brennan, J., dissenting)).

126. *See, e.g.*, *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 19 (2d Cir. 1986) (“[T]he chief ‘special circumstance’ we have noted is our interest in discouraging forum shopping.”). In *Factors*, the Second Circuit cited to a district court case that addressed forum shopping. *Factors, Etc., Inc.*, 579 F.2d at 219 (citing *Columbia Pictures Indus. Inc. v. Schneider*, 435 F. Supp. 742, 747 (S.D.N.Y. 1977)).

127. *See EEOC v. Univ. of Pa.*, 850 F.2d 969 (3d Cir. 1988).

challenged a national EEOC policy by filing suit in the district court for the District of Columbia.¹²⁸ The EEOC then filed an enforcement suit in a district court in the Third Circuit.¹²⁹ The district court judge in that case held that an exception to the first-filed rule applied and refused to dismiss the EEOC's suit.¹³⁰ The Third Circuit affirmed, basing its decision in large part on the University's obvious attempt at forum shopping.¹³¹ The court reasoned that when the University filed suit, it knew that the EEOC's enforcement action was imminent and that Third Circuit precedent would likely favor the EEOC.¹³² According to the court, the University's conduct was "tantamount to the blowing of a starter's whistle in a foot race."¹³³ The court concluded that the first-filed rule should not apply when one of the parties is trying to "circumvent local law" and preempt an imminent enforcement action.¹³⁴

Many first-filed disputes involving patent litigation include a discussion of the anticipatory suit exception.¹³⁵ Forum shopping is arguably less relevant in patent cases because of the Federal Circuit's role in promoting uniformity in applying patent laws throughout the various district courts.¹³⁶ Because courts have developed a "distinct" set of rules for managing patent cases, rules developed in the patent context should be considered with "caution" in other contexts.¹³⁷ However, these cases do demonstrate well how courts apply differing perspectives to first-filed disputes.

Genentech, Inc. v. Eli Lilly & Co., a Federal Circuit case, stressed that there must be a "sound reason" for allowing an exception to the first-filed rule.¹³⁸ The fact that the first-filed suit was a declaratory action did not change the analysis since that judgment was "entitled to precedence as against a later-filed patent infringement action."¹³⁹ Still, the Federal Circuit does consider the anticipatory nature of a suit as a special circumstance that may potentially warrant an exception to the first-filed rule.¹⁴⁰ In terms of forum

128. *Id.* at 971.

129. *Id.*

130. *Id.*

131. *Id.* at 973, 975-76.

132. *Id.*

133. *Id.* at 978 (citing *Rayco Mfg. Co. v. Chicopee Mfg. Corp.*, 148 F. Supp. 588, 592 (S.D.N.Y. 1957)).

134. *Id.*

135. *See supra* notes 64 and 66.

136. *See Hill, supra* note 56, at 254.

137. *See supra* note 64.

138. *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993).

139. *Id.*

140. *Serco Servs. Co. v. Kelley Co.*, 51 F.3d 1037, 1039-40 (Fed. Cir. 1995). The *Serco* court

shopping, the *Genentech* court pointed out that first-filed suits may be dismissed when forum shopping was the only motive for the suit, but not when there are “sound reasons” for the first-filer’s choice of forum.¹⁴¹

The Seventh Circuit takes a different approach. In *Tempco Electric Heater Corp. v. Omega Engineering, Inc.*,¹⁴² the court stressed that it did not adhere to a “rigid” first-filed rule.¹⁴³ Rather, “[w]here, as here, the declaratory judgment action is filed in anticipation of an infringement action, the infringement action should proceed, even if filed four days later.”¹⁴⁴ The *Tempco* court was skeptical of the declaratory judgment filer who might be acting to secure a more advantageous forum.¹⁴⁵ Filing first did not give *Tempco* the “right” to choose a forum, the court reasoned, noting that the purpose of the Declaratory Judgment Act “would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.”¹⁴⁶ Allowing the first-filer to prevail would encourage an “unseemly” race to the courthouse in similar cases.¹⁴⁷

Like the *Genentech* court, some critics disapprove of a liberal application of exceptions to the first-filed rule. One commentator protests overuse of the anticipatory-suit exception, decrying its limiting effect on the ability of a party to bring a declaratory judgment action to resolve the “uncertainty, insecurity and controversy” that can be “crippling” to a company embroiled in a patent dispute.¹⁴⁸ However, the presence of an anticipatory suit also implicates concerns about forum shopping. While it might be reasonable to assert that “the risk of outcome-determinative forum shopping in patent cases has been largely eliminated,”¹⁴⁹ that position is not justified in the retiree benefits context, where substantive differences between the circuits are crucially important to companies and retirees.¹⁵⁰

considered both the “race to the courthouse” factor and the convenience of the parties. *Id.* Ultimately, the relative convenience of the parties was a “sound reason” to uphold the lower court’s decision not to continue the declaratory suit. *Id.* at 1040.

141. *Genentech, Inc.*, 998 F.2d at 938.

142. 819 F.2d 746 (7th Cir. 1987).

143. *Id.* at 750.

144. *Id.* at 749.

145. *See id.* at 749-50.

146. *Id.* (internal quotations omitted) (citing *Am. Auto. Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939)).

147. *Id.* at 750.

148. Hill, *supra* note 56, at 239.

149. *Id.* at 254.

150. *See Payne et al.*, *supra* note 23, at 31; *see also Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543-44 (7th Cir. 2000) (discussing the presumption of vesting in retiree benefits cases and stating that

III. THE NATURAL PLAINTIFF AND FORUM-SELECTION PRIVILEGES

When a party asks a court to decide not to follow the first-filed rule, it is essentially asking that court to favor the disfavored—that is, to let the second-filed suit proceed instead of the first-filed suit. Courts are understandably reluctant to do so, since the first-filed rule serves important goals of judicial economy and comity between courts.¹⁵¹ When making these decisions, courts use the factors described in Section II.B.¹⁵² Another applicable factor is the natural-plaintiff concept.

Under the common-law tradition, the plaintiff, as “master of the complaint,” frames the issues of the case, deciding whom to sue,¹⁵³ what claims to bring,¹⁵⁴ and where to sue.¹⁵⁵ Given traditional notions of party-initiated pleading systems, the natural plaintiff is the aggrieved party, or the one with a cause of action for coercive relief.¹⁵⁶

The Supreme Court has expressed support for the plaintiff’s forum-selection privilege, or the exercise of the “plaintiff’s choice” principle.¹⁵⁷ In *Gulf Oil Corp. v. Gilbert*, a 1947 forum non conveniens case, the Court stated that a plaintiff may not “vex,” “harass,” or “oppress” the defendant by choosing an inconvenient forum, but “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”¹⁵⁸ In another 1947 case, the Court reasoned that the plaintiff should generally “not be deprived of the presumed advantages of his home jurisdiction.”¹⁵⁹ The Court in *Van Dusen v. Barrack* reviewed lower court cases involving transfer

“[c]ases in other circuits are all over the lot”).

151. See George, *supra* note 13, at 786.

152. See *supra* Section II.B.

153. As “master of the complaint,” the plaintiff “has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties.” *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (citing 16 J. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 107.14[2][c], at 107-67 (3d ed. 2005)).

154. For example, the well-pleaded complaint rule enables the plaintiff to “eschew[] claims based on federal law,” so that the case will be heard in state court. *Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002).

155. See Ryan, *supra* note 29, at 168.

156. *Id.* at 189; see also text accompanying YACKLE, *supra* note 30.

157. See Ryan, *supra* note 29, at 168-69 (discussing the plaintiff’s traditional privilege of selecting the forum in which to bring a suit).

158. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). In the forum non conveniens context, relevant factors include, inter alia, the “relative ease of access to sources of proof” and other “practical problems that make disposing of a case easy, expeditious, and inexpensive.” *Id.*

159. *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947).

of venue and noted that, “[o]f course[,] these cases allow plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected.”¹⁶⁰

However, there are constraints on these privileges. Statutory mechanisms such as removal and transfer of venue¹⁶¹ give defendants tools as well. These provisions allow courts to invoke the principle of “judicial management,” which elevates the importance of convenience and efficient resolution of disputes.¹⁶² According to commentator Antony L. Ryan, the judicial management and plaintiff’s choice principles “co-exist uneasily.”¹⁶³

Declaratory judgment actions complicate matters. Edwin Borchard, the proponent of declaratory judgment actions whose work helped lay the foundation for the federal Declaratory Judgment Act,¹⁶⁴ stressed the utility of this procedure.¹⁶⁵ In these cases, “no traditional ‘wrong’ has yet been committed or immediately threatened,” but there is a “cloud upon the plaintiff’s rights” that “endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace.”¹⁶⁶ But are parties filing declaratory judgment actions natural plaintiffs seeking to enforce their rights,¹⁶⁷ or are they potential defendants seeking to “appropriate” plaintiffs’ privileges by filing a declaratory judgment action?¹⁶⁸

Wilton v. Seven Falls Co. gives insight into how courts should approach declaratory judgment actions.¹⁶⁹ The *Wilton* Court held that the Declaratory Judgment Act confers “unique and substantial discretion in deciding whether to declare the rights of litigants,” allowing federal courts to exercise their discretion in deciding to hear declaratory judgment actions, rather than

160. 376 U.S. 612, 633 (1964).

161. See 28 U.S.C. § 1404 (2006).

162. Ryan, *supra* note 29, at 169.

163. *Id.*

164. See Andrew Bradt, “*Much to Gain and Nothing to Lose*”: Implications of the History of the Declaratory Judgment for the (b)(2) Class Action, 58 ARK. L. REV. 767, 771 (2006).

165. See EDWIN BORCHARD, DECLARATORY JUDGMENTS 20 (2d ed. 1941); see also Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2559 (1998). In discussing the need for anticipatory relief, Meltzer cited Borchard, who had stated, “in explaining the need for declaratory judgments, a prospective victim should not be told ‘that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it.’” *Id.* (citing Edwin M. Borchard, *The Constitutionality of Declaratory Judgments*, 31 COLUM. L. REV. 561, 589 (1931)).

166. BORCHARD, *supra* note 165, at 18.

167. For a defense of the rights of declaratory judgment plaintiffs, see Hill, *supra* note 56.

168. See Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 102 (1999).

169. 515 U.S. 277 (1995).

recognizing an absolute right in the litigant to bring such actions.¹⁷⁰ However, as Ryan stresses, *Wilton*'s ruling applied to a federal court dealing with a question of state law.¹⁷¹ Thus, it left open the question of whether the ruling applies when the parallel action is not in a state court but is in another federal court where the claim arises under federal law.¹⁷² Concurrent federal-federal cases invoke the judicial management principle, as courts seek to avoid duplication and inefficiencies. They also implicate plaintiff's choice principles; however, application of those principles is complicated by the question of whether the first-filer, the declaratory judgment plaintiff, is really a potential defendant in a coercive action who is attempting to assert plaintiffs' privileges, particularly the forum-selection privilege. Thus, according to Ryan, "[t]he more faithful application of the plaintiff's-choice principle . . . may be to defer to the choice of forum by the 'natural plaintiff,' which usually means favoring the action for coercive relief over the declaratory-judgment action."¹⁷³

Retiree benefits cases present an example of the usefulness of identifying the natural plaintiff and, where one is found, granting more deference to that party's choice of forum. This approach enables courts to avoid a too-rigid application of the first-filed rule—an inflexibility that would violate traditional notions that the aggrieved party should determine the course of litigation.¹⁷⁴

IV. APPLYING THE FIRST-FILED RULE IN EMPLOYER-UNION DISPUTES AND THE THEME OF THE NATURAL PLAINTIFF

A. *Putting Retiree Benefits Disputes in Context*

ACF Industries, which unilaterally altered medical benefits enjoyed by Basil Chapman and his fellow retirees, is not alone. Many other companies have implemented or are considering the same course of action.¹⁷⁵

Forty years ago, retiree health benefits were relatively inexpensive for employer sponsors.¹⁷⁶ Since then, health care costs have risen dramatically,

170. *Id.* at 286.

171. *See* Ryan, *supra* note 29, at 189-90.

172. *Id.*

173. *Id.* at 190.

174. *See supra* text accompanying notes 29-30.

175. *See supra* note 96.

176. Watson Wyatt Worldwide, *Retiree Health Benefits: Time to Resuscitate?*, at 2, <http://www.watsonwyatt.com/research/resrender.asp?id=W-559&page=2> (last visited Aug. 23, 2007); *see*

and more retirees began receiving those benefits.¹⁷⁷ The combination of “generous benefits, steadily increasing utilization rates, growing retiree populations and rapidly escalating cost of services” has created fiscal problems for some employers.¹⁷⁸ Many companies have responded by reducing coverage for future retirees; in a 2004 survey, 79 percent of the companies surveyed had recently increased their retirees’ contributions for premiums.¹⁷⁹ Facing steep premium increases, some retirees drop out of the plan; then, the company no longer pays their costs and can write the obligation to pay the benefits off their recorded liabilities.¹⁸⁰ Another approach is for the company and the union to negotiate an agreement to reduce benefits.¹⁸¹

Some companies, including Rexam and ACF Industries, unilaterally reduce benefits for already-retired workers.¹⁸² Retirees protesting benefit cuts sue under federal law since state causes of action are generally preempted.¹⁸³ Both union and non-union retirees can sue under the Employee Retirement Income Security Act of 1974 (ERISA).¹⁸⁴ Former union employees can sue under the Labor Management Relations Act of 1947 (LMRA) as well as ERISA.¹⁸⁵ In these challenges, courts consider whether coverage was meant

also Eduardo Porter & Mary Williams Walsh, *Benefits Go the Way of Pensions*, N.Y. TIMES, Feb. 9, 2006, at C1. Porter and Walsh quoted Paul Fronstin, director of the Health Research and Education Program at the Employee Benefit Research Institute, who remarked: “It was easy to offer these things 40 years ago because they were cheap. They’re not cheap anymore.” *Id.*

177. Watson Wyatt Worldwide, *supra* note 176, at 2.

178. *Id.*

179. *See supra* note 96; *see also* Sondgeroth, *supra* note 20, at 1219-23 (describing trends in retiree health benefits).

180. Ellen E. Schultz, *Employer Actions Drive Health Costs For Retirees Higher*, WALL ST. J., Dec. 30, 2004, at B1. In a later interview on PBS’s NOW program, Ellen Schultz went on to say: “In fact, when retirees drop out it is boosting companies’ income. And depending on how many people drop out, you get enough gains added to your income on a quarterly basis that it can actually help you meet your earnings targets.” *NOW, Science & Health: Aging in America, Pension Health Benefits, Retiree Health Benefits* (PBS television broadcast Apr. 1, 2005) (transcript available at http://www.pbs.org/now/transcript/transcriptNOW113_full.html).

181. *See, e.g.*, *Shy v. Navistar Int’l Corp.*, No. C-3-92-333, 1993 WL 1318607 (S.D. Ohio May 27, 1993) (approving a class action settlement reducing retiree benefits for a corporation that had downsized significantly and would likely have entered bankruptcy without changes to its benefits plan). General Motors has also been negotiating with its retirees. *See* Jeff Green, *GM Retirees May Fight Health Cuts; Ford Union Members May Join*, BLOOMBERG.COM, Dec. 30, 2005, http://www.bloomberg.com/apps/news?pid=10000103&sid=aUR.kgr_0gIw&refer=us.

182. *See, e.g.*, *Rexam, Inc. v. United Steelworkers*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, *1 (D. Minn. Oct. 30, 2003); *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, *1 (E.D. Mo. Aug. 26, 2004).

183. *See* Payne et al., *supra* note 23, at 27.

184. *Id.*

185. *Id.*; *see also, e.g.*, *Crown Cork & Seal Co. v. United Steelworkers*, No. 03-CV-1381, 2004 WL

to be “vested” or “gratuitous” and subject to termination at the will of the employer.¹⁸⁶ Some governing plan documents unambiguously state that retiree benefits must continue throughout retirement, so that the retirees would more likely prevail.¹⁸⁷ Alternatively, some state that the benefits are terminable, so that the retirees would more likely lose.¹⁸⁸ Other documents, however, are ambiguous.¹⁸⁹ Whether or not the documents are ambiguous is thus the central legal issue in these cases.¹⁹⁰

This is where the circuit split becomes important. In *UAW v. Yard-Man, Inc.*, the Sixth Circuit held that “retiree benefits are in a sense ‘status’ benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained.”¹⁹¹ Other circuits, including the Fourth and Eleventh, also apply this inference, while others do not.¹⁹²

B. Employer-Union Disputes

The substantive issues underlying retiree benefits disputes are “much-litigated” ones.¹⁹³ Serious consideration of the first-filed rule within these cases is less common. Such a case may proceed without any consideration of the rule.¹⁹⁴ Four relatively recent cases—three involving retiree benefits

117923, at *1 (W.D. Pa. Jan. 9, 2004) (describing the coercive action that union retirees brought against Crown under the LMRA and ERISA).

186. See Payne et al., *supra* note 23, at 27 (citing *Sprague v. Gen. Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc)).

187. *Id.* at 28.

188. *Id.*

189. *Id.*

190. See Sondgeroth, *supra* note 20, at 1230 (“The most important issue in welfare benefits termination cases is whether the two parties to the agreement, the employer and the union, mutually intended to provide benefits that lasted beyond the life of the agreement. . . . If the language of the collective bargaining agreement unambiguously describes the duration of the retirees’ medical benefits, courts will abide by the language of the contract and consider that language to be completely indicative of the parties’ intent. If, instead, the language is ambiguous as to whether the benefits were intended to vest, courts allow both sides to introduce extrinsic evidence to clarify the parties’ intentions at the formation of the agreement. The degree to which a court protects the expectations of the employees and considers the context of the unionized workplace greatly affects both the determination of ambiguity and the ultimate question of what the parties intended.” (footnotes omitted)).

191. 716 F.2d 1476, 1482 (6th Cir. 1983).

192. Payne et al., *supra* note 23, at 31; see also *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 541-44 (7th Cir. 2000) (surveying decisions dealing with the “much-litigated issue” of retiree health benefits and discussing the “presumption” against vesting of health care benefits); Sondgeroth, *supra* note 20, at 1231-42 (discussing the circuit split).

193. *Rossetto*, 217 F.3d at 541.

194. See, e.g., *id.* at 539. In that case, the retirees sued the employer for terminating their health

disputes and one involving a labor dispute between a union and an employer—illustrate recent application of the first-filed rule in the employer-union context. In all of these cases, the employer filed a declaratory judgment action first and the union then filed a coercive action. All of the courts deciding this jurisdictional issue invoked, either explicitly or implicitly, the concept of the natural plaintiff.

1. ACF Industries, LLC v. Chapman

To return to the story of Basil Chapman and ACF Industries, the retirees asked the Missouri District Court to dismiss ACF's declaratory judgment action, or, alternatively, to transfer the case to the federal district court in West Virginia, the site of the retirees' second-filed suit.¹⁹⁵ Applying the "two red flags" analysis established in *Northwest Airlines, Inc. v. American Airlines, Inc.*,¹⁹⁶ the Missouri court found that both red flags were evident.¹⁹⁷ First, ACF, the plaintiff in the first action, knew that the retirees would file suit. Its action in announcing the changes and filing the declaratory judgment action the very next business day indicated a disfavored "race to the courthouse."¹⁹⁸ Second, ACF's suit was a declaratory judgment action.¹⁹⁹

The court did not stop there, though. It invoked the concept of the natural plaintiff when it dismissed ACF's reliance on another case, in which "no other suit was ever filed by the 'natural plaintiffs,' nor did the 'natural plaintiffs' seek dismissal based on another pending suit."²⁰⁰ In contrast, the retirees who alleged that ACF had violated provisions of the LMRA and ERISA in fact did claim that they were "the natural plaintiffs and as such enjoy the right of selecting their forum and framing the litigation."²⁰¹ The Missouri court agreed with their position.²⁰² Allowing ACF to win a race to the courthouse by adhering to the first-filed rule would have deprived those natural plaintiffs of

benefits. The district court granted summary judgment to the employer. *Id.* at 541-42. The Seventh Circuit reversed and remanded. *Id.* at 547.

195. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, *1 (E.D. Mo. Aug. 26, 2004).

196. 989 F.2d 1002, 1006 (8th Cir. 1993).

197. *ACF Indus. LLC*, 2004 WL 3178257, at *2.

198. *Id.*

199. *Id.*

200. *Id.* at *3.

201. Memorandum of Law in Support of Defendants' Motion to Defer Consideration of Plaintiff's Motion for Summary Judgment at 3, *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257 (E.D. Mo. Aug. 26, 2004), 2004 WL 2127571.

202. *ACF Indus. LLC*, 2004 WL 3178257, at *3.

their right to select the forum of their choice.²⁰³ Thus, the court in its discretion transferred the Missouri case to West Virginia.²⁰⁴

2. Crown Cork & Seal Co. v. United Steelworkers of America, AFL-CIO

In June 2003, Crown Cork & Seal Company (Crown) reduced its retirement benefits package and, on the same day, filed suit in federal district court in Chicago (in the Seventh Circuit) for a declaratory judgment that its action was proper.²⁰⁵ Twenty days later, Crown's retirees and their union filed suit in federal district court in Cincinnati (in the Sixth Circuit) against the company.²⁰⁶ The retirees moved to dismiss the Chicago action, claiming that it was a "pre-emptive strike" that improperly deprived the retirees of the right to "frame their own claims and choose their own forum"—a right that the retirees, as the natural plaintiffs, had exercised by filing the Cincinnati suit.²⁰⁷ The Chicago judge transferred the case to a federal district court in Pittsburgh, even though neither side had requested that transfer.²⁰⁸

In Pittsburgh, the district court declined to exercise jurisdiction over the declaratory action, allowing the second-filed Ohio suit to proceed.²⁰⁹ The Pennsylvania district court cited a number of reasons for its decision, including the fact that the second-filed action was "substantially further along" than the case in its court.²¹⁰ The court also noted the presence of applicable exceptions to the first-filed rule, including an anticipatory suit and forum shopping.²¹¹ The court also frowned on the use of a declaratory judgment action "as a race for res judicata."²¹²

203. *Id.*

204. *Id.* The Third Circuit cited this case when it rejected the "natural plaintiff" approach in a retiree benefits dispute with different facts. *In re Amendt*, 169 F. App'x 93, 97 (3d Cir. 2006) (not precedential); see *infra* text accompanying notes 300-02.

205. *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *1 (W.D. Pa. Jan. 9, 2004).

206. *Id.*

207. *Id.* at *2.

208. *Id.*

209. *Id.* at *3.

210. *Id.*

211. *Id.* (citing *EEOC v. Univ. of Pa.*, 850 F.2d 969 (3d Cir. 1988) (setting forth reasons for courts to allow exceptions to the first-filed rule, including where the first suit was motivated by forum shopping, when the second-filed suit had developed further, or where the first-filer had sued in anticipation of another action)).

212. *Id.* at *3 (citing *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1225 (3d Cir. 1989)).

Significantly, the court strongly stated its position on these types of actions:

[T]his Court rules that the *proper plaintiffs* in an action to determine whether the retirees' retirement benefits can be unilaterally changed (and without notice) are the retirees and the Union. Further, that as the *proper plaintiffs*, the retirees and their Union should be permitted to select the forum of their choice so long as the selected forum has some nexus to the lawsuit.²¹³

Framing the problem in this way is different from a blanket condemnation of forum shopping. The *Crown* court only briefly alluded to the substantive law differences that motivated *Crown* to sue in the Seventh Circuit.²¹⁴ It did not raise the converse of that issue—the reasons why the retirees sought to be in the Sixth Circuit. The court disapproved of the company's forum shopping, but it implicitly recognized that the retirees, left to their own devices, would do their own shopping; that strategy would be permissible because they were the “proper” plaintiffs.²¹⁵

Thus, the Pittsburgh court's interpretation of forum shopping in first-filed cases elevates the importance of first identifying the natural plaintiffs and then acting to discourage forum shopping by the opposing party. In *Crown*, the company had reduced its benefits package and filed a declaratory judgment action on the same day, without any notice to the retirees who then faced the injury of diminished health benefits.²¹⁶ This sequence of events parallels that in *ACF*, where the Missouri court also invoked the natural-plaintiffs concept to justify a departure from the first-filed rule.²¹⁷

3. UAW v. Dana Corp.

Dana, which preceded the *ACF* and *Crown* cases, is not a retiree benefits case, but it presents an analogous fact pattern.²¹⁸ In *Dana*, the UAW sought to enforce the Dana Corporation's compliance with an arbitrator's award

213. *Id.* (emphasis added).

214. *Id.* at *1.

215. See *supra* Section III for a discussion of Supreme Court statements on the plaintiffs' rights to choose the forum.

216. *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *1 (W.D. Pa. Jan. 9, 2004).

217. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *3 (E.D. Mo. Aug. 26, 2004).

218. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *1 (N.D. Ohio Dec. 6, 1999).

relating to a labor disagreement.²¹⁹ Following pre-agreed procedures, the parties submitted the dispute to binding arbitration.²²⁰ After the arbitrator sustained the union's grievance, the union asked Dana if it intended to comply with the decision.²²¹ Dana responded that it was considering the arbitrator's decision, and then, while the union awaited its response, the company filed a declaratory judgment complaint in federal district court in North Carolina to vacate the award.²²² The UAW filed its own action in federal district court in Ohio four hours later.²²³ This case, too, invoked the natural-plaintiff concept and specifically addressed the forum-shopping argument central to *ACF* and *Crown*.

In determining whether to exercise its jurisdiction over Dana's action, the United States District Court for the Northern District of Ohio differentiated forum shopping from forum selection:

The device of the declaratory judgment can thus, when cleverly employed, be an effective aid to forum shopping by a party who anticipates that suit is about to be filed against it. Proper forum selection should not be confused with inappropriate forum shopping. A plaintiff seeking redress for a cognizable injury is entitled, to the extent able to choose among several forums, to select the one that it finds most attractive. Forum shopping, on the other hand, occurs when a party, perceiving that it may find itself forced into a disadvantageous forum, seeks to manipulate procedural devices to secure an advantage which, were those devices not available, it could not employ to defeat its opponent's choice of forum.²²⁴

Given this caution, the court reasoned that Dana's declaratory judgment action was forum shopping, since it "was motivated by a desire to preempt the choice of forum that otherwise would be for the union to make."²²⁵ As in *ACF* and *Crown*, the court expressly identified the union as the "true plaintiff" and

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at *1-2. In its subsequent ruling on this case, the court noted that Dana did not cite the Declaratory Judgment Act when filing its action. *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 WL 1182883, at *2 (N.D. Ohio Mar. 22, 2000). Instead, it filed under the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (2006). *Id.* After the court's first ruling, Dana argued that cases involving declaratory judgment actions and the first-filed rule did not apply to its situation because it had not filed its complaint under the Declaratory Judgment Act. *Id.* However, the court noted that there was no "meaningful difference" between the language of the two acts in terms of the declaratory relief that a party could seek. *Id.* It then reaffirmed its ruling in favor of the union's action. *Id.*

223. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *2 (N.D. Ohio Dec. 6, 1999).

224. *Id.* at *4.

225. *Id.* at *5.

ruled against Dana.²²⁶ The court denied Dana's motion to dismiss, stay, or transfer the case and ordered it to show cause why the court should not enjoin it from further maintaining its declaratory judgment action.²²⁷ The court later enjoined Dana from so doing.²²⁸

Further, the court stated a more general principle for first-filed disputes involving declaratory judgment actions.²²⁹ According to the court, there should be a presumption that the declaratory action should be dismissed or stayed in favor of the coercive suit—that is, a *preference* for an exception to the first-filed rule in these situations.²³⁰ “At the very least,” the court stated, the plaintiff in the first-filed declaratory judgment action “should have the burden of showing persuasive cause why its suit should not be dismissed or enjoined.”²³¹ Later, when holding that Dana had failed to do so, the court reiterated that “the union, as the party seeking a remedy, stands in the posture of a plaintiff, while Dana, the putative wrongdoer, finds itself defending against that claim.”²³² The plaintiff “is entitled to choose the forum,” the court held.²³³

4. *Rexam, Inc. v. United Steel Workers of America, AFL-CIO-CLC*

Section II.B.1 of this Note describes the *Rexam* district court's analysis of the balance-of-convenience test. Before applying that test, however, the court considered whether it should exercise its jurisdiction to hear the declaratory action because of other factors, including the possibility that *Rexam's* action was a wrongful preemptive strike or an attempt at forum shopping.²³⁴ The court considered those issues twice, once in an analysis of

226. *Id.* at *6.

227. *Id.*

228. *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 WL 1182883, at *2 (N.D. Ohio Mar. 22, 2000). The court stated that it remained “firmly of the view that the union is the true plaintiff, and, as such, is entitled to choose its forum, and not to have that choice made for it by its adversary.” *Id.*

229. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *6 (N.D. Ohio Dec. 6, 1999).

230. *Id.*

231. *Id.*

232. *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 WL 1182883, at *1 (N.D. Ohio Mar. 22, 2000).

233. *Id.* at *2.

234. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *2-3 (D. Minn. Oct. 30, 2003). In support of these factors, the court cited *Verizon Communications, Inc. v. Inverizon International, Inc.*, 295 F.3d 870 (8th Cir. 2002) and *BASF Corp. v. Symington*, 50 F.3d 555 (8th Cir. 1995). Both cases involved issues of federal-state parallel litigation, or inter-jurisdictional disputes, compared to the retiree benefits cases, which present issues of federal-federal parallel litigation, or intra-jurisdictional disputes. Thus, the first-filed rule does not apply in the same way. In *Verizon*, the court did consider the order of filing. *Verizon*, 295 F.3d at 874. It was relevant that Verizon had filed its declaratory

its discretion to hear a declaratory judgment action,²³⁵ and once in an analysis of the application of the first-filed rule.²³⁶ Ultimately, the court rejected both of these similar arguments.²³⁷

First, Rexam's suit did not fit the anticipatory suit exception.²³⁸ The union first filed grievances against the changes to Rexam's benefits plan in December 2001.²³⁹ The parties met and exchanged information from February through October 2002.²⁴⁰ It was not until May 2003 that Rexam filed its suit.²⁴¹ The court compared this fact pattern with that of *Northwest Airlines*, where Northwest knew that American was considering litigation but there was no documentation that litigation was imminent.²⁴² The court in *Northwest Airlines* had allowed Northwest's suit to proceed.²⁴³ Similarly, in *Rexam*, the union had referenced the possibility of litigation in a letter to Rexam in 2002, but that letter did not state that litigation was imminent.²⁴⁴ According to the court, Rexam, which initiated litigation six months later, had not "secretly learned" of the union's plan to sue and did not act in anticipation of a suit by the union.²⁴⁵

Northwest Airlines' second "red flag"—the presence of a declaratory judgment action—did appear in this case.²⁴⁶ According to the court, Rexam was legitimately interested in clarifying its ability to amend its plan and end a series of expensive grievances. The company wanted to remove a seventy-nine million dollar liability attributable to retiree benefits from its balance

judgment action first, though "not dispositive." *Id.* The court reiterated that litigants should not use declaratory judgments "defensively" in order to "deny a prospective plaintiff's choice of forums." *Id.* (citing *Prudential Ins. Co. of Am. v. Doe*, 140 F.3d 785, 790 (8th Cir. 1998)). According to the court, Verizon had not engaged in improper forum shopping or filed an anticipatory suit. *Id.* at 874. The *BASF* court held that a products liability defendant could not choose the forum by virtue of a declaratory judgment action filed before the injured party's claim. *BASF*, 50 F.3d at 559.

235. *Rexam, Inc.*, 2003 WL 22477858, at *2-3. This analysis relied on the *Wilton* precedent, as well as *Verizon* and *BASF*. *Id.*

236. *Id.* at *4-5. The court used the *Northwest Airlines'* "two red flags" framework for this analysis. *Id.*

237. *Id.* at *3.

238. *Id.*

239. *Id.* at *1.

240. *Id.*

241. *Id.* at *3.

242. *Id.* at *4-6 (discussing *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993)).

243. *Id.* at *5.

244. *Id.* at *3.

245. *Id.* at *5.

246. *Id.*

sheet.²⁴⁷ In its view, this liability “lower[ed] its stock value and impair[ed] its ability to obtain financing.”²⁴⁸ Thus, although forum shopping might have played a role in Rexam’s decision, it was not the sole motivating factor.²⁴⁹ The court held that Rexam had not “raced to the courthouse” to preempt the union’s suit.²⁵⁰

C. Common Threads

The district courts in *ACF*, *Crown*, *Dana*, and *Rexam* all sought to reconcile the usual preference for allowing the first-filed case to proceed where other factors bolstered the argument for taking the second-filed case. In applying exceptions to the first-filed rule, all dealt with three common themes. First, the balance of conveniences was generally not a significant factor. Second, forum shopping and the possible presence of an anticipatory suit were relevant. Third, all disputes involved declaratory judgment actions. In three of the four cases, the court’s identification of a natural plaintiff unified these themes and led the court to resolve the first-filed dispute in favor of the second-filed suit.

The first common theme is that the balance of convenience test was not, in practice, a powerful analytical tool. The district court in *ACF* never even addressed the issue of convenience in its ruling.²⁵¹ The *Crown* court briefly noted that it had considered the relative conveniences and interests, but did not describe the issue of convenience at all.²⁵² After the district court in Ohio described evidence of *Dana*’s forum shopping, it added that there was “no other plausible explanation” for *Dana*’s decision to file in North Carolina when its headquarters were in Ohio, along with likely witnesses.²⁵³ Thus,

247. *Id.* at *3.

248. *Id.*

249. *Id.*

250. *Id.* at *5 (quoting *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993)). Subsequently, the court denied Rexam’s motion for summary judgment. *Rexam, Inc. v. USW*, No. 03-2998 ADM/JJG, 2006 U.S. Dist. LEXIS 6579 (D. Minn. Feb. 21, 2006). The court held that the unions had alleged sufficient facts to preclude resolving the issue of whether benefits were vested on summary judgment. *Id.* at *32-33, *52.

251. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257 (E.D. Mo. Aug. 26, 2004).

252. *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *3 (W.D. Pa. Jan. 9, 2004). This case actually began when *Crown* filed in Chicago (Seventh Circuit). *Id.* at *1. At a status conference, the Chicago judge transferred the case to the Western District of Pennsylvania (Third Circuit). *Id.* at *2. According to the Pittsburgh judge, “[s]upposedly neither side requested such a transfer.” *Id.*

253. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *5 (N.D. Ohio Dec. 6, 1999).

“[t]he convenience of the parties could not have been a factor motivating Dana’s decision to file . . . in North Carolina.”²⁵⁴ The *Rexam* court addressed the location issue twice. First, it reviewed factors relating to its discretion over the declaratory judgment action,²⁵⁵ and then it considered the § 1404(a) motion to transfer venue.²⁵⁶ It did not specifically address convenience when applying the first-filed rule.²⁵⁷

Thus, in the four cases, convenience was only an issue in *Rexam*. Even there, the argument was stretched. The court noted that *Rexam* had contacts with forums throughout the country, so “there is no suggestion that filing suit in Minnesota is any more arbitrary than bringing suit in one of the other forty-seven states where retirees reside.”²⁵⁸ This reasoning might support a decision not to refuse jurisdiction because of conveniences, but it is not a ringing endorsement of the selection of the Minnesota venue. Likewise, convenience is not likely to be a determinative factor in other suits where the parties are large, multi-state employers and retirees who are scattered across the country. That said, convenience is not negligible for some parties, particularly elderly retirees fighting to preserve health care benefits.²⁵⁹

Second, each court probed for evidence of an anticipatory suit and looked for evidence of forum shopping. ACF appeared to provoke the retirees to threaten suit with its call to Mr. Chapman.²⁶⁰ Crown never gave the retirees a chance to consider a first suit—it changed its benefits plan and filed suit on the same day.²⁶¹ The timing of Dana’s suit, filed before the company had responded to the union’s query whether the company planned to sue, “strongly suggest[ed] a preemptive purpose.”²⁶² All three provided evidence to the district court that the employer filed suit to preserve its choice of forum when it knew that there was the potential of future litigation. *Rexam*, on the other

254. *Id.* at *5.

255. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *3 (D. Minn. Oct. 30, 2003).

256. *Id.* at *7.

257. *Id.* at *4-5.

258. *Id.* at *3.

259. See Ellen E. Schultz, *Plaintiff Cry: When Retirees Sue an Ex-Employer*, WALL ST. J. ONLINE, Nov. 10, 2004, <http://online.wsj.com/public/resources/documents/SB110003715157069249.htm>. Schultz describes the travails of a group of elderly retirees struggling to travel to the courthouse in Akron, Ohio, from their homes in Pennsylvania, Kentucky, Ohio, and Texas. *Id.*

260. *NOW Science & Health: Aging in America, Pension Benefits, Retiree Benefits*, *supra* note 180; see *supra* text accompanying notes 1-7; see also *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *1 (E.D. Mo. Aug. 26, 2004).

261. See *infra* text accompanying note 265.

262. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *5 (N.D. Ohio Dec. 6, 1999).

hand, openly discussed the benefit plan changes with the union for over a year before filing suit.²⁶³

In these cases, the possibility of an anticipatory suit was useful mostly in determining whether the declaratory judgment plaintiff had engaged in forum shopping. Whether or not there was actually notice of a coercive suit did not seem to change the analysis. Thus, *Crown*, where there was no actual threat of litigation—because the retirees could not possibly have considered a suit when they did not know the change was going to happen—is analytically similar to *ACF*, where the company provoked the threat of a lawsuit. It would be inappropriate to create a legally relevant distinction between the two situations by making it meaningful that one declaratory judgment plaintiff had one day's notice, and the other did not. Thus, the presence of an anticipatory suit, which is the first of *Northwest Airlines'* "two red flags," may be more appropriately described as a tool in the search for evidence of forum shopping.²⁶⁴ That search is the one that invokes the concept of the natural plaintiff: the retirees in *ACF* and *Crown* can easily be described as natural plaintiffs seeking redress for injuries caused by the defendant-company.

In these cases, courts found that forum shopping exists where the company—the declaratory judgment plaintiff—races to the courthouse, as in *ACF*, *Crown*, and *Dana*; but is not determinative where there does not appear to be a race at all, as in *Rexam*. Another way of analyzing the situation is from the perspective of the natural plaintiff. The companies surprised the retirees in *ACF* and *Crown* with near-simultaneous announcements of benefit reductions and litigation, giving them no time to assert their status as the natural plaintiffs in the matter and select the forum of their choice. In *Rexam*, however, a year and a half of negotiations clouded the issue of which party was the natural plaintiff. Was it the union dealing with the benefit reductions, or the company seeking a court determination to end a seemingly endless series of grievances? If the company could be characterized as a natural plaintiff, then its Eighth Circuit suit would be a way to assert its forum-selection rights, and not an example of forum shopping. If *Rexam* was a natural plaintiff, then allowing the union's second-filed suit to proceed in the Sixth Circuit would reward forum shopping on the union's part. An alternate interpretation of *Rexam* is that both parties were arguably natural plaintiffs, each of which was seeking to select the forum of its choice, in which case the

263. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *3 (D. Minn. Oct. 30, 2003).

264. See also Hill, *supra* note 56, at 247-48 (describing the anticipatory suit exception as a "superset" of the bad faith exception, which focuses on whether the first-filer unfairly won the race to the courthouse).

firm application of the first-filed rule made sense as a straightforward way of solving a parallel-litigation problem.

Third, all cases considered the presence of a declaratory judgment action as a factor in determining which of two parallel cases should proceed.²⁶⁵ The courts noted that they had discretion over whether or not to exercise jurisdiction over a declaratory judgment action.²⁶⁶ In *Northwest Airlines*, the fact that one side had brought a declaratory judgment action was a “red flag” that prompted a closer examination of whether the first-filed rule should apply.²⁶⁷ One court, *Dana*, even noted that there should be “a presumption that a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.”²⁶⁸ But the courts also recognized that the first-filed rule “should not be disregarded lightly.”²⁶⁹ The goals of the Declaratory Judgment Act would be thwarted if the party opposing the motion could too easily displace that action with its own suit.²⁷⁰ Thus, it was not the fact, on its own, that one suit involved a declaratory judgment action; instead, the courts closely analyzed the nature of the litigation and the conduct of the parties. They reached the nub of the analysis by invoking, either explicitly or implicitly, the concept of the natural plaintiff.²⁷¹

265. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *2 (E.D. Mo. Aug. 26, 2004); *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *2-3 (W.D. Pa. Jan. 9, 2004); *Dana Corp.*, 1999 WL 33237054, at *3-4; *Rexam, Inc.*, 2003 WL 22477858, at *5.

266. *See, e.g., Rexam, Inc.*, 2003 WL 22477858, at *2 (citing *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)).

267. *See, e.g., Rexam, Inc.*, 2003 WL 22477858, at *4-5 (citing *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1006-07 (8th Cir. 1993)).

268. *Dana Corp.*, 1999 WL 33237054, at *6.

269. *Id.* at *2 (quoting *Church of Scientology v. U.S. Dep’t of the Army*, 611 F.2d 738, 750 (9th Cir. 1979)).

270. Hill, *supra* note 56, at 255.

271. Three of the cases explicitly discussed the position of natural plaintiffs. In *ACF*, the court specifically distinguished the case with that of another where no other suit had been filed by the natural plaintiffs. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *3 (E.D. Mo. Aug. 26, 2004) (citing *John Sorrell & Co. v. United Food & Commercial Workers Int’l Union*, 37 F.3d 1302 (8th Cir. 1994)). The *Crown* court held that the controversy should be resolved in the forum chosen by the “natural plaintiffs.” *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *3 (W.D. Pa. Jan. 9, 2004). The *Dana* court discussed the concern for ascertaining the identity of the “true plaintiffs.” *Dana Corp.*, 1999 WL 33237054, at *4. The *Rexam* court implicitly addressed the issue of natural plaintiffs by focusing specifically on the motivations of Rexam, the declaratory plaintiff, for suing and its purported injuries. *Rexam, Inc.*, 2003 WL 22477858, at *3.

V. FACTORING IN THE NATURAL-PLAINTIFF CONCEPT WHEN APPLYING THE FIRST-FILED RULE

Courts considering abrogating the first-filed rule require a strong showing that notions of “equity” demand such a course.²⁷² In concurrent federal litigation involving the first-filed rule, courts can successfully strike this balance between the usefulness of a “bright line” rule and equity considerations by invoking the concept of the natural plaintiff.

Three out of the four employer-union cases described in this Note either explicitly or implicitly identified a natural plaintiff and held in favor of that party. The *ACF* court, which ruled on the retirees’ motion to dismiss or transfer *ACF*’s declaratory action, explicitly identified the retirees as the natural plaintiffs.²⁷³ As such, they should have had their choice of forum.²⁷⁴ Thus, the court granted their motion to transfer *ACF*’s case to the district court in West Virginia.²⁷⁵ The *Crown* court also explicitly stated its case for the natural plaintiff, holding that the retirees were the proper plaintiffs and as such should have been able to select the forum.²⁷⁶

In its initial discussion of the case, the *Dana* court was not quite so explicit. First, it discussed the usual factors relevant to a decision to forego the first-filer’s suit.²⁷⁷ Then it noted how other courts had expressed concern over the identity of the natural plaintiff, and it, too, expressed disapproval of a party who seeks to “manipulate procedural devices” to defeat the choice of forum of its opponent, the party that was seeking redress for a “cognizable injury.”²⁷⁸ The *Dana* court was persuaded that the company had acted in order to “preempt” the choice of forum that should have been the union’s to make.²⁷⁹ In its initial order, the court concluded that the “successful grievant is the ‘true plaintiff’” and ordered *Dana* to show cause why the court should not enjoin it from maintaining its declaratory action.²⁸⁰ In its subsequent order enjoining

272. See, e.g., *Plating Res., Inc. v. UTI Corp.*, 47 F. Supp. 2d 899, 905 (N.D. Ohio 1999) (“Having decided that the three factors of the first-to-file rule are satisfied, the Court next considers whether equity warrants dispensing with the rule in this case.”).

273. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *5 (E.D. Mo. Aug. 26, 2004).

274. *Id.* at *5-6.

275. *Id.* at *6.

276. *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *3 (W.D. Pa. Jan. 9, 2004).

277. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *2-4 (N.D. Ohio Dec. 6, 1999).

278. *Id.* at *4.

279. *Id.* at *5.

280. *Id.* at *6.

Dana from maintaining its declaratory judgment action, the court explicitly affirmed its use of the natural-plaintiff concept to guide its decision. It explained that “the union, as the party seeking a remedy, stands in the posture of a plaintiff, while Dana, the putative wrongdoer, finds itself defending against that claim.”²⁸¹ As a result, the court remained “firmly of the view that the union is the true plaintiff, and, as such, is entitled to choose its forum, and not to have that choice made for it by its adversary.”²⁸²

Rexam is the only case of the four examples that did not hold for the union in the first-filed dispute.²⁸³ However, this result actually underscores the usefulness of the natural-plaintiff framework. In a case where there is no clear natural plaintiff—as in *Rexam*, where the court sympathized with *Rexam*’s desire to clarify its obligations after lengthy negotiations²⁸⁴—a court’s strong preference to abide by the first-filed rule’s bright line is more likely to prevail.

The courts in these four cases arguably got it right. However, merely reaching a just result would not serve the first-filed rule’s goals of consistency and predictability. Here, though, the four courts reached their conclusions in a way that suggests a broader theme applicable to other first-filed disputes.

First, when considering the factors relevant to a first-filed dispute, a court should examine the situation to ascertain if there is a natural plaintiff. This analysis incorporates the traditional emphasis on looking for inappropriate forum shopping and “the proverbial race to the courthouse.”²⁸⁵ A natural plaintiff may plausibly appear when an aggrieved party files a coercive suit, one seeking a “traditional” remedy such as compensatory damages or an injunction,²⁸⁶ after its opponent has already filed a declaratory judgment action, at least partially in an attempt to secure the forum of its choice.²⁸⁷

Second, if there is a natural plaintiff, and that party has lost the race to the courthouse, then the court should look skeptically at the first-filer’s suit. In

281. *UAW v. Dana Corp.*, No. 3:99CV7603, 2000 WL 1182883, at *1 (N.D. Ohio Mar. 22, 2000).

282. *Id.* at *2.

283. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *4 (D. Minn. Oct. 30, 2003). Later, the district court denied *Rexam*’s motion for summary judgment. *Rexam, Inc. v. USW*, No. 03-2998 ADM/JJG, 2006 U.S. Dist. LEXIS 6579 (D. Minn. Feb. 21, 2006).

284. *Rexam, Inc.*, 2003 WL 22477858, at *3.

285. *ACF Indus. LLC v. Chapman*, No. 4:03CV1765 HEA, 2004 WL 3178257, at *3 (E.D. Mo. Aug. 26, 2004).

286. YACKLE, *supra* note 30, at 257.

287. Looking for a race to the courthouse and the presence of a declaratory judgment action are the two “red flags” from *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993).

this context, the court must be persuaded that the first-filed suit should not be dismissed or enjoined in favor of the natural plaintiff's second-filed suit.²⁸⁸ That analysis would refer to established precedents of that court's circuit²⁸⁹ but within a context of greater deference to the interests of the second-filing party than apparent in a plain statement of the first-filed rule.

This approach furthers the plaintiff's privilege in selecting a forum, given that the court has carefully determined which party is the proper plaintiff. It provides a rationale for taking an unusually skeptical look at the first-filer's choice of forum and improves on the practice of going through a "hodgepodge of factors" in the decision-making process.²⁹⁰ Identifying a natural-plaintiff provides a way for the court to assert its role as a neutral arbiter and prevent one side from manipulating procedural devices to secure an advantage. The natural plaintiff approach does not require courts to change the factors that they use to test whether or not to apply the first-filed rule. Previous precedents, such as *Northwest Airline's* "two red flags," preserve their vitality. Instead, under this framework, courts would consider the concept of the natural plaintiff and, where appropriate, vault it ahead of the other factors, such as convenience and deterrence of forum shopping.

This emphasis is particularly appropriate when convenience is not much of an issue and forum-shopping considerations may be equivocal. For example, neither the *ACF*, *Crown*, nor *Dana* courts devoted much time to a discussion of convenience.²⁹¹ The *Rexam* court addressed conveniences, but it did so in a context where the natural-plaintiff concept was not as useful, and thus that element retained more significance.²⁹² All four courts discussed forum shopping, but that designation is strained in a situation where *both* parties are maneuvering to achieve their choice of forum. For example, the *Dana* court stressed the difference between "[p]roper forum selection," an entitlement held by a plaintiff seeking redress for a cognizable injury, and "inappropriate forum shopping," as when a party manipulates procedural

288. The *Dana* court called for a burden-shifting approach. When a declaratory judgment plaintiff is not the natural plaintiff, that party "should have the burden of showing persuasive cause why its suit should not be dismissed or enjoined." *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *6 (N.D. Ohio Dec. 6, 1999).

289. See *supra* Section II.B for a discussion of approaches to the first-filed test.

290. Hill, *supra* note 56, at 239.

291. For example, after discussing the "true plaintiff" and Dana's desire to preempt the union's choice of forum, the *Dana* court stated that "there is no other plausible explanation for Dana's actions. The convenience of the parties could not have been a factor motivating Dana's decision to file in the Northern District of North Carolina." *Dana Corp.*, 1999 WL 33237054, at *5.

292. See *supra* Section IV.B.4.

devices, such as application of the first-filed rule, to secure an advantage.²⁹³ The *Crown* court allowed the retirees and the union (the natural plaintiffs) to select the forum of their choice, resulting in litigation in the Sixth Circuit,²⁹⁴ home to the *Yard-Man* inference.²⁹⁵ According to the *Dana* court's definition of forum shopping, the unions in those cases were engaged in "[p]roper forum selection"—not "inappropriate forum shopping"²⁹⁶—but such a distinction, which is not so black-and-white to start with, becomes even grayer when each side is maneuvering to take advantage of a circuit split.

Courts face a long list of factors when they consider the application of the first-filed rule.²⁹⁷ Sometimes they closely analyze only a few of those factors, as when the Eighth Circuit scrutinizes the two red flags it deems particularly significant.²⁹⁸ The natural-plaintiff concept would provide a framework for interpreting cases involving a declaratory judgment action, a possible anticipatory suit exception, and the presence of forum shopping. It could provide a useful tool for parties, such as the unions in retiree benefits cases, to structure their arguments, as well as an analytical framework supporting a court's approach to justifying an abrogation of the first-filed rule.

Sometimes the natural-plaintiff factor would not apply. It might have limited usefulness in declaratory judgment actions involving patent disputes, where the alleged infringer who files a declaratory judgment action to assert its right to continue doing business could be characterized as the natural plaintiff. Faced with threats from the alleged patent holder to sue and recover significant damages, the alleged infringer must choose between ceasing its business involving that patent, or facing crippling penalties if found in violation.²⁹⁹ Where each side claims the title of natural plaintiff, the distinction is no longer useful. Courts would then consider the usual factors,

293. *Dana Corp.*, 1999 WL 33237054, at *4.

294. *Crown Cork & Seal Co. v. USW*, No. 03-CV-1381, 2004 WL 117923, at *3-4 (W.D. Pa. Jan. 9, 2004).

295. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1984).

296. *Dana Corp.*, 1999 WL 33237054, at *4.

297. See *supra* text accompanying notes 98-99.

298. *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 989 F.2d 1002, 1007 (8th Cir. 1993).

299. See Hill, *supra* note 56, at 239; see also *Daimler-Chrysler Corp. v. General Motors Corp.*, 133 F. Supp. 2d 1041, 1043 n.2 (N.D. Ohio 2001) ("The Federal Circuit has . . . held that the first to file rule will be applied more rigorously in patent cases to enable alleged infringers to relieve themselves of the uncertainty that can result from a patent-holder's delay in filing suit, and, as well, in view of the consideration that all appeals in patent cases go to that court, thereby reducing the impetus to forum-shop.").

such as the anticipatory suit exception, with the usual preference for adhering to the first-filed rule.³⁰⁰

In the retiree benefits cases, each side could have claimed that it was a legitimate plaintiff: the companies sought judicial determination of their liabilities, and the retirees sought redress for the benefits cuts. The *Rexam* court sympathized with this argument, since Rexam had negotiated extensively with the unions before filing its declaratory action. Arguably, the company believed it had to pursue court action to clarify its responsibilities.³⁰¹ In contrast, in *ACF* and *Crown*, the companies filed suit immediately after announcing benefit cuts, never giving the retirees a chance to assert their status as natural plaintiffs. Timing was also a factor in another similar case, *In re Amendt*, in which the Third Circuit rejected the *ACF* court's "natural plaintiff" approach.³⁰² In that case, the retirees "waited an entire year" after the company had filed its declaratory action to bring their own suit; by that time, the court presiding over the declaratory action had denied the retirees' motion to transfer the action.³⁰³ The court was thus unsympathetic to their "natural plaintiff" argument. Significantly, *In re Amendt* involved a writ of mandamus, an "extraordinary remedy," thus distinguishing it from the *ACF* case.³⁰⁴ Since both the timing of the lawsuits and the type of remedy distinguish *In re Amendt* from *ACF*, the rejection of the natural-plaintiff theory is not as forceful as it would be in a case where the context was more similar to that of *ACF*.

The *Dana* court, though dealing with a different employer-union issue, most explicitly called for a preference for allowing the coercive action to proceed, even if it was filed after the declaratory action: "Cases construing the interplay between declaratory judgment actions and suits based on the merits of underlying substantive claims create, in practical effect, a presumption that

300. See Hill, *supra* note 56, for a discussion of the merits of abiding by the first-filed rule in the context of patent litigation.

301. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *3 (D. Minn. Oct. 30, 2003). The court noted that Rexam

possessed a strong interest in initiating litigation beyond simply thwarting Defendants' choice of forum. Rexam desires clarification about its ability to amend healthcare plans since several retirees have filed individual grievances contesting reduced benefits. These proceedings have been repetitious and costly, and there is a likelihood of continued similar litigation. . . . Plaintiff must also include a seventy-nine million dollar liability on its balance sheet for retiree benefits. In Plaintiff's view, this liability lowers its stock value and impairs its ability to obtain financing.

Id. (citations omitted).

302. *In re Amendt*, 169 F. App'x 93, 97 (3d Cir. 2006) (not precedential).

303. *Id.*

304. *Id.*

a first filed declaratory judgment action should be dismissed or stayed in favor of the substantive suit.”³⁰⁵ Arguably, this analysis coexists uneasily with the companies’ desire to employ the legitimate procedural mechanism of the declaratory action. Companies considering changes to retiree benefits plans would argue they are merely pursuing the goals endorsed by the Declaratory Judgment Act, which provides a tool to remove “uncertainty, insecurity, and controversy” in legal relationships.³⁰⁶ Under *Kerotest* and *Wilton*, though, courts may exercise their discretion in choosing whether or not to exercise their jurisdiction over the declaratory action.³⁰⁷ Adding the natural-plaintiff concept to the list of factors considered in a first-filed dispute is a reasonable expansion of that list. Such an approach provides a way for courts to deal with forum shopping in situations such as retiree-benefits disputes, where the choice of forum is extremely important, without necessarily affecting the analysis in litigation where forum shopping is not as relevant, as in patent cases.³⁰⁸

One reason to want to discourage a race to the courthouse is the desire to avoid going to the courthouse at all. If the parties can work out their differences without litigation, so much the better. Arguably, the circuit split over the *Yard-Man* inference provides an incentive for both unions and employers to file suit immediately if there are any potential changes to their retiree benefits plans. The union, either facing or fearing a declaratory judgment action, will file in a forum that follows the *Yard-Man* inference, while the company will aggressively pursue a venue that rejects that approach. Perhaps two such future parties, predicting that a court would invoke the concept of the natural plaintiff, would recognize that the retirees and their unions would likely prevail in a first-filed dispute and would refrain from costly, time-consuming procedural fencing in the first place.³⁰⁹ Or perhaps

305. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *6 (N.D. Ohio Dec. 6, 1999).

306. Hill, *supra* note 56, at 239.

307. *See supra* Section II.A.

308. *See Daimler-Chrysler Corp. v. Gen. Motors Corp.*, 133 F. Supp. 2d 1041, 1043 n.2 (N.D. Ohio 2001) (“[I]n view of the consideration that all appeals in patent cases go to [Federal Circuit] court, thereby reducing the impetus to forum-shop[,] . . . decisions involving a race to the courthouse between a declaratory judgment plaintiff and a patent holder probably are not of much precedential value except in patent cases.” (citation omitted)).

309. Procedural maneuvering can be costly to the courts as well. One commentator recognized that critics of forum shopping “suggest that it is a waste of time, money, and resources,” but then stressed that [a]s long as venue choices exist, venue will potentially be an issue that must be litigated by the courts, just like evidentiary issues are litigated and other procedural issues are litigated. Sometimes litigating venue will be expensive and will occupy a good deal of the court’s time, while in most cases it will not be an issue. Venue is no different from any other issue in a suit in terms of the

not; the prospect, no matter how slim, of avoiding a *Yard-Man* court might just be too tempting for a company seeking to reduce its retiree benefit liabilities. Regardless, applying the concept of the natural plaintiff could help ensure that the natural plaintiffs preserve their “traditional right to choose the forum and time of suit.”³¹⁰ In the future, these natural plaintiffs will likely be wary of the *Rexam* experience, where negotiating with the company over the course of a year and a half and failing to file their own suit cost those retirees that choice.³¹¹ Similarly, *In re Amendt* highlights the dangers of waiting to file a coercive action.³¹²

Any suggestion that district courts should depart from an easily administered, bright-line rule in favor of a more nuanced analysis will face the criticism that the proposed path will require too much effort, too much time spent on procedural maneuvering, and too much sacrifice to the rule’s goals of economy and efficiency.³¹³ However, courts are already looking carefully at issues of equity. A clearer framework for examining these cases could help the courts serve the interests of justice and, ideally, discourage that procedural maneuvering in the first place.

Of course, a more obvious solution to the problem of procedural fencing in retiree benefits litigation would be to resolve the circuit split that motivates the parties. Where there is the potential for concurrent federal-state court litigation, venue matters; parties perceive quite different environments in federal versus state courts.³¹⁴ But venue should not matter quite so much in

attention it deserves and the variations that will exist from one case to the next.

Algero, *supra* note 168, at 111.

310. *Rexam, Inc. v. USW*, No. Civ. 03-2998 ADM/AJB, 2003 WL 22477858, at *3 (D. Minn. Oct. 30, 2003) (citing *BASF Corp. v. Symington*, 50 F.3d 555, 557-58 (8th Cir. 1995)).

311. The passage of time may make it harder to identify a natural plaintiff, but in this type of case, it probably will not diminish the retirees’ frustrations with a system that turns them into defendants. In the course of the *Rexam* proceedings, a retiree was “mystified” when a deputy sheriff served him with a court summons from his former employer, and was dismayed to find himself a defendant. Shultz, *supra* note 1. The retiree, George Kneifel, said, “I’m glad I was home when they came, because my wife had a stroke about six years ago. Suing retirees is a cowardly way to go about the whole thing.” *Id.*

312. *In re Amendt*, 169 F. App’x 93, 97 (3d Cir. 2006) (not precedential) (rejecting the natural-plaintiff theory). The court noted that in the *ACF* case “the retirees responded promptly to the declaratory judgment action, waiting less than two months to bring their own suit. Here, the retirees waited an entire year . . .” *Id.* (citation omitted).

313. See, e.g., David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1508 (1997) (“[T]he change in focus from trial adjudication to pre-trial resolution reduces the legitimacy of the civil process. Parties are in court to resolve some substantive issue. . . . [P]re-trial litigation often focuses on ancillary procedural issues, such as the proper geographic location for a federal civil case. . . . As ancillary procedural issues dominate over substantive issues, parties lose connection with their own litigation.”).

314. See, e.g., Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*,

the litigation of federal questions in federal courts.³¹⁵ The Supreme Court denied a petition for certiorari in the *Yard-Man* case.³¹⁶ It has also denied petitions for certiorari in cases applying or rejecting the *Yard-Man*³¹⁷ inference. Without resolution of the basis underlying the parties' maneuvering, the procedural fencing will continue.

Mr. Chapman, the ACF retiree, was first astonished, and then outraged, at ACF's plan to cut his health care benefits. His nearly immediate response was to plan a lawsuit to protect his rights. Before he could do so, though, he found himself a defendant in ACF's already-prepared declaratory judgment action.³¹⁸ As a retiree facing cuts to his health benefits plan, Mr. Chapman would probably agree that he fits the characterization of a natural plaintiff. These types of cases are a good fit for the natural-plaintiff approach. It would hardly serve the interests of justice to adhere to a rigid rule allowing the companies to win a race to the courthouse before the retirees even knew there was a race to be run.³¹⁹

36 UCLA L. REV. 233, 310-12 (1998) (discussing the litigant choice principle regarding actions that could be brought in either federal or state court).

315. See, e.g., Alison S. Rozbruch, Note, *Resolving the Conflict Between Two Visions for a Standard of Review in ERISA Denial of Benefit Claims*, 9 J.L. & POL'Y 507, 524-25 (2001) (discussing ERISA's goals of providing a uniform system of rules and regulations and the difficulties caused by circuit splits); Meredith H. Bogart, Note, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447, 476 (2003) (discussing the uniformity goal for ERISA regarding the administration of employee benefit plans and a relevant circuit split).

316. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1984), cert. denied, 465 U.S. 1007 (1984).

317. See *Payne*, supra note 82, at 24-27 (citing *Anderson v. Alpha Portland Indus.*, 836 F.2d 1512 (8th Cir. 1988), cert. denied sub nom. *Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989)).

318. Schultz, supra note 1.

319. The *Dana* court expressed its disapproval of the way *Dana* had raced to the courthouse. *UAW v. Dana Corp.*, No. 3:99CV7603, 1999 WL 33237054, at *6 (N.D. Ohio Dec. 6, 1999) ("In any event, *Dana's* decision to sue before responding, as [the company representative] had told [the union representative] that it would, to the union's request for information shows that it wanted to get to the courthouse before the union knew the race was underway.").