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## Federal Civil Procedure - Statutory Interpleader - Interpleading Potential Claimants

T. Winston Weeks

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## Federal Civil Procedure — Statutory Interpleader — Interpleading Potential Claimants

Mass torts have always caused problems for insurance companies as well as for tortfeasors. While the tortfeasor faces numerous suits in many jurisdictions, the insurer, usually under a contractual duty to defend the insured in any action payable under the policy, often faces litigation expenses far in excess of the maximum policy coverage. In addition, the insurer risks having to pay claims in excess of the policy limits.<sup>1</sup> Insurers have attempted to solve these problems inherent in mass tort situations in several ways.<sup>2</sup> The recent case of *State Farm Fire & Casualty Co. v. Tashire*<sup>3</sup> illustrates one such attempt.

*Tashire* involved a bus-truck collision out of which grew a number of personal injury suits against the truck driver. Before these actions came to trial, the truck driver's insurer, State Farm, sought to interplead all potential claimants under section 1335 of the Judicial Code.<sup>4</sup> That section provides that "[t]he district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader . . . if . . . [t]wo or more adverse claimants, of diverse citizenship . . . are claiming or may claim to be entitled to such money or property . . ."<sup>5</sup> State Farm sought to enjoin all claimants and potential claimants of the insured from suing in any other action.<sup>6</sup> Moreover, State Farm asked to be relieved of its contractual duty to defend the insured in any other action.<sup>7</sup>

The object of State Farm's action was, of course, to bring into one suit under federal jurisdiction the thirty-five different claims against its insured. If this could be accomplished, State Farm's costs and attorney fees

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<sup>1</sup> The several resident states of the claimants may enforce individual judgments that in aggregate exceed the policy limits, and the insurer could become liable to the insured if it were negligent in defending the separate actions.

<sup>2</sup> One method is for the court to obtain a voluntary consolidation of trials on the liability issues, leaving the damage issues to the various state courts, which apply state law. Another method, recently used in a mass tort involving a commercial airliner crash, is the coordination by the trial judges and attorneys of the pre-trial procedures of discovery, etc. Chief Justice Warren recently appointed a committee of distinguished judges and attorneys to study the problem of mass tort litigation and to make recommendations as to the possibility of having common trials of liability issues.

<sup>3</sup> 386 U.S. 523 (1967).

<sup>4</sup> 28 U.S.C. § 1335 (1964). State Farm alternatively alleged that Ellis Clerk, the insured, was not negligent and therefore not liable to any of the passengers on the bus. Although at common law the person seeking interpleader could not claim any interest in the fund, this restriction was expressly abolished in FED. R. CIV. P. 22 and was impliedly abolished under 28 U.S.C. § 1335 (1964). See *John Hancock Mut. Life Ins. Co. v. Keagan*, 22 F. Supp. 326 (D. Md. 1966).

Only minimal diversity is required under 28 U.S.C. § 1335 (1964); *i.e.*, there need be only two or more adverse claimants from different states to satisfy the diversity requirement, whereas under rule 22 complete diversity is required. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951); *Haynes v. Felder*, 239 F.2d 868 (5th Cir. 1957); 3 J. MOORE, FEDERAL PRACTICE § 22.09 (1967) (Hereinafter cited as MOORE).

<sup>5</sup> 28 U.S.C. § 1335 (1964).

<sup>6</sup> 28 U.S.C. § 2283 (1964) provides that a federal court may grant an injunction to stay proceedings in a state court where necessary in aid of its jurisdiction. 28 U.S.C. § 2361 (1964) provides that in an interpleader action the federal court may issue an injunction restricting the filing or prosecuting of claims affecting the property involved in the interpleader action.

<sup>7</sup> Under the terms of the insurance policy, State Farm agreed to provide coverage for bodily injury up to \$10,000 per person and \$20,000 per accident and agreed to defend the insured in any action payable under the policy.

would be substantially reduced, and there would be less chance that it would be liable for more than maximum policy coverage. The district court granted State Farm's requests, issuing an order enjoining any claimant or potential claimant of the insured or the bus driver from suing either of them, State Farm, or Greyhound in any other action.<sup>8</sup> However, on interlocutory appeal<sup>9</sup> the Ninth Circuit reversed, holding that in non-direct action states (those states not allowing an injured party to sue the insurer directly) the insurer may not obtain interpleader until the claims against the insured have been reduced to final judgment.<sup>10</sup> Because this decision conflicted with other lower federal court cases,<sup>11</sup> the Supreme Court granted State Farm's petition for certiorari.<sup>12</sup> *Held, reversed*: Under section 1335 potential claimants to an insurance fund may be interpleaded; but section 1335 cannot be used to draw liability and damage claims against the alleged tortfeasors into a single action. *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967).

### I. EARLY DEVELOPMENT OF FEDERAL INTERPLEADER

The common law action of interpleader had its beginnings in equity, as a device by which a stakeholder, such as an insurer, subject to possible multiple liability could force all adverse claimants to prosecute their claims against the fund in one action.<sup>13</sup> To obtain interpleader, the stakeholder was required to establish four facts:<sup>14</sup> (1) that the parties claimed the same thing, debt, or duty; (2) that all adverse claims arose from the same common source; (3) that he had no claim of interest in the subject matter; and (4) that he had incurred no independent liability to any of the claimants. However, these strict requirements proved inadequate for the protection of the stakeholder. Because the court having jurisdiction in the interpleader action was unable to effect service of process on non-resident claimants,<sup>15</sup> the stakeholder was still subject to the possibility of multiple liability and heavy litigation expenses.

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<sup>8</sup> This action raised the question of whether the court, under the abstention doctrine, should leave the questions of liability and damages to the state forums and state law. The Supreme Court has held that actions in federal courts should be stayed "pending determination by a state court of decisive issues of state law." *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27 (1959). But the liberal use of the abstention doctrine has come under recent attack. See concurring opinion of Justice Douglas in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 423 (1964). However, the application of the doctrine became a moot question in the instant case by the Supreme Court modification of the district court order.

<sup>9</sup> The appeal was based on 28 U.S.C. § 1292(a)(1) (1964), which provides that courts of appeal shall have jurisdiction on appeal from an interlocutory order of a district court of the United States.

<sup>10</sup> *Tashire v. State Farm Fire & Cas. Co.*, 363 F.2d 7 (9th Cir. 1966). The circuit court alternatively held that the interpleader action could not be upheld under FED. R. Civ. P. 22, for the injured persons could not be considered claimants under the rule. The rule provides that "Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability."

<sup>11</sup> The Ninth Circuit in the instant case was the first circuit court to hold that an insurer could not interplead unliquidated tort claimants of the insured under the 1948 revision. See authorities cited in note 28 *infra*.

<sup>12</sup> *State Farm Fire & Cas. Co. v. Tashire*, 385 U.S. 811 (1966).

<sup>13</sup> F. JAMES, CIVIL PROCEDURE § 11 (1965).

<sup>14</sup> *Id.*; 3 MOORE § 22.03.

<sup>15</sup> *New York Life Ins. Co. v. Dunlevey*, 241 U.S. 518 (1916).

This defect was cured when Congress enacted the federal interpleader provisions.<sup>16</sup> Under this legislation, federal district courts were given original jurisdiction of interpleader actions when the subject matter of the suit had a value of \$500 or more, there were two or more adverse claimants of diverse citizenship, and the plaintiff had deposited the fund in court.<sup>17</sup> Moreover, the district courts were given the power to effect service of process in interpleader actions anywhere within the United States.<sup>18</sup>

The original interpleader act<sup>19</sup> gave jurisdiction to the federal district courts in cases where adverse claimants "are claiming or may claim" to be entitled to the same fund held by the stakeholder.<sup>20</sup> However, the statute was rewritten in 1926<sup>21</sup> and in 1936,<sup>22</sup> and in both revisions the "may claim" clause was intentionally omitted.<sup>23</sup> As a result, federal courts would not accept jurisdiction unless the stakeholder was actually being sued and was in immediate danger of being liable for an amount in excess of his policy coverage.<sup>24</sup> Thus, insurance companies could not obtain interpleader unless they were being sued directly by an injured party under a direct action statute<sup>25</sup> or by a judgment creditor of the insured in those states not allowing direct action suits.<sup>26</sup>

In 1948 Congress again rewrote the interpleader provisions<sup>27</sup> and reinserted the "may claim" clause. Since this time there has been a question as to whether the "may claim" provision allows potential claimants against an insurance fund to be interpleaded prior to their obtaining judgments against the insured.<sup>28</sup>

## II. CASES INTERPRETING THE "MAY CLAIM" CLAUSE

The conflicting interpretations of the "may claim" provision are illustrated by two recent federal district court decisions. In *Commercial Union Insurance Co. v. Adams*<sup>29</sup> the insured was involved in an accident in which

<sup>16</sup> 29 Stat. 929 (1917).

<sup>17</sup> 28 U.S.C. § 1335 (1964).

<sup>18</sup> 28 U.S.C. § 2361 (1964).

<sup>19</sup> 29 Stat. 929 (1917).

<sup>20</sup> The "may claim" provision in the 1917 act was construed to allow the interpleader of potential claimants to the fund. *Klaber v. Maryland Cas. Co.*, 69 F.2d 934 (8th Cir. 1934).

<sup>21</sup> 44 Stat. 416 (1926).

<sup>22</sup> 49 Stat. 1096 (1936).

<sup>23</sup> See 3 MOORE § 22.06.

<sup>24</sup> See *Klaber v. Maryland Cas. Co.*, 69 F.2d 934 (8th Cir. 1934); *American Indem. Co. v. Hale*, 71 F. Supp. 529 (W.D. Mo. 1947).

<sup>25</sup> Direct action statutes, used in only a few states, allow an injured party to sue directly the insurer of the alleged tortfeasor by naming the insurer as a party defendant. See *Pan American Fire & Cas. Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960).

<sup>26</sup> See authorities cited note 24 *supra*.

<sup>27</sup> 28 U.S.C. § 1335 (1964).

<sup>28</sup> See, e.g., *Underwriters at Lloyd's v. Nichols*, 363 F.2d 357 (8th Cir. 1966) (the use of interpleader does not depend on the presence or absence of a direct action statute); *Commercial Union Ins. Co. v. Adams*, 231 F. Supp. 860 (S.D. Ind. 1964) (insurer may interplead unliquidated tort claimants of the insured); *Pan American Fire & Cas. Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960) (the danger need not be immediate before the insurer is subject to possible multiple liability under the statute); *Onyx Ref. Co. v. Evans Prod. Co.*, 182 F. Supp. 253 (N.D. Tex. 1959) (where the court allowed interpleader of a creditor who "might" in the future claim a conflicting interest (lien) on certain property). But see *Underwriters at Lloyd's v. Nichols*, 250 F. Supp. 837 (E.D. Ark.), *rev'd*, 363 F.2d 357 (8th Cir. 1966); *National Cas. Co. v. Insurance Co. of North America*, 230 F. Supp. 617 (N.D. Ohio 1964).

<sup>29</sup> 231 F. Supp. 860 (S.D. Ind. 1964).

persons from four different states and a foreign country were injured. Before any suits could be brought to trial, plaintiff insurer filed a bill in the nature of interpleader under section 1335 in an attempt to bring all the actions into one trial under federal jurisdiction. An Indiana district court allowed the action, stating that "interpleader may be resorted to by an insurance carrier when the adverse claims are unliquidated tort claims against its insured."<sup>30</sup>

However, in *Underwriters at Lloyd's v. Nichols*,<sup>31</sup> where eighteen cotton farmers' crops were injured by negligent spraying by the insured, an Arkansas district court refused to allow an insurer to use section 1335 to interplead claimants who had not obtained judgments against the insured. The court reasoned that the insurer was not in danger of multiple liability because the liability of the insured had not yet been established. Moreover, the court observed that there was no showing that the insured could not satisfy any judgments rendered against him in excess of policy limits. Until judgments are obtained against the insured, said the court, tort claimants are not claimants against the insurer. In *Tashire* the court of appeals followed the reasoning of the *Nichols* court, refusing to consider the injured parties claimants within the meaning of section 1335 until they had obtained judgments against the insured.

### III. THE SUPREME COURT: THE EFFECT OF TASHIRE

In *Tashire* the Supreme Court set out to resolve the conflict and confusion generated by the reinsertion of the "may claim" provision in section 1335. The court concluded that, in light of this phrase, an insurance company need not wait until claims against its insured are reduced to judgment before seeking interpleader, even in the absence of a direct action statute.

In reaching this result, the court employed a rationale similar to that of the district court in *Commercial Union*, observing that unliquidated tort claimants are ordinarily adverse claimants. Because the total amount of their claims is generally in excess of policy limits, each claimant is necessarily interested in reducing or defeating the claim of every other claimant. Thus claimants of the insured are potential claimants of the insurer within the purview of the "may claim" provision of section 1335.

In *Tashire* the basis of the decision was the reinsertion of the "may claim" clause into section 1335. The court reasoned that the insertion necessitated a broader meaning of the term "claimants" than under the previous acts.<sup>32</sup> If the word "claimants" was still to be construed as referring only to

<sup>30</sup> *Id.* at 863.

<sup>31</sup> 250 F. Supp. 837 (E.D. Ark.), *rev'd*, 363 F.2d 357 (8th Cir. 1966). The district court felt that to allow interpleader of unliquidated tort claimants of the insured would draw into federal court controversies that properly belong in the state forums and would give to the insurer unwarranted advantages in choosing the forum. The court was applying the abstention doctrine.

<sup>32</sup> Professor Moore points out that although the Reviser's Note failed to give the reasons for the change in the wording of the statute, the "may claim" provision was reinserted partly at his suggestion for the purpose of allowing an insurer to interplead prospective claimants. The reason for suggesting the liberalization of the statute was that personal injury judgments were becoming very large and that the insurer normally had a contractual duty to defend the insured, making the insurer an interested party anyway. 3 MOORE § 22.08.

those currently claiming against the insurer, the "may claim" provision would cause section 1335 to be self-contradictory. Therefore, "claimants" must be those who have claims against the insured with a view toward obtaining a judgment and satisfying it at least partially out of the insurance fund. Thus, the insurer has a definite interest that should be protected by relegating the claims against the fund to one interpleader action.

Although the Supreme Court substantially broadened the use of section 1335, it refused to consider that section an all-purpose bill of peace. State Farm hoped that all the liability and damage claims against its insured could be litigated in one interpleader action, and the district court allowed this combining of claims. However, the Supreme Court concluded that "in these circumstances, the mere existence of such a fund cannot, by use of interpleader, be employed to accomplish purposes that exceed the needs of orderly contest with respect to the fund."<sup>33</sup> Interpleader was devised both to protect the stakeholder and to prevent the "race to judgment" among the various claimants.<sup>34</sup> These purposes are accomplished, observed the court, when the interpleader action is limited to actual or potential claimants against the insurance fund, and there is no basis under section 1335 for protecting the insured or other tortfeasors from the multiplicity of suits. Evidently, the court felt that if alleged tortfeasors are to be protected in a manner similar to the stakeholder, Congress should so provide.

In his dissent,<sup>35</sup> Justice Douglas noted that in *Tashire*, as in *Underwriters at Lloyd's v. Nichols*,<sup>36</sup> the insurer faced only a double contingency. There was as yet no proof of negligence on the part of the insured, so it was possible that State Farm would never be sued for the fund. And even if judgments were obtained against the insured, there was no certainty that they would be in excess of policy limits, since the insured might be able to satisfy personally enough judgments to reduce the liability of the insurer below the policy coverage. This situation, Justice Douglas argued, was too contingent to be a basis for an interpleader action even under the "may claim" provision, especially since the Reviser's Note failed to suggest the reason for the insertion of the clause in the 1948 revision.<sup>37</sup>

#### IV. CONCLUSION

Permitting the use of early interpleader of the potential claimants to the insurance fund appears to be correct in light of the 1948 amendments to the interpleader act. The act was not passed with the intention of taking from state forums issues of liability and damages for negligence, but was

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Prior to the 1948 revision an insurer could not interplead claimants against the insured until they had obtained judgments against the insured and filed suits against the insurer. Thus "claimants" were those making actual claims against the insurer. See *Klaber v. Maryland Cas. Co.*, 69 F.2d 934 (8th Cir. 1934).

<sup>33</sup> 386 U.S. 523, 534 (1967). See also *Pan American Fire & Cas. Co. v. Revere*, 188 F. Supp. 474 (E.D. La. 1960).

<sup>34</sup> 386 U.S. 523, 533 (1967).

<sup>35</sup> *Id.* at 538.

<sup>36</sup> 250 F. Supp. 837 (E.D. Ark.), *rev'd*, 363 F.2d 357 (8th Cir. 1966).

<sup>37</sup> See note 32 *supra*.

intended only to protect the stakeholder from multiple liability.<sup>38</sup> Professor Keeton supports this view, pointing out that those without judgments against the insured were not claimants under the 1926 and 1936 acts, but under the 1948 statute "certainly in the federal courts and probably in the state forums the distinction between claimants already having judgments against the insured and those without judgments is unwarranted."<sup>39</sup>

However, one further question raised by *Tashire* merits attention—the insurer's duty to defend the insured. Under existing law the insurer has such a duty only until judgments are paid in the amount of the policy limits,<sup>40</sup> provided the insurer uses ordinary care in protecting the interests of the insured.<sup>41</sup> The question is whether paying the insurance fund into the court registry in the interpleader action is the equivalent to paying judgments up to the amount of the policy. In *Tashire* the district court apparently concluded that payment into the court registry constituted payment up to the policy limits;<sup>42</sup> however, the question was not argued before the

<sup>38</sup> It should be pointed out that the insurer obtained another practical advantage from early interpleader. When the claimants and potential claimants against the insured see that, when and if they obtain judgment against the insured, they will ultimately receive only a small portion of the total proceeds from the policy, the insurer is in a much better bargaining position in trying to settle the claim out of court. If the insurer settles with the claimant, the agreement could stipulate that the claimant would prosecute the trial in the state court on the liability and damage issues, obtain a settlement payment from the insurer, and would then assign his claim against the fund to the insurer. This procedure would not only benefit the insurer, but would also benefit the insured by decreasing claims that might ultimately be made against him when the insurance proceeds are gone.

The insurer is in a position to offer a settlement to the potential claimants for another reason. The traditional interpleader action involved adverse claims to the entire fund, and only one claimant will obtain a judgment for the fund. However, in mass tort situations all claimants in the interpleader action are presumptively entitled to at least a portion of the fund. The court must then find a method for determining the shares to go to each claimant. Should each claimant receive a share based on the percentage of his state judgment to the total judgments of all claimants? Or should each claimant get an equal share of the insurance fund? With the answer to this question still in a state of flux, the insurer can more easily convince a potential claimant that at best he can obtain only a small portion of the fund and that he is better off settling the claim before he incurs attorney fees that may substantially eat up his final judgment. It therefore appears that although the insurance company may not use interpleader to bring liability issues into the federal action and may not even win the duty to defend issue, by the use of early interpleader its position on settlement negotiations is enhanced.

<sup>39</sup> Keeton, *Preferential Settlement of Liability-Insurance Claims*, 70 HARV. L. REV. 27, 42 (1956).

<sup>40</sup> *Denham v. La Salle-Madison Hotel Co.*, 168 F.2d 576 (7th Cir. 1948); *Commercial Union Ins. Co. v. Adams*, 231 F. Supp. 860 (S.D. Ind. 1964); *Traveler's Indem. Co. v. New England Box Co.*, 102 N.H. 380, 157 A.2d 765 (1960); *Lumberman's Mut. Cas. Co. v. McCarthy*, 90 N.H. 320, 8 A.2d 750 (1939), Annot., 126 A.L.R. 894 (1940).

<sup>41</sup> *Id.*

<sup>42</sup> There are three approaches to this problem. In *Commercial Union* the court held that the duty to defend ended when the insurer paid claims up to the policy limits and that paying the fund into court satisfied this requirement. The disadvantage with this alternative is that it would lessen the significance of the contractual duty to defend, a duty for which the insured pays the insurer, and would shift the entire burden of defending negligence suits to the insured, a burden that at least partially belongs with the insurer.

At the other extreme, the duty to defend would be completely independent of the duty to pay up to the policy limits; the insurer would then have the duty to defend until the judgment were actually paid or satisfied out of the insurance fund paid into court. This view would prevent the insurer from seeking interpleader, for he would end up defending the insured in all liability suits because the insurance fund with which to pay judgment creditors would be tied up in court in the interpleader action. Thus the insurer would not interplead, but would rather pay off the judgment creditors of the insured, thereby enhancing the "race to judgment" aspects of mass torts and nullifying the intended purpose of interpleader.

The third and most favorable alternative comes from the *Travelers* case, where the court held that the duty to defend was independent of the duty to pay judgments up to the policy limits, but the duty to defend still ends when judgments are rendered against the insured up to the

Supreme Court and thus remains unanswered.

When interpleader is used to protect the insurer from multiple liability, his duty to defend should continue until judgments are *rendered* in the amount of the policy coverage. Thus, the insured would still receive the benefits of his insurance contract, and the insurer would still be protected against a multiplicity of suits by judgment creditors of the insured. More importantly, the intended purposes of the interpleader statute would be furthered: the race to judgment aspects of mass torts would be diminished and the judgment creditors of the insured would receive a non-discriminatory pro rata distribution of the insurance proceeds.

*T. Winston Weeks*

### Full Faith and Credit — Procedural Limitation Bars Sister State's Collateral Attack on Jurisdiction

Jeff Burleson filed for divorce from Mary Burleson in Harris County, Texas. Later, but before the Texas suit could come to trial, Mary filed suit for divorce in Nevada, alleging that she had been a bona fide resident of that state for the requisite six-week period.<sup>1</sup> Jeff was personally served in Houston, pursuant to the Nevada long-arm statute.<sup>2</sup> He filed no answer and made no appearance in the Nevada proceeding, and a default judgment granting Mary a divorce was rendered in Nevada. The judgment specifically recited that Mary Burleson had been a bona fide resident of Nevada for a period of six weeks before filing suit.

In the Texas action, Mary filed an amended answer setting up the Nevada decree as a defense, but Jeff attacked the validity of the Nevada divorce, alleging that the Nevada court lacked jurisdiction because Mary never intended to become a bona fide resident of Nevada. Mary argued that Nevada Rule of Civil Procedure 60(b)<sup>3</sup> foreclosed such an attack in Texas because: (1) rule 60(b) limits attack for "intrinsic fraud" to within six months of the judgment; (2) the Nevada Supreme Court has defined "intrinsic fraud" as including an attack based on fraudulent domicile;<sup>4</sup> (3) more than six months had passed since Mary's Nevada divorce decree; and (4) the full faith and credit clause<sup>5</sup> requires the Texas court to apply the

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maximum policy coverage. The insurer then has a duty to pay judgment creditors up to the policy limits, and this is accomplished in the interpleader action.

<sup>1</sup> NEV. REV. STAT. § 125.020 (1967) in part provides:

2. Unless the cause of action shall have accrued within the county while plaintiff and defendant were actually domiciled therein, no court shall have jurisdiction to grant a divorce unless either the plaintiff or defendant shall have been resident of the state for a period of no less than 6 weeks preceding the commencement of the action.

<sup>2</sup> NEV. R. CIV. P. 4(2).

<sup>3</sup> *Id.* 60(b).

<sup>4</sup> *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962).

<sup>5</sup> U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (1964), in part, provides: "Such act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."