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## Federal Venue Under Section 1392(a): The Problem of the Multidistrict Defendant

Section 1391(a) and (b) of title 28 of the United States Code<sup>1</sup> provides the basic framework for venue in the federal courts. Subsection (a) of section 1391 deals with venue in diversity actions and permits venue, among other places, in the district where "all defendants reside."<sup>2</sup> Subsection (b) of section 1391 controls venue in federal question cases. This subsection, like its counterpart for diversity actions, allows venue in the district where "all defendants reside."<sup>3</sup>

The provisions of section 1391(a) and (b) allowing venue in the district where all the defendants reside are supplemented by 28 U.S.C. § 1392(a) in cases where there are multiple defendants "residing in different districts in the same State."<sup>4</sup> In these cases, section 1392(a) permits the action to be brought "in any of such districts."<sup>5</sup> Despite the apparent clarity of section 1392(a), this venue provision has produced an unresolved conflict among the federal district courts<sup>6</sup> in cases involving suits against multiple defendants where at least one of the defendants is a corporation.<sup>7</sup>

Section 1391(c) of title 28 provides that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."<sup>8</sup> It is

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1. 28 U.S.C. § 1391(a)-(b) (1982).

2. "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose." 28 U.S.C. § 1391(a) (1982).

3. "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law." 28 U.S.C. § 1391(b) (1982).

The chief difference between subsection (a) and subsection (b) of section 1391 is that subsection (a) allows venue in the district where all the plaintiffs reside while subsection (b) does not.

4. "Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." 28 U.S.C. § 1392(a) (1982).

5. 28 U.S.C. § 1392(a) (1982).

6. There have been no appellate court opinions dealing with the issue presented in this Note. A possible reason why this issue has not been the subject of appellate review is that "[a]n order [of transfer under section 1406(a)] is an interlocutory order and is nonappealable." 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3827 (1976); see *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 951 (9th Cir. 1968); 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.13(6) (2d ed. 1986). The result is that, barring recourse to the extraordinary writ of mandamus, a disgruntled defendant will have to wait for a final judgment before taking an appeal on the venue issue. Perhaps the cost of an appeal and subsequent new trial simply outweigh the possibility that a different district within the same state would render a more favorable judgment to the defendant.

7. See notes 13-19 *infra* and accompanying text.

8. 28 U.S.C. § 1391(c) (1982).

clear from the language of this statute that, for some corporations, venue will lie in more than one district in a given state. For example, an interstate trucking company might regularly drive its truck through two or more federal districts in a multidistrict state and, as a consequence, be judged to be "doing business" for venue purposes in those districts through which it passes.<sup>9</sup> The trucking company would therefore be amenable to suit in any of those districts under section 1391(c).

The creation of multiple districts of residence for corporate defendants (and, in certain situations, other classes of defendants<sup>10</sup>) under section 1391(c) raised an issue which has yet to be answered: does section 1392(a) permit suit against multiple defendants in a district where any one of them resides even if there is another single district in which all of the defendants reside? Consider the following hypothetical:

Opie Taylor, resident of Yuma, Arizona, is vacationing at Yosemite National Park in Northern California. Lured by the challenge of Half-Dome, Opie purchases the necessary supplies from the Mayberry Mountaineering Supply Company, a California corporation headquartered in San Francisco but doing business throughout the state. Opie begins his ascent of the mountain. Approximately halfway up the mountain's face, Opie encounters Barney Fife, a novice rock climber and resident of Crescent City, California (located near the California-Oregon border). Barney, moments before, lost his grip on a small crevice in the mountain and has plunged into Opie. Barney's fall is arrested by his safety rope. Opie, however, is not so lucky. His impact with Barney jars loose his hold on the mountain and he begins to fall. Opie's safety rope proves unable to withstand the force of his fall and he plummets to his death on the rocks below.

Beatrice Taylor, Opie's aunt and executor of his estate, wants to bring suit against both Barney Fife and the Mayberry Mountaineering Supply Company in the federal district court seated in San Diego (a distance of 120 miles from Yuma). Can Aunt Bea invoke section 1392(a) to bring suit in the Southern District of California on the

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9. See *Johnson v. Tri-State Motor Transit Co.*, 263 F. Supp. 278, 281 (W.D. Mo. 1966) (defendant trucking company, by hauling explosives through the Western Division of the Western District of Missouri, found to be doing business in that division according to section 1391(c)).

10. See, e.g., *Canaday v. Koch*, 598 F. Supp. 1139, 1144 (E.D.N.Y. 1984), *affid. sub nom. Canaday v. Valentin*, 768 F.2d 501 (2d Cir. 1985) (Mayor of New York, although having his official residence in the Southern District of New York, might, for venue purposes under section 1391(b), have an additional residence in the Eastern District where a significant amount of his official business is transacted); *Buffalo Teachers Fedn. v. Helsby*, 426 F. Supp. 828 (S.D.N.Y. 1976) (state agency headquartered in the Northern District of New York held to have an additional residence for venue purposes under section 1391(b) in the Southern District); *Hawkins v. National Basketball Assn.*, 288 F. Supp. 614, 620-22 (W.D. Pa. 1968) (unincorporated association, by scheduling professional basketball games in Philadelphia and receiving revenue from the gate receipts and television rights to these attractions, found to be doing sufficient business in the Eastern District of Pennsylvania to meet section 1392(a)'s requirement for residency).

ground that Barney and Mayberry reside in "different districts" (by virtue of the fact that Mayberry "does business" in the Southern District and is therefore a "resident" of that district under section 1391(c)) even though both Barney and Mayberry reside in the Northern District and could properly be sued there? In answering this question, should the financial hardship that will accrue to Barney if he is compelled to retain San Diego counsel and travel the 854 miles from Crescent City to San Diego to defend<sup>11</sup> be weighed against the economic burden that will befall Opie's estate if Aunt Bea is required to travel to the Northern District of California to prosecute the claim?

This Note argues that a broad construction of section 1392(a) which would allow Aunt Bea to bring suit in the Southern District of California where Mayberry alone resides is preferable to a narrow construction which would restrict Bea to the Northern District where both defendants reside. Part I of this Note maintains that the language of section 1392(a) is ambiguous and does not indicate the clear intent of Congress, despite assertions to the contrary by proponents of both the broad and narrow constructions of the statute. Part II demonstrates that a superficially relevant Supreme Court decision tending to support the broad construction of section 1392(a) is not dispositive of the controversy. Part III argues that the extant legislative history is also inconclusive in determining the congressional intent on this issue. Finally, Part IV of this Note concludes that judicial policy grounded in fairness to both plaintiffs and defendants requires adoption of the broad construction of section 1392(a).

## I. THE AMBIGUITY IN SECTION 1392(A)

Proponents of the narrow construction of section 1392(a) assert that the plain meaning of the statute precludes its application if there is a district where all defendants reside.<sup>12</sup> They argue that such parties do not reside in "different districts" but in the same district. In *Hawks v. Maryland & Pennsylvania Railroad*,<sup>13</sup> the plaintiff brought suit in the Eastern District of Pennsylvania against two corporations, one doing business in the Middle District of the state and the other doing business in both the Middle and Eastern Districts. The District Court

11. The failure to mention the hardship that would accrue to Mayberry is intentional. It is less likely that a corporation (as opposed to an individual), with substantially greater assets than most individuals, would be seriously inconvenienced by a plaintiff's choice of venue under section 1392(a).

12. *See, e.g., Andrew H. v. Ambach*, 579 F. Supp. 85, 89 (S.D.N.Y. 1984) (the court declared that section 1392(a) "applies only to civil actions 'against defendants residing in *different* districts in the same state.' The plain meaning of this language seems to preclude the application of section 1391(b) to the present case, in which both defendants reside in the Northern District.") (footnote omitted) (emphasis in original); *Hawks v. Maryland & Pa. R.R.*, 90 F. Supp. 284, 285 (E.D. Pa. 1950).

13. 90 F. Supp. 284 (E.D. Pa. 1950).

for the Eastern District of Pennsylvania, adopting the narrow construction of section 1392(a), granted the defendants' motion to transfer venue to the Middle District.<sup>14</sup> In so holding, the court argued that the language of section 1392(a) unambiguously mandates the narrow construction. The court stated: "In this case the defendants do not reside in different districts; they all reside in the Middle District of Pennsylvania. Consequently, Section 1392(a) does not apply."<sup>15</sup>

Advocates of the narrow construction are not alone in arguing that section 1392(a) is unambiguous. Proponents of the broad construction of section 1392(a) assert that the plain meaning of the statute demands its use whenever defendants have residences in "different districts," regardless of whether there is a district common to all of them.<sup>16</sup> They argue that the broad construction of section 1392(a) gains strength once this section is read together with section 1391(c), which creates multiple corporate residences for venue purposes. Clearly, if an individual defendant is a resident of one district and a corporate defendant is a resident of both that same district and a "different district" in the same state, venue in the "different district" is permissible.<sup>17</sup>

The arguments made by proponents of both the narrow and broad construction of section 1392(a) regarding the statute's purported lucidity are perhaps the best illustration of the section's true ambiguity.<sup>18</sup> As Professors Wright, Miller, and Cooper have recognized, the language would be much more clear if it said: "defendants residing in the state but not residents of the same district."<sup>19</sup> However, the existing language of section 1392(a) ("residing in different districts in the same State") simply is not this clear. Thus, it is necessary to look at other sources to determine whether the statute upholds venue in a district where only one defendant resides, in cases where there is another single district in which all of the defendants reside.

## II. THE *SUTTLE* DECISION AS PRECEDENT FOR THE BROAD CONSTRUCTION OF SECTION 1392(A)

Some advocates of the broad construction of section 1392(a) argue that a 1948 Supreme Court decision, *Suttle v. Reich Bros. Construction*

14. 90 F. Supp. at 285.

15. 90 F. Supp. at 285.

16. See note 17 *infra*.

17. *PI, Inc. v. Valcor Imprinted Papers, Inc.*, 465 F. Supp. 1218, 1223 (S.D.N.Y. 1979) ("Congress used 'absolutely unambiguous language' in section 1392(a), language which contains not the slightest hint that venue under that section is available only when there is no one district in which all defendants reside."); *Kirkland v. New York State Dept. of Correctional Serv.*, 358 F. Supp. 1349, 1350 (S.D.N.Y. 1973) (also referring to the "clear language" of section 1392(a)).

18. Indeed, so found the District Court for the Eastern District of Pennsylvania in *Mazzella v. Stineman*, 472 F. Supp. 432, 434 (E.D. Pa. 1979).

19. 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811, at 76.

Co.,<sup>20</sup> supports their view that section 1392(a) is applicable even when there is a single district in which all the defendants reside.<sup>21</sup> In *Suttle*, the plaintiff, a resident of Mississippi, brought suit against a corporation, a partnership, and the individual members of the partnership in the Eastern District of Louisiana under section 52 of the Judicial Code (the precursor to today's section 1392(a)).<sup>22</sup> The partnership and its individual members were all residents of the Western District of Louisiana. The corporate defendant was a Texas corporation doing business in both districts of Louisiana.<sup>23</sup> The Supreme Court, in describing the issue before it, stated:

The critical issue of the case is whether Highway Insurance [the Texas corporation] may be regarded as a "resident" of the Eastern District of Louisiana within the meaning of § 52 of the Judicial Code so that respondents *Reich Bros. Construction Company and its individual members* may properly be sued as co-defendants of the corporation in the Eastern District of Louisiana, despite the fact that respondents are residents of the Western District of that State.<sup>24</sup>

The Supreme Court found that the corporate defendant, Highway Insurance, was not a resident of the Eastern District of Louisiana for

20. 333 U.S. 163 (1948).

21. In *Williams v. Hoyt*, 372 F. Supp. 1314, 1316 (E.D. Tex. 1974), the district court rejected the individual defendants' argument for a narrow construction of section 1392(a) based on the Supreme Court's decision in *Suttle*. The court, discussing the *Suttle* decision, stated that "[t]he conclusion seems unmistakable that the Court considered its restrictive definition of 'resident' the only obstacle to suing all defendants in any district in which the corporate defendant is amenable to suit . . . ."

22. Act of Mar. 3, 1911, ch. 231, § 52, 36 Stat. 1101 (codified at 28 U.S.C. § 113 (1940)), repealed by Act of June 25, 1948, ch. 646, 62 Stat. 935 (codified at 28 U.S.C. § 1392(a) (1982)). The language of section 52 is substantially similar to the language used in 28 U.S.C. § 1392(a). In relevant part, it provided:

When a State contains more than one district, every suit not of a local nature, in a district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district . . . .

23. *Suttle* was decided in March of 1948 — three months before congressional enactment of section 1391(c) of the new Judicial Code. Prior to the enactment of section 1391(c), a corporation was considered a "resident" only in the district in which it was incorporated. See, e.g., *Lockett v. Delpark, Inc.*, 270 U.S. 496, 499 (1926) (the defendant corporation, although doing substantial business in New Jersey, was not considered a resident of that state); *Seaboard Rice Milling Co. v. Chicago, R.I. & Pac. R.R.*, 270 U.S. 363, 366 (1926) ("[A] corporation being, within the meaning of the jurisdictional statutes, a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State, although it may be engaged in business within such other State."); *Southern Pac. Co. v. Denton*, 146 U.S. 202, 205 (1892) ("[A] corporation cannot . . . be considered a citizen or a resident of a State in which it has not been incorporated.").

In order to expand the plaintiff's choice of venue in suing a corporate defendant, the Supreme Court, in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), held that a corporation which appointed an agent to receive service of process in a state other than its state of incorporation waived venue objections to suits brought in that state. The question before the Supreme Court in *Suttle*, therefore, was whether this waiver of venue objections was tantamount to establishing residency in the state in which the corporation was doing business so as to satisfy the language of section 52 of the Judicial Code.

24. 333 U.S. at 165 (emphasis added).

venue purposes. But proponents of the broad construction of section 1392(a) argue that had the Supreme Court found that Highway Insurance was a resident of the Eastern District, the Court would have evidently upheld venue in that district even though all the defendants resided in the Western District.<sup>25</sup>

The statement by the Supreme Court quoted in the above paragraph might be persuasive authority for the broad construction of section 1392(a) if it could be demonstrated that the Court thought seriously about the issue of the scope of section 52 in relation to section 1392(a). For two reasons, it seems unlikely that the Court did so.

First, the Court never reached the issue of whether section 52 allowed venue in the district in which the corporate defendant alone resides when there is another district in which all the defendants reside. Prior to the 1948 codification of the Judicial Code, there was no statute analogous to section 1391(c), which defines a corporation's residence for venue purposes as any district in which the corporation is incorporated, licensed to do business, or doing business. Consequently, the Supreme Court's sole concern in *Suttle* was in determining whether a foreign corporation could be considered a "resident" of a state in which it does business under section 52 of the former Judicial Code.<sup>26</sup> In deciding the question in the negative, the Supreme Court concluded its judgment. The statement made by the Court concerning the propriety of venue in the district where only the corporate defendant resides is, therefore, obiter dictum.

There exists a second and more potent reason to doubt that the Supreme Court in *Suttle* made a searching inquiry into the merits of permitting a plaintiff to invoke section 52 even when all of the defendants reside in a single district: the Court simply was never presented with this issue. The obvious candidates to raise the argument that the petitioner's assertion of venue in the Eastern District of Louisiana rested on an erroneously broad construction of section 52 were the respondents, Reich Brothers Construction Company and its individual partners. Yet nowhere in the respondents' brief to the Supreme Court did the respondents' attorneys raise the argument that section 52 should be interpreted narrowly to lay venue in the Western District of Louisiana where all of the defendants might be said to reside.<sup>27</sup> The

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25. See note 21 *supra*.

26. 333 U.S. at 165-66 ("The issue we are called upon to resolve is a narrow one . . . . The sole issue of this case relates to the construction of the term 'residence,' appearing in the particular federal venue statutes under consideration, as it applies to a foreign corporation.").

27. Respondent's brief addresses only two points. First, the brief asserts that since respondents' codefendant is a resident of Texas, the venue decision does not fall within the parameters of section 52 of the Judicial Code. And second, the brief maintains that respondents did not waive their right to object to venue in the Eastern District of Louisiana. See Brief on Behalf of Reich Bros. Constr. Co. and Individual Members, *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163 (1948).

respondents' failure to raise the possibility of a narrow construction of section 52 left the petitioner's assertion of the broad construction unchallenged. As a consequence, it seems likely that the Court simply assumed the broad construction of section 52 *arguendo*, without giving any thought to possible alternatives.<sup>28</sup>

### III. THE LEGISLATIVE HISTORY OF SECTION 1392(A) AND ITS COMPANION VENUE STATUTES

#### A. *Legislative Intent Arguments for the Broad Construction*

Some proponents of the broad construction of section 1392(a) argue that regardless of the *Suttle* decision's dubious precedential value, the congressional response to the Court's decision is ample proof that Congress intended section 1392(a) to apply even when there is a single district in which all the defendants reside.<sup>29</sup> In *Carson v. Vance Trucking Lines*,<sup>30</sup> the District Court for the Western District of South Carolina noted that shortly after the Supreme Court's decision in *Suttle*, Congress enacted section 1391(c) of title 28. That section provided for venue over a corporation in any district in which the corporation is incorporated, licensed to do business, or doing business. The district court construed this congressional action as intended "to produce a different result in *Suttle*, that is, a result upholding venue."<sup>31</sup> In other words, the district court in *Carson* interpreted the congressional enactment of section 1391(c) some three months after the Supreme Court's decision in *Suttle*<sup>32</sup> as clear support for the broad construction of section 1392(a). The *Carson* court thus suggests that Congress intended to allow a plaintiff to bring suit against multiple defendants in a district where the corporate defendant alone resided even when there was another district within the state in which all the defendants resided.

The defect in this argument of constructive legislative intent is that it is somewhat inconsistent with the actual legislative history surrounding the enactment of section 1391(c). This legislative history discloses that the bill containing the language found in section 1391(c)<sup>33</sup>

28. This view of *Suttle*, although speculative, garners much support from the language of the opinion which fails to acknowledge even the possibility of an alternative construction of section 52.

29. *E.g.*, *Williams v. Hoyt*, 372 F. Supp. 1314, 1316 (E.D. Tex. 1974); *Carson v. Vance Trucking Lines*, 245 F. Supp. 13, 17 (W.D.S.C. 1965).

30. 245 F. Supp. 13 (W.D.S.C. 1965).

31. 245 F. Supp. at 17.

32. *Suttle* was decided on March 8, 1948, while 28 U.S.C. § 1391(c) was enacted on June 25, 1948.

33. H.R. 3214, 80th Cong., 1st Sess. (1947). Although the House of Representatives passed H.R. 3214 without amendment, the Senate Committee on the Judiciary proposed numerous amendments to the bill that were enacted into law. None of these amendments, however, dealt with section 1391(c). See 94 CONG. REC. 7928-30 (1948) for a comprehensive listing of the Senate amendments.



was introduced into the House of Representatives on April 25, 1947<sup>34</sup> — *ten months before the Supreme Court's decision in Suttle*.<sup>35</sup> Furthermore, section 1391(c) was not an isolated proposal by a member of Congress. Rather, it was part of an extensive recodification effort administered by numerous committees of eminent lawyers, law professors, and judges<sup>36</sup> working together for a period of over five years.<sup>37</sup> It is apparent, then, that whatever motive prompted these committees to draft section 1391(c), it was probably not the Supreme Court's decision in *Suttle*.<sup>38</sup>

A more plausible explanation for Congress' inclusion of section 1391(c) in the 1948 Judicial Code is that this provision facilitates the free joinder of corporate defendants in federal diversity actions.<sup>39</sup> Prior to the 1966 amendment to section 1391(a) allowing suit against a defendant in a diversity action in the district "in which the claim arose,"<sup>40</sup> a plaintiff could only lay venue in the district "where all plaintiffs or all defendants reside."<sup>41</sup> The provision in section 1391(c) allowing suit where the plaintiff resides, however, is often of little utility to the plaintiff<sup>42</sup> since rule 4(f) of the Federal Rules of Civil Procedure requires, in most cases, that service of process on the defendants be made "within the territorial limits of the state in which the district

34. 93 CONG. REC. 4115 (1947).

35. See note 32 *supra*.

36. 94 CONG. REC. 7928 (1948). The principal work of revising and codifying the new Judicial Code fell to the West Publishing Company of St. Paul, Minnesota and the Edward Thompson Company of Brooklyn, New York. *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 80th Cong., 1st Sess. 3 (1947)* (statement of Edward J. Devitt).

The two publishing companies formed an advisory committee of judges and lawyers including:

Judge Floyd E. Thompson, former chief justice of the Illinois Supreme Court and former president of the Chicago Bar Association; Hon. Justin Miller, former associate justice of the United States Circuit Court of Appeals for the District of Columbia; Judge John B. Sanborn, judge of the United States Circuit Court of Appeals for the Eighth Circuit; Hon. Walter P. Armstrong, of the Memphis bar and former president of the American Bar Association; and Hon. John Dickinson, of the Philadelphia bar, former assistant Attorney General of the United States.

H.R. REP. NO. 308, 80th Cong., 1st Sess. 3 (1947).

The Judicial Conference also appointed an advisory committee with Circuit Judge Maris acting as Chairman and District Judges Galston and W.F. Smith serving as members. *Ex Parte Collett*, 337 U.S. 55, 66 n.23 (1949).

37. 337 U.S. at 65.

38. It is simply unclear from the existing legislative history exactly what prompted the revisers of the 1948 Judicial Code to draft section 1391(c).

39. This explanation was suggested in *Robert E. Lee & Co. v. Veatch*, 301 F.2d 434, 437 (4th Cir. 1961), *cert. denied*, 371 U.S. 813 (1962) (stating that section 1391(c) might have been included to facilitate the "free joinder of corporate defendants").

40. Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (1966) (codified as amended at 28 U.S.C. § 1391(a) (1982)).

41. 28 U.S.C. § 1391(a) (1952) (amended 1966).

42. See Korbelt, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 RUTGERS L. REV. 607, 609 (1961).

court is held . . . ."<sup>43</sup> Because the "defendant is unlikely to stray into plaintiff's bailiwick, the 'extra' venue in diversity actions is apt to be of little comfort to the plaintiff."<sup>44</sup> This inability of most plaintiffs to acquire personal jurisdiction over foreign defendants in the plaintiffs' home states leaves these plaintiffs with no recourse under section 1391(a) but to bring suit where "all defendants reside."

Laying venue in the district where "all defendants reside," however, presented an insurmountable obstacle when a plaintiff sought to join an individual defendant who resided in the forum state and a corporate defendant incorporated in a different state but doing business in the forum state. The problem was precipitated by a long line of pre-1948 decisions holding that a corporation's residence for venue purposes is only the state in which it is incorporated.<sup>45</sup> As a consequence of these decisions, it was virtually impossible for a plaintiff to bring a single action against a foreign corporation and an individual defendant residing in the forum state even though the corporate defendant conducted business in that state. Quite possibly then, Congress enacted section 1391(c) to overcome this need for multiple suits and allow for the free joinder of corporate defendants.

In *Kirkland v. New York State Department of Correctional Services*,<sup>46</sup> the District Court for the Southern District of New York put forward its own legislative intent argument in adopting a broad construction of section 1392(a). The court's argument was less of an affirmative defense of the broad construction than an assault on the notion that the narrow view of section 1392(a) is consistent with legislative intent.

In *Kirkland*, the court characterized the narrow construction of section 1392(a) as allowing that statute to come into play only when section 1391(b) fails to identify a single district in which all of the defendants in an action can be joined. But since Congress amended section 1391(b) in 1966 to allow for venue in the district "in which the claim arose"<sup>47</sup> as well as in the district "where all defendants reside,"

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43. FED. R. CIV. P. 4(f).

44. Korb, *supra* note 42, at 609.

45. See note 23 *supra*. The Supreme Court partially ameliorated the harsh effect of this rule in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939). In *Neirbo*, the Court held that a foreign corporation which designates an agent upon whom process can be served in a state has waived its objection to venue in that state. As the Court later pointed out in *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163 (1948), however, *Neirbo* "did not hold that in losing the privilege of insisting upon suit in districts specified in section 51 of the Judicial Code, the defendant corporation thereby acquired 'residence' in New York, within the meaning of the venue statutes." 333 U.S. at 168. The *Suttle* decision resulted in the anomaly that an individual defendant residing in the forum state could not be joined with a foreign corporation under section 52 of the Judicial Code even when the corporation, by appointing an agent for the service of process, became subject to suit in the forum state alone.

46. 358 F. Supp. 1349 (S.D.N.Y. 1973).

47. 28 U.S.C. § 1391(b) (1952), amended by Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (1966).

there will always be at least one district under section 1391(b) where all of the defendants can be joined. Consequently, the narrow view of section 1392(a) will prevent that statute from ever coming into play. The *Kirkland* Court reasoned therefore that the narrow construction of section 1392(a) must be incorrect since Congress would never have "intended to repeal § 1392(a) in such a backhanded manner."<sup>48</sup>

The fundamental defect in this argument is that it falsely characterizes the narrow construction of section 1392(a).<sup>49</sup> Proponents of the narrow construction do not have to assert that section 1392(a) applies only when section 1391(b) fails to identify a single district in which all of the defendants can be joined. Rather, they can argue that a plaintiff activates section 1392(a) whenever she invokes the provision of section 1391(b) (or its "twin" in section 1391(a) for diversity actions) to lay venue where "all defendants reside" but is unable to do so because the defendants reside in "different districts in the same state." The proponents of the narrow construction, therefore, can view the 1966 amendment to section 1391(b) as merely expanding the available fora in which the plaintiff can lay venue. She can bring suit in the district where "the claim arose" under section 1391(b), or she can bring suit in the district where the defendants reside and avail herself of section 1392(a) if the defendants "reside in different districts in the same state."<sup>50</sup> By viewing the 1966 amendment to section 1391(b) as providing the plaintiff with an additional choice of forum, proponents of the narrow construction of section 1392(a) can overcome the argument that a narrow interpretation of section 1392(a) renders it useless.

### B. *Legislative Intent Argument for the Narrow Construction*

In *Hawks v. Maryland & Pennsylvania Railroad*,<sup>51</sup> the District Court for the Eastern District of Pennsylvania argued that the legislative history behind sections 1391 and 1392 indicates an intent for section 1392(a) to apply only when there is no single district where all defendants reside.<sup>52</sup> In order to understand the position taken by the *Hawks* court, a brief historical analysis of these statutes is required.

In 1789, Congress enacted the first Judiciary Act establishing the

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48. 358 F. Supp. at 1351.

49. Professors Wright, Miller, and Cooper have noted that the mischaracterization of the narrow construction of section 1392(a) is attributable in some cases to the narrow constructionists themselves. The professors point out that in *Kirkland* the defendants, in advocating the narrow construction of section 1392(a), "contended that § 1392(a) applies only if there is no district under the general venue provision in which venue would be proper for all defendants . . . ." 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811, at 76 n.78.

50. See C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811, at 76 n.78 ("It remains open to a plaintiff to lay venue according to residence rather than where the claim arose, and if he does so § 1392(a) supplements the general rule of § 1391(a), (b), that he must sue in the district in which all defendants reside.").

51. 90 F. Supp. 284 (E.D. Pa. 1950).

52. 90 F. Supp. at 285.

lower federal court system. In resolving the venue issue, Congress simply provided that a United States citizen could only be sued in the district "whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . ."<sup>53</sup>

Originally, almost every state was made a federal district.<sup>54</sup> However, population growth compelled Congress to subdivide states into two or more federal districts.<sup>55</sup> In a state thus divided, a plaintiff seeking to sue defendants residing in different districts in the same state was forced to bring separate actions in the residences of each of the defendants.<sup>56</sup>

Yet, Congress never forsook the "idea that state lines should be used to delimit venue jurisdiction in the federal courts."<sup>57</sup> In 1858 it passed a general act providing that, where two or more defendants to a suit are residents of different districts in the same state, venue is proper in any district where one of the defendants resides.<sup>58</sup> The Act of 1858 saw numerous codifications but continued to serve as an "escape clause" permitting the joinder of multiple defendants in a single suit where, otherwise, multiple suits would have to be brought in different districts in the same state.

Relying on the historical background of section 1392(a) outlined above, the district court in *Hawks* concluded:

The purpose of [section 1392] was and is to relieve a plaintiff from the necessity of bringing more than one suit if all the defendants who lived in one state did not reside in the same district. *It is to be invoked only in those intrastate situations when the general venue statute would force the plaintiff to bring two or more suits.*<sup>59</sup>

The argument put forward by the *Hawks* court is therefore that since

53. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (1789).

54. Judiciary Act of 1789, ch. 20, § 2, 1 Stat. 73, 73 (1789). Several states were divided into more than one district.

55. See, e.g., Act of Apr. 29, 1802, ch. 31, § 7, 2 Stat. 156, 162 (1802) (creating three judicial districts in North Carolina); Act of Apr. 29, 1802, ch. 31, § 16, 2 Stat. 156, 165 (1802) (creating two districts in Tennessee); Act of Apr. 9, 1814, ch. 49, § 1, 3 Stat. 120 (1814) (creating two districts in New York); Act of Apr. 20, 1818, ch. 108, § 1, 3 Stat. 462 (1818) (creating two districts in Pennsylvania); Act of Feb. 21, 1823, ch. 11, 3 Stat. 726 (1823) (creating two districts in South Carolina); Act of Mar. 3, 1823, ch. 44, § 1, 3 Stat. 774 (1823) (creating two districts in Louisiana).

56. *Melvin Lloyd Co. v. Stonite Prods. Co.*, 119 F.2d 883, 886 (3d Cir. 1941), *revd.*, 315 U.S. 561 (1942) (similar historical analysis).

57. 119 F.2d at 886. The court in *Stonite* went on to state:

It is clear that Congress had this idea in mind when, in dividing the State of Alabama into two judicial districts by the Act of March 10, 1824, ch. 28, § 6, 4 Stat. 10, it provided: "That all suits hereafter to be brought, in either of the Courts aforesaid, not of a local nature, shall be brought only in the district where the defendant shall reside; but if there be more than one defendant, and some of them reside in the northern, and some in the southern district, the plaintiff may sue in either . . . ."

119 F.2d at 886.

58. Act of May 4, 1858, ch. 27, § 1, 11 Stat. 272 (1858).

59. 90 F. Supp. at 285 (emphasis added).

the Congresses that enacted the precursors to section 1392(a) intended these statutes to provide a single district in which a plaintiff can bring suit against multiple defendants, the use of section 1392(a) by a plaintiff to expand his choice of forum is illegitimate.

The defect in the legislative intent argument advanced by the *Hawks* court lies not in the court's grasp of the relevant history but in the assumption the court draws from that history. It is clear from the legislative history detailed above that a primary purpose for the enactment of the 1858 Act providing for suit in the district where either defendant resides was to allow the joinder of multiple defendants residing in different districts in the same state. But the *Hawks* court erred in assuming that since this was the obvious purpose it was the only purpose. It is at least a possibility that the Congress responsible for drafting the 1858 Act recognized the potential use of this provision by plaintiffs to expand their choice of forum within a multidistrict state. Perhaps, by leaving the language of the act ambiguous, Congress tacitly approved of such use. And even if the use of the Act by a plaintiff to lay venue where only one defendant resides despite the existence of another district where all defendants reside was not anticipated by Congress, the *Hawks* court cannot be so certain that had Congress been able to envision such a use, they would have proscribed it. The intuitive leap taken by the *Hawks* court from the legislative history surrounding the enactment of section 1392(a) to the conclusion that Congress intended this provision to be invoked only when all defendants fail to share a common district of residence is unwarranted.

The legislative intent arguments offered by proponents of both the broad and narrow construction of section 1392(a) are unpersuasive. Those courts favoring the broad application of section 1392(a) so as to bring the statute into effect even when all defendants reside within a single district have erred in their understanding of both the legislative history surrounding section 1392(a)'s enactment and the nature of the narrow constructionists' view of the statute. The narrow constructionists, for their part, while grasping the historical context of section 1392(a), have assumed too much in maintaining that this history proves unequivocally that Congress intended section 1392(a) to apply *only* when there is no single district where all defendants reside. The lack of clear legislative guidance in the interpretation of section 1392(a) necessitates an examination of judicial policy in reaching a proper construction of this venue statute.

#### IV. CONVENIENCE AND TRANSFER OF VENUE UNDER THE FEDERAL RULES — THE POLICY DEBATE

##### A. *Convenience of the Litigants*

Lacking any clear guidance from either the language of section 1392(a) or the legislative history surrounding its enactment, the reso-

lution of the issue at hand rests ultimately on policy considerations. Since it is well accepted that the guiding policy behind venue is the convenience of the litigants,<sup>60</sup> the choice between the broad and narrow construction of section 1392(a) must be made with an eye toward maximizing the convenience of the parties to a suit.

In *Mazzella v. Stineman*,<sup>61</sup> a decision embracing the narrow construction of section 1392(a), the District Court for the Eastern District of Pennsylvania considered a motion by an individual defendant to dismiss or transfer the action on the ground of improper venue. The plaintiff in *Mazzella* had brought suit under section 1392(a) in the Eastern District where two corporate defendants resided even though the two corporations and the individual defendant were all residents of the Western District of Pennsylvania. The district court, relying on the analysis of Professors Wright, Miller, and Cooper,<sup>62</sup> held that "[t]here is no reason to bring the individual defendant, resident in the Western District, to defend a lawsuit in the Eastern District, when the suit can be conveniently heard in the Western District where both defendants reside."<sup>63</sup> The convenience of the individual defendant, then, was a determining factor in the district court's adoption of the narrow construction of section 1392(a).

At first blush, the policy argument offered by the district court in *Mazzella* appears persuasive. After all, the broad construction of section 1392(a), by permitting a plaintiff to lay venue in the district where the corporate defendant alone resides, serves as a powerful weapon for the harassment of individual defendants. For example, returning to the hypothetical presented in the introduction, Opie's estate might have ample resources to bring suit in the Northern District of California. Aunt Bea's choice of venue in the Southern District might therefore be an attempt to shift unfairly the economic burden of the litigation to Barney by compelling him to retain San Diego counsel and travel the 854 miles from Crescent City to San Diego. Thus, a narrow construction of section 1392(a), by restricting the plaintiff to the district in the forum state where "all defendants reside," would protect individual defendants from plaintiffs determined to use the ambiguity in section 1392(a) as a means of harassment.

The difficulty with adopting the narrow construction of section 1392(a) to prevent plaintiffs from using the statute in a way that seriously disadvantages defendants is that in so doing, the courts overlook a large class of plaintiffs who rely on a broad construction of section

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60. See *Denver & R.G.W.R.R. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967); 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811, at 76.

61. 472 F. Supp. 432 (E.D. Pa. 1979).

62. 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811.

63. 472 F. Supp. at 434 (quoting 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3811, at 76).

1392(a) to provide a federal forum in which they can economically bring suit. Again, returning to the hypothetical presented in the introduction, Opie's estate might be severely indebted. In this case, it is likely that were it not for the fact that Arizona courts lack personal jurisdiction over Barney,<sup>64</sup> Aunt Bea would have brought suit in an Arizona District Court under section 1391(a).<sup>65</sup> By allowing her to lay venue in the Southern District of California, a distance of approximately 120 miles from Yuma, a broad construction of section 1392(a) might give Bea her only realistic opportunity to bring an action in a federal court against those parties responsible for her nephew's death. The narrow construction of section 1392(a), when applied to the situation where a low-income plaintiff brings suit against multiple defendants, suffers from the same general malady as the broad construction. By restricting venue to the district where all defendants reside, the narrow construction severely inconveniences the low-income plaintiff seeking to use the ambiguity in section 1392(a) to bring suit in the federal district closest to home.

An examination of the convenience issue raised by the choice between the broad and narrow constructions leads to the conclusion that either choice would yield injurious consequences to a discrete class of litigants. The broad construction, by permitting a plaintiff to bring suit wherever one defendant resides despite the existence of another district in which all defendants reside, potentially inconveniences a large class of low-income defendants by compelling them to travel far from their homes to defend against lawsuits. The narrow construction, by limiting a plaintiff to the district where "all defendants reside," injures low-income plaintiffs by denying them the opportunity to bring suit in a federal district close to home. Since there is no discernible advantage (in terms of convenience) in choosing either the narrow or broad construction of section 1392(a), a decision based solely on policy considerations underlying that section would necessarily be quite arbitrary.

#### B. *Transfer of Venue Under Section 1404(a) — Breaking the Policy Deadlock*

Fortunately, the choice between the broad and narrow construction of section 1392(a) does not have to be made arbitrarily. If section 1392(a) is examined in the broader context of the full panoply of federal venue rules, a solution to the convenience dilemma becomes apparent. Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have

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64. See notes 42-43 *supra* and accompanying text.

65. 28 U.S.C. § 1391(a) (1982). This statute provides for venue in the district where the plaintiff resides in diversity actions.

been brought."<sup>66</sup> Thus, defendants who have been inconvenienced by a plaintiff's choice of forum under the broad construction of section 1392(a) can invoke section 1404(a).<sup>67</sup>

The standards used to determine whether a proposed transfer under section 1404(a) is for the convenience of parties and in the interests of justice are largely fact-specific.<sup>68</sup> Indeed, in *Brown v. Woodring*,<sup>69</sup> the District Court for the Middle District of Pennsylvania declared, "[w]isely it has not been attempted to catalogue the circumstances which will justify or require grant or denial of transfer. Given the statutory standards the decision is left to the sound discretion of the court."<sup>70</sup> Among those factors pertinent to a transfer decision under section 1404(a), however, the relative financial strength of the parties often assumes an important role.<sup>71</sup>

For example, in *AAMCO Automatic Transmissions, Inc. v.*

66. 28 U.S.C. § 1404(a) (1982). That section 1404(a) can be used to transfer venue after a plaintiff has chosen his forum under a broad construction of section 1392(a) is beyond dispute. The phrase "any civil action" in section 1404(a) is used "without qualification, without hint that some should be excluded." *Ex parte Collett*, 337 U.S. 55, 58 (1948) (Court rejected argument by the Louisville & Nashville R.R. that section 1404(a) does not apply to suits under the Federal Employer's Liability Act). See also 7B J. MOORE, *supra* note 6, § 1404, at 601 ("Under § 1404(a), although venue is properly laid in accordance with the general or a special venue statute, the district court in the exercise of a sound discretion may, nevertheless, transfer the action to a more convenient venue.").

67. See *Williams v. Hoyt*, 372 F. Supp. 1314 (E.D. Tex. 1974) (Eastern District Court of Texas, Tyler Division, denying the corporate defendant's motion for a transfer of the case to the Beaumont Division under section 1404(a) on the ground that almost all of the witnesses, individual plaintiffs, and other defendants would be seriously inconvenienced by the proposed transfer); *Kirkland v. New York State Dept. of Correctional Serv.*, 358 F. Supp. 1349 (S.D.N.Y. 1973) (Southern District Court of New York denying defendants' motion for a transfer of venue to the Northern District under section 1404(a) on the grounds that most of the plaintiffs resided in the Southern District, the defendant-state agency resided in the Southern District, and the individual defendants, although not all residents of the Southern District, would have little or no active participation in the case); *De George v. Mandata Poultry Co.*, 196 F. Supp. 192, 197 (E.D. Pa. 1961) (Eastern District Court of Pennsylvania denying defendants' motion to transfer the case to the Middle District, offering no reasoning beyond the cryptic remark that "[t]he record fails completely to show any facts which would move the Court to grant this motion."); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak*, 88 F. Supp. 863, 866 (S.D.N.Y. 1949) (Southern District Court of New York denying defendant's motion for transfer of venue stating, "perhaps, convenience should be waived as one of the burdens attendant on the vastness of their national and international business activities").

68. 15 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3847, at 236.

69. 174 F. Supp. 640 (M.D. Pa. 1959).

70. 174 F. Supp. at 644; *accord* *SEC v. Golconda Mining Co.*, 246 F. Supp. 54, 57 (S.D.N.Y. 1965) (District court, referring to the criteria established in section 1406(a) for a transfer of venue declared, "[t]he court must make a reasonable appraisal between conflicting factors that admit of no quantitative measure. In the last analysis, the problem is one of particularized judgement.").

71. See *Goldstein v. Rusco Indus.*, 351 F. Supp. 1314, 1318 (E.D.N.Y. 1972) (district court declared that in assessing the merits of a motion to transfer under section 1404(a) "the court cannot overlook the relative means of the parties"); *Grubs v. Consolidated Freightways, Inc.*, 189 F. Supp. 404, 410 (D. Mont. 1960) ("The ability of the respective litigants to bear the expenses of trial in a particular forum may be considered."); *accord* *General Portland Cement Co. v. Perry*, 204 F.2d 316, 320 (7th Cir. 1953).



*Bosemer*,<sup>72</sup> the plaintiff, AAMCO Transmissions, brought suit against the defendant in the Eastern District of Pennsylvania. The plaintiff was a Pennsylvania corporation and the defendant a resident of the Central District of California. The defendant sought to transfer venue under section 1404(a) to the Central District of California on the ground that "he is in poor financial condition and cannot afford the expense of travel to Philadelphia either for himself or his witnesses."<sup>73</sup> The court accepted this argument and transferred venue stating that "[a] transfer to the Central District of California, where this action could have been instituted, would enable Bosemer to properly prepare and effectively present his defense which he would otherwise be unable to do if the action remained in this forum."<sup>74</sup> Implicit in the court's opinion in *Bosemer* is the recognition that, of the two parties to the dispute, AAMCO is better able to bear the financial burden of traveling the distance between Philadelphia and Central California to litigate.

The willingness of courts to consider the relative financial strength of the litigants in deciding motions for venue transfer under section 1404(a) ameliorates the harsh effect that a broad construction of section 1392(a) would have on individual defendants. Under section 1404(a), individual defendants who are unfairly burdened by a plaintiff who lays venue in the district where only the corporate defendant resides can seek a venue transfer to the district where both he and the corporate defendant reside. The district court is then able to weigh the convenience of the forum to the plaintiff against the inconvenience accruing to the individual defendant, taking into account the relative financial strength of the litigants.<sup>75</sup> The decision thus reached reflects the court's judgment as to the judicial forum which maximizes the convenience of the litigants and their witnesses.

By providing for a transfer of venue when an individual defendant has been unfairly burdened by the plaintiff's choice of forum, section 1404(a) defuses the threat that plaintiffs will wittingly or unwittingly use the broad construction of section 1392(a) to inconvenience defendants. With this threat eradicated, the policy deadlock between the broad and narrow construction of section 1392(a) is broken. The courts are free to adopt the broad construction of section 1392(a) so as to provide low-income plaintiffs with an expanded choice of forum without fear that this construction will be used by wealthier plaintiffs to burden low-income defendants unfairly.

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72. 374 F. Supp. 754 (E.D. Pa. 1974).

73. 374 F. Supp. at 757.

74. 374 F. Supp. at 757.

75. The convenience of the corporate defendant is usually not a consideration in section 1404(a) transfer decisions. See *Williams v. Hoyt*, 372 F. Supp. 1314 (E.D. Tex. 1974); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak*, 88 F. Supp. 863 (S.D.N.Y. 1949).

## CONCLUSION

Section 1392(a) presents a classic illustration of the difficulties involved in statutory interpretation. Ideally, interpreting a statute involves nothing more than the straightforward task of giving effect to the plain meaning of the words supplied by the legislature. The "different district in the same State" language of section 1392(a), however, is far from clear as to whether it applies when all defendants reside in a single district. Any construction of section 1392(a) based solely on the statute's language, therefore, is little more than an educated guess.

Advocates of the broad construction of section 1392(a) view the Supreme Court's decision in *Suttle v. Reich Bros. Construction Co.* as a clear endorsement of the view that section 1392(a) is applicable even when all defendants reside in a single district. These advocates, however, are overly optimistic. For not only did the Supreme Court fail to reach this issue in the opinion, neither of the parties to the suit argued the proper construction of section 1392(a) in their briefs. Given these facts, it is doubtful that the Court spent much time, if any, considering the possible constructions of section 1392(a). The *Suttle* decision, therefore, is "too slender a reed" to support an argument for the broad construction of section 1392(a).

The task of choosing between the broad and narrow construction of section 1392(a) is not resolved by turning to the legislative history surrounding the statute's enactment. The extant legislative history simply does not address the issue of whether section 1392(a) is applicable even when there is a single district in which all defendants reside. And the arguments of constructive legislative intent offered by proponents of the broad and narrow constructions of section 1392(a) are unpersuasive — marred by a faulty understanding of the relevant legislative history, a mischaracterization of their opponents' view of the statute, or an unwarranted intuitive leap.

In the end, courts must turn to policy considerations to decide whether section 1392(a) should apply even when there is a single district within the forum state in which all defendants reside. Analysis of the primary policy consideration involved in this issue, the convenience of the parties, leads to the conclusion that both the broad and narrow constructions of section 1392(a) would have injurious effects on a discrete class of litigants. The broad view, by allowing a plaintiff to bring suit in the district where only the corporate defendant resides, has the potential to inconvenience individual defendants severely. The narrow view, by restricting a plaintiff to the district in which all defendants reside, may serve as a stumbling block to low-income plaintiffs seeking to bring suit in a district close to home. Section 1404(a), allowing for the transfer of venue for the convenience of the parties, breaks this stalemate by providing individual defendants with the ability to seek a transfer of venue when they have been unfairly burdened

by the plaintiff's choice of forum under a broad construction of section 1392(a). With the potential for using section 1392(a) to harass individual defendants curtailed by section 1404(a), the broad construction of section 1392(a) can be adopted to provide low-income plaintiffs with the widest choice of forum available under the federal venue statutes.

— *Brent E. Johnson*