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FEDERAL PROCEDURE-VENUE OF CORPORATIONS-APPLICABILITY OF 28 U.S.C. §1391(c) TO PLAINTIFF CORPORATIONS

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FEDERAL PROCEDURE—VENUE OF CORPORATIONS—APPLICABILITY OF 28 U.S.C. §1391(c) TO PLAINTIFF CORPORATIONS—Plaintiff, trustee in bankruptcy of a Delaware corporation, brought a contract action based on diversity of citizenship in an Ohio district court. Defendant is a partnership, whose partners are all residents of states other than Delaware. Defendant moved to dismiss the action on the ground that venue was improperly laid. The court, relying on 28 U.S.C. §1391(c), *held:* motion to dismiss overruled. "Since the district where plaintiff is doing business . . . is the 'residence of the corporation for venue purposes,' this action may be properly maintained here [Ohio]."[1] *Hadden v. Barrow, Wade, Guthrie & Co.*, (D.C. Ohio 1952) 105 F. Supp. 530.

It has always been the general rule that transitory actions based on diversity of citizenship may be brought in the judicial district where either the plaintiff(s) or the defendant(s) reside.[2] Prior to 1948 a corporation was deemed, for venue purposes, to be a resident of the state in which it was incorporated.[3] The *Neirbo* case,[4] which without changing this basic rule greatly lessened its restrictive effect, held that a corporation by qualifying to do business in a state and consenting to suit therein has waived the right to object

[1] Principal case at 531.

[2] Prior to 1948, the code used the words: ". . . in the district of the residence of either the plaintiff or the defendant." 49 Stat. L. 1213 (1936), 28 U.S.C. (1946) §112. In the 1948 Revision, Congress used these words: ". . . where all plaintiffs or all defendants reside." 62 Stat. L. 935 (1948), 28 U.S.C. (Supp. V, 1952) §1391(a).

[3] Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales, 151 U.S. 496, 14 S.Ct. 401 (1894).

[4] Neirbo Company v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 60 S.Ct. 153 (1939). As to the scope of the Neirbo doctrine, see 3 MOORE, FEDERAL PRACTICE §1904 (1948).

to venue in diversity cases.[5] Section 1391(c), which was added to the code in 1948, 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.*"[6] This section makes it reasonably clear that the plaintiff corporation could be sued in Ohio without resort to the *Neirbo* doctrine. The second clause of this section raises the additional question whether the plaintiff corporation may bring an action in the Ohio district court. The court in the principal case held that the second clause is independent of the first clause and therefore determines venue for both plaintiff and defendant corporations. Judge Freed felt that any other interpretation would "attribute to Congress the anomalous intent to define the residence of corporate defendants but not that of corporate plaintiffs"[7] and would render the second clause "meaningless and redundant in the face of the clear, expressive and unambiguous wording which precedes it."[8] If sound, this decision represents a major change in the venue rules for plaintiff corporations. Obviously the ramifications of such a change are far-reaching. Text writers[9] and one district court[10] have taken the view that section 1391(c) applies only to defendant corporations.[11] This position is based upon the theory that section 1391(c) is basically an outgrowth of the *Neirbo* doctrine,[12] although the section is admittedly broader than the *Neirbo* rule in regard to defendant corporations. Unfortunately neither the congressional hearings nor the Reviser's Notes on the 1948 Revision lend any aid in establishing the actual legislative intent. Perhaps this in itself is an indication that no major change was intended. When read independently, the second clause of section 1391(c) is susceptible to the position taken in the principal case. However, when examined in context

[5] Venue is a privilege personal to the defendant and is waived if timely objection is not made. See Neirbo case, supra note 4.

[6] 62 Stat. L. 935 (1948), 28 U.S.C. (Supp. V, 1952) §1391(c). Italics added.

[7] Freiday v. Cowdin, (D.C. N.Y. 1949) 83 F. Supp. 516 at 517. This case appears to be the only other primary authority in accord with the principal case. Query whether such an intent is "anomalous." The development of the Neirbo doctrine gave Congress a real reason for setting forth venue provisions for defendant corporations.

[8] Principal case at 531.

[9] MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 194 (1949); 1-A OHLINGER'S FEDERAL PRACTICE, rev. ed., 297 (1950). See also 1 SYRACUSE L. REV. 117 at 120 (1949); cf. 60 HARV. L. REV. 435 (1947).

[10] Chicago & North Western Ry. Co. v. Davenport, (D.C. Iowa 1950) 94 F. Supp. 83 at 85, vacated on other grounds, 95 F. Supp. 469 (1951): "It seems to me that §1391(c) has merely clarified by legislation what the courts have been declaring by interpretation as to venue for corporate defendants only, broadened to eliminate any necessity of resort to waiver."

[11] This view has the merit of being in accord with the historical tendency of federal courts to restrict the number of diversity cases by strict statutory interpretation. See cases cited supra note 10.

[12] This position was also taken in Carlisle v. Kelly Pile and Foundation Corp., (3d Cir. 1949) 175 F. (2d) 414 (1949).

with the history and prior law sketched above,[13] with the other venue provisions, and with the first clause of the section,[14] the validity of such an interpretation is at least doubtful. Considering section 1391(c) alone, it would seem that the second clause is tied to the first by the use of the word "such." "Such judicial district" must refer to the district where the corporation is incorporated, licensed or actually doing business. "Such corporation" appears to refer to a corporation being sued, i.e., a defendant corporation. In the 1948 Revision, Congress separated the venue provisions from other jurisdictional rules and dealt with venue in a somewhat comprehensive manner.[15] The general venue provisions[16] and some of the special venue provisions[17] are phrased in terms of "residence." Section 1391(c), which applies only to corporations, cuts across these general and special venue provisions.[18] Therefore, since the first clause of section 1391(c) is not phrased in terms of residence, it would seem that the second clause was added to make it clear that the first clause does not conflict with the general and special venue provisions. If this analysis is correct, it is concluded that the second clause merely serves to tie the first clause with the other venue provisions and does not state an independent rule. Because of the importance of this problem to those involved in corporate litigation, it is hoped that the Supreme Court will be called upon to settle the conflicting interpretations of section 1391(c).

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[13] CRAWFORD, THE CONSTRUCTION OF STATUTES 422 (1940): "If a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted."

[14] "All parts of the act should be considered, compared, and construed together." 50 AM. JUR. 350 (1944).

[15] MOORE, COMMENTARIES ON THE U.S. JUDICIAL CODE 189 (1949).

[16] 62 Stat. L. 935 (1948), 28 U.S.C. (Supp. V, 1952) §1391(a) and (b).

[17] E.g., 62 Stat. L. 936 (1948), 28 U.S.C. (Supp. V, 1952) §1400(b).

[18] MOORE, COMMENTARIES ON THE JUDICIAL CODE 194 (1949). *Accord:* Farr Co. v. Gratiot, (D.C. Cal. 1950) 92 F. Supp. 320. But cf. Gulf Research and Development Co. v. Harrison, (9th Cir. 1950) 185 F. (2d) 457.