

sion the *Fabiani* rule appears the most efficacious method thus far propounded.

So, the last of the propositions that may be asserted against constructive custody appears as inapplicable as those preceding it. Moreover, positive justification exists for the suggested extension, since earlier availability of judicial review will more fully protect the registrant's individual liberty without obstructing realization of the country's mobilization goals.

### FEDERAL VENUE AND THE CORPORATE PLAINTIFF: JUDICIAL CODE SECTION 1391 (c)

In 1948 Congress revised the Judicial Code with the passage of the Judicial and Judiciary Act; Section 1391(c) treats the difficult problem of corporate venue in the federal courts.<sup>1</sup> A court must, before it can adjudicate, gain jurisdiction over the subject matter and the parties involved. With jurisdiction obtained, the question of proper venue must be settled. While Section 1391(c) explicitly allows a corporation, in diversity of citizenship cases, to be sued in a federal district where it is incorporated, licensed to do, or is doing, business, it raises a question with regard to its meaning for the corporate plaintiff.

The persistent problem of reconciling the migratory nature of corporations with an inclination to confine their efficacy has plagued the courts since the nation's founding. An indelible and virtually unchallenged theory of non-migration prevailed until *Ex Parte Schollenberger*<sup>2</sup> "displaced metaphor with common sense."<sup>3</sup> In the light of acquiescence

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1. 28 U.S.C. § 1 *et seq.* (Supp. 1952).

"(a) 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.

"(b) 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, except as otherwise provided by law.

"(c) 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."

28 U.S.C. § 1391 (Supp. 1952). (emphasis added)

2. 96 U.S. 369 (1877). This case was based on two earlier opinions. *Chicago and Northwestern Ry. v. Whitton*, 13 Wall. 270 (U.S. 1871); *Baltimore & Ohio R.R. v. Harris*, 12 Wall. 65 (U.S. 1870).

3. *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 169 (1939).

in the activity of concerns outside their state of incorporation, exemption from suit in foreign states became unacceptable. The *Schollenberger* decision, interpreting the 1875 venue statute,<sup>4</sup> concluded that a corporation, by designating an agent in a state, would render itself amenable to service of process there.<sup>5</sup> The improper venue defense, *Neirbo Co. v. Bethlehem Shipbuilding Corporation* pronounced, is waived by selection of an agent even without the 1875 statute.<sup>6</sup> Compliance with state law abrogated the privilege of objecting to venue in districts wherein a company could not otherwise be compelled to answer.<sup>7</sup> Between 1939 and the 1948 legislation, courts utilized the "consent to venue" fiction as enunciated by *Neirbo* and extirpated by Section 1391(c).<sup>8</sup>

The revised Code requires the laying of venue where all plaintiffs or all defendants reside in diversity cases and where all defendants are situated in non-diversity litigation, both situations subject to provisions in other laws.<sup>9</sup> Section 1391(c) unequivocally states that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business . . ." but the next phrase, "and such judicial district shall be regarded as the residence of such corporation for venue purposes," requires exploration to discern a credible interpretation.

A trio of district court judges has examined the position of the corporate plaintiff under Section 1391(c). *Freiday v. Cowdin*<sup>10</sup> and *Hadden v. Barrow, Wade, Guthrie & Co.*<sup>11</sup> sanctioned a firm's laying venue where it was doing business. Citing only Professor Moore, who ignored the issue of a corporation as plaintiff,<sup>12</sup> and a law review note,

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4. "[N]o civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings. . . ." 18 STAT. 470 (1875).

5. The phrase, "in which he shall be found," was removed in order to stop service against natural persons wherever they might be caught. 24 STAT. 552 (1887); see *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 171 (1939).

6. 308 U.S. 165 (1939).

7. These state laws vary in their requirements. For examples of such laws and cases which interpret them, see PA. STAT. ANN. tit. 15, §§ 2852-1001 through 2852-1016 (Supp. 1951), *Robinson v. Coos Bay Pulp Corp.*, 147 F.2d 512 (3d Cir. 1945); TENN. CODE ANN. §§ 4118-4135 (Williams 1942), *International Union of Mine, etc., Workers v. Tennessee Copper Co.*, 31 F. Supp. 1015 (E.D. Tenn. 1940).

8. Ample legal writing discusses the conditions under which a corporation is deemed to come within the rule of the *Neirbo* case. *E.g.*, Comment, 42 ILL. L. REV. 780 (1948); 13 GEO. WASH. L. REV. 244 (1945); 27 NEB. L. REV. 595 (1948).

9. 28 U.S.C. §§ 1391(a), (b) (Supp. 1952).

10. 83 F. Supp. 515 (S.D.N.Y. 1949).

11. 105 F. Supp. 530 (N.D. Ohio 1952).

12. 3 MOORE, FEDERAL PRACTICE 2142-2143 (2d ed. 1948). The court seemingly mis-

which intimates an apparent ability to initiate an action in such a district,<sup>13</sup> the *Freiday* opinion demonstrates the paucity of authoritative comment on the subject. Facing this dearth of authority, the court presumed a congressional desire to allow a corporation to sue in the district where it does business. A contrary conclusion would impute to the legislature an amorphous scheme of delineating the residence of a corporate defendant, but not a corporate plaintiff; furthermore, the "and such" phrase would otherwise be a mere superfluity, and an inequitable unbalance would permit a suit against a corporation where commencement of proceedings by the same company was prohibited. More recently, the *Hadden* case has followed the *Freiday* opinion, contending that an antithetical finding would necessitate a lucid legislative declaration of such intention.<sup>14</sup>

Denial of a privilege to file a claim wherever a corporation engages in activity occurred between the *Freiday* and *Hadden* cases in *Chicago and Northwestern Ry. v. Davenport*,<sup>15</sup> tracing the legislative and judicial history of venue in the United States, the judge noted a disposition to limit the residence of corporate bodies for purposes of litigation.<sup>16</sup> For example, *Neirbo* and the doctrine of waiver grew out of *Schollenberger*, but the former decision itself referred to an 1887 bill which would have severely restricted venue of corporate parties in the district courts.<sup>17</sup>

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uses the statement of Professor Moore by citing it to support its position with regard to corporate plaintiff whereas the writer omits discussion of the plaintiff at that point.

13. 60 HARV. L. REV. 424, 435 (1947).

14. The court in *Hadden* recognized opposition by two text writers. 3 MOORE, FEDERAL PRACTICE 42 (Supp. 1951); 1-A OHLINGER, FEDERAL PRACTICE 297 (1950).

Although Professor Moore is cited in the *Freiday* case as supporting authority, he has disagreed with the holding in that case. "Query whether 28 U.S.C. § 1391(c) was not intended to apply to a corporate defendant only. . . . It would seem that the Delaware corporation could not have maintained the action in New York notwithstanding that a suit could be brought against it in New York." MOORE'S COMMENTARY ON THE U.S. JUDICIAL CODE 178, 194 (1949), states, "[T]he Code has made no change in this rule relative to the residence of a corporate plaintiff."

In referring to § 1391(c), Ohlinger says, ". . . it does not make the corporation a resident of the state so that as plaintiff it may lay the venue of an action in which jurisdiction is invoked only on the ground of diversity, in that state." This comment cited *Guth v. Groves*, 44 F. Supp. 855 (S.D.N.Y. 1942) as authority; however, the case was decided before § 1391(c) was enacted. The *Freiday* case was also cited, but Ohlinger conceded that it is *contra*.

15. 94 F. Supp. 83 (S.D. Iowa 1950).

16. *Cf. Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163, 166 (1948).

17. This section prohibited resort to the federal courts by foreign corporations authorized to do local business. It was passed by the house three times. 10 CONG. REC. 1304 (1880); 14 CONG. REC. 1244-1255 (1883); 15 CONG. REC. 4879 (1884). But the Senate allowed the bill to die in committee each time. 10 CONG. REC. 1340 (1880); 14 CONG. REC. 1270 (1883); 15 CONG. REC. 4909 (1884). The House passed it again in 1887 as part of H.R. 2441. 18 CONG. REC. 613 (1887). This time the Senate amended

The accuracy of an assertion that Congress intended the result reached in *Freiday* is repudiated by the haunting reminiscence of the 1887 provision; thus, the tribunal would not read into statutory language a meaning that was non-existent in fact.<sup>18</sup>

Validity of such ratiocination can be doubted at least to the extent of attesting to its inconclusiveness; in the past, corporate litigation has been restrained by court and legislature, but, on the other hand, there is no denying either the current tendency to liberalize venue statutes<sup>19</sup> or the fact that corporate activity extends beyond state boundaries.<sup>20</sup> Undoubtedly in many instances valid reasons exist for allowing a company doing business in a district to sue a non-resident therein.<sup>21</sup>

Whether Congress intended only to embrace and expand the *Neirbo* rule applicable to corporate defendant, or to contemplate the corporate plaintiff, remains the salient inquiry in attempting to interpret Section 1391(c). Most commentators who discuss the provision take for granted the former position,<sup>22</sup> but one of the exceptors to this general attitude, Professor Wechsler, maintains that "when the corporation is a plaintiff it will be able in diversity cases to lay venue in any district in which it does business."<sup>23</sup> The few volumes on procedure written since 1948 do not mention the possibility of such an innovation;<sup>24</sup> it would

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the bill, specifically striking out the section before passing the bill. 18 CONG. REC. 2543 (1887).

18. All of this discussion by the court makes no effort to assign any meaning to the problem phrase of Section 1391(c).

An interesting sidelight on the *Davenport* case is that the judge who heard the case was serving as a federal judge under an interim appointment by the President and was not confirmed by the Senate. An application made to his successor to set aside the order of dismissal and to transfer to Texas where most of the defendants resided was granted. See *Chicago & Northwestern Ry. v. Davenport*, 95 F. Supp. 469 (S.D. Iowa 1951).

19. See *Freiday v. Cowdin*, 83 F. Supp. 516, 518 (S.D.N.Y. 1949); 3 MOORE, FEDERAL PRACTICE 2143 (2d ed. 1948); 3 CYCLOPEDIA OF FEDERAL PROCEDURE 31 (3rd ed. 1951).

20. *Williams v. Green Bay & Western R.R.*, 326 U.S. 549, 553 (1946).

21. The *Davenport* case was brought in Iowa, where the corporation was doing business, for several reasons: (1) to bring the action "near the physical location of witnesses, whose presence at the trial would be necessary to establish all the facts"; (2) to determine the meaning of the contract as quickly as possible and to see what type of business enterprise the defendant conducted; (3) the *Freiday* case, then the only authority, declared this to be possible; (4) it seemed that if a corporation could be sued where doing business it should have the corresponding right to maintain a suit in such a district. Communication to the INDIANA LAW JOURNAL from Mr. Frank Davis, attorney for the plaintiff, *Chicago & Northwestern Ry.*

22. E.g., *Bethell and Friday, The Federal Judicial Code of 1948*, 3 ARK. L. REV. 146, 149 (1949); *Harris, Survey of the Federal Judicial Code*, 3 SOUTHWESTERN L.J. 229, 235 (1949).

23. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 240, n. 126 (1948).

24. 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 80 (Supp. 1952)

thus seem that those who are most thoroughly acquainted with the Judicial Code revision either considered the change favoring the corporate plaintiff as being obvious and indisputable, or did not recognize the possibility of the judicial interpretation in *Freiday* and *Hadden*.

Little aid may be gained from an examination of legislative history since Section 1391 appears to have occasioned no debate; if Congress contemplated the extension here discussed, the language used must have been deemed explicit enough to accomplish the desired result.<sup>25</sup> Representative Keogh<sup>26</sup> and Senator Donnell,<sup>27</sup> in commenting on the entire 1948 revision, each advanced the view that the bill did not include controversial changes whenever they could be avoided; reviser's notes<sup>28</sup> and declarations by Professor Moore, who served as special consultant to the advisory committee of the House Judicial Committee,<sup>29</sup> substantially parallel these statements. The foregoing seems to indicate congressional intent to merely include an expanded *Neirbo* rule, without going further, because the grant of a previously unyielded privilege to corporation plaintiffs would be disputatious.<sup>30</sup> It could also support a finding of intention to allow suit by a company where doing business on the ground that to do so would not be controversial.<sup>31</sup> The latter view would abrogate the necessity of questioning the existence of the concluding

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(the authors merely point out the conflict between the *Freiday* and *Davenport* decisions without declaring their preference); 3 CYCLOPEDIA OF FEDERAL PROCEDURE 33-34 (3d ed. 1951); TALBOTT, INTERGOVERNMENTAL RELATIONS AND THE COURTS 76 (1950).

25. A special pamphlet published in 1948 by U.S. Code Congressional Service contains legislative history, reviser's notes, and congressional debate and discussion of the 1948 revision.

26. *Hearings before Subcommittee No. 1 of the Committee on Judiciary on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 6 (1947).

27. 94 CONG. REC. 7928 (1948).

28. 28 U.S.C.A. §§ 1391-1406 (Supp. 1952). These are referred to in H.R. REP. NO. 308, 80th Cong., 1st Sess. 6 (1948), which says, ". . . minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the revisor's notes under sections 1391-1406."

29. 3 MOORE, FEDERAL PRACTICE 3541, 3544 (2d ed. 1948). Professor Moore testified on H.R. 2055, which was substantially the same as H.R. 3214, the bill that was finally passed. In referring to venue, he said: "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer grounds for dismissal of an action in the federal courts. Instead the district court is to transfer the case to the proper venue. See Section 1406. And Section 1404 introduces an element of convenience which gives the court the power to transfer a case for the convenience of parties and witnesses to another district." *Hearings before Subcommittee No. 1 of the Committee on Judiciary on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 29 (1947).

30. These men endeavor to prove that legislation prior to 1948 had definite intent to limit venue. See *King v. Wall and Beaver Street Corp.*, 145 F.2d 377, 380 (D.C. Cir. 1944), which discusses such limitations.

31. There have been only three cases in four years, which fact might indicate that the Congressmen were unaware any controversy would arise.

phrase of the section, while the contrary holding might require attribution to Congress of an "anomalous intent to define the residence of corporate defendants but not that of corporate plaintiffs."<sup>32</sup>

Whatever the legislative intent, if indeed an ascertained intent existed, the statutory language does not facilitate its discovery. Assuming the superfluity of the problem phrase, a period after *business* would have solved the problem; or, if the phrase had been introduced as a separate sentence, it could be interpreted as merely a clarification of the preceding sentence. Instead, inclusion of the terminology, "and such . . ." leads to the belief that something new has been added to what has gone before. Section 1391(a) allows venue to be laid where all plaintiffs, or all defendants, reside; omitting that portion of Section 1391(c) pertaining solely to defendants, it reads: The "judicial district in which it [the corporation] is incorporated or licensed to do business or is doing business . . . shall be regarded as the residence of such corporation for venue purposes."<sup>33</sup> Certainly a conclusion permitting instigation of an action in a state where a company is engaged in commercial activity is not repugnant to this language.<sup>34</sup>

Logical arguments can thus be assembled to support the conclusions of *Freiday* and *Hadden*, or *Davenport*; none of them being conclusive, it would perhaps be best to seek other avenues to a just solution.<sup>35</sup>

32. *Freiday v. Cowdin*, 83 F. Supp. 516, 518 (S.D.N.Y. 1949).

33. 28 U.S.C. § 1391(c) (Supp. 1952).

34. The brief for an appeal of the *Freiday* decision, which was later withdrawn by stipulation, contains an interesting grammatical argument at pp. 10-11, the judgment of which is left to the reader. "The section [1391(c)] consists of a single sentence and the subject matter of that sentence is the place where 'a corporation may be sued.' The provision of the last part of the sentence does not, and does not purport to, introduce or deal with the entirely different subject matter, namely, where a corporation can bring suit. On the contrary, the last part of the sentence relates to 'such corporations,' which necessarily means a defendant corporation."

The brief cites *Schoen v. Mountain Producers Corp.*, 170 F.2d 707, 713, n. 10 (3d Cir. 1948), which states, "[b]ut Section 1391(c) of revised Title 28 very substantially broadens the venue as to corporate defendants." Communication to the INDIANA LAW JOURNAL from Mr. H. G. Pickering, attorney for the defendant Cowdin. However, this does not preclude the possibility that venue was also broadened in order to embrace the corporate plaintiff.

35. Another approach to elucidation of the ambiguous expression consists of endeavoring to define *residence*, but the use of *reside* in Section 1391(a) implies that Congress affected no hidden or peculiar meaning of the word in Section 1391(c). A restrictive definition of *residence* would attribute to the legislators an intent to vary the interpretation of *reside* and *residence* within a statute.

Court pronouncement on the word *reside* in Section 1391(c) may be found in *Dalton v. Shakespeare Co.*, 196 F.2d 469 (5th Cir. 1952). For excellent discussion of the various views of *residence*, see *Suttle v. Reich Bros. Construction Co.*, 333 U.S. 163 (1948); *Mincy v. Detroit & Cleveland Nav. Co.*, 94 F. Supp. 456 (S.D.N.Y. 1950); *Jakubowski v. Central R.R.*, 88 F. Supp. 258 (S.D.N.Y. 1950); *Bagner v. Blidberg Rothchild Co.*,

A predilection for conducting trials in the best possible place forms the foundation of venue theory. Even after the venue statute is satisfied, a court may refuse to accept a case. Prior to 1948, such refusal resulted in dismissal based on the judicial doctrine *forum non conveniens*,<sup>36</sup> by enactment of Judicial Code Section 1404,<sup>37</sup> however, Congress accepted and modified the doctrine, allowing transfer to another district or division in which the suit could originally have been brought.<sup>38</sup> The following are some of the considerations upon which a court will base its decision whether or not to accept or transfer a case: private interests of the litigants; sources of proof; cost of obtaining attendance of reluctant witnesses; practicability of viewing premises, if necessary; and administrative difficulties.<sup>39</sup> Plaintiff has first choice of the forum, and Section 1404 should not be invoked "unless balance in the defendant's favor is shown by clear and convincing evidence";<sup>40</sup> though ample importance ought to be accorded his selection, it should not create a result unjust to the defendant.

Coalescence of Section 1391(c), allowing suit by plaintiff in proximity to the situs of the cause of action, and Section 1404, avoiding injustice by use of the court's discretion,<sup>41</sup> whether consciously or intuitively intended by Congress, should provide a sound result. Such

84 F. Supp. 973 (E.D. Pa. 1949); *Wagner Mfg. Co. v. Cutler-Hammer, Inc.*, 84 F. Supp. 211 (S.D. Ohio 1949); 3 *CYCLOPEDIA OF FEDERAL PROCEDURE* 26 (3d ed. 1951).

Mr. Leonard S. Lyon of Los Angeles, arguing before the Supreme Court in *Gulf Research & Development Co. v. Leahy*, 21 U.S.L. WEEK 3113 (U.S. Oct. 28, 1952), maintained that Section 1391 had changed the meaning of the word *resident*. He said that *resident* now means where the corporation is doing business, which is more realistic in view of modern conditions. The court was considering Section 1391 in relation to Section 1400. There was a four to four split, the court finding itself unable to decide the relation.

For diversity jurisdiction, *residence* must be defined as the place of incorporation, while for venue purposes *residence* is where the corporation is "incorporated or licensed to do business or is doing business."

36. For a discussion of *forum non conveniens* and its adoption in § 1404, see *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F.2d 360 (4th Cir. 1949); *Aircraft Marine Products, Inc. v. Burndy Engineering Co.*, 96 F. Supp. 588 (S.D. Cal. 1951); *United States v. E. I. du Pont de Nemours & Co.*, 83 F. Supp. 233 (D.D.C. 1949); *United States v. National City Lines, Inc.*, 80 F. Supp. 734 (S.D. Cal. 1948); *Hayes v. Chicago, R. I. & P. R.R.*, 79 F. Supp. 821 (D. Minn. 1948).

37. "For 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 been brought." 28 U.S.C. § 1404(a) (Supp. 1950).

38. *Ibid.*

39. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946); *Koster v. Lumbermens Mutual Cas. Co.*, 330 U.S. 518, 524 (1946).

40. *Gulf Oil Corp. v. Gilbert*, *supra* note 39.

41. *New York, C. & St. L. R.R. v. Vardaman*, 181 F.2d 769, 770 (8th Cir. 1950). Application of Section 1404, says the court, depends upon the exercise of the "sound judicial discretion of the trial court"

merger at least ascribes to the lawmakers a justifiable policy. This approach is perceived by the *Freiday* case when, referring to the 1948 revision, the court declared that Section 1391(c) "appears to be in line with the Congressional intent to liberalize the statutes dealing with venue, while reserving the right to the courts to transfer actions which have been laid in the wrong forum."<sup>42</sup>

Few arguments have been volunteered questioning the propriety of the *Freiday-Hadden* result. The strongest contention is provided by the defense in the *Davenport* case,<sup>43</sup> which asserts that the *Freiday* determination does "violence to the long settled principle that a *defendant* is (within certain exceptions) entitled to be sued in his own area of residence. . . ." <sup>44</sup> and creates the possibility of a company doing business in California "catching" a defendant in that state, though the latter resided in New York. This practical proposition arouses greater concern than any abstract disapprobation of *Freiday-Hadden*.

Currently in existence, however, are several rules that may cause a defendant inconvenience similar to that which some fear will be caused by the proposed interpretation of Section 1391(c). In any diversity case either the plaintiff or defendant must necessarily suffer some inconvenience; for example, under Section 1391(a) an individual plaintiff is allowed to bring suit where he resides, and a company may do the same where it is incorporated; but, these privileges usually cannot be abused, since a person, either individual or corporate, ordinarily maintains only one place of residence. A nation-wide firm might, to harass or weaken the defense, seek to serve its opponent as far from his customary residence as possible. A company sued where it is conducting its usual activities can probably defend itself there as well as at its home base, having competent personnel available in both places, but an individual may be extremely ill-prepared to defend an action at a distance from his home.<sup>45</sup>

The saving factor, vindicating the *Freiday-Hadden* position, remains the presence of *forum non conveniens*, as enacted in Section 1404. Un-

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42. *Freiday v. Cowdin*, 83 F. Supp. 516, 518 (S.D.N.Y. 1949).

43. Brief for defendant *passim*, *Chicago & Northwestern Ry. v. Davenport*, 94 F. Supp. 83 (S.D. Iowa 1950), and communication to the INDIANA LAW JOURNAL from Mr. John J. McKay, attorney for Davenport.

44. Brief for defendant, *supra* note 43. Compare this argument with that by the corporation attorney in regard to the long established federal policy of trying cases as close to the cause as possible, see note 21 *supra*.

45. In Note, 34 VA. L. REV. 811, 822 (1948), the suggestion is made that Section 1404 resulted at least in part from the *Neirbo* doctrine; it is to provide a method of eliminating inconvenience and injustice to a corporation being sued.



doubtedly, there are instances where a concern should be permitted to initiate an action where it is doing business, and there are also situations in which such suit would be disproportionately detrimental to the interests of the defendant. Coordinate use of Sections 1391(c) and 1404 will bestow the initial privilege upon the plaintiff corporation, while leaving the prevention of trials conducted in improper forums to the discretion of the court.

Interpretation of the statute herein suggested results in operation designed both to achieve just results and avoid unnecessary inconvenience to the parties involved. If Congress desired a different meaning, it thus becomes its duty to clarify the matter by amendment.

## MEDICAL DEDUCTION: SCOPE AND PURPOSE

As long ago as 1848 John Stuart Mill, although not advocating progressive taxation, advanced a theory whereby amounts necessary to maintain the health of an individual would be exempt from taxation.<sup>1</sup> Since the federal tax system is a progressive one, hence inferably more responsive to ability to pay, one would imagine that an effective medical deduction would by now be embedded in the federal income tax structure. But a puzzling ambiguity has recently arisen which makes it impossible to predict the deductibility of an expenditure that might also confer incidental non-medical benefits upon the taxpayer.

The Internal Revenue Code allows the deduction of expenses for the "medical care" of the taxpayer or his dependents,<sup>2</sup> and rather vaguely defines that care as including "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease or for the purpose of affecting any structure of the body."<sup>3</sup> Because congressional comment,

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1. MILL, *PRINCIPALS OF POLITICAL ECONOMY* 828 (Ashley Ed. 1926).

2. The only requirement for a "dependent" is that he receive more than half his support from the taxpayer. See I.T. 4034, 1950-2 CUM. BULL. 28 (the deduction was allowed for a married daughter); I.T. 3703, 1945 CUM. BULL. 127 (the deduction was allowed for the expenses of a person making more than \$500 per year, but nevertheless receiving more than half her support from the taxpayer).

3. 26 U.S.C. § 23(x). A medical expense as defined in this section would potentially include almost everything for which money could be spent. See Hodgkin, *If You Eat to Stay Healthy—Here's New Light on the Medical Deduction*, 30 TAXES 206 (1952), in which the author facetiously describes a fictitious case where the Tax Court allows the deduction of everything from whisky to cigarettes.