

# NOTES

## FEDERAL VENUE AND SERVICE AND THE FOREIGN CORPORATION IN DIVERSITY LITIGATION

### I

Venue and service of summons have been the traditional determinants of place of trial in the federal system.<sup>1</sup> Service of summons is the procedure by which jurisdiction is asserted over the person of the defendant,<sup>2</sup> while venue requirements are imposed for the protection of the litigants against an arbitrary selection of forum.<sup>3</sup> The narrower of these two requirements will act as the outer limit on the plaintiff's choice of a place for the trial. Under the Judicial Code of 1948 a third determinant has been provided, *forum non conveniens*, which permits the defendant to seek a transfer of the forum on grounds of inconvenience.<sup>4</sup>

Since the selection of a forum is the basic first step in all litigation, the requirements for its selection should be simple and certain allowing the plaintiff to choose his forum with a minimum of delay. In suits against non-resident corporations, which make up a large percentage of diversity litigation,<sup>5</sup> there has been great confusion on this basic problem much of which is due to the fact that the courts have historically made use of fictions to overcome obstacles to suits against foreign corporations.<sup>6</sup>

The states were the first to solve the problem of acquiring jurisdiction over foreign corporations. The peculiar nature of these defendants made it difficult to subject them to suit. It early developed that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty."<sup>7</sup> Jurisdictional requirements for corporations were

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1. "In addition to jurisdiction *as a federal court* and jurisdiction *of the person or of property*, the District Court cannot retain a case against objection if it is not laid in the proper *venue*, that is, in the right district." BUNN, *JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES* 114 (5th ed. 1949).

2. *Mississippi v. Murphree*, 326 U.S. 438, 444 (1946). Validity of service involves two questions: how the defendant may be served and where the defendant may be served. *Nickerson v. Warren City Tank & Boiler Co.*, 223 Fed. 843, 845 (E.D. Pa. 1915).

3. Stevens, *Venue Statutes: Diagnosis and Proposed Cures*, 49 MICH. L. REV. 307 (1951).

4. "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) (1948).

5. In seventy percent of diversity litigations corporations are parties. Non-resident corporations are defendants in approximately fifty percent of all diversity litigation. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 243 (1948).

6. Notes, 35 COL. L. REV. 591 (1935); 16 U. OF CHI. L. REV. 523 (1949).

7. *Bank of Augusta v. Earle*, 13 Pet. 519, 588 (U.S. 1839).

thus, at first, clear but very restrictive, for a corporation could only be sued in its home state. Until the middle of the nineteenth century the general belief was that foreign corporations were subject only to quasi in rem proceedings.<sup>8</sup> As corporations increasingly engaged in activities outside their state of incorporation, however, it became important to subject them to suit in these states. The first attempt to exercise in personam jurisdiction over a foreign corporation came in New York in 1835.<sup>9</sup> The foreign corporate defendants were finally made amenable to state process on the basis of their carrying on business activity in the state.<sup>10</sup>

An equally difficult problem was the subjection of corporate defendants to federal diversity jurisdiction.<sup>11</sup> Under the Judiciary Act of 1789 venue in the federal courts was limited to the plaintiff's or defendant's residence; service was valid only if the defendant were present in the state.<sup>12</sup> At that time, no corporation had a recognized existence outside its state of incorporation.<sup>13</sup> Therefore, though venue would be proper at plaintiff's residence, there could be no service upon and thus no means of acquiring diversity jurisdiction over a foreign corporation.<sup>14</sup> In 1875 venue was broadened by statute to include any place at which the defendant could be served, *i.e.*, wherever he was an inhabitant or could be found.<sup>15</sup> *Ex parte Schollenberger*<sup>16</sup> held that a foreign corporation's consent to receive state process pursuant to a state statute was also con-

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8. For a detailed historical account of jurisdiction of the courts over foreign corporations see DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860* (1954); HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* c.5 (1918).

9. *Kane v. Morris Canal & Banking Co.* The opinion is set forth in *Middlebrooks v. Springfield Fire Insurance Co.*, 14 Conn. 301, 303 n.(a) (1841). The attempt was unsuccessful.

10. Personal jurisdiction of a court over a foreign corporation was at first based on the fiction of implied consent. *St. Clair v. Cox*, 106 U.S. 350 (1882); *Lafayette Insurance Co. v. French*, 18 How. 404 (U.S. 1856). Later cases recognized that the corporation was present and subject to jurisdiction of the court if it was carrying on business. See Cahill, *Jurisdiction over Foreign Corporations and Individuals Who Carry On Business within the Territory*, 30 HARV. L. REV. 676 (1917).

11. This Note will not analyze the requirement of diversity of citizenship of the parties for suit in the federal courts. For the development of the fiction that a corporation is a citizen of the state of its creation see McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090 (1943). For the interesting problem of diversity of citizenship and the multistate corporation see Notes, 31 N.C.L. REV. 211 (1953); 14 OHIO ST. L.J. 106 (1953); 1953 WASH. U.L.Q. 220 (1953).

12. 1 STAT. 78 (1789).

13. See note 7 *supra*.

14. *Pomeroy v. New York & N.H.R.R.*, 19 Fed. Cas. 965, No. 11,261 (C.C.S.D.N.Y. 1857); *Day v. Newark India-Rubber Mfg. Co.*, 7 Fed. Cas. 245, No. 3685 (C.C.S.D.N.Y. 1850).

15. 18 STAT. 470 (1875). Early cases under this Act held that a corporation could only be sued in the state of incorporation. *Hume v. Pittsburg C. & St. L. R. R.*, 12 Fed. Cas. 870, No. 6,865 (D.C. D. Ind. 1877); *Stillwell v. Empire Fire Ins. Co.*, 23 Fed. Cas. 90, No. 13,449 (C.C.E.D. Pa. 1877).

16. 96 U.S. 369 (1878).

sent to be "found" in the state for purposes of federal jurisdiction. Later cases held that, even in the absence of express consent, if the corporation carried on sufficient activities, it was "found" in the state for federal jurisdiction purposes.<sup>17</sup> This was the first instance in which federal diversity jurisdictional requirements were wholly satisfied by a quantum of corporate business activity.

The advantages of this liberal approach were partially nullified in 1888 by a statute which again restricted venue to the plaintiff's or defendant's residence;<sup>18</sup> the word "found" was eliminated as a basis for venue. Since a corporation's residence was its place of incorporation,<sup>19</sup> its business activity elsewhere would not satisfy federal venue though such activity would subject a corporation to service at the plaintiff's residence.<sup>20</sup> It was not until 1939, in *Neirbo v. Bethlehem Shipbuilding Corp.*,<sup>21</sup> that the Supreme Court allowed a plaintiff to sue a corporation elsewhere than the plaintiff's residence or defendant's state of incorporation. The *Neirbo* case, like *Schollenberger*, held that, if a foreign corporation, pursuant to a state statute, appointed an agent to receive summons, it waived venue in the federal court of that state.<sup>22</sup> Section 1391(c), the present provision permitting venue to be laid where a corporate defendant is "doing business," was added in 1948.<sup>23</sup> This was an expansion of the *Neirbo* rule: Venue was to be determined independently of state service statutes though still to be defined by the concept of corporate activity. The traditional bases of venue, plaintiff's and defendant's residences, were preserved in Section 1391(a).<sup>24</sup>

There are two federal rules that provide a *manner* of service on foreign corporations.<sup>25</sup> Rule 4(d)(3), designates the agent upon whom service may be made but does not indicate *where* a corporation may be

17. See *Merchants' Mfg. Co. v. Grand Trunk Ry.*, 13 Fed. 358, 360 (C.C.S.D.N.Y. 1882).

18. 25 STAT. 433 (1888).

19. *Southern Pacific Co. v. Denton*, 146 U.S. 202 (1892).

20. Two fictions were used to subject the corporation to service in the district of plaintiff's residence: implied consent [*Ex parte Schollenberger*, 96 U.S. 369 (1878)] and the presence theory [*Barrow Steamship Co. v. Kane*, 170 U.S. 100 (1898)]. See note 10 *supra*.

21. 308 U.S. 165 (1939).

22. Under this doctrine many problems arose as to the scope of the consent and the engagement in activities in violation of or in the absence of a state statute. See Comment, 42 ILL. L. REV. 780 (1948).

23. "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(c) (1948).

24. "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." 28 U.S.C. § 1391(a) (1948).

25. 2 MOORE, FEDERAL PRACTICE 924 (2d ed. 1948).

served.<sup>26</sup> Though the language of this rule intimates that mere physical presence of an agent may be sufficient basis for service, it has generally been interpreted as a codification of former practice which required that corporations must be engaged in business activity.<sup>27</sup> Rule 4(d)(7) per-

26. Service shall be made "[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." FED. R. CIV. P. 4(d)(3). There is some ambiguity in the phrase "agent authorized by law." It is generally accepted that "law" means federal law. See 2 MOORE, FEDERAL PRACTICE 959 n.5. No rigid rule can be laid down as to who is an agent authorized by law to receive service. It is obvious that if there is no agency relationship between the defendant corporation and the person served, no basis for service of process under 4(d)(3) exists. *Rogers v. Arzf*, 1 F.R.D. 581 (1941). The basic requirement is that service be made on an agent who can reasonably be expected to realize the significance of the legal papers and notify the corporation of the suit. See *Operative Plasterers' & Cement Finishers' Int'l Ass'n v. Case*, 93 F.2d 56 (D.C. Cir. 1937); *Cohen v. Physical Culture Shoe Co.*, 28 F. Supp. 679 (S.D. N.Y. 1938). For cases illustrating the particular agents who may be served see 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 179 (1950); 9 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4415 *et seq.* (Perm. ed. 1931).

27. 4 CYCLOPEDIA OF FEDERAL PROCEDURE §§ 965, 975 (2d ed. 1943); Holtzoff, *Practice under the Federal Rules of Civil Procedure*, 20 B.U.L. REV. 179, 187 (1940). After the passage of the 1888 act, the majority of courts held that a foreign corporation was not subject to service within the district of the plaintiff's residence unless it was "found" there, *i.e.*, "regularly and substantially doing business" there. *Noel Construction Co. v. George W. Smith & Co.*, 193 Fed. 492, 497 (C.C.D. Md. 1911). See *Hoyt v. Ogden Portland Cement Co.*, 185 Fed. 889 (C.C.N.D.N.Y. 1911); *Wilkins v. Queen City Savings Bank & Trust Co.*, 154 Fed. 173 (C.C.S.D.N.Y. 1907); *London Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008 (C.C.S.D. Iowa 1904); *Dinzy v. Illinois Cent. Ry.*, 61 Fed. 49 (C.C.N.D. Iowa 1894).

A minority of courts took the view that service made on an officer present in the state on corporate business was valid even though the corporation did not engage in requisite activity within the state. These courts held that a corporation, like an individual, should be subject to service wherever physically present and that the corporation was present in any state to which it sent its officers to transact business. The requirement of being "found" was looked upon as a misapplication of the earlier federal statute. *Brush Creek Coal & Mining Co. v. Morgan-Gardner Electric Co.*, 136 Fed. 505 (C.C.W.D.Mo. 1905); *New Haven Pulp & Board Co. v. Downingtown Mfg. Co.*, 130 Fed. 605 (C.C. D.Conn. 1904); *Houston v. Filler & Stowell Co.*, 85 Fed. 757 (C.C.N.D.Ill. 1898).

To the present time, however, in order for service to be valid in the federal courts, the corporation must be engaged in requisite activity within the district. See, *e.g.*, *Bank of America v. Witney Central National Bank*, 261 U.S. 171 (1923); *Lumiere v. Mae Edna Wilder Inc.*, 261 U.S. 174 (1923); *Philadelphia & Reading Ry. v. McKibben*, 243 U.S. 264 (1917); *Lopinsky v. Hertz Drive-UR-Self-Systems, Inc.*, 194 F.2d 422 (2d Cir. 1951); *Caunon v. Time*, 115 F.2d 423 (4th Cir. 1940); *Dam v. General Electric Co.*, 111 F.Supp. 342 (E.D. Wash., 1953); *Ott v. Hudnut Sales Co.*, 107 F.Supp. 919 (D. Colo. 1952); *Schenstrom v. Continental Machines, Inc.*, 7 F.R.D. 434 (S.D.N.Y. 1947); *Rendleman v. Niagara Sprayer Co.*, 16F.2d 122 (E.D. Ill. 1925).

Four cases which were removed from the state court to the federal courts are most often cited as authority for the proposition that a corporation can only be served in the federal courts if the corporations engage in requisite activity. *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910); *Conley v. Mathieson Alkali Works*, 190 U.S. 406 (1903); *Goldrey v. Morning News*, 156 U.S. 518 (1895).

mits service to be made in the manner prescribed by the law of the state in which the federal court sits.<sup>28</sup> The state statutes reached through this rule not only describe methods of service but also provide the basis of a state's jurisdiction over foreign corporations.<sup>29</sup> Thus a federal notice provision is fortuitously tied to the state basis of jurisdiction—the territorial sovereignty of the state.

The requisite activity concept<sup>30</sup> is thus, as in the states, the basis of federal jurisdictional requirements. Having developed concurrently over a long period, the various federal and state courts' interpretations of requisite activity vary, presently, from some conservative state concepts requiring sizeable business activity,<sup>31</sup> to the federal concept of minimal business contacts,<sup>32</sup> to the liberal state concept of a single act within the jurisdiction.<sup>33</sup> This variance raises complicated due process and choice of law problems, and, to indicate the interaction of these trial determinants, it is necessary to examine them in specific fact situations.

## II

No serious problems of service or venue arise if the plaintiff sues a

28. "[I]t is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the service is made. . . ." FED. R. CIV. P.4(d) (7).

The concept of using state procedure in the federal courts is an old one. A 1789 statute (1 STAT. 93) provided that forms of writs and execution and modes of processes in a suit at common law in the federal courts be the same as their respective states. Conformity to state practice was continued by the Process Act of 1828 (4 STAT. 278) and the Conformity Act of 1872 (17 STAT. 196). The purpose of the Conformity Act was to bring about uniformity in the law of procedure in federal and state courts of the same locality; lawyers would only have to learn one procedure.

One commentator states: "Unfortunately, the Conformity Act of 1872 has not operated wholly in the manner expected. While intended to simplify the situation, it has resulted in considerable confusion in Federal practice, owing to the exceptions and limitations, which decisions of the Supreme Court have read into the Act." Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 546, 564 (1930). One of the limitations some courts followed was that all questions of jurisdiction were determined exclusively by federal law. See *McNeal-Edwards Co. v. Frank L. Young Co.*, 42 F.2d 362 (1st Cir. 1930), *rev'd on other grounds*, 283 U.S. 398 (1931); 4 CYCLOPEDIA OF FEDERAL PROCEDURE § 974; Tolman, *The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom and the Cure for those Evils*, 23 A.B.A.J. 971 (1937).

29. See notes 52, 53 *infra*.

30. Requisite activity is used in this Note to represent the concept that a court will attach legal consequences to a quantum of business activity. This word is used rather than ones which have been used by the courts in their various fictions.

31. See note 62 *infra*.

32. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This leading case established the test that the due process clause is satisfied if the corporation's ties with the state, "make it reasonable and just according to our traditional conception of fair play and substantial justice" that the corporation be subject to the state's jurisdiction.

33. *Johns v. Bay State Abrasive Products Co.*, 89 F.Supp. 654 (D.Md. 1950); *Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951); Comment, 37 CORNELL L.Q. 458 (1952).

corporation in the federal district court sitting in a state where the corporation is incorporated or licensed to do business. This is obviously a permissible place of trial.<sup>34</sup> Suppose, however, that the plaintiff sues a foreign corporation in the district court sitting at the plaintiff's residence. Since venue is correct at the plaintiff's residence under Section 1391(a), the only problem should be one of service. In two recent cases of this type, however, the courts looked to the venue requirement of Section 1391(c), held that the defendants were not "doing business," and dismissed the suits.<sup>35</sup> One possible explanation for this result is that the courts did not believe Section 1391(a) applied where corporations were defendants. Another possibility is that the courts regarded corporate activity necessary for service and then mistakenly drew upon the requirement of "doing business" in the federal venue statute instead of looking to state service statutes. When the plaintiff sues at his own residence, however, it is not the venue requirement which should limit his choice of forum; the limitation in such cases should be the service requirement.

The federal rules merely prescribe the manner of service. If service were made under a state statute, pursuant to 4(d)(7), state decisions would determine the validity of the *manner* of service;<sup>36</sup> while if service were made as provided in 4(d)(3), federal law would control.<sup>37</sup> The corporation must be engaged in requisite activity to be subject to service under either of these provisions, and the question arises whether state or federal law shall determine the quantum of activity required.

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34. Although, to satisfy venue under § 1391(c), the corporation must be doing business in the particular district rather than the state, if the corporation is incorporated or licensed in the state, venue is valid in any district within the state. See Note, 1 SYRACUSE L. REV. 117, 120 n.23 (1949). Under the former venue statute, a corporation was a resident of the state in which it was incorporated, and, where the state of incorporation was divided into several districts, then the corporation was considered as resident of the district where its official residence was designated by charter or law or in the district where its principal headquarters was maintained. 3 MOORE, FEDERAL PRACTICE 2123.

If a corporation was "doing business" and the state was composed of several federal districts, venue would be proper only in the district in which the defendant corporation was "doing business" although service would be valid anywhere within the state under Federal Rule 4(f). See *Neset v. Christensen*, 92 F.Supp. 78, 83 (E.D. N.Y. 1950).

If a corporation is not incorporated or licensed in the state where suit is brought but is merely engaged in activities, very difficult problems arise whether or not such activities satisfy the requirement of "doing business" within the meaning of 1391(c) and the requisite activities necessary for service under 4(d)(3) and 4(d)(7). These problems are discussed at p. 334 *infra*.

35. *Harrison v. Robb Mfg. Co.*, 110 F.Supp. 848 (D.Md. 1953); *Goldstein v. Chicago, R.I. & P.R.R.*, 93 F.Supp. 671 (W.D. N.Y. 1950).

36. *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F.2d 184 (2d Cir. 1949); *Allegue v. Gulf & South American S. S. Co.*, 103 F.Supp. 34 (S.D. N.Y. 1952); *Moore v. Atlantic Coast Line R.R.*, 98 F.Supp. 375 (E.D. Pa. 1951).

37. *Neset v. Christensen*, 92 F.Supp. 78 (E.D. N.Y. 1950); *Hartsock v. Commodity Credit Corp.*, 10 F.R.D. 181 (S.D. Iowa 1950); *Western Mutual Fire Ins. Co. v. Lamson Bros. & Co.*, 42 F.Supp. 1007 (S.D. Iowa 1941).

It is contended by some writers that the very reference to state statutes in 4(d)(7) forces federal courts to state decisions defining requisite activity.<sup>38</sup> If state statutes are to govern the manner of service in the federal courts, then state law should also define what activities are required to subject the corporation to service. *Pulson v. American Rolling Mill Co.*,<sup>39</sup> and many cases following,<sup>40</sup> have developed a two-step analysis to be used when a foreign corporation is served under 4(d)(7). First, the state law and decisions must be examined to determine if the corporation's activities are sufficient to make it amenable to state service. If the state permits service, the next consideration<sup>41</sup> is whether or not such service is consistent with the due process or commerce clauses of the Federal Constitution.<sup>42</sup> This is a federal question and the state rulings are not controlling. If a state statute sets a standard below the constitutional minimum, the act is invalid; and, for all practical purposes, there is no state statute. Rule 4(d)(7) would be of no assistance to the plaintiff.<sup>43</sup>

The use of state law to define requisite activity in cases involving 4(d)(7) and 4(d)(3) can also be explained on the basis of *Erie v. Tomp-*

38. See *Ackerley v. Commercial Credit Co.*, 111 F.Supp. 92, 98, 102 (D. N.J. 1954); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 959 (1953); Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 618 (1954).

39. 170 F.2d 193 (1st Cir. 1948).

40. *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949), *cert. denied*, 339 U.S. 947 (1950); *Schmickler v. Petersime Incubator Co.*, 177 F.2d 983 (5th Cir. 1949); *Kelley v. Delaware, L. & W.R.R.*, 170 F.2d 195 (1st Cir. 1948), *cert. denied*, 336 U.S. 939 (1949); *Reko v. U.S. Trotting Ass'n*, 14 F.R.D. 25 (S.D. Iowa 1953); *Nichols v. Cowles Mag. Inc.*, 103 F.Supp. 864 (D. Mass. 1952); *Green v. Equitable Powder Mfg. Co.*, 99 F.Supp. 237 (W.D. Ark. 1951); *Wadell v. Green Textile Associates Inc.*, 92 F.Supp. 738 (D.Mass. 1950); *Read v. Corbitt Co.*, 10 F.R.D. 125 (E.D. Pa. 1950); *Barnhart v. John B. Rogers Producing Co.*, 9 F.R.D. 590 (W.D. Pa. 1950); *Fritchey v. Summar*, 86 F.Supp. 391 (W.D. Ark. 1949); *Isenberg v. Atlantic Coast Line R.R.*, 82 F.Supp. 927 (D. Mass. 1949).

Federal courts not specifically citing 4(d)(7) have used state law to determine the activity necessary when service is made under state law. *Mississippi Wood Preserving Co. v. Rothschild*, 201 F.2d 233 (5th Cir. 1953); *Albritton v. General Factors Corp.*, 201 F.2d 138 (5th Cir. 1953); *London's Inc. v. Mack Shirt Corp.*, 114 F.Supp. 883 (D. Mass. 1953); *Cole v. Stonhard Co.*, 12 F.R.D. 508 (N.D. N.Y. 1952).

41. At times there is a "cart-before-the-horse" consideration and the court reverses the order in considering these two questions. *Insurance Co. of North America v. Lone Star Package Car Co.*, 107 F.Supp. 645 (S.D. Tex. 1952), *rev'd on other grounds sub. nom.* *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147 (5th Cir. 1954).

42. For a discussion of this second step see *Green v. Equitable Powder Mfg. Co.*, 99 F.Supp. 237 (W.D. Ark. 1951); *Wadell v. Green Textile Associates Inc.*, 92 F.Supp. 738 (D. Mass. 1950).

43. "The principal limitation upon the application of a state statute under Rule 4(d)(7) is the constitutionality of the statute." *McWhorter v. Anchor Serum Co.*, 72 F.Supp. 437, 439 (W.D. Ark. 1947). See *Barnhart v. John B. Rogers Producing Co.*, 9 F.R.D. 590 (W.D. Pa. 1950); HART & WECHSLER, *op. cit. supra* note 38; 2 MOORE, *FEDERAL PRACTICE* 942.

*kins*.<sup>44</sup> Both the Federal Rules of Civil Procedure and the *Erie v. Tompkins* doctrine were formulated in 1938; the rules substituted federal uniformity for state conformity in the area of procedure, while the *Erie* decision required state conformity instead of federal uniformity in matters of substantive law.<sup>45</sup> In 1945 the *Guaranty Trust* case<sup>46</sup> discarded the procedure-substance dichotomy and established the rule that state law should be applied in cases in which disregard of such law would substantially affect the outcome.<sup>47</sup> Using this extended *Erie* rationale three federal courts recently held that, since their jurisdiction was based on diversity of citizenship, state law must be applied to determine the quantum of activity necessary for service.<sup>48</sup> Notwithstanding these expansions of *Erie v. Tompkins*, some federal courts have held that state

44. 304 U.S. 64 (1938).

45. Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950).

46. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

47. This is based on the theory that diversity of citizenship should not lead to a substantially different result in state and federal courts within the same geographical area. Recent cases have pushed this extended version of the *Erie* doctrine to rules of procedure. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

Whether the federal court has jurisdiction over the parties does affect the result of litigation. See Keffe, Gilhooley, Bailey, and Day, *Weary Erie*, 34 CORNELL L.Q. 494, 511 (1949). The Court in an early case said, "The state could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract." *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489, 500 (1912). In *Angel v. Bullington*, 330 U.S. 183, 192 (1947), however, the Court declared that cases such as *Lupton's Sons Co.* were obsolete in light of *Erie v. Tompkins*. "[The *Erie*] decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in State courts."

48. *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953); *Canvas Fabricators Inc. v. William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952); *Allentown Record Co. v. Agrashell, Inc.*, 101 F.Supp. 790 (E.D. Pa. 1951); cf. *Iser v. Brockway*, 25 F.Supp. 221 (W.D. Pa. 1938).

In the three cases, neither 4(d)(3), 4(d)(7), nor state statutes were cited. The courts spoke in terms of *Erie v. Tompkins* as they applied state law to determine if the defendants were engaged in sufficient activity to be amenable to service. The *Pulson* case, however, was cited as authority for applying state law. Were these decisions (that state law be applied) restricted to cases where service is under a state statute or in all diversity cases because of *Erie*? See Judge Bigg's concurring opinion in *Partin v. Michaels Art Bronze Co.*, *supra* at 545; 102 U. OF PA. L. REV. 415 (1954). Judge Biggs does not believe that *Erie* governs this area, but he has not clarified his position as to whether or not state law should govern through Rule 4(d)(7) because of the wording of that rule. *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147, 153 n.4 (5th Cir. 1954), interpreted the *Partin* case and *Pulson* case as holding that it was the *Erie* rule that required the use of state law to determine whether a foreign corporation is subject to service. The court in the *Lone Star* case held that, since its jurisdiction was based on a federal question, *Erie v. Tompkins* and state law were not applicable. See discussion p. 333 *infra*.



decisions are not controlling in this matter.<sup>49</sup> Judge Biggs of the Third Circuit has maintained that the right of a citizen to sue a citizen of another state in a federal court is granted by the Constitution, and jurisdiction so conferred upon the national courts should not be impaired by a state statute or decision.<sup>50</sup> Accepting this view, when service is made under either of the applicable federal rules, then federal law should determine whether the corporation is engaged in sufficient activity to be amenable to suit. Then the *manner* of service should be determined with state law controlling under 4(d)(7) and the federal law under 4(d)(3).<sup>51</sup> This approach is based on the assumption that the requisite activity test can be separated from questions of manner of service. If the state legislature has separated these two requirements,<sup>52</sup> it is easy for federal courts to treat them separately; but, if the two are fused in one statute,<sup>53</sup> it seems strained to rule that federal law should determine one half a state statute and state law the other half.<sup>54</sup>

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49. "Whether a foreign corporation or other business entity is doing business in a state is a matter of general, not local, law." 2 MOORE, FEDERAL PRACTICE 969. *Woodworkers Tool Works v. Byrne*, 191 F.2d 667 (9th Cir. 1951); *French v. Gibbs Corp.*, 189 F.2d 787 (2d Cir. 1951); *General Electric Co. v. Masters Mail Order Co.*, 122 F.Supp. 797 (S.D. N.Y. 1954); *Ackerley v. Commercial Credit Co.*, 111 F.Supp. 92 (D. N.J. 1953) (court noted that the same result would be reached under state law); *Pike v. N.E. Greyhound Lines*, 93 F.Supp. 669 (D. Mass. 1950) (court noted that the same result would be reached under state law); *Myers Motors v. Kaiser-Fraser Sales Corp.*, 80 F.Supp. 18 (D. Minn. 1948); *Bergold v. Commercial National Underwriters, Inc.*, 61 F.Supp. 639 (D. Kan. 1945); *Carby v. Greco*, 31 F.Supp. 251 (W.D. Ky. 1940); *Hedrick v. Canadian Pacific Ry.*, 28 F. Supp. 257 (S.D. Ohio 1939). Cf. *McCoy v. Siler*, 205 F.2d 498, 501 (3d Cir. 1953) (concurring opinion), *cert. denied*, 346 U.S. 872 (1953). See *Lacey, Solicitation as Doing Business—A Review of New York and Federal Cases*, 18 *FORD. L. REV.* 204, 211, n.30 (1949).

Perhaps this is the sounder view of the effect of *Erie v. Tompkins* in federal procedure in light of *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946). The enabling clause of the Federal Rules of Procedure provides that the rules shall not modify the substantive rights of the litigants. The court admitted that an alteration in the rules of service affects the right of litigants but pointed out that such a change does not modify the rules of decision by which the court will decide the parties' rights but relates merely to the manner by which a right to recover is enforced. "In this sense the rule is a rule of procedure and not of substantive right. . . ." *Id.* at 446. *Guaranty Trust* case was cited as authority for this distinction. See discussion p. 331 *supra*; HART & WECHSLER, *op. cit. supra* note 38, at 960. Cf. *McCoy v. Siler, supra*.

50. *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541, 545 (3d Cir. 1953) (concurring opinion). For a refutation of this argument see 102 U. OF PA. L. REV. 415, 417 (1954).

51. See notes 36 and 37 *supra*.

52. Some states have partially done this by a statutory provision listing agents who may be served, and the courts have stipulated that the corporation must carry on a quantum of activity to be amenable to service. See, e.g., MO. ANN. STAT. § 506.150 (Vernon 1949); N.Y. CIV. PRAC. ACT. § 229.

53. Some statutes provide that a foreign corporation doing business shall be deemed to appoint a state officer as its agent upon whom service may be made. See, e.g., ARK. STAT. ANN. § 27-340 (1947); MASS. ANN. LAWS c.181, § 3A (1933).

54. Compare *Moore v. Atlantic Coast Line R.R.*, 98 F.Supp. 375 (E.D. Pa. 1951), with *Read v. Corbitt Co.*, 10 F.R.D. 125 (E.D. Pa. 1950).

State law can thus be reached either through a particular interpretation of 4(d)(7) or through an application of the *Erie* rule.<sup>55</sup> Should state decisions determine requisite activity because of the wording of 4(d)(7), they would be applied whether federal jurisdiction were based on diversity of citizenship or federal question. If state interpretations govern as a result of the *Erie* doctrine, they would apply only in diversity cases.<sup>56</sup>

If state law defines requisite activity, then the due process clause which limits service in the state also limits service in the federal courts. The defendant is thus protected from being sued in an unreasonable forum. Should federal law govern, it is necessary to inquire what due process limitations are imposed on federal courts. Service on corporate agents present within the district would seem to satisfy Fifth Amendment requirements of notice. Beyond this, federal courts have imposed upon themselves, as upon the states, the limitation that corporations must be engaged in requisite activity in order to be subject to service.<sup>57</sup> The due process limitation on the Federal Government, unlike that on the states, is not based on territorial sovereignty.<sup>58</sup> The powers of the federal courts are not coextensive with the territorial limits of the district, for the

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55. The problems of service in a case removed to a federal court are very similar to those arising in a case involving 4(d)(7). As under Rule 4(d)(7), service in a case removed to a federal district court is based on state statutes. By removal a defendant does not lose his right to challenge the service in the state court. *Bomze v. Nardis Sportswear, Inc.*, 165 F.2d 33 (2d Cir. 1948).

Just as under Rule 4(d)(7) some courts in removal cases have used the two-step analysis. See *Schmidt v. Esquire, Inc.*, 210 F.2d 908 (7th Cir. 1954); *Rosenthal v. Frankfort Distillers Corp.*, 193 F.2d 137 (5th Cir. 1951); *Roark v. American Distilling Co.*, 97 F.2d 297 (8th Cir. 1938); *Forsgren v. Gillioz*, 110 F.Supp. 647 (W.D. Ark. 1953); *Johns v. Bay State Abrasive Products Co.*, 89 F.Supp. 654 (D. Md. 1950); *Doyle v. Southern Pacific Co.*, 87 F.Supp. 974 (E.D. Mo. 1949). Again this result can be rationalized on the theory that, since service is based on state law, it should be defined by state law. See note 41 *supra*. One court held that it was the *Erie* doctrine that required state law to be followed in a removal case. *Perkins v. Louisville & N.R.R.*, 94 F.Supp. 946 (S.D. Cal. 1951). See *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147, 153 (5th Cir. 1954).

Other cases have held that the question of service in cases removed to the federal courts is determined by reference to federal law and not state statutes or decisions. *Woodard v. Mutual Life Ins. Co.*, 59 F.Supp. 452 (W.D. La. 1945); *Hinchcliffe Motors, Inc. v. Willys-Overland Motors, Inc.*, 30 F.Supp. 580 (D. Mass. 1939).

56. *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147 (5th Cir. 1954).

57. See note 27 *supra*. In a case involving service under the District of Columbia Code the court stated that, if Congress passed a statute allowing service on an agent of the corporation not doing business in the district, this would not be an undue burden on interstate commerce because Congress has the right to regulate such commerce; but it would be open to inquiry whether it violated due process. *Chase Bag Co. v. Munson Steamship Line*, 295 Fed. 990, 994 (D.C. Cir. 1924).

58. Note, 35 COL. L. REV. 591, 598 (1935).

Federal Government can provide for nationwide service,<sup>59</sup> but, as in the states, the due process limitation on the federal courts is based on fairness, convenience, and reasonableness of the suit in a particular forum.<sup>60</sup> Although the *International Shoe* case sets out the Fourteenth Amendment due process limit on the states, federal courts have adopted this test as applicable to cases governed by the Fifth Amendment.<sup>61</sup>

Under either state or federal definition of requisite activity, therefore, the defendant is protected from an inconvenient forum through the due process limitation. Although the state definitions of requisite activity cannot be broader than the constitutional limit, they may be narrower.<sup>62</sup> It is the resulting variance that makes the choice of law critical. If the federal courts in diversity cases are to follow state definitions of requisite activity, they are tied to the state's jurisdictional concepts. Federal courts, adhering to their respective state's decisions, may have broad service powers or may follow more rigorous concepts of requisite activity for service.

When the plaintiff sues in the state in which he resides, he is thus restrained only by the requirements of service. If the plaintiff wishes to sue a corporation in a federal district court located in State X of which he is a non-resident and which is not where the corporation is incorporated or licensed to do business, complex problems of both venue and service arise. The narrower of the two requirements will limit the plaintiff's choice of forum. The service problems are the same as when the plaintiff sues in his own state, but there is an added problem of venue since he must also establish that the corporation is "doing business" under Section 1391(c). Because the venue provision is based on requisite activity and is imposed to protect the defendant from an unreasonable forum, it coincidentally satisfies due process. Since both service and venue depend on

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59. 38 STAT. 736 (1914), 15 U.S.C. § 22 (1951) (Clayton Act); 48 STAT. 86 (1933), as amended, 63 STAT. 107 (1949), 15 U.S.C. § 77v(a) (1951) (Securities Act); 53 STAT. 1175 (1939), 15 U.S.C. § 77vvv(b) (1951) (Trust Indenture Act).

In diversity litigation when the action is brought at the plaintiff's residence, though venue is correct, the service requirement must still be satisfied. The opposite situation exists where statutes provide special venue and service provisions for certain causes of action. Though service is made nationwide, the plaintiff's choice of forum is then limited by the venue provision. Could Congress constitutionally provide that there be no venue restriction on the plaintiff's choice of forum?

60. See Note, 35 COL. L. REV. 591, 599 (1935); Cf. *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 286 Fed. 566 (E.D. Ky. 1922).

61. *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 672 (9th Cir. 1951).

62. *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948); *Charles Keeshin, Inc. v. Gordon Johnson Co.*, 109 F.Supp. 939, 942 (W.D. Ark. 1952); *Doyle v. Southern Pacific R.R.*, 87 F.Supp. 974, 976 (E.D. Mo. 1949).

some form of requisite activity, these concepts can easily be confused.<sup>63</sup> Are the definitions of requisite activity (for service) and "doing business" (venue) the same? Some courts have held that the satisfaction of one requirement also satisfies the other.<sup>64</sup>

The federal rules do not expressly define the limits of requisite activity, and this is therefore a dynamic concept which can change with the state statute and with the requirements of due process. Section 1391(c) expressly provides that the "doing business" test must be satisfied in order for venue to be proper. It may be asked whether the definition of "doing business" is also a dynamic concept or whether Congressional action would be necessary to expand its definition to the broadest limits of requisite activity?

It has been held that the single act of causing one of a corporation's motor vehicles to be driven through the state would not constitute "doing business" within the meaning of Section 1391(c).<sup>65</sup> Sporadic or occasional dealings fall short of the requisite activity for federal venue purposes,<sup>66</sup> while, on the other hand, the single acts of operating a vehicle,<sup>67</sup> owning property,<sup>68</sup> entering a contract, or committing a tort in a state<sup>69</sup> have been held to be sufficient activity under 4(d)(7) to subject the corporation to service for both state and federal diversity purposes. Thus,

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63. See *Polizzi v. Cowles Mag. Inc.*, 345 U.S. 663 (1953), *reversing*, 197 F.2d 74 (5th Cir. 1952); 1 BARRON & HOLTZOFF, *op. cit. supra* note 26, § 71.

In *Ronson Art Metal Works Inc. v. Brown & Bigelow Inc.*, 104 F.Supp. 716 (S.D. N.Y. 1952), questions of both venue and service arose. The court recognized the different ways in which the concept of requisite activity had been used. However in discussing what corporate activity was sufficient to constitute doing business for proper venue under 1391(c), the court used language typical of a discussion of service and cited cases involving service.

64. *Lehn & Fink Products Corp. v. Milner Products Corp.*, 117 F.Supp. 320, 322 (S.D. N.Y. 1953); *Ronson Art Metal Works Inc. v. Brown & Bigelow Inc.*, 104 F.Supp. 716, 724 (S.D. N.Y. 1952); *Moore v. Atlantic Coast Line R.R.*, 98 F.Supp. 375, 382 (E.D. Pa. 1951).

Under the Clayton Act [38 STAT. 736 (1914), 15 U.S.C. § 22 (1951)] and the Securities Act [48 STAT. 86 (1933), as amended, 63 STAT. 107 (1949), 15 U.S.C. § 77(v) (1951)] the cases have held that the quantum of business necessary to support venue ("transact business") is less than the quantum of business necessary to sustain service of process ("found"). *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Noerr Motor Freight Inc. v. Eastern R.R. Presidents Conference*, 113 F.Supp. 737 (E.D. Pa. 1953); *Naifeh v. Ronson Art Metal Works, Inc.*, 111 F.Supp. 491 (W.D. Okla. 1953); *Abrams v. Bendix Home Appliances, Inc.*, 96 F.Supp. 3 (S.D. N.Y. 1951); *Securities & Exchange Comm'n v. Wimer*, 75 F.Supp. 955 (W.D. Pa. 1948).

65. *Martin v. Fischback Trucking Co.*, 183 F.2d 53 (1st Cir. 1950).

66. In *Martin v. Fischback Trucking Co.*, *supra* note 65, *Hutchinson v. Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930), a case concerning service was cited as authority for this statement. See *Olympic Radio & Television, Inc. v. Hazeltine Research Inc.*, 85 F.Supp. 579 (E.D. N.Y. 1949).

67. *Hess v. Pawloski*, 274 U.S. 352 (1927).

68. *Dubin v. Philadelphia*, 34 Pa. Dist. & Co. 61 (1938).

69. See note 33 *supra*.

if the plaintiff sues on a cause of action arising out of an automobile accident in the district court of State X, service would be valid but venue requirements would not be met.<sup>70</sup> Here venue is the stricter of the two requirements and restrains the plaintiff's choice of forum. In these situations there is a gap between the state and the federal court's jurisdictional powers. The plaintiff could sue the corporation in a state court; service and venue would be proper, but a federal court would lack venue and could not retain the case.<sup>71</sup> In diversity litigation the effect of *Erie v. Tompkins* doctrine has been to make the federal courts as much like the courts of the state in which they are located as possible. Since, under this doctrine, a federal court may not take cases a state court would not hear,<sup>72</sup> should not an attempt be made to close the gap created by restricted venue and hold that a federal court should hear all cases heard by a state court?

The effect of the *Erie v. Tompkins* doctrine on the venue provisions has not been considered in the cases. Under the *Neirbo* doctrine the defendant waived venue in the federal courts by appointing an agent for receipt of state process. The applicable state law defined the extent of the waiver, and, as a result, state law defined federal venue.<sup>73</sup> Although *International Shoe* established requisite activity as a basis for service, recent cases have applied its doctrine as a federal test for defining doing business within the meaning of Section 1391(c).<sup>74</sup> Since venue requirements are designed to protect the parties from inconvenience, it may be

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70. Since, under the Judicial Code of 1948, venue is a waivable defect, Professor Moore believes that the *Neirbo* rule is still in reserve. 3 MOORE, FEDERAL PRACTICE 2136. See McCauley, *Recent Developments in Federal Venue in Diversity Cases*, 13 GA. B.J. 419, 429 (1951). Professor Moore contends that, if the state had a non-resident motorist statute, venue would be proper under the *Neirbo* doctrine rather than 1391(c). *Falter v. Southwest Wheel Co.*, 109 F.Supp. 556 (W.D. Pa. 1953). In *Olberding v. Illinois Central R.R.*, 346 U.S. 338 (1953), a corporation sued an individual, and the court held that the implied appointment of an agent would not be a waiver of venue. The court held that this decision was consistent with the *Neirbo* doctrine. Perhaps the *Olberding* case points out the necessity of establishing a new basis of venue—where the cause of action arose. Barrett, *supra* note 38, at 628. Interesting questions could have been raised in the *Olberding* case: Does 1391(c) apply to corporate plaintiffs? Was the Illinois Central Railroad doing business in Kentucky within the definition of 1391(c)? If so, it could have been argued that 1391(c) applied to corporate plaintiffs, and that, therefore, venue was correct since the plaintiff was suing in his own residence. See Note, 28 IND. L.J. 256 (1953).

71. The plaintiff could sue in the state court, and the defendant might then remove to the federal court. Removal jurisdiction of the federal court is thus greater than original jurisdiction in this type of case. See 42 ILL. B.J. 382 (1954).

72. See note 47 *supra*.

73. *Carlisle v. Kelly Pile & Foundation Corp.*, 175 F.2d 414 (3d Cir. 1949); *North Butte Mining Co. v. Tripp*, 128 F.2d 588 (9th Cir. 1942).

74. *Glick v. Empire Box Corp.*, 119 F.Supp. 224 (S.D. N.Y. 1954); *Cooke v. Kilgore Mfg. Co.*, 105 F.Supp. 733 (N.D. Ohio 1952); *Ronson Art Metal Works Inc. v. Brown & Bigelow Inc.*, 104 F.Supp. 716 (S.D. N.Y. 1952); *Goldstein v. Chicago, R.I. & P.R.R.*, 93 F.Supp. 671 (W.D. N.Y. 1950).

consistent to apply this "fair and substantial justice" test.<sup>75</sup> This general application of *International Shoe* furnishes a uniform federal test of doing business for venue purposes.<sup>76</sup>

Whether or not the federal courts of a state, of which the plaintiff is not resident and in which the corporate defendant is not licensed to do business or incorporated, will entertain the plaintiff's suit thus involves all the complicated problems of venue and service and depends on which of the different possible combinations of these conflicting methods of defining requisite activity and "doing business" is used. If Section 1391(c) is given a uniform federal interpretation based on *International Shoe*, and service under both federal rules is made to depend on state law, then, although venue may be correct and due process satisfied, there may be no means of service because the state may demand more extensive activity than is required by due process. If Section 1391(c) is given a uniform federal interpretation, and the requisite activity required for service under 4(d)(3) is based on federal law while service under 4(d)(7) is made dependent on state law because of the wording of that rule, then there is a method of service wherever venue is proper. Due process would be the outer limits on the plaintiff's choice of forum. When 4(d)(3) is used, a uniform federal procedure would be invoked; and, when 4(d)(7) is used, there would be conformity with the state. If Section 1391(c), Rules 4(d)(3) and 4(d)(7) are to depend on state law, there will be complete conformity to the state courts but no uniformity among the federal courts. On the other hand, if venue and service are defined by federal law, there will be no conformity to state courts; but there will be uniformity among the federal courts.

It is evident that the venue, doing business test, and the service, requisite activity test, are ultimately defined by *International Shoe*. The rule of *International Shoe* is conceptually based on fairness, reasonableness, and convenience so that venue and service become tests to determine

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75. *But see* Olympic Radio & Television v. Hazeltine Research Inc., 85 F.Supp. 579 (E.D. N.Y. 1949) where the use of *International Shoe* is questioned.

In Magnetic Engineering & Mfg. Co. v. Dings Magnetic Separator Co., 86 F.Supp. 13 (S.D. N.Y. 1950), 1391(c), forum non conveniens [28 U.S.C. § 1404(a) (1948)] and the provision for transfer because of improper venue [28 U.S.C. § 1406 (1948)] were involved. It is very difficult to tell on which of the three provisions the court based its holding. The court may have transferred the case because convenience, an essential element of the "doing business" test under 1391(c), was lacking. Or, if venue was proper because the defendant engaged in sufficient activity to constitute "doing business", the court may have transferred the case on the ground that the forum was inconvenient under tests of forum non conveniens. The court did say that the defendant's activities brought it within the literal meaning of the venue statute. *Id.* at 16.

76. This application of *International Shoe* supports Professor Barrett's statement that there is a uniform federal interpretation of doing business for venue purposes. Barrett, *supra* note 38, at 619.

a convenient forum. Once the forum is determined the defendant can still move to transfer under forum non conveniens.<sup>77</sup> This gives the defendant a second opportunity to attack the inconvenience of the forum, and in this context forum non conveniens may be a dilatory tactic.<sup>78</sup> Because of *Erie v. Tompkins* it is uncertain whether a defendant may take advantage of forum non conveniens in diversity litigation.<sup>79</sup> Since the three determinants act together in affixing proper place of trial, application of the *Erie* doctrine is possible as to service, venue, and forum non conveniens. If the *Erie* policy is to limit the federal court to the jurisdictional powers of the state court, then state law should be applied to all three determinants. Should state law control service and forum non conveniens, it is inconsistent to use a uniform federal test to govern venue alone. Since consistent usage of the same body of law is necessary for a rational determination of a forum, the present conditions demand a resolution of the affect of the *Erie* doctrine.

### III

Because of the expansion of the service and venue provisions and the added complication of the *Erie v. Tompkins* doctrine, the parties spend much time litigating the question of the proper forum without reaching the merits of the case. The many problems arising as to service and venue have not been settled by the cases. The courts have disagreed on the application of *Erie v. Tompkins*, and even writers suggesting reforms have been unable to agree as to the scope of the doctrine.

If jurisdiction is a matter of procedure under *Erie v. Tompkins*, then federal law should govern our present venue-process scheme. Some courts have used a federal definition of requisite activity for Section 1391(c) and Rule 4(d)(3) under the theory of *Erie v. Tompkins*, and a state definition of 4(d)(7) under the theory that state decisions should be employed to construe state statutes.<sup>80</sup> To make this interpretation of our present system more workable, the definition of doing business under Section 1391(c) should be extended to include a single act in order that there will be no jurisdictional gap between the federal and the more liberal of state courts.<sup>81</sup>

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77. See note 4 *supra*.

78. See *Ronson Art Metal Works, Inc. v. Brown & Bigelow, Inc.*, 104 F.Supp. 716, 724 (S.D. N.Y. 1952).

79. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 398 (1947).

80. *Ackerley v. Commercial Credit Co.*, 111 F.Supp. 92 (D. N.J. 1953).

81. It is questionable whether, under the present statutory language, this extension is possible. See discussion p. 335 *supra*.

If it is desirable that federal jurisdiction be determined by federal law, perhaps all reference to state law should be eliminated. The interests of the federal and state governments in broadening jurisdiction are not the same. The states have a more provincial interest; they expand their jurisdiction to protect their own residents. The Federal Government, on the other hand, is not solely interested in the convenience of the citizen of the state in which the district court sits. It must establish rules of procedure which will provide convenience and fairness to citizens of a nation over 3000 miles wide and 2000 miles long.

Should 4(d)(7) be eliminated, attention may then be turned to possible expansion of 4(d)(3) to include methods of service allowed under existing state laws. If due process is the only limitation and a single act by a corporation as a basis for service would satisfy due process, it would seem that a corporation could be served under 4(d)(3) if there were an agent to receive summons. State statutes (reached by 4(d)(7)) allow substitute service on an officer of the state, but, under present Rule 4(d)(3), only an agent of the corporation or one authorized by law can be served. Thus if an agent of the corporation cannot be found in the state, as is most likely in single tort or contract cases, 4(d)(3), unlike 4(d)(7), would not provide a method of service. Congress would have to enact a statute to provide a federal officer with authority to receive service for the corporation.

If 4(d)(7) is retained and federal law is used to determine the requisite activity requirement, the disadvantage of tying federal courts to state jurisdictional concepts would be eliminated, yet the advantage of giving the federal courts access to the state's broad methods of service under 4(d)(7) would be retained. Of course, the soundness of interpreting state statutes by federal law may be questioned.<sup>82</sup>

If the position is adopted that a uniform federal interpretation should be employed, one suggestion with far reaching implications is the complete abandonment of *Erie v. Tompkins* with a return to *Swift v. Tyson*.<sup>83</sup> Presently, a weakness of the federal system is highlighted by encouraging forty-eight variations of substantive and procedural law.<sup>84</sup> Another approach is Professor Barrett's recent suggestion of an overall revision of the present rules based on trial convenience.<sup>85</sup> Uniform and complete federal provisions would govern place of trial; all references to state

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82. See discussion p. 332 *supra*.

83. 16 Pet. 1 (U.S. 1842).

84. Keeffe, *supra* note 47, at 506.

85. Barrett, *supra* note 38, at 630, 635.



practice would be eliminated.<sup>86</sup> This suggestion is a complete departure from present procedure and is feasible only if the role of *Erie v. Tompkins* is abandoned or restricted in application in this area.

The trend has been, however, through an extension of *Erie v. Tompkins*, to let state law encroach on federal procedure,<sup>87</sup> and the impact of this interpretation is to destroy the advantages of diversity jurisdiction since the federal courts in effect become state courts. Present cases have used state law to define service and forum non conveniens. The cases have not applied state law to Section 1391(c), and, even if the courts were to attempt to cure this inconsistency, an applicable state definition would be hard to find. Just as it is questionable to define state statutes by federal law, it may be unsound to interpret federal statutes by state law. Federal venue and forum non conveniens statutes were developed as a part of an integrated federal scheme, and as such they are not easily adaptable to state interpretations.

If the present direction of *Erie v. Tompkins* is to be accepted,<sup>88</sup> federal statutes are out-dated and should be replaced with ones permitting a federal court to take jurisdiction in a diversity case only where the respective state courts have such power. On the theory that procedure and substance cannot be separated, a more sweeping revision, suggested by the late Bernard Gavit,<sup>89</sup> is to compel the federal courts in diversity litigation to conform completely not only to state jurisdictional requirements but to all matters of state procedure. The Federal Rules of Civil Procedure would be retained only for federal civil action, and the federal courts would continue to be a model for states which wished to modernize their practice and procedure. Whether federal or state law determines federal jurisdiction the current situation demands reform, and before reforms can be instituted the role of *Erie v. Tompkins* must be resolved.

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86. For the suggestion that Congress or the Supreme Court should provide a uniform formula for the determination of doing business see 102 U. OF PA. L. REV. 415, 418 (1954).

87. See discussion p. 331 *supra*.

88. Perhaps this expansion should be rejected with a return to the traditional distinction between substance and procedure. The Federal Rules would be looked upon as procedural.

89. Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1, 26 (1949). See also Merrigan, *supra* note 45, at 727.