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## Civil Procedure - Federal Venue Statute - Requirements Satisfied if Corporations Doing Business within District When Cause of Action Arose

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industry. It would afford him much security to know that in the event of trouble his supplier would rush to his aid by cutting the price to him. However, if he wants to retain his identity and independence he should be made to shift for himself. By restricting the supplier in his methods of aiding his retail customers competition will be increased in that the retailer will have to improve his service and operations in order to attract the motorist. Knowing that he must stand or fall on his own merits the independent will compete with more vigor and will benefit in the knowledge that his success is his own. The consumer will get better products and improved service. Due to the peculiar focal point of competition in the oil industry, an exception should be carved out of the Robinson-Patman Act. But, until Congress so acts, the Court will maintain the strict interpretation of the law as it is now written.

*John J. Walsh*

CIVIL PROCEDURE—FEDERAL VENUE STATUTE—REQUIREMENTS  
SATISFIED IF CORPORATION DOING BUSINESS WITHIN DISTRICT  
WHEN CAUSE OF ACTION AROSE.

*L'Heureux v. Central American Airways Flying Service, Inc.*  
(D. Md. 1962)

Plaintiff, a citizen of Connecticut, brought this action in negligence against defendant, a Kentucky corporation, in the federal district court for the district of Maryland. The defendant had operated a training program for pilots in Maryland but did not qualify to do business under the Maryland statutes.<sup>1</sup> Plaintiff alleged that while on a training flight he was injured when the plane crashed in Maryland as a result of the negligence of defendant's employees. This action was brought three years later. The defendant sought dismissal on the ground of improper venue, contending that 28 U.S.C. § 1391(c) should be interpreted to require that a defendant corporation be residing within the district where it is being sued at the time the suit is brought and not merely when the cause of action arose. The district court denied defendant's motion, *holding* that the venue requirements for federal district courts were satisfied by a showing that the defendant had been doing business in the district at the time the cause of action arose; but, even if it were necessary that the corporation be doing business within the district when the claim was filed, it had waived its objection. *L'Heureux v. Central American Airways Flying Service, Inc.*, 209 F. Supp. 713 (D. Md. 1962).

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<sup>1</sup> MD. ANN. CODE art. 23 § 90-95 (1957).

Whether a corporation must be doing business within the district at the time the action is brought to satisfy the venue requirements for federal district courts is a matter of federal law.<sup>2</sup> The relevant section of the federal venue statute for district courts 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, and such judicial district shall be regarded as the residence of such corporation for venue purposes."<sup>3</sup> Literally, it appears that if a corporation were not doing business when the cause was brought it could not be sued there. It certainly would have been a simple matter for Congress to have used "was" instead of "is" if it had intended a different meaning. It should be noted that Congress did, in fact, make this distinction in enacting the venue statute for patent purposes.<sup>4</sup> In *Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*,<sup>5</sup> this precise question was discussed by the Third Circuit in an antitrust context. In considering both the federal venue statute and § 12 of the Clayton Act,<sup>6</sup> the court stated:

It is true that at the time the cause of action asserted in this case is said to have arisen, Roebing [defendant] was registered in Pennsylvania as a foreign corporation and maintained its principal Pennsylvania office in Philadelphia within the Eastern District of Pennsylvania. But before the present suit was filed, this New Jersey corporation had terminated its registration and activities in Pennsylvania. Therefore, the present choice of forum does not satisfy the venue requirements of the Clayton Act or Section 1391 of Title 28 and this action cannot be maintained unless Roebing has waived venue and submitted to this kind of suit in Eastern Pennsylvania.<sup>7</sup>

Professor Moore is in agreement with this analysis.<sup>8</sup> Decisions interpreting § 12 of the Clayton Act are helpful in attempting to define

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2. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 66 S. Ct. 242 (1946); *McCoy v. Siler*, 205 F.2d 498 (3d Cir. 1953). In *Rensing v. Turner Aviation Corp.*, 166 F. Supp. 790, 794 (N.D. Ill. 1958), the court stated: "It has been consistently held that venue in Federal courts is not affected or limited by State legislation, but is wholly a matter of congressional control and legislation." See also *State Public School Bldg. Authority v. Maryland Casualty Co.*, 127 F. Supp. 902 (M.D. Pa. 1955).

3. 38 U.S.C. § 1391(c) (1958).

4. 62 Stat. 936 (1948), 28 U.S.C. § 1400 (1958).

5. 230 F.2d 511 (3d Cir. 1956).

6. Clayton Act § 12, 38 Stat. 736 (1914), 15 U.S.C. § 22 (1958): "Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business." It is to be noted that the venue provision of the Clayton Act is essentially the same as 28 U.S.C. § 1391(c) as far as doing business is concerned.

7. *Supra* note 5 at 512-13.

8. 1 MOORE, FEDERAL PRACTICE 1493 (2d ed. 1961):

[S]uppose a foreign corporation's license to do business in a state is revoked or expires, the corporation ceases doing business in the state but remains liable to suit on causes of action growing out of the business done by it, and process can be served on the state's statutory agent. In such an action brought in a federal court of that state, the venue would not be proper under § 1391(c) unless the jurisdictional basis of the action was diversity and the action was brought in the plaintiff's district.

§ 1391(c) since the two are quite similar. Section 12 of the Clayton Act requires a finding that the corporation "transacts business" within the district;<sup>9</sup> § 1391(c) makes it necessary that the defendant be "doing business." In *Gem Corrugated Box Co. v. Mead Corp.*,<sup>10</sup> the plaintiff alleged that the venue provisions of the Clayton Act were satisfied if defendant had transacted business in the district at the time of the alleged violation and that the latter's withdrawal prior to the commencement of suit would not affect the plaintiff's position for venue purposes. The court rejected this contention, stating:

While it is clear that section 12 was designed to broaden the choice of forum available in anti-trust actions, nothing in the statutes indicates a congressional intent to depart from the usual temporal reference, i.e., the date the complaint is filed with the court . . . Therefore, I cannot accept as a rule of general application plaintiffs' contention that it is sufficient to show that the acts complained of arose out of defendant's business transactions in the chosen forum prior to the commencement of legal proceedings.<sup>11</sup>

On the other hand, *Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc.*,<sup>12</sup> calls for a contrary result. The defendant contended that it was no longer within the district when the action was filed although it had previously done business there. The court held:

At this stage we have only to consider if total absence of this defendant from Virginia at the institution of the action precludes service of process under Section 12 of the Clayton Act, 15 U.S.C.A. § 22. In deciding that it does not, the Court holds that the sworn charges of the combination and conspiracy in this district, and the commission of acts in the district pursuant thereto directly or by co-conspirators admittedly present here, sustain venue in the eastern district of Virginia.<sup>13</sup>

However, the court emphasized, and, in fact, seemed to base its decision upon dicta in *United States v. Scophony Corp.*<sup>14</sup> The court said: "[Section 12 of the Clayton Act intended that] a foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating . . . to its headquarters defeat or delay the retribution due."<sup>15</sup> However, the evidence showed that the defendant actually *was* transacting business at the time of the institution of the suit. In this regard, the court noted:

But there can be no question of the existence of "jurisdiction," in the sense of venue under § 12, over Scophony in the Southern

9. *Supra* note 6.

10. 189 F. Supp. 584 (S.D.N.Y. 1960).

11. *Id.* at 586.

12. 140 F. Supp. 401 (E.D. Va. 1954).

13. *Id.* at 403.

14. 333 U.S. 795, 68 S. Ct. 855 (1947).

15. *Id.* at 803.

district of New York. To say that on the facts presented Scophony transacted no business 'of any substantial character' there during the period covered by institution of the suit and the times of serving process would be to disregard the . . . 'transacts business' [standard] in the venue provision.<sup>16</sup>

The Court added that "Scophony . . . was 'transacting business' of a substantial character' in the New York district at the times of service, so as to establish venue there . . ."<sup>17</sup>

The approach of the court in the *Ross-Bart Port Theatre* case and in the instant decision has a certain appeal since the more restrictive interpretation may allow a defendant corporation to escape liability within the district for a tort committed there. Ordinarily, however, the corporation could still be sued wherever it is found to be doing business. Although this may sometimes be inconvenient for the injured plaintiff, it should be remembered that the statute is concerned with the convenience of both plaintiff and defendant.<sup>18</sup> The most natural reading of the section leads to the conclusion that Congress determined that in such situations the possible inconvenience to the defendant corporation outweighs the discomfort to the complainant. The United States Supreme Court, in interpreting the venue provision of the Clayton Act, pointed out that "Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice."<sup>19</sup> Therefore, considering all these factors, the most consistent interpretation of the statute does not support the present court's finding.

However, the court held alternatively that defendant had waived his right to question proper venue. Under certain circumstances, this right may certainly be waived. In *Neirbo Co. v. Bethlehem Ship Building Corp.*,<sup>20</sup> the defendant corporation had qualified to do business in New York and had appointed a resident agent to receive service of process. The Court, speaking through Mr. Justice Frankfurter, found that since there had been an "actual consent by Bethlehem to be sued in the courts of New York, federal as well as state,"<sup>21</sup> the corporation had waived its venue rights. (Emphasis added.) In *Knott Corp. v. Furman*,<sup>22</sup> it was held that if a corporation did business in a state in defiance of the state's licensing laws it waived its venue rights not only for the time during which it was doing business but for causes of action arising out of that business after the corporation had moved out.

16. *Id.* at 810, 68 S. Ct. at 863.

17. *Id.*, at 818, 68 S. Ct. at 866.

18. *Rensing v. Turner Aviation Corp.*, *supra* note 2.

19. *United States v. National City Lines, Inc.*, 344 U.S. 573, 588, 68 S. Ct. 1169, 1177 (1948). See also *Abrams v. Bendix Home Appliances*, 96 F. Supp. 3 (S.D.N.Y. 1951).

20. 308 U.S. 165, 60 S. Ct. 153 (1939).

21. *Id.* at 175, 60 S. Ct. at 158.

22. 163 F.2d 199 (4th Cir. 1947).

We think it clear that with respect to waiving the provisions of the federal venue statute there can be no distinction between the consent to suit and service of process *implied* from doing business in the state and that arising out of appointment of a process agent, so that where a foreign corporation has given such consent as subjects it to suit in the courts of the state, the same consent subjects it to suit in the federal courts there sitting if the elements of federal jurisdiction are present.<sup>23</sup> (Emphasis added.)

In *Neirbo*, actual consent was found; but in *Knott*, the Fourth Circuit considered mere implied consent to be enough. However, in *Olberding v. Illinois Central Ry. Co.*,<sup>24</sup> the United States Supreme Court sharply cut short any trend which might have been developing toward a broad interpretation. The plaintiff contended that in light of a Kentucky statute which declared that one using highways of that state impliedly consented to suit therein, the defendant had waived his venue rights. Justice Frankfurter disagreed, stating: "[T]o conclude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, has actually agreed to be sued and has thus waived his federal venue rights is surely to move in the world of Alice in Wonderland."<sup>25</sup> Thus, the concept of implied consent was rejected in such a situation. The rule of the *Olberding* case has been applied to corporations as well as to individuals.<sup>26</sup> Three years later, the Third Circuit passed upon this same problem in *Sunbury Wire Rope Mfg. Co. v. United States Steel Co.*<sup>27</sup> The court found that even though the defendant corporation had moved out of the state before suit was instituted, by signing a withdrawal certificate consenting to service within the state in certain cases, it had waived its venue rights. The decision does not seem inconsistent with *Olberding* since the defendant did *actually* consent to suit within the state, albeit for a time after it had left the jurisdiction. In the present case there was no written actual consent of any kind. However, the facts in the instant situation are distinguishable from those in *Olberding*. It could be argued that the United States Supreme Court found no consent to be sued within the district in question in the latter case since "long-arm" motorist statutes are based on the state's police powers and in no way involve actual or implied consent on the part of the corporation. In the present case, as in *Knott*, it could be said that the basis of the power of the state was an implied consent by the defendant since a state may impose any restrictions it wishes upon a corporation's doing business within its borders. However, the approach of the Court in *Olberding* strongly suggests a different result. The Court there warned: "The requirement of venue is specific and unambiguous; it is not one of those vague

23. *Id.* at 204.

24. 346 U.S. 338, 74 S. Ct. 83 (1953).

25. *Id.* at 341, 74 S. Ct. at 85-86.

26. *Lied Motor Car Co. v. Maxey*, 208 F.2d 672 (8th Cir. 1953).

27. *Supra* note 5. For a similar rationale, see I MOORE, FEDERAL PRACTICE 1494 (2d ed. 1961).