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Mitchell G. Page

AFTER THE JUDICIAL IMPROVEMENTS ACT OF 1990: DOES THE GENERAL FEDERAL VENUE STATUTE SURVIVE AS A PROTECTION FOR DEFENDANTS?

MITCHELL G. PAGE*

INTRODUCTION

The general federal venue statute, 28 U.S.C. § 1391 ("§ 1391"), carries great weight for the parties on either side of a civil suit. These statutory rules promulgated by Congress address the propriety of "venue," or the judicial district in which a court with jurisdiction may hear a claim.[1] Section 1391 determines where the vast majority of civil claims brought into the federal court system may be heard[2]—quite a significant number considering roughly a quarter of a million civil claims are filed in our federal district courts per year.[3] Opposing parties clash over the propriety of venue for a few simple reasons. For example, venue affects potential plaintiffs and defendants because the trial location influences the cost and convenience of litigation. Consequently, venue may be disputed in an effort to shift the costs of litigation, often in the name of "fairness."[4] Venue might also be disputed if the

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* Candidate for Juris Doctor, University of Colorado School of Law, 2003; B.A., Vanderbilt University, 2000. The author thanks the staff of the Law Review for their editorial assistance, and would like to specially recognize the contributions of Robyn Lutz (Class of 2002), Daniel Steuer (Class of 2003) and Molly Allen (Class of 2003). Thanks also to Professor Melissa Hart for her comments on early drafts of this article. Finally, thanks always to my family and friends.

1. BLACK'S LAW DICTIONARY 1553–54 Deluxe 7th ed. 1999).

2. *See* 28 U.S.C. § 1391 (2000) (governing venue "except as otherwise provided by law"); *see also* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 110.60 (3d ed. 1997) (listing federal claims with special venue provisions which preempt the general venue statute).

3. *See* STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 38 (Mar. 31, 2002), *available at* http://www.uscourts.gov/caseload2002/tables/c00mar02.pdf.

4. *See* Leroy v. Great W. United Corp., 443 U.S. 173, 186–87 (1979); discussion *infra* Part I.D.

particular judge or potential jurors in the district are perceived as sympathetic to one side, or even if the trial calendar for a particular venue is inconvenient.[5] Additionally, disputes arise because, in cases where the federal court's jurisdiction is based on the diversity of state citizenship between the parties (a "diversity" case),[6] venue may determine the substantive law that ultimately resolves the case.[7] Indeed, disputes over venue arise for good reason, as litigants regularly affect the outcome of a dispute by arguing over venue. Empirical data shows that plaintiffs are successful in fifty-eight percent of cases when their choice of venue stands.[8] By comparison, plaintiffs find success only twenty-nine percent of the time when a defendant has the case transferred from the district in which the plaintiff filed.[9]

The rules set forth in § 1391 serve two goals simultaneously. First, these venue rules guide civil cases through the federal court system "on a district-by-district level."[10] Second, and germane to this Comment, venue has been characterized as a protection afforded by Congress "to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial."[11] To put this statement in context, even if a federal district court has personal jurisdiction over the defendant consistent with the Due Process Clause of the Constitution, the rules set forth in § 1391 provide defendants additional protection against having to defend a claim brought in "an unfair or inconvenient" district.

Considering the importance of venue in federal civil suits, any change to the language of § 1391 could potentially affect a great number of cases. Moreover, such a change would also upset the balance between the protection afforded to the defendant under § 1391, and the plaintiff's interest in strategically selecting the trial site. Although the potential for

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5. *See* Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 272 (1995).

6. *See* 28 U.S.C. § 1332(a)(4); discussion *infra* Section I.A.

7. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); discussion *infra* Part III.B.1.

8. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511–12 (1995).

9. *Id.* at 1512.

10. *See, e.g.*, KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 80 (1999).

11. Leroy v. Great W. United Corp., 443 U.S. 173, 183–84 (1979).

such widespread effects may appear to be a deterrent to congressional modification, the language of the general venue statute has been amended by Congress several times over the past few decades.[12] For example, prior to 1990, venue for certain civil claims was permitted in the single judicial district "in which the claim arose."[13] This language created problems for the lower federal courts because they struggled with exactly how to ascertain the single judicial district "in which the claim arose."[14] With the Judicial Improvements Act of 1990 (the "1990 Act"), however, the general venue statute was amended to permit venue in any district in which a "substantial part of the events or omissions giving rise to the claim occurred."[15] In drafting this amendment to the federal venue statute, Congress meant to eliminate "wasteful litigation" concomitant with ascertaining the single district "in which the claim arose."[16]

Despite the rather limited intent of Congress to stem litigation over venue, the 1990 Act curtailed the ability of § 1391 to protect a defendant from having to defend a claim brought in an unfair or inconvenient district. In order to counter the unintended effects wrought by the 1990 Act, this Comment suggests that the lower federal courts interpret the language of § 1391 with an aim towards protecting defendants. Section I explains the traditional role and purpose of statutory venue, and traces the evolution of the general federal venue statute prior to the 1990 amendment. This Section also discusses the United States Supreme Court's 1979 interpretation of § 1391 in *Leroy v. Great Western United Corp.*[17] Against this backdrop, Section II shows that the

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12. Some of the most important changes occurred in 1966, 1988, and 1990. *See* Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111 (1966); Act of Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4642 (1988); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5114 (1990); discussion *infra* Section I.C.

13. *See* 28 U.S.C. §§ 1391(a)(2), (b)(2) (1988). For other venue alternatives available under the pre-1990 general venue statute, see *infra* notes 46–59 and accompanying text.

14. *See, e.g.*, Rosenfeld v. S.F.C. Corp., 702 F.2d 282, 284 (1st Cir. 1983) (observing that several tests could be employed to determine if venue was proper, including the "significant contacts" test, the "place of injury" tests, or the "convenience of the parties" test) (citations omitted).

15. Pub. L. No. 101-650, § 110, 104 Stat. 5114 (1990) (codified at 28 U.S.C. §§ 1391(a)(2) & (b)(2)).

16. *See* H.R. REP. NO. 734, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6869.

17. 443 U.S. 173 (1979).

Court's opinion in *Leroy* left many questions regarding § 1391 unanswered. As a result of the Court's failure to definitively interpret § 1391 in *Leroy*, litigation over venue persisted, thus prompting Congress to amend the language of § 1391 under the 1990 Act. In amending § 1391, the express intent of Congress was to decrease litigation over venue. However, Section III demonstrates that the reformulated language of § 1391 curtailed the venue statute's ability to protect a defendant from having to defend a claim brought in an unfair or inconvenient district. Specifically, not only does the 1990 amendment afford plaintiffs greater choice in selecting a venue in which to bring their claim, but it also allows plaintiffs in diversity cases a greater choice over the substantive law that decides their claims under the *Erie* doctrine. Additionally, by considering the existing statutory scheme and jurisprudence relating to the transfer of cases from one district to another, Section III also demonstrates that the 1990 amendment facilitates a "file-and-transfer" practice, whereby plaintiffs in diversity cases strategically file in one federal district so as to obtain the substantive law of that district and then transfer the case to another district, with the substantive law of the transferring district still governing the claim. In light of this, Section IV argues that § 1391 should be construed in favor of defendants by the federal courts.

I. THE FEDERAL VENUE STATUTE PRIOR TO THE JUDICIAL IMPROVEMENT ACT OF 1990

The central purpose of statutory venue is to protect defendants from having to defend a suit in an unfair or inconvenient place of trial. This protection provided by statutory venue is somewhat more expansive, and significantly different from, the basic protections provided by jurisdictional requirements. This Section begins with this topic, and then traces the evolution of the language of the general venue statute, highlighting the difficulties of past formulations and ending with an account of the Supreme Court's interpretation of § 1391 in *Leroy v. Great Western United Corp.*[18] Against the background provided here, it will be clear that the 1990

18. *Id.*

amendment to the language of § 1391 undermined the venue statute's ability to protect defendants.

A. Differentiating Venue from Jurisdiction

Jurisdiction is a broad, umbrella term that refers to a court's "power to adjudicate,"[19] yet the initial jurisdictional question for a federal district court is rather narrow. The question is simply whether the court has jurisdiction to hear the subject matter presented by a claim.[20] Such a simple question is extremely important, however, for its answer carries constitutional implications. Article III of the United States Constitution limits the power of the federal judiciary by restricting the subject matter of claims which federal courts may hear.[21] In accordance with its Article III power,[22] Congress further restricts the jurisdiction of the district courts to certain subject matter under 28 U.S.C. §§ 1331[23] and 1332.[24] As a result of these constitutional underpinnings, subject

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19. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167–68 (1939) (Frankfurter, J., defining "jurisdiction").

20. *See Leroy*, 443 U.S. at 180 (subject-matter jurisdiction is a "fundamentally preliminary . . . absolute stricture on the court").

21. *See* U.S. CONST. art. III, § 2; *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 512–14 (1869).

22. In commenting on Congress's Article III power, the Supreme Court has stated:

> Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction . . . this reflects the constitutional source of federal judicial power: Apart from this Court, that power only exists "in such inferior Courts as the Congress may from time to time ordain and establish.

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 701–02 (1992) (citation omitted).

23. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000).

24. 28 U.S.C. § 1332(a) (as amended by the Act of Oct. 19, 1996, Pub. L. 104-317, Title II, § 205(a), 110 Stat. 3850) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

matter jurisdiction works as an absolute stricture that neither the court nor the parties may waive.[25]

In addition to subject matter jurisdiction, a district court must also have personal jurisdiction over a defendant. This requirement provides protection for a defendant in the following manner.[26] Unless a defendant waives the protection afforded by the personal jurisdiction requirement,[27] a court cannot enter a valid judgment[28] unless a defendant has "minimum contacts" with the state in which the district court sits "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[29] This personal jurisdiction requirement ensures that the defendant receives treatment by the court in a manner consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments.[30]

Jurisdictional requirements differ significantly from venue requirements. In comparing the requirements of the general venue statute to the requirements of subject matter

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25. *Leroy*, 443 U.S. at 180.

26. *See id.*

27. *See id.*; *see also* Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939) ("Being a privilege, [venue] may be lost . . . by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct.").

28. *See* Pennoyer v. Neff, 95 U.S. 714, 733 (1887) ("Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.").

29. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Personal jurisdiction would also be found if the defendant was served with process when he or she was physically present within the State. *See* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 610–11 (1990).

30. *Burnham*, 495 U.S. at 609 ("[T]he judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment . . . .") (citing *Pennoyer*, 95 U.S. at 732). Also note that in addition to the Due Process grounds for requiring personal jurisdiction, the requirement has also been characterized as serving a structural purpose by reigning in the judicial power of "'the sovereign that created the court.'" Robert Haskell Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 IND. L.J. 1, 8 (1982) (quoting Stafford v. Briggs, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting)); *see also Int'l Shoe Co.*, 326 U.S. at 317 (noting the exercise of jurisdiction must be reasonable "in the context of our federal system of government"). *See generally* Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U.L. REV. 279 (1983). *But see* Jay Conison, *What Does Due Process Have to Do with Personal Jurisdiction?*, 46 RUTGERS L. REV. 1073, 1188–92 (1994) (criticizing the federalism justification for a personal jurisdiction requirement).

jurisdiction, two key differences appear. First, unlike subject matter jurisdiction requirements, which must be met in order for a district court to constitutionally wield its power to adjudicate,[31] the requirements set forth in the general federal venue statutes do not implicate the constitution.[32] Second, venue concerns the district in which a claim is heard, not the subject matter presented. Thus, venue is quite different than subject matter jurisdiction.

Unlike personal jurisdiction, venue rules determine where litigation may take place with greater specificity than personal jurisdiction. Some states, such as New York, contain multiple federal judicial districts.[33] In these states, venue provisions channel a case to a particular district. In contrast to this specificity, personal jurisdiction assures only the propriety of haling the defendant before a court anywhere in the state.[34] There is another sharp difference between personal jurisdiction and venue, though both have been characterized as protections for the defendant.[35] Personal jurisdiction deals with the court's constitutional power over a defendant: "The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of the particular sovereign has power . . . over a named defendant."[36] In contrast, venue requirements do not raise constitutional concerns,[37] but are thought of as an additional protection for defendants.

B. Venue as a Protection for Defendants

Personal jurisdiction only concerns issues of fairness and convenience such that constitutional requirements are met. Under the Supreme Court's analysis of personal jurisdiction, a court lacks personal jurisdiction over the defendant unless that defendant has "minimum contacts" with the state in which the

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31. *Neirbo Co.*, 308 U.S. at 168.

32. CLERMONT, *supra* note 10, at 28–29.

33. *See* 28 U.S.C. § 133 (2000), which lists the federal judicial districts within the states, as well as the number of judges that shall be appointed for each district.

34. *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 197 (5th ed. 2000).

35. *See* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) ("[B]oth are personal privileges of the defendant . . . .").

36. Abrams, *supra* note 30, at 8.

37. *See* CLERMONT, *supra* note 10, at 28–29.

court sits "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[38] While "notions of fair play and substantial justice" appear central to the Court's analysis, this appearance is not the reality. In the nearly sixty years since the Court announced the "fair play and substantial justice" inquiry, only in *Asahi Metal Industry Co. v. Superior Court*[39] has the Court found the forum state lacked personal jurisdiction based on "fair play and substantial justice" grounds. Instead, the Court's personal jurisdiction analysis seems primarily to focus on whether the defendant had purposeful contacts with the forum state.[40] Thus, only in rare cases do issues of "fair play and substantial justice" seem to protect the defendant.

It is the venue rules promulgated by Congress, and not the Due Process requirements of the Constitution, that primarily take account of issues of convenience and fairness. As Judge Wisdom commented in the 1966 case of *Time, Inc. v. Manning*:

> Jurisdiction and venue, while comprising many of the same considerations, are not the same thing.... If the two concepts should be described as applying along a continuum, one extreme might be demonstrated by the case in which the corporate defendant's contacts with the forum were so minimal that it would be patently unfair, let alone inconvenient, to require him to defend an action there. Due process would say that the forum lacked jurisdiction. At the other extreme would be the case in which not only were jurisdiction and venue proper, but the inconvenience caused the corporation by requiring it to defend the suit where brought would be so slight that a motion for discretionary transfer under 28 U.S.C. § 1404(a) would be denied. Between the extremes are those cases in which jurisdiction exists, but the inconvenience of requiring the defendant to defend the suit where brought is so substantial that Congress, through the venue provisions of [§ 1391], has prohibited the maintenance of suit there ....[41]

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38. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Personal jurisdiction would also be found if the defendant was served with process when he or she was physically present within the state. *See* Burnham v. Super. Ct. of Cal., 495 U.S. 604, 610–11 (1990).

39. 480 U.S. 102, 113–16 (1987).

40. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–76 (1985).

41. *See* Time, Inc. v. Manning, 366 F.2d 690, 696 (5th Cir. 1966).

Thus, it is up to Congress to legislate venue rules that take into account issues of fairness and convenience when allowing a plaintiff to file a claim in federal court.

Since the venue rules add another layer of protection upon that already guaranteed by the personal jurisdiction requirement, venue rules are often thought of as an additional protection for the defendant. As the Court stated in *Leroy v. Great Western United Corp.* in 1979, "the purpose of statutory venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial."[42] This is not a new concept; in 1939, the Court commented on a precursor to § 1391, noting "the policy . . . is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found.'"[43] Indeed, the notion that venue serves as an additional protection for defendants has enjoyed prominence both before and after the Court's declaration in *Leroy*.[44] It is this historical

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42. Leroy v. Great W. United Corp., 443 U.S. 173, 180, 183–84 (1979).

43. Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939) (citing General Inv. Co. v. Lake Shore Ry., 260 U.S. 261, 275 (1922)).

44. *E.g.*, *Neirbo Co*, 308 U.S. at 168 (stating purpose of venue "is 'to save defendants from inconveniences to which they might be subjected if they could be compelled to answer in any district, or wherever found'") (citation omitted); Richard v. Franklin County Distilling Co., 38 F. Supp. 513, 516 (W.D. Ky. 1941) (noting venue requirements are "as much for the protection of the defendant as they are for the convenience of the plaintiff"); Olberding v. Ill. Cent. R.R. Co. 346 U.S. 338, 340 (1953) (stating "unless the defendant has also consented [to venue], he has a right to invoke the protection which Congress has afforded him"); Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 260 (E.D. Pa. 1968) ("[V]enue affords some protection to a defendant from being forced to litigate an action in a district remote from his residence."); Energy Res. Group, Inc. v. Energy Res. Corp., 297 F. Supp. 232, 234 (S.D. Tex. 1969) ("[V]enue statutes were devised . . . to lay venue in a place having a logical connection with the parties to the litigation, and to afford the defendant some protection against hardship of having to litigate in a distant forum"); Fuller & Dees Mktg. Group, Inc. v. Outstanding Am. High Sch. Students, 335 F. Supp. 913, 915 (M.D. Ala. 1972) (noting the purpose of venue statutes is "to place trial in a place having a logical connection with parties . . . and to afford defendant some protection against the hardship of having to litigate in some distant place"); PI, Inc. v. Valcour Imprinted Papers, Inc., 465 F. Supp. 1218, 1222 (S.D.N.Y. 1979) (noting the "underlying rationale of venue statutes . . . [is] to protect defendants from inconvenience of defending actions in areas remote from where they reside or, in case of corporations, where they have significant activities") (citation omitted); Cascade Steel Rolling Mills, Inc. v. C. Itoh and Co., 499 F. Supp. 829, 833 (D. Or. 1980) (finding that venue statutes are generally intended to protect defendant); Adams v. Bell, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983) (finding venue serves role of "protecting defendants from the inconvenience and harassment of participating in trial far from home"); Hogue v. Milodon Eng'g, Inc., 736 F.2d 989, 991 (4th Cir.

purpose of statutory venue—providing protection for defendants beyond the privilege of personal jurisdiction—that Congress appears to have unintentionally eroded by enacting the 1990 Judicial Improvements Act.

C. *The Language of the Statute and Confusion in the Courts*

Venue restrictions affecting federal courts have their origins in the Judiciary Act of 1789. Under this Act, venue was proper in the district of the defendant's residence or where the defendant could be found.[45] Understanding the relationship between venue and personal jurisdiction is essential to

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1984) ("[D]efendant must look primarily to federal venue requirements for protection from onerous litigation"); Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest., 760 F.2d 312, 316 (D.C. Cir 1985) (noting limitations on venue "generally are added by Congress to ensure a defendant a fair location for trial and to protect him from inconvenient litigation"); Kupcho v. Steele, 651 F. Supp. 797, 801 (S.D.N.Y. 1986) (stating venue requirements protect "*defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial") (emphasis in original) (citation omitted); Leidholdt v. L.F.P., Inc., 647 F. Supp. 1283, 1286 (D. Wyo. 1986) ("[T]he purpose of venue is to protect defendant from being haled into inconvenient forums"); Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 869 F. Supp. 152, 154 (S.D.N.Y. 1994) ("[B]y limiting plaintiff's choice of forum beyond those courts which have personal and subject matter jurisdiction, venue statutes protect defendants from litigating in unfair or inconvenient location"); Seko Air Freight, Inc. v. Direct Transit, Inc., 859 F. Supp. 306, 308 n.2 (N.D. Ill. 1994) (finding venue statutes limit venue to a place that has logical connection with parties to litigation and protects defendant against hardship); Saferstein v. Paul, Mardinly, Durham, James, Flandreau & Rodger, P.C., 927 F. Supp. 731, 735 (S.D.N.Y. 1996) (finding venue protects defendants from having "to defend an action in a trial court that is either remote from defendant's residence or from the place where acts underlying the controversy occurred") (citation omitted); Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 255 (W.D.N.Y. 1997) ("[V]enue requirements serve to protect defendant from inconvenience of defending action in court that is either remote from defendant's residence or from the place where the acts underlying the controversy occurred"); Cobra Partners L.P. v. Liegl, 990 F. Supp. 332, 332 (S.D.N.Y. 1998) ("The purpose of statutorily specified venue is to protect defendants against the risk that a plaintiff will select an unfair or inconvenient place of trial."); Nutrition Physiology Corp. v. Enviros Ltd., 87 F. Supp. 2d 648, 652 (N.D. Tex. 2000) (noting that venue requirements "protect defendants from being forced to defend lawsuits in court remote from their residence or from where acts underlying controversy occurred"); Abrams Shell v. Shell Oil Co., 165 F. Supp. 2d 1096, 1106 (C.D. Cal. 2001) ("[V]enue statutes are generally intended to protect a defendant from being forced to defend in an unfair or inconvenient forum").

45. *See* Judiciary Act of 1789, ch. 20, § 11(c), 1 Stat. 73, 79 ("And no civil suit shall be brought . . . against an inhabitant of the United States, by an original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.").

realizing the practical limits on the venue provisions of this Act. Under the Act, venue may have been proper where the defendant could be found, yet suits failed because federal courts often lacked subject matter jurisdiction necessary to hear the claim "where the defendant could "be found."[46] Thus, even though the Act's venue provisions were rather liberal, its constrictive subject matter jurisdiction provisions "effectively confined [venue] to the district of residence" of the defendant.[47]

The 1789 venue provisions remained in place for nearly one hundred years until Congress amended the Judiciary Act in 1875.[48] The 1875 venue revisions have been characterized as "stylistic and not substantive: the restrictions on venue in the federal courts were those imposed by the 1789 statute."[49] In short, venue was still proper where the defendant resided or could be found.[50] "In 1887, however, Congress eliminated the provision authorizing suit wherever the defendant could be found: federal-question cases could be brought only where the defendant was an 'inhabitant,' and diversity cases only where either the plaintiff or the defendant resides."[51]

Until the 1966 amendment to § 1391, venue for a diversity case was proper in a district where either all plaintiffs or all defendants resided.[52] For cases where the court's subject matter jurisdiction was not based on diversity of the parties, venue was only appropriate in the district where all defendants resided.[53] Given these simple venue formulations,[54] the

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46. *See* Judiciary Act of 1789, § 11, 1 Stat. 73, 79 ("And no civil suit shall be brought . . . by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ . . . ."); MOORE'S FEDERAL PRACTICE, *supra* note 2, at § 101 App. 101; *see also* James William Moore & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEX. L. REV. 1, 1–8 (1964) (tracing the history of diversity jurisdiction).

47. Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 708 n.4 (1972).

48. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875).

49. *Brunette Mach.*, 406 U.S. at 709 & n.7.

50. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

51. *Brunette Mach.*, 406 U.S. at 709 & n.7; *see also* Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

52. *Brunette Mach.*, 406 U.S. at 709 & n.7; *see also* Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

53. *Brunette Mach.*, 406 U.S. at 709 & n.7; *see also* Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

54. At the time, perhaps the only difficulty for the courts was in applying the venue statute to a business entity named as a party. "When the litigants are natural persons the conceptions underlying venue present relatively few problems in application" but in the case of corporate litigants, for example, "these

Supreme Court declared that "the requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."[55] One anomaly in the general venue statute during this time was that if no district qualified as one in which "all" plaintiffs, or "all" defendants resided, a claim arising in the United States could not be brought in federal court due to lack of proper venue.[56]

The irksome situation in which venue was proper in no federal court, referred to by the courts as a "venue gap,"[57] was resolved in 1966 when Congress amended § 1391 by adding the district "in which the claim arose" as a permissible venue alternative for both diversity and non-diversity civil cases.[58] Thus, the language of the general venue statute after the 1966 amendment read:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought in the judicial district where all plaintiffs or all defendants reside, *or in which the claim arose.*
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district in where all defendants reside, *or in which the claim arose,* except as otherwise provided by law.[59]

The amended venue provisions, like their predecessors, posed problems as well. Determining the district "in which the claim arose" proved no easy task for federal courts. Several different tests were devised to determine the district in which

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procedural problems are enmeshed in the wider intricacies touching the statues of a corporation in our law." Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 168 (1939).

55. Olberding v. Ill. Central R.R. Co., 346 U.S. 338, 340 (1953).

56. *See, e.g.*, Smith v. Lyon, 133 U.S. 315, 317 (1890).

57. *See, e.g.*, Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 710 n.8 (1972).

58. *See* Act of Nov. 2, 1966, Pub. L. No. 89-714, § 2, 80 Stat. 1111, 1112 (1966).

59. 28 U.S.C. § 1391 (1964), *amended by* Act of Nov. 2, 1966, Pub. L. No. 89-714, § 2, 80 Stat. 1111, 1112 (italics signify the additions to § 1391 made by the Act).

the claim arose: the "place of injury" test for tort claims,[60] the "place of performance" test for contract claims,[61] the "weight of contacts" test,[62] the American Law Institute's test,[63] and even a test equating venue with personal jurisdiction.[64]

For example, the court in *Scott Paper Co. v. Scott's Liquid Gold, Inc.*[65] relied on the "place of injury" test. *Scott Paper* involved a Colorado corporation that infringed upon the

60. *See* Parham v. Edwards, 346 F. Supp. 968, 969–73 (S.D. Ga. 1972), *aff'd*, 470 F.2d 1000, 1000 (5th Cir. 1973); Daugherty v. Procunier, 456 F.2d 97, 97–98 (9th Cir. 1972); Kletschka v. Driver, 411 F.2d 436, 442 (2d Cir. 1969); Glendale Fed. Sav. & Loan Ass'n v. Fox, 481 F. Supp. 616, 623–24 (C.D. Cal. 1979); Quinn v. Bowmar Publ'g Co., 445 F. Supp. 780, 783 (D. Md. 1978); Maney v. Ratcliff, 399 F. Supp. 760, 766 (E.D. Wis. 1975); Scott Paper Co. v. Scott's Liquid Gold, Inc., 374 F. Supp. 184, 190 n.6 (D. Del. 1974); S.A. v. Moraites, 377 F. Supp. 644, 647–48 (S.D.N.Y. 1974); Wingard v. North Carolina, 366 F. Supp. 982, 983 (W.D.N.C. 1973); Iranian Shipping Lines, Albert Levine & Assocs. v. Bertoni & Cotti, 314 F. Supp. 169, 170–71 (S.D.N.Y. 1970); *In re* Multidistrict Civil Actions Involving the Air Crash Disaster, 342 F. Supp. 907, 907–09 (D.N.H. 1968); Rosen v. Savant Instruments, Inc., 264 F. Supp. 232, 237 (E.D.N.Y. 1967).

61. *See* Gardner Eng'g Corp. v. Page Eng'g Co., 484 F.2d 27, 33 (8th Cir. 1973).

62. *See* United States v. Casey, 420 F. Supp. 273, 276 (S.D. Ga. 1976); Idaho Potato Comm'n v. Wash. Potato Comm'n, 410 F. Supp. 171, 175–76 (D. Idaho 1976); British-Am. Ins. Co. v. Lee, 403 F. Supp. 31, 36 (D. Del. 1975); Weil v. N.Y. State Dep't of Transp., 400 F. Supp. 1364, 1365–66 (S.D.N.Y. 1975); Mad Hatter, Inc. v. Mad Hatters Night Club, 399 F. Supp. 889, 892–93 (E.D. Mich. 1975); Ghazoul v. Int'l Mgmt. Servs., 398 F. Supp. 307, 314–15 (S.D.N.Y. 1975); Wahl v. Foreman, 398 F. Supp. 526, 529 (S.D.N.Y. 1975); Redmond v. Atlantic Coast Football League, 359 F. Supp. 666, 669–70 (S.D. Ind. 1973); Fox-Keller, Inc. v. Toyota Motor Sales, U.S.A., Inc., 338 F. Supp. 812, 815–16 (E.D. Pa. 1972); Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 291 F. Supp. 252, 260–61 (E.D. Pa. 1968); *see also* ABC Great States, Inc. v. Globe Ticket Co., 310 F. Supp. 739, 742–43 (N.D. Ill. 1970) (finding venue proper only in the district where most of the contacts occurred). *But see* Cal. Clippers, Inc. v. United States Soccer Football Ass'n, 314 F. Supp. 1057, 1062–65 (N.D. Cal. 1970) (finding venue may be proper in a district irrespective of the fact that significant contacts occurred in other districts).

63. The purpose of the American Law Institute ("ALI") test was to expand the "weight of contacts" test so that venue could be possible in more than one district. This test was adopted by the United States Court of Appeals for the District of Columbia Circuit in *Lamont v. Haig*, 590 F.2d 1124, 1132–37 (D.C. Cir. 1978); *see also* McDonald's Corp. v. Congdon Die Casting Co., 454 F. Supp. 145, 147–48 (N.D. Ill. 1978) (adopting the test announced in *Tefal*); Commercial Lighting Prods., Inc. v. United States Dist. Court, 537 F.2d 1078, 1079–80 (9th Cir. 1976); Tefal, S.A. v. Products Int'l Co., 529 F.2d 495, 496–97 (3d Cir. 1976) (implicitly adopting the ALI test).

64. *See* Battle Creek Equip. Co. v. Roberts Mfg. Co., 460 F. Supp. 18, 20–21 (W.D. Mich. 1978); Munsingwear, Inc. v. Damon Coats, Inc., 449 F. Supp. 532, 536–37 (D. Minn. 1978).

65. 374 F. Supp. 184, 189–90 (D. Del. 1974).

trademark rights of a Pennsylvania corporation.[66] The United States District Court for the District of Delaware found that venue was proper in Delaware because the defendant's actions injured the plaintiff in Delaware, despite the fact that the only action taken by the defendant within the district was product marketing.[67] The court concluded that the plaintiff was injured wherever the defendant infringed on its trademark rights.[68] Therefore, the plaintiff could bring suit anywhere the defendant conducted business. Moreover, the court found that where minimum contacts were sufficient to guarantee the defendant due process, such contacts were also sufficient for the plaintiff to lay venue under § 1391.[69] As *Scott Paper* illustrates, some courts interpreted the venue statute so broadly that it offered a defendant no more protection than personal jurisdiction requirements.[70]

Instead of focusing on "the place of injury" to resolve a venue dispute, other courts looked at the weight of a defendant's contacts with the district. For example, in *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,[71] the plaintiffs sued the defendants for violating antitrust provisions of the Clayton Act. The United States District Court for the Eastern District of Pennsylvania looked at the defendants' "weight of contacts" with the district to determine if venue was proper.[72] The court determined that venue was improper under a "weight of contacts" test because the defendants carried on no substantial business within the district, and because the defendants conducted no business directly with the plaintiffs within the district.[73] This "weight of contacts" test gained acceptance because unlike the "place of injury" test employed in *Scott Paper*, the "weight of contacts" test often required that the defendant's contacts exceed the minimum required for personal

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *See also* Battle Creek Equip. Co. v. Roberts Mfg. Co., 460 F. Supp. 18, 19–22 (W.D. Mich. 1978); Munsingwear, Inc. v. Damon Coats, Inc., 449 F. Supp. 532, 536–37 (D. Minn. 1978).
71. 291 F. Supp. 252 (E.D. Pa. 1968).
72. *Id.* at 260–62.
73. *Id.* at 261.

jurisdiction to be proper.[74] For this reason, courts seemed to believe they were reaching more equitable results in resolving venue disputes.[75]

While preferable to the "place of injury test" in the eyes of some judges, the "weight of contacts" test contained flaws as well. First, the propriety of venue often turned on just how much weight was needed, and this varied from court to court.[76] Second, some courts looked at all of the defendant's contacts with the district, rather than focusing on the conduct giving rise to the claim.[77]

While the place of injury and weight of contacts tests were two of the most common tests formulated to deal with the "in which the claim arose" language, the morass created by the ambiguity of this language spawned other tests, protracted litigation, and splits among the United States Courts of Appeal.[78] In 1979, the United States Supreme Court had its chance to clarify just what the "in which the claim arose" language of § 1391(a) and (b) demanded in the case of *Leroy v. Great Western United Corp.*[79]

D. The Decision of the Court in Leroy v. Great Western United Corp.

Great Western United Corp. ("Great Western") was a publicly owned Delaware corporation headquartered in Dallas, Texas.[80] Great Western made a public offer to purchase two million shares of stock in the Sunshine Mining and Metal Co. ("Sunshine") at a premium price.[81] Sunshine operated a silver mine in Idaho, and its executive offices and the majority of its assets were also situated in Idaho.[82] Great Western filed forms

74. *See, e.g.*, Honda Assocs., Inc. v. Nozawa Trading, Inc., 374 F. Supp. 886, 889–90 (S.D.N.Y. 1974).

75. *See id.*

76. *See* Governor v. Herter's, Inc., No. 77 Civ. 3989, 1978 U.S. Dist. LEXIS 16796, at *7–17 (S.D.N.Y. Jul. 5, 1978) (surveying the problems with the "weight of contacts" or "significant contacts" test).

77. *See id.*

78. For a survey of the situation leading up to the Court's decision in *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), see generally MOORE'S FEDERAL PRACTICE, *supra* note 2, at § 110 App.106[1].

79. 443 U.S. at 173–87.

80. *Id.* at 176.

81. *Id.*

82. *Id.* at 175–76.

with the Securities and Exchange Commission in compliance with the Williams Act.[83] Because Sunshine maintained substantial assets within the state of Idaho, Great Western also filed forms with the Idaho Director of Finance in order to comply with the state's corporate takeover laws.[84] When the Idaho Director of Finance delayed the effective date of Great Western's offer because of a dispute over the filings, Great Western filed suit in the United States District Court for the Northern District of Texas, naming the Idaho officials responsible for enforcing the state statute as defendants.[85]

The district court found that venue was not proper in the Northern District of Texas under § 1391(b), though venue in the district was proper under provisions of the Williams Act.[86] On appeal, the Fifth Circuit disagreed with the district court, concluding that venue was proper under both § 1391(b) and the venue provisions of the Williams Act.[87] Regarding § 1391(b), the Fifth Circuit reasoned that because the allegedly groundless restraint of Great Western's tender offer affected the company there, at its headquarters, venue was proper in the Northern District of Texas.[88]

On appeal before the United States Supreme Court, the Court held that Idaho's restraint on Great Western's tender, though affecting Great Western in its principal place of business in the Northern District of Texas, did not meet the requirements for venue under § 1391(b).[89] The Court held that although the effects of the Idaho officials' actions might be felt in Texas, such effects were not a factor in determining venue.[90] The Court's rationale was that if such effects made venue appropriate under the "in which the claim arose" language of § 1391(b), the Idaho officials could be sued anywhere a Sunshine shareholder alleged he or she wanted to accept Great Western's

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83. *Id.* at 176–77; *see* The Williams Act, Pub. L. No. 90-439, 90 Stat. 454 (1968) (codified in scattered subsections of 15 U.S.C. §§ 78m, n) (The Williams Act, in amending the Securities and Exchange Act of 1934, requires information schedules to be filed with the Securities and exchange Commission.).

84. *Leroy*, 443 U.S. at 176.

85. *Id.* at 177.

86. Great W. United Corp. v. Kidwell, 439 F. Supp. 420, 433–34 (N.D. Tex. 1977).

87. Great W. United Corp. v. Kidwell, 577 F. 2d 1256, 1273–74 (5th Cir. 1978).

88. *Id.*

89. *Leroy*, 443 U.S. at 187.

90. *Id.* at 186.

tender offer.[91] Because "Congress did not intend to provide for venue at the residence of the plaintiff or to give that party unfettered choice among a host of different districts," the Court could not accept the Court of Appeal's conclusion.[92] The Court noted that the language of § 1391(b) assumes that a claim may only "arise" in a single district, so accepting Great Western's argument would have impermissibly stretched the statute by allowing suits in nearly every state.[93] Since the Court noted that the § 1391(b)(2) assumes that venue can arise only in one district,[94] some courts have subsequently characterized their task as determining "which district among two or more potential forums is the 'best' venue."[95] The *Leroy* Court bolstered its conclusion with several observations regarding the federal venue statute. First, the Court noted that the purpose of the 1966 statute was to close venue gaps—the situation when neither all plaintiffs nor all defendants resided in one district—so the statute should not be read any more broadly than necessary to achieve this purpose.[96] Upholding the Fifth Circuit's opinion would have done far more than close a venue gap; it would have exposed the Idaho officials to lawsuits almost everywhere in the nation.[97] Second, the Court found the general purpose of statutory venue was to protect defendants from the possibility that a plaintiff might select an inconvenient or unfair trial location.[98] Again, upholding the Fifth Circuit's interpretation of § 1391(b) would have eliminated such protection for the defendants and actually increased their exposure to suit. Third, factors to determine the "best" venue include the location of evidence and witnesses, and the familiarity of Idaho judges with the Idaho anti-takeover laws—plaintiff's convenience was not considered a relevant factor.[99] Finally, the court noted that only in rare cases should there be more than one judicial district in which the claim was considered to arise.[100]

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91. *Id.*
92. *Id.* at 185.
93. *See id.* at 184–86 & n.22.
94. *Id.* at 184–85 & n.19.
95. Setco Enter. Corp. v. Robbins, 19 F.3d 1278, 1281 (8th Cir. 1994).
96. *Id.* at 184.
97. *See id.* at 184–86 & n.22.
98. *Id.* at 183–84.
99. *Id.* at 185–86.
100. *Id.* at 185.

While these observations came to be called *Leroy* "factors,"[101] the observations were never incorporated into a defined test by the Court. Ultimately, the Court's failure to identify the scope of its observations, and its failure to clearly endorse one test to resolve venue disputes, would prove to be two of the shortcomings of the *Leroy* decision.

II. THE 1990 AMENDMENT AND SUBSEQUENT JUDICIAL DECISIONS

One way to view the 1990 amendment to the general federal venue statute is that Congress was merely responding to the confusion that remained after the Court's decision in *Leroy*. Specifically, the Court made many observations regarding § 1391(b), but failed to address addressed § 1391(a). The Court also did not approve of a specific test for the lower courts to apply in deciding venue disputes. As a response to these shortcomings and to the litigation engendered by the language of § 1391, Congress amended the language of the general venue statute with the 1990 Act in an effort to stem litigation over venue. However, as recent decisions by the federal circuit courts of appeals demonstrate, the amended language of § 1391 essentially brushed aside the concerns expressed by the Court in *Leroy*.

A. *The Shortcomings of the* Leroy *Decision*

Despite the Court's interpretation of the general federal venue statute in *Leroy*, the lower federal courts soon found the decision problematic for several reasons. As the Second Circuit noted in Cheesman v. Carey: "The difficulties posed by Leroy seem certain to make venue issues an even greater problem for the lower federal courts than they were before the Supreme Court Spoke."[102] For instance, the *Leroy* decision did not address the effects of its interpretation of § 1391(b) on § 1391(a). Even though the "in which the claim arose" language was common to both subsections of § 1391, there was a dispute among the courts over whether the factors the Court

101. *See, e.g.*, Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867 (2d Cir. 1992) ("Many of the factors in *Leroy* . . .").

102. 485 F. Supp. 203 (S.D.N.Y. 1980), *remanded and dismissed on other grounds*, 623 F.2d 1386 (2d Cir. 1980).

announced in *Leroy* concerning § 1391(b) were applicable to § 1391(a). Many courts concluded that, since the "in which the claim arose" language was common to both subsections, the factors relevant to a venue determination under either of the two subsections should be identical.[103] Yet at the time the *Leroy* decision was handed down, § 1391(a) allowed a plaintiff to lay venue in the district where "all plaintiffs . . . reside."[104] Therefore, some courts reasoned that since a plaintiff could lay venue in the district of his or her residence in a diversity case under § 1391(a), it would seem appropriate to also consider the convenience of the plaintiff when he or she files in the district "in which the claim arose."[105] In sum, there was general confusion over whether the factors discussed by the Court in interpreting § 1391(b) carried over into diversity cases, where venue is governed by § 1391(a).

In addition, the Court failed to address the effect of its decision on the tests employed by the lower federal courts. Instead of dismissing prior tests, or explicitly endorsing one of them, the Court's opinion enumerated a list of observations regarding § 1391.[106] Thus, even after the *Leroy* opinion, the lower federal courts continued to employ "weight of contacts" tests,[107] "place of injury" tests,[108] and others[109] to resolve venue disputes. Based on the plethora of tests, and the amount of time spent litigating, the American Law Institute issued a

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103. *See* Hodson v. A.H. Robins Co., 528 F. Supp. 809, 812–13 (E.D. Va. 1981), *aff'd*, 715 F.2d 142, 145 (4th Cir. 1983); Davis v. Costa-Gavras, 580 F. Supp. 1082, 1088–89 (S.D.N.Y. 1984); Med. Emergency Serv. Assocs. v. Duplis, 558 F. Supp. 1312, 1315 n.4 (N.D. Ill. 1983); Robbins v. First Am. Bank, 514 F. Supp. 1183, 1192 (N.D. Ill. 1981).

104. See full text, quoted in Section I.B, *supra*.

105. *See* Haeberle v. Tex. Int'l Airlines, 497 F. Supp. 1294 (E.D. Pa. 1980); Abkar v. N.Y. Magazine Co., 490 F. Supp. 60 (D.D.C. 1980).

106. Leroy v. Great Western United Corp., 443 U.S. 173, 185 (1979).

107. *See, e.g.*, Cent. Valley Typographical Union No. 46 v. McClatchy Newspapers, 762 F.2d 741, 746 (9th Cir. 1985) (following a "significant contacts" test espoused prior to *Leroy* in Commercial Lighting Prods., Inc. v. U.S. Dist. Ct., 537 F.2d 1078, 1080 (9th Cir. 1976)).

108. *See, e.g.*, Delta Educ., Inc. v. Langlois, 719 F. Supp. 42, 49 (D.N.H. 1989) (finding venue appropriate in district where business injured in civil RICO case).

109. *See* Océ-Indus. v. Coleman, 487 F. Supp. 548, 551 (E.D. Ill. 1980) (equating standards for venue with the minimum contacts requirements for personal jurisdiction); *see also* MOORE'S FEDERAL PRACTICE, *supra* note 2, at § 110 app. at 106[2] (citing the many different combinations of tests created in the wake of *Leroy*).

report in 1969,[110] prior to *Leroy*, that was subsequently adopted by the Federal Courts Study Committee in 1990,[111] which called for amending the "district . . . in which the claim arose" venue alternative.[112] As the following subsection demonstrates, Congress would amend the general venue statute to "avoid[] the litigation breeding phrase 'in which the claim arose'."[113]

B. The 1990 Amendment to § 1391

The 1990 Act extensively revised subsections (a), (b), and (e) of § 1391.[114] The 1990 Act struck all of the language in subsections (a) and (b) of § 1391 and supplied a new formulation altogether.[115] As amended, §§ 1391(a)(2) and (b)(2) include as proper venue the "district in which a substantial part of the events or omissions giving rise to the claim" took place.[116] Thus, the new language reads in part:

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . , (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or . . . . (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . , (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, ...[117]

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110. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1303 (1969) [hereinafter AMERICAN LAW INSTITUTE].

111. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 94 (1990) [hereinafter JUDICIAL CONFERENCE].

112. *Id.*

113. H.R. REP. NO. 101-734, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6869.

114. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 110, 104 Stat. 5114 (1990).

115. *Id.*

116. *Id.*

117. 28 U.S.C. § 1391 (2000).

This new language was modeled on a recommendation made by the 1990 Federal Courts Study Committee,[118] though the American Law Institute first called for such an amendment in 1969.[119]

In referring to the "substantial part of the events" clause, the House Report of the Committee on the Judiciary explained:

> The great advantage of referring to the place where things happened or where property is located is that it avoids the litigation breeding phrase "in which the claim arose". It also avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts.[120]

The effect of the amendment was that so as long as the "substantial" threshold is met with respect to the events occurring in the district where the claim is brought, it does not matter that another district has *more* substantial ties to the claim.[121] "Any other approach would restore the pinpointing problem that created the difficulties under the now discarded 'claim arose' standard."[122] Thus, Congress intended that federal courts need not bother with determining the single venue "in which the claim arose" or the "best" venue, but instead need only ascertain if a substantial part of the events giving rise to the claim occurred in their district.[123] Of course, what acts or omissions meet the "substantial" requirement can vary dramatically, as will be shown.

C. Decisions Interpreting the General Federal Venue Statute after the 1990 Amendment

In the wake of the 1990 amendment, district courts have wrestled with the problem of interpreting the language of the amended statute in a manner that protects defendants. To date, five federal circuits have interpreted the 1990 amendment to the federal venue statute. The three earliest

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118. JUDICIAL CONFERENCE, *supra* note 111, at 94.

119. AMERICAN LAW INSTITUTE, *supra* note 110, at § 1303.

120. H.R. REP. NO. 101-734, at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6869.

121. David D. Siegel, *Commentary on the 1988 and 1990 Revisions of Section 1391*, 28 U.S.C.A. § 1391 (1993).

122. *Id.*

123. *See* Setco Enter. Corp. v. Robbins, 19 F.3d 1278, 1281 (8th Cir. 1994).

cases concerned interpretation of § 1391(b)(2), while the two most recent cases concerned § 1391(a)(2).

1. Decisions Interpreting 28 U.S.C. § 1391(b)(2)

The Second, Third, and Eighth Circuit Courts of Appeals have interpreted 28 U.S.C. § 1391(b)(2) as amended, and each in a slightly different manner. In *Bates v. C & S Adjusters, Inc.*,[124] the plaintiff, Phillip E. Bates, filed a claim based on the Fair Debt Collection Practices Act[125] in the "Western District of New York upon receipt of a collection notice from" defendant C & S Adjusters, Inc.[126] Bates was a resident of the Western District of Pennsylvania at the time he incurred the debt to the creditor corporation, whose principal place of business was also within the district.[127] The creditor referred the account to defendant C & S Adjusters, a business also within the Western District of Pennsylvania that conducted no regular business in New York.[128] By the time C & S mailed a collection notice to Bates' Pennsylvania address, he had relocated to New York.[129] The Postal Service forwarded the collection notice to Bates' residence in New York, and upon receipt of this notice, Bates instituted his action against C & S in the Western District of New York.[130] Ultimately, the district court dismissed the action for lack of venue.[131]

On appeal, the Second Circuit was faced with the question of whether venue was proper under § 1391(b)(2) "in a district in which the debtor resides and to which a bill collector's demand for payment was forwarded."[132] On the one hand, Bates' receipt of the collection notice was a "substantial event" for venue purposes, as the receipt triggered his claim under the Fair Debt Collection Act.[133] On the other hand, C & S had no notice Bates relocated, and never intended or controlled the forwarding of the collection notice.[134] Relying on the language

124. 980 F.2d 865 (2d Cir. 1992).
125. 15 U.S.C. § 1692 (2000).
126. *Bates*, 980 F.2d at 866.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *See id.* at 867.
134. *See id.*

of the amended venue statute, the Second Circuit reversed the district court, finding venue proper because the statute did not require that the substantial event giving rise to the claim be intentional on the defendant's part.[135]

In its opinion, the Second Circuit interpreted the 1990 amendment to § 1391 as an attempt to decrease litigation over determining the "best" venue when "substantial parts of the underlying events have occurred in several districts."[136] The Second Circuit distinguished *Leroy* by noting that *Leroy's* focus on the convenience of the defendant was only useful in distinguishing between two or more plausible venues in trying to ascertain the "best" venue.[137] Therefore, the *Leroy* factors were of "less significance" given that the 1990 amendment no longer requires courts to find the "best" district.[138]

In 1994, the Third Circuit interpreted the amended § 1391 in *Cottman Transmission Systems, Inc. v. Martino*.[139] Martino, a Michigan resident and sole stockholder of the transmission repair business of co-defendant Trans One II, Inc. ("Trans One"), entered into a franchise agreement with the Michigan corporation A-1 Transmissions, Inc. ("A-1").[140] Three years later, A-1 assigned its franchises to plaintiff Cottman. In conformance with this assignment, Cottman and Trans One executed a franchise agreement between them, though Cottman reserved the right to enforce the original A-1 agreement.[141] In 1992, Cottman instituted an action against Martino and Trans One in the Eastern District of Pennsylvania for trademark infringement in violation of the Lanham Act,[142] as well as for breach of contract.[143]

As the Lanham Act itself contains no specific venue provisions, the controlling provision is § 1391(b)(2) because such a claim raises questions of federal law.[144] Given that there was no applicable forum selection clause in the contract

135. *Id.* at 868.
136. *Id.* at 867 (quoting AMERICAN LAW INSTITUTE, *supra* note 110, at § 1303.)
137. *Id.*
138. *Id.*
139. 36 F.3d 291 (3d Cir. 1994).
140. *Id.* at 292.
141. *Id.*
142. 15 U.S.C. § 1051 (2000).
143. *Cottman*, 36 F.3d at 292.
144. *Id.* at 293.

between the parties,[145] venue was proper in the Eastern District of Pennsylvania only if it constituted "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."[146] The Third Circuit therefore held that venue was improper in the Eastern District of Pennsylvania because the actions amounting to trademark infringement occurred in Michigan.[147]

The *Cottman* court noted that provisions of the amended general venue statute still show due consideration for the defendant by requiring that the events or omissions be "substantial."[148] In this manner, the Third Circuit concluded that the policy explained by the *Leroy* Court—that the purpose of statutory venue is to protect the defendant—remained intact despite the fact that the amended general venue statute no longer required the court to determine the single district in which the claim arose.[149] However, the Third Circuit did not attempt to reconcile the amended venue statute with any of the *Leroy* factors.[150] Thus, while announcing that protecting defendants remained the goal of statutory venue, the Third Circuit disregarded the factors previously used to protect defendants, concluding that Congress lodged such protection in the "substantial" requirement.[151]

The Eighth Circuit took a different tack in 1995 when it decided *Woodke v. Dahm*.[152] The issue presented in this case was whether the Northern District of Iowa was a proper venue for a suit based on violations of the Lanham Act.[153] The" plaintiff, Jerry Woodke, was a resident of the Northern District of Iowa, who designed and sold . . .trailers.""[154] Woodke entered into a joint venture with the defendants Patrick Dahm, Douglas Blass, and Cornbelt Manufacturing "to manufacture trailers under the registered trademark "Hawkeye Eagle."[155] During the course of their joint venture, defendants placed an advertisement in a publication which was not circulated in

145. *Id.*
146. 28 U.S.C. § 1391(b)(2) (2000).
147. *Cottman*, 36 F.3d at 295–96.
148. *Id.* at 294.
149. *Id.*
150. *See id.*
151. *See id.*
152. 70 F.3d 983 (8th Cir. 1995).
153. *Id.* at 984.
154. *Id.*
155. *Id.*

Iowa.[156] In this advertisement, the defendants allegedly passed off[157] Woodke's Hawkeye Eagle trailer as their own by picturing Woodke's trailer with the trademark obscured and the name "Cornbelt Peanut Hopper" identifying the pictured trailer.[158] Woodke filed suit in the Northern District of Iowa alleging that the defendants violated § 1125 of the Lanham Act.[159]

The District Court dismissed Woodke's claim for lack of proper venue, finding the sole federal claim was insubstantially connected with the district for purposes of § 1391(b)(2).[160] The Eighth Circuit upheld the decision of the District Court.[161] While the Eighth Circuit noted that the district in which the passing off occurred would have been proper for venue, it rejected Woodke's argument that venue is also proper in the district where the *effects* of the passing off are felt.[162] In so holding, the Eighth Circuit explained that accepting Woodke's argument would obfuscate the purpose of statutory venue; specifically, protecting defendants from being haled into a remote district with no real relationship to the dispute.[163] Moreover, the Eighth Circuit distinguished itself from the other circuits by declaring that the question of venue should be resolved by focusing on the "relevant activities of the defendant, not of the plaintiff."[164] As a final rebuff to Woodke, the Eighth Circuit declared that if Congress had intended to allow venue where the plaintiff was injured by a violation of the Lanham Act, Congress could have said so expressly.[165]

As the cases discussed show, each circuit has tried to reconcile the language of § 1391(b)(2) with the Court's discussion in *Leroy* and with the concept that venue is a protection afforded to defendants. Each of the three circuits

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156. *Id.* at 985.

157. "Passing off" is a term of art—an "act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers." BLACK'S LAW DICTIONARY 1146 (Deluxe 7th ed. 1999).

158. *Woodke*, 70 F.3d at 985.

159. *Id.* at 984; Lanham Act, 15 U.S.C. § 1125 (2000).

160. Woodke v. Dahm, 873 F. Supp. 179, 200 (N.D. Iowa 1995).

161. *Woodke*, 70 F.3d at 986.

162. *Id.* at 985.

163. *Id.*

164. *Id.*; *see also Circuit Split Roundup*, 69 U.S. LAW WEEK 2750 (2001) (noting that the First Circuit's decision to look at plaintiff's acts as well as those of the defendant in *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38 (1st Cir. 2001), furthers the split amongst the circuits on the issue of whose acts are relevant for deciding venue under 28 U.S.C. § 1391(a)(2)).

165. *Woodke*, 70 F.3d at 985.

reached a somewhat different conclusion after analyzing § 1391(b)(2)—the Second Circuit found the Leroy factors of less importance, the Third Circuit found that protection of the defendants is to be found in the "substantial" requirement, and the Eight Circuit protected the defendant by focusing on his or her actions. Analysis of § 1391(a)(2) is also somewhat inconsistent.

2. Decisions Interpreting 28 U.S.C. § 1391(a)(2)

Both the Sixth and First Circuits have interpreted the amended language of § 1391(a)(2), with little or no attention paid to *Leroy* or the purpose of statutory venue. In 1998, the Sixth Circuit interpreted the amendment to § 1391(a)(2) in *First of Michigan Corp. v. Bramlett.*[166] The defendants, Carlton and Delores Bramlett, made investments with First of Michigan Corp. ("First Michigan") between the years of 1989 and 1991, investing roughly $62,000 in an Individual Retirement Account.[167] Four years after this initial investment period, the Bramletts discovered the account had lost over half its value when they received a statement from First Michigan.[168] The Bramletts then initiated an arbitration action against First Michigan in Florida (as they had relocated there in 1990), alleging it failed to provide periodic statements of the account's value, thus preventing mitigation of the loss.[169] First Michigan then filed suit in the Eastern District of Michigan to enjoin defendants Carlton and Delores Bramlett from arbitrating the claim in Florida.[170]

The district court interpreted § 1391 as requiring that venue lie in the district with the "most substantial event giving rise to [plaintiff's] complaint."[171] The district court dismissed the case for lack of venue, opining that the most substantial event giving rise to the First Michigan's claim was the Bramlett's institution of arbitration proceedings, which took place in Florida.[172]

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166. 141 F.3d 260, 263 (6th Cir. 1998).
167. *Id.* at 261.
168. *Id.*
169. *Id.*
170. *Id.* at 261–62.
171. *Id.* at 264.
172. *Id.*

On appeal, the Sixth Circuit reversed the district court for applying an "incorrect, obsolete" interpretation of § 1391 to plaintiff's action in the Eastern District of Michigan.[173]Citing the comments to § 1391 after the 1990 amendments, the Sixth Circuit pointed out that venue is proper in any district where a "substantial" part of the events occurred, not just where the "most substantial" events occurred.[174] The Sixth Circuit criticized the standard applied by the district court because it was essentially identical to that required before the 1990 amendment to the venue statute.[175] Thus, the Sixth Circuit reversed the district court, adopting the rule set forth in the statute's comments: "If the selected district's contacts are 'substantial,' it should make no difference that another's are more so, or the most so."[176] Notably, the Sixth Circuit's opinion made no reference to *Leroy*, nor to the fact that venue is a protection afforded to defendants.

Finally, in *Uffner v. La Reunion Francaise, S.A.*,[177] the plaintiff filed suit in the District of Puerto Rico for damages arising out of an alleged wrongful denial of an insurance claim.[178] Looking to § 1391(a)(2), the Court of Appeals for the First Circuit faced the question of whether Puerto Rico could be considered a "district in which a substantial part of the events or omissions giving rise to the claim occurred."[179] The First Circuit noted that in deciding this question, it must look at "the entire sequence of events underlying the claim," rather than try to identify a "single triggering event."[180] In *Uffner*, the plaintiff's vessel caught fire and sank in Puerto Rican waters—this was the only relevant event that occurred there.[181] Thus, venue was proper in Puerto Rico only if the fire and sinking of the vessel was "substantial" for venue purposes.[182]

The *Uffner* court was not convinced by the defendants' arguments that the actual loss of the ship was not a substantial event in a case based on an alleged bad faith denial

173. *See id.* at 262.
174. *Id.* at 263.
175. *See id.* at 264.
176. *Id.*
177. 244 F.3d 38 (1st Cir. 2001).
178. *Id.* at 39.
179. *Id.* at 42 (quoting 28 U.S.C. § 1391(a)(2) (2000)).
180. *See id.* at 42.
181. *Id.* at 40, 43.
182. *Id.* at 43.

of an insurance claim.[183] Neither party to the case disputed facts surrounding the scuttling of the vessel. Instead, the case raised only issues of interpretation of the insurance contract between the parties.[184] In finding venue proper in the District of Puerto Rico, the First Circuit held that even though the fire and sinking were not at issue, these events constituted a substantial event giving rise to the claim.[185] The sinking of the vessel was substantially "connected to the claim inasmuch as [the plaintiff's] requested damages include[d] recovery for the loss."[186] The First Circuit concluded that, in a suit against an insurance company to recover damages for loss covered by an insurance contract, venue was proper in the jurisdiction in which the loss occurred.[187] The court then stated that its holding was consistent with *Leroy* and with the principle that venue is a protection for the defendant, noting that "appellees have not alleged—either below or on appeal—that continuing the suit in the district of Puerto Rico would confer a tactical advantage to appellant or prejudice their own case in any way . . . . [and] conceded at oral argument that they would not object to litigating in the Virgin Islands, suggesting that traveling to the Caribbean would not be unduly burdensome."[188] The First Circuit then pointed out that the defendant could have protected itself by using a forum selection clause in issuing insurance contracts.[189]

As the *Bramlett* and *Uffner* decisions illustrate, interpretation of the amended language of § 1391(a)(2) appears to take place in a near vacuum. In *Bramlett*, no reference was made to *Leroy* or to the fact that § 1391(a)(2) serves to protect defendants. In *Uffner*, the First Circuit noted that its holding was consistent with *Leroy* and with the principle that venue is a protection for the defendant, yet this came after its holding and played no part in the Court's reasoning.[190]

183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *See id.*

III. THE LOSS OF PROTECTIONS FOR DEFENDANTS

Even though the express intent of Congress in amending the general venue statute was simply to decrease litigation, the circuit's interpretations of § 1391—from *Bates* to *Uffner*—demonstrate that that the congressional amendment disserves defendants. The 1990 Act dealt a significant blow to defendants in diversity cases in particular. First, the amendment allows plaintiffs a greater opportunity to influence the substantive law that resolves the claim. Second, the 1990 amendment allows a plaintiff to engage in file-and-transfer tactics so that he or she may effectively appropriate the law of one forum, and then transfer the case to another.

A. A Critique of the Recent Court Decisions

In three of the decisions interpreting the effects of the 1990 amendments on § 1391(b)(2), the federal circuit courts have openly struggled to reconcile their interpretation of the "substantial part" language with the traditional concept that statutory venue operates to protect defendants. Each of these three opinions reach different conclusions regarding § 1391(b)(2), and prompts one to question whether protection of the defendant is still a feasible goal after the 1990 Act. Perhaps more troubling, in the cases applying § 1391(a)(2), the circuits have applied the amended language of the venue statute without adequately considering protection for the defendant. As a result, the 1990 Act offers less protection for defendants.

As the first to take up the issue, the Second Circuit stated in *Bates*[191] that the convenience of the defendant was "most useful in distinguishing between two or more plausible venues." Further, the Second Circuit reasoned that because the amended venue statute no longer requires a single "best" district for venue purposes, the convenience of defendants is "of less significance."[192] However, saying that the convenience of the defendants is "of less significance" seems to be an anodyne statement on the Second Circuit's part. Under the amended statute, the "test for determining venue is . . . [ascertaining]

191. Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867 (2d Cir. 1992); *see also supra* Section II.C.1.

192. *Bates*, 980 F.2d at 867.

the location of those 'events or omissions giving rise to the claim.'"[193] Thus, it is hard to see how convenience of defendant is *ever* relevant to an inquiry into the *location* of events or omissions.

Because the only stated purpose of Congress in amending the venue statute was to simplify litigation,[194] rather than abrogate the protections for defendants typically associated with statutory venue, federal district courts have searched for ways to explain just *how* the amended statute continues to protect defendants. In *Cottman*,[195] the Third Circuit mentioned one manner in which the language of the amended statute operates to protect defendants. The *Cottman* court found that the amended language of § 1391 "still favors the defendant in a venue dispute by requiring that the events or omissions supporting a claim be 'substantial .... Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute."[196]

The *Bates* case, however, provides a clear example of how the "substantial" requirement may offer little protection for defendants. In *Bates*, case law made it clear to the Second Circuit that the receipt of a debt collection notice gave rise to a claim under the Fair Debt Collection Practices Act, and this receipt was therefore a "significant event" giving rise to a plaintiff's claim.[197] Accordingly, venue was proper where the plaintiff resided even though: (1) the defendant who sent the collection notice had no knowledge that plaintiff moved to another district, (2) the postal service forwarded the notice to the plaintiff's new residence without the defendant's knowledge, and (3) the defendant conducted no other business in the district where the plaintiff filed his claim.[198] As *Bates* illustrates, what may be considered "significant" for the purpose of a claim may afford a defendant little or no

193. Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994) (quoting 28 U.S.C. § 1391); *see also supra* Section II.C.1.

194. *See supra* note 120 and accompanying text.

195. *Cottman*, 36 F.3d at 294.

196. *Id.*

197. Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867-68 (2d Cir. 1992); *see also supra* Part II.C.1.

198. *See id.* at 866.

protection against a plaintiff who selects an "inconvenient place of trial."[199]

Finally, the Eighth Circuit's decision in *Woodke* shows a more extravagant effort to protect defendants from an unfair choice of venue. The Eighth Circuit decided that the only relevant factors for determining venue were the actions or omissions of the defendant, rather than those of the plaintiff.[200] This seems to echo the Supreme Court's holding in *Leroy*, where it found that while the convenience of the defendant is a relevant factor, the convenience of the plaintiff was irrelevant in deciding a venue dispute.[201] Moreover, the Eighth Circuit also questioned whether the acts or omissions of a plaintiff could *ever* give rise to a claim.[202] Finally, the Eight Circuit stated that those events that serve as the basis for venue must be "wrongful" in and of themselves.[203] This interpretation goes too far. First, inspection of "the entire sequence of events underlying the claim"[204] is more consistent with § 1391 because the language of the statute does not discriminate based on which party's conduct gave rise to the claim.[205] Instead, the language of the statute simply requires the court to determine whether the events in the district are substantial.[206] Second, as *Bates* demonstrates, the acts of a plaintiff can give rise to a claim. Recall that in *Bates*, the court held that the plaintiff's receipt of the debt collection notice triggered his claim under the Fair Debt Collection Practices Act.[207] Finally, an event giving rise to a claim need not be wrongful in itself. As *Uffner* shows, the sinking of a vessel gave rise to a dispute over provisions of an insurance contract dispute,[208] yet the sinking itself could not be called "wrongful."

As the preceding analysis shows, the language of the amended statute simply does not allow a court to protect defendants by resurrecting the *Leroy* factors. Recall, the *Leroy* Court held that the venue statute should be read narrowly to

199. Leroy v. Great W. United Corp., 443 U.S. 173, 184 (1979).
200. Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995).
201. *Leroy*, 443 U.S. at 185.
202. *Woodke*, 70 F.3d at 985.
203. *Id.* at 986.
204. Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 42 (1st Cir. 2001).
205. See the text of 28 U.S.C. § 1391 (2000) *supra* note 117.
206. *E.g.*, First of Mich. Corp. v. Bramlet, 141 F.3d 260, 263 (6th Cir. 1998).
207. Bates v. C & S Adjusters, Inc., 980 F.2d 865, 867-68 (2d Cir. 1992).
208. *Uffner*, 244 F.3d at 43.

protect a defendant from a plaintiff who selects an inconvenient site for trial, and the plaintiff's convenience was not to be considered in determining venue.[209] *Leroy* also counseled that the lower federal courts should take into account the location of evidence and witnesses, as well as the judge's familiarity with the law applicable to the case.[210] These factors once afforded the lower federal courts considerable leeway to protect defendants, thereby accomplishing the goal of the venue statute. As some of the recent circuit decisions discussed above demonstrate, today the courts can do little to actively protect a defendant in a manner consistent with the plain language of 1391;[211] courts are only called upon to determine if substantial events have taken place within the district to allow venue under § 1391(a)(2) or (b)(2).

Notably, the two most recent cases applying the amended venue statute—*Bramlet* and *Uffner,* both diversity cases—fail to discuss the *Leroy* factors or how the amended venue statute continues to protect defendants. Instead, both the *Bramlet* and *Uffner* courts based their decisions solely on a rather mechanistic application of the "substantial" language in § 1391(a)(2). The *Bramlet* court relied on the comments to § 1391 to guide its decisions without considering *Leroy* or the fact that statutory venue serves to protect defendants.[212] Ironically, Jonathan R. Siegel, the author of the comments to the amended § 1391, recently stressed in an article concerning statutory interpretation that the plain language of § 1391 should not be applied without considering the purpose of statutory venue.[213] The *Uffner* opinion is also somewhat confusing. The First Circuit appeared to take *Leroy* and the convenience of the defendants into account,[214] yet this is only an appearance when the court's opinion is read closely. In fact, the First Circuit bases its holding on whether "'a substantial part of the events . . . giving rise to the claim occurred' in Puerto Rico,"[215] and only mentions as a closing aside that its

209. Leroy v. Great W. United Corp., 443 U.S. 173, 183, 185 (1979).

210. *Id.* at 185–86.

211. *Contra* Woodke v. Dahm, 70 F.3d 983 (8th Cir. 1995), discussed *supra* Section III.A.

212. First of Mich. Corp. v. Bramlet, 141 F.3d 260, 263 (6th Cir. 1998).

213. Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO.WASH. L. REV. 309, 312–19 (2001).

214. Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 43 (1st Cir. 2001).

215. *Id.* at 42.

decision was consistent with Leroy and the purpose of statutory venue.[216] In conclusion, and as these two cases illustrate, the language of § 1391 and its mechanical application effectively rob defendants of the protection that § 1391 was to supposed afford them. This is perhaps most troubling in diversity cases, such as *Bramlet* and *Uffner*.

B. Additional Losses for Defendants in Diversity Cases

A plaintiff engages in the practice traditionally and pejoratively termed "forum shopping" when he or she surveys alternative districts to find the most advantageous site to try a case. Procedural rules,[217] statutory requirements,[218] and legal doctrine[219] have been promulgated to deter plaintiffs from forum shopping. The primary policy underlying such deterrence is to ensure that the same substantive law applies to a case, regardless of where it is brought.[220] However, defendants in diversity cases suffer disproportionately as a result of the 1990 amendments to § 1391(a)(2). First, the 1990 amendment allows plaintiffs to shop among a more expansive set of potential districts for the one that will provide the most advantageous substantive law. Second, when taking into account the existing statutory scheme and jurisprudence regarding the transfer of cases from one district to another, the 1990 amendment also facilitates a "file-and-transfer" practice. This practice allows plaintiffs in diversity cases to strategically file in one federal district so as to obtain the substantive law of

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216. *Id.* at 43.

217. *See, e.g.*, Esposito v. Piatrowski, 223 F.3d 497, 501 (7th Cir. 2000) (awarding attorney's fees as a component of costs advances the purpose of Federal Rule of Procedure 41(d), "which is to deter forum shopping and vexatious litigation.")

218. *See, e.g.*, Wainwright v. Spenkelink, 442 U.S. 901, 906 (1979) (Rehnquist, J., dissenting) (noting that the purpose of Title 28 U.S.C. § 2242 is to deter forum shopping in petitions for *haebeas corpus* relief.)

219. *See generally*, Erie R. Co. v. Tompkins, 304 U.S. 64 (1938); Guar. Trust Co. v. York, 326 U.S. 99 (1945); Hanna v. Plumer, 380 U.S. 460, 468 (1965)

220. *See, e.g.*, *Hanna*, 380 U.S. at 468 (stating the "discouragement of forum shopping" is one reason federal courts apply state law in diversity cases); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 199–203 (2000); *but see* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984) (upholding jurisdiction in a state with a statute of limitations favorable to plaintiff: "[p]etitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations").

that district, and then transfer the case to another district, with the substantive law of the transferring district still governing the claim.

1. Shopping for Substantive Law

Prior to the 1990 amendments to the general venue statute, a plaintiff had only limited ability to affect the choice of law applied to a diversity claim. Before 1990, venue was proper only in the district where all defendants resided, or in the district "in which the claim arose." However, the 1990 amendment to § 1391(a)(2) allows a plaintiff to lay venue in one of many potential districts, so long as "substantial" events underlying the claim took place in the district. This increased range of potential venue sites holds major implications for the law applied to the claim.

In *Erie Railroad Co. v. Tompkins*,[221] the Supreme Court held that a federal court sitting in diversity jurisdiction must apply the substantive law of the state in which it sits.[222] The *Erie* doctrine, in combination with the general venue statute, limits the options plaintiffs have in affecting the law applicable to their claim. Prior to 1990, a plaintiff with a diversity claim could only lay venue in a district where the defendant resided, or in the single district in which the claim arose. Applying the *Erie* doctrine, the plaintiff could effectively select between two bodies of substantive law to govern the case: (1) the substantive law of the district where the defendant resided, or (2) the substantive law of the district in which the claim arose.[223] Under the current language of § 1391(a)(2), however, a plaintiff is entitled to bring his or her claim in any district, so long as substantial events underlying the claim occurred within the district. Applying the *Erie* doctrine to the current venue regime, a plaintiff with many choices for venue under § 1391(a)(2) consequently has many choices of law at his or her disposal.[224]

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221. 304 U.S. 64 (1938).

222. *Id.* at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

223. *See* ROBERT C. CASAD, JURISDICTION AND FORUM SELECTION § 2.21 (1st ed. 1988).

224. *See id.* Additionally, there are almost no repercussions for a plaintiff who tries to stretch the venue statute in order to obtain the benefits of the forum's substantive law, or to use the inconvenience of the forum to leverage a settlement.

The foregoing summary oversimplifies the choice of law analysis a plaintiff might undertake before filing his or her claim.[225] For example, the prior summary assumed that the forum court always applied the law of the forum state, but the *Erie* doctrine is much more complex—it requires that the forum court apply the forum state's choice of law rules as well.[226] Thus, a plaintiff may seek to file in one district to obtain the forum's conflict of laws statutes, which may well provide that the laws of yet another state should govern resolution of the claim. Since "[s]tates differ widely in their choice of law rules,"[227] a plaintiff's ability to affect the substantive law applied to a case may actually be much greater under the amended § 1391(a)(2), when compared to its predecessor.[228]

As a final note, it is important to keep in mind that statutes of limitation, though often thought of as procedural in nature, are considered part of state substantive law when a federal court applies *Erie* and its progeny.[229] Thus, a plaintiff who files in a particular forum simply because the statute of limitations has run in all other viable forums would still comply with § 1391(a)(2). Such was the situation in *Keeton v. Hustler Magazine, Inc.*[230] In *Keeton*, the plaintiff brought suit in New Hampshire because it was the only state in which the statute of limitations did not bar her claim.[231] The United States Supreme Court held that the United States District Court for the District of New Hampshire validly exercised personal jurisdiction over Hustler, since the magazine was purposefully sold in the state.[232] With the personal jurisdiction question resolved, the Court then turned to the defendant's argument that venue was improper. Though the plaintiff had

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Cf. Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (Rule 11 sanctions for filing in an inconvenient forum are not upheld where venue was not improper because inconvenience of litigation is one of the tools a plaintiff may properly use to leverage a settlement.).

225. For more detailed hypothetical scenarios, see Norwood, *supra* note 5, at 270–91.

226. *See* Ryan, *supra* note 220, at 191.

227. *See generally* Ryan, *supra* note 220, at 191–96; *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 1999: One More Year*, 48 AM. J. COMP. L. 143, 145–46 (2000) (comparing choice-of-law methodologies in American jurisdictions in torts and contracts).

228. *See* Ryan, *supra* note 220, at 191–96.

229. Guar. Trust Co. v. York, 326 U.S. 99, 109–10 (1945).

230. 465 U.S. 770, 778 (1984).

231. *See id.* at 778.

232. *Id.* at 781.

no contacts with New Hampshire, the Court found her choice of venue unobjectionable since it met the requirements of § 1391(a)(2).[233] Specifically, the sale of Hustler magazines in New Hampshire constituted a "substantial event" for venue purposes, since it gave rise to the plaintiffs claim for libel, regardless of the fact that the plaintiff had no prior contacts with the forum.[234] On remand to the Supreme Court of New Hampshire, Justice Souter (then sitting on the state's high court) quoted from the American Law Institute's proposal for revising the Restatement (Second) of Conflict of Laws § 142 which characterized the case as an "'egregious example[] of forum shopping.'"[235] As *Keeton* shows, a plaintiff may also use the amended § 1391(a)(2) to keep his or her claim alive, in addition to affecting the applicable substantive law.

To conclude with the remarks of one commentator, "the curious effect of the new venue criteria is a substantial expansion of venue choices, especially in diversity cases, and hence the encouragement of even wider-ranging forum shopping than had been the case."[236]

2. The Effects of a Transfer

The loss of protection for defendants resulting from the 1990 Act is exacerbated for diversity defendants because of the federal transfer provisions. Specifically, if a plaintiff is successful in laying venue in one of several districts hypothetically available as a result of the 1990 Act, the federal transfer provisions allow the plaintiff to then transfer the case to another district, with the substantive law of the previous forum still applying to the case. Thus, the relaxation of the requirements of § 1391(a)(2) facilitates "file-and-transfer" tactics where the plaintiff will file in one district to obtain the substantive law of that forum, and then transfer the case to a

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233. *Id.*

234. *Id.*

235. Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1197 (N.H. 1988) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986 Revisions, Supp.: April 12, 1988). The case was remanded to the New Hampshire Supreme Court because it answered the certified question concerning the statute of limitations question, as issued by the First Circuit. *Keeton*, 549 A.2d at 1188.

236. John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 775 (1991).

completely different district for litigation. The plaintiff may use such tactics when he or she believes that the result that would be obtained from the application of the initial forum's law would be better—because of choice of law or other considerations—while actually trying the case in that forum would be inconvenient because of the location of witnesses, evidence, and the like.

Change of venue is allowed under 28 U.S.C. § 1404(a), (b) ("§ 1404"):

> (a) 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.
>
> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district.[237]

These transfer provisions raise an interesting question when the *Erie* doctrine is considered. The *Erie* doctrine mandates that federal courts sitting in diversity jurisdiction apply the forum state's choice of law rules,[238] so a question arises as to what the *Erie* doctrine requires when a diversity case is transferred from one district to another in a different state.

The United States Supreme Court confronted this question in *Van Dusen v. Barrack*.[239] In *Van Dusen*, the plaintiff filed suit in United States District Court for the Eastern District of Pennsylvania. While venue was proper in the district under § 1391(a)(2),[240] the defendant convinced the court to transfer the case to the Federal District Court for the District of Massachusetts under § 1404(a), because the defendant was already defending many suits arising from the same incident (the crash of a commercial airliner into Boston Harbor) in Massachusetts, and because evidence and witnesses were

237. 28 U.S.C. § 1404(a), (b) (2000).
238. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
239. 376 U.S. 612 (1964).
240. *Id.* at 614.

located primarily in that forum.[241] This created the issue of whose substantive law applied to the case: the law of the transferee court, or the law of the transferor court? In *Van Dusen*, the Court held that the transferee court must apply the law that would have been applied if the case remained with the transferor court.[242] According to the Court, if there is an advantage to the plaintiff in the law of the state where the transferor court sits, it is an advantage the plaintiff is entitled to and should not be destroyed by transfer under § 1404.[243]

The *Erie* doctrine leads to the exact opposite result if the plaintiff files suit in a district where venue is improper under § 1391. If the plaintiff brings an action in a district that fails to meet the requirements of the general venue statue, the court may transfer the case to a district where venue is proper according to 28 U.S.C. § 1406(a) ("§ 1406"):

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.[244]

The effects of a § 1406 transfer on the applicable substantive law are exactly the opposite of a transfer under § 1404: the substantive law of the transferee court applies to a claim transferred under § 1406.[245]

For plaintiffs, the net result of combining the amended venue statute, the transfer provisions, and the *Erie* doctrine is quite positive. The 1990 amendment to § 1391(a)(2) increases the number of districts in which a plaintiff may permissibly lay venue. Because venue will more often be appropriate under the amended language of § 1391(a)(2), more transfers will necessarily occur under § 1404 than under § 1406. Given that the substantive law of the transferor court applies to a case transferred under § 1404, as opposed to § 1406, a plaintiff is more likely to retain the advantage of applicable substantive

241. *Id.*
242. *Id.* at 639.
243. *Id.* at 626–39.
244. 28 U.S.C. § 1406(a) (2000).
245. *E.g.*, Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1109–10 (5th Cir. 1981).

law if the court grants a transfer.[246] In short, even if a court grants a defendant's request to transfer a case to another district, it is more likely that a plaintiff will still retain the advantage of the district in which he or she filed.[247]

On top of the advantages a plaintiff has gained as a result of the amendment to § 1391(a)(2), he or she may also request a transfer for convenience under 28 U.S.C. § 1404(a). The results of a transfer initiated by a plaintiff appear especially inequitable to defendants. For example, the plaintiff in *Ferens v. John Deere Co.* was a resident of Pennsylvania.[248] This plaintiff was injured at his residence by equipment manufactured by the defendant, John Deere Company.[249] Unfortunately for the plaintiff, Pennsylvania's two-year statute of limitations had run on his personal injury claim, so he filed suit in a federal court sitting in the state of the defendant's headquarters—Mississippi.[250] Mississippi conflict of laws rules mandated that Pennsylvania substantive law apply to the plaintiff's claim, while Mississippi's procedural law applied, including the state's favorable six-year statute of limitations.[251] The plaintiff then moved to transfer the case back to Pennsylvania under § 1404(a), and the motion was granted.[252] On appeal, the United States Supreme Court held that the substantive law of the transferor court still applied to the case,

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246. Even the American Law Institute has chosen to avoid the problems posed by the combined effects of the amended venue statue and the *Erie* doctrine on the transfer provisions of Title 28, saying, "[f]or fear of the bugs underneath, this stone is here left unturned." FED. JUDICIAL CODE REVISION PROJECT 86 (Tentative Draft No. 4, 2001).

247. Note that as a result of the relationship between venue provisions, transfer provisions, and the *Erie* doctrine, a transferred claim might end up in the district called for prior to the 1990 amendment, but with different substantive law applying to the claim.

248. 494 U.S. 516, 519 (1990).

249. *Id.*

250. *Id.*

251. *Id.* at 519–20. Although this may seem to conflict with the statement in Section III.B, *see supra* note 229 and accompanying text, that statutes of limitations are a part of state substantive law under *Erie*, the conclusion of the court is entirely consistent with *Van Dusen* when the Court's *Erie* analysis is examined. The Court applied the law of the forum state, holding that Mississippi courts—according to Mississippi's conflict of laws statute and statute of limitations—"would apply Mississippi's 6-year statute of limitations to the tort claim arising under Pennsylvania law and the tort action would not be time barred under the Mississippi statute." *Ferens*, 494 U.S. at 520 (citing Miss. Code Ann. § 15-1-49 (1972).

252. *Id.* at 520–21.

regardless of who affected the transfer under § 1404(a).[253] Justice Scalia's dissent drove home the effect the ruling would have on defendants. By employing the file-and-transfer strategy, a plaintiff may now "appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and . . . carry that prize back to the State in which he wishes to try the case."[254]

Finally, although § 1404 gives the court discretion over whether to allow a transfer, a denial would probably be unlikely for a plaintiff using file-and-transfer tactics. As long as a district court has subject matter jurisdiction and personal jurisdiction over the defendant, a plaintiff may validly file a claim with the court, despite the fact that all of the evidence and witnesses are located in another, more convenient forum. Thus, when a plaintiff or defendant files a request for transfer based on convenience under §1404(a), it is unlikely that a court would deny such a request in these circumstances. And considering the fact that the Supreme Court approved of file-and-transfer techniques in *Ferens*,[255] a denial of such a request appears all the more unlikely.

IV. HOPE FOR A REMEDY

The most obvious solution to the problems created by the 1990 amendment to the venue statute is simply to amend the language once more. Even assuming that another amendment to § 1391 is politically feasible, crafting an amendment that resolves the problem is a difficult task. It would be an exercise in futility to elaborate upon every event or occurrence that may give rise to a specific claim for the purpose of allowing venue in a given district. However, one solution is that Congress may allow the lower federal courts to take into account many different factors in deciding the propriety of venue under § 1391(a)(2) or (b)(2). In other words, Congress could amend the statute so as to allow the lower federal courts enough discretion to effectuate the fundamental purpose for having the statute in the first place—the protection of defendants. This task may be carried out by effectively codifying the factors announced in *Leroy* to determine the "best" venue—the location of evidence

253. *Id.* at 523.
254. *Id.* at 535 (Scalia, J., dissenting).
255. *Id.* at 523.

and witnesses, and the familiarity of the judge with the law, and so on.[256] Obviously, the problem here is that such an amendment only restores the situation that existed prior to the 1990 amendment.

Why consider amending § 1391(a)(2) and (b)(2) at all? There are compelling arguments that these subsections should be repealed outright, while allowing the residual exceptions in § 1391(a)(3) and (b)(3) to survive. Under § 1391(a)(3), venue is proper in a diversity case in "a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought."[257] Similarly, venue is proper in non-diversity cases under § 1391(b)(3) in "a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought."[258] The first argument in support of such a change is that the statutory predecessors to § 1391(a)(2) and (b)(2)—the "in which the claim arose" venue alternatives added in 1966—were intended to close venue gaps, and that now the residual venue provisions in § 1391(a)(3) and (b)(3) more effectively guard against venue gaps. Second, if the purpose of statutory venue is to protect defendants, then this purpose is better served when the plaintiff only has discretion over venue "if there is no district in which the action may otherwise be brought."[259] Moreover, relying on the residual exception might be more efficient, because then a venue dispute would be over whether venue may have been proper in another district, as opposed to whether the events or occurrences taking place in the district met the "substantial" requirement of § 1391(a)(2) or (b)(2). In conclusion, one viable alternative to amending § 1391(a)(2) and (b)(2) is simply to repeal these venue provisions altogether.

Assuming that Congress will not amend the general federal venue statute in the near future, a judicial solution might be the only hope for mitigating the damage done by the 1990 Judicial Improvements Act. Federal courts should follow the reasoning of the Third Circuit in *Cottman Transmission*

256. Leroy v. Great W. United Corp., 443 U.S. 173, 185-86 (1979); *see also supra* note 96–100 and accompanying text.

257. 28 U.S.C. § 1391(a)(3) (2000).

258. 28 U.S.C. § 1391(b)(3).

259. 28 U.S.C. § 1391(a)(3), (b)(3).

Systems, Inc. v. Martino[260] and place weight on the "substantial" requirement in the language of § 1391(a)(2) and (b)(2).[261] This is important because the "substantial" requirement prevents a plaintiff from seeking to lay venue in an unfair or inconvenient forum, or from shopping for substantive law by using a file-and-transfer tactic. Thus, some of the problems wrought by the 1990 Judicial Improvements Act may be solved simply by the judiciary elevating the "substantial" requirement for venue purposes.

While the foregoing reason is practical in nature, a second reason for the federal courts to place great weight on the "substantial" requirement is more jurisprudential. The general venue statute currently allows venue in a district where a federal court has personal jurisdiction, or where the defendant may be found, but only as a last resort.[262] Placing greater emphasis on the "substantial" requirement of § 1391(a)(2) and (b)(2) preserves the distinction between these two venue alternatives, and the residual exceptions. That is, if the events or occurrences needed to find venue proper under § 1391(a)(2) or (b)(2) are no more "substantial" than the "minimum contacts" needed to find personal jurisdiction, then the residual venue exceptions would be superfluous—venue would be proper under § 1391(a)(2) or (b)(2).[263]

CONCLUSION

Congress dealt quite a blow to defendants in passing the 1990 Act. Inasmuch as the expressed intent of Congress was simply to decrease litigation over venue, the results of the amendments to § 1391 prevent the general statutory venue provisions from serving one of their key purposes. The amended language of the statute effectively prevents federal courts from protecting defendants from a plaintiff that selects an unfair or inconvenient site for trial. Arguably, the amended

260. 36 F.3d 291 (3d Cir. 1994).

261. *Id.* at 294.

262. 28 U.S.C. § 1391(a)(3), (b)(3).

263. *See also* Oakley, *supra* note 236, at 780 ("I conclude that the third venue option in diversity cases under new section 1391(a)(3) was intended to be a fallback provision applicable only to multiple defendant cases. The limitation of this third option to use only as a last resort, where no district of proper venue exists on the basis of residential or transactional venue, was unfortunately omitted from the legislation as enacted.").

general venue statute now operates only to distribute cases among the federal district courts, leaving defendants to fall back on the personal jurisdiction requirement as their only protection from being haled before a court sitting in an unfair or inconvenient district.

Congress dealt a more serious blow to defendants in diversity cases. As a result of the 1990 Act, Congress has created a situation where plaintiffs in diversity cases may use the amended language of § 1391(a)(2) to influence the law applied to resolve their claim. This is certainly a consequence that goes beyond Congress' stated intent of trying to decrease litigation over venue. Moreover, this result runs against general judicial doctrine and statutory provisions that seek to discourage forum shopping.

In light of these results, one must seriously question whether the 1990 Act really worked much of an improvement. It is questionable whether the amended language of § 1391 actually disposes of the problem of litigation over proper venue. As one commentator noted, the amended language of § 1391

> is more liberal than the 'in which the claim arose test,' but hardly comes warranted as less likely to be 'litigation breeding.' Congress's new basic venue provisions seem certain to invite recurrent district court litigation, and [has] managed to reinstate the very anomaly of broader venue in diversity than federal-question actions that the Committee had sought to abolish.[264]

Arguably, there is a greater incentive to litigate venue now, considering all that hinges on the propriety of venue.[265] Moreover, if parties were willing to bear the costs of litigation over venue prior to the 1990 amendment, Congress should not have taken action in the absence of clear evidence that venue disputes strained the federal docket or caused some other harm to the federal judicial branch that was not born by the parties. Thus, the 1990 amendment to the general venue statutes should have allowed the lower federal courts to evaluate the propriety of venue based on a specific test or a variety of factors, thereby avoiding the sacrifice of defendants' protections at the altar of expediency and efficiency. Alternatively,

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264. *Id.* at 775.

265. The author has not found any available statistics to support this suggestion.

Congress should have struck the district "in which the claim arose" as a permissible alternative for venue altogether and simply provided a residual exception as a last resort. Instead, the path taken by Congress has proven to create hardships for defendants, instead of providing an extra measure of protection beyond that secured by personal jurisdiction requirements. Therefore, the most effective and expedient solution to the problems created by the 1990 Act will come from the lower federal courts emphasizing the "substantial" requirement in a venue disputes over § 1391(a)(2) or (b)(2).