Federal Venue Amendment – Service of Process, Erie and Other Limitations

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COMMENT / Federal Venue Amendment—

Service of Process, *Erie* and Other Limitations

**PART I**

P.L. 89-714 has amended 28 U.S.C. § 1391; the result is that for the first time there is always a proper federal venue. In spite of this amendment, many multi-party suits with complete diversity will not be litigated. The plaintiff may be excluded from suing in the federal courts because service of process is not possible in any district where venue is proper. Those parties who do lay venue under this amendment will confuse the courts and increase the cost of litigation. The purpose of this comment is to explain the amendment, discuss its weakness and suggest a remedy.

*Common Law Venue*

Venue designates the place where a court with jurisdiction may hear and determine the case; it is the place of trial. Our understanding of this concept is traced from its common law origins. Originally venue followed the king's person as he traveled throughout the realm. After 1100 the different branches of the court stopped following the king; thereafter, trial was held at the location of the particular court. Eventually, due to the evolution of the jury it became a rule that a civil action must be "laid" in the county in which the cause of action arose. Later, even though witnesses were precluded from the jury, the rule was continued for local actions because, generally, it was most convenient. In transitory actions the defendant could request a change of venue when he could prove that the cause of action arose somewhere else. In such cases, the court was concerned with the inconvenience and expense of bringing witnesses from afar. Venue, then, deals with con-

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2 *Maddon, History and Antiquities of the Exchequer* (1711). In 1 Holdsworth, *The History of English Law* 34 (6th ed. 1958), there is an account of one Richard of Anesty who spent five years (1158-1163) traveling through England and the Continent in order to try a suit pending before the court.
3 Blume, supra note 1.
4 The first juries consisted of people from the neighborhood who made a finding not so much on evidence presented to them as on the strength of their own knowledge of the facts. Louisel & Hazard, *Pleading and Procedure* 50 (1962).
6 Blume, *supra* note 1, at 28.
venient. It has gone full cycle; from serving the sovereign's convenience it developed to serve his subjects.

Venue History in the United States

In a country with a unitary system of law venue worked well. Unfortunately, it was never well suited to our multi-law system: a change in the place of trial in England does not cause conflicts problems. Add to this our irrational venue provisions and the result has often been neither just nor convenient. Under the Judiciary Act of 1789 venue was proper wherever service could be made on the defendant: in civil suits service was proper where the defendant "is an inhabitant" or where he was "found at the time of serving." However, this broad grant of venue was limited in diversity cases since the federal courts had jurisdiction only where the plaintiff or the defendant resided. After the Civil War jurisdictional power was increased in an effort to expand federal power. The requirement that one of the parties must be a citizen of the state where the suit was brought was eliminated. Thus, the district courts in both federal question and diversity cases could hear any transitory action so long as service of process could be made within the district.

In 1887, Congress, wishing to make the federal courts less accessible, amended the venue provision: suit could not be brought in "any other district than that whereof he (defendant) is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of residence of either the plaintiff or the defendant." Although widely criticized this statute remained essentially unchanged for seventy-nine years. Its chief weaknesses were three: (a) venue in federal question cases was narrower than in diversity cases, despite the fact that federal courts are best able to decide federal questions. Oddly enough there is no justifiable reason for the difference; (b) cases involving multi-parties from different states were usually beyond the

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8 See Barrett, Venue and Service of Process In the Federal Courts—Suggestions for Reform, 7 VAND. L. REV. 608 (1954); Blume, supra note 1, at 29.
9 1 Stat. 73, 78 (1789).
11 18 Stat. 470 (1875).
14 Two minor changes did occur: Venue was judicially narrowed by a holding that all the plaintiffs or all the defendants, as the case might be, must be residents of the district, Smith v. Lyon, 133 U.S. 315 (1890); The Judicial Code of 1948 (62 Stat. 869) was intended to liberalize but not revise venue, it provided for broad corporate residence, transfer instead of dismissal for improper venue, and the doctrine of forum non conveniens.
15 One writer attributes the difference to legislative ineptness. Wright, supra note 13, at 129 n. 17.
competence of state courts, yet in some situations venue requirements barred the parties from federal court. For example, in a federal question case if one defendant is from Vermont and the other defendant is from New Hampshire there is no way, unless venue objections are waived, that the suit can be brought in a federal court. Likewise, if this were a diversity case and the plaintiffs also were from different states there could be no proper federal venue; (c) convenience was not served in cases where the parties wished to sue in the district where the claim arose. Based on these weaknesses it is obvious that venue in the United States had developed, not to serve convenience, but, in many cases, as an obstruction to justice. Common law practicality had been perverted by our federal system.

The Venue Amendment-P.L. 89-714

On November 2, 1966, a significant venue amendment was signed into law. For the first time in our history there will always be a proper venue. P.L. 89-714 amends subsection 1391 (a) and 1391 (b) of Title 28, United States Code as follows:

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, 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 where all the defendants reside, or in which the claim arose, except as otherwise provided by law.

Sec. 2. Subsection (f) of section 1391, title 28, United States Code, is hereby repealed.

It is obvious that the effect of the amendment is to enlarge venue authority so as to authorize any civil action to be brought in the judicial district where the claim arose. Under subsection 1391 (a), as amended, a civil action wherein jurisdiction is founded only on diversity of citizenship, unless otherwise provided by law, may be brought in the judicial district in which the claim arose, as well as in the judicial districts where all the plaintiffs or defendants reside. Subsection 1391 (b), as amended, authorizes a civil action, wherein jurisdiction is not founded solely on diversity of citizenship, to be brought in the judicial district in which the claim arose as well as in the district where all the defendants reside, unless otherwise provided by law.


The chief sponsor of the bill, Congressman Brooks of Texas, disagrees: "This legislation would not affect tort actions in any manner whatsoever. It is aimed at making some minor changes in the venue of civil contractual actions. It would not change the tort venue of the laws whatsoever." 112 Cong. Rec. 20820 (daily ed. Sept. 1966).
Subsections (a) and (b) encompass the provisions of subsection (f) which laid venue in certain civil automobile suits in the district where the act or omission complained of occurred, and, therefore, subsection (f) has been repealed.

For the first time since 1789, venue no longer will venue bar suits in the federal courts. This enlargement of venue will facilitate the disposition of civil cases by providing, in appropriate cases, a more convenient forum to the litigants and the witnesses involved.

But the garden is not all roses; there is poison ivy among the flowers. The phrase "in which the claim arose" is not clear and the requirements of service of process limit the effectiveness of the amendment. The phrase "in which the claim arose" will first be analyzed, and this will be followed by an examination of the service of process limitations.

In which the claim arose

The choice of these words is unfortunate because (a) their meaning is unclear and (b) they will encourage forum shopping.

It is probable that the courts will equate claim with cause of action. Not in a manner that will incorporate the troublesome elements of a common law cause of action into venue, but in the way in which the word "claim" has been dealt with in the Federal Rules of Civil Procedure. Courts have adopted a pragmatic treatment of the concept cause of action. Judge Swan has said that "For the traditional and hydra-headed phrase 'cause of action' the Federal Rules of Civil Procedure have subsituted the word 'claim'. It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts." It is general hornbook knowledge that a cause of action or claim arises at the time of the breach and at the place where the act creating the right to bring the action occurred. Of importance, therefore, in determining where the claim arose is the substantive claim involved. In other words, venue based on where the claim arose renders the transaction

18 To determine the district in which the claim arose one would expect the courts to look to the interpretation of like provisions elsewhere. Both federal and state law have similar venue provisions but case law based on them will generally not be helpful because they are limited to certain kinds of actions. For an excellent analysis of state venue provisions see Stevens, Venue Statutes Diagnosis and Proposed Cure, 49 MICH. L. REV. 305 (1951).

19 The classical definition of what constitutes a cause of action is found in Pomeroy's Code Remedies § 453:

A primary right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right or duty; a remedial right in favor of the plaintiff and a remedial duty resting upon the defendant springing from delict; and finally the remedy or relief itself. Every action, however complicated, or however simple, must contain these essential ingredients. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action.

20 2 MOORE, FEDERAL PRACTICE § 2.06, at 359 (2d ed. 1965).

which is the subject of the action of controlling effect in determining the
place of trial.

The Erie doctrine requires federal courts to apply state law to resolve
the substantive rights of litigants in diversity suits. It is likely that Hanna v. Plummer will be relied on to argue that Erie does not apply to venue because venue is procedural and not substantive law, and, therefore, where the claim arose will be determined by federal law. The Sixth Circuit was recently faced with this issue. In Still v. Rossville Crushed Stone Co., the court held that because Tennessee law denied jurisdiction to Tennessee courts over actions for injury to real estate located in another state the federal court, in Tennessee, was required to dismiss a diversity suit by Georgia residents for injury to the real estate, even though the federal court has jurisdiction. The landowners argued Hanna v. Plummer, but the court pointed out the distinction between jurisdiction and venue and found that venue was substantive.

What this amendment does, then, is to make venue dependent upon state substantive law. For example, in state A contractual claims arise where the contract was made but in state B this type of claim arises where the contract was breached. This illuminates the amendment's chief weakness, i.e., the courts must turn to state law in order to find where a claim arose. This will result in forum shopping, increased litigation and judicial confusion.

The following hypothetical case will illustrate these points: A power tool negligently manufactured in state A and negligently labeled in state B explodes in state C. Jurisdiction is based on diversity of citizenship and all the plaintiffs and all the defendants are from different states. Plaintiff lays venue in state A because it has the most favorable accidental death statute. Under the new venue amendment allows him to do this because under the law of state A the claim arose where the power tool was manufactured. But state B recognizes that a claim has arisen because of the labeling error, and state C believes that the occurrence of the injury gives rise to the claim. Under the amendment, it seems plaintiff has three choices in which to lay venue.

Obviously, the multiplication of grounds of negligence alleged as causing the same injury does not result in several claims. The plaintiff's claim does not consist of separate facts but of the violation of a single right. So, theoretically, there is only one place where the claim can arise. Plaintiffs'

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right to bodily safety has been invaded in either state A, B, or C. Nevertheless, as we have seen, he may litigate in any one of three districts. In cases such as this, plaintiffs versed in state substantive law will have the advantage of choosing the most advantageous forum.

Suppose the plaintiff choose A as the district in which the claim arose. What effect does this have on defendant's transfer motion under 1404 (a)\(^2\) Are B and C districts in which the suit "could have been brought?" Does the defendant have two choices under 1404 (a) or none? Logically, we think, the suit could have been brought in B or C and, therefore, these districts should be available to the defendant for transfer purpose. All this will add confusion to the already litigious transfer provisions.

Since the courts must consider state law to determine where the claim arose must they also hear evidence going to the merits? Will courts after taking evidence decide that a contract was not executed in state A or that the negligence did not occur in state B and therefore, there is no venue? To what extent will courts have to delve into the merits of a case? It is probable that in many cases it will first be necessary to try venue before trying the case. This, of course, is undesirable because of the time and expense involved, but, unfortunately, unavoidable because of the amendment.

\(\S\) 1391 (c)

A point of interest is whether or not a corporation which fails to meet the residency requirements of "doing business" for purposes of \(\S\)1391 (c)\(^2\), Title 28, may now sue or be sued in the district in which the claim arose. Subsection (c) was added to \(\S\)1391 to meet the difficult problem of corporate residence. Its purpose was to give a broad definition of corporate residence so that venue would lie under subsection (a) or (b). Subsection (a) and (b) speak in terms of all the parties. They are not limited to individuals, nor do they exclude corporations. Apparently, then, corporations may now sue or be sued in the district in which the claim arose.

**PART II**

**Federal Venue, the Federal Rules, and State Long-Arms**

In the prior power tool example, all the plaintiffs and all the defendants lived in different states. (Plaintiffs in states 1 and 2, defendants in states 3 and 4.) There was complete diversity of citizenship. The parts of the tool were negligently manufactured in state A, and negligently assembled and labelled in state B. The tool exploded in state C, injuring the plaintiffs there.

\(^{28}\) U.S.C. \(\S\) 1404 (a) (1964).

\(^{29}\) U.S.C. \(\S\) 1391 (c) (1964).
There was no federal question, but diversity of citizenship existed and, assuming that the jurisdictional monetary amount of $10,000.00 could be met, suit could be brought in a federal as well as a state court. Federal venue based on residency would be immediately foreclosed since neither all plaintiffs nor all defendants lived in any one state. It would appear, however, that a claim could arise in any of the three states, A, B, and C; and, under the new federal venue provision, venue could be laid in any one of those three separate federal districts.

As previously discussed, state substantive law will, to a great extent, control the determination of whether or not a claim arose there. Negligent manufacture in state A, negligent assembly and labelling in state B, and explosion and injury in state C may be sufficient grounds to bring action in the state courts against a resident party in each one of those states. However, a non-resident may be subjected to that state court's jurisdiction only if there is a state non-resident long-arm statute or similar court rule.

Rule 4 (e) of the Federal Rules of Civil Procedure provides in part:

> ... Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of a summons upon a party not an inhabitant of or found within the state or (2) for service upon or notice to him to appear and respond or defend in an action by reason of his property located within a state, service may in either case be made under the circumstance and in the manner prescribed in the state statute or rule. (Emphasis added.)

Stated simply, each federal district court sitting in states A, B, and C will have to comply with the state non-resident long-arm for service of process unless the non-resident may somehow be served within the state. If such a statute or rule does not exist, or the existing long-arm does not cover the particular type of action, then out of state process cannot be served by the federal court; that court does not have jurisdiction over the parties and suit may not be brought in the federal district in which that claim arose, notwithstanding the new federal venue provision.

At this point, it should be noted that manner of service of process has been

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81 Supra notes 22-26 and accompanying text.
83 FED. R. CIV. P. 4 (e). The first part of this rule provides for service of process in the remaining federal question cases. See infra at note 37.
held to be a procedural matter and subject to federal law when state and federal provisions conflict.寺庙 Nevertheless, jurisdiction over the non-resident parties is clearly a question of whether or not service may be made on the non-resident, is substantive and is subject to the state substantive determinations unless there is a supervening federal substantive provision for service of process. Certain federal statutes provide for nationwide service of process, whether on a resident or a non-resident.寺庙 In those federal statutes as implemented by the first part of Rule 4 (e), federal law controls the question of whether or not a non-resident is to be served, as well as the manner of service. That part of Rule 4 (e) reads:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons or of a notice, or if an order in lieu of summons upon a party not an inhabitant or found within the state in which the district court is held, service may be made under the circumstances, and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule . . . . (Emphasis supplied).寺庙 In other words, parties bringing suit under those federal statutes that do not provide for process are subject to the same state long-arm statutes when the suit is against a non-resident and he cannot be served within the state.

There is one major qualification to service of process under Rule 4. Rule 4 (f) provides the territorial limits of service of process on parties brought in as third parties or additional parties to a pending action, counterclaim or cross-claim under Rules 14 and 19 in a manner that has been termed "the Hundred Mile Bulge."寺庙 These parties may, in the absence of a state long-arm, be served 100 miles from the place where the action is commenced. Problems under 4 (f) and involving Rules 14 and 19 are complex and beyond the scope of this comment. They will not be treated here except to point out the qualification, and that these third party and additional party actions open up the entire spectrum of concepts formerly classified as "indispensable" and "necessary" parties, now spoken of in terms of "Joinder of Persons Needed for a Just Adjudication,"寺庙 based on "feasibility" of joiner. The impact on venue and change of venue will be the need to determine which parties should have been included in the original action. This determination, in turn, might have an effect on the question of diversity-resi-
dence, convenience, and interests of justice. However, problems affecting service of process on these parties as non-residents will be relatively the same as those under Rule 4 (e) beyond the 100 mile distance, and it has been suggested that many of these Rule 19 problems could be solved by providing for nationwide service of process.\textsuperscript{40}

Regardless of other factors, such as convenience of parties and favorable law of the forum, as a practical matter all venue determinations under the new federal venue amendment based upon “in which the claim arose” will have two characteristics based on residency:

1. There will be a failure on the part of one or all plaintiffs and one or all defendants to meet the residency requirements of the federal venue statute in that district. (Otherwise the venue would lie on the basis of residency with Rule 4 (e)’s option to serve process by federal standards, or by the state rule.)

2. There must be an applicable state non-resident long-arm provision upon which the jurisdiction of the court over the parties will depend, unless the non-resident can be found and served within the state.

Rules governing service of process in the federal courts are contained in Rule 4. By Rule 4 (e) federal service on persons who are non-residents of the state where the federal court sits must be served in accordance with the state non-resident long-arm provision, except for cases such as patents mentioned above. Insofar as federal service is subject to the state provisions in the absence of a federal provision, the new venue statute’s practical use may be said to be limited by the presence of, absence of, or scope of these long-arms.

To return to the power tool example, plaintiffs could not lay venue based on residency. If the plaintiffs were unable to find an applicable long-arm statute in states A, B, and C, they could not bring the action in a federal court despite the “in which the claim arose” provision. To them the new statute has little meaning.

\textit{The Status of the Long-Arm}

The attorney contemplating use of the new venue provision to either bring his claim or transfer the place of trial to the district “in which the claim arose” must be fully aware of the limitations placed on his flexibility by failure to include comprehensive provisions for service of process.\textsuperscript{41} Until

\textsuperscript{40}See Fink, \textit{Indispensable Parties and the Proposed Amendment to Rule 19}, 74 \textit{Yale L. J.} 403 (1966).

\textsuperscript{41}Blume, \textit{Place of Trial of Civil Cases}, 48 \textit{Mich. L. Rev.} 1, 39 (1949). Following passage of the federal transfer of venue statutes (28 U.S.C. § 1404 (a) and § 1406 (a)) Prof. Blume emphasized the need for “return to the fundamental common law rule that an action should be tried in the place in which the cause of action or a part thereof arose” in the
the Congress or the Court does provide for nationwide service of process, an understanding of the present status of the long-arm in state court jurisdiction is crucial to an understanding of the present limitations on federal jurisdiction and, therefore, on the practical use of the venue statute.

_Pennoyer v. Neff_\(^4\) first defined the standards for state court jurisdiction over non-residents in these terms: presence; classifications of actions as _in personam, in rem_ or _quasi-in rem_; territorial jurisdiction; and actual notice to satisfy the demands of due process for service of process. The most valid point in the case was the last; that due process demands adequate notice of intent to sue. But the most significant aspect of the case from the standpoint of immediate impact was the "presence" criterion.\(^4\)

The "presence" test soon gave rise to statutes based on presence by agency.\(^4\) These are of three types: 1. State\(^4\) or federal\(^6\) statutes requiring appointment of an agent for certain purposes; 2. Statutes designating an existing agent for the acceptance of service of process;\(^4\) 3. Statutes providing that the agent is deemed appointed by operation of law.\(^4\) The latter include the familiar non-resident motorist acts wherein it is provided that a motorist by driving his auto on the highways of a state is deemed to have appointed the Secretary of State or Commissioner of Motor Vehicles as his agent for service of process. The Massachusetts non-resident motorist act, based upon appointment of the Registrar of Motor Vehicles, was upheld fifty years after _Pennoyer_ in _Hess v. Pawloski_.\(^9\) Now, all the states except Colorado, and the territories of Puerto Rico and the Virgin Islands, have such statutes or rules in one form or another.\(^5\)

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\(^5\) Most of the development based on _Pennoyer v. Neff_ centers on this quote: "Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them." _Id._ at 727.

\(^6\) See 2 MOORE, supra note 20, at ¶ 14.12, at 1052.

\(^7\) See, e.g., 12 PA. STAT. ANN. §297 (1953) (State "Blue Sky Laws"); and FLA. STAT. ANN. §47.161 (1962).


\(^9\) See, e.g., Dogget v. Peck, 32 F. Supp. 889 (N.D. Tex. 1940). The court in this case upheld service of process on an agent of non-resident partners under a local statute.

\(^10\) See, e.g., Gen. Laws Mass. ch. 90, as amended ch. 431 §2 (1923). In 1953 Justice Frankfurter was soon curried by ruling that the driving of a truck on the Kentucky highways was insufficient under the Kentucky motor vehicle long-arm provision [KY. REV. STAT. §§188.020-188.030] to be the appointment of a corporate agent to receive service of process, when the actual appointment of an agent was required under the corporate provisions for service of process. Olberding v. Illinois Cent. R.R., 346 U.S. 338 (1953).

\(^11\) 274 U.S. 352 (1927).

\(^12\) Clemens v. District Court, 154 Colo. 176, 340 P.2d 83 (1964) saw the Colorado non-resident motorist long-arm statute struck down as unconstitutional in a historic rebellion
The attorney attempting to determine federal venue will find a host of these original types of long-arm statutes on the books all utilizing agency by operation of law for service of process on some state official as the agent of the non-resident. This is true even where comprehensive long-arms, which will be discussed below, have been enacted. As examples, see Maryland's non-resident motorist, aircraft, and watercraft statutes providing for the de jure appointment of agents, and its new comprehensive long-arm, enacted without repealing the motorist, aircraft and watercraft statutes.

The transition to what this comment refers to as “comprehensive long-arms” evolved after the landmark case of International Shoe v. State of Washington, as clarified in McGee v. International Life Insurance Co. and Hanson v. Denckla. International Shoe replaced Pennoyer's “presence” in the state test with a “minimum contacts” within the state test, while reaffirming the necessity for actual notice of suit as the heart of the due process requirement. McGee took the additional step of upholding direct service on the defendant by registered mail as within the bounds of due process. Hanson v. Denckla served to set minimum standards on the use of a minimum contacts test. The International Shoe Court had been troubled by single acts and the “quality and nature of the activity in relation to the fair and orderly administration of the laws.” In treating the single act, Hanson v. Denckla ruled that the act must be purposeful; that is, a purposefully availing oneself of the protection of the laws of a state. Under this test, a convenience meeting by business agents of corporations at opposite ends of the country, in Chicago to sign a contract, would not seem to be such “purposeful” activity.

against the acceptance of such statutes. The information on all of the state non-resident motorist acts was derived by consulting 4 Martindale Hubbel Law Directory for 1967, under the Law Digests of each state and the subheading Motor Vehicles-Action Against Non-Resident.


52 326 U.S. 310 (1945).


55 Supra note 52, at 316. “[D]ue process requires only that in order to subject a defendant to a judgement in personam if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions fair play and substantial justice.'”

56 Id. at 318-19.

57 Supra note 54, at 258. “It is essential that in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and provisions of its laws.”

The three case International Shoe doctrine appears to be this: To be served extra-territorially from the forum state to another state of residency, defendant must have exercised meaningful or significant minimum contact with the forum state whereby he purposefully avails himself of the protection of the forum state's laws. In such a case, the party may be suing in the state courts and process may be served by any means calculated to give reasonable and adequate notice and thus meet the standards of due process.

Gradually, states began enacting limited long-arm statutes based on the International Shoe doctrine. Maryland's pioneering tort and contract long-arms were held valid by its courts, and Vermont's "tortious act" long-arm was similarly upheld in Smyth v. Twin State Improvement Corp. These and other state supreme court decisions prompted the Illinois legislators to probe the outer limits of International Shoe. They passed the following statute which later provided the model for a uniform act promulgated by the Conference of Commissioners on Uniform State Laws:

1) Any person (individual or corporation) whether or not a citizen or resident of this state who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and if an individual his personal representative, to the jurisdiction of this State as to any cause of action arising from the doing of any of said acts:
   (a) the transaction of any business within this state;
   (b) the commission of a tortious act within this state;
   (c) the ownership, use, or possession of any real estate situated within this state;
   (d) contracting to insure any person, property, or risk located within this state at the time of contracting.

The Illinois long-arm was upheld as constitutional by that state's Supreme Court in Nelson v. Miller, encouraging Wisconsin and New York to subsequently enact similar legislation. Along with a number of less comprehensive state provisions, these states established the basis for Section 1.03, the comprehensive long-arm section of the Uniform Interstate and International Procedure Act, which has since been adopted by Arkansas, Oklahoma, and the Virgin Islands, and used as a model or point of departure by Arizona.

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60 B. UNIFORM LAWS ANN. 305. The Uniform Interstate and International Procedure Act was approved by the Conference of Commissioners on Uniform State Laws and the American Bar Association in 1962.

Idaho, Louisiana, Maine, Maryland, Montana, New Jersey, New Mexico, New York, Ohio, Rhode Island, Tennessee, Virginia, Washington, and Wisconsin.\textsuperscript{67}

It is generally accepted that the \textit{International Shoe} standards and the long-arms premised on them are equally applicable to individuals.\textsuperscript{68} The last United States Supreme Court opinion concerning individuals was \textit{Doherty v. Goodman}\textsuperscript{69} in 1935, ten years before \textit{International Shoe}. There, an individual salesman was sued in a district of the state other than his residence. It was held, in support of the state supreme court, that where an individual doing an act within the district created an unreasonable risk of injury to others in that district, he could be subject to suit in that district.

Of true significance from the standpoint of both individuals and the advocates of the long-arms, is the 1965 \textit{Rosenblatt v. American Cyanide Co.}\textsuperscript{70} ruling issued by Justice Goldberg from his chambers on a writ to stay proceedings. Recognizing that there had been no opinion expressed by the entire Court on the constitutionality of the comprehensive long-arms, he ruled that the New York statute, which was patterned on the Illinois long-arm, fell within the \textit{International Shoe} standards. Fox, an individual who had absconded to Rome with his employer's "trade secrets," was served by mail in Rome and forced to defend in New York under the "tortious act" portion of the long-arm. In Professor Currie's words, Justice Goldberg stated a refinement of the \textit{Hanson v. Denckla} rule: "... the defendant must have taken voluntary action calculated to have an effect in the forum state,"\textsuperscript{71} to give that court jurisdiction. Had this been a statement of the entire Court it would have been considered a milestone in \textit{International Shoe} development. As it stands, it is weighty authority for what the Court might one day rule.

The litigant should be aware that there are subtle differences between the various state enactments, and that they should be combed for the niceties. For example, Maryland's comprehensive long-arm requires that both the act and the injury occur in the state, contrary to the recommendations in the Uniform Interstate and International Procedure Act.\textsuperscript{72} The Uniform
Act provides that the suit may be brought in the state if the act or omission occurs without the state as well as within. A detailed comparison of all the state differences is not within the scope of this study, but some others will be seen below. The differences will affect not only service itself, but the determination of the district "in which the claim arose."

The Uniform Act differed from the Illinois long-arm in providing for jurisdiction over a person acting by himself or through an agent in "(2) contracting to supply service or things in this state" and by breaking down the tort provisions into two parts namely:

(3) causing tortious injury by an act or omission in this state and
(4) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; or takes certain actions toward real property or attempts to insure persons or property within the state.75

New York's statute represents the broadest view, allowing suit against any non-domiciliary, if acting as a domiciliary he "commits a tortious act within the state." This was the statute left intact by Justice Goldberg in Rosenblatt.74

The Virginia statute contemplates complete jurisdiction in the tort-contract-warranty area by providing for jurisdiction over any person "causing injury in this State to any person by breach of warranty . . ."76 in a sale outside of state for reasonably foreseen consumption within the state. In this regard, the Federal District Court for the Western District of Virginia upheld service of process on the Illinois manufacturer of a solvent that exploded in a Virginia plaintiff's sink trap, maintaining that the sale in Virginia of defective solvent, as part of an annual $25,000 business in Virginia, was a single act adequate to subject the manufacturer to the court's jurisdiction under the Virginia statutes.76

Rhode Island's act, providing service in all cases consistent with due process,77 is at the absolute outer limits of International Shoe.

Decisions under comprehensive long-arms such as the Illinois act indicate that there may be several districts in which the claim might be alleged to have arisen, and that these new statutes may allow valid service from any one of them depending on the theory of the claim. An examination of a few

74 ILL. REV. STAT. ch. 110, §17 (1956).
76 VA. CODE ANN. ch. 4. 1 (a) (2), §§8.81.2 (Supp. 1964).
of these decisions will present an opportunity to both verify the "limiting" differences between comprehensive long-arms, and to explore the broad possibilities available when more than one state's long-arm are found to be applicable.

*Symth v. Twin State Improvement Corp.* sup7 upheld a Vermont statute providing for jurisdiction over a corporation which "commits a tort in whole or in part"79 in Vermont. In that case, the Massachusetts company's one leaky roofing job in Vermont was held adequate to subject the company to jurisdiction in the Vermont court. The court's rationale included three premises: (1) Defendant took advantage of the protection of Vermont laws; (2) Forcing the Vermont resident to bring his suit in Massachusetts would be unfair; (3) Vermont was the most favorable locale for both witnesses and substantive law.

*Nelson v. Miller,* in which the Illinois long-arm statute was found constitutional, cited the Vermont case and ruled that, "An act or omission within the state, in person or by an agent is sufficient basis for the exercise of jurisdiction to determine whether or not the act or omission gives rise to liability in tort."81 Here, the defendant's employee came to the state solely to deliver a stove and injured the plaintiff while moving the stove from the truck. The contact was held sufficient to require defendant to defend the suit in Illinois.

Yet, a Texas manufacturer of gas pipe was held not to be subject to jurisdiction in West Virginia following an explosion in the line after installation by another company in West Virginia. The basis of the decision was insufficient minimum contact.82

A comparable situation arose in North Carolina. The court in *Erlanger Mills v. Cohoe Fibre Mills*83 declined jurisdiction over a defendant based on a single act of shipping goods into the state. The action was premised on a statute anticipating personal jurisdiction when there was reasonable expectation of consumption within the state.84 This provision, however, was later held to be constitutional.85

Following the passage of the Illinois long-arm, *Gray v. American Radiator & Standard Sanitary Corp.*86 became a classic example of the complexities

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78 116 Vt. 568, 80 A.2d 664 (1951).
79 Vt. STAT. ch. 72, §1562 (1947).
80 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
81 Id. at 394, 143 N.E.2d at 681.
83 299 F.2d 502 (4th Cir. 1960).
84 N.C. GEN. STAT. §§ 5-145 (3) (1960).
86 22 Ill. App. 2d 492, 176 N.E.2d 761 (1961). The *Gray* case has caused a wealth of commentary. See, e.g., Currie, supra note 32; Advisory Committee note to the Uniform Interstate & International Procedure Act §1.03, 9B Uniform Laws Ann. 303.
that were unfolding as a result of the new long-arms. The defendant, an Ohio corporation, manufactured a safety valve in Ohio. This was fastened to a hot water heater in Pennsylvania and was sold to a customer in Illinois. The radiator exploded in Illinois, and the plaintiff brought suit against the Ohio valve manufacturer in the Illinois court, invoking the Illinois “tortious act” long-arm to serve process. Admitting that the wrong arose from acts performed in the place of manufacture, the Illinois court held the place of injury to be the place of the tortious act. However, in dicta the Gray court felt that the intent of the legislature in the use of “tortious act” was less one of concern for the technicalities of definition than with substantial elements of convenience and justice. There was no evidence of other contact with the state, but the court held that purchase from the Pennsylvania and Illinois middlemen made no difference and that the liability arose from the manufacture of products presumably sold in contemplation of use in Illinois.

A second potential classic is Singer v. Walker, a New York case. This case presents a situation almost identical with the power tool hypothetical case. It involved a geologist’s hammer which was shipped to a New York dealer by an Illinois manufacturer who labeled it “unbreakable.” The New York dealer sold the hammer to another New Yorker who gave it to a third. The final recipient brought the hammer to Connecticut where it exploded and injured his son. The plaintiff brought his suit in a New York state court. Service was attempted and rejected twice as on the wrong person and on the ground that defendant was not doing business in the state. Meanwhile, the comprehensive New York long-arm statute was passed. Service was again attempted basing suit on breach of warranty and negligence under the “transaction of business” provision of the New York long-arm. The court upheld jurisdiction and service, reasoning that:

The fact that the infant plaintiff obtained possession of the hammer in New York is an essential to sustain jurisdiction. By the same token, the place or places to which the infant plaintiff took the hammer in his use of it has relevance ... [the injury] could just as well have been in New York or in any other place and this would have happened.

More interesting in terms of the federal venue statute was the court’s focus on the place where the cause of the action arose.

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87 Id. at 436, 176 N.E.2d at 763.  
88 Id. at 442, 176 N.E.2d at 766.  
91 Supra note 93, at 290, 250 N.Y.S.2d at 221.
The tort cause of action arose in Connecticut under traditional analysis; but as already stated the statute is not cast in terms of where the cause of action arose. The modern trend is to reject the old cause of action test . . . . It suffices that the tortious act was committed in this state.\(^9\)

In that same vein, the court discussed warranties:

A breach of warranty resulting in harm is now characterized as also a tortious wrong. . . . Cases analyzing in traditional fashion the tortious act as compared with the complete tort hold generally that the duty of proper manufacture was breached in the manufacture or production of a defective product and, therefore, occurs only in the place of manufacture. . . . But there are some breaches of duty which create a continuing condition of hazard to users. . . . In the case of an instrument defective in construction or dangerous because mislabelled the hazard persists whenever and so long as the product circulates.\(^9\)

In these statutes and cases, the extent of the “minimum contacts” that an individual or corporation must have with a state have been more clearly defined. The type of presence (for example, invoking the protection of a state’s laws) has become clearer with a sharper focus on the “interest of justice” to the parties, as opposed to the traditional narrow construction of “tort,” “contract,” and the like. The necessary adjunct to these \emph{International Shoe} results has been a broadening of the concept of the place “in which the claim arose.”

Just how broad is seen in the North Carolina holding\(^4\) in which a single act by a non-resident manufacturer may be a sufficient “minimum contact” with the forum state for jurisdiction if the manufacturer has a reasonable expectation that the product will be consumed there. Other statutes provide for jurisdiction over a non-resident party to a contract “to be performed” in the state of the forum.\(^5\) A single act of breach by a non-resident party under such a statute allows the state courts to assume personal jurisdiction over him, regardless of the fact that he never set foot in the state. However, it is doubtful under \emph{Hanson v. Denckla}\(^0\) that the single act is such an adequate minimum contact as long as the emphasis remains on any \emph{degree} of contact, such as “minimum.”

It is submitted that the “minimum contact” criterion should be reconsidered. The test should first be broadened to encompass any “contact,” whether it be with the state, with the residents thereof or \emph{in futuro}, and let the guidelines of “convenience of the parties and witnesses, and in the in-

\(^9\) \textit{Id.} at 288, 250 N.Y.S.2d at 219-20.
\(^{10}\) \textit{Id.} at 289, 250 N.Y.S.2d at 220.
\(^{14}\) \textit{Supra} note 85.
\(^{45}\) \textit{Id.} at 289, 250 N.Y.S.2d at 219-20.
\(^{46}\) \textit{Supra} note 85.
\(^{47}\) \textit{Id.} at 289, 250 N.Y.S.2d at 219-20.
\(^{48}\) \textit{Id.} at 289, 250 N.Y.S.2d at 220.
\(^{44}\) \textit{Supra} note 85.
\(^{13}\) See, e.g., (“Contracting to supply services or things”) \textit{ILL. REV. STAT. ch. 110, §17} (1963) and \textit{VA. CODE ANN. §8-81.2 (a) (2). (Supp. 1964).}
\(^{45}\) 357 U.S. 235 (1958).
terest of justice" do the rest. Secondly, adequate reasonable notice should be strictly enforced. Due process would be pragmatically insured. In addition, venue in the federal district in which a claim arose would also be better insured, since there would be a minimum amount of proof required to prove that the claim "arose" there and the court could concentrate on issues.

Two interesting aspects of the previous cases are first, that the rulings are formulated with little regard to whether the defendant is a corporation or an individual; and second, that the residency factor of jurisdiction over the defendant seems to be held less important than the facts of the activity giving rise to a claim in that district. The reasoning of the cases insofar as it relates to activity and causes of action is directly applicable both to a determination of whether or not a claim arose in the district, and the further determination of whether or not process may be served on the non-resident party engaged in the activity. It shows that either the state of the injury, that of the sale, or that of manufacture may give rise to a claim and that traditional notions of what constitutes a cause of action have become more comprehensive.

Non-Resident v. Non-Resident

The reservation in the above study of state long-arms, and decisions thereunder, is this: The plaintiffs in the prior cases were residents of the state where the claim was brought. For example, had the Gray and Singer cases been brought in the federal courts they could have been controlled by the old venue provisions based on residency of the plaintiffs. Further examination reveals, however, that state long-arm statutes usually are construed to allow jurisdiction and service of process over non-residents when the claim is brought by another non-resident, if the claim arose there. However, some statutes are to the contrary and do not allow the non-residents to sue in all cases. This determination may be relevant in federal cases and the issue is squarely presented: If the state does not allow suits between non-residents in its courts, what is the effect of this determination on the federal courts?

Applying Maryland's Non-Resident Motorist Act, transient motorists have been subject to Maryland's jurisdiction even if the injured person is also a non-resident. But jurisdiction over non-resident operators of aircraft or watercraft exists only if the injury is to the person or property of a

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97. See, e.g., Singer, supra note 62.
100. Steele v. Dennis, 62 F. Supp. 73 (D. Md. 1945). (In this case both parties were non-residents. The case was decided long before the new venue amendment, but defendant waived the "all plaintiffs or all defendants reside" venue criterion.) See also, Ewing v. Lockheed Aircraft Co., 202 F. Supp. 216 (D. Minn. 1962).
Maryland resident. Under Federal Rule 4, the Maryland statutes would control service in a federal proceeding and process could be served in the first instance (motorists), but not in those involving aircraft and watercraft.

Professor Auerbach writes in *Maryland Law Review* that the 1964 act expands jurisdiction by including non-resident plaintiffs as well as resident plaintiffs who are injured in the state. "To the defendant it can make no difference whether the injured person is a resident or a non-resident."

The Illinois Non-Resident Motorists Act was similarly held to permit suits by non-resident plaintiffs as well as resident plaintiffs, and in another case, under the new comprehensive state long-arm, the plaintiffs non-residency was ignored.

At this point, we yield to Professor Currie and his article, "The Growth of the Long-arm: Eight Years of Extended Jurisdiction in Illinois." He cites the Illinois long-arm as phrased in terms devoid of association with plaintiff's residence. He further concedes the correctness of this broad interpretation in cases of personal injury because of the state's interest in compensation as a means of insuring highway safety. Nevertheless, he does take issue with a non-resident plaintiff suing another non-resident under certain circumstances:

The notion of the cause of action may be important when the plaintiff is a non-resident . . . The state of the accident, as such, [may have] no interest in applying its wrongful death law as between non-residents. Illinois' unfair competition law may well express a policy of protecting non-residents doing business here, but it is not so clear . . . that Illinois has any policy of protecting transients and affecting property located elsewhere . . . The place where the contract is made may not always have an interest in the outcome of the litigation . . . This may also be true in some tort cases . . .

Professor Currie admits that assertion of jurisdiction in these cases may not offend due process, but claims that the principal support for asserting jurisdiction is no longer present. He also points out that "judicious use" of forum non-conveniens may adequately stay the problem.

In light of the above statutes, cases, and law review discussions, it appears

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103 Ibid.
105 Dart Transit Co. v. Wiggins, 1 Ill. App. 2d 126, 117 N.E.2d 314 (1953); accord, State ex rel. Rush v. Circuit Court, 209 Wis. 246, 244 N.W. 766 (1932).
108 Id. at 543.
109 Id. at 544.
that the non-resident long-arms of Illinois and Uniform Act family of statutes may be invoked by non-resident plaintiffs as well as residents. However, a court could conceivably cite Professor Currie's argument and maintain that certain non-residents will be unable to invoke the provision under certain causes of action.\textsuperscript{110}

Let us suppose for a moment that today the Illinois Supreme Court ruled that a non-resident could not sue another non-resident under the Illinois Fraudulent Conveyances Act and for its rationale stated that the policy behind the Illinois long-arm did not comprehend suits under that law. It seems highly doubtful that the Federal District Court could rule tomorrow that Congress had given the plaintiff the right to bring his action in the district in which the claim arose, and then allow service of process through that same Illinois long-arm and Rule 4. The state provision, as in the Maryland aircraft and watercraft long-arms, would certainly govern the persons served. It seems that the court rule in the Illinois hypothetical case above should also control service of process when there has been a state Supreme Court ruling.

However, Professor Currie did not mention \textit{Hughes v. Fetter},\textsuperscript{111} a 1951 case that held the Illinois wrongful death law was available to a non-resident suing in Wisconsin courts, after an accident in Illinois. The reasoning of the court was based on the fact that wrongful death statutes were so widespread and accepted that a non-resident plaintiff should not be denied their protection although this decision was based on full faith and credit, and not due process. It seems that any deviation from the above result under the fraudulent conveyance act—that is, that the federal court would be bound by the state supreme court's rule—would have to be brought within the \textit{Hughes v. Fetter} rule to allow the non-resident to sue. That is, when it could be shown that a statute's use was so widespread that a non-resident should not be denied its protection in a state, then a statute primarily designed to benefit residents may be applied by non-residents.

By way of summary, the \textit{Gray} case was written in a restricted manner in holding that the "tortious act" was committed where the last event takes place which is necessary to render the actor liable and that the place in this case was Illinois.\textsuperscript{112} This, however, suited the court's immediate purpose. So too in \textit{Singer}, the "tortious act" was admitted to be in Connecticut, but allowed jurisdiction and service in and from the New York court on the basis that the sale was a "transaction of business" in New York.\textsuperscript{113} Other state long-arms might have allowed that same suit in New York on the basis of

\textsuperscript{110} No cases could be found directly on this point.

\textsuperscript{111} Supra notes 59-61 and accompanying text.

\textsuperscript{112} Supra notes 62-66 and accompanying text.

\textsuperscript{113} Supra notes 89-93 and accompanying text.
warranty, and the New York case would appear to be authority for the bringing of the suit in Illinois against the manufacturer on the basis of warranty (notwithstanding residency). As has been emphasized in other parts of this comment, the long-arms go far to provide a choice of forums where jurisdiction, service, and venue are all proper, but there are limitations, including possible limitations on suits by non-resident plaintiffs.

PART III

Additional Limitations, Summary, and a Proposed Remedy

Additional Limitations

The original choice of venue by plaintiff might be termed phase one of venue. Venue's phase two comes after plaintiff's initial choice, and here, under the federal transfer statutes all three, the plaintiff, defendant and judge, and perhaps third parties and witnesses, might be petitioning to transfer a case to the district “in which the claim arose.”

Federal judges will no doubt become more aware of “convenience of the parties and in the interests of justice” control dockets and the increase in number of forums, just as state court officials have become more aware of their discretion under forum non-conveniens to control their own dockets. In the state courts this was brought about by the increase in number of available forums under comprehensive long-arm statutes.

A further limitation is that transfer to the district in which the claim arose must also be to one where it “might have been brought.” A split court in *Hoffman v. Blaski* found that if service of process could not be made in one federal district, then that district was not one in which the claim “might have been brought.” Most authorities agree that this is preposterous. It appears even more so since it fails to be a district in which “it might have been brought” regardless of the fact that it is the federal district “in which the claim arose.”

115 28 U.S.C. §1404 (a) (1964). “For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. §1406 (a) (1964). “The district court 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.
116 See discussion in JAMES, CIVIL PROCEDURE §12.17, at 663 (1965).
118 363 U.S. 335 (1964). But see, Van Deusen v. Barrack, 363 U.S. 335 (1964), ruling that the appointment of an ancillary administrator under a state statute, and the litigant's failure to do so, were not determinative of a transfer to the district in which it "might have been brought."
A final limitation occurs in both phases of venue. The amount of evidence necessary to meet the burden of proving where the "claim arose" is uncertain. Judges might range from accepting the complaint's face value for venue determinations, to requiring a great deal of evidence as do the courts in Texas. In the latter case a great deal of litigation might be required merely to determine venue, but in either case it is a safe bet that parties will be "pleading venue" in their complaints. It is also possible that federal judges will be influenced by the amount of evidence required to prove venue in local state courts.

Summary
The new amendment cures a major defect in laying venue for multi-party suits. Venue, except in certain federal question cases, may now be laid in the district "in which the claim arose" as well as "in the place where all plaintiffs or all defendants reside" of the original statute. Consequently, there will technically always be a proper venue for the first time in the history of our country.

The panacea on closer inspection appears to be deficient. A dilemma arises out of the fact that in choosing the place to initiate his action a plaintiff cannot actually lay his venue until he determines that process may be served there. Not only is the determination of whether or not a claim arose in that district subject to state substantive law under Erie v. Tompkins, but Rule 4 (e) of the Federal Rules of Civil Procedure defers to state provisions to govern service of process in certain federal question cases and in all federal litigations based solely on diversity of citizenship. This last "limitation" places the federal court's exercise of its jurisdiction at the mercy of state long-arm statutes. While there may technically "be" a venue, as a practical matter venue cannot always be laid.

The Remedy
The limitations to the venue statute outlined above can be cured by either Court or Congressional action. The "100 Mile Bulge" of Rule 4 (f) and Mississippi Publishing Co. v. Murphree are authority for the Court or Congress to provide nationwide service of process, if either one chooses to do so. The Court by Rule, or Congress, might pass a simple provision such as: "Henceforth, nationwide process may be served from all federal courts."

120 Sec, e.g., H. E. Butt Grocery Co. v. Bradfield, 396 S.W.2d 254 (Tex. Civ. App. 1965), the holding of which insisted that all elements of a tort case had to be proven for a change of venue; and Clubb Testing Serv. v. Singletary, 395 S.W.2d 956 (Tex. Civ. App. 1965) with a similar ruling in a contract case.
121 326 U.S. 438, 442 (1946). "The fifth amendment does not prevent congress from providing for service of process anywhere in the United States."
We doubt that this will happen, just as we doubt that Congress or the Court will ever overtly overturn *Erie v. Tomkins*.

However, we do propose the following rule or statute as the politically appealing and pragmatic approach:

Subject to a judicial determination that the district in which original action is commenced meets the traditional standards of “convenience of the parties and witnesses, in the interest of justice,” all process other than subpoena may be served from any federal court anywhere within the territorial limits of the United States and its possessions.122

122 This statute has the effect of providing nationwide service of process in almost all instances.