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VENUE IN THE FEDERAL COURTS UNDER THE "DOING BUSINESS" PROVISION OF 28 U.S.C. § 1391(c): A PROVISION SUBJECT TO REINTERPRETATION?

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I. INTRODUCTION

A determination of whether venue is proper for a civil action commenced in federal court requires the application of the rules set forth in 28 U.S.C. § 1391 to the facts of the particular case.

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1. "Venue relates to the place or places where an action may be properly instituted and the suit determined, provided the court has subject-matter jurisdiction and the requisite jurisdiction over the defendant. In state practice venue is normally geared to the county, while in federal practice venue is geared to the district or, where the district is divided into divisions, to a division thereof." 1 Moore's Federal Practice ¶ 0.140, at 1307 (2d ed. 1948) (footnotes omitted).

2. 28 U.S.C. § 1391 reads as follows:

Venue generally
(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 defendants reside, or in which the claim arose, except as otherwise provided by law.
(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.
(d) An alien may be sued in any district.
(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the
Making such a determination has often proved difficult for litigants and courts alike because the basic rules governing venue for civil actions brought in federal courts set forth in section 1391 are not without ambiguity. Section 1391(b), for example, provides in part that "[a] civil action . . . may be brought only in the judicial district . . . in which the claim arose." The language of this subsection clearly allows both the narrow reading that a claim could arise in only one district, and the more expansive reading that a claim could arise in more than one district.

In 1979 the United States Supreme Court clarified this subsection of the venue statute in Leroy v. Great Western Corp. This case involved an appeal by Idaho officials who contended that venue for the suit commenced by Great Western to challenge enforcement of Idaho securities regulations could not be properly laid in the United States District Court for the Northern District of Texas. The officials based their contention on the ground that

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Great Western's claim did not arise in that district within the meaning of section 1391(b). As will be more fully developed below, the Supreme Court upheld their challenge and ultimately adopted a narrow interpretation of this section of the general venue statute, emphasizing that venue statutes, being designed to protect defendants, should be construed narrowly.

Although other commentators have thoroughly examined the potential impact of *Leroy* in determining "where the claim arose" for purposes of section 1391(b), the Supreme Court's posture suggests that the impact of *Leroy* may extend well beyond section 1391(b). The Court's interpretation of venue provisions so as to protect defendants from litigation in remote forums may well stimulate the re-evaluation of other venue provisions which have been liberally construed in favor of plaintiffs.

This article focuses on the potential impact of *Leroy* on the problematic venue provision of section 1391(c) which provides that "[a] corporation may be sued in any judicial district in which it is . . . doing business." The "doing business" provision of section 1391(c) is ripe for examination in light of *Leroy*. Currently whether a defendant's contacts with a district constitute "doing business" so as to permit venue to be laid in that district is determined on the basis of two tests, the jurisdictional test and the licensing test, the validity of which are doubtful in the wake of *Leroy*.

The jurisdictional test provides that a corporate defendant is "doing business" in the district for venue purposes if its contacts with the district are sufficient to permit the court to exercise its personal jurisdiction. This test permits a court to find that a corporate defendant was "doing business" in the district for purposes of laying venue under section 1391(c) if it had but one isolated minimum contact with the district.

6. See notes 48-52 infra and accompanying text.
7. See, e.g., 443 U.S. at 183-84.
10. See notes 78-116 infra and accompanying text.
The licensing test permits a finding that a corporate defendant was "doing business" in the district if the laws of a state within the district would have required the corporation to obtain a license prior to engaging in corporate activities in that state. This test breeds confusion and uncertainty; it permits the meaning of the "doing business" provision of a federal venue statute to be substantially broadened by state law. Under the licensing test, a state requirement that all foreign corporations acquire licenses prior to engaging in the most minimal activity in that state, could constitute "doing business" despite the minimal activity actually conducted by the corporation in that state.

Both the jurisdictional and the licensing tests allow plaintiffs to establish venue in districts where the defendant's activities have been minimal. Because of the Court's statement in Leroy that venue statutes are intended to protect defendants, and thus are to be construed narrowly, it remains to be seen whether the "doing business" provision of section 1391(c) will be subjected to a restrictive reinterpretation which would invalidate the use of the jurisdictional and licensing tests to establish venue in districts with which defendants have had little contact.

To assess Leroy's potential impact on section 1391(c), this article will briefly review the history of venue in the United States and will examine the meaning of a similar venue provision of the federal antitrust laws, which provides that in an antitrust action, a defendant may be sued in any district wherein it "transacts business." The validity of the jurisdictional and licensing tests for determining whether a corporate defendant's conduct in a district constitutes "doing business" within the meaning of section 1391(c) will be examined in light of Leroy. Finally the article will recommend a better approach for determining whether a defendant has done business in a district so as to permit venue to be laid under

11. 443 U.S. at 183-84.
12. The antitrust venue provision states:
   Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.
This approach provides that only continuous, substantial contacts with a district will be held to constitute "doing business" within the meaning of section 1391(c), which reduces the number of forums where corporate defendants may be sued under section 1391(c) and provides an alternative to the current tests, the validity of which are doubtful in light of the Supreme Court's reasoning in *Leroy*.

II. THE HISTORY OF VENUE IN THE UNITED STATES


Section 1391 sets forth the general rules which govern venue for civil actions brought in the federal courts. Subsections determine where venue may be laid when jurisdiction is founded solely on diversity of citizenship, when jurisdiction is based on grounds other than diversity, and when the defendant is a corporation, an alien, or an officer or employee of the United States government. Unfortunately, subsection (c), which is frequently relied upon to establish venue in actions against corporations, has bred considerable confusion and litigation.

In order to understand the concept of venue, it is necessary to note that venue relates solely to the place where a court should or may exercise jurisdiction. Venue does not relate to the power or authority of a court to hear a controversy. The extent of that power is determined by the subject matter jurisdiction of any given court. Moreover, the rights of the parties to a controversy vary depending upon whether a question of venue or subject matter jurisdiction is before the court. A defect in venue may be waived by the parties whereas subject matter jurisdiction may not. As the Su-
preme Court observed in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*:

The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of the litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition.21

Despite the distinction between venue and jurisdiction, attorneys22 and courts23 sometimes confuse the two concepts. Although this confusion may result from haphazard legal analysis, it may also result from courts mixing the concepts of venue and jurisdiction with the tests which have been developed to apply them.24

The concept of venue is not a product of contemporary jurisprudence, but rather has its origins in the English common law.25 The first American federal venue statute provided that suit could be brought in any judicial district where the defendant was an inhabitant or could be found.26 Thus, a defendant could be sued wherever he could be served. The breadth of this early statute, however, was restricted by the limitations upon the diversity jurisdiction of the federal courts.27

In 1887, Congress further restricted the possible forums for the trial of a civil action. The 1887 Act provided that an action should

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27. C. Wright, supra note 25, at 149.
not be brought in "any other district than that whereof [the 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 the residence of either the plaintiff or the defendant."\textsuperscript{28} In 1948, Congress responded to the confusion surrounding corporate residency and where corporations could be sued by enacting a statute, now 28 U.S.C. \textsection{}1391(c), which provides that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."\textsuperscript{29} The rules established by the 1887 Act remained largely unchanged until 1966,\textsuperscript{30} despite their significant weaknesses.\textsuperscript{31} Although various amendments\textsuperscript{32} have remedied some of the defects which plagued the earlier venue statutes, the current statutes remain problematic in certain respects.

The validity of the Court's position in Leroy—that venue statutes are designed to protect defendants\textsuperscript{33}—had received prior acceptance by both the Supreme Court\textsuperscript{34} and commentators.\textsuperscript{35} How-

\begin{footnotesize}
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\item 29. Act of June 25, 1948, ch. 646, \textsection{}1, 62 Stat. 935 (current version at 28 U.S.C. \textsection{}1391(c) (1976)).
\item 31. C. Wright, supra note 25, at 150-51. The first weakness identified by Professor Wright is that the 1887 Act allowed a greater choice of forums for diversity cases than it allowed for federal question cases. Professor Wright finds that illogical, for it restricted the ability of federal courts to exercise jurisdiction in federal question cases, despite their presumably greater expertise in such matters. Furthermore, it gave plaintiffs greater freedom to sue in districts where they resided, despite the concern about local bias which originally justified the diversity jurisdiction. Another weakness of the 1887 Act was its tendency to preclude suit in federal question cases in the frequently convenient forum of the district where the claim arose, unless all the defendants resided there, or in diversity cases, unless all the plaintiffs resided in the district. Finally, cases where several parties resided in different states or districts were barred from the federal courts under the old Act unless the parties waived their venue objections.
\item 32. For a discussion of the legislative history of these amendments, see Wood, supra note 30, at 397-98.
\item 33. 443 U.S. at 184.
\item 35. 1 Moore's Federal Practice \textsection{}0.140 at 1307 (2d ed. 1948). Professor Moore has ob-
\end{enumerate}
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ever, courts and commentators have also observed that determining where venue may properly be laid requires courts to consider the convenience of all the litigants.\textsuperscript{36} For example, the Eighth Circuit Court of Appeals has adopted a sympathetic view towards plaintiffs, observing that "[s]ince venue is a procedural rule of convenience, the convenience of the aggrieved party should be first accommodated. The court is always open to a motion based on \textit{forum non conveniens} to be raised by the other party."\textsuperscript{37} This latter view went largely unnoticed by the Court in \textit{Leroy}. Consequently, the decision may either be read narrowly as one in which the Court reached a result dictated by the particular facts of the case, or the decision may signal the beginning of a trend toward a narrow construction of venue provisions so as to protect defendants at the expense of aggrieved plaintiffs.

One commentator has noted that "[t]he concept of venue has evolved through three stages: as an instrument for convenience of the court, as a vehicle for protection of the defendant, and as a mechanism for balancing convenience of the court and all parties."\textsuperscript{38} The Court's holding and reasoning in \textit{Leroy} indicate its willingness to regress to the second of the preceding stages.

B. \textit{Leroy v. Great Western United Corp.}

The plaintiff, Great Western United Corporation ("Great Western"), was a Delaware corporation with its executive headquarters in Dallas, Texas. On March 21, 1977, Great Western announced its intent to make a tender offer for two million shares of stock in the Sunshine Mining and Metal Company ("Sunshine"), a Washington corporation with its main operations in Idaho. As completion of the sale would have given Great Western ownership of more than five percent of the outstanding shares of Sunshine, Great Western

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\textsuperscript{37} Gardner Eng'r Corp. v. Page Eng'r Co., 484 F.2d 27, 33 (8th Cir. 1973).
\textsuperscript{38} Comment, \textit{supra} note 8, at 583.
\end{flushleft}
was required to comply with certain provisions of the Williams Act, amendments to the Securities and Exchange Act of 1934.\textsuperscript{49} Arguably, it also had to comply with various provisions of the Idaho Takeover Act.\textsuperscript{40} After publicly announcing its tender offer, Great Western endeavored to comply with the relevant federal and state statutes. On March 25, 1977, an official of the Idaho Department of Finance informed Great Western that it had failed to provide certain required information, and consequently, the Department refused to take any further action on Great Western's application until it received the requested information.

Shortly thereafter, Great Western filed suit in the United States District Court for the Northern District of Texas. The complaint sought declaratory and injunctive relief against the enforcement of the takeover statutes of three states, on the grounds that these statutes violated the commerce clause of the United States Constitution\textsuperscript{41} and were pre-empted by the Williams Act. The district court dismissed Great Western's actions against Maryland and New York on grounds of standing and mootness respectively.\textsuperscript{42} By restrictively reading section 1391(b), and thus establishing that a claim may arise in only one district, the court found venue to be improperly laid in Texas under the "claim arose" provision of section 1391(b) since the most significant contacts were in Idaho where the Idaho Department of Finance asserted its extraterritorial power to block Great Western's takeover attempt.\textsuperscript{43} The court did, however, find venue proper in Texas under section 27 of the 1934 Securities and Exchange Act which provides that venue is appropriate in any district where a violation occurred. The court reasoned that the unconstitutional enforcement of the Idaho statute against Texas shareholders of Great Western constituted a violation in the district within the meaning of the Securities and Exchange Act.\textsuperscript{44}

In reviewing the district court's findings, the Fifth Circuit Court

\textsuperscript{39} 15 U.S.C. §§ 78m(b)-(e), 78n(d)-(f) (1976).
\textsuperscript{40} Idaho Code §§ 30-1501 to 30-1513 (Supp. 1979).
\textsuperscript{41} U.S. Const. art. I, § 8, cl. 3.
\textsuperscript{43} 439 F. Supp. at 433.
\textsuperscript{44} Id. at 434.
of Appeals affirmed the lower court's invalidation of the Idaho Takeover Statute on the grounds that it violated the supremacy and commerce clauses of the United States Constitution, but rejected the lower court's finding that venue was improper in Texas under the "claim arose" provision of section 1391(b). The Court of Appeals adopted what it characterized as an "expansive interpretation" of section 1391(b) by finding that a claim may arise in more than one district for the purpose of establishing venue under section 1391(b). It further found that the claim arose in the Northern District of Texas because it was there that Great Western originated the tender offer and Idaho sought to restrain the purchase.

Upon review of the decisions of the district and circuit courts, the Supreme Court found that venue could not be properly laid in the Northern District of Texas under either section 1391(b) or section 27 of the Securities and Exchange Act. The Supreme Court based its analysis upon the premise that statutory venue provisions are generally intended to protect defendants from being forced to litigate in remote, inconvenient forums. Moreover, in reference to the Court of Appeals expansive interpretation of the "claim arose" provision of section 1391(b), the Supreme Court observed:

Congress did not intend to provide for venue at the residence of the plaintiff or to give that party an unfettered choice among a host of different districts. Rather, it restricted venue either to the residence of the defendants or to "a place which may be more convenient to the litigants"—i.e., both of them—"or to the witnesses who are to testify in the case."

Regarding cases where a claim may have arisen in more than one district, the Court further stated that a plaintiff may lay venue in any of those districts where the interests of witness availability, evidence accessibility, and defendant convenience are served with

45. 577 F.2d at 1262.
46. Id. at 1273.
47. Id.
48. 443 U.S. at 180.
49. Id. at 184.
50. Id. at 185 (citations omitted).
equal plausibility. It emphasized that the convenience of the plaintiff is not to be a factor in identifying the locus of the claim which could also be the place of trial under the “claim arose” provision of section 1391(b). The Supreme Court then rejected the Court of Appeals’ findings that the claim arose in Texas because Great Western initiated the tender offer there, and because the enforcement of the Idaho statute had its impact there. Instead, the Court concluded that “the claim involved has only one obvious locus—the District of Idaho.”

Although the Court’s analysis of where the claim arose is not above reproach, its general statements regarding the purpose of venue and proper interpretation of venue statutes are of greatest interest in light of this article’s focus upon future constructions of the “doing business” provision of section 1391(c). Of most importance is the emphasis the Supreme Court placed upon interpreting venue provisions to protect defendants. While the Supreme Court and commentators have expressed that sentiment before, the Court’s position is somewhat troublesome in that it ignores the plight of the aggrieved plaintiff. In recognition of this problem, the Eighth Circuit Court of Appeals has observed that “[s]ince venue is a procedural rule of convenience, the convenience of the aggrieved party should always be accommodated. The court is always open to a motion based on forum non conveniens to be raised by the other party.” Similarly, the Fourth Circuit Court of Appeals has stated that the choice of forums is the primary right of the plaintiff, and that choice should “not easily be overthrown.”

Although the Supreme Court failed to consider forum non conveniens as an alternative to strictly construing venue provisions in favor of defendants, the Court took a position as to which party venue provisions are to protect, rather than merely holding that venue should serve the convenience of the litigants. The latter

51. Id.
52. Id.
53. See generally Gilbert, supra note 8, at 413.
55. See generally 1 Moore’s FEDERAL PRACTICE ¶ 0.140, at 1307 (2d ed. 1948).
standard, that venue should serve the convenience of the parties, provides little guidance in those situations where the interests of the parties diverge. In short, the Court used the opportunity provided by Leroy to reemphasize a major policy consideration which should govern the interpretation of federal statutory venue provisions. Consequently, it is necessary to examine both section 1391(c) and the various tests for determining whether a defendant corporation is doing business in a district, especially in light of the Court's posture in Leroy.

C. "Transacting Business" Under Antitrust Laws

Despite the efforts of "the great group of lawyers and judges who labored to rewrite the Code in language so clear that its meaning should be plain to all," courts have had difficulty determining the nature of conduct which should constitute "doing business" within the meaning of section 1391(c). Much of the current confusion regarding what constitutes "doing business" exists because the Supreme Court has failed to articulate adequate standards to guide courts in their application of that provision of section 1391(c).

The Supreme Court has explained what conduct by a defendant is required in order to find that venue is proper under a provision similar to that in section 1391(c) contained in federal antitrust laws. This provision provides that a defendant may be sued in any district in which it "transacts business." Views differ as to whether the Court's interpretation of the "transacting business" provision provides guidance in determining the meaning of "doing business." Some courts have held the two provisions to be synonymous, but other courts have found the two provisions to be disparate on the grounds that the "transacts business" provision estab-

58. Wood, supra note 30, at 393.
60. See, e.g., Rensing v. Turner Aviation Corp., 166 F. Supp. 790, 795 (N.D. Ill. 1958) ("Neither Sec. 1391 nor the revisors' notes supply any direct indication as to deciding how much activity a foreign corporation must engage in before it is held to be doing business under this Section.").
lishes a standard which is satisfied when a defendant has had fewer contacts with a district than is necessary to support a finding that he had "done business" there. The latter view does not preclude using the Court's interpretation of transacting business to establish a minimum contact requirement. Should a court conclude that more contact is required to satisfy the "doing business" standard than is required to transact business, it may apply the "transacting business" standard, together with the requirement of additional contact.

The "transacts business" provision was first interpreted by the Court in the 1927 case of Eastman Kodak Co. v. Southern Photo Materials Co. Here the Supreme Court held that a defendant transacts business within a district "if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character." In 1948 the Supreme Court decided United States v. Scophony Corp., in which it restated its interpretation of "transacts business" when it observed that the test is "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.' " When these interpretations are viewed in conjunction with the facts of the two cases, it is possible to understand what the Supreme Court meant when it spoke of activity of a "substantial character."

In Eastman Kodak, plaintiff, Photo Materials Company, commenced a lawsuit in the Federal District Court for Northern Georgia against the Eastman Kodak Company. Photo Materials sought to recover damages for injuries caused by Kodak's violation of the Sherman Antitrust Act. The district court entered a judgment for Photo Materials which was subsequently affirmed by the Fifth Circuit Court of Appeals. In reviewing that decision, the Supreme

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64. 273 U.S. 359 (1927).
65. Id. at 373.
67. Id. at 807.
68. 273 U.S. at 367.
69. 295 F. 98 (5th Cir. 1923).
Court faced several issues, but only its analysis of the factual basis for finding that Kodak transacted business in Georgia is relevant to the question considered by this article.

Kodak manufactured and distributed photo supplies in Georgia as well as throughout the United States. In describing Kodak’s activities in Georgia which it later held to constitute transacting business there, the Supreme Court observed:

[Kodak has] for many years prior to the institution of the suit, in a continuous course of business, carried on interstate trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its traveling salesmen who visited Georgia several times in each year and solicited orders from these dealers . . . .

The continuous, systematic nature of Kodak’s promotional efforts in Georgia was crucial to the Supreme Court’s finding that Kodak transacted business in the state within the meaning of the “transacts business” provision of the Clayton Antitrust Act. Kodak’s activities in the state were in no way sporadic or unintentional.

In Scophony, the Court again faced the question of whether venue was properly laid, this time in the Southern District of New York, under the “transacts business” provision of the Clayton Act. The defendant Scophony Corporation manufactured and sold television equipment in England until late 1941, at which time it found itself in difficult financial straits and thus looked to the United States for capital. In an effort to salvage their company, Scophony directors entered into an agreement with major American motion picture and television interests pursuant to which Scophony transferred all of its equipment, patents and other interests to the United States. In 1946, the complex agreement finally collapsed and the United States commenced an antitrust action

70. 273 U.S. at 369.
71. Id. at 374.
72. Id. at 370.
74. 333 U.S. at 797-98.
75. Id. at 799.
against Scophony.

In holding that Scophony had transacted business in New York, the Supreme Court noted that Scophony had engaged in a "continuous course of business" with "continuity" and "intensity."\(^7\) That business consisted of unsuccessful attempts to manufacture and sell television equipment, the failure of which was followed by Scophony's efforts to develop profitable licensing and patent arrangements. The Court further noted that while Scophony had pursued various paths in its effort to recovery, it never stopped or even interrupted its intensive activity to save itself.\(^7\)

The Supreme Court found that the defendants transacted business within the respective districts on the basis of their sustained intensive activities within those districts. When defendants have done business of a sporadic, infrequent and insubstantial nature, such activity would hardly satisfy the substantiality requirement of the *Kodak* and *Scophony* tests for "transacts business." Should the Supreme Court conclude that the "doing business" provision of section 1391(c) requires at least as much contact with a district as is required to constitute "transacting business" as defined by *Eastman Kodak* and its progeny, then it may invalidate those tests for doing business which have allowed venue to be established under that provision on the basis of a defendant's infrequent and sporadic contact with a district.

D. *Tests for "Doing Business"*

1. The Personal Jurisdiction Test

One approach for deciding whether a corporation is doing business within a district for venue purposes requires the court to determine whether a corporation's contacts with the district are sufficient to support the court's exercise of personal jurisdiction. Under the jurisdictional test for doing business, a court must determine whether a defendant has "minimum contacts with the forum so that maintenance of the suit is reasonable and does not offend 'traditional notions of fair play and substantial justice.'"\(^7\) Under

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76. Id. at 810-11.
77. Id. at 812.
78. Long v. Victor Prod. Corp., 297 F.2d 577, 580 (8th Cir. 1961). Accord, Houston Fear-
this test a defendant need have no more contact with the forum
district to support a finding of proper venue under the "doing bus-
ness" provision of section 1391(c) than is necessary to permit the
forum court's exercise of personal jurisdiction under a state long
arm statute.79

Although some commentators have approved the preceding ap-
proach,80 certain courts have rejected it on the ground that a de-
fendant should be required to have more contact with a district to
establish venue than is necessary to permit a court to constitution-
ally exercise personal jurisdiction under a state long arm statute.81
Equating the requirements for venue and personal jurisdiction
ignores a fundamental distinction between the rationales of venue
and jurisdiction.82 Venue is a doctrine intended to protect defend-
ants from having to defend themselves in remote forums, while
long arm statutes are designed to allow aggrieved plaintiffs to gain
jurisdiction over defendants who at one time availed themselves of
the protection offered by the laws of the forum but have since
departed.83

Another flaw in this test is that it may permit venue in a district
where the defendant has had only sporadic contact which never-
theless would be sufficient to support jurisdiction under a typical
state long-arm statute.84 While such statutes generally authorize
courts to exercise jurisdiction when the defendant has had pur-
poseful or foreseeable contact with the district,85 such minimal
contact should not be held sufficient to satisfy the continuous and
systematic elements of a more rigorous test for doing business.86

79. See, e.g., Stith v. Manor Baking Co., 418 F. Supp. 150, 155 (W.D. Mo. 1976); West-
80. 1 MOORE'S FEDERAL PRACTICE, ¶ 0.142 at 1411 (2d ed. 1948).
83. Id.
84. Note, supra, note 36, at 314.
85. Id.
86. See, e.g., Scott Paper Co. v. Scotts Liquid Gold, Inc., 374 F. Supp. 184 (D. Del. 1974);
Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966); Medicenters of Am., Inc. v. T and V
36, at 314-16.
A review of certain cases which questioned the court's power to exercise personal jurisdiction reveals why the constitutionally mandated minimum contacts test is an inappropriate standard to apply in determining whether a defendant was doing business in a district for purposes of establishing venue under 28 U.S.C. § 1391. These cases show that the constitutional requirement for the exercise of personal jurisdiction requires truly minimal contact with a district. When the question of whether a corporate defendant was doing business in a district is resolved through an application of a minimum contacts analysis, a court may reach an affirmative conclusion on the basis of sporadic or inconsequential conduct which would not support such a finding were the court to use the more appropriate analysis suggested by the requirement that conduct which constitutes doing business be continuous and systematic.

In *International Shoe Co. v. Washington*, the Supreme Court articulated the fundamental contemporary standard for determining when a court may exercise personal jurisdiction over an absent defendant without violating the due process clause of the fourteenth amendment. The case arose after the State of Washington attempted to collect delinquent contributions which the defendant International Shoe had failed to pay into the state unemployment compensation fund. Notice of the assessment was served pursuant to a Washington State statute upon a salesman employed in Washington by International Shoe, and notice was also mailed to International Shoe's principal place of business in St. Louis, Missouri. International Shoe contended that its activities within the state were insufficient to establish its presence there, and consequently, it was a violation of due process for the state to subject it to suit. The United States Supreme Court affirmed the Washington Supreme Court's finding that International Shoe was subject to the personal jurisdiction of the state court. That decision was based upon International Shoe's "regular and systematic" activity within the state. Although it had neither an office nor a stock of merchandise there an although its representatives never made contracts for the purchase or sale of goods, the Washington Supreme

87. 326 U.S. 310 (1945).
88. Id. at 312.
89. Id. at 313.
Court found "that the regular and systematic solicitation of orders in the state by [defendant's] salesmen, resulting in a continuous flow of [defendant's] product into the state, was sufficient to constitute doing business."\textsuperscript{90} During the years in question, International Shoe employed eleven to thirteen salesmen who resided in Washington. Their principal activities were restricted to Washington, and on occasion they rented rooms in hotels or business buildings for the display of their goods.\textsuperscript{91}

In approving the Washington Supreme Court's holding, the Supreme Court observed that "[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws."\textsuperscript{92} The Supreme Court further stated:

\begin{quote}
[T]he activities carried on in behalf of [International Shoe] in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which [International Shoe] received the benefits and protection of the laws of the state . . . .\textsuperscript{93}
\end{quote}

Had the foregoing requirement of systematic and continuous contact remained the standard for determining when a defendant's conduct made it amenable to a court's exercise of personal jurisdiction, then the test of whether a defendant's contacts with a state were sufficient to subject it to a court's exercise of personal jurisdiction would also be an acceptable measure of whether a defendant's conduct within the district constituted doing business for the purpose of establishing venue. This standard, however, has not been adhered to by the Court. Instead, the Supreme Court has, until recently, permitted a steady erosion in the quantity and quality of contacts which a defendant must have with a state to permit the exercise of personal jurisdiction.

This erosion is exemplified by the Supreme Court's holding in

\textsuperscript{90} Id. at 314.
\textsuperscript{91} Id. at 313-14.
\textsuperscript{92} Id. at 319.
\textsuperscript{93} Id. at 320.
McGee v. International Life Insurance Co.\textsuperscript{94} This case involved a suit by a California resident, who was a beneficiary of a life insurance policy, against a Texas insurance company which had reinsured a California decedent. The defendant insurance company sent its policy of reinsurance to the California policy holder, who sent premium payments by mail to the insurance company's Texas office. The record indicated that neither the original insurer nor the defendant reinsurer had ever had an office or an agent in California.\textsuperscript{95} Moreover, the defendant had never solicited or done any business in California, other than that of the single policy at issue. The plaintiff successfully sued in California and then sought to have the judgment enforced by a Texas court, but the latter refused on the ground that the California court could not establish personal jurisdiction over the Texas defendant by service of process outside California. In reversing the Texas court and holding that the California court had properly exercised personal jurisdiction, the Supreme Court reasoned that "[i]t is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State."\textsuperscript{96} The Supreme Court emphasized the contacts of the plaintiff and the insurance contract with California, but said little about the defendant's lack of contacts with California, other than to note that it had abandoned "doing business" as a standard for determining state court jurisdiction over absent corporate defendants.\textsuperscript{97} The reasoning in McGee seriously undermines the use of the minimum contacts test in determining whether a defendant was doing business in a district for purposes of venue. Commentators have concluded that McGee made "it clear that personal jurisdiction may be upheld on the basis of very minimal contacts with the forum state."\textsuperscript{98}

\textsuperscript{94} 355 U.S. 220 (1957).
\textsuperscript{95} Id. at 222.
\textsuperscript{96} Id. at 223.
\textsuperscript{97} Id. at 222.
\textsuperscript{98} 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1067 at 237 (1969). The recent cases of World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) and Kulko v. California Superior Court, 436 U.S. 84 (1978) have somewhat limited the extent to which state courts may exercise personal jurisdiction over absent defendants. However, the test for the exercise of personal jurisdiction still requires far less contact with a district than would probably be required to find that a defendant was doing business in a district for purposes of § 1391(c), given the Court's position in Leroy.
The importance of the foregoing distinction between the minimum contacts test for venue purposes and for long arm statute purposes will be even more critical in light of the Supreme Court's concern about protecting defendants from litigating tenuous claims in forums with which they have had little contact. Should the Court wish to pursue the trend it began in Leroy, then it seems likely that the minimum contacts test for doing business will come under intense scrutiny. A challenger of this test may profitably compare the substantial contacts requirement articulated by the Supreme Court in Kodak and Scophony with the minimum contacts requirement of the personal jurisdiction test. Such a comparison will reveal that under the latter test, the doing business provision of the general venue statute serves the interests of plaintiffs while offering little protection to defendants, a result that is inconsistent with the principles announced in Leroy. Thus, the invalidation of the minimum contacts test seems possible, if not probable.

2. The Licensed to Do Business Test

The second principal test currently used by courts to determine "doing business" under section 1391(c) was articulated by the Federal District Court for the Eastern District of Pennsylvania in Remington Rand, Inc. v. Knapp-Monarch Co.100 This test provides that a corporation will be held to be doing business in a district within the meaning of section 1391(c) "if its activities within the district are such that its business has become localized and is an operation within the district so that some state would probably require the foreign corporation to be licensed as a condition precedent to doing that business."101 This test is a product of the Remington court's analysis of the Supreme Court's decision in Neirbo Co. v. Bethlehem Shipbuilding Corp.102 and the legislative response to the holding of that case.

In Neirbo, the Supreme Court held that the appointment by a foreign corporate defendant of an agent for receipt of service of

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99. 443 U.S. at 184.
101. Id. at 620-21.
102. 308 U.S. 165 (1939).
process as required by the law of the state in which the corporation was doing business constituted a waiver of the provisions of the federal venue statutes. That holding provided support for the anomalous rule that a law-abiding corporation which obtained a license thereby waived a defense based on improper venue while a corporate defendant that failed to obtain the required license would be allowed to assert that defense. The court in *Remington* concluded that the revision of the Judicial Code to include a venue provision which applies solely to corporations represents a codification of the *Neirbo* holding. The court in *Remington* further stated that the language of section 1391(c) which provides that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business" is an attempt to facilitate the establishment of venue for actions against defendants who fail to comply with state licensing requirements. Thus, the basic test for determining whether a defendant was doing business is whether a license would be required.

Although the *Remington* court's conclusion is not without support, and has been adopted by several courts, the licensing test must be viewed with skepticism, especially in view of the *Leroy* Court's disfavor toward expansively construed venue provisions. Even before *Leroy*, one commentator questioned the soundness of the licensing test, reasoning first, that if Congress had desired the usage of this test, it could easily have provided for it in the statute, and second, that there is nothing to suggest that "doing business" means "should get a license."

In addition to the foregoing weakness, the reference of the licensing tests to state laws governing the licensure of business ac-

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104. Id.
106. 139 F. Supp. at 617.
tivity raises two problems which further undermine its validity. The test, as stated in Remington, permits a court to find that the defendant was doing business if the defendant's conduct in the district was such that some state would probably require it to obtain a license.\(^{110}\) The principal weakness of this test is that it allows venue in the federal courts to be governed by reference to state law. Consequently, the state statute which mandates the acquisition of a license to do business on the basis of the most minimal business activity will, nevertheless, establish a national test for doing business. Under this test, the doctrine of venue is governed by a state statute which in all likelihood was enacted for purposes other than to protect defendants from having to litigate claims in remote forums. It is difficult to believe that Congress intended by the adoption of section 1391(c) to allow a single state legislature to dramatically expand venue in the federal courts.

The Remington licensing test provision that only "some" states require a license for such activity apparently constitutes an attempt to relieve courts and attorneys of having to review the business licensing statutes of every state.\(^{111}\) Nevertheless, certain courts have still had difficulty applying the test. Most troublesome is the tendency of some courts to reach a conclusion regarding whether a license would be required, without ever applying the provisions of a particular state statute to the facts of the case.\(^{112}\) For example, in Lubrizol Corp. v. Neville Chemical Co., the court found venue improper merely on the grounds that it "cannot conclude that defendant's business can in any way be found to be 'localized' within the State of Ohio to such a degree that some state would require it to be licensed."\(^{113}\) Although the facts of Lubrizol suggest that the court reached the correct result, it is difficult to believe that the Remington court could have envisioned that its test would be applied in such an uncritical manner.

\(^{110}\) 139 F. Supp. at 620-21.

\(^{111}\) In Remington, the court noted that "[a] test for 'doing business' which requires examination of the laws of all the states to determine whether any one State might require a license on the basis of the activity engaged in would be a useless yardstick." 139 F. Supp. at 613.


In addition to the foregoing problems, those courts which do look to the specific provisions of a state licensing statute tend to look exclusively to the statutes of the state in which they are sitting.\textsuperscript{114} Such a parochial perspective conflicts with the \textit{Remington} licensing test because it may permit a finding that a defendant was not doing business based upon the licensing law of that particular state which happened to require an unusually great amount of activity before a license is required. For instance, in \textit{Philadelphia Housing Authority v. American Radiator \& Standard Sanitary Corp.}, the court concluded that although the defendant's independent sales representative made sales in the district of more than $300,000 over the course of less than four years, such sales did not constitute "doing business" by the defendant as measured by the licensing test, because the applicable Pennsylvania statute provided "that a foreign corporation 'effecting sales through independent contractors need not be licensed to carry on such activity in the Commonwealth.'\textsuperscript{115} While the court apparently reached the correct result under Pennsylvania law, it erred when it failed to review the licensing statutes of other states to determine whether some state requires even corporations selling products through independent representatives to be licensed. Had the court pursued that course, it might have discovered that certain states did require foreign corporations selling through independent representatives to be licensed, and consequently, it could have allowed venue on the grounds that the licensing test for doing business was satisfied.

Venue provisions are generally intended to protect defendants from being unfairly forced to litigate in remote forums. It is difficult to see the fairness in finding that a corporate defendant may be required to litigate a claim in a remote forum with which it has had little contact, merely because some state requires the acquisition of a license as a condition precedent to activity of the nature undertaken by the defendant. The licensing test appears especially suspect after \textit{Leroy}, since it allows a plaintiff to establish venue


under the "doing business" provision of section 1391(c) in a forum under a state statute which provides that the slightest activity must be licensed. That approach yields a result analogous to the result produced in *Leroy* by the lower court's expansive interpretation\(^\text{116}\) of section 1391(b). Given the Court's concern with protecting defendants, it may decide to invalidate the license test because of the broad venue which it could permit.

**III. A Better Standard For Doing Business**

In lieu of the licensing and personal jurisdiction tests for determining whether a corporate defendant is doing business in a district within the meaning of section 1391(c), the federal courts should consider other factors in making that determination. Although the careful consideration of these factors is more difficult than merely concluding that some states would require a license to carry on such activities, or that those activities constitute the minimum contacts necessary to support the exercise of personal jurisdiction, this approach should produce findings which are consistent with the Supreme Court's recent statement in *Leroy* regarding the purposes of the federal venue statutes. Under the following approach, defendants will be more protected from having to defend themselves in remote forums where they have had contacts which are only minimal or which would require a license under the law of some state.

In determining whether a corporate defendant does business within a district, the court should consider the quantity and quality of a defendant's contacts with the district.\(^\text{117}\) Moreover, the court should not look at events or activities unrelated to the defendant's commercial endeavors in the state. Instead, the court should review "the sum total of sundry relevant activities considered in light of the circumstances of the particular case."\(^\text{118}\)

Given the infinite variety of contacts which a corporation may

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have with a district over a period of time, courts should find the following factors to be particularly significant in determining whether a defendant's contacts were sufficiently systematic and substantial to constitute doing business for venue purposes:

1. Whether the defendant engaged in sales solicitation and advertising in the district.¹¹⁹ Such activities may be in the form of mail order catalogues, letters and good will tours by company representatives.¹²⁰
2. Whether the defendant's business activities in the district were regular and continuous.¹²¹
3. Whether an ordinary business person would consider the dollar volume of the defendant's sales in the district to be substantial.¹²²
4. Whether the defendant's sales in the district were a "substantial" percentage of the total sales of the district.¹²³

By reviewing the facts of a case with an eye towards the nature and quantity of the defendant's contacts with the district, a court will engage in what might be characterized as significant contacts analysis. Because of the great importance which facts play in findings of venue, this analysis must be undertaken with a special sensitivity regarding the nature of the defendant's business. In so doing, the federal courts will better serve the ends of the venue statutes which the Court identified in Leroy, because it will enable the courts to attach proper weight to a defendant's contacts with a district.

IV. CONCLUSION

The various sections of the federal venue statute¹²⁴ are riddled with ambiguous provisions, the satisfaction of which is frequently measured through the application of confusing and sometimes contradictory tests. Those provisions which permit suit to be brought

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¹²¹ 121. 448 F. Supp. at 550.
in the district where the claim arose\textsuperscript{125} or where the defendant is doing business\textsuperscript{126} have proven especially difficult for the courts to administer.

In \textit{Leroy v. Great Western United Corp.}, the Supreme Court clarified the meaning of “where the claim arose” and more importantly, emphasized its concern that the federal venue statutes be construed so as to protect defendants from being forced to litigate in inconvenient forums.\textsuperscript{127} The Supreme Court’s admonition that courts disregard the plaintiff’s interests while considering the convenience of witnesses and defendants establishes a standard for the interpretation of venue provisions. That standard could have a dramatic effect upon the interpretation of various venue provisions, including the provision of section 1391(c) which permits venue to be laid in any district where a corporate defendant is “doing business.” The doing business provision is especially susceptible to a considerably narrower construction in the wake of \textit{Leroy} because the two principal tests which courts apply to determine whether a defendant was doing business in a district allow plaintiffs to establish venue in districts where defendants have had infrequent contact. In such cases the interests of the aggrieved plaintiffs are served at the expense of the defendant—an approach which is the antithesis of the concern articulated in \textit{Leroy}.

Consequently, the federal courts should discard the test which provides that a defendant is doing business in a district for purposes of establishing venue under 28 U.S.C. § 1391(c) if its conduct within the state was such that some state would require a foreign corporation to obtain a license before it could legally engage in such conduct.\textsuperscript{128} Similarly, courts should reject the test for “doing business” which provides that if a defendant’s contact with a state is sufficient to support the exercise of personal jurisdiction, then such contact constitutes “doing business” for venue purposes.\textsuperscript{129}

As an alternative, the courts should look to a variety of factors including the continuity, substantiality, and regularity of advertis-

\textsuperscript{125} \textit{Id.} § 1391(b) (1976).
\textsuperscript{126} \textit{Id.} § 1391(c) (1976).
\textsuperscript{127} \textit{See} note 50 \textit{supra} and accompanying text.
\textsuperscript{128} \textit{See generally} note 101 \textit{supra} and accompanying text.
\textsuperscript{129} \textit{See generally} note 79 \textit{supra} and accompanying text.
ing, solicitation, and sales in a state. Such factors are better indicia of whether a defendant's conduct in a district was sufficiently continuous and substantial so as to constitute "doing business" for venue purposes. Through such an analysis, courts may better protect defendants from having to litigate claims in inconvenient forums where they have had but slight contact.

Should Congress be satisfied with the presently enlarged scope of venue under the doing business standard, then it would be wise to modify section 1391(c) by providing a more explicit standard to guide the federal courts in determining whether a defendant was doing business. Otherwise, federal courts may, pursuant to the standards announced in Leroy, construe more narrowly "doing business" to comply with the Supreme Court's mandate that venue statutes be interpreted with an eye toward protecting defendants, despite the adverse impact which such a construction may have on plaintiffs.