A SIMPLE QUESTION THAT ISN'T SO SIMPLE: WHERE DO ENTITIES RESIDE FOR VENUE PURPOSES?

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INTRODUCTION

The Federal Courts Jurisdiction and Venue Clarification Act of 2011[1] made a number of changes to the removal and venue statutes. The legislation was vetted by prominent legal academics as well as by organizations such as the Judicial Conference of the United States, the American Bar Association, the Federal Bar Association, the U.S. Chamber of Commerce, and Lawyers for Civil Justice.[2] The legislation enjoyed support from both Republicans and Democrats, having co-sponsors from both parties.[3] It unanimously passed both the House and Senate.[4] President Obama, a former law professor, signed the legislation into law.[5]

Despite the attention it received, the Act is not perfect. One of the changes that the Act made was to add a section to the venue statutes to address the residency of corporate and non-corporate entities that are named as defendants. Section 1391(c)(2) provides that such entities are deemed to reside in any district in which they are subject to personal jurisdiction for the claims asserted in the action.[6] The section seems to have been based on a proposal by

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[1] Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011).

[2] H.R. REP. NO. 112-10, at 2 (2011).

[3] The House Bill, H.R. 394, was sponsored by Rep. Lamar Smith (R-Tex). The co-sponsors were Reps. Howard Coble (R-N.C.), John Conyers, Jr. (D-Mich.), and Henry C. Johnson, Jr. (D-Ga.). *See Bill Summary & Status, 112th Congress (2011-2012), H.R. 394, Cosponsors*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00394:@@@P (last visited Jan. 31, 2015). The Senate Bill, S. 1636, was sponsored by Sen. Amy Klobuchar (D-Minn.). The co-sponsors were Patrick Leahy (D-Vt.) and Jeff Sessions (R-Ala.). *See Bill Summary & Status, 112th Congress (2011-2012), S. 1636, Cosponsors,* LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01636:@@@P (last visited Jan. 31, 2015). For the sponsors' party affiliations, see CONG. BIOGRAPHICAL DIRECTORY, http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Jan. 31, 2015) (type in the name of the member for his or her party affiliation).

It is not clear who actually drafted the bill. Most likely, it was drafted by the House Office of Legislative Counsel. For an informative discussion of how federal legislation is drafted, see Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014).

[4] *See Bill Summary & Status, 112th Congress (2011-2012), H.R. 394, All Congressional Actions,* LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00394:@@@X (last visited Jan. 31, 2015).

[5] *Id.* President Obama signed the legislation on December 7, 2011.

[6] 28 U.S.C. § 1391(c)(2) (2012). For the text of the statute, see *infra* text accompanying note 49.

the American Law Institute (ALI) that was designed to replace the prior version of § 1391(c), a section that deemed corporations to be residents of the districts in which they would be subject to personal jurisdiction if the districts were separate states.[7]

Although the drafters of the Act added § 1391(c)(2), they did not eliminate the prior version of § 1391(c). They instead retained it as § 1391(d).[8] It is not clear why they did that—but it is clear that in doing so they created a conflict between the two sections. Section 1391(c)(2) deems any entity, including a corporation, to be a resident of any district in any state in which it is subject to personal jurisdiction regardless of whether it has any contacts with the particular district. By contrast, § 1391(d) deems a corporation to be a resident of a district in a multiple-district state only if it has contacts with the particular district.

One might be tempted to deal with the conflict by glossing over the language of the two sections and applying them equally to corporate and non-corporate entities. That is what the courts have done so far.[9] Judges and lawyers, however, should avoid rewriting statutes. To paraphrase an old saying, "we have to play the cards that Congress dealt us."[10] This Article proposes that we play the cards by interpreting § 1391(c)(2) as governing the residence of corporate and non-corporate entities in states with one judicial district and § 1391(d) as governing the residence of corporate entities in states with more than one judicial district.

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[7] *See infra* notes 67-72 and accompanying text.

[8] 28 U.S.C. § 1391(d) (2012). For the text of the statute, see *infra* text accompanying note 52.

[9] *See* Presidio Home Care, LLC v. B-East, LLC, No. CV-14-1864-RSWL, 2014 WL 2711299, at *3 (C.D. Cal. June 13, 2014) (applying both sections to a limited liability company); Sprit Airlines, Inc. v. Ass'n of Flight Attendants-CWA, No. 3:13-CV-4651-D, 2014 WL 585344, at *3 (N.D. Tex. Feb. 14, 2014) (applying § 1391(d) to a labor union); ICA Grp., LLC v. Taggart Global, LLC, No. 12-6156, 2013 WL 159936, at *1 (E.D. Pa. Jan. 15, 2013) (treating a limited liability company as a corporation and applying § 1391(d)); Graham v. Dyncorp Int'l, Inc., 973 F. Supp. 2d 698, 701 n.2 (S.D. Tex. 2013) (same). The courts applied the same standards to both types of entities prior to the 2011 legislation. *See infra* note 44.

[10] The most common form of the saying is "you have to play the hand you're dealt." It means that "you must accept and deal with the things that happen to you in your life." *Deal*, MERRIAM-WEBSTER LEARNER'S DICTIONARY, http://www.learnersdictionary.com/definition/deal (last visited Jan. 31, 2015).

After providing an overview of the federal venue statutes,[11] this Article explains why §§ 1391(c)(2) and 1391(d) are inherently contradictory.[12] This Article next uses the canons of statutory interpretation to harmonize the two sections by limiting § 1391(c)(2) to single-district states and § 1391(d) to multiple-district states.[13] This Article then explores the relationship between venue and personal jurisdiction in light of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*.[14] The relationship suggests that this Article's proposed interpretation of the statutes will result in a significant difference in the way that corporate and non-corporate entities are treated—but only in theory. In reality, the difference will be minor.[15]

Lastly, this Article identifies and attempts to resolve three other issues raised by §§ 1391(c)(2) and 1391(d): (1) whether corporations reside in every district of the state in which they are incorporated, (2) whether state long-arm statutes are relevant to the residency determination for venue, and (3) whether subsequent waivers of personal jurisdiction are sufficient to establish residency for venue.[16]

I. AN OVERVIEW OF THE FEDERAL VENUE STATUTES

In order to be a proper forum, a court must have subject matter jurisdiction of the action, personal jurisdiction over the defendant, and proper venue. Both personal jurisdiction and venue are concerned to some extent with protecting the defendant from being forced to defend itself in an inconvenient forum. But they have different requirements that flow from different sources.

Personal jurisdiction is primarily a constitutional requirement that is grounded in the Due Process Clause. For a court to assert personal jurisdiction over a defendant, the defendant must have sufficient contacts with the territory of the sovereign that created the court "such that the maintenance of the suit does not offend 'traditional notions of fair play and

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[11] *See infra* Part I.
[12] *See infra* Part II.
[13] *See infra* Part III.A-C.
[14] 134 S. Ct. 746 (2014).
[15] *See infra* Part III.D.
[16] *See infra* Part IV.

substantial justice.'"[17] Venue is a purely statutory requirement. For a court to be a proper venue, it must be the court for the geographical area that the legislature has designated as a proper place for the action to be brought.[18]

Personal jurisdiction in federal court normally exists on a statewide level. As a general rule, a federal court has personal jurisdiction if a state court of the state in which the federal court is sitting has personal jurisdiction.[19] In other words, a federal

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[17] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[18] Section 1390 defines venue as "the geographic specification of the proper court or courts for the litigation of a civil action that is within the subject-matter jurisdiction of the district courts in general." 28 U.S.C. § 1390(a) (2012).

[19] Rule 4(k)(1)(A) provides: "Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located . . . ." FED. R. CIV. P. 4(k)(1)(A). There are three other situations in which a federal court has personal jurisdiction over a defendant. The first is if a party is joined under the compulsory joinder provisions of Rule 19 or under the impleader provisions of Rule 14(a) and the party is served within 100 miles of the federal courthouse in which the action is pending. *See* FED. R. CIV. P. 4(k)(1)(B). This is sometimes called the "100-mile bulge" rule. *See* Fitzgerald v. Wal-Mart Stores E., LP, 296 F.R.D. 392, 394 (D. Md. 2013). In addition to being served within the 100-mile bulge, the party must have contacts with the bulge area. *See* Quinones v. Pa. Gen. Ins. Co., 804 F.2d 1167, 1177 (10th Cir. 1986); *Fitzgerald*, 296 F.R.D. at 394; Carpenter v. Victoria's Secret Stores, LLC, No. 09-CV-2068-A/P, 2011 WL 1750755, at *3 (W.D. Tenn. Feb. 11, 2011).

The second situation is when the plaintiff asserts a claim for which there is a national service of process statute. *See* FED. R. CIV. P. 4(k)(1)(C). Examples of claims for which there is a national service process statute include, among others, antitrust claims against corporate defendants (15 U.S.C. § 22 (2012)), as well as claims arising under the 1934 Securities Exchange Act (15 U.S.C. § 78aa (2012)), the Racketeer Influenced and Corrupt Organizations Act, commonly called "RICO" (18 U.S.C. § 1965(b) (2012)), statutory interpleader (28 U.S.C. § 2361 (2012)), and the False Claims Act (31 U.S.C. § 3732(a) (2012)). If there is a national service of process statute, then the defendant may be subject to personal jurisdiction in every district. As a result, an entity defendant may be deemed to reside in every district for venue purposes under §§ 1391(c)(2) and 1391(d). For a criticism of this result, see Rachel M. Janutis, *Pulling Venue up by Its Own Bootstraps: The Relationship Among Nationwide Service of Process, Personal Jurisdiction, and § 1391(c)*, 78 ST. JOHN'S L. REV. 37 (2004).

The third situation is when the plaintiff asserts a federal claim against a defendant who is not subject to personal jurisdiction in any state court (i.e. Rule 4(k)(1)(A) does not apply) but who has sufficient contacts with the United States as a whole. *See* FED. R. CIV. P. 4(k)(2). A plaintiff who seeks to invoke Rule 4(k)(2) does not have to conduct a fifty state analysis to satisfy the requirement that the defendant is not subject to personal jurisdiction in any state court. The requirement is deemed satisfied if the defendant contends that it is not subject to personal jurisdiction in the state in which the federal court is sitting but fails to identify a state in which it would be subject to personal jurisdiction. *See* Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1294

court can assert personal jurisdiction if both the state long-arm statute and Due Process Clause of the Fourteenth Amendment are satisfied.[20] If both are satisfied, then the defendant will be subject to personal jurisdiction in every federal district court in the state.

Venue exists on a district-wide level. The federal venue statutes specify the federal judicial district(s) in which the action can be brought.[21] Federal judicial districts are normally located within one state.[22] Some states have only one judicial district. That is true, for example, of Nebraska.[23] Other states have more than one judicial district. That is true of California, which is divided into four judicial districts.[24] Because the contacts the

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(Fed. Cir. 2012); Oldfield v. Pueblo de Bahia Lora, S.A., 558 F.3d 1210, 1218 n.22 (11th Cir. 2009); Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 461-62 (9th Cir. 2007).

[20] *See, e.g.*, ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 391 (4th Cir. 2012); Felland v. Clifton, 682 F.3d 665, 672 (7th Cir. 2012); Touchcom, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1411 (Fed. Cir. 2009).

[21] There are currently 94 federal district courts, 91 of which are Article III courts and three of which are not. The Article III courts include the district courts for the fifty states, the District of Columbia, and the District of Puerto Rico. The non-Article III courts include the district courts for the District of Guam, the District of the Northern Mariana Islands, and the District of the Virgin Islands. *See* KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 214 (3d ed. 2012). Those three courts are created pursuant to Congress's power to regulate the territories under Article IV of the Constitution. *See* Nguyen v. United States, 539 U.S. 69, 71-72 (2003) (discussing the status of the District Court of Guam).

Some districts are further divided geographically into divisions. *See, e.g.*, 28 U.S.C. § 83 (2012) (dividing the Eastern District of Arkansas into five divisions and Western District into six). Divisions are essentially administrative subdivisions with individual courthouses and clerk's offices. Judges normally have their chambers in one of the courthouses, so in that sense, they are judges for the division in which that courthouse is located. By local rule or standing order, a district court may create divisional venue and require that an action be brought or assigned to a particular division. *See* 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3809, at 234 (4th ed. 2013) [hereinafter 14D WRIGHT & MILLER].

[22] One exception is the District of Wyoming. It includes the State of Wyoming and the parts of the Yellowstone National Park that are in Montana and Idaho. 28 U.S.C. § 131 (2012).

[23] 28 U.S.C. § 107 (2012). There are a number of other states with only one judicial district. Among them are Delaware, South Carolina, and Utah. *See* 28 U.S.C. §§ 87, 121, 125 (2012).

[24] California is divided into the Northern, Eastern, Central, and Southern Districts. 28 U.S.C. § 84 (2012). There are a number of other states with multiple districts. Among them are Missouri (two districts), Oklahoma (three districts), and Texas (four districts). *See* 28 U.S.C. §§ 105, 116, 124 (2012).

defendant has with a multiple-district state may be concentrated in one district, it is possible for personal jurisdiction to exist in all of the districts but for venue to be proper in only one of them.

Section 1391 is often called the "general venue statute"[25] because it applies to most of the claims that can be brought in federal court.[26] The statute provides three ways of establishing proper venue. The first is on the basis of residence. Section 1391(b)(1) provides that when the defendants are all residents of the same state, an action may be brought in a district of that state in which any defendant resides.[27] The second is on the basis of events or property. Section 1391(b)(2) provides that an action may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. If the action involves property, then the action can be brought in a judicial district in which a substantial part of the property is located.[28]

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[25] *See, e.g.*, KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718, 723 (7th Cir. 2013); Alliance Health Grp., LLC v. Bridging Health Options, LLC, 553 F.3d 397, 400 (5th Cir. 2008); D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 105 (2d Cir. 2006).

[26] Some federal statutory claims have their own special venue statutes. For a partial listing, see 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 110.60 (3d ed. 2014). For another although less current listing, see AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 253-304 (2004). Most of the special venue statutes supplement § 1391, meaning that venue may be established under § 1391 or the special venue statute. That is true, for example, of the venue provisions of the Federal Arbitration Act. *See* Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000). Others are exclusive, meaning that venue may only be established under the special venue statute. That is true, for example, of the venue provisions of Title VII of the Civil Rights Act of 1964. *See* Pinson v. Rumsfeld, 192 F. App'x 811, 817 (11th Cir. 2006); Stebbins v. State Farm Mut. Auto. Ins. Co., 413 F.2d 1100, 1102-03 (D.C. Cir. 1969).

[27] The statute provides that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(b)(1) (2012). The current version is a product of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (2011). The prior version of the residency provision read: "a judicial district where any defendant resides, if all defendants reside in the same State." 28 U.S.C. §§ 1391(a)(1), (b)(1) (2006), *amended by* 28 U.S.C. § 1391(b)(1) (2012). There was some concern about how that prior version might be applied in an action against an individual defendant and a corporate defendant. The concern was that if there was a corporate and an individual defendant who both resided in one state, the statute could be read as making venue proper in a district of another state in which only the corporate defendant resided. H.R. REP. NO. 112-10, at 19 (2011). That concern led Congress to replace the prior version of the statute with the current version. *Id.*

[28] 28 U.S.C. § 1391(b)(2) (2012).

The third is on the basis of personal jurisdiction. Section 1391(b)(3) provides that an action may be brought in a judicial district in which any defendant would be subject to personal jurisdiction. This subsection is sometimes called the "fallback provision" because it only applies if there is no district in which venue is proper under the other two subsections.[29]

Section 1391(c) defines residence for venue purposes.[30] Section 1391(c)(1) governs the residence of natural persons and provides that natural persons are residents of the district in which they are domiciled.[31] Section 1391(c)(2) governs the residency of all entities, regardless of whether they are incorporated or

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[29] *See, e.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Court, 134 S. Ct. 568, 578 (2013); KM Enters., Inc. v. Global Traffic Techs., Inc., 725 F.3d 718, 733 (7th Cir. 2013); Gridiron Mgmt. Grp. LLC v. Wranglers, No. 8:12CV3128, 2012 WL 5187839, at *5 (D. Neb. Oct. 18, 2012). Taken in isolation, the fallback provision seems to be very helpful to plaintiffs. It allows plaintiffs to bring an action in a district in which one but not all of the defendants are subject to personal jurisdiction. In practice, however, the provision is of limited utility. The reason is that while venue is necessary to make the forum a proper one, it is not sufficient. There must also be personal jurisdiction over all the defendants.

In cases involving multiple defendants, the fallback provision only applies in a multiple defendant case if the defendants are not residents of the same state (meaning venue cannot be established under § 1391(b)(1)) and a substantial part of the events or omissions giving rise the claim did not occur in any district (meaning venue cannot be established under § 1391(b)(2)). That makes it hard to imagine a situation in which the fallback provision applies and personal jurisdiction exists over all the defendants under Rule 4(k)(1)(A). One possibility is when one of the defendants has contacts with the state in which the federal court is sitting and the other defendant is served in the state, giving the state transient personal jurisdiction over that defendant. *See* 28 U.S.C.A. § 1391 cmt. at 11, 14-15 (West 2006). But that is unlikely to occur very often. Therefore, the utility of the fallback provision is limited to cases in which personal jurisdiction is established through Rule 4(k)(1)(C) (national service of process statutes) or Rule 4(k)(2) (federal claims for which personal jurisdiction cannot be established under Rule 4(k)(1)(A)). For further discussion of the fallback provision, see 14D WRIGHT & MILLER, *supra* note 21, § 3806.1.

[30] The statute opens with the clause, "[f]or all venue purposes." 28 U.S.C. § 1391(c) (2012). As a result, it applies to both the general venue statute and to all special venue statutes. *See* 17 JAMES WM. MOORE ET AL., *supra* note 26, § 110.03[4][b].

[31] 28 U.S.C. § 1391(c)(1) (2012). The standard for domicile for residency purposes is the same as the standard for citizenship purposes. *See* Al-Ghena Int'l Corp. v. Radwan, 957 F. Supp. 2d 511, 520 n.7 (D.N.J. 2013); H.R. REP. NO. 112-10, at 20-21 (2011). A person is domiciled for venue purposes where (s)he is physically present and intends to remain. *See* Farkas v. Rich Coast Corp., No. 2:13-cv-00926-LPL, 2014 WL 550594, at *10 (W.D. Pa. Feb. 11, 2014); McHenry v. Astrue, No. 12-2512-SAC, 2012 WL 6561540, at *2 (D. Kan. Dec. 14, 2012). The residency provision of § 1391(c)(2) applies to both citizens and permanent resident aliens. If a defendant does not reside in the United States, however, then venue as to that defendant is proper in any district. § 1391(c)(3).

unincorporated. Defendant entities that have the capacity to be sued are residents of "any judicial district in which" they are "subject to the court's personal jurisdiction with respect to the civil action in question."[32] Plaintiff entities are residents of the district in which they have their principal place of business.[33]

Section 1391(d) governs the residence of incorporated entities in states that have multiple judicial districts.[34] The statute only applies if the corporation is subject to personal jurisdiction in the state at issue. If it is, then the corporation resides in any district of the state in which its contacts would be sufficient to subject it to personal jurisdiction if the district were a separate state. If there is no such district, then the corporation resides in the district with which it has the most significant contacts.[35] In effect, the statute treats the districts as fictitious states and requires a court to decide whether the defendant would be subject to personal jurisdiction in one of those fictitious states.[36]

II. THE RELATIONSHIP BETWEEN § 1391(c)(2) AND § 1391(d)

Sections 1391(c)(2) and 1391(d) seem contradictory on their face. For example, assume that AB Inc. (ABI) entered into a contract with Carla to provide computer support services. ABI is incorporated in Washington and has its principal place of business in Seattle, which is located in the Western District of Washington. Carla resides and runs her business in Los Angeles, which is located in the Central District of California. The contract was

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[32] 28 U.S.C. § 1391(c)(2) (2012). The capacity of a corporation to sue and be sued in federal court is governed by the law of the corporation's state of incorporation. FED. R. CIV. P. 17(b)(2). The capacity of an unincorporated entity is governed by the law of the state in which the federal court is located. FED. R. CIV. P. 17(b)(3).

[33] 28 U.S.C. § 1391(c)(2) (2012). Although the plaintiff's residence does not provide a basis for venue under § 1391(b), it does provide a basis for venue under a few specialized venue statutes. *See* 28 U.S.C. § 1391(e)(1)(C) (actions not involving real property that are brought against employees of the United States acting in their official capacity); 28 U.S.C. § 1398(a) (actions involving orders of the Surface Transportation Board); 28 U.S.C. § 1402 (actions against the United States, including tort claims).

[34] The statute opens with the clause, "[f]or purposes of venue under this chapter." 28 U.S.C. § 1391(d) (2012). Therefore, unlike § 1391(c), § 1391(d) only applies to the venue statutes in Chapter 87 of the United States Code.

[35] 28 U.S.C. § 1391(d) (2012).

[36] One federal court has referred to § 1391(d) analysis as "a fictitious personal jurisdiction analysis." Zinn v. Gichner Sys. Grp., No. CIV.A.-93-5817, 1994 WL 116014, at *2 (E.D. Pa. Apr. 5, 1994).

negotiated in Los Angeles and required ABI to perform services in Los Angeles. ABI subsequently breached the contract by performing shoddy services, so Carla claims. She also claims she suffered $100,000 in damages as a result.

Carla plans to sue ABI in federal court for breach of contract. There is federal subject matter jurisdiction because ABI and Carla are citizens of different states and the amount in controversy exceeds $75,000.[37] There is personal jurisdiction over ABI in California. The California long-arm statute allows the California courts to assert personal jurisdiction when it would be constitutional for them to do so.[38] The assertion of personal jurisdiction over ABI would be constitutional because ABI has established minimum contacts with California by negotiating a contract in California that required the corporation to provide services in California, and the claim for breach of contract arises out of the contract.[39]

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[37] *See* 28 U.S.C. § 1332(a)(1) (2012). An individual like Carla is a citizen of the state in which she is domiciled. *E.g.*, Hall v. Curran, 599 F.3d 70, 72 (1st Cir. 2010). A corporation like ABI is a citizen of the state(s) in which it is incorporated and the state in which it has its principal place of business. § 1332(c)(1).

[38] *See* CAL. CIV. P. CODE § 410.10 (West 2004). There are two primary types of long-arm statutes. The first type gives the courts the authority to assert personal jurisdiction whenever doing so would be constitutional. An example of that is the California statute. The second type gives the courts the authority to assert personal jurisdiction when the defendant commits one or more of the acts enumerated in the statute. An example of the second type is the New York statute. *See* N.Y. C.P.L.R. § 302(a) (McKinney 2010). If the court determines that the assertion of personal jurisdiction is authorized by this type of long-arm statute, it must then determine whether the assertion of personal jurisdiction is constitutional. *See* 16 JAMES WM. MOORE ET AL., *supra* note 26, § 108.60[3][a].

Some states combine the two types in the disjunctive. *See* NEB. REV. STAT. § 25-536 (2008); 42 PA. CONS. STAT. ANN. § 5322 (West 2004). The practical effect of doing so is to render irrelevant the portions of the statute that enumerate the requisite acts. If the assertion of personal jurisdiction is (or is not) constitutional, then it is (or is not) permissible regardless of whether the acts are enumerated.

[39] Entering into a contract with a resident of the forum state is insufficient to establish contacts with the state. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985). The negotiations leading to the contract, the terms of the contract itself, the contemplated future consequences of the contract, and the parties' course of dealings must instead be evaluated to determine whether the contracting party established contacts with the state. *Id.* at 479. Here, the first three factors all support the conclusion that ABI purposefully established contacts with California. Furthermore, ABI is the seller. That is relevant because courts are more likely to find personal jurisdiction over out-of-state sellers than out-of-state buyers, in part because sellers are often more actively involved in seeking out the contractual relationship than buyers

In other words, there is specific personal jurisdiction over ABI in California. The State of California has four judicial districts: the Northern, the Southern, the Eastern, and the Western Districts. If there is personal jurisdiction over ABI in California, then there is personal jurisdiction over ABI in all four of those districts. There also seems to be proper venue in all four districts. Section 1391(c)(2) provides that a corporation resides in "any judicial district" in which the corporation "is subject to the court's personal jurisdiction with respect to the civil action in question." As explained above, ABI is subject to personal jurisdiction with respect to Carla's breach of contract action in every district in California. Therefore, venue is proper in all four districts under § 1391(b)(2) because ABI resides in all four districts under § 1391(c)(2).

Under § 1391(d) however, venue would only be proper in the Central District (which encompasses Los Angeles) because all of ABI's contacts are with the Central District. ABI negotiated a contract in the Central District that required ABI to provide services in the Central District and the claim for breach of contract arises out of the contract for services in the Central District. Were the Central District a separate state, ABI's contacts with the district would be sufficient to subject it to personal jurisdiction in that state. ABI has no contacts with any of the other districts and therefore would not be subject to personal jurisdiction if those districts were separate states. Therefore, ABI only resides in the Central District.

Something is wrong here. A corporation cannot reside in four districts and at the same time reside in only one of them. There is a conflict between §§ 1391(c)(2) and 1391(d). That raises the question of how to resolve the conflict. One way is to read § 1391(c)(2) as applying to single-district states and § 1391(d) as applying to multiple-district states. As a result, corporations and unincorporated entities would be subject to the same standards in single-district states but different standards in multiple-district states. In multiple-district states, corporate entities would have a

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are. *See* Cascade Lumber Co. v. Edward Rose Bldg. Co., 596 N.W.2d 90, 92 (Iowa 1999); *see also* Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249, 1269 (11th Cir. 2010) (facts indicating that the buyer was active rather than passive may establish minimum contacts).

residence but non-corporate entities would not. Admittedly, this reading does not make the most sense from a policy standpoint. As explained in the next section, however, this reading best reflects the wording and evolution of the statute.

III. IRONING OUT THE CONTRADICTORY WRINKLE

A. The History of the Entity Residency Provisions

Congress first addressed the issue of corporate residency for venue purposes in 1948, when it enacted § 1391(c). The statute provided that a corporate defendant was a resident of "any judicial district in which it is incorporated or licensed to do business or is doing business."[40] The statute did not address the residency of corporate plaintiffs or unincorporated entities.[41] In 1967, the Supreme Court decided *Denver & Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen*[42] and held that an unincorporated association named as a defendant resided in any district in which it was doing business.[43] The *Denver & Rio Grande* case involved a suit against a labor union. Subsequent lower court cases applied the holding of *Denver & Rio Grande* to other types of entities.[44]

In 1988, Congress amended § 1391(c) to expand the corporate residency by tying it to personal jurisdiction.[45] The statute as amended had two sentences. The structure of the statute indicates

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[40] 28 U.S.C. § 1391(c) (1948) (current version at 28 U.S.C. § 1391(c)-(d) (2012)).

[41] *See id.* Most of the courts that addressed the issue held that a corporate plaintiff could sue in the state of its incorporation. *See* Johns-Manville Sales Corp. v. United States, 796 F.2d 372, 373 (10th Cir. 1986); Rosenfeld v. S.F.C. Corp., 702 F.2d 282, 283 (1st Cir. 1983); Reuben H. Donnelley Corp. v. F.T.C., 580 F.2d 264, 269 (7th Cir. 1978).

[42] 387 U.S. 556 (1967).

[43] *Id.* at 562.

[44] Penrod Drilling Co. v. Johnson, 414 F.2d 1217, 1224 (5th Cir. 1969) (partnerships); PepsiCo, Inc. v. Bd. of Trs. of W. Conference of Teamsters Pension Trust Fund, No. 87-CIV.-3968, 1988 WL 64869, at *2 (S.D.N.Y. June 13, 1988) (pension fund); Flowers Indus., Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension Fund, 565 F. Supp. 286, 289-90 (N.D. Ga. 1983) (same). Some courts, however, said that an unincorporated entity resided in the district in which its principal place of business was located. *See* Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 841-42 (9th Cir. 1986) (plaintiff joint venture); FSI Grp. v. First Fed. Sav. & Loan Ass'n, 502 F. Supp. 356, 357 (S.D.N.Y. 1980) (plaintiff limited partnership); Reading Metal Craft Co. v. Hopf Drive Assocs., 694 F. Supp. 98, 101 (E.D. Pa. 1988) (defendant joint venture).

[45] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988) (current version at 28 U.S.C. § 1391(d) (2012)).

that the first sentence of the statute dealt with corporate residency in states with one judicial district. In those states, a corporation was deemed to reside in the state's judicial district if the corporation was subject to personal jurisdiction in the state. The second sentence dealt with corporate residency in states with more than one judicial district. In those states, a corporation was deemed to reside in the judicial district(s) in which it would be subject to personal jurisdiction were the district a separate state.

> [1] For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. [2] In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.[46]

The statute did not address the residency of unincorporated entities. That raised the question of whether Congress intended to eliminate the parity of treatment that the Supreme Court's decision in *Denver & Rio Grande* had created earlier. The courts that addressed the issue concluded that the parity of treatment survived and that the amended statute applied to both corporations and unincorporated associations alike.[47]

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[46] 28 U.S.C. § 1391(c) (2006) (amended 2011).

[47] *See, e.g.*, EnviroGLAS Prods., Inc. v. EnviroGLAS Prods., LLC, 705 F. Supp. 2d 560, 568 n.1 (N.D. Tex. 2010) (limited liability company); StormWater Structures, Inc. v. Platipus Anchors, Inc., No. H-09-2755, 2010 WL 582554, at *9 (S.D. Tex. Feb. 11, 2010) (professional association); MacCallum v. New York Yankees P'ship, 392 F. Supp. 2d 259, 263-64 (D. Conn. 2005) (partnership); Certainteed Corp. v. Cellulose Insulation Mfrs. Ass'n, No. 02-CV-6691, 2003 WL 1562452, at *5 (E.D. Pa. Mar. 24, 2003) (trade association); Kingsepp v. Wesleyan Univ., 763 F. Supp. 22, 28 (S.D.N.Y. 1991) (university organized as a trust); Injection Research Specialists v. Polaris Indus., L.P., 759 F. Supp. 1511, 1512-13 (D. Colo. 1991) (limited partnership). The courts have rejected the argument that the statute applies to sole proprietorships. *See* Carolina Archery Prods., Inc. v. Alpine Archery Inc., No. 1:03-CV-00176, 2004 WL 1368863, at *6-8 (M.D.N.C. June 15, 2004); Hsin Ten Enter. USA, Inc. v. Clark Enters., 138 F.

B. Single v. Multiple-District States

In 2011, Congress reworked § 1391(c).[48] It took the first sentence of the statute and made it the core of a new section, § 1391(c)(2). The new section retained the provision about the residency of corporate defendants and expressly made the provision applicable to non-corporate entities as well. It also included a provision about the residency of corporate plaintiffs. The new section reads:

> [A]n entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business . . . .[49]

The House Report indicates that the purpose of the change was to "restore the parity of treatment contemplated in *Denver & Rio Grande*" and clarify "current law by expressly making the deeming provision applicable to unincorporated associations, such as partnerships and labor unions, and other entities with capacity to sue [and be sued] in their common name under applicable law."[50] In other words, the same rules governing the residence of corporations would also govern the residence of unincorporated associations. Resorting to the legislative history, however, is unnecessary to establish that the same rules govern. The words of the statute are clear on their face. The statute refers to an entity, "whether or not incorporated."[51]

While Congress restored parity of treatment in single-district states, it did not explicitly do so in multiple-district states. When Congress reworked § 1391(c) in 2011, Congress took the second sentence and put it in § 1391(d). The only change that Congress

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Supp. 2d 449, 458-59 (S.D.N.Y. 2000); Kabb, Inc. v. Sutera, No. 91-3551, 1992 WL 245546, at *2 (E.D. La. Sept. 4, 1992).

[48] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 202, 125 Stat. 758, 763-64 (2011).

[49] 28 U.S.C. § 1391(c)(2) (2012).

[50] H.R. REP. NO. 112-10, at 21-22 (2011).

[51] 28 U.S.C. § 1391(c)(2) (2012).

made to the sentence was to take the introductory clause from the first sentence of old § 1391(c)—"For purposes of venue under this chapter"—and put it at the beginning. Section 1391(d) reads:

> For purposes of venue under this chapter, in a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.[52]

In short, the statutory evolution supports the conclusion that § 1391(c)(2) governs the residency of entities in single-district states and § 1391(d) governs the residency of corporate entities in multiple-district states. Section 1391(c)(2) traces its roots to the first sentence of old § 1391(c), the sentence that governed the residency of corporations in single-district states. Section 1391(d) traces its roots to the second sentence of old § 1391(c), the sentence that governed the residency of corporations in multiple-district states.

The canons of statutory interpretation also support that conclusion. The canons are relevant because the meaning of §§ 1391(c)(2) and 1391(d) cannot be ascertained by simply reading the words and giving those words their plain and ordinary meaning.[53] Doing so creates a conflict between the two sections.

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[52] 28 U.S.C. § 1391(d) (2012).

[53] If the language of a statute is plain and unambiguous, then the language is normally controlling unless it would lead to absurd results. *E.g.*, Clark v. Absolute Collection Serv., Inc., 741 F.3d 487, 489-90 (4th Cir. 2014); United States v. Yates, 733 F.3d 1059, 1064 (11th Cir. 2013); Cook v. FDA, 733 F.3d 1, 9 (D.C. Cir. 2013). Some cases add that the plain language will not control if the legislative history provides an "extraordinary showing of contrary intentions." Garcia v. United States, 469 U.S. 70, 75 (1984); *see* United States v. Alexander, 725 F.3d 1117, 1118-19 (9th Cir. 2013) (legislative history may be considered if it "clearly indicates that Congress meant something other than what it said") (citation and internal quotations omitted); *In re* Visteon Corp., 612 F.3d 210, 227 (3d Cir. 2010) ("'[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure' from the unambiguous plain language of a statute." (quoting United States v. Albertini, 472 U.S. 675, 680 (1985))). *But see* MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503,

The two sections instead need to be interpreted to resolve that conflict. A basic canon of statutory interpretation is that the various sections of a statute should be interpreted in a way that makes them harmonious rather than contradictory or superfluous.[54]

One way of harmonizing the two sections is by interpreting them as alternatives. In other words, the residence of a corporate defendant in a multiple-district state could be established under § 1391(c)(2) or § 1391(d). But there is a problem with that. If § 1391(c)(2) were interpreted to govern the residency of entities in multiple-district states, then it would cover every situation that § 1391(d) would cover—plus some. Such an interpretation would render § 1391(d) superfluous, a result contrary to the canons of statutory interpretation.

Furthermore, § 1391(d) includes the words "in a State which has more than one judicial district" while § 1391(c)(2) does not. Another basic canon of statutory interpretation is that Congress is presumed to have acted intentionally when it includes particular language in one section of a statute but not in another.[55] As

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539 (Fed. Cl. 2011) (an analysis of the Supreme Court cases shows that "exceptional circumstances" occur "somewhere between 'never' and when a plain reading would result in the absurd"). The rationale for relying on the plain meaning of the language is that the words that Congress uses provide the best and most reliable indicator of its intent. *See* OMJ Pharm., Inc. v. United States, 753 F.3d 333, 340 (1st Cir. 2014); Papazoglou v. Holder, 725 F.3d 790, 792-93 (7th Cir. 2013); Cotroneo v. Shaw Env't & Infrastructure, Inc., 639 F.3d 186, 194 (5th Cir. 2011). The focus on the statutory language is often referred to as the "plain meaning rule." *See* Beyond Sys., Inc. v. Kraft Foods, Inc., 972 F. Supp. 2d 748, 763 (D. Md. 2013); Meridian Joint Sch. Dist. No. 2 v. D.A., No. 1:11-cv-00320-CWD, 2013 WL 3270424, at *6 (D. Idaho June 25, 2013); United States v. Schuetz, No. 12-mj-3046, 2012 WL 2923171, at *4 (C.D. Ill. July 18, 2012). For further discussion of the plain meaning rule, see 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 46:1-46:7 (7th ed. 2014).

[54] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000); New Cingular Wireless PCS, LLC v. Finley, 674 F.3d 225, 249 (4th Cir. 2012); Lyon v. Chase Bank USA, N.A., 656 F.3d 877, 890 (9th Cir. 2011). "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)); *see, e.g.*, Hedges v. Obama, 724 F.3d 170, 189 (2d Cir. 2013); *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1184 (9th Cir. 2013). The canon is strongest when courts are interpreting statutes that are part of the same statutory scheme. Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1178 (2013).

[55] *See, e.g.*, Sebelius v. Cloer, 133 S. Ct. 1886, 1894 (2013); Kucana v. Holder, 558 U.S. 233, 249 (2010); Dean v. United States, 556 U.S. 568, 573 (2009).

applied here, that canon indicates that Congress intended § 1391(d) rather than § 1391(c)(2) to govern the residence of corporate entities in states that have more than one judicial district.

That leaves only one way of harmonizing the two sections. Section 1391(c)(2) governs the residency of entities in single-district states and § 1391(d) governs the residency of corporate entities in multiple-district states. There is no conflict between the statutes if they are interpreted this way. It is true that their definitions of residence are in conflict. But those definitions apply in mutually exclusive situations: a state either has one district (§ 1391(c)(2)) or multiple districts (§ 1391(d)). As a result, there is no conflict in application.

C. Incorporated v. Unincorporated Entities

One objection to this proposed interpretation is that it assumes that Congress intended § 1391(d) to apply to corporations only. There are some arguments to the contrary. Wright & Miller note that prior to the adoption of § 1391 in its present form, the courts tended to equate the residency of incorporated and unincorporated entities. They assert that "because Congress gave no indication of a desire to change that equivalence" when it amended the statute in 2011, § 1391(d) should be applied equally to unincorporated and incorporated entities.[56]

The problem with this argument is that Congress indicated a desire to change the equivalence. Instead of simply re-enacting the corporate residency provision in 2011, Congress added § 1391(c)(2), a new section that specifically addressed the residency of non-corporate entities. If Congress believed that the residence of non-corporate entities was already governed by § 1391(d), then there would be no need to add a new section to address their residence.

Another argument is that the omission of unincorporated entities from § 1391(d) was an inadvertent drafting mistake.[57] As

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[56] 14D WRIGHT & MILLER, *supra* note 21, § 3812.

[57] *See id.*; *see also* 17 JAMES WM. MOORE ET AL., *supra* note 26, § 110.03[4][e] (describing failure of Congress to provide the same residence rule for unincorporated and incorporated entities as inadvertent and suggesting that Congress may have intended the same rule to apply).

discussed earlier, the House Report says that the purpose of § 1391(c)(2) was to treat corporations and unincorporated entities alike "by expressly making *the deeming provision* applicable to unincorporated associations, such as partnerships and labor unions, and other entities with capacity to sue [and be sued] in their common name under applicable law."[58] The phrase "shall be deemed to reside" appears in both § 1391(c)(2) and § 1391(d).

That raises the possibility that the Congress intended to treat both incorporated and unincorporated entities the same way but forgot to include the necessary language in § 1391(d). It is not surprising that Congress may have made a mistake. The amendments to the corporate residency provisions were a minor part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011. As a result, they may not have been vetted as thoroughly as the major parts of the Act were.

There are some weaknesses in the mistake argument, however. One weakness is that the wording of the amendments indicates that some thought was given to the scope of the two sections. Section 1391 is part of Chapter 87 of the United States Code. The amendments made § 1391(c)(2) applicable to all venue statutes, including specialized venue statutes that are found outside of Chapter 87. Section 1391(c) opens with the phrase, "[f]or all venue purposes."[59] Section 1391(d), however, was only made applicable to the venue statutes found in Chapter 87. The statute opens with the phrase from the old version of § 1391(c), "[f]or purposes of venue under this chapter."[60]

If the drafters made a conscious decision to write the residency sections differently in terms of the venue statutes to which they will apply, then it is plausible that the drafters made a conscious decision to write them differently in terms of the entities to which they will apply. The question is why. One plausible answer is that the drafters sought to make the proposed changes as noncontroversial as possible to enhance the prospects for passage.

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[58] H.R. REP. NO. 112-10, at 22 (2011) (emphasis added).

[59] 28 U.S.C. § 1391(c) (2012). As result, § 1391(c) applies to the special venue statutes as well. *See supra* note 26.

[60] *Compare* 28 U.S.C. § 1391(d) (2012), *with* 28 U.S.C. § 1391(c) (2006) (amended 2011).

The proposed changes were first introduced in 2010 as part of H.R. 4113.[61] The bill passed the House, but died in the Senate. There were no congressional hearings on H.R. 4113. Instead, the Administrative Office of the United States Courts coordinated an informal vetting exercise that involved the Judicial Conference, a number of legal academics, and a variety of organizations such the U.S. Chamber of Commerce and the American Bar Association.

> The point of this exercise was to identify and delete those provisions that were considered controversial by prominent legal experts and advocacy groups. This informal vetting process served the functional equivalent of a hearing or markup and increased the likelihood that [the legislation] could be passed by both houses of Congress prior to adjournment *sine die*.[62]

If the goal was to avoid controversy, then one way to do that with the venue provisions would be to retain the existing provision governing corporate residency in states with multiple districts, add a new provision that governed the residency of incorporated and unincorporated entities as both plaintiffs and defendants, and describe the new provision as nothing more than a clarification of current law. And that is exactly what Congress did.

H.R. 4113 was reintroduced in 2011 as H.R. 394.[63] The House Report on H.R. 394 described § 1391(d) as "[r]etaining district-specific venue"[64] and described the portion of § 1391(c)(2) that addresses the residency of entity defendants as a provision that "clarifies current law."[65] The provision of § 1391(c)(2) that addresses the residency of corporate plaintiffs was described as "keeping with the trend to move away from plaintiff-based venue and focus on the convenience of defendants."[66] If one were to use a colloquial phrase to summarize what the House Report said about the entity venue provisions, the most appropriate phrase would be "no big deal" or "same old, same old."

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[61] H.R. REP. NO. 112-10, at 2 (2011).

[62] *Id.* at 2-3.

[63] *Id.* at 2. H.R. 394 was almost identical to H.R. 4113. *See id.* at 3 (listing the four minor differences between the two bills).

[64] *Id.* at 23.

[65] *Id.* at 22.

[66] *Id.* at 22.

The entity provisions could not have been described as "same old, same old" if Congress had followed the recommendations of the 2004 Federal Judicial Code Revision Project of the ALI. The ALI Project proposed treating all entities alike for purposes of determining residence for venue purposes.[67] The ALI Project also proposed eliminating the provision that deemed a corporation to reside in a district in which it would be subject to personal jurisdiction if the district were a separate state.[68]

The Project described the provision as "bizarre" and "confusing."[69] The time had come "to iron out of venue law the unruly wrinkle" of attempting "to use principles of personal jurisdiction for purposes of intrastate venue allocation within multidistrict states."[70] The Project therefore proposed replacing the old corporate residency provision of § 1391(c) with two new sections:

> (2) When sued as a defendant, any entity, whether or not incorporated, shall be deemed to reside in any judicial district in which such defendant is subject to personal jurisdiction.
>
> (3) When suing as a plaintiff, any entity, whether or not incorporated, shall be deemed to reside only in the judicial district in which it maintains its principal place of business.[71]

These proposed sections seem to be the source of § 1391(c)(2). In fact, the House Report specifically identified the ALI Project as the source for the provision in § 1391(c)(2) regarding the residency of corporate plaintiffs.[72] Congress was apparently willing to accept

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[67] AM. LAW INST., *supra* note 26, at 189-91.

[68] *Id.* at 182-88.

[69] *Id.* at 184-85. The authors of the ALI Project acknowledged that the provision protects a corporation from the inconvenience of defending a lawsuit in a district in which it has no real contacts but concluded that the "protection comes at too great a systemic cost." *Id.* at 187. The possibility of transferring the case under 28 U.S.C. § 1404(a) would provide the corporation with adequate protection without the "expensive, fact-intensive" inquiry mandated by the separate state provision. *Id.* at 188.

[70] *Id.* at 188.

[71] *Id.* at 166-67.

[72] H.R. REP. NO. 112-10, at 22 (2011). Congress followed the Project's recommendations on a number of venue-related issues. Those included abolishing the local action doctrine, eliminating the distinction between venue in federal question and diversity cases, using domicile as the standard for determining an individual's

one of the changes that the ALI Project proposed: deeming the principal place of business as the residence for plaintiff entities. It was also willing to accept another proposed change: treating all entity defendants alike. Congress, however, was unwilling to accept the third proposed change: eliminating the provision regarding multiple-district states. That would have been a big change—which is most likely the reason it was not made.

In short, it is quite possible that the 2011 amendments to § 1391(c) were motivated by an attempt to avoid controversy. If so, the result is a statutory scheme that treats all entity defendants alike in single-district states but not in multiple-district states. The result is imperfect and the corresponding change is incremental. But that is not surprising. Political considerations often lead to imperfect results and incremental change.

All of this is not to say with certainty that political considerations explain why §§ 1391(c)(2) and 1391(d) were drafted as they were. But it is a possibility. Another possibility is that Congress intended to treat entity defendants the same but simply overlooked the need to broaden the language of § 1391(d) to accomplish what it intended. There may be other possibilities. The problem is that no one can say for sure what Congress was trying to do when it enacted the current version of the statutes. Under these circumstances, it makes sense to ignore the possibilities and focus instead on the structure and wording of the statutes.

The structure and wording indicate that § 1391(d) only applies to corporate defendants. If Congress had intended for § 1391(d) to apply to incorporated and unincorporated defendants, then it would not have said "a defendant that is a corporation." It would have chosen different words, such as "an entity, whether or not incorporated." Congress knew how to say that because it used those words in § 1391(c)(2). Its failure to use those words in § 1391(d) seems to be less of an oversight and more of a deliberate choice.[73]

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residence, and modifying the rules governing venue in actions involving aliens and citizens domiciled abroad. *See id.* at 18-23.

[73] *See* Jama v. ICE, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."); Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (inclusion of phrase "act or omission" in

But even if it was an oversight, it is not the province of the courts to correct congressional oversights. That is a point that the Supreme Court made in *Exxon Mobil Corp. v. Allapattah Services, Inc.*[74] The issue in *Exxon Mobil* was whether the federal courts could assert supplemental jurisdiction over claims that did not independently meet the amount in controversy requirement for diversity jurisdiction. Section 1367(a) allows the federal courts to assert supplemental jurisdiction over claims that are part of the same case or controversy as claims of which the court has original jurisdiction.[75] The Supreme Court held that the statute allowed the courts to assert supplemental jurisdiction in diversity cases as long as one or more of the claims satisfied the amount in controversy requirement. The statute therefore abrogated the prior case law requiring each plaintiff's claim to satisfy the amount in controversy requirement.[76]

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two provisions of a statute but not the third indicated that "Congress knew how to specify 'act or omission' when it wanted to" and the attempt to read the phrase into the third provision ran "afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" (quoting 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th rev. ed. 2000))); *see also* Delgado v. U.S. Att'y Gen., 487 F.3d 855, 862 (11th Cir. 2007) (When "'Congress knows how to say something but chooses not to, its silence is controlling.'" (quoting CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001))).

[74] 545 U.S. 546 (2005).

[75] The statute provides:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (2012). Section 1367(a) was enacted in 1990 and codified the judicially-created doctrines of pendent and ancillary jurisdiction. *See* 28 U.S.C.A. § 1367 cmt. at 759, 759-60 (West 2006). The last sentence of the statute also superseded the Supreme Court's decision in *Finley v. United States*, 490 U.S. 545 (1989), a decision in which the Court declined to apply pendent jurisdiction to claims against additional parties. *See* Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 1000-01 (1995).

[76] *Exxon Mobil*, 545 U.S. at 566-67. The prior cases included *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), and *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). The Court in *Clark* held that each plaintiff's claim must independently satisfy the amount in controversy requirement. *Clark*, 306 U.S. at 590. The Court in *Zahn* applied the

One of the issues in *Exxon Mobil* was whether interpreting the statute to allow the assertion of supplemental jurisdiction over claims that did not satisfy the amount in controversy requirement would create an anomaly in § 1367(b).[77] That section lists six types of claims over which the federal courts cannot assert supplemental jurisdiction when original jurisdiction is based on diversity and the assertion of supplemental jurisdiction would be inconsistent with the requirements of the diversity statute.[78] The list includes claims against plaintiffs joined under Rule 19—but does not include claims by plaintiffs joined under Rule 20 or Rule 23.

The Court said that the "natural, indeed the necessary, inference" to be drawn from the failure to include claims by plaintiffs joined under Rule 20 or Rule 23 is that the courts can assert supplemental jurisdiction over them.[79] The Court

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holding of *Clark* to class actions and held that each class member's claim must independently satisfy the amount in controversy requirement. *Zahn*, 414 U.S. at 300-01.

[77] *Exxon Mobil*, 545 U.S. at 565.

[78] The statute provides:

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b) (2012). As previously mentioned, the Supreme Court's decision in *Zahn* held that in a class action based on diversity jurisdiction, each class member's claim must independently satisfy the amount in controversy requirement. *See supra* note 76. The legislative history of § 1367 contained a sentence that suggested that Congress did not intend to supersede *Zahn*. *See* H.R. REP. NO. 101-734, at 29 (1990) (footnote omitted). The Court in *Exxon Mobil* said that it would be inappropriate to consider the legislative history of § 1367 because the statutory language was clear. *Exxon Mobil*, 545 U.S. at 567. The Court added that even if it considered the legislative history, it would not attach much weight to it because the legislative history was murky. *Id.* at 569-71.

[79] *Exxon Mobil*, 545 U.S. at 560. The *Exxon Mobil* case actually involved two appeals that had been consolidated, one in a class action under Rule 23 and the other in a case involving claims by plaintiffs joined under Rule 20. *Id.* at 549-51. In discussing the effect of § 1367(b), the Court said that the inference that the courts can assert supplemental jurisdiction over claims by plaintiffs joined under Rule 20 "is

acknowledged that the omission of those claims created an anomaly because it was "not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties" under the compulsory joinder provisions of Rule 19 but allow it over claims by plaintiffs joined under the permissive joinder provisions of Rule 20.[80] The Court speculated that the failure to include Rule 20 may have been an "unintentional drafting gap."[81] The Court added, however, that if it was a drafting gap, "it is up to Congress rather than the courts to fix it."[82]

The same is true of § 1391(d). The "natural, indeed the necessary, inference" to be drawn from the omission of unincorporated entities in § 1391(d) is that § 1391(d) does not apply to them. The omission "may seem odd," especially given Congress's stated goal of treating unincorporated and incorporated entities the same, just as they had been prior to the 1988 amendments to § 1391(c). But that goal was stated in regard to § 1391(c)(2), not § 1391(d). To some extent, harmonizing §§ 1391(c)(2) and 1391(d) is like forcing a square peg into a round hole. But with enough hammering, the square peg will fit. Section 1391(c)(2) can be hammered to govern the residence of entity defendants in single-district states while § 1391(d) can be left

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strengthened by the fact that § 1367(b) explicitly excludes supplemental jurisdiction over claims against defendants joined under Rule 20." *Id.* at 560.

[80] *Id.* at 565. Section 1367(a) only allows the courts to assert supplemental jurisdiction if the courts have original jurisdiction of the action. The dissent took the view that original jurisdiction in diversity cases existed only if all the plaintiffs were citizens of states different than all the defendants and each plaintiff independently satisfied the amount in controversy requirement. *See id.* at 585-87 (Ginsburg, J., dissenting). Section 1367(b)'s omission of plaintiffs joined under Rule 20 and Rule 23 made sense under this view because original jurisdiction would not exist if those plaintiffs did not independently satisfy the amount in controversy requirement. If original jurisdiction did not exist, then there could be no supplemental jurisdiction under § 1367(a). And if there was no supplemental jurisdiction, then there was no need to create an exception in § 1367(b). *See id.* at 592. The majority agreed that the omission of Rule 20 plaintiffs from § 1367(b) was anomalous under the majority's reading of § 1367(a) but pointed out that the inclusion of Rule 19 plaintiffs was anomalous under the dissent's reading. *See id.* at 566 (majority opinion). The takeaway point seems to be that the presence of a statutory anomaly is insufficient to warrant departing from the statutory text unless the anomaly renders the text absurd.

[81] *Id.* at 565 (quoting Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 221 n.6 (3d Cir. 1999)) (internal quotation marks omitted).

[82] *Id.* at 565.

intact to govern the residence of corporate defendants in multiple-district states.

D. The Practical Effect of Limiting § 1391(d) to Corporations

Assuming there is a drafting gap in § 1391(d), it is worth asking how significant the gap is. If the gap is significant, then one might be tempted to read the statute broadly to cover the gap or to urge Congress to eliminate the gap. The gap in § 1391(d) certainly seems significant on its face. It means that residency can be used to establish venue in multiple-district states when suing a corporation but not when suing an unincorporated entity. The gap, however, is actually rather insignificant. As a practical matter, it only exists when the entity is subject to general personal jurisdiction in a multiple-district state. Even then the gap is insignificant because the Supreme Court considerably narrowed the scope of general personal jurisdiction in 2014 when it decided *Daimler AG v. Bauman*.[83]

1. Same Results When Specific Personal Jurisdiction Exists

By way of background, there are two types of personal jurisdiction. If the defendant is considered to be at home in the forum state, then the courts can exercise personal jurisdiction over the defendant regardless of whether the claims are related to the defendant's contacts with the forum. This is known as general personal jurisdiction or "all-purpose jurisdiction."[84] If the defendant is not considered to be at home in the forum state, then the courts can only exercise personal jurisdiction over the defendant for claims that arise out of the defendant's contacts with the state. This is known as specific personal jurisdiction or "case-linked jurisdiction"[85] because the court's jurisdiction is specific to, in other words, linked to the case.

Personal jurisdiction and venue are separate requirements. Yet there is considerable overlap between the two. The overlap

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[83] 134 S. Ct. 746 (2014).

[84] *Id.* at 751; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

[85] Walden v. Fiore, 134 S. Ct. 1115, 1121 n.6 (2014); *Goodyear*, 131 S. Ct. at 2851. The Supreme Court has also described specific jurisdiction as "conduct-linked" jurisdiction. *Daimler AG*, 134 S. Ct. at 751.

exists in single-district states for entity defendants because of § 1391(c)(2). That section provides that an entity defendant is deemed to reside in any district in which it would be subject to personal jurisdiction.[86] If the defendant resides in a district, then venue is proper in the district under § 1391(b)(1).

But there is another source of overlap in single-district states. Section 1391(b)(2) provides that an action may be brought in a district in which a substantial part of the events or omissions giving rise to the claim occurred. That sounds much like the requirements for specific jurisdiction. A court can assert specific jurisdiction when the defendant purposefully availed itself of the privilege of conducting activities in the forum and the plaintiff's claim arises out of or relates to those activities.

In some jurisdictions, the bar for satisfying § 1391(b)(2) is lower than the bar for establishing specific personal jurisdiction. Specific jurisdiction analysis focuses on the defendant's activities to determine whether the defendant has contacts with the forum.[87] The same is not necessarily true, however, of venue analysis. Although some courts limit their focus to the defendant's activities,[88] other courts do not. They take a "holistic view of the

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[86] *See supra* text accompanying note 49.

[87] *See, e.g.*, *Walden*, 134 S. Ct. at 1122; Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984); Rush v. Savchuk, 444 U.S. 320, 332-33 (1980). In *Walden*, the Court noted that the relationship with a state necessary to support specific personal jurisdiction

> must arise out of contacts that the "defendant *himself*" creates with the forum State. Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. We have consistently rejected attempts to satisfy the defendant-focused "minimum contacts" inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.

Walden, 134 S. Ct. at 1122 (citations omitted).

[88] *See* Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1371-72 (11th Cir. 2003); Woodke v. Dahm, 70 F.3d 983, 985 (8th Cir. 1995); Gamboa v. USA Cycling, Inc., No. 2:12-cv-10051-ODW, 2013 WL 1700951, at *3 (C.D. Cal. Apr. 18, 2013); Burke, Warren, MacKay & Serritella, P.C. v. Tamposi, No. 10-CV-8267, 2011 WL 5373981, at *6 (N.D. Ill. Nov. 4, 2011); Ware v. United Rentals (N. Am.), Inc., No. 1:10-CV-13, 2010 WL 1374583, at *3 (E.D. Tex. Mar. 30, 2010); Bigham v. Envirocare of Utah, Inc., 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000); PKWare, Inc. v. Meade, 79 F. Supp. 2d 1007, 1016 (E.D. Wis. 2000). Focusing on the defendant's activities is arguably appropriate because the purpose of venue "is to protect the defendant against the risk that a

acts underlying a claim"[89] and consider the activities of the plaintiff and third parties in addition to the activities of the defendant.[90]

For example, assume that a mechanic performed faulty brake work on the plaintiff's car in New York and that the plaintiff subsequently drove the car to Tulsa, Oklahoma. The brakes failed while the plaintiff was driving in downtown Tulsa, causing an accident in which the plaintiff was injured. The plaintiff then sued the mechanic in the Northern District of Oklahoma, the district in which Tulsa is located.[91] A court taking a holistic view would find that a substantial part of the events giving rise to the claim occurred in the district because the plaintiff was injured in the district.[92]

Specific personal jurisdiction would not exist, however, because the defendant did not engage in any activities in Oklahoma. Any connections between Oklahoma and the mechanic were established by activities of the plaintiff, not by the activities of the mechanic.[93]

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plaintiff will select an unfair or inconvenient place of trial." *Gamboa*, 2013 WL 1700951, at *3 (quoting LeRoy v. Great W. United Corp., 443 U.S. 173, 183-84 (1979)).

[89] *See* Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 12 (1st Cir. 2009) (quoting Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 42 n.6 (1st Cir. 2001)).

[90] *See id.* at 12; Mitrano v. Hawes, 377 F.3d 402, 405-06 (4th Cir. 2004); Careplus Health Plans, Inc. v. Crespo, No. 8:05CV2010-T-27MAP, 2006 WL 1382102, at *2 n.6 (M.D. Fla. May 19, 2006); *see also* Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994) ("The test for determining venue is not the defendant's 'contacts' with a particular district, but rather the location of those 'events or omissions giving rise to the claim' . . . .").

[91] *See* 28 U.S.C. § 116(a) (2012).

[92] *See Uffner*, 244 F.3d at 42-43 (sinking of the yacht for which the plaintiff submitted an insurance claim was a substantial part of the events giving rise to bad faith action against insurer even though the sinking was not in dispute). In courts that focus on the defendant's activities in determining whether § 1391(b)(2) is satisfied, the location of the injury is a relevant although not determinative consideration. *See* Fedele v. Harris, No. 13-cv-6368, 2014 WL 1870840, at *7-8 (E.D.N.Y. May 9, 2014); Medbox Inc. v. Kaplan, No. CV-13-00949-PHX-GMS, 2013 WL 6094577, at *3 (D. Ariz. Nov. 20, 2013); Wieland v. John Rigby & Co. [Gunmakers], Inc., No. 4:09CV2100-JCH, 2010 WL 1528527, at *1-2 (E.D. Mo. Apr. 15, 2010).

[93] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (distributor selling cars to dealers in Connecticut, New Jersey and New York, and dealer based in New York were not subject to personal jurisdiction in Oklahoma in products-liability action brought by plaintiffs who purchased car in New York and drove it to Oklahoma where it burst into flames after being rear-ended). The Court in *World-Wide Volkswagen* acknowledged that it "is foreseeable that the purchasers of automobiles

In short, there are situations in which the relevant activities will be sufficient to establish venue under § 1391(b)(2) but insufficient to establish specific personal jurisdiction. It is unlikely, however, that will be many situations in which the reverse occurs—the relevant activities are sufficient to establish specific personal jurisdiction but insufficient to establish venue under § 1391(b)(2).[94] It is also unlikely that that there will be situations in which the causal link between the activities and the claim will be sufficient to establish specific personal jurisdiction but insufficient to establish venue.

Both specific jurisdiction and § 1392(b)(2) require a causal connection between the activities and the plaintiff's claim. For purposes of specific personal jurisdiction, some courts require a very close connection that is often referred to as the "proximate cause" test, others require a looser connection that is often referred to as the "but for" test, and still others steer a middle course.[95] For purposes of § 1391(b)(2), at least one circuit requires

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sold [in New York] may take them to Oklahoma. But the mere "'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" *Id.* at 298 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[94] One situation in which specific jurisdiction may have existed but proper venue did not was when the defendant committed an intentional tort with knowledge that the harm would be felt in the forum state. Some courts, including the Ninth Circuit, applied a very liberal version of the effects test for specific jurisdiction in which mere knowledge that the plaintiff was a resident of the forum state was sufficient to establish that the defendant's conduct was aimed at the forum state. *See* Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000) (Conduct is expressly aimed at the forum state if the defendant targets a plaintiff that the defendant knows is a resident of the forum.); *see also* Licciardello v. Lovelady, 544 F.3d 1280, 1287-88 (11th Cir. 2008) (same); Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) (state in which the victim of tort suffers injury may assert personal jurisdiction over the tortfeasor). A defendant could therefore establish contacts with the forum without engaging in activities that were deliberately targeted at the forum state. Essentially the Ninth Circuit shifted the focus from the defendant to the plaintiff for purposes of specific jurisdiction. A court that focused on the defendant's activities for venue purposes could therefore find that there was specific personal jurisdiction but not proper venue. *See* Mach 1 Air Servs. Inc. v. Bustillos, No. CV-12-02617-PHX-GMS, 2013 WL 1222567, at *10-11 (D. Ariz. Mar. 25, 2013). The Supreme Court, however, rejected the Ninth Circuit's liberal version of the effects test in 2014. *See* Walden v. Fiore, 134 S. Ct. 1115 (2014).

[95] *See* Victor N. Metallo, "Arise out of" *or* "Related to"*: Textualism and Understanding Precedent Through* Interpretatio Objectificata*, "Objectified Interpretation"—A Four Step Process to Resolve Jurisdiction Questions Utilizing the Third Circuit Test in* O'Connor *as a Uniform Standard*, 17 WASH. & LEE J. CIVIL RTS.

that the events or omissions must themselves be wrongful.[96] That seems to correspond to the proximate cause test for specific jurisdiction. Most circuits, however, do not limit their focus to matters that are in dispute or that directly led to the filing of the action.[97] They instead consider "the entire sequence of events underlying the claim."[98] One of the most common formulations is that there must be a "close nexus" between the events or omissions and the plaintiff's claims.[99]

Although the courts use different terminology when discussing the "arising out of" requirement for specific jurisdiction and the substantiality requirement of § 1391(b)(2), both are designed to promote fairness.[100] Given that the requirements further the same purpose, it seems unlikely that courts will be more demanding when assessing the causal connection for venue than the causal connection for specific jurisdiction.[101] If the

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& SOC. JUST. 415, 426-45 (2011) (discussing cases). The courts tend to employ the tests primarily in tort cases in which the plaintiff was solicited in his or her home jurisdiction to travel to another jurisdiction, where the plaintiff was injured as a result of the defendant's conduct. *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312 (3d Cir. 2007).

[96] *See* Woodke v. Dahm, 70 F.3d 983, 986 (8th Cir. 1995) (event did not give rise to the plaintiff's claim because the event was not itself wrongful).

[97] Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1166-67 (10th Cir. 2010); Mitrano v. Hawes, 377 F.3d 402, 405 (4th Cir. 2004); First of Mich. Corp. v. Bramlet, 141 F.3d 260, 264 (6th Cir. 1998); Uffner v. La Reunion Francaise, S.A., 244 F.3d 38, 42 (1st Cir. 2001).

[98] *Emp'rs Mut.*, 618 F.3d at 1166-67 (quoting *Uffner*, 244 F.3d at 42); *see* 17 JAMES WM. MOORE ET AL., *supra* note 26, § 110.04[1] (collecting cases).

[99] *See Emp'rs Mut.*, 618 F.3d at 1166; Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 433 (2d Cir. 2005); Jenkins Brick Co. v. Bremer, 321 F.3d 1366, 1372 (11th Cir. 2003).

[100] *See* Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994) ("Substantiality is intended to preserve the element of fairness so that a defendant is not haled into a remote district having no real relationship to the dispute."); Mark M. Maloney, Note, *Specific Personal Jurisdiction and the "Arise from or Relate to" Requirement . . . What Does It Mean?*, 50 WASH. & LEE L. REV. 1265, 1296 (1993) ("[T]he basis for the distinction between related and unrelated contacts must be that it is inherently more fair to require a defendant to litigate in a foreign state when the defendant's contacts with that state played some part in the injury leading to the cause of action.").

[101] The point is not the courts all take the same approach. As discussed in the text, some courts take a more demanding approach to specific jurisdiction than other courts do. Likewise, some courts take a more demanding approach to venue than others do. The point is that whatever approach the courts take to specific jurisdiction, they are unlikely to take a more demanding approach to venue.

defendant purposefully engaged in activities in or aimed at the forum and the plaintiff's claim arises out of them, then it would seem to follow that the activities constitute a substantial part of the events or omissions giving rise to the plaintiff's claim.[102]

Therefore, as a general matter, if the requirements for specific personal jurisdiction are satisfied in a single-district state, then the requirements for venue under § 1391(b)(2) will also be satisfied. Here is how that plays out. Assume that a limited liability company and a corporation are both defendants in an action and are both subject to specific personal jurisdiction in a state. If the state has one district, then venue will be proper under § 1391(b)(1) for both defendants. The limited liability company and the corporation will be deemed to reside in the district under § 1391(c)(2) because they are both subject to the court's personal jurisdiction. Venue will also be proper under § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in the state.

If the state has more than one district, then venue will be proper under § 1391(b)(2) for both defendants in the district in which the events giving rise to the claims occurred. Venue will also be proper against the corporation in that district under § 1391(b)(1). The corporation will be deemed to reside in that district under § 1391(d) because the corporation would be subject to specific personal jurisdiction in that district were it a separate state.

Venue would not be proper against the limited liability company under § 1391(b)(1), however. Unincorporated entities are not deemed to reside in any districts of the multiple-district state because § 1391(d) does not apply to them. But that does not matter from a practical standpoint. Venue would still be proper in the district in which the limited liability company would be subject to personal jurisdiction if the district were a separate

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[102] Sometimes courts simply refer back to their discussion of why personal jurisdiction exists when explaining why a substantial part of the events giving rise to the claim occurred in the district. *See* Ciena Corp. v. Jarrard, 203 F.3d 312, 318 (4th Cir. 2000); Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 563 (8th Cir. 2003); J.M. Smucker Co. v. Weston Firm, P.C., No. 5:13-CV-0448, 2013 WL 3713457, at *3 (N.D. Ohio July 15, 2013); Quarra Stone Co. v. Yale Univ., No. 13-cv-790-slc, 2014 WL 320059, at *11-12 (W.D. Wis. Jan. 29, 2014); Am. Action Network, Inc. v. Cater Am., LLC, 983 F. Supp. 2d 112, 122 (D.D.C. 2013).

state, not because of § 1391(b)(1) but because of § 1391(b)(2). The events and relationship that would establish specific personal jurisdiction were it relevant would also establish venue under § 1391(b)(2).

In short, when the entities are subject to specific personal jurisdiction in a state, failing to apply § 1391(d) to unincorporated entities is unlikely to affect the districts in which venue would be proper. Although there will be additional districts in which corporations will be deemed to reside, the additional districts will also be ones in which venue will be proper under § 1391(b)(2). Therefore, corporations and unincorporated entities that engage in the same conduct in the same districts can be sued in the same districts.

2. Different Results When General Personal Jurisdiction Exists

When the entities are subject to general personal jurisdiction in a state, however, failing to apply § 1391(d) to unincorporated entities is likely to affect the districts in which venue will be proper. The venue gap between corporations and unincorporated entities cannot be filled by § 1391(b)(2) because general personal jurisdiction does not require a causal relationship between the contacts and the claim. In the absence of such a relationship, a substantial part of the events giving rise to the claim will not have occurred in the district. Therefore, venue must be established under § 1391(b)(1) unless the fallback provision of § 1391(b)(3) applies.

In order to assess how significant the venue gap is, it is first necessary to determine the circumstances under which corporations and unincorporated entities are subject to general personal jurisdiction. That requires an analysis of the Supreme Court's 2014 decision in *Daimler AG v. Bauman*.[103] The Court's decision indicates that both types of entities are subject to general personal jurisdiction in the states of their formation and principal place of business. If § 1391(d) is limited to corporations, then corporations may reside in as many as five more districts than incorporated entities do. Those districts, however, are unlikely to

[103] 134 S. Ct. 746 (2014).

be attractive choices for the plaintiff. As a result, the venue gap is far less significant than the numbers might suggest.

a. The Supreme Court's Decision in Daimler

Prior to 2014, the scope of general jurisdiction was fairly broad. Corporations were subject to general personal jurisdiction in states in which they engaged in continuous and systematic activities.[104] Examples of continuous and systematic activities sufficient to establish general personal jurisdiction were (1) having a physical presence in the forum state, with employees conducting activities in the state that are central to the corporation's business,[105] (2) selling a high volume of products directly to buyers in the forum state,[106] or (3) regulating the activities of franchisees or other affiliates in the forum state.[107]

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[104] *See, e.g.,* Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 334-35 (3d Cir. 2009); Seiferth v. Helicopteros Atuneros, Inc., 472 F.3d 266, 271 (5th Cir. 2006); Dever v. Hentzen Coatings, Inc., 380 F.3d 1070, 1073 (8th Cir. 2004).

[105] *See* Robbins Motor Transp., Inc. v. 24/7 Transp. Specialists, Inc., No. Civ.A.-03-1038, 2004 WL 438650, at *2 (E.D. Pa. Mar. 8, 2004) (corporation was subject to general personal jurisdiction in Pennsylvania because it maintained a warehouse in Pennsylvania for its "bread and butter activity" (sale and service of containers) and employed Pennsylvania residents at its warehouse); Doula v. United Techs. Corp., 759 F. Supp. 1377, 1380-81 (D. Minn. 1991) (jet engine manufacturer was subject to general personal jurisdiction in Minnesota because it sold billions of dollars of products to a Minnesota-based airline and had four employees working in Minnesota as customer service representatives); Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 919-20 (Cal. 2006) (financial brokerage firm that maintained numerous offices and did extensive business in California was subject to general personal jurisdiction there).

[106] *See* Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1174 (9th Cir. 2006) (tobacco company was subject to general personal jurisdiction in Washington because it made hundreds of millions of dollars in sales, advertised in local publications, was licensed to do business, and maintained an office and workforce in Washington); LSI Indus., Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000) (lighting manufacturer was subject to general personal jurisdiction in Ohio because it sold millions of dollars of products in Ohio and had a broad distribution network in Ohio); Nutraceutical Corp. v. Vitacost.com, Inc., No. 2:05CV222DAK, 2006 WL 1493224, at *5 (D. Utah May 25, 2006) (corporation was subject to general personal jurisdiction in Utah because it was doing business there through its fully interactive website).

[107] *See* Fiacco v. Sigma Alpha Epsilon Fraternity, No. Civ.-1:05-145-GZS, 2006 WL 890686, at *9 (D. Me. Mar. 31, 2006) (fraternity was subject to general personal jurisdiction in Maine because of its regular review of and its extensive contacts and relationship with local chapter in Maine); Steir v. Girl Scouts of the USA, 218 F. Supp. 2d 58, 64 (D.N.H. 2002) (Girl Scouts were subject to general personal jurisdiction in New Hampshire because of national organization's oversight and control of local councils); Erickson v. U-Haul Int'l, Inc., 738 N.W.2d 453, 465 (Neb. 2007) (parent

In January 2014, the Supreme Court decided *Daimler* and substantially narrowed the scope of general personal jurisdiction. The *Daimler* case was brought in the United States District Court for the Northern District of California by twenty-two Argentinean residents who claimed that Daimler's Argentinean subsidiary, Mercedes-Benz Argentina (MBA), collaborated with the Argentinean government to kidnap, detain, and torture a number of MBA employees. None of the events occurred in California.

The plaintiffs argued that Daimler was subject to general personal jurisdiction in California because of the California activities of another one of its subsidiaries, Mercedes-Benz USA LLC (MBUSA). MBUSA had a regional office and a vehicle preparation center in California.[108] It also sold thousands of cars to dealers in California each year and generated billions of dollars in sales revenue.[109] In fact, MBUSA was the "largest supplier of luxury vehicles to the California market."[110]

The issue on which the District Court and the Ninth Circuit focused in *Daimler* was whether the contacts of MBUSA could be attributed to Daimler on the ground that MBUSA was Daimler's agent.[111] The plaintiffs argued that MBUSA's contacts with California were sufficient to establish general personal jurisdiction over MBUSA. If those contacts could be attributed to Daimler (i.e., treated as contacts by Daimler), then Daimler would also be subject to general personal jurisdiction in California. The Ninth Circuit agreed with the plaintiffs and held that there was general personal jurisdiction in California because MBUSA's

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corporation was subject to general personal jurisdiction in Nebraska because of its substantial and continuous contractual relationship with its Nebraska subsidiary).

[108] *Daimler*, 134 S. Ct. at 752.

[109] Its California sales were approximately $4.6 billion. *Id.* at 767 (Sotomayor, J., concurring).

[110] *Id.* at 752 (majority opinion).

[111] *Id.* at 752-53. The federal courts are divided on which test to use when deciding whether the contacts of a subsidiary can be attributed to the parent corporation. Some use the agency test while others use the alter ego test. *See* Justin Kesselman, Note, *Multinational Corporate Jurisdiction & the Agency Test: Should the United States Be a Forum for the World's Disputes?*, 47 NEW ENG. L. REV. 361 (2012); *see also* 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069.4 (3d ed. 2002 & Supp. 2014) (discussing the attribution of the contacts of a subsidiary to a parent and vice versa).

contacts could be attributed to Daimler.[112] The Supreme Court reversed.

The Court said that it did not matter whether MBUSA's contacts could be attributed to Daimler because even if they could, they would be insufficient to establish general personal jurisdiction. The Court described the contacts as "slim" and hardly sufficient to establish that Daimler was at home in California.[113] It also described the proposition that a corporation is subject to general personal jurisdiction in every state in which it "engages in a substantial, continuous, and systematic course of business" as "unacceptably grasping."[114]

The Court explained that the proper inquiry is whether the "corporation's affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State."[115] A corporation is at home—and therefore subject to

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[112] Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 920-24 (9th Cir. 2011), *reh'g denied*, 676 F.3d 774 (9th Cir. 2011), *rev'd sub nom.* Daimler AG v. Bauman, 134 S. Ct. 746 (2014).

[113] *Daimler*, 134 S. Ct. at 760.

[114] *Id.* at 761.

[115] *Id.* at 761 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted). The Supreme Court first used the phrase "at home" in *Goodyear*. The plaintiffs in *Goodyear* were the parents of two boys who died in a bus accident in France. The parents sued an American company, Goodyear Tire and Rubber Co., and three of its European subsidiaries in North Carolina, alleging that the accident was the result of a defective tire manufactured by Goodyear's Turkish subsidiary. The North Carolina Court of Appeals found that the subsidiaries were subject to general personal jurisdiction in North Carolina because thousands of the tires that the European subsidiaries manufactured were distributed in North Carolina by other Goodyear subsidiaries. *Brown v. Metter*, 681 S.E.2d 382, 394-95 (N.C. Ct. App. 2009), *rev'd sub nom.* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011).

The Supreme Court reversed. The Court began by noting that general jurisdiction over corporations exists in a forum in which the corporation is "at home,' which includes both the forum in which the corporation is incorporated and the forum in which it has its principal place of business. *Goodyear*, 131 S. Ct. at 2853-54. The Court said that the three subsidiaries in *Goodyear* were "in no sense at home in North Carolina." *Id.* at 2857. The Court described their contacts with North Carolina as sales of tires "sporadically made in North Carolina through intermediaries." *Id.* at 2856. Those contacts fell "far short of 'the continuous and systematic general business contacts' necessary" to support the assertion of general personal jurisdiction. *Id.* at 2857.

The Court's opinion in *Goodyear* was susceptible to two readings. One reading was that sales through intermediaries will not support the exercise of general personal jurisdiction. The second reading was that a corporation is subject to general personal jurisdiction only in the states in which it is incorporated or has its principal place of

general personal jurisdiction—in the state(s) in which it is incorporated and the state in which it has its principal place of business.[116] The Court left open the possibility that, in "an exceptional" case, a corporation may be subject to general personal jurisdiction in a state other than a state in which it is incorporated or where it has its principal place of business.[117] The Court cited *Perkins v. Benguet Consolidated Mining Co.*[118] as an example of such an exceptional case.[119]

The *Perkins* case involved a Philippine mining corporation that was subject to general personal jurisdiction in Ohio because its president was conducting the corporation's business from Ohio during and after World War II.[120] What made *Perkins* an exceptional case was that the corporation had for all practical purposes ceased operations in the Philippines and moved its principal place of business, to the extent there was one, to Ohio. To use the Court's words, "Ohio was the corporation's principal, if temporary, place of business."[121] If the exceptional case that

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business. The Court in *Daimler* made it clear that the second reading is the correct one. For further discussion of *Goodyear*, see John N. Drobak, *Personal Jurisdiction in a Global World: The Impact of the Supreme Court's Decisions in* Goodyear Dunlop Tires *and* Nicastro, 90 WASH. U. L. REV. 1707 (2013).

[116] *Daimler*, 134 S. Ct. at 760. Prior to *Daimler*, the courts were divided on the question of whether the appointment of an agent for service of process was sufficient to subject the corporation to general personal jurisdiction. *See* Viko v. World Vision, Inc., No. 2:08-CV-221, 2009 WL 2230919 (D. Vt. July 24, 2009) (collecting and analyzing cases). The Court in *Daimler* omitted the appointment of an agent when it listed the paradigm bases for the assertion of general jurisdiction. The Court's omission suggests that the appointment of an agent is insufficient. A corporation might be subject to general personal jurisdiction, however, if the state statute specifically provides that the corporation consents to the exercise of general personal jurisdiction as a condition of obtaining a license to do business in the state.

[117] *Daimler*, 134 S. Ct. at 761 n.19.

[118] 342 U.S. 437 (1952).

[119] *Daimler*, 134 S. Ct. at 761 n.19.

[120] *See id.* at 756. The corporation had been all but shut down when the Japanese occupied the Philippines during the war. The corporation's president returned home to Ohio and conducted the corporation's activities from an office in his home in Ohio. Those activities consisted of carrying on corporate correspondence, writing checks, and later supervising the post-war rehabilitation of the corporation's property in the Philippines. In other words, the president "carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company." *Perkins*, 342 U.S. at 448.

[121] *Daimler*, 134 S. Ct. at 756 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 n.11 (1984)) (internal quotation marks omitted).

Daimler identified still turns on the location of the corporation's principal place of business, then for all practical purposes there are no exceptions to the rule that a corporation is subject to general personal jurisdiction only in the state in which it is incorporated and where it has its principal place of business.

b. The Location of the Principal Place of Business

The Court in *Daimler* did not specifically discuss the standard for determining the location of a corporation's principal place of business for general personal jurisdiction purposes. The Court, however, did cite its 2010 decision in *Hertz Corp. v. Friend*[122] in support of its assertion that a corporation's principal place of business is easily ascertainable.[123] In *Hertz*, the Court adopted the nerve center test for determining a corporation's principal place of business for purposes of 28 U.S.C. § 1332(a), the federal statute that governs corporate citizenship for purposes of diversity jurisdiction. Under the nerve center test, a corporation's principal place of business is the place where the corporation's officers direct, control, and coordinate the corporation's activities.[124] The Court in *Hertz* opted for the nerve center test because it was easier to apply than any of the alternatives.[125]

The Court's citation of *Hertz* in *Daimler* suggests that the nerve center test that the Court adopted in the diversity context also applies in the personal jurisdiction context. Both *Hertz* and *Daimler* reflect a preference for jurisdictional rules that are relatively easy to apply. In *Hertz*, that preference was reflected in the adoption of the nerve center test for determining a corporation's principal place of business. In *Daimler*, that preference was reflected in the recognition of the places of

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[122] 559 U.S. 77 (2010).

[123] *Daimler*, 134 S. Ct. at 760.

[124] *See Hertz*, 559 U.S. at 89-92.

[125] Prior to *Hertz*, the lower courts were split on how to determine a corporation's principal place of business. Some had said that the principal place of business was the corporation's nerve center, others had said it was the nerve center when there was no state in which a substantial predominance of the corporation's activities occurred or when those activities were far-flung, and still others said it depended on an analysis of the corporation's total activities. *See id.* at 89-92. In opting for the nerve center test, the Court emphasized the need for administrative simplicity and predictability. *See id.* at 94-95.

incorporation and principal place of business as the basis for the assertion of general personal jurisdiction.[126]

Having the same rule apply in both contexts would best accomplish the goal of having jurisdictional rules that are relatively easy to apply. Therefore, a corporation's principal place of business for purposes of general jurisdiction should be the same as its principal place of business for purposes of diversity jurisdiction. In other words, it should be the nerve center.[127]

c. General Personal Jurisdiction over Unincorporated Entities

The next question is whether corporations and unincorporated entities are subject to general personal jurisdiction in the same places. The Court's decision in *Daimler* suggests that the answer is "yes." The Court in *Daimler* held that MBUSA was not subject to general personal jurisdiction in California because it was not incorporated there and did not have its principal place of business there.[128] MBUSA, however, is not a corporation. It is instead a Delaware limited liability company.[129] The Court must

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[126] The Court in *Daimler* wrote that the place of incorporation and the principal place of business "have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Daimler*, 134 S. Ct. at 760 (citing *Hertz*, 559 U.S. at 94). The Court also cited efficiency as the reason for not importing into general personal jurisdiction the five-factor reasonableness analysis that developed in the context of specific personal jurisdiction. Using that analysis "in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation." *Id.* at 762 n.20. For a discussion of the five-factor reasonableness analysis, see 16 JAMES WM. MOORE ET AL., *supra* note 26, § 108.42[5].

[127] In articles written before *Daimler*, commentators reached somewhat different conclusions about how a corporation's principal place of business should be determined for general personal jurisdiction purposes. *See* Lindsey D. Blanchard, Goodyear *and* Hertz*: Reconciling Two Recent Supreme Court Decisions*, 44 MCGEORGE L. REV. 865 (2013) (arguing that the two standards should be the same); Carol Andrews, *Another Look at General Personal Jurisdiction*, 47 WAKE FOREST L. REV. 999 (2012) (arguing that unlike for diversity purposes, a corporation may have more than one principal place of business for general personal jurisdiction purposes); Michael H. Hoffheimer, *General Personal Jurisdiction After* Goodyear Dunlop Tires Operations, S.A. v. Brown, 60 U. KAN. L. REV. 549 (2012) (suggesting that principal place of business should be defined differently for diversity and general personal jurisdiction purposes).

[128] *Daimler*, 134 S. Ct. at 761-62.

[129] *See* DEL. DEP'T ST.: DIVISION CORPS., https://delecorp.delaware.gov/tin/GIName Search.jsp (last visited Jan. 31, 2015) (type in "Mercedes-Benz USA, LLC" and then click on the hyperlink).

have known that. At the beginning of its opinion, the Court stated the entity's name as "Mercedes-Benz USA, LLC".[130] The Court also described the entity as a "limited liability corporation"[131] that was incorporated in Delaware.[132]

The ease with which the Court blended corporations and limited liability companies indicates that there is no difference between them for purposes of general personal jurisdiction. Furthermore, the rationales for asserting general personal jurisdiction over corporations indicate that there should be no difference. Although the Court has never explicitly articulated the rationales, it has relied on a 1988 article by Lea Brilmayer and others to craft its standard for the assertion of general personal jurisdiction over corporations.[133] The article identifies three key rationales for general personal jurisdiction: reciprocal benefits, convenience for the defendant, and convenience for the plaintiff.[134]

These rationales apply equally well to corporate and non-corporate entities. The formation of most business entities requires filing various documents with the State. Corporations must file articles of incorporation.[135] There are also filing requirements for limited liability companies, limited liability partnerships, and limited partnerships.[136] By choosing to be formed under a particular state's laws, an entity creates a relationship with the state and presumably does so "to obtain the benefits [and protection] of that state's substantive and procedural

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[130] *Daimler*, 134 S. Ct. at 751.

[131] *Id.* at 752.

[132] *Id.* at 751.

[133] The article is Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 730-35 (1988) [hereinafter Brilmayer]. The Court cited the article in both *Daimler* and *Goodyear* when discussing the paradigm places in which a corporation is fairly regarded at home and therefore subject to general personal jurisdiction. *Daimler*, 134 S. Ct. at 760; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853-54 (2011).

[134] Brilmayer, *supra* note 133, at 730. The authors of the article cited power as an additional rationale but dismissed it as inherently circular. *Id.* at 732.

[135] *See* 1 MODEL BUS. CORP. ACT ANN. § 2.01 (4th ed. 2013). The term "articles of incorporation" is not used in every state. For example, Delaware uses the term "certificate," DEL. CODE ANN. tit. 8, § 102 (2001), Tennessee uses the term "charter," TENN. CODE ANN. § 48-12-101 (2012), and Texas uses the term "certificate of formation." TEX. BUS. ORGS. CODE ANN. § 3.001 (West 2006).

[136] *See* 2 ZOLMAN CAVITCH ET AL., BUSINESS ORGANIZATIONS WITH TAX PLANNING §§ 30.04[3], 33.03[2], 34.02[3] (2014) (limited partnerships, limited liability companies, and limited liability partnerships, respectively).

laws."[137] In other words, the entity obtains benefits from the state and, in exchange for those benefits, the entity provides the state with a benefit: jurisdiction over the entity for any and all claims against the entity. The benefits are therefore reciprocal.

There are no filing requirements for unincorporated associations, joint ventures, and partnerships. Therefore, these entities do not have a readily-identifiable state of formation. But they do have a principal place of business. Like the state of a corporate entity's principal place of business, the state of a non-corporate entity's principal place of business is presumably a convenient forum for the entity to defend itself against any claims because its officers, records, and counsel are most likely there.

The state of the principal place of business may be the same as or different than the state of formation. In either case, allowing the state to assert general jurisdiction over a non-corporate entity makes things convenient for the plaintiff by ensuring that there will be "at least one clear and certain forum in which a [non-corporate entity] defendant may be sued on any and all claims."[138]

In conclusion, corporate and non-corporate business entities should be treated the same for purposes of general personal jurisdiction because the rationales for general personal jurisdiction apply equally to them. As a result, they should be subject to general personal jurisdiction in the state of their formation, if they are required to file documents to exist, and in the state in which they have their principal place of business.

d. The Different Results Are Insignificant as a Practical Matter

Treating corporate and non-corporate business entities the same for purposes of general personal jurisdiction does not mean that they will be treated the same for purposes of venue in multiple-district states. Under § 1391(d), a corporation resides in the districts of the state of its formation (incorporation) and in the

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[137] Brilmayer, *supra* note 133, at 733.

[138] *Daimler*, 134 S. Ct. at 760; *see* Brilmayer, *supra* note 133, at 730; Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1137 (1966) ("[J]ustice requires a certain and predictable place where a person can be reached by those having claims against him."). Just because a forum is certain and predictable, however, does not mean that it is a good choice for the plaintiff strategically. *See infra* text accompanying note 141.

district in which it has its principal place of business.[139] Those are the districts in which the corporation would be subject to general personal jurisdiction if the districts were separate states. By contrast, an unincorporated entity will not be deemed to reside in any of the districts of the state of its formation or in the district in which it has its principal place of business.

What that means is that a plaintiff may have up to five additional districts from which to choose when suing a corporation instead of an unincorporated entity: the district of the state in which the corporation's principal place of business is located and the districts (which could be as many as four) in the state in which the corporation is incorporated. Even though the events giving rise to the claim did not occur in those districts, venue will be proper because the corporation will be deemed to reside in each of them.

Although five districts sounds like a lot, none of those districts are likely to be attractive choices from the plaintiff's standpoint. If the events giving rise to the claim did not occur in those districts, then it is unlikely that witnesses or evidence will be found in them. As a result, there is nothing to be gained by suing in one of those districts from a litigation efficiency standpoint. In fact, the corporate defendant may file a motion to transfer the case pursuant to § 1404(a) to a district that would be convenient for the parties and the witnesses.[140]

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[139] Some courts have held that a corporation that is incorporated in a state with multiple districts does not reside in any of them. Those courts are incorrect. *See infra* note 145 and accompanying text.

[140] Section § 1404 provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a) (2012). In exercising its discretion to transfer a case under § 1404(a), a court will consider variety of factors, including among others, the plaintiff's choice of forum, situs of operative events, ease of access to evidence, convenience of the witnesses, cost of obtaining the attendance of willing witnesses, availability of compulsory service of process for unwilling witnesses, the location of the parties, and the parties' ability to bear the cost of litigation. *See, e.g.*, 17 JAMES WM. MOORE ET AL., *supra* note 26, § 111.13. Section 1404(a) applies when venue is proper in the district in which the action was brought. If venue is improper, then § 1406(a) applies. That section provides: "The district court . . . in which is filed a case laying venue in the wrong . . . district shall dismiss, or if it be in the interest of justice, transfer such case to any district . . . in which it could have been brought." 28 U.S.C. § 1406(a) (2012). For further discussion of § 1406(a), see 14D WRIGHT & MILLER, *supra* note 21, § 3827.

There is a possibility that witnesses and evidence may be found in the district in which the corporation's principal place of business is located. That does not mean that the district will be convenient for plaintiff, however. The plaintiff and its witnesses may be located elsewhere. Furthermore, suing a corporate defendant in the district in which its principal of business is located gives the defendant the equivalent of the home court advantage.[141] Doing that is not in the plaintiff's strategic interest.

It may nevertheless be convenient for the plaintiff to sue in one of those districts if the plaintiff is domiciled in the district (assuming that the plaintiff is an individual) or has a physical facility there (assuming that the plaintiff is an entity). It is not clear how often that will happen. It may happen in federal question cases because the citizenship of the parties has no bearing on jurisdiction. Diversity cases are another matter. Jurisdiction under § 1332(a) will not exist if an individual plaintiff is domiciled or a corporate plaintiff has its principal place of business in the same state in which the corporate defendant is incorporated or has its principal place of business.[142]

In short, limiting the application of § 1391(d) to corporations means that plaintiffs suing corporations may have more districts to choose from than plaintiffs suing unincorporated entities. That seems unfair. And it is—in theory. In reality, however, the plaintiff is unlikely to choose to file suit against a corporation in one of the additional districts that § 1391(d) offers. Therefore, while it might be nice to amend the statute so that incorporated and unincorporated entities are treated the same way, there is no pressing need to do so.

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[141] "Sophisticated and expensive jury research isn't necessary to figure out that a jury likely will have a positive bias towards a local business with favorable community relations." Gita F. Rothschild, *Forum Shopping*, LITIG., Spring 2008, at 40, 42. It may also be less costly and more convenient for a corporation to defend a suit in the district in which its principal place of business is located. *See* Michael N. Rader, *Pre-Litigation Strategies to Ensure a "Home Court" Advantage*, WOLF GREENFIELD (Sept. 2011), http://www.wolfgreenfield.com/newsstand/417-pre-litigation-strategies-ensure-home-court-advantage.

[142] For there to be diversity jurisdiction under § 1332(a), diversity must be complete. In other words, all of the plaintiffs must be citizens of states different than all the defendants. *E.g.*, Lincoln Prop. Co. v. Roche, 546 U.S. 81, 89 (2005). Some jurisdictional statutes, however, only require minimal diversity. That is true of the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) (2012), and the Federal Interpleader Act, 28 U.S.C. § 1335(a)(1) (2012).

IV. IRONING OUT SOME ADDITIONAL WRINKLES IN § 1391(d)

Although the contradiction between §§ 1391(c)(2) and 1391(d) is a large wrinkle in the residency provisions, there are also three smaller ones. The first involves the applicability of § 1391(d) to corporations that are incorporated in a state with more than one district. The discussion in the preceding section assumed that corporations are residents of each district of the state in which they are incorporated.[143] The cases, however, suggest otherwise. The second wrinkle involves the state long-arm statutes. The cases are split on whether the statutes are relevant to the determination of corporate residency. The third wrinkle involves the effect on venue of post-filing waivers of personal jurisdiction. The cases are split on that as well. This section will attempt to iron out these smaller wrinkles, one at a time.

A. The Effect of Incorporation in a Multiple-District State

Section 1391(c)(2) provides that an entity named as a defendant resides in any district in which it is subject to personal jurisdiction. If the state has only one judicial district, then the corporation resides in that district for venue purposes because it is subject to personal jurisdiction there. As the Court made clear in *Daimler*, a corporation that is incorporated in a state is subject to general personal jurisdiction in that state.[144]

Things become less clear if the state has more than one judicial district. In that case, § 1391(d) applies and provides that a corporation resides in any district in which the corporation is subject to personal jurisdiction if the district were a separate state. There are just a handful of district court cases that have discussed the relationship between incorporation and § 1391(d). Almost all of them have said that the mere fact of incorporation in the state does not establish that the corporation resides in the state for venue purposes. The corporation must instead have other contacts with the district that independently establish personal jurisdiction.[145]

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[143] *See supra* text accompanying note 139.

[144] *See supra* note 116 and accompanying text.

[145] *See* Superior Precast, Inc. v. Safeco Ins. Co. of Am., 71 F. Supp. 2d 438, 444 n.1 (E.D. Pa. 1999); Sanders v. Seal Fleet, Inc., 998 F. Supp. 729, 736 (E.D. Tex. 1998); Tranor v. Brown, 913 F. Supp. 388, 390 (E.D. Pa. 1996); *see also* ICA Grp., LLC v.

Many of these cases are based on the legislative history of the 1988 amendments to § 1391(c). Prior to 1988, § 1391(c) provided that a corporate defendant resided in any district in which it was incorporated, in which it was licensed to do business, or was doing business.[146] Some courts interpreted the statute as allowing corporations to be sued in any district of a multiple-district state if they were incorporated or licensed to do business there. Others interpreted it as allowing corporations to be sued only in the district in which they were doing business.[147]

In 1988, Congress replaced the old provisions of § 1391(c) with the provision that a corporation resided in any district in which it would be subject to personal jurisdiction if the district were a separate state.[148] The cases say that Congress did that in order to ensure that a corporation would not be deemed to reside in every district in a multi-district state just because the corporation was incorporated or licensed to do business in that state.[149] As one district court put it, the 1988 amendments "in effect repudiated [the] case law holding that corporate defendants are suable in every district of their state of incorporation."[150]

The legislative history, however, suggests otherwise. The House Judiciary Committee Report indicates that Congress thought that it was appropriate to deem corporate defendants as residents of every district of the state of their incorporation. What Congress thought was inappropriate was to deem corporate defendants as residents of every district of the state if they only

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Taggart Global, LLC, No. 12-6156, 2013 WL 159936, at *2-3 (E.D. Pa. Jan. 15, 2013) (limited liability company does not reside in each district of its state of incorporation). *But see* Barrineau v. Sub Sea Int'l, Inc., 940 F. Supp. 153, 154 (E.D. Tex. 1996).

[146] *See supra* notes 40-44 and accompanying text.

[147] *See* Burbank Int'l, Ltd. v. Gulf Consol. Int'l Inc., 441 F. Supp. 819, 821 n.1 (N.D. Tex. 1977) (collecting conflicting cases and authorities). Only one circuit court specifically addressed the issue. *See* Davis v. Hill Eng'g, Inc., 549 F.2d 314 (5th Cir. 1977), *overruled on other grounds by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997). In *Davis*, the Fifth Circuit held that a corporation that was incorporated in a multiple-district state resided in every district of that state. *Id.* at 323-24.

[148] *See supra* notes 45-46 and accompanying text.

[149] *ICA Grp.*, 2013 WL 159936, at *2-3; *Sanders*, 998 F. Supp. at 736; *Tranor*, 913 F. Supp. at 390. One commentator read the legislative history the same way as these courts did. *See* 28 U.S.C.A. § 1391 cmt. at 11, 19 (West 2006).

[150] Van's Supply & Equip., Inc. v. Echo, Inc., 711 F. Supp. 497, 501 (W.D. Wis. 1989).

engaged in activities in part of the state. Under those circumstances, the corporation should be deemed to reside only in the district(s) in which it was engaging in those activities.

> The general venue statute defines the residence of a corporation as "any judicial district in which it is incorporated or licensed to do business or is doing business." 28 U.S.C. § 1391(c). Read literally, the statute appears to make venue proper in *any* district in a multidistrict state in which a corporation is incorporated, licensed to do business, or doing business.
>
> The Committee concluded that a corporation for venue purposes should be deemed to reside in any judicial district in which it was subject to personal jurisdiction at the time the action was commenced. *In multidistrict states in which a corporation is not incorporated or licensed to do business*, the venue determination should be made with reference to the particular district in which a corporation is sued. Thus, for example, a corporation that confines its activities to Los Angeles (Central California) should not be required to defend in San Francisco (Northern California) unless, of course venue lies there for other reasons. This amendment would accomplish this purpose.[151]

The highlighted language indicates that when a corporation *is not* incorporated or licensed to do business in the state, the venue determination *should focus* on the corporation's activities in the district in which the action was brought. The converse is that when the corporation *is* incorporated or licensed to do business in the state, the venue determination *should not focus* on the corporation's activities in the district in which the action was brought. It should instead focus on the corporation being incorporated or licensed to do business in the state.[152]

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[151] H.R. REP. NO. 100-889, at 70 (1988) (emphasis added).

[152] The authors of the ALI Project put it this way:

> This passage's express exclusion of corporations that *are* incorporated or licensed to do business from the anticipated operation of the district-specific-contacts part of present [§1391(d)] can be understood in only one way. Under the new "subject to personal jurisdiction" test, personal jurisdiction predicated on incorporation or a license to do business was to have statewide application in a multidistrict state for venue purposes, just as it does for personal jurisdiction. Only when personal jurisdiction was based on specific

Because the cases that refuse to recognize incorporation as a basis for corporate residency misread the legislative history, the position they take is unsound. The better position is that a corporation resides in every district of the state of its incorporation. That interpretation is not only consistent with the legislative history of § 1391(d) but is also consistent with the concept of incorporation.

Incorporation is a status that is not tied to a particular geographical location within the state. A corporation that exists under the laws of a state exists everywhere in the state. Under the Model Business Corporation Act, for example, a corporation can conduct business, make contracts, purchase or sell property, and invest or reinvest funds anywhere in the state.[153] It can sue and be sued anywhere in the state, assuming that the requirements of jurisdiction and venue are satisfied.[154] Although a corporation must have a registered office and a registered agent in the state, both the office and the agent can be anywhere in the state.[155]

> forum-related activities, rather than the general submission to jurisdiction entailed by incorporation or licensing, was it intended to restrict venue within a multidistrict state to the particular district or districts in which an otherwise nonresident corporation was active.

AM. LAW INST., *supra* note 26, at 186.

[153] 1 MODEL BUS. CORP. ACT ANN. § 3.02, at 3-14 (4th ed. 2013). These general powers exist in all jurisdictions. *See id.* at 3-24 to 3-26 (listing statutes). The Model Act does not impose any limitations on where a corporation may conduct its business. It instead provides the corporation may conduct its business "within or without this state." *See id.* § 3.02(10).

[154] Like an individual, a corporation can assert the attorney-client privilege. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981). Unlike an individual, however, it cannot prosecute or defend an action pro se. It must instead be represented by an attorney. *See* McGowan v. Cross, 991 F.2d 790 (4th Cir. 1993); Palazzo v. Gulf Oil Corp., 764 F.2d 1381, 1385 (11th Cir. 1985); Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1427 (7th Cir. 1985); Galaxy Telecom, L.L.C. v. SRS, Inc., 689 N.W.2d 866, 872 (Neb. Ct. App. 2004).

[155] 1 MODEL BUS. CORP. ACT ANN. § 5.01, at 5-3 (4th ed. 2013). The provision regarding a registered office has been adopted in thirty-four jurisdictions and the provision regarding a registered agent has been adopted in third-nine. *See id.* at 5-7. Ten states and the District of Columbia have adopted the Model Registered Agents Act. *See* MODEL REGISTERED AGENTS ACT, 6B U.L.A. 100 (Supp. 2014). The Act establishes one registration procedure for registered agents for all types of business entities. *See* MODEL REGISTERED AGENTS ACT, 6B U.L.A. 659-87 (2008) (reproducing text of the Act). Neither model act specifies where in the state the registered office or agent must be located. Therefore, they can be located anywhere in the state. There arguably is a specific location in New York, however. Corporations that are incorporated or

In short, a corporation has legal existence in every district of a multiple-district state because it is exists everywhere in the state. If each district were a separate state, the corporation would still exist in each district because the corporation's status as a corporation is not tied to a particular location in the state. Therefore, the corporation would be subject to general personal jurisdiction in each district and should therefore be deemed to reside in each district under § 1391(d).

There is a counterargument. The corporation's status as a corporation is a product of the act of incorporating. Under the Model Business Corporation Act, a corporation comes into existence when the articles of incorporation are filed.[156] The articles of incorporation are filed with a particular office—usually the secretary of state or the state agency with authority for corporate filings. That office has a physical location. The district in which that office is located is arguably the only district in the state in which a corporation can exist because it is the only district of the state in which the necessary filings can be made.[157]

For example, in Mississippi the articles are filed with the Mississippi Secretary of State.[158] There are two federal districts in Mississippi, the Northern District and the Southern District. The Office of the Mississippi Secretary of State is located in Jackson, Mississippi,[159] which is in the Southern District.[160] If the Southern District were a separate state, all Mississippi

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authorized to do business in New York are deemed to have appointed the New York Secretary of State as their agent for service of process. N.Y. BUS. CORP. LAW § 304 (McKinney 2003).

[156] 1 MODEL BUS. CORP. ACT ANN. § 2.03(a), at 2-46 (4th ed. 2013). This provision has been adopted in whole or with minor modifications in twenty-nine states, the District of Columbia, and Puerto Rico. *Id.* at 2-53. For information about when corporations in other states come into existence, see *id.* at 2-53 to 2-56.

[157] Another approach is to assume that the corporation in incorporated in the district that contains the office listed in the articles of incorporation. *See* Horizon Mktg. v. Kingdom Int'l Ltd., 244 F. Supp. 2d 131, 138 (E.D.N.Y. 2003). That seems to be an even more arbitrary approach than the one suggested in the text because there is no clear nexus incorporation and the location of an office that the incorporators happen to choose, especially given that there is no requirement that any business activities occur at the office. *See* N.Y. BUS. CORP. LAW § 102(10) (McKinney 2003).

[158] MISS. CODE ANN. § 79-4-2.01 (2013).

[159] *See Business Services*, MISS. SECRETARY STATE, http://www.sos.ms.gov /BusinessServices/Pages/default.aspx (last visited Jan. 31, 2015).

[160] *See* 28 U.S.C. § 104(b) (2012).

corporations would be incorporated there because all of the necessary corporate filings would be done there. No corporations would exist in the Northern District of Mississippi because, were the district a separate state, there would be nowhere to file the necessary documents.

But that seems to take the fiction of separate states too far. The purpose of the fiction is not to create an alternative universe. The purpose is instead to protect a corporation that engages in activities in a state from being subject to suit in every district of the state.[161] It is arguably unfair to subject a corporation to suit in one district when it chose to concentrate its activities in another district. There is nothing unfair, however, about subjecting a corporation to suit in every district of a state because of its incorporation in the state. The corporation chose to incorporate in the state and owes its existence to the state. Furthermore, there is nothing special about the district in which the secretary of state's office is located that makes that particular district a fairer or more convenient forum than any other district in the state.

B. The Effect of the State Long-Arm Statute

So far, the discussion has assumed that the separate state analysis of § 1391(d) turns on whether the assertion of personal jurisdiction would satisfy the Due Process Clause—in other words, whether there would be general or specific personal jurisdiction. There may be more to the analysis, however. Some federal courts have said that the state long-arm statute must also be satisfied. In other words, the defendant's activities in the district must be sufficient to satisfy the state long-arm statute and the Due Process Clause.[162] Other federal courts have said that only the Due Process Clause must be satisfied.[163]

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[161] *See supra* text accompanying note 150.

[162] *See* Del Toro v. Atlas Logistics, No. 1:12-CV-01535-AWI-BAM, 2013 WL 796593, at *3 (E.D. Cal. Mar. 4, 2013); Walbro Auto. Corp. v. Apple Rubber Prods., Inc., No. 92-Civ.-4179, 1992 WL 251449, at *3 (S.D.N.Y. Sept. 18, 1992); Zinn v. Gichner Sys. Grp., No. 93-5817, 1994 WL 116014, at *2 (E.D. Pa. Apr. 5, 1994); Ill. Tool Works, Inc. v. Rawlplug Co., No. 90-C-1742, 1990 WL 171601, at *3 (N.D. Ill. Oct. 25, 1990).

[163] *See* Graham v. Dyncorp Int'l, Inc., 973 F. Supp. 2d 698, 702 (S.D. Tex. 2013); N.Y. Access Billing, LLC v. ATX Commc'ns, Inc., 289 F. Supp. 2d 260, 267 (N.D.N.Y. 2003); Smehlik v. Athletes & Artists, Inc., 861 F. Supp. 1162, 1169-70 (W.D.N.Y. 1994).

The split among the courts does not matter in states in which the long-arm statute is satisfied if the Due Process Clause is satisfied. The statutory and constitutional inquiries merge into one in those states. The split may matter, however, in states that have more traditional long-arm statutes in which the defendant's activities must fit into one of the categories enumerated by the statute.[164] It is possible that the defendant's activities may not fall into of the statutory categories but may nevertheless be sufficient to satisfy the Due Process Clause.

Although the issue is not free from doubt, the language of § 1391(d) suggests that the state long-arm statute should not be part of the venue analysis. Section 1391(d) draws a distinction between being subject to personal jurisdiction and having contacts sufficient to be subject to personal jurisdiction. Being subject to personal jurisdiction is a requirement tied to the state. Having contacts sufficient to be subject to personal jurisdiction is a requirement tied to the district. The statute reads:

> [*I*]*n a State* which has more than one judicial district and *in which a defendant that is a corporation is subject to personal jurisdiction* at the time an action is commenced, such corporation shall be deemed to reside in *any district* in that State *within which its contacts would be sufficient* to subject it to personal jurisdiction if that district were a separate State . . . .[165]

The opening clause imposes the requirement that a corporation must be subject to personal jurisdiction in the state. As a general rule, a corporation is subject to personal jurisdiction in a state when the state long-arm statute is satisfied and the corporation has sufficient contacts to satisfy the Due Process Clause.[166] The long-arm statute is therefore relevant in determining whether the requirement of the opening clause is satisfied because the focus of the clause is on the state.[167]

If the requirements of the opening clause are satisfied, then the focus shifts from the state to the districts. In other words, the

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[164] *See supra* note 38.

[165] 28 U.S.C. § 1391(d) (2012) (emphasis added).

[166] *See supra* notes 19-20 and accompanying text.

[167] *See Smehlik*, 861 F. Supp. at 1170 n.7.

focus shifts from being subject to personal jurisdiction in the state to having contacts with the district that would be sufficient to subject the corporation to personal jurisdiction were the district a separate state. The word "contacts" is part of the due process lexicon rooted in *International Shoe*. Congress's decision to use that word with reference to the residency determination indicates that Congress intended the courts to use a pure due process analysis when determining the residency of a corporation in a multiple-district state.[168]

In a very real sense, however, it does not matter whether a court simply uses a due process analysis or also uses a statutory analysis when specific personal jurisdiction is involved. Adding a statutory analysis may lead a court to conclude that a corporation is not subject to personal jurisdiction in a district even though its contacts with the district are sufficient to satisfy the Due Process Clause. That does mean that venue will be improper, however. It simply means that venue will be proper under § 1391(b)(2) rather than § 1391(b)(1). As discussed earlier, if the constitutional requirements for specific personal jurisdiction are satisfied in a single-district state, then the requirements for venue under § 1391(b)(2) will also be satisfied.[169]

On a final note, while the long-arm statute may not be part of the analysis under § 1391(d), it is part of the analysis under § 1391(c)(2). Section 1391(c)(2) provides that an entity resides "in any judicial district in which" the entity "is subject to the court's personal jurisdiction with respect to the civil action in

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[168] Wright & Miller take the position that a pure due process analysis should be used but for a different reason. Here is what they say:

> Nowhere does the statute say that the court should look to state law, though perhaps this is implied when [§ 1391(c)(2)] speaks of personal jurisdiction "with respect to the civil action in question." Under Civil Rule 4, state personal jurisdiction statutes (usually long-arm statutes) are relevant to the personal jurisdiction inquiry. Still, the better view is that courts should engage only the constitutional analysis. After all, venue in federal courts is wholly a matter of federal law and it seems inappropriate that state-law limits on personal jurisdiction should hamper liberal federal venue provisions.

14D WRIGHT & MILLER, *supra* note 21, § 3811.1, at 297 (footnote omitted). Their reasoning is unsatisfactory because it ignores the language of § 1391(d).

[169] *See supra* notes 85-102 and accompanying text.

question."[170] An entity is normally subject to personal jurisdiction when the state long-arm statute is satisfied and the corporation has sufficient contacts to satisfy the Due Process Clause.

C. The Effect of Waiver

Lack of personal jurisdiction and improper venue are defenses that can be waived. One way a defendant can waive these defenses is by failing to raise them properly under Rule 12 of the Federal Rules of Civil Procedure. Rule 12 allows a defendant to raise lack of personal jurisdiction and improper venue in a pre-answer motion or in its answer.[171] If the defendant files a pre-answer motion and omits either lack of personal jurisdiction or improper venue, then the defendant waives the omitted defense under Rule 12(h)(1)(A).[172] If the defendant does not file a pre-answer motion, then the defendant must raise the defenses in its answer. If the defendant fails to do so, then the defendant waives the omitted defense under Rule 12(h)(1)(B).[173]

Rule 12 recognizes lack of personal jurisdiction and improper venue as separate defenses. Nevertheless the two defenses can overlap when an entity is a defendant because § 1391 defines an entity's residence in terms of personal jurisdiction. That raises the possibility that an entity defendant that fails to raise personal jurisdiction as a separate defense will waive both its personal jurisdiction and venue defenses.

For example, assume that a limited liability company was sued in the District of Nebraska on a claim unrelated to any events that occurred in the district. The company subsequently

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[170] 28 U.S.C. § 1391(c)(2) (2012).

[171] *See* FED. R. CIV. P. 12(b).

[172] A party who files a motion under Rule 12 must include any defenses or objections that Rule 12 allows a party to raise by motion and that were available to the party at the time the party filed its motion. FED. R. CIV. P. 12(g)(2). The rule penalizes a party who omits a defense by precluding the party from raising the defense in a second pre-answer motion under Rule 12. *Id.* The penalty for omission is higher for the defenses of lack of personal jurisdiction, improper venue, insufficiency of service, and insufficiency of service of process. If the party omits one or more of those defenses, then the party is deemed to have waived the omitted defenses. FED. R. CIV. P. 12(h)(1)(A). For further discussion of the consolidation and waiver provisions of Rule 12, see 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1384-1397 (3d ed. 2004).

[173] FED. R. CIV. P. 12(h)(1)(B).

moved to dismiss for improper venue under Rule 12(b)(3) and made three arguments in support of its motion. First, the company argued that venue was improper under § 1391(b)(1) because the company was not subject to personal jurisdiction in the district and therefore, under § 1391(c)(2), the company did not reside in the district. Second, the company argued that venue was improper under § 1391(b)(2) because a substantial part of the events giving rise to the claim did not occur in the district. Third, the company argued that venue was improper under the fallback provision of § 1391(b)(3) because there was another district in which venue would be proper.[174]

A strong argument can be made that the court should deny the motion if § 1391(c)(2) applies. By failing to raise lack of personal jurisdiction as a separate defense, the company has waived the defense under Rule 12(h)(1)(A). Therefore, the company is subject to the court's personal jurisdiction. That in turn makes venue proper under § 1391(b)(1) because the company resides in the district. The company resides in the district because § 1391(c)(2) provides that an entity defendant resides in any district in which it "is subject to the court's personal jurisdiction with respect to the civil action in question."[175]

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[174] This hypothetical is based on *Centerville ALF, Inc. v. Balanced Care Corp*., 197 F. Supp. 2d 1039 (S.D. Ohio 2002). The defendant in *Centerville* moved to dismiss on the ground that venue was improper because it was not subject to personal jurisdiction in the district and therefore did not reside there. *Id.* at 1046. The court determined that venue was proper because the defendant waived its defense of personal jurisdiction by failing to join a motion to dismiss for lack of personal jurisdiction. That waiver in turn established personal jurisdiction for venue purposes. *Id.* at 1048.

[175] 28 U.S.C. § 1391(c)(2) (2012). As Wright & Miller put it, "if an entity defendant waives its right to object to personal jurisdiction, it has ipso facto consented to venue under this statute. It is, after all, "subject to personal jurisdiction with respect to the civil action in question." 14D WRIGHT & MILLER, *supra* note 21, § 3811.1, at 296. One court has rejected the waiver argument in the context of § 1391(c)(2). *See* Rankel v. Kabateck, No. 12-CV-216, 2013 WL 7161687, at *3 (S.D.N.Y. Dec. 9, 2013). Although the court in *Rankel* said that it was applying § 1391(c)(2), the court actually relied on the provision in § 1391(d) that the corporation must be subject to personal jurisdiction "at the time an action is *commenced*." *Id.* (quoting 28 U.S.C. § 1391(d) (2012)) (alteration in original). The court's decision in *Rankel* illustrates how easy it is to move back and forth between §§ 1391(c)(2) and 1391(d) without even noticing that they are different sections with different language.

The waiver argument may seem rather hyper-technical. If the defendant argues that venue is improper because it is not subject to personal jurisdiction in the district, then the defendant is indirectly raising personal jurisdiction as a defense. The courts, however, expect defendants to be direct and precise when raising Rule 12(b) defenses.

The motion should be denied, however, if § 1391(d) applies. As discussed earlier, § 1391(d) provides that in multiple-district states, a corporation is deemed to reside in any district in which it would be subject to personal jurisdiction were the district a separate state.[176] By its own terms, however, § 1391(d) only applies if the corporation "is subject to personal jurisdiction at the time an action is commenced."[177] Although waiving personal jurisdiction under Rule 12 can subject a defendant to personal jurisdiction, it does not subject a defendant to personal jurisdiction "at the time" the "action is commenced." The waiver comes later.

The courts see things differently. A few courts have focused on § 1391(d)'s language and ruled that a subsequent waiver of personal jurisdiction cannot be used to establish proper venue.[178] But most of the courts have ignored the language. They have found venue to be proper on the basis of a waiver of personal jurisdiction, without even acknowledging the potential significance of the statutory language.[179]

"Citing one Rule 12(b) defense in the hope that it will sufficiently raise another defense is not permissible." Hemispherx Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1360 (11th Cir. 2008) (raising objection to personal jurisdiction is insufficient to raise an objection to service of process); *see* Am. Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107 (9th Cir. 2000) (raising objection to service was insufficient to raise objection to personal jurisdiction); Roque v. United States, 857 F.2d 20, 21-22 (1st Cir. 1988) (raising objection to personal jurisdiction is insufficient to raise objection to service).

[176] *See supra* text accompanying note 52.

[177] 28 U.S.C. § 1391(d) (2012).

[178] *See* Lanser v. MGM Mirage, No. 4:09CV877-DJS, 2009 WL 4559278, at *1 (E.D. Mo. Nov. 30, 2009); Bell v. Classic Auto Grp., Inc., No. 04-Civ.-0693, 2005 WL 659196, at *5 (S.D.N.Y. Mar. 21, 2005); DSMC, Inc. v. Convera Corp., 273 F. Supp. 2d 14, 19 (D.D.C. 2002).

[179] *See* Bomkamp v. Hilton Worldwide, Inc., No. 4:13-CV-1569, 2014 WL 897368, at *6 (E.D. Mo. Mar. 6, 2014); Duke Energy Indus. Sales, LLC v. Massey Coal Sales Co., No. 5:11-cv-00092, 2011 WL 4744907, at *2 (S.D. W. Va. Oct. 7, 2011); Twenty First Century Commc'ns, Inc. v. TechRadium, Inc., No. 2:09-cv-1118, 2010 WL 3001721, at *4 (S.D. Ohio July 30, 2010); Principal Tech. Eng'g, Inc. v. SMI Cos., No. 4:09-CV-316, 2009 WL 4730609, at *2 (E.D. Tex. Dec. 8, 2009); KMR Capital, L.L.C. v. Bronco Energy Fund, Inc., No. SA-06-CA-189-OG, 2006 WL 4007922, at *4-5 (W.D. Tex. July 11, 2006); Frederick Goldman, Inc. v. Commemorative Brands, Inc., No. 04-Civ.1100, 2004 WL 954692, at *1 (S.D.N.Y. May 5, 2004); Alpha Tau Omega Fraternity v. Pure Country, Inc., 185 F. Supp. 2d 951, 957-58 (S.D. Ind. 2002); Williams v. Terex Corp., No. CIV.A.-01-3770, 2001 WL 1486228, at *1-2 (E.D. Pa. Nov. 20, 2001); Soli-Tech, Inc. v. Halliburton Co., No. 91-CV-10232-BC, 1993 WL 315358, at *1-2 (E.D. Mich. Jan. 26,

Perhaps the reason these courts ignore the language is because it seems illogical to allow a defendant to waive personal jurisdiction but still contest venue. As one district court put it, "[i]t would defy logic to deem [the defendant] subject to this Court's personal jurisdiction, due to waiver, yet dismiss the . . . claims against it for improper venue, due to lack of residency or, in other words, for want of personal jurisdiction."[180]

The courts are correct—up to a point. In a single-district state, an entity defendant that is subject to personal jurisdiction in the state will be subject to personal jurisdiction in the district because the state and the district are one and the same. If the defendant claims that the court lacks personal jurisdiction, then the defendant should raise the defense directly by moving to dismiss for lack of personal jurisdiction under Rule 12(b)(2) and by also moving to dismiss for improper venue under Rule 12(b)(3). Requiring the defendant to do this is consistent with the purpose of Rule 12: to avoid delay by requiring the defendant to raise all its Rule 12 defenses at one time.[181]

Things are different, however, in multiple-district states. An entity defendant that is subject to personal jurisdiction in the state will not necessarily be subject to personal jurisdiction in the

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1993). Courts applying the statute in single-districts have reached the same conclusion. *See* Eagle's Flight of Am., Inc. v. Play N Trade Franchise, Inc., No. 10-1208, 2011 WL 31726, at *3 (D. Minn. Jan. 5, 2011); Thomas v. Lockheed Martin Corp., No. 05-1377-MLB, 2006 WL 1174026, at *2 (D. Kan. Apr. 28, 2006). With one exception, all of these cases were decided prior to the 2011 amendments to § 1391. The courts were therefore applying the second sentence of the pre-2011 version of § 1391(c), the sentence that is now codified in § 1391(d). *See supra* text accompanying notes 46, 52.

One court did address the language by stating that in its view, a waiver of personal jurisdiction "is the same as a concession that personal jurisdiction existed at the time the action was commenced." *Eagle's Flight*, 2011 WL 31726, at *3 n.2. The problem with the court's view is that a waiver is effective regardless of whether the defense has merit. A party can waive the defense of lack of personal jurisdiction even though there are insufficient contacts to establish personal jurisdiction. Therefore, a waiver is not necessarily the same as a concession.

[180] Centerville ALF, Inc. v. Balanced Care Corp., 197 F. Supp. 2d 1039, 1048 (S.D. Ohio 2002).

[181] *See* Flory v. United States, 79 F.3d 24, 25 (5th Cir. 1996) ("The purpose of the Rule 12(h)(1) automatic waiver provision is to encourage the consolidation of motions and discourage the dilatory device of making them in a series."); Chilicky v. Schweiker, 796 F.2d 1131, 1136 (9th Cir. 1986) (The consolidation and waiver provisions of Rule 12 "promote the early and simultaneous presentation and determination of preliminary defenses."), *rev'd on other grounds*, 487 U.S. 412 (1988).

district because the state and the district are not one and the same. For example, assume that the plaintiff sues a corporate defendant on a federal claim in the Northern District of California. Also assume that the defendant has its principal place of business in the Southern District of California and all of the events giving rise to the claim occurred there. The plaintiff nevertheless filed in the Northern District of California because the plaintiff resides there.

Under these circumstances, the defendant does not have a good-faith basis for moving to dismiss the action for lack of personal jurisdiction. The defendant is subject to both general and specific personal jurisdiction in the State of California because it has its principal place of business in California and engaged in activities giving rise to the claim in California. If the defendant filed a motion to dismiss for lack of personal jurisdiction, the defendant could be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.[182]

The defendant, however, does have a good faith basis for moving to dismiss for lack of proper venue. The defendant has no contacts with the Northern District of California. As a result, the defendant does not reside there because the defendant would not be subject to personal jurisdiction in the Northern District if the district were a separate state. That makes venue improper under § 1391(b)(1). Venue would be improper under § 1391(b)(2) because none of the events giving rise to the claim occurred there. Lastly, venue would be improper under the fallback provision of § 1391(b)(3) because there is another district in which venue would be proper, namely, the Southern District.

The courts are making a mistake when they use the defendant's failure to raise a personal jurisdiction defense to deprive the defendant of a venue defense in a multiple-district state. The most likely reason why they are making the mistake is

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[182] By presenting a motion to the court, the attorney for a corporation is certifying that to the best of his or her knowledge that the motion is not being presented for any improper purpose, that the legal contentions in the motion are warranted by the existing law, and that the factual contentions have evidentiary support. FED. R. CIV. P. 11(b). If an attorney violates Rule 11, the court may impose sanctions on its own motion or on a party's motion. FED. R. CIV. P. 11(c)(2)-(3). For further discussion of Rule 11, see 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1334-1337.3 (3d ed. 2004).

that they are forgetting that while personal jurisdiction and venue overlap, they are not co-extensive. The defendant may have sufficient contacts with the state to subject it to personal jurisdiction in the state but may not have sufficient contacts with the district to subject the defendant to personal jurisdiction if the district were a separate state.

One way of avoiding that mistake is adopt this Article's proposed interpretation of the venue statutes: § 1391(c)(2) applies in single-district states and § 1391(d) applies in multiple-district states. A waiver of personal jurisdiction in a single-district state will establish venue because § 1391(c)(2) does not require that the defendant be subject to personal jurisdiction at the time the action is commenced. It instead requires that the defendant be "subject to the court's personal jurisdiction with respect to the civil action in question."[183] By contrast, a waiver of personal jurisdiction in a multiple-district state will not establish venue because § 1391(d) requires that the defendant be "subject to personal jurisdiction at the time an action is commenced."[184]

CONCLUSION

Mistakes happen, even in well-vetted legislation. Congress may have made a mistake when it added § 1391(c)(2) and retained § 1391(d) instead of deleting it. The courts can clean up Congress's mistake by ignoring the statutory language and applying the same standards to corporate and non-corporate entities. Congress, however, should clean up its own mistakes. Until Congress does so, the courts should give effect to the statutory language as best they can. That means applying § 1391(c)(2) to all entities in single-district states and applying § 1391(d) to corporations in multiple-district states.

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[183] 28 U.S.C. § 1391(c)(2) (2012); *see supra* text accompanying note 49.

[184] 28 U.S.C. § 1391(d) (2012).