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# NARROW VENUE STATUTES AND THIRD PARTY PRACTICE: SOME THIRD PARTY DEFENDANTS GET TO GO HOME

*Paul J. Kozacky\**

These rules. . . shall be construed to secure the just, speedy, and inexpensive determination of every action.<sup>1</sup>

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.<sup>2</sup>

## INTRODUCTION

Once a defendant is hailed with adequate notice into a federal court of competent jurisdiction in a forum in which the defendant maintains sufficient contacts, there is no constitutional obstacle to that court's assertion of jurisdiction over the defendant. Pursuant to its regulatory powers under articles I and III of the United States Constitution,<sup>3</sup> however, Congress has enacted certain statutes which go beyond the constitutional restrictions to further limit the locations, or "venue," in which certain defendants may be sued. For example, in cases where a federal court's jurisdiction is based solely upon diversity of citizenship, venue is appropriate: (1) where all of the plaintiffs reside; (2) where all of the defendants reside; or, (3) where the claim arose.<sup>4</sup> Venue for civil cases not founded solely on diversity of citizenship is more limited and includes only the latter two fora.<sup>5</sup> As a practical matter, both statutes permit suit at least where a person generally would expect to be sued: where he resides or where he committed the wrong at issue.<sup>6</sup>

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1. FED. R. CIV. P. 1.

2. FED. R. CIV. P. 82.

3. Article I, section 8 grants Congress the power "[t]o constitute Tribunals inferior to the supreme Court," and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cls. 9 & 18.

Article III, section 1 provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

4. 28 U.S.C. § 1391(a) (1982).

5. 28 U.S.C. § 1391(b) (1982).

6. "Venue" is distinct from and should not be confused with "jurisdiction." Venue relates merely to the physical location of a court, whereas jurisdiction relates to the court's power or

In addition to the statutory venue provisions applicable to all federal civil suits, other statutes contain their own venue provisions defining where suit may be brought. Some provide for expansive venue, such as the nationwide venue statute for suits against aliens,<sup>7</sup> or the provisions applicable to prize cases<sup>8</sup> and RICO cases.<sup>9</sup> At the very least, most venue statutes permit suit where the cause of action arose and where one of the parties resides. These are referred to herein as "general" venue statutes.<sup>10</sup>

On the other hand, a number of venue statutes significantly *restrict* the fora in which certain defendants may be sued. For instance, some venue statutes permit suit only at a specific location of the defendant.<sup>11</sup> This Article examines some of these "narrow" venue statutes in the context of third party practice, which traditionally has not been subject to statutory venue restrictions. As a general rule, once venue is appropriate in the principal action, third party claims are considered ancillary and therefore do not need to independently satisfy venue requirements.<sup>12</sup> However, as discussed below, several recent federal court decisions have applied specific venue statutes so as to defeat third party claims. The result has significantly increased expense and inconvenience to defendants who are then required to file their third party claims as principal claims in a forum other than the one in which they were being sued. As discussed below, these cases which permit third party defendants to raise venue challenges are inconsistent with prior law, and merit reconsideration in light of the purposes behind third party practice.

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authority to decide a case. Regardless of which venue a statute authorizes, in order for the defendant to be amenable to suit the defendant still must have minimum contacts in the forum in which the cause of action arose or in the forum in which the plaintiff resides. Defendants are always amenable to suit where they maintain their domicile because the state which gives defendants privileges and protects them and their property also may exact reciprocal duties. *Milliken v. Meyer*, 311 U.S. 457 (1940); *see also* *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (stating seminal minimum contacts test); *cf. Hospes v. Burmite Div. of the Whittaker Corp.*, 420 F. Supp. 806, 810 (S.D. Miss. 1976) ("a court must have personal jurisdiction over a third party defendant before it can proceed to adjudicate a third party claim").

7. 28 U.S.C. § 1391(d) (1982) ("An alien may be sued in any district").

8. 10 U.S.C. § 7653(c) (1982) ("If the prize property is lost . . . proceedings for adjudication of the cause may be brought in any district designated by the Secretary of the Navy").

9. 18 U.S.C. § 1965(a) (1982) ("Any civil action or proceeding under this chapter may be instituted in . . . any district in which such person resides, is found, has an agent or transacts his affairs").

10. *See generally* 1A J. MOORE, W. TAGGART, A. VESTAL, J. WICKER & B. RINGLE, *MOORE'S FEDERAL PRACTICE*, ¶ 0.344[17] (2d ed. 1989) (listing most federal venue statutes) [hereinafter J. MOORE].

11. *See, e.g.,* Atomic Energy Act, 42 U.S.C. § 2210(n) (1982) (venue proper in the district where the extraordinary nuclear occurrence took place or, if outside the United States, the District Court for the District of Columbia); Federal Water Pollution Control Act, 33 U.S.C. § 1365 (1982) (venue proper in forum where pollution source located).

12. *See infra* Part I.

## I. GENERAL VENUE STATUTES AND THIRD PARTY PRACTICE

With minor exception, third party defendants who would not be subject to a direct suit in a particular forum by either the principal plaintiff or by the principal defendant (suing as a plaintiff in a separate lawsuit) due to the restrictions of a general venue statute are unable to raise that challenge against a third party plaintiff.<sup>13</sup> This means that even though the principal plaintiff could not have directly sued the third party defendant in the principal forum due to improper venue, and the principal defendant similarly could not have sued the third party defendant in a separate lawsuit due to improper venue in that forum, once the principal defendant is properly hailed into court, he may then bring suit against a third party in that forum. As long as venue is appropriate between the principal plaintiff and defendant, the principal defendant may bring in any third party defendant who may be liable for all or part of the principal defendant's exposure to the principal plaintiff. This is true regardless whether venue as to that third party defendant is appropriate.<sup>14</sup> As one commentator has stated, "[g]enerally, third-party proceedings are considered ancillary to the main action and therefore do not require independent . . . venue."<sup>15</sup>

The reason venue restrictions generally are not applicable to third party practice is simple: judicial economy. To require a defendant to sue a third party defendant in a venue appropriate to that third party would often require two separate suits. The only exception would be if, by coincidence, venue as to the third party defendant also happened to be appropriate in the principal plaintiff's chosen forum. The reason behind third party practice in the first place is to permit parties to try related issues in one forum, therefore saving time, expense, and resources.<sup>16</sup>

Despite this traditional rationale, several recent federal court decisions have upheld venue challenges based on specific venue statutes in third party practice situations.

## II. SPECIFIC VENUE STATUTES AND THIRD PARTY PRACTICE

### A. *The National Bank Act Cases: Mixed Returns*

The most inconsistent cases on the third party venue issue arise from section 94 of the National Bank Act ("Act")<sup>17</sup> which narrows the fora for

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13. See, e.g., *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1008 (N.D. Ill. 1973).

14. See, e.g., *F & D, Inc. v. O'Hara & Kendall Aviation, Inc.*, 547 F. Supp. 44, 45 (S.D. Tex. 1982); *Powell, Inc. v. Abney*, 83 F.R.D. 482, 487 (S.D. Tex. 1979).

15. 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE*, § 1455 (1982). See also 3 J. MOORE, *supra* note 10, at ¶ 14.28[2] ("With a few exceptions, especially in the earlier decisions, the weight of authority supports the view advocated herein: the third party defendant has no objection based on venue").

16. See *Powell*, 83 F.R.D. at 484-86. See generally 3 J. MOORE, *supra* note 10, at ¶ 14.04 (citing cases on third party practice).

17. 12 U.S.C. §§ 21-216(d) (1982).

suits against national banks in FDIC receivership or against the FDIC when acting as receiver of a national bank. Under section 94 of the Act, as amended,<sup>18</sup> venue is limited solely to the district in which the national bank is located:

Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, shall be brought in the district or territorial court of the United States held within the district in which that association's principal place of business is located . . . .<sup>19</sup>

The courts, for the most part, have held that this narrow statutory venue provision prevails over more general venue statutes in principal party practice. This typically has been the case where, for example, a national bank in FDIC receivership is sued for a securities law violation which has its own broad venue provision.<sup>20</sup> In third party practice situations, however, the courts are divided on the effect of narrow statutory venue provisions. For example, the District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals reached opposite conclusions on the issue of venue under the Act as applied to third parties.

In *FDIC v. Hartford Insurance Company*,<sup>21</sup> the FDIC, as receiver of the failed Continental Illinois National Bank, brought suit against fidelity insurers who wrote bonds covering certain Continental employees.<sup>22</sup> The FDIC, wearing its receiver hat, also sought punitive damages from one of the fidelity insurers which, in alleged breach of its fiduciary duty, paid for the criminal defense of one of the bank's employees.

The defendant fidelity insurer claimed that some of the bank's losses which it insured against were attributable to the FDIC's mismanagement as receiver of the also-failed Penn Square Bank, a national bank located in Oklahoma

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18. Section 94 previously applied to all national banks but was amended in 1982 to apply only to national banks in FDIC receivership. The amendment came as a result of increased criticism of the statute as antiquated and unnecessary, technology having changed the way banks do business and obviating the need to keep all bank records centrally located. See *Citizens & S. Nat'l Bank v. Bougas*, 434 U.S. 35, 38-41 (1977).

19. 12 U.S.C. § 94 (1982).

20. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152-58, (1976). In *Radzanower*, a Securities Exchange Act claim against a national bank, proper under the Securities Exchange Act's general venue provision, 15 U.S.C. § 78aa, had to be brought in the home venue of a national bank pursuant to 12 U.S.C. § 94. The Court stated that, "under the general principals of statutory construction . . . the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act." *Id.* See also *National Union Fire Ins. Co. v. Continental Illinois Corp.*, 640 F. Supp. 182, 183 (N.D. Ill. 1986) ("Absent waiver by FDIC, Section 94 is both mandatory and exclusive"; held, securities act claim against national bank in FDIC receivership properly dismissed for inadequate venue).

21. 692 F. Supp. 866 (N.D. Ill. 1988), *vacated*, 877 F.2d 590 (7th Cir. 1989).

22. *Id.* at 867.

City.<sup>23</sup> Penn Square Bank had sold Continental participations in some of the loans for which the FDIC sought to hold the fidelity insurers accountable. Thus, one of the fidelity insurers who was sued by the FDIC in Chicago filed a third party claim against the United States, claiming that the United States was liable for the FDIC's tortious mismanagement of Penn Square Bank under the Federal Tort Claims Act.<sup>24</sup>

The FDIC, now wearing its third party defendant or FTCA hat,<sup>25</sup> invoked the narrow venue statute applicable to national banks in FDIC receivership and claimed that it was not amenable to suit in Chicago. Both the district and appellate courts agreed that the narrow venue provision of the Act prevailed over the broader Federal Tort Claims Act venue provision, which under the facts permitted suit in Chicago,<sup>26</sup> and concluded that suit based on the FDIC's alleged mismanagement of Penn Square Bank had to be brought in Oklahoma. The two courts differed, however, with respect to the applicability of the narrow venue statute to the third party action.

Although the district court initially ruled that a principal party claim under the facts would have to be brought in Oklahoma, it went on to conclude that the narrow venue statute did not apply to third party practice, and denied the third party FDIC's motion to dismiss.<sup>27</sup> The district court reasoned that it would be unfair to require the fidelity insurer, who was being sued by the FDIC in Chicago, to bring its third party contribution claim in a different forum because the two claims were directly related to each other and therefore could conveniently be litigated in one forum. The court also cited avoidance of duplicative discovery, inconvenience to the principal defendant, and conservation of judicial resources as additional reasons for allowing all claims to be tried in one forum.<sup>28</sup>

Under the district court's holding, the FDIC, acting as receiver of a national bank, could be sued both in the national bank's home forum pursuant to section 94 *and* by a defendant pursuant to Federal Rule of Civil Procedure 14(a) for related claims wherever the FDIC filed suit against that defendant.<sup>29</sup>

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23. *Id.*

24. *Id.* According to the third party complaint for contribution, the FDIC's mismanagement rose to the level of a tort, and the fidelity insurer sought recoupment of the losses therefrom. *Id.*

25. See *Hartford Ins. Co.*, 692 F. Supp. at 870-71.

26. *Id.* at 871; 877 F.2d at 594. See also 28 U.S.C. § 1402(b) (1982). The venue provision for FTCA claims provides "[a]ny civil action on a tort claim against the United States . . . may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." *Id.*

The district court's reasoning was dictated by *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976), which came to the same conclusion in the context of the competing venue provisions under the "specifically applicable" National Bank Act and the "generally applicable" Securities Exchange Act.

27. *Hartford Ins. Co.*, 692 F. Supp. at 871.

28. *Id.*

29. *Id.*

The Seventh Circuit reversed the district court's ruling and held that section 94 of the Act fully applied to third party practice.<sup>30</sup> The Seventh Circuit first reasoned that the narrow venue statute served an important purpose: it allowed one court to oversee the receivership of a failed bank, thereby conserving judicial resources as well as the bank's assets.<sup>31</sup> Since the failure of one bank can lead to many lawsuits, section 94 makes the consolidation of these cases in the defendant's forum possible.<sup>32</sup>

By balancing the hardships differently than the district court, the Seventh Circuit went on to conclude that the purpose of the Act's narrow venue provision equally applied to third party situations. For example, the court discounted any concerns about duplicative discovery, stating that evidence once discovered did not necessarily have to be sought again.<sup>33</sup> In addition, since the district court in the receivership forum already was knowledgeable of the facts of that particular controversy, in contrast to the court in the principal forum, it was more logical for the receivership action to be litigated in the third party defendant's forum.<sup>34</sup> The Seventh Circuit also de-emphasized the issue of convenience, preferring instead to create a bright line rule. The court stated that because section 94 serves to protect defendants rather than plaintiffs, the third party defendant should receive its protection, as opposed to the third party plaintiff.<sup>35</sup>

The Seventh Circuit's commitment to enforcing the policy behind the Act's narrow venue provision was laudable but misguided. In the course of its analysis, the Seventh Circuit paid too little attention to the most salient fact: that the FDIC had chosen to sue the insurer *in Chicago*. If centralization of the litigation related to Penn Square Bank was of the utmost importance, the FDIC could have tried to sue the insurer in Oklahoma City. If nothing else, the Seventh Circuit's holding simply encourages the beneficiaries of narrow venue statutes to file as many claims as possible outside of the single statutorily authorized forum, so that defendants will be burdened by the need to present their counter or third party claims in a different forum.

The Seventh Circuit is not alone in its determination that third party practice must yield to the narrow venue provisions of the National Bank Act. In *Madison Bank v. Simpson*,<sup>36</sup> for example, a national bank sued the maker of certain promissory notes and was subsequently declared insolvent and placed in FDIC receivership. The maker filed a counterclaim and third party claim against the bank,<sup>37</sup> which the FDIC moved to dismiss for lack

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30. FDIC v. Hartford Ins. Co., 877 F.2d 590, 594 (7th Cir. 1989).

31. *Id.* at 593.

32. *Id.*

33. *Id.*

34. *Id.* at 594.

35. *Id.* at 594; *see also* Leroy v. Great W. United Corp., 443 U.S. 173, 183-84 (1979) (statutory venue restrictions serve to protect defendants).

36. *Madison Bank v. Simpson*, No.87-0099 (E.D. Mo. Jan.12, 1988) (LEXIS Genfed library, Dist file).

37. *Id.* at 1-2.

of proper venue. The District Court for the Eastern District of Missouri agreed and dismissed the claims because "the concept of ancillary venue should not overcome the specific and narrow venue requirement of § 94."<sup>38</sup>

In *In re Continental Securities*,<sup>39</sup> a case involving the same collapse as *FDIC v. Hartford Insurance Company*, the District Court for the Northern District of Illinois reviewed the inconsistency in the National Bank Act cases. Without explaining why the amendment to section 94 made any difference,<sup>40</sup> the northern district refused to follow those earlier cases. The court reasoned that the interests of protecting the investors and creditors of a failed bank outweighed the benefit of preventing multiple litigation.<sup>41</sup> Therefore, the court dismissed the third party claims for improper venue.<sup>42</sup>

In contrast, another line of cases reached the opposite conclusion. In *Petrizzo v. United States*,<sup>43</sup> decided before the amendment to section 94, the plaintiff sued the United States for erroneously assessed taxes. The United States filed a counterclaim against the plaintiff and a third party, a national bank, which moved to dismiss the counterclaim because of improper venue.<sup>44</sup>

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38. *Id.* at 6. The *Madison Bank* court relied, in part, on cases decided before section 94 was amended. In *Lazarow, Rettig & Sundel v. Castle Capital Corp.*, 49 N.Y.2d 508, 515, 404 N.E.2d 130, 132, 427 N.Y.S.2d 40, 41 (1980), the court dismissed a third party claim against a national bank for inadequate venue, holding that "this is a matter for legislative consideration by Congress and should not be the subject of judicial intrusion." *Id.* In *Swiss Israel Trade Bank v. E.L. Mobley*, 319 F. Supp. 374, 375 (S.D. Ga. 1970), the court upheld the national bank's venue challenge reasoning that "[i]f the provisions as to venue under the Securities Exchange Act do not constitute an exception or a repeal by implication, certainly Rule 14 of the Federal Rules of Civil Procedure cannot undo what Congress specifically provided as to suits against national banks." *Id.* In *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1001, 1005 n.3 (N.D. Ill. 1973), the court dismissed principal and third party claims against national banks for improper venue and, in a footnote, scolded the third party plaintiff for coming up with no authority for the proposition that venue statutes did not apply to third party practice. *Southeast Guaranty* should be read as an issue waiver case, not an opinion considering the merits of the third party venue controversy.

39. No. 82 C 4712, slip op. at 4-6 (N.D. Ill. Oct. 21, 1985) (LEXIS Genfed library, Dist file).

40. See *supra* note 18.

41. *Continental Securities*, No. 82 C 4712, slip op. at 7.

42. *Id.* See also *Davis & Cox v. Summa Corp.*, 751 F.2d 1507 (9th Cir. 1985). The court in *Davis & Cox* upheld the dismissal of a third party defendant bank based on section 94, stating that this section is mandatory and exclusive. *Id.* at 1527. However, the court distinguished its action from those cases which refused to apply section 94 to third parties, pointing out that in *Davis & Cox*, the plaintiff, not the defendant, had brought the bank into the action. *Id.* at 1527 n.10. The court concluded that since the plaintiff has the choice of forum, it could chose the correct forum in which to sue the third party defendant. Therefore, the defendant still deserved the protection of section 94. For other cases finding section 94 applicable to third party defendants, see *Apco Employees Credit Union v. Sun Capital Management*, No. CV 83 P 2760 S, slip. op. at 2-3 (N.D. Ala. Jan. 4, 1984); *Stutsman v. Patterson*, 457 F. Supp. 189, 192-93 (C.D. Cal. 1978). For a case rejecting a third party venue challenge under section 94, see *Herndon v. Herndon*, 491 F. Supp. 53, 55 (W.D. Tex. 1980).

43. 492 F. Supp. 752 (D.N.J. 1980).

44. *Id.* at 753. The national bank was located in Pennsylvania, while the principal action was in New Jersey. *Id.*

Noting that application of the narrow venue statute would require two separate suits, the District Court for the District of New Jersey held that section 94 of the Act had no impact on third party practice.

The court reasoned that since the third party action was not an "original" action, but merely ancillary to the original action, the venue requirements of section 94 were not applicable. The court then went on to state that application of the Act's narrow venue provision would only result in multiplicity of litigation, possible inconsistent results and inconvenience to the parties.<sup>45</sup> Accordingly, the *Petrizzo* court denied the bank's motion to dismiss for improper venue.<sup>46</sup>

Similarly, in *Odette v. Shearson Hammill & Co.*,<sup>47</sup> a third party plaintiff claimed that a national bank was responsible for some of the plaintiff's securities law claims. The national bank responded that it was not amenable to suit in that district. After examining the policy behind section 94, the *Odette* court reasoned that because it served to prevent the disruption of national bank activities, the policy would be advanced by having the third party defendant litigate in the principal forum, where it also did a large amount of business.<sup>48</sup>

In *Jones v. Kreminski*,<sup>49</sup> the defendant was sued for securities laws violations and brought third party claims against those who allegedly conspired against him, including a national bank. Once again, the national bank moved to dismiss the third party action for improper venue.<sup>50</sup> The *Jones* court, noting the "commonly acknowledged" policy underlying third party practice of consolidating related claims in one court and restricting them if possible to one hearing,<sup>51</sup> refused to apply the narrow venue statute to the third party claims. The court instead reasoned that the policies behind the Act's narrow venue provision did not apply when the suit in question was brought by a principal defendant.<sup>52</sup>

Although *Petrizzo*, *Odette*, and *Jones* were decided before section 94 was amended to apply only to failed national banks, this is not the basis of any

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45. *Id.* at 755.

46. *Id.*

47. 384 F. Supp. 946 (S.D.N.Y. 1975).

48. *Id.* at 951. The court based its holding primarily on the rule that third party actions are ancillary to principal actions, but also dismissed other arguments that the defendant advanced. These included waiver of the right to challenge venue and failure to raise the issue in prior litigation. *Id.* at 950-51. The court further rejected the third party's contention that to refuse its request for transfer violated Federal Rule of Civil Procedure 82's proscription against extending venue. *Id.* at 952.

49. 404 F. Supp. 667 (D. Conn. 1975), *appeal dismissed*, 603 F.2d 213 (2d Cir.), *remanded*, 614 F.2d 1287 (2d Cir. 1979).

50. *Id.* at 668.

51. *Id.*

52. *Id.* at 668-69. The court elaborated: "The fact that he is a defendant, and therefore had no choice in the venue of the action, means that the control over that choice which Congress attempted to exert in the National Bank Act is not applicable." *Id.* at 669.

meaningful distinction. Whether the narrow venue statute applied to all national banks or only to failed national banks, the policy behind third party practice remains the same. Nevertheless, there remains a split of authority as to whether the Act's narrow venue provision applies to third party practice despite the amendment. However, since there is no valid reason to differentiate between general and narrow venue statutes with respect to third party claims, there is no basis for the existing inconsistency in third party situations which turns entirely upon whether the applicable venue statute is narrow or general.

### B. *The Carmack Amendment Venue Provision*

A recently reported decision addressing the conflict between narrow and general venue statutes has resolved the conflict in favor of third party practice. The decision concerned the narrow venue provisions for suits involving rail carriers known as the Carmack Amendment.<sup>53</sup> Under that statute, an action against a railroad which first picks up cargo, called an "originating carrier," had to be brought in the judicial district of the point of origin. This narrow venue statute presented an obstacle to a third party complaint against a railroad in *Mid-Continent International v. Evergreen Marine Corp.*,<sup>54</sup> where one plaintiff purchased and the other plaintiff insured garden rakes manufactured in Taiwan for shipment to Ohio. The rakes were transported from Taiwan to Los Angeles aboard the defendant's oceanic vessel, and from Los Angeles to Ohio by at least two separate railroads.<sup>55</sup>

The shipment in *Mid-Continent* was covered under a single bill of lading from Taiwan to Ohio,<sup>56</sup> known as a through bill of lading, instead of separate bills of lading for each segment of its journey.<sup>57</sup> In other words, the plaintiffs had arranged the entire shipment with the ocean carrier, which in turn arranged for rail carriers to transport the cargo where its ocean vessels could not. Plaintiffs were not, however, privy to any contract with the rail carrier.

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53. The Carmack Amendment, 49 U.S.C. § 11707(d)(2)(A), provides:

A civil action under this action may only be brought

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and,

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

54. No. 87 C 2579 (N.D. Ill. Dec.14, 1987) (LEXIS Genfed library, Dist file).

55. *Id.* at 1.

56. Complaint at 2, *Mid-Continent Int'l v. Evergreen Marine Corp.*, No. 87 C 2579 (N.D. Ill. Dec. 14 1987) (LEXIS Genfed library, Dist file).

57. For example, the shipment could have involved an ocean bill of lading between Taiwan and Los Angeles and a separate rail bill or bills between Los Angeles, intermediate points, and Ohio.

The plaintiffs claimed that the rakes arrived in Ohio in damaged condition.<sup>58</sup> They sued the ocean carrier in federal court in Chicago, the location of the ocean carrier's regional office which arranged for the shipment.<sup>59</sup>

The ocean carrier brought a third party action for indemnity against the railroad, claiming that any damage to the plaintiffs' cargo occurred while it was in the railroad's control.<sup>60</sup> In addition to the typical third party claim requesting that the third party defendant reimburse the principal defendant for any judgment assessed against the principal defendant, the ocean carrier also requested that the third party defendant be held *directly* liable to the plaintiffs.<sup>61</sup> Specifically, the principal defendant requested that the court, under this alternative prayer, enter any judgment in plaintiffs' favor directly against the third party defendant only, and not against the principal defendant.<sup>62</sup> Although not permitted in any other practice, direct third party defendant to plaintiff liability is permitted in admiralty and maritime cases pursuant to Federal Rule of Civil Procedure 14(c).<sup>63</sup> Thus, not only was the railroad being sued as a third party defendant potentially liable to reimburse the ocean carrier for any judgment which the ocean carrier suffered, but the railroad also was being sued as directly liable to the plaintiffs, as if the plaintiffs had originally brought suit naming only the railroad as a defendant.

The railroad moved to dismiss the third party claim on the grounds that, under the Carmack Amendment, venue was not proper in Illinois.<sup>64</sup> The railroad averred that its tracks ended in Kansas City and that it did not operate railroad lines into Ohio, the final destination of the goods.<sup>65</sup> Therefore, as an "originating carrier," the railroad claimed amenability to suit only in Los Angeles, the origination point for the rail segment of the goods.<sup>66</sup>

The ocean carrier preferred not to litigate the case in two separate fora at increased expense as well as exposure to inconsistent judgments. Instead, it opposed the railroad's motion to dismiss contending that the narrow venue

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58. *Id.* at 1. Plaintiffs sued under the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 ("COGSA"), which regulates bills of lading, creates a federal cause of action and controls liability in oceanic shipping cases.

59. The complaint indicates that the ocean carrier was "doing business in Illinois." Complaint at 2.

60. *Id.*

61. Third Party Complaint at 3, *Mid-Continent Int'l v. Evergreen Marine Corp.*, No. 87 C 2579 (N.D. Ill. Dec. 14, 1987) (LEXIS Genfed library, Dist file).

62. *Id.*

63. The historic admiralty practice was first recognized in *The Hudson*, 15 F. 162 (S.D.N.Y. 1883), and survived the unification of civil and admiralty rules in 1966. See generally 3 J. MOORE, *supra* note 10, at ¶¶ 14.31[j] - 14.37 (discussing admiralty statutes).

64. Third Party Complaint at 2.

65. Third Party Memorandum in Support of Motion to Dismiss or Transfer at 4, *Mid-Continent Int'l v. Evergreen Marine Corp.*, No. 87 C 2579 (N.D. Ill. Dec. 14, 1987) (LEXIS Genfed library, Dist file).

66. *Id.* at 7.

provisions of the Carmack Amendment were not applicable to third party practice.<sup>67</sup>

The third party defendant railroad contended that the Carmack Amendment venue provision was analogous to that of section 94 of the National Bank Act, which permitted suit in only one forum, the national bank's home forum.<sup>68</sup> The court, however, distinguished the National Bank Act cases as inapplicable because the "narrower" venue statute involved therein permitted suit in only a *single* forum. Since the Carmack Amendment offered a choice of fora, albeit limited, the court concluded that the policy behind limiting venue in railroad cases was not as strong as that behind the National Bank Act.<sup>69</sup> Therefore, the third party defendant could not claim the limited venue protection provided to principal parties under the Carmack Amendment.<sup>70</sup>

### C. Other Narrow Venue Statutes: The Untold Story

The narrow venue provisions of the National Bank Act and the Carmack Amendment are not alone.<sup>71</sup> Several other federal statutes similarly restrict the available venues, among them the laws relating to patent infringement and maritime torts.

Suits for patent infringement, under 28 U.S.C. § 1400(b), can only be brought where the defendant resides or where he committed the alleged acts of infringement, as long as the defendant has a "regular and established place of business" at the site of their commission.<sup>72</sup> The policy underlying this narrow venue statute is that suit should be brought near the location where the defendant keeps his business records, which ordinarily are both voluminous and painstakingly scrutinized in patent infringement litigation.<sup>73</sup> Likewise, sailors' lawsuits against their employers for maritime torts under the Jones Act<sup>74</sup> must be brought in the district where the employer resides,

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67. Defendant/Third Party Plaintiff's Response to Third Party Defendant's Motion to Dismiss or Transfer at 3, *Mid-Continent Int'l v. Evergreen Marine Corp.*, No. 87 C 2579 (N.D. Ill. Dec. 14, 1987) (LEXIS Genfed library, Dist file).

68. *Id.* at 10.

69. *Id.* at 10-11.

70. *Id.* at 11. After the decision, the case settled without the expense of a separate lawsuit in Los Angeles between the ocean carrier and the rail carrier. This was beneficial at least for the plaintiffs, the ocean carrier and the California court, which never had to be burdened by that duplicative action.

71. For a list of federal statutes that contain narrow venue provisions, see 1A J. MOORE, *supra* note 10, at ¶ 0.344[17].

72. 28 U.S.C. § 1400(b) (1982). Venue for suits for copyright infringement, in contrast, is broader because it is appropriate where the defendant or his agent "may be found." *Id.* § 1400(a).

73. *See, e.g., Bradford Novelty Co. v. Manheim*, 156 F. Supp. 489, 491 (S.D.N.Y. 1957).

74. 46 U.S.C. § 688 (1982).

not where the tort occurred.<sup>75</sup>

There is little case law regarding the application of these narrow venue statutes to third party practice. For example, under the Jones Act, the District Court for the Eastern District of Pennsylvania, although it noted the issue of venue challenges in third party situations, declined to rule on the issue.<sup>76</sup> Under the patent infringement statute, a single case demonstrates an aversion to allowing third party venue challenges. In *Dickey-john Corp. v. Richway Sales Corp.*,<sup>77</sup> the plaintiff sued the defendant for infringement of the plaintiff's electronic seed planter operations monitoring system.<sup>78</sup> The defendant filed a third party claim against the manufacturer and supplier of the system, and the plaintiff sought to implead them under Federal Rule of Civil Procedure 14.<sup>79</sup> The third party defendants moved to dismiss the principal defendant's action against them pursuant to 28 U.S.C. § 1400(b), because neither the manufacturer nor the supplier resided or did business in the plaintiff's chosen forum.<sup>80</sup> The *Dickey-john* court held, however, that the third party defendants were properly before the court in the indemnification action brought by the principal defendant. Therefore, there was no reason to prevent the plaintiff from bringing an action against these parties as well.<sup>81</sup> The court cited the interests of judicial economy and prevention of unnecessary suits as reasons for its holding.<sup>82</sup>

A review of the cases interpreting the above-mentioned venue statutes indicates that those statutes that permit suit in more than one forum, and are therefore less "narrow," may be treated differently for third party purposes than those that permit suit in only one forum. For instance, the Carmack Amendment, while narrowing venue to less than that available

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75. *Id.* However, the knowledgeable admiralty proctor may escape this provision. If, instead of bringing the sailor's Jones Act claim in civil court, the claim is filed under the court's "admiralty jurisdiction," then suit is appropriate where the defendant is found or where his property is seized, pursuant to traditional concepts of admiralty venue. See, e.g., *Puget Sound Tug & Barge Co. v. The Go Getter*, 106 F. Supp. 492 (D. Or. 1952) (transfer to admiralty docket denied because forum non conveniens held inapplicable to admiralty).

76. *Mitchell v. Farrell Lines, Inc.*, 350 F. Supp. 1325 (E.D. Pa. 1972). In *Mitchell*, the plaintiff seaman brought an action against a shipowner for damages under the Jones Act. The defendant shipowner brought third party actions against two other parties. *Id.* at 1326. The principal defendant and third party defendants filed motions to transfer to another venue under 28 U.S.C. § 1404 (1982). Finding that none of the operative facts occurred in the Pennsylvania forum, the court granted the principal defendant's motion to transfer the action. *Id.* at 1327. The court recognized that the plaintiff may have had a valid objection to the motion to transfer by the third party defendant, but refused to decide if such a motion would be upheld, basing its holding solely on the principal defendant's motion. *Id.* at 1327-28.

77. 78 F.R.D. 66 (N.D. Ill. 1977).

78. *Id.* at 67.

79. *Id.*

80. *Id.*

81. *Id.* at 67-68.

82. *Id.* at 68. The court stated that when all parties were properly before the court, and a ruling would affect the rights of all these parties, judicial economy mandated a determination of all claims within that forum. *Id.*

under the general venue statutes,<sup>83</sup> nonetheless provides for more than one forum.<sup>84</sup> As the court in *Mid-Continent International*<sup>85</sup> pointed out, since the Carmack Amendment provides for more than one forum, it does not evidence a policy of protecting the convenience of a defendant by requiring the plaintiff to bring suit in only one forum.<sup>86</sup> Instead, the interests of judicial economy expressed in Rule 14 of the Federal Rules of Civil Procedure take priority. The *Mid-Continent International* court further distinguished venue under the Carmack Amendment from the even more narrow venue provided for under section 94 of the National Bank Act.<sup>87</sup> The court pointed out that because section 94 permitted suit in only one forum, it did evidence a policy of protecting the principal defendant, which may then be extended to third party defendants. Since the Carmack Amendment allows for a choice of fora, third party defendants have no grounds to demand protection and challenge venue.<sup>88</sup>

Applying this reasoning to the patent infringement and Jones Act venue statutes, two different results would be reached. Since the patent infringement statute provides for two fora, it is similar to the Carmack Amendment in that it at least implies a policy of providing the defendant with only limited control over where he must defend himself.<sup>89</sup> Therefore, under both the Carmack Amendment and the patent infringement statute, the third party defendant cannot claim that venue is improper when a principal party sues him in the principal parties' forum.

Under the Jones Act, however, a plaintiff can bring a civil claim in only one forum—where the employer resides.<sup>90</sup> The statute is similar in this respect to the National Bank Act. Since both Acts seem to indicate an intent to protect the defendant from litigation in more than one forum, both may be construed as also affording the same protection to third party defendants.

### III. THE RESTRICTIONS OF NARROW VENUE STATUTES SHOULD NOT BE APPLICABLE TO THIRD PARTY ACTIONS

Although the foregoing discussion of the National Bank Act and Carmack Amendment cases indicates some disagreement among the courts as to the application of venue statutes to third party defendants, there are several arguments supporting the position that such statutes are inapplicable in that context.

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83. For the general federal venue statutes, see 28 U.S.C. § 1391(a)-(b) (1982).

84. See 49 U.S.C. § 11707(d)(2)(A) (1982).

85. No. 87 C 2579 (N.D. Ill. Dec. 14, 1987) (LEXIS Genfed library, Dist file).

86. *Id.* at 10-11.

87. *Id.* See 12 U.S.C. § 94 (1982).

88. *Mid-Continent Int'l*, No. 87 C 2579 at 10-11.

89. See 28 U.S.C. § 1400(b) (1982). The plaintiff may sue the defendant where he resides or where he committed the acts of infringement. *Id.*

90. 46 U.S.C. § 688 (1982).

First, allowing third party defendants a choice of venue, and thus requiring a third party plaintiff to bring suit in another jurisdiction, merely serves to increase the time and expense of litigation. The litigation is, in effect, duplicated.<sup>91</sup> For example, the third party plaintiff must carry out discovery proceedings in a forum separate from that of the original action.<sup>92</sup> Requiring the third party action to take place in a separate forum ordinarily would also necessitate separate trial counsel for both the third party and principal fora, thus increasing litigation expense.<sup>93</sup>

In evaluating whether to sustain a third party's venue challenge, reference must be made to the goals of narrow venue statutes. These statutes frequently serve to protect the defendant's convenience.<sup>94</sup> For instance, the narrow venue provision of the National Bank Act serves to avoid disruption of banking operations that likely would occur if a bank in receivership had to defend itself in an action in a remote forum.<sup>95</sup> In contrast, different policies are involved when the suit involves a third party action. In this situation, the need to litigate all claims in the same forum is greater than the policy of protecting the third party defendant's convenience interests.<sup>96</sup> Congress demonstrated the importance of deciding all claims in a single action by adopting the liberal impleader provisions of Rule 14 of the Federal Rules of Civil Procedure.<sup>97</sup> Rule 14 allows a defendant to implead another party who is or may be liable for any part of the defendant's liability, at any time after the plaintiff brings suit.<sup>98</sup> The purpose of this rule is to adjudicate the rights of all interested parties at once, and in a single forum.<sup>99</sup>

Similarly, there can be no logical argument that the various narrow venue statutes supersede the Federal Rules of Civil Procedure and common law relating to third party practice. Congress promulgated both the Federal Rules and the various statutes that contain narrow venue provisions.<sup>100</sup> Under general principles of statutory construction, if the narrow venue statutes make no mention of their applicability to third party actions, they do not overrule the general policy of impleading third parties found in the Federal Rules.<sup>101</sup>

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91. See *Petrizzo v. United States*, 492 F. Supp. 752, 754 (D.N.J. 1980) (allowing a change in venue in third party proceedings results in a multiplicity of suits).

92. *FDIC v. Hartford Ins. Co.*, 692 F. Supp. 866, 871 (N.D. Ill. 1988), *vacated*, 877 F.2d 590 (7th Cir. 1989).

93. *Id.*

94. *FDIC v. Hartford Ins. Co.*, 877 F.2d 590, 594 (7th Cir. 1989).

95. *Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 951 (S.D.N.Y. 1975).

96. See *Odette*, 394 F. Supp. at 951 (citing the need to simplify and expedite procedures under the Federal Rules as a reason to deny third party venue challenges).

97. FED. R. CIV. P. 14.

98. *Id.*

99. *Odette*, 394 F. Supp. at 951-52 (quoting *United States v. Acord*, 209 F.2d 709, 712 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954)).

100. Congress promulgated the Federal Rules under the authority of the Act of June 19, 1934, 28 U.S.C. § 2072 (1982).

101. When two statutes can coexist, the courts must, absent a clear congressional intent,

In addition, case law prior to the Federal Rules indicates that the venue in an ancillary action is presumptively correct where a court has jurisdiction over the original action.<sup>102</sup> Since the development of the Federal Rules, courts have held that Rule 14 should be applied in accordance with the law in existence prior to the adoption of the Federal Rules relating to ancillary proceedings.<sup>103</sup> Because the courts apply Rule 14 in light of the pre-Rules law, there is no inconsistency between Rule 14 and Rule 82, which provides that the Federal Rules are not to extend or limit either the jurisdiction or venue of the district courts.<sup>104</sup> The third party provisions of Rule 14 cannot be understood to impermissibly extend venue in violation of Rule 82, because this was the state of the law prior to the adoption of the Federal Rules.<sup>105</sup>

If viewed in light of the policy considerations underlying third party actions, there is no reason to treat the application of narrow venue statutes any differently than the application of general venue statutes. This is so because as a general matter courts find that if venue is proper in the original action between the principal plaintiff and defendant, venue also is proper as to the action by the principal defendant against a third party defendant. It is no defense for the third party defendant to assert that venue is improper simply because an independent action against it by the defendant could not be sustained in that particular forum.<sup>106</sup> Because there is no specific requirement that a third party action comply with general venue statutes, there is no corresponding requirement of compliance with narrow venue statutes.

One final argument against the practice of allowing application of narrow venue statutes in third party actions involves the policy, provided for in the narrow venue statutes, of protecting the principal defendant from having to litigate in an inconvenient forum. The courts have held that this policy applies only to the principal defendant, in the context of the original action, and not when the defendant himself is suing another.<sup>107</sup> The protection of the first defendant would be frustrated if the statute was extended to third parties, thus forcing the defendant to litigate in two fora.<sup>108</sup>

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view them as each effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1973). When there is no affirmative showing of an intent to repeal, repeal can be implied only when early and later statutes are irreconcilable. *Id.* at 550.

102. See *Dickey v. Turner*, 49 F.2d 998, 1001 (6th Cir. 1931).

103. *Morrell v. United Air Lines Transport Corp.*, 29 F. Supp. 757, 759 (S.D.N.Y. 1939).

104. FED. R. CIV. P. 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.").

105. *Id. Accord Odette v. Shearson, Hammill & Co.*, 394 F. Supp. 946, 956 (S.D.N.Y. 1975). *But see King v. Shepard*, 26 F. Supp. 357, 358 (W.D. Ark. 1938) (interpreting Rule 82 as requiring separate third party venue statutes).

106. *Thompson v. United Artists Theatre Circuit, Inc.*, 43 F.R.D. 197, 201 (S.D.N.Y. 1967).

107. *E.g., Jones v. Kreminski*, 404 F. Supp. 667, 669 (D. Conn. 1975).

108. *Id. But see FDIC v. Hartford Ins. Co.*, 877 F.2d 590 (7th Cir. 1989). In upholding the third party's venue challenge, the Seventh Circuit noted that section 94 was to protect the defendant; presumably, the court meant the third party defendant, in this case. Ironically, since the third party defendant was the FDIC, the court's holding had the effect of requiring the third party defendant to litigate in two fora. *See also Seemer v. Ritter*, 25 F. Supp. 688 (M.D. Pa. 1938) (original plaintiff cannot challenge third party venue).

## CONCLUSION

The general federal venue statutes provide that plaintiffs may hail defendants into court in more than a single forum. Under the most narrow venue provisions of several federal statutes, however, a plaintiff may sue a defendant in one forum only, such as where the defendant maintains his principal place of business. Although it is fairly well-established that the general venue provisions yield to the more narrow venue statutes in suits between principal parties, there is disagreement over the application of the narrow venue statutes in the context of third party actions. While some courts have found that third party defendants deserve the protection of narrow venue restrictions, other courts have found such restrictions to be inapplicable in third party actions. The latter approach is the most consistent with the law of third party practice generally. Because third party claims are ancillary to principle claims, there should be no independent venue requirement in order to sue a third party. This approach provides for judicial economy, reduces duplication of pre-trial proceedings, and saves litigation time and expenses.