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VENUE IN PATENT INFRINGEMENT ACTIONS: JOHNSON GAS FOULS THE AIR

I. INTRODUCTION

In 1897, Congress enacted a special venue¹ statute governing patent infringement actions,² with the express intent that the special patent venue statute stand independent of the general federal venue statute.³ For nearly a century afterward, commentators⁴ and the courts warred over whether the general federal venue statute⁵ supplemented the special patent venue statute.⁶ Throughout the war, the federal courts consistently adhered to the original legislative intent, holding the rule governing venue in patent infringement actions in a class by itself, outside the scope of the general venue legislation.⁷

After the latest battle, however, those advocating supplementation claim victory in the war. In *VE Holding Corp. v. Johnson Gas Appliance Co.*,⁸ the United States Court of Appeals for the Federal Circuit⁹ dramatically altered longstanding common and statutory law by eliminating the

1. Venue refers to the place where a lawsuit may be properly brought and decided. See *infra* note 19 and accompanying text.

2. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

3. See *infra* notes 33-37 and accompanying text.

4. See, e.g., 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.344, at 4240-60 (1991); 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3823, at 218-23 (1986); Richard C. Wydick, *Venue in Actions for Patent Infringement*, 25 STAN. L. REV. 551, 584-85 (1973). The commentators typically argued for the special patent venue statute's revocation or revision, calling its original enactment a "historical accident." Wydick, *supra*, at 585.

5. The general federal venue statute is now located at 28 U.S.C. § 1391(a)-(c) (1988).

6. The special patent venue statute is now located at 28 U.S.C. § 1400(b) (1988).

7. See, e.g., *Brunette Mach. Works v. Kockum Indus.*, 406 U.S. 706, 713 (1972); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942). See *infra* notes 38-70 and accompanying text for a discussion of these cases.

8. 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

9. The Federal Circuit has been the final arbiter in actions under the patent laws since 1982. See ARTHUR H. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT PATENT LAW AND PRACTICE 2-3 (1984):

The Court of Appeals for the Federal Circuit was established on October 1, 1982, by merging the Court of Customs and Patent Appeals and the Court of Claims. The Court of Appeals for the Federal Circuit is entrusted with significant new nationwide jurisdiction in the field of patents. In addition to hearing appeals from the United States Patent and Trademark Office, all patent appeals from a United States District Court are now centralized in this new court in an effort to attain uniformity in patent law on an appellate level.

Id.

patent venue statute's independence from the general venue statute. The court held that the general corporate civil venue statute¹⁰ defined the residence of corporate defendants for purposes of venue in patent infringement cases.¹¹ According to the court, patent holders may now sue corporate patent infringement defendants in any judicial district in which a normal corporate civil defendant may be sued.¹² The commentators had argued for adoption of this exact result.¹³

The *Johnson Gas* decision, however, should not be warmly welcomed by the legal community. The problem lies in the lack of authority mandating the change. Although the *Johnson Gas* court appeared to base its decision on a recent statutory revision,¹⁴ a closer look reveals the decision to be unsupported by congressional action or acquiescence. Thus, by changing the law despite the existence of contrary congressional authority, the Federal Circuit has crossed over the line marking the outer limits of allowable judicial conduct.¹⁵

This Note traces the birth and development of the general venue statute, particularly the emergence of a general venue provision governing actions in which a corporation is a party. It also describes the development of the special venue statute for patent infringement actions. This Note then focuses on the major cases that have addressed how the general venue statute and special patent venue statute should interact. To answer the question whether the special patent venue statute should be supplemented by the general venue provision governing corporations, this Note analyzes the Federal Circuit's decision in *Johnson Gas* and exposes the court's flawed reasoning. This Note ultimately recommends

10. 28 U.S.C. § 1391(c) (1988). The relevant portion of § 1391(c) provides that "[f]or 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." *Id.* The chapter referred to is chapter 87, title 28 of the United States Code, which spans §§ 1391-1412. Section 1400(b), the patent venue statute, is included in chapter 87.

11. *Johnson Gas*, 917 F.2d at 1575. Section 1400(b) reads as follows: "Any civil action for patent infringement may be brought in the judicial district where the defendant *resides*, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1988) (emphasis added). The court held that the definition of corporate residence supplied by § 1391(c) must be applied to determine where a corporation "resides" for purposes of § 1400(b). *Johnson Gas*, 917 F.2d at 1575.

12. *See* 28 U.S.C. § 1391(c) (1988) ("corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction").

13. *See supra* note 4.

14. *Johnson Gas*, 917 F.2d at 1578; *see* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1013, 102 Stat. 4642, 4669 (1988) (amending 28 U.S.C. § 1391(c)).

15. *See infra* notes 197-204 and accompanying text.

that *Johnson Gas* be overruled. Any change in the meaning of the patent venue statute must be effected by future congressional legislation.

II. BACKGROUND

Federal courts have exclusive subject-matter jurisdiction over actions arising under the patent laws.¹⁶ Plaintiffs seeking to assert a claim of patent infringement must overcome two additional hurdles before they may bring their claim in federal court: (1) the court must have personal jurisdiction over the defendant;¹⁷ and, (2) venue must be proper in that court.¹⁸ Venue refers to the locality of a lawsuit—the place where judicial authority may be exercised.¹⁹ In federal practice, each federal judicial district defines the smallest “place” where venue could be proper.²⁰ Venue requirements are intended to lend a degree of certainty to the forum selection process and prevent unnecessary inconvenience to the parties.²¹ In criminal actions, the Sixth Amendment guarantees defendants venue “in the district wherein the crime shall have been committed.”²² In civil actions, however, there is no constitutional right to a particular venue. Thus, civil venue statutes have been a part of American jurisprudence since the beginning of the American judiciary.²³

16. 28 U.S.C. § 1338(a) (1988). Section 1338(a) provides that “[t]he district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents Such jurisdiction shall be exclusive of the courts of the states in patent . . . cases.” *Id.*

17. *International Shoe Co. v. Washington*, 326 U.S. 310, 314-16 (1945).

18. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979).

19. *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 167-68 (1939); *see also Minnesota Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (venue refers to place where action may be properly instituted and decided). Jurisdiction, on the other hand, refers to the source of authority of the court. *Neirbo*, 308 U.S. at 167-68; *see also Leroy*, 443 U.S. at 180 (stating that question of jurisdiction “goes to the court’s power”).

The determination of venue is relevant only if personal jurisdiction over the defendant has been established, although in rare instances a court may resolve venue issues prior to engaging in the personal jurisdiction issue. *See, e.g., Leroy*, 443 U.S. at 181 (venue determined first to avoid undecided question of constitutional law pertaining to personal jurisdiction).

20. 28 U.S.C. § 1391 (1988).

21. *Leroy*, 443 U.S. at 180. Specifically, venue statutes are designed to protect defendants from litigating in inconvenient forums. *Id.* at 184. Venue is the personal privilege of the defendant, rather than an absolute stricture on the court. *Id.* at 180. Thus, an objection to improper venue may be waived by a defendant. *Id.* Subject-matter jurisdiction, on the other hand, is a power granted by constitution or statute which no party has the authority to confer or waive. *Id.*

22. U.S. CONST. amend. VI.

23. *See infra* note 24 and accompanying text.

A. Statutory History

1. General venue

The Judiciary Act of 1789,²⁴ which created the federal judiciary, also contained the nation's first venue provisions.²⁵ Civil suits could be initiated in the district in which the defendant was an inhabitant or in the district in which the defendant was "found" at the time of serving the writ.²⁶ This was an extremely broad venue provision, allowing plaintiffs to bring suits in districts in which the defendant was only transitorily present.

This original venue rule remained in force until Congress adopted a more restrictive rule in 1887.²⁷ The 1887 revision eliminated the "found" clause. Thus, most civil suits could now only be instituted in the district in which the defendant was an inhabitant.²⁸

2. Special venue provisions for patent cases

Upon restriction of the general venue provisions in 1887, questions arose concerning the venue rules applicable to patent infringement suits. Prior to 1887, the broad venue rules of the 1789 Act were uniformly applied to all actions, including those for patent infringement.²⁹ After enactment of the restrictive general venue provisions of the 1887 Act,³⁰ however, dicta in two Supreme Court decisions implied that the new general venue rules of the 1887 Act did *not* apply in patent cases, and that the extremely broad venue rules from the 1789 Act still applied in patent infringement actions.³¹ Despite this guidance from the Supreme Court,

24. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. The lower federal courts are established, and the rules "necessary and proper" to govern them, are promulgated by Congress pursuant to constitutional authorization. U.S. CONST. art. I, § 8, cls. 9, 18; *id.*, art. III, § 2.

25. Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. at 79.

26. *Id.* The second clause of this rule came to be known as the "found" clause. *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 172 (1939).

27. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552.

28. Not all civil suits had to be brought in the district in which the defendant was an inhabitant, however, because the 1887 Congress also developed a separate rule governing venue in cases in which subject-matter jurisdiction was based on the parties' diversity of citizenship. *Id.* § 2, 24 Stat. at 553. In diversity jurisdiction cases, suit could be instituted in the district of the defendant's residence or the district of the plaintiff's residence. *Id.* § 1, 24 Stat. at 552-53.

29. *Chaffee v. Hayward*, 61 U.S. (20 How.) 208, 216 (1858).

30. *See supra* notes 27-28 and accompanying text.

31. *In re Keasbey & Mattison Co.*, 160 U.S. 221, 230-31 (1895); *In re Hohorst*, 150 U.S. 653, 661-62 (1893). The Court in *Keasbey* reasoned that the 1887 Act only regulated suits which fell under the *concurrent* jurisdiction of the federal and state courts, while suits for infringement of a patent right fell under the federal court's *exclusive* jurisdiction. *Keasbey*, 160

lower federal courts split their decisions regarding proper application of the 1887 Act.³²

In response to the confusion in the lower federal courts, Congress enacted a separate patent venue law in 1897.³³ Congress expressly intended the 1897 Act to eliminate the uncertainty generated by the growing number of conflicting decisions³⁴ regarding whether the 1789 or 1887 Act applied to determine venue in patent infringement actions.³⁵ The 1897 Congress eliminated the confusion by enacting a completely new venue rule. Plaintiffs could now bring patent infringement suits in the judicial district where the defendant resided,³⁶ or where the defendant had committed acts of infringement and had a regular and established place of business.³⁷ Compared to the 1789 Act, the 1897 Act explicitly

U.S. at 230-31. Therefore, the provisions of the 1887 Act did not affect patent infringement suits. *Id.*

32. See *Union Switch & Signal Co. v. Hall Signal Co.*, 65 F. 625, 627 (C.C.S.D.N.Y. 1895) (limiting *Hohorst* to infringement suits against aliens or foreign corporations); *accord* *Donnelly v. United States Cordage Co.*, 66 F. 613, 615 (C.C.D. Mass. 1895). *Contra* *Smith v. Sargent Mfg. Co.*, 67 F. 801, 801 (C.C.S.D.N.Y. 1895) (following *Hohorst*).

33. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

34. See *supra* note 32 and accompanying text.

35. Note especially the following excerpt from the congressional debates concerning the Act of 1897:

[Mr. Mitchell:] Mr. Speaker, the necessity for this law grows out of the acts of 1887 and 1888 which amended the judiciary act. Conflicting decisions have even arisen in the different districts in the same States as to the construction of these acts of 1887 and 1888, and there is great uncertainty throughout the country as to whether or not the act of 1887 as amended by the act of 1888 applied to patent cases at all.

The bill is intended to remove this uncertainty and to define the exact jurisdiction of the circuit courts in these matters.

29 CONG. REC. 1900 (1897) (remarks of Mr. Mitchell, who reported bill for House Committee on Patents).

36. According to prevailing law at the time, a corporation "resided" only in the district in which it was incorporated. See *Galveston, H. & S.A. Ry. v. Gonzales*, 151 U.S. 496, 504 (1894).

37. Act of Mar. 3, 1897, 29 Stat. at 695-96. Chapter 395 of the 1897 Act stated:

[I]n suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Id. The service of process portion of the original statute is codified at 28 U.S.C. § 1694 (1988). The first clause of chapter 395 of the 1897 Act has been held to be substantively the same as the present patent venue statute located at 28 U.S.C. § 1400(b). See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227-28 (1957).

Section 1400(b) currently reads: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has com-

restricted the allowable venue in actions to enforce patent rights.

B. Common Law Developments

1. *Stonite Products Co. v. Melvin Lloyd Co.*

Forty-five years after enactment of the special patent venue provision, the United States Supreme Court first addressed the interaction between the general venue provisions and the special patent venue statute.³⁸ In *Stonite Products Co. v. Melvin Lloyd Co.*,³⁹ the plaintiff sought to supplement the patent venue statute⁴⁰ with a section of the general venue statute which provided that, for purposes of actions against multiple defendants who reside in different districts in the same state, venue was proper in either district.⁴¹

Reasoning that the 1897 Act clearly intended to create a separate patent venue statute independent from the general venue statute,⁴² the Supreme Court declared that "Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings."⁴³ No further controversy surrounded the patent statute until 1948.⁴⁴

2. Revision of the Judicial Code and *Fourco Glass Co. v. Transmirra Products Corp.*

Before 1948, the general venue rule and patent venue rule applied equally to individuals and corporate litigants.⁴⁵ To enable easy application of the residence-oriented venue statutes, the courts defined the residence of a corporation to be only the district in which it was

mitted acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1988).

38. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

39. *Id.*

40. 28 U.S.C. § 109 (1940). Section 109 was the codified version of the patent venue rule enacted as chapter 395 of the Act of March 3, 1897. Essentially this same provision is found today at 28 U.S.C. § 1400(b) (1988).

41. *Stonite*, 315 U.S. at 561-62.

42. See *supra* notes 33-37 and accompanying text.

43. *Stonite*, 315 U.S. at 566.

44. Before 1948, both the general venue rules and the special patent venue rules were also applied to corporate defendants. *Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 166-68 (1948) (decided shortly before enactment of 1948 Judicial Code revision). Enactment in 1948 of the general venue rule applicable to corporations generated the controversy at issue in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957), which is discussed in the next section. See *infra* notes 56-64 and accompanying text. For a discussion of the development of the general corporate venue statute, see *infra* notes 45-52 and accompanying text.

45. *Suttle*, 333 U.S. at 166-68.

incorporated.⁴⁶ In 1948, however, Congress enacted a separate general venue rule for corporations⁴⁷ as part of a comprehensive revision of the Judicial Code.⁴⁸

The new corporate general venue provision, codified at § 1391(c) of title 28 of the United States Code,⁴⁹ provided that “[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of the corporation for venue purposes.”⁵⁰ Although Congress apparently intended the 1948 codification to simply compile the existing common law,⁵¹ commentators quickly read new meaning into the corporate general venue code section, determining that a corporation could now reside in more than just the judicial district of its incorporation.⁵²

Following the 1948 revision of the Judicial Code,⁵³ the federal courts split their decisions on the question of whether the definition of corporate residence in the new general venue rule⁵⁴ also defined the resi-

46. *Galveston, H. & S.A. Ry. v. Gonzales*, 151 U.S. 496, 504 (1894); *see also* *Automotive Equip. v. Trico Prods. Corp.*, 10 F. Supp. 736, 738-39 (S.D.N.Y. 1935) (“Where the state of incorporation has more than one district, the habitation is in the district in the state where the principal place of business is located.”).

47. Act of June 25, 1948, Pub. L. No. 773, § 1, 62 Stat. 869, 935 (enacting 28 U.S.C. § 1391(c)).

48. *See generally* William W. Barron, *The Judicial Code—1948 Revision*, 8 F.R.D. 439 (1948) (authored by Chief Reviser) (stating that Congress revised Judicial Code in response to demand for single source of positive law governing judiciary).

49. 28 U.S.C. § 1391(c) (1948).

50. *Id.*

51. In an article written shortly after the codification, the Chief Reviser took pains to point out that substantive changes had been kept to a minimum throughout the whole codification process. *See* Barron, *supra* note 48, at 441. Furthermore, the House Report on the revision stated that only “minor changes were made in the provisions regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the reviser’s notes under sections 1391-1406.” HOUSE COMM. ON THE JUDICIARY, REVISION OF TITLE 28, UNITED STATES CODE, H.R. REP. NO. 308, 80th Cong., 1st Sess. 6 (1947). Unfortunately, the reviser’s note for § 1391(c) has never been fully understood, and is of no use in determining Congress’s intent. *See* Charles A. Wright, *Forward [sic]* to LEGISLATIVE HISTORY OF TITLE 28, UNITED STATES CODE “JUDICIARY AND JUDICIAL PROCEDURE” at iii (Roy M. Mersky & J. Myron Jacobstein eds., 1971) (“The Reviser’s Notes suggest that often the Reviser was wholly unaware of the significance of what he was doing.”).

52. *See* JAMES MOORE, MOORE’S JUDICIAL CODE COMMENTARY ¶ 0.03(28), at 178 (1949) (stating that corporation now could “be a resident of many districts for purposes of applying the [general] venue rules, whereas formerly a corporation was resident of only one district”).

53. *See supra* notes 48-51 and accompanying text.

54. 28 U.S.C. § 1391(c) (1948).

dence of corporations for purposes of the patent venue provision.⁵⁵ In *Fourco Glass Co. v. Transmirra Products Corp.*,⁵⁶ the United States Supreme Court addressed the interaction between the general venue provisions and the special patent venue statute previously explored by the Court in *Stonite*.⁵⁷

In *Fourco*, the plaintiff argued that the new, broader definition of corporate residence in the general venue statute should supplement the patent venue statute.⁵⁸ Plaintiff asserted that the definition of corporate residence provided in § 1391(c) should be used to determine where a corporate defendant resided for purposes of § 1400(b).⁵⁹

The Court rejected plaintiff's contention, stating that the issue was "not legally distinguishable" from the issue decided in *Stonite*.⁶⁰ The Court reaffirmed the holding of *Stonite* that the patent venue statute was not to be supplemented by the general venue provision.⁶¹ The Court also rejected any suggestion that the 1948 Act effected a change in the patent venue provision.⁶² The Court therefore concluded that the creation of § 1391(c) could not change the definition of corporate residence for purposes of venue in patent infringement actions.⁶³

In a line of cases following *Fourco*, the federal courts consistently held that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions," and that it is not to be supplemented by general venue statute provisions.⁶⁴

55. *Id.* § 1400(b) (1948). As part of the 1948 revision to the Judicial Code, the revisers moved the patent venue provisions previously located at § 109 into § 1400(b).

56. 353 U.S. 222 (1957).

57. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

58. *Fourco*, 353 U.S. at 223.

59. *Id.* at 223-24.

60. *Id.* at 224.

61. *Id.* at 228.

62. "[W]e hold that 28 U.S.C. § 1400(b) made no substantive changes from 28 U.S.C. (1940 ed.) § 109 as it stood and was dealt with in the *Stonite* case." *Id.*

63. *Id.* at 227-28.

64. *Id.* at 229; accord *Brunette Mach. Works v. Kockum Indus.*, 406 U.S. 706, 713 (1972) (stating that patent infringement cases are "in a class by themselves, outside the scope of general venue legislation"); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 263 (1961) (stating that "for us to enlarge upon the mandate of the Congress as to venue in such patent actions would be an intrusion into the legislative field"); see also *American Cyanamid Co. v. Nopco Chem. Co.*, 388 F.2d 818 (4th Cir.), cert. denied, 392 U.S. 906 (1968) (declining to follow supplementation argument).

In *American Cyanamid*, the plaintiff argued that the patent venue statute should be supplemented by the 1966 amendment to § 1391(b) which allowed federal question cases to be brought in the district "in which the claim arose." *Id.* at 820-21 (quoting 28 U.S.C. § 1391(b) (1966)). The Fourth Circuit found the argument "interesting and not without merit," but held that *Stonite*, *Fourco* and *Schnell* foreclosed consideration of such a theory. *Id.* at 821.

3. *Brunette Machine Works v. Kockum Industries*

In 1972, the United States Supreme Court decided another challenge to the independence of the special patent venue statute. In *Brunette Machine Works v. Kockum Industries*,⁶⁵ the plaintiff attempted to supplement the special patent venue statute with the alien venue statute codified at § 1391(d) of title 28,⁶⁶ which allows an alien to be sued in any district.

The Court first determined that § 1391(d) was *not* a general venue statute: “[I]t totally misconceives the origin and purpose of § 1391(d) to characterize that statute as an appendage to the general venue statutes, analogous to the provisions at issue in *Stonite* and *Fourco*.”⁶⁷ Reasoning from this premise, the Court concluded that “in § 1391(d) Congress was stating a principle of broad and overriding application, and not merely making an adjustment in the general venue statutes, as this Court found Congress had done in *Stonite* and *Fourco*.”⁶⁸ The Court determined the alien statute to be the declaration of a rule which could not be confined in its application like the general venue statute.⁶⁹ Therefore, § 1391(d) was held to supplement § 1400(b).⁷⁰

The *Brunette* Court carefully distinguished § 1391(d) from the general venue statute in order to circumvent § 1400(b)'s immunity from the general venue statute and allow § 1391(d) to supplement § 1400(b).

III. STATEMENT OF THE PROBLEM

In 1988, Congress amended § 1391(c) of title 28, the general venue statute governing corporations, as part of the Judicial Improvement and Access to Justice Act.⁷¹ As amended, § 1391(c) now provides that “[f]or purposes of venue under this chapter”⁷² a corporation is deemed to reside

65. 406 U.S. 706 (1972).

66. 28 U.S.C. § 1391(d) (1988).

67. *Brunette*, 406 U.S. at 713.

68. *Id.* at 714.

69. *Id.*

70. *Id.*

71. Pub. L. No. 100-702, 102 Stat. 4642 (1988). The final version of the bill passed the Senate on October 14, 1988 and the House on October 19, 1988. *Id.* at 4673. The President signed the bill on November 19, 1988 and amendments contained in the bill became effective on February 17, 1989. *Id.*; see also David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act*, 123 F.R.D. 399, 399 (1989) (discussing passage of bill). In addition to amending § 1391(c), the Act made a significant number of changes to federal court procedure. For example, the Act raised the amount in controversy required in diversity jurisdiction cases to \$50,000, changed the definition of citizenship under certain circumstances, and altered removal procedure. *Id.* at 402-09.

72. 28 U.S.C. § 1391(c) (1988). As amended, the full text of § 1391(c) states:

in any district in which the corporation is subject to personal jurisdiction.⁷³ Some evidence exists of the legislature's intent with respect to the 1988 revision of § 1391(c).⁷⁴ However, as far as can be discerned, there is no legislative history regarding the revision's effect on § 1400(b). For the most part, Congress revised § 1391(c) to change the manner in which general corporate venue was determined in states with multiple judicial districts.⁷⁵ The prime intent of these changes was to curtail the available districts in which a corporation could be sued when a state is divided into

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. 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.

Id. The chapter referred to in the first line of the revised statute is chapter 87, title 28 of the United States Code, which spans §§ 1391-1412.

Section 1400(b), the patent venue statute, is included in chapter 87, and states: "Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1988).

73. *Id.* § 1391(c).

74. See, e.g., H.R. REP. NO. 889, 100th Cong., 2d Sess. 22-81 (1988), reprinted in 1988 U.S.C.C.A.N. 5982-6042; *Judicial Branch Improvements Act of 1987: Hearings on S. 1482 Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 90-91 (1988); *Court Reform and Access to Justice Act, 1988: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 1st & 2d Sess. 656 (1987-1988); see also *infra* notes 147-59 and accompanying text (discussing pre-amendment memos to Judicial Conference Subcommittee on Federal Jurisdiction).

75. The best summation of the amendment's purpose appears in the House Report:

Venue generally turns on one of two considerations: the place where the claim arose or the residence of the parties. When one or more of the parties is a corporation, venue problems arise in determining a corporation's "residence." 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.

H.R. REP. NO. 889, *supra* note 74, at 70, reprinted in 1988 U.S.C.C.A.N. at 6031.

several judicial districts.⁷⁶ The legislative intent leads logically to the conclusion that Congress merely intended to clarify general corporate venue in states with multiple judicial districts.

Almost immediately following the passage of the 1988 Act, however, a dispute over the same issue litigated in the *Stonite*⁷⁷ and *Fourco*⁷⁸ cases arose: whether the patent venue rule should be supplemented by the provisions of a general venue statute,⁷⁹ and more particularly whether the new definition of "residence" in § 1391(c) should apply to define the word "resides" in § 1400(b). This dispute arose from the addition of the new phrase "[f]or purposes of venue under this chapter" in the opening sentence of the amended § 1391(c).⁸⁰ The chapter referred to is chapter 87, which includes § 1400(b).⁸¹ Shortly after the amendment to § 1391(c), the lower federal courts split their decisions regarding whether this new language required the corporate venue statute to supplement the special patent venue statute.⁸²

Over the years a vocal group has consistently called for supplementation of the special venue statute with the general venue statutes.⁸³ After any significant revision to the venue statutes, these "supplementers" challenge the patent venue statute's independence.⁸⁴ Each battle generates strong and vigorous debate, even though those opposing supplementation have consistently won in the courts.⁸⁵ Consistent with past

76. See Siegel, *supra* note 71, at 406.

77. *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942).

78. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957).

79. See *supra* notes 38-64 and accompanying text for a discussion of the *Stonite* and *Fourco* decisions.

80. See *supra* note 72 for the full text of § 1391(c).

81. Chapter 87 spans §§ 1391-1412 of title 28.

82. Prior to the October 24, 1990 decision in *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991), seven district courts addressed the problem. Three decided that the revised § 1391(c) did *not* supplement § 1400(b). See *Tri-Tronics Co. v. MacGregor & Co.*, No. 90 C 0630, 1990 U.S. Dist. LEXIS 9141 (N.D. Ill. July 25, 1990); *Joslyn Mfg. Co. v. Amerace Corp.*, 729 F. Supp. 1219 (N.D. Ill. 1990); *Doelcher Prods. v. Hydrofoil Int'l, Inc.*, 735 F. Supp. 666 (D. Md. 1989).

Four courts decided that the revised § 1391(c) did supplement § 1400(b). See *Ernster v. Ralston Purina Co.*, 740 F. Supp. 724 (E.D. Mo. 1990); *Diamond-Chase Co. v. Stretch Devices, Inc.*, No. CV 90-1808 (C.D. Cal. filed May 29, 1990), *aff'd on other grounds*, 923 F.2d 871 (Fed. Cir. 1990); *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 734 F. Supp. 911 (N.D. Cal. 1990); *Century Wrecker Corp. v. Vulcan Equip. Co.*, 733 F. Supp. 1170 (E.D. Tenn. 1989), *aff'd mem.*, 923 F.2d 870 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991).

83. See, e.g., 1A MOORE et al., *supra* note 4, ¶ 0.344, at 4248-49; 15 WRIGHT et al., *supra* note 4, § 3823, at 218-19; Wydick, *supra* note 4, at 584.

84. See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) (challenge following 1948 codification); *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 567 (1942) (challenge following 1897 Act).

85. See, e.g., *Fourco*, 353 U.S. at 228-29; *Stonite*, 315 U.S. at 567.

history, the supplementers seized the 1988 revision to § 1391(c) as another opportunity to challenge the independent status of the special patent venue statute. After the divided results at the district court level,⁸⁶ a 1990 Federal Circuit opinion decided the merits of this latest challenge.⁸⁷

IV. STATEMENT OF THE CASE—*VE HOLDING CORP. v. JOHNSON GAS APPLIANCE CO.*

A. *The Facts*

VE Holding Corporation (VE), owner of three United States patents, filed two suits in the Northern District of California against Johnson Gas Appliance Company alleging infringement of VE's patents.⁸⁸ Johnson moved to dismiss for improper venue in both cases, asserting that it was an Iowa corporation with no regular and established place of business in the Northern District of California.⁸⁹

The district court agreed, finding that Johnson, as an Iowa corporation, did not "reside" in the Northern District of California under the definition of corporate residence used in § 1400(b).⁹⁰ The court rejected VE's argument that the 1988 revision⁹¹ of the general corporate venue statute⁹² redefined the term "resides" as it is used with respect to corporations in § 1400(b).⁹³ Therefore, the district court held that venue was not proper in the Northern District of California with respect to Johnson.⁹⁴ VE appealed to the Federal Circuit.⁹⁵

86. See *supra* note 82.

87. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

88. *Id.* at 1576. The opinion of the court did not describe the allegedly infringed patents.

89. *Id.* at 1577. The second clause of the special patent venue statute allows suit to be brought where defendant has "committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1988). This Note is primarily concerned with the first clause of § 1400(b) and is not concerned with the interpretation and application of the second clause. A significant body of law already exists on that subject.

90. *Johnson Gas*, 917 F.2d at 1576. The district court relied on the common law rule that, for venue purposes, a corporate patent infringement defendant resided only in the district of its incorporation for venue purposes. *Id.*

91. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4669 (1988).

92. 28 U.S.C. § 1391(c) (1988).

93. *Johnson Gas*, 917 F.2d at 1576.

94. *Id.*

95. *Id.* The Federal Circuit has exclusive jurisdiction over appeals from the nation's district courts on matters involving patents. See SEIDEL, *supra* note 9, at 2.

B. Reasoning of the Federal Circuit Court

1. *Fourco* is distinguishable

The Federal Circuit began the substantive portion of its opinion by stating that the previous Supreme Court cases finding an immunity in § 1400(b) from § 1391(c) were no longer applicable due to the change in § 1391(c)'s language.⁹⁶ The court recognized that "it is sometimes said that, since *Fourco*, the only way to change the way that venue in patent infringement actions is determined is to change § 1400(b)."⁹⁷ The court asserted that this argument failed for two reasons.

The court first noted that the Supreme Court has refused to act to impede Congress's ability to enact or amend legislation. The court cited *Brunette Machine Works v. Kockum Industries, Inc.*⁹⁸ to support their position that Congress could supplement or amend § 1400(b) through enactment of another statute. The court then stated that *Fourco* did not apply because the language of § 1391(c) "as it was in *Fourco* is no longer."⁹⁹

2. Plain meaning rule

The court in *Johnson Gas* then applied the plain meaning rule,¹⁰⁰ which states that "the starting point for interpreting a statute is the language of the statute itself. . . . [T]hat language must ordinarily be regarded as conclusive."¹⁰¹ The Supreme Court, however, has carved out a narrow exception to this rule: in "rare occasions under highly unusual circumstances"¹⁰² a court may conclude that the words used by Congress did not capture the congressional intent. The plain meaning rule analysis is susceptible to this narrow exception when a clear-cut contrary legislative intent exists¹⁰³ or "a literal application of the statute produces a result so unlikely that Congress could not have intended it."¹⁰⁴

96. *Johnson Gas*, 917 F.2d at 1579.

97. *Id.*

98. 406 U.S. 706 (1972). See *supra* notes 65-70 for a discussion of *Brunette*.

99. *Johnson Gas*, 917 F.2d at 1579.

100. A long line of United States Supreme Court decisions support the plain meaning rule. See, e.g., *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); *United States v. James*, 478 U.S. 597, 606 (1986); *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980).

101. *GTE Sylvania*, 447 U.S. at 108.

102. *Johnson Gas*, 917 F.2d at 1579.

103. *Id.* (citing *United States v. Turkette*, 452 U.S. 576, 590 (1981)); see also *Garcia v. United States*, 469 U.S. 70, 75 (1984) (stating that existence of contrary legislative intent justifies limitation on plain meaning of statute).

104. *Johnson Gas*, 917 F.2d at 1579-80 (citing *United States v. Ron Pair Enters.*, 489 U.S. 235, 242-43 (1989)).

The *Johnson Gas* court concluded that the plain meaning rule applied because "the language of the statute is clear and its meaning is unambiguous."¹⁰⁵ The court then dismissed each of the exceptions. The court found the first exception inapplicable because Congress had not clearly expressed that its intent was contrary to the court's interpretation of the words of the statute.¹⁰⁶ The court found the second exception inapplicable because the broadening of available venue in patent infringement actions was *not* a result that "Congress could not have intended."¹⁰⁷

3. Rule against implicit repeals

The court in *Johnson Gas* also addressed the general statutory construction rule against implicit repeals. The rule against implicit repeals provides that a general statute ordinarily shall neither control nor nullify a specific statute.¹⁰⁸ The common law, however, has recognized an exception to this rule when the legislature manifests a clear intention to repeal the specific statute.¹⁰⁹

Initially, the court baldly stated that the rule against implicit repeals "does not govern the present situation."¹¹⁰ The court supplied very little support for this conclusion, merely stating that the general rule did not apply because: (1) § 1391(c) "reads itself into the specific statute"; and, (2) § 1391(c) "only operates to define a term in § 1400(b)."¹¹¹

Moreover, the court stated that if the rule applied to the instant situation, the exception to the rule prevailed because the words of § 1391(c) evidenced Congress's clear intention to supplement § 1400(b).¹¹²

4. Holding

Based on the above arguments, the court in *Johnson Gas* held that the 1988 revision to the wording of the general corporate venue statute¹¹³ redefined the term "resides" as it is used with respect to corporations in

105. *Id.* at 1580.

106. *Id.*

107. *Id.* at 1583-84.

108. See *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). A general statute which controls or nullifies a specific statute is said to "implicitly repeal" the specific statute.

109. See *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *infra* notes 179-96 and accompanying text.

110. *Johnson Gas*, 917 F.2d at 1580.

111. *Id.*

112. *Id.*

113. 28 U.S.C. § 1391(c) (1988).

§ 1400(b).¹¹⁴ Using this new definition of the word “resides,” the court held that the defendant corporation resided in the Northern District of California because the court had obtained personal jurisdiction over the corporation in that district.¹¹⁵ Thus, under § 1400(b), venue was proper in the Northern District of California.¹¹⁶ The court reversed the district court’s judgment and remanded the case for further proceedings consistent with its opinion.¹¹⁷

V. ANALYSIS

A. *The Proper Role of Fourco After the Amendment to § 1391(c)*

The court in *VE Holding Corp. v. Johnson Gas Appliance Co.*¹¹⁸ began the substantive part of its opinion by attempting to distinguish *Fourco Glass Co. v. Transmirra Products Corp.*¹¹⁹ and other judicial precedent associated with § 1400(b). In particular, the court took offense at the argument that the only way to change the method of determining venue in patent infringement actions was to amend § 1400(b). The Federal Circuit held that this argument failed for two reasons.

First, the court noted that the Supreme Court has refused to “impose such a disablement upon the Congress’s ability to enact or amend legislation.”¹²⁰ The court cited *Brunette Machine Works v. Kockum Industries, Inc.*¹²¹ as an example of this policy. The court’s reliance on *Brunette*, however, is misplaced. The *Brunette* Court went to great lengths to distinguish § 1391(d) from the general venue statute in order to avoid abrogating the special patent venue statute’s immunity from the general venue statute.¹²² The *Brunette* decision does not support the Federal Circuit’s position in *Johnson Gas*. Rather, *Brunette* recognized

114. *Id.* § 1400(b). The first part of § 1400(b) states that “[a]ny civil action for patent infringement may be brought in the judicial district where the defendant *resides*.” *Id.* (emphasis added).

115. Section 1391(c) defines the residence of a corporation as “any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.” *Id.* § 1391(c). Johnson conceded that VE obtained personal jurisdiction over Johnson in the Northern District of California. *Johnson Gas*, 917 F.2d at 1584.

116. *Johnson Gas*, 917 F.2d at 1584.

117. *Id.* at 1575-76, 1584.

118. 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

119. 353 U.S. 222 (1957). See *supra* notes 53-64 for a discussion of the *Fourco* decision.

120. *Johnson Gas*, 917 F.2d at 1579.

121. 406 U.S. 706 (1972). See *supra* notes 65-70 and accompanying text for a discussion of the *Brunette* decision.

122. See *supra* notes 65-70 and accompanying text.

that the patent venue statute enjoyed an absolute immunity from the general venue statutes.¹²³

Second, the *Johnson Gas* court asserted that the defendant's *Fourco* argument must fail because "[s]ection 1391(c) as it was in *Fourco* is no longer."¹²⁴ Thus, according to the court, *Fourco* did not apply and the sole issue was what "Congress now intends by this new language in the venue act."¹²⁵

The court's technical factual dismissal of *Fourco* is unwarranted. Like the plaintiff in *Fourco*, VE argued that the new, liberalized general corporate venue statute should supplement the patent venue statute.¹²⁶ Like the plaintiff in *Fourco*, VE asserted that the word "resides" in the patent venue statute should be defined per the definition of corporate residence given in § 1391(c).¹²⁷ Accordingly, just as the *Fourco* Court upheld the independence of the patent venue statute because the Court found the issue "not legally distinguishable from the issue decided in *Stonite*,"¹²⁸ the *Johnson Gas* court should have upheld the independence of the patent venue statute because the issue before the court was legally identical to the issue already decided in *Fourco* and *Stonite*.

Notwithstanding a technical factual dismissal of the holding of *Fourco*,¹²⁹ the reasoning underlying the *Fourco* decision remains valid. *Fourco* found that § 1400(b)'s immunity from the reach of the original § 1391(c) did not depend on the wording of § 1391(c). Moreover, *Fourco* determined that 1400(b)'s immunity arose from the legislative history of the original patent venue statute,¹³⁰ the forerunner to § 1400(b).¹³¹ This legislative history clearly shows that the 1897 Congress intended that the patent venue statute stand independent from the general venue statute.¹³² In particular, nothing in the historical record stated that the patent venue statute's immunity depended on the wording of the general venue

123. "[I]n 1897, Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." *Brunette*, 406 U.S. at 713.

124. *Johnson Gas*, 917 F.2d at 1579. At the time of the *Fourco* case, § 1391(c) contained the phrase "for purposes of venue." 28 U.S.C. § 1391(c) (1948). At the time of the *Johnson Gas* case, § 1391(c) started with the phrase "[f]or purposes of venue under this chapter." *Id.* (1988). The *Johnson Gas* court determined that this technical change in language rendered the *Fourco* holding inapplicable to the dispute before it. *Johnson Gas*, 917 F.2d at 1579.

125. *Johnson Gas*, 917 F.2d at 1579.

126. *Id.* at 1576; *Fourco*, 353 U.S. at 222.

127. *Johnson Gas*, 917 F.2d at 1576; *Fourco*, 353 U.S. at 223-24.

128. *Fourco*, 353 U.S. at 224.

129. See *supra* note 124.

130. Act of Mar. 3, 1897, ch. 395, 29 Stat. 695.

131. See *supra* notes 33-37 and accompanying text for a history of the patent venue statute.

132. See *supra* notes 33-37.

statute. Thus, dismissal of the holding of *Fourco* does not limit the focus of the instant dispute to *only* the plain meaning of the wording of § 1391(c). Instead, that plain meaning¹³³ must be supplemented by the reasoning of *Fourco*, which mandates that § 1400(b) remain independent from, and unaffected by, the wording of the general venue statute.

B. Proper Application of the Plain Meaning Rule

1. Plain meaning of the amended section 1391(c)

After distinguishing the holding of *Fourco Glass Co. v. Transmirra Products Corp.*,¹³⁴ the court in *VE Holding Corp. v. Johnson Gas Appliance Co.*¹³⁵ stated that the plain meaning rule¹³⁶ compelled the supplementation of § 1400(b) with § 1391(c).¹³⁷ The court stated that the “[f]or purposes of venue under this chapter” language of § 1391(c) was clear and its meaning unambiguous, therefore § 1391(c) applied to *all* of chapter 87 of title 28, including § 1400(b).¹³⁸

Such a conclusion, however, goes too far. Originally, § 1391(c) included the phrase “for purposes of venue,”¹³⁹ and the revised § 1391(c) contains the phrase “[f]or purposes of venue *under this chapter*.”¹⁴⁰

The Supreme Court determined the reach of the original § 1391(c) in *Pure Oil Co. v. Suarez*.¹⁴¹ After carefully distinguishing the *Fourco* decision as “limited to the particular question of statutory construction presented there,”¹⁴² the *Suarez* Court held that the general corporate venue statute in chapter 87 of title 28 “applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute.”¹⁴³ The immediate result of the *Suarez* decision was the supplementation of the specific venue provision of the

133. See *infra* notes 134-59 and accompanying text.

134. 353 U.S. 222 (1957).

135. 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

136. See *supra* notes 100-07 and accompanying text.

137. *Johnson Gas*, 917 F.2d at 1580.

138. *Id.*

139. 28 U.S.C. § 1391(c) (1948).

140. *Id.* (1988) (emphasis added).

141. 384 U.S. 202 (1966). *Suarez* involved an action under the Jones Act, which provides seamen the right to recover damages for personal injuries incurred during the course of their employment. The Jones Act contains its own specific venue provision which confers jurisdiction on the court “of the district in which the defendant employer resides or in which his principal office is located.” *Id.* at 203 (citing 46 U.S.C. § 688 (1964)).

142. *Id.* at 206.

143. *Id.* at 205. The Court ruled that it would hold a general venue provision inapplicable to a specific venue provision only if there was evidence that Congress intended the specific venue provision to be exclusive or that Congress intended venue to be restrictively applied under the specific venue provision at issue. *Id.* at 205-07.

Jones Act with the general corporate venue statute.¹⁴⁴ Lower federal courts subsequently relied on the broad language of *Suarez* to extend the reach of the general corporate venue provision to other specific venue statutes located *outside* of chapter 87 of title 28.¹⁴⁵

Read in light of the *Suarez* decision, the plain meaning of the additional wording of amended § 1391(c)¹⁴⁶ expressly restricts the reach of § 1391(c) to, at most, only the specific venue provisions located within chapter 87. The amended wording of § 1391(c) therefore overrules the *Suarez* Court's extension of § 1391(c) to venue provisions located outside of chapter 87 of title 28.

2. Legislative history

The scant legislative history of the 1988 revision to § 1391(c)¹⁴⁷ contains express support for the proposition that the "under this chapter" language eliminates application of the general venue statute to specific venue statutes located outside of chapter 87, such as those found in the Jones Act¹⁴⁸ and the antitrust laws.¹⁴⁹ Pre-amendment memorandums to the legislative subcommittee responsible for the 1988 revision to § 1391(c)¹⁵⁰ contain the key evidence of the purpose of the "under this chapter" language added to § 1391(c).

In 1985, Federal Judge William W. Schwarzer wrote a memo to the Subcommittee which contained a proposed revision to § 1391(c) and discussed the problems plaguing the statutory scheme governing general

144. The new rule applied particularly well to the Jones Act venue provision at issue in *Suarez*. Congress enacted the Jones Act to provide broader venue rules at a time when the general venue provisions applicable to Jones Act-type cases were more restrictive. *Id.* at 205. Thus, the Court concluded that the Jones Act venue provision should be supplemented by the general corporate venue statute. *Id.*

On the other hand, the history of the patent venue statute presents the completely opposite situation. Congress enacted the patent venue statute to provide more restrictive venue rules at a time when the general venue provisions being applied in patent cases were much broader. *See supra* notes 33-37 and accompanying text. Moreover, Congress also intended that the specific patent venue provision remain exclusive. *See supra* notes 33-37 and accompanying text. Thus, the *Suarez* Court expressly noted that its new rule of venue statute interpretation would not affect the independence of the special patent venue statute. *Suarez*, 384 U.S. at 206.

145. *See, e.g., School Dist. v. Harper & Row Publishers*, 267 F. Supp. 1006, 1009 (E.D. Pa. 1967) (extending § 1391(c) to 15 U.S.C. § 22).

146. The 1988 revision to § 1391(c) included the addition of the words "under this chapter." 28 U.S.C. § 1391(c) (1988).

147. *See supra* notes 74-76 and accompanying text.

148. 46 U.S.C. § 688 (1988).

149. 15 U.S.C. §§ 15, 22 (1988).

150. The Judicial Conference Subcommittee on Federal Jurisdiction (the "Subcommittee") was responsible for generating, drafting and amending the proposed revision to § 1391(c).

corporate venue.¹⁵¹ The memo expressly stated that the revision primarily focused on the problem of determining corporate venue in a multi-district state.¹⁵² Judge Schwarzer subsequently admitted that the proposal he initiated "had a very narrow purpose and was not intended to overrule any special venue statute."¹⁵³

In 1986, at Judge Schwarzer's suggestion, Professor Edward H. Cooper, the reporter for the Subcommittee, wrote a memorandum to the Subcommittee which addressed the proposed changes to § 1391(c).¹⁵⁴ The revision reviewed by Professor Cooper already contained the "[f]or purposes of venue under this chapter" language identical to the wording of the subsequently enacted provision.¹⁵⁵ Professor Cooper's memo contained the reason for this restrictive language:

As a matter of caution, the proposal limits its definition of residence to the venue provisions gathered in chapter 87 of the Judicial Code, 28 U.S.C. §§ 1391 through 1412. If the proposal were enacted in its present form, *it would be necessary to re-create definitions of residence for the specialized venue statutes.*¹⁵⁶

The specialized venue statutes referred to by Professor Cooper appear to be those located *outside* chapter 87 of title 28, such as the Jones Act and antitrust specialized venue provisions.¹⁵⁷ The fact that the plain words of the revised statute included the proposal's limiting language¹⁵⁸ indicates

151. Memorandum from Judge William W. Schwarzer to the Subcommittee on Federal Jurisdiction (Feb. 22, 1985), in 39 Pat. Trademark & Copyright J. (BNA) No. 974, at 435-36 (Mar. 29, 1990) [hereinafter Schwarzer Memo].

152. See *supra* note 75 for a discussion of the amendment's purpose with respect to corporate venue in a multidistrict state.

153. *CAFC Will Consider Whether New Law Changed Patent Venue*, 39 Pat. Trademark & Copyright J. (BNA) No. 974, at 425-26 (Mar. 29, 1990) (quoting Judge Schwarzer).

154. Memorandum from Edward H. Cooper to the Subcommittee on Federal Jurisdiction (Dec. 4, 1986), in 39 Pat. Trademark & Copyright J. (BNA) No. 974, at 436-40 (Mar. 29, 1990) [hereinafter Cooper Memo]. Professor Cooper is a co-author of the 1986 federal civil procedure treatise, CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE.

155. "As early as December 1985 the proposed redraft of § 1391(c) included the language '[f]or purposes of venue under this chapter . . .'" *Century Wrecker Corp. v. Vulcan Equip. Co.*, 733 F. Supp. 1170, 1173 (E.D. Tenn. 1989), *aff'd mem.*, 923 F.2d 870 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1587 (1991) (quoting REPORT OF THE SUBCOMM. ON FEDERAL JURISDICTION TO THE COMM. ON COURT ADMIN., at 11 (Dec. 1985)). As of December 1986, the proposal to amend § 1391(c) had been adopted by the Subcommittee, approved by the Committee on Court Administration, and remanded by the Judicial Conference. Cooper Memo, *supra* note 154, at 435.

156. See Cooper Memo, *supra* note 154, at 438 (emphasis added).

157. See, e.g., 46 U.S.C. § 688 (1988) (special venue provision of Jones Act); 15 U.S.C. §§ 15, 22 (1988) (special venue provisions of antitrust law).

158. See 28 U.S.C. § 1391(c) (1988).

congressional assimilation of the intent to restrict application of the general venue statute to only those venue provisions contained in chapter 87.¹⁵⁹

3. Proper application of the exceptions to the plain meaning rule

The conclusion that § 1391(c)'s wording plainly means that the statute now modifies only those venue statutes located within chapter 87 does not, however, lead to the conclusion that § 1391(c) now supplements § 1400(b). The result obtained under the plain meaning rule must yield when a clear-cut contrary legislative intent exists or a literal application of the statute produces a result so unlikely that Congress could not have intended it.¹⁶⁰

The second plain meaning rule exception is inapplicable to this case because it is possible that Congress *could* have intended to supplement § 1400(b) with § 1391(c). The *Johnson Gas* court also held the first exception inapplicable because the legislative history of the 1988 revision to § 1391(c) fell silent with respect to the correct interaction of § 1391(c) and § 1400(b). The court, however, failed to address the applicability of the legislative history of the patent venue statute. The legislative history of the precursor to § 1400(b)¹⁶¹ manifests Congress's original intent to keep the patent venue statute free from the influence of the general venue statute. Prior to enactment of the original patent venue statute, several congressmen expressly stated that the statute should be regarded as independent from the general venue provisions.¹⁶² These statements provide the "clearly expressed legislative intention contrary to the literal terms of the statute" necessary to constitute an exception to the plain meaning rule.¹⁶³

*Fourco Glass Co. v. Transmirra Products Corp.*¹⁶⁴ and its progeny¹⁶⁵ recognized this history and held the patent venue statute immune from the plain meaning reach of the general venue statute. *Fourco* and its progeny were decided when § 1391(c) literally applied to all venue provi-

159. See Schwarzer Memo, *supra* note 151, at 438.

160. See *supra* notes 100-07 and accompanying text.

161. See *supra* notes 33-37 and accompanying text.

162. See 29 CONG. REC. 1900 (statements of Reps. Mitchell and Lacey).

163. *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 632 (Fed. Cir. 1989). Such intent makes it clear that § 1400(b) is *not* to be supplemented simply through the action of the plain wording of § 1391(c) even though § 1400(b) is located within chapter 87.

164. 353 U.S. 222 (1957).

165. See *Brunette Mach. Works v. Kockum Indus.*, 406 U.S. 706, 713 (1972); *Pure Oil Co. v. Suarez*, 384 U.S. 202, 206 (1966); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 263 (1961).

sions,¹⁶⁶ therefore, the 1988 amendment's restriction of § 1391(c)'s reach to only those venue provisions "under this chapter" should have absolutely no effect on the independently derived immunity of the patent venue statute.¹⁶⁷ The plain meaning restriction of § 1391(c)'s scope of application does not compel reversal of the preexisting, congressionally-intended and common law-enforced independence of the special patent venue statute.

C. *Proper Application of the Rule Against Implicit Repeals*

The general rule against implicit repeals is a technical statutory construction argument that has been well developed in the case law.¹⁶⁸ Basic principles of statutory construction dictate that "a specific statute will not be controlled [n]or nullified by a general one, regardless of the priority of enactment."¹⁶⁹

The court in *VE Holding Corp. v. Johnson Gas Appliance Co.*¹⁷⁰ held that the general statutory construction rule against implicit repeals did not govern the instant statutory dispute.¹⁷¹ The court, however, only devoted one short paragraph to an analysis of this argument.¹⁷²

The court stated that the general rule did not apply because § 1391(c) "reads itself into the specific statute";¹⁷³ and, § 1391(c) "only operates to define a term in § 1400(b)."¹⁷⁴ This argument fails to extricate the court from applying the rule against implicit repeals. Although both of these statements are correct observations of § 1391(c)'s effect on

166. *Fourco*, 353 U.S. at 228.

167. No cases have been found that hold the newly revised § 1391(c) inapplicable to cases brought under the specialized venue statutes located outside of chapter 87. This lack of authority may merely show widespread ignorance of the true effect of § 1391(c)'s amendment.

168. See *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

169. *Id.*, quoted with approval in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). The *Radzanower* Court gave the reasons for the rule:

The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is *absolutely necessary* to give the latter act such a construction, in order that its words shall have any meaning at all.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (emphasis added) (quoting THEODORE SEDGWICK, *THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW* 98 (2d ed. 1874)).

170. 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

171. See *supra* notes 108-12 and accompanying text.

172. The placement of this argument in the middle of the court's discussion of the plain meaning rule may illustrate the court's discomfort with its own analysis of this argument.

173. *Johnson Gas*, 917 F.2d at 1580.

174. *Id.*

§ 1400(b), they do not correctly state the full effect of § 1391(c) on § 1400(b).

The first clause of the patent venue statute allows a defendant to be sued where he resides.¹⁷⁵ The second clause of § 1400(b) allows a defendant to be sued where acts of alleged infringement have occurred, if the corporation is also doing business in that locale.¹⁷⁶ The *Johnson Gas* decision expanded the first clause of § 1400(b) to allow a defendant corporation to be sued where it is subject to personal jurisdiction.¹⁷⁷ Because a corporation is subject to personal jurisdiction wherever it has "minimum contacts" or is "doing business,"¹⁷⁸ the court's interpretation of § 1391(c) implicitly nullified the second clause of § 1400(b). Thus, the *Johnson Gas* court should have applied the rule against implicit repeals.

The common law, however, has recognized an exception to the rule when the legislature manifests a clear intention to repeal the specific statute.¹⁷⁹ Thus, the crucial issue here is whether Congress intended to work an implicit repeal of § 1400(b) through the operation of the amended § 1391(c).¹⁸⁰ The common law exception to the rule against implied repeals contains two well-settled categories of allowable repeals:

- (1) [W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and, (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.¹⁸¹

The *Johnson Gas* court's decision does not involve the second category of repeal by implication. In order for that exception to apply, the second act must cover the whole subject of the earlier act.¹⁸² Section 1391(c) does not cover the whole subject of § 1400(b).¹⁸³ Thus, for the

175. 28 U.S.C. § 1400(b) (1988).

176. *Id.*

177. *Johnson Gas*, 917 F.2d at 1584.

178. *See International Shoe Co. v. Washington*, 326 U.S. 310, 314-16 (1945).

179. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *infra* note 109 and accompanying text.

180. The *Johnson Gas* court said the express language of § 1391(c) manifested such a clear intention to "repeal" § 1400(b). *Johnson Gas*, 917 F.2d at 1580. The express language as a "contrary intention otherwise" is merely a repeat of the plain meaning rule argument and will not be discussed here further. *See supra* notes 134-63 and accompanying text for a discussion of the effect of the express language of the revised § 1391(c) on the operation of § 1400(b).

181. *Posadas*, 296 U.S. at 503, *quoted with approval in Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976).

182. *See Posadas*, 296 U.S. at 503.

183. The 1988 revision to § 1391(c) clearly did not cover the whole subject of § 1400(b). Section 1391(c) applies only to venue with respect to corporations, *see supra* notes 45-52, while

Federal Circuit's position to prevail, the legislature's intention to repeal must be manifested through an "irreconcilable conflict" between the two acts.¹⁸⁴

In 1976, the Supreme Court resolved a similar statutory dispute involving an alleged "irreconcilable conflict" between two acts. In *Radzanower v. Touche Ross & Co.*,¹⁸⁵ the Court determined which venue provision controlled: the broad venue provision of section 27 of the Securities Exchange Act of 1934¹⁸⁶ or the narrow venue provision of section 94 of the National Bank Act of 1898.¹⁸⁷ The Court stated that irreconcilable conflict between two Acts means that "there is a positive repugnancy between them or that they cannot mutually coexist."¹⁸⁸ The Court further emphasized that "repeal is to be regarded as implied only if it is *necessary* to make the [later enacted law] work."¹⁸⁹ To begin its analysis, the Court delved into the purposes of each Act.¹⁹⁰ After finding that the basic purposes of the Securities Exchange Act can be fairly served even while still giving full effect to the National Bank Act provision, the Court then concluded that because "it is possible for the statutes to coexist in this manner, they are not so repugnant to each other as to justify a finding of an implied repeal by this Court."¹⁹¹

The same analysis used in *Radzanower* is applicable to the two venue provisions at issue in *Johnson Gas*. According to the scant legislative history, the purpose of the 1988 amendment to § 1391(c) was to eliminate the subjection of corporations to state-wide venue in multidistrict states.¹⁹² The purpose of the original patent venue statute was to

§ 1400(b) applies to venue with respect to corporations and individuals. 28 U.S.C. § 1400(b) (1988).

184. *Radzanower v. Touche Ross & Co.* 426 U.S. 148, 155 (1976).

185. 426 U.S. 148 (1976).

186. Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1988).

187. Rev. Stat. § 5198 (1898); 12 U.S.C. § 94 (1988).

188. *Radzanower*, 426 U.S. at 155.

189. *Id.* (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963)) (alteration in original) (emphasis added).

190. The Court found the purpose of the venue provision of the Securities and Exchange Act, 15 U.S.C. § 78aa (1988), to be the facilitation of providing "fair and honest mechanisms for the pricing of securities [and] to assure that dealing in securities is fair and without undue preferences or advantages." *Radzanower*, 426 U.S. at 155. This was accomplished by allowing suit wherever a defendant could be found. See 15 U.S.C. § 78aa (1988).

The Court found the purpose of the venue provision of the National Bank Act, 12 U.S.C. § 94 (1988), to be the prevention of interruption in banking business that might result from a bank's books being sent to distant counties. *Radzanower*, 426 U.S. at 156. This was accomplished by only allowing suit in the district where the bank was established. See 12 U.S.C. § 94 (1988).

191. *Radzanower*, 426 U.S. at 156-57.

192. See *supra* notes 74-76 and accompanying text.

restrict the venue available in patent infringement actions and clarify the independence of such a venue rule from the general venue rules.¹⁹³ Similar to section 94's effect on section 27 in *Radzanower*, § 1400(b) will have no impact whatsoever on the vast majority of lawsuits against corporations.¹⁹⁴ While suits brought against the defendants covered by § 1400(b) may have to be brought where the defendant is incorporated,¹⁹⁵ it simply is not necessary that § 1400(b) be repealed to make the general corporate venue statute work.¹⁹⁶ For these reasons, it is impossible to conclude that § 1400(b) was implicitly repealed by passage of the 1988 Act.

D. Fundamental Errors of the Johnson Gas Court

The *Johnson Gas* decision also violated basic principles of our system of government. With respect to statutory interpretation, the primary responsibility of the federal judiciary is to subordinate its individual wishes to the will of Congress, under the idea that the legislators' collective intention trumps the will of the court.¹⁹⁷ Rather than performing their proper role in this constitutional scheme, the *Johnson Gas* court simply engaged in policy making, apparently to appease those dissatisfied with the current state of the law. Such action is irreconcilable with the judicial review approach intended for the judiciary by the framers of our constitution.¹⁹⁸

Congress, not the judiciary, possesses enumerated powers to "promote the Progress of Science and useful Arts,"¹⁹⁹ "constitute Tribunals inferior to the supreme Court,"²⁰⁰ and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Pow-

193. See *supra* notes 33-37 and accompanying text.

194. Patent infringement suits comprise a small minority of the general pool of litigation in the United States courts. Those disputes that do make it into court are "notoriously costly, complex, and technical." SEIDEL, *supra* note 9, at 123.

195. Venue may also be proper in a district where the defendant has its principal place of business and has committed acts of infringement. 28 U.S.C. § 1400(b) (1988).

196. See *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 157 (1976); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

197. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281 (1990). Another commentator stated that "[t]he conscientious judge searches for the 'true' meaning of a statute, because the constitutional separation of powers assigns to the legislative branch the central responsibility for the statutory management of social policy in the substantive areas allocated to it under the applicable constitution." Reed Dickerson, *Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1125 (1983).

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

199. U.S. CONST. art. I, § 8, cl. 8.

200. *Id.* cl. 9.

ers."²⁰¹ Merely because a law has been dated by the passage of time and fallen into disfavor with contemporary commentators does not mean that a court now has the power, originally given to Congress, to unilaterally change the law. It is Congress's function to set national policy.²⁰² Activist judicial intervention should not give to litigants what Congress has expressly chosen not to give to litigants.

The legislative history of the 1988 revision to § 1391(c)²⁰³ is silent with respect to the proper interaction of § 1391(c) and § 1400(b). Such a record does not expressly indicate or even imply congressional intent to supplement the special patent venue statute with the general venue statute governing corporations. Under these circumstances, the independent immunity of § 1400(b) from the general venue statutes, explicitly based in the legislative history of the original patent venue statute and subsequently bolstered by years of judicial affirmation, may not be expressly curtailed by the judiciary. Technical arguments of statutory construction cannot prevail against this immunity. As recognized by the Supreme Court, the rules governing venue in patent infringement actions may only be amended by express congressional revision of § 1400(b).²⁰⁴

VI. RECOMMENDATION: *JOHNSON GAS* MUST BE OVERRULED

The decision of the Court of Appeals for the Federal Circuit in *VE Holding Corp. v. Johnson Gas Appliance Co.*²⁰⁵ must be overruled. The court held that corporate patent infringement defendants may be sued in an almost unlimited number of venues: any judicial district in which the corporate defendant is subject to personal jurisdiction.²⁰⁶ Venue requirements, however, are intended to reduce the cost and inconvenience to the parties.²⁰⁷ The *Johnson Gas* decision increased the cost and inconvenience of litigation for corporate patent infringement defendants. If allowed to stand, this decision could have a tremendous negative impact on our society.

For example, because the decision greatly expanded a plaintiff's venue choices, patent holders no longer have the cost of suing in a distant forum to dissuade them from filing an action for patent infringement. Even a small increase in the number of patent infringement actions

201. *Id.* cl. 18.

202. *See generally id.* arts. I & III (delineating legislative authority to Congress and judicial power to Supreme Court).

203. *See supra* notes 147-59 and accompanying text.

204. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 n.8 (1957).

205. 917 F.2d 1574 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1315 (1991).

206. *Id.* at 1584.

207. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979).

would severely disrupt the operation of the federal courts, due to the notoriously complex and time-consuming nature of patent infringement actions.²⁰⁸

An increase in the number of patent infringement suits creates other troubling side effects. Companies competing with patent holders may refuse to bring similar products to market for fear of subjecting themselves to expensive, time-consuming infringement suits in distant forums. Concurrently, the costs of new products will increase as corporations set aside funds to defend actions across the country. The reduction of viable choices in the marketplace and the increased price of the available products will make consumers the ultimate loser.

On the other hand, a reversal of *Johnson Gas* returns the law to its original, intended state.²⁰⁹ Patent infringement suits would only be prosecuted where the corporate defendant is incorporated, or where the alleged infringement occurred—if the corporate defendant maintained a regular and established place of business in that locale. As a result, patent infringement suits would continue to comprise a small minority of the general pool of litigation in the federal courts.²¹⁰ Furthermore, the economics of competition would remain unaffected.

By enacting the special patent venue statute, Congress manifested a policy determination that the two venues provided by the statute best served the practicality and convenience concerns of patent infringement defendants. The *Johnson Gas* court contradicted this congressional policy by misapplying the legal standards governing statutory construction. Furthermore, if allowed to stand, the decision raises the specter of many negative societal effects. Therefore, *Johnson Gas* must be overruled.

VII. CONCLUSION

The special patent venue statute has been held to possess an inherent immunity from supplementation by the general venue statute for almost 100 years. For almost as many years, commentators and courts have been locked in a bitter war over whether the general statute governing venue in civil actions²¹¹ supplements the special statute governing venue in actions for patent infringement.²¹² The commentators have argued for revocation or revision of this provision, or at least abrogation of its im-

208. See SEIDEL, *supra* note 9, at 123.

209. See *supra* notes 33-37 and accompanying text.

210. See SEIDEL, *supra* note 9, at 123.

211. 28 U.S.C. § 1391(a)-(c) (1988).

212. *Id.* § 1400(b).

munity from the broader general venue statutes, on the grounds that the narrow venue it allows is the result of historical accident.

The Supreme Court has consistently reaffirmed the immunity of § 1400(b) from supplementation by the general venue statute.²¹³ The Court has repeatedly expressed the belief that the rules governing venue in patent infringement actions are "in a class by themselves, outside the scope of general venue legislation."²¹⁴

The 1988 revision to the Judicial Code²¹⁵ spawned a dispute over whether § 1400(b) should be supplemented by the provision of the general venue statute governing corporations, § 1391(c) of title 28 of the United States Code. In *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Court of Appeals for the Federal Circuit held that tenets of statutory construction dictated that § 1400(b) be supplemented with the recently revised § 1391(c).

The court's decision to supplement § 1400(b) with § 1391(c) contradicted the extensive congressional and judicial history of § 1400(b)'s immunity from the general venue statutes. The court misapplied the legal standards concerning statutory construction to arrive at this erroneous result. If allowed to stand, the decision could have many negative effects on our society and economy. Thus, *Johnson Gas* must be overruled, and an appeal to Congress made, in order to end this bitter war.

*John A. Laco**

213. See *Brunette Mach. Works v. Kockum Indus.*, 406 U.S. 706, 713 (1972); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 263 (1961); *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957).

214. *Brunette Mach. Works*, 406 U.S. at 713.

215. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

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