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Federal Procedure - Venue in Third-Party Tort Actions Against the United States

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FEDERAL PROCEDURE—VENUE IN THIRD-PARTY TORT ACTIONS AGAINST THE UNITED STATES—Plaintiff sustained serious injuries when he was struck by a mail pouch thrown from defendant's moving train by a United States mail clerk. Action was was brought against the railroad in the District Court for the *Western* District of Oklahoma, whereupon the railroad filed a third-party complaint against the United States, alleging negligence on the part of the mail clerk. The United States moved for a dismissal on the ground that both plaintiff's residence and the situs of the injury were in the *Eastern* District of Oklahoma; since the venue provisions of Title 28, U.S.C. (1952) §1402(b)[1] prescribe that tort actions against the United States may be brought only in the district where the plaintiff resides or where the act or omission complained of occurred, the United States had not consented to be sued in the *Western* District. The motion was denied, and judgments were rendered against both the railroad and the United States. On appeal, *held,* affirmed. A third-party action being ancillary in nature, its venue might be derived from that of the original action. *United States v. Acord,* (10th Cir. 1954) 209 F. (2d) 709.

The reasoning by which the court arrived at its conclusion is open to question. Having initially conceded that the United States may prescribe the terms under which it consents to be sued,[2] the court shifted to a consideration of matters having nothing to do with the relinquishment of immunity to suit. Attention was given to rule 14(a) of the Federal Rules of Civil Procedure,[3] which provides for the institution of a third-party complaint when a third-party defendant is or may be liable over to the defendant in the original action. The court found that (1) independent grounds for federal jurisdiction need not be shown in the third-party action,[4] (2) rule 14(a) entitles an original defendant to bring a third-party action against the United States when the venue requirements of section 1402(b) are met,[5] (3) rule 14(a) has been construed to allow the ancillary action to derive its venue from the original action,[6] and therefore (4) the venue requirements of section 1402(b) need not be met in an ancillary

[1] Section 1402(b): "Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred."

[2] Minnesota v. United States, 305 U.S. 382, 59 S.Ct. 292 (1939); United States v. Shaw, 309 U.S. 495, 60 S.Ct. 659 (1940); United States v. Hosteen Tse-Kesi, (10th Cir. 1951) 191 F. (2d) 518; Miller v. United States, (D.C. Wash. 1948) 76 F. Supp. 523.

[3] 28 U.S.C. (1952) following §2072. See generally 3 MOORE, FEDERAL PRACTICE, 2d ed., §§14.25, 14.28(2), 14.29 (1948).

[4] Moncrief v. Pennsylvania R. Co., (D.C. Pa. 1947) 73 F. Supp. 815; Waylander-Peterson Co. v. Great Northern Ry. Co., (8th Cir. 1953) 201 F. (2d) 408. See also 1 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §424 (1950). Where the United States has preserved its immunity, however, there can be no suit against it even in an ancillary action. United States v. Dry Dock Savings Institution, (2d Cir. 1945) 149 F. (2d) 917.

[5] United States v. Yellow Cab Co., 340 U.S. 543, 71 S.Ct. 399 (1951).

[6] Moncrief v. Pennsylvania R. Co., note 4 supra; Morrell v. United Air Lines Transport Corp., (D.C. N.Y. 1939) 29 F. Supp. 757; Dickey v. Turner, (6th Cir. 1931) 49 F. (2d) 998. *Contra:* Lewis v. United Air Lines Transport Corp., (D.C. Conn. 1939) 29 F. Supp. 112; King v. Shepherd, (D.C. Ark. 1938) 26 F. Supp. 357.

action when there is no inconvenience to the government.[7] No further consideration was given to the contention of the government that section 1402(b) defines the precise terms under which the United States has given its consent to be sued for torts. Thus, by resorting to the authority of cases dealing with venue requirements other than those of section 1402(b), the court begged the question whether section 1402(b) constitutes not only a venue requirement[8] but also a limitation on governmental consent to be sued. Faulty reasoning, however, often leads to surprisingly accurate results. Section 1406(b) of Title 28 makes it clear that a district court will not be deprived of jurisdiction by virtue of the requirements of section 1402(b) unless a timely and sufficient objection is made to the venue.[9] By coupling this provision with the well recognized rule that an agent of the government[10] cannot waive governmental immunity where the sovereign itself has not consented to be sued,[11] it can be argued quite forcibly that Congress did not intend section 1402(b) to constitute an absolute limitation on governmental amenability to tort claims.[12] The only alternative to this conclusion is that section 1402(b) is a limitation on consent which can be waived by a district attorney—a highly improbable result.[13] Had

[7] The granting of a motion for leave to file a third-party complaint is discretionary with the trial court, and where great inconvenience will result to the original plaintiff or the third-party defendant, the motion will be denied. See Missouri ex rel. and to the Use of Ward v. Fidelity & Deposit Co. of Maryland, (8th Cir. 1950) 179 F. (2d) 327; Baltimore & O. R. Co. v. Saunders, (4th Cir. 1947) 159 F. (2d) 481.

[8] In the statutory predecessor to §1402(b), the language employed by Congress indicated a jurisdictional limitation rather than merely a venue requirement. As originally enacted, the Federal Tort Claims Act contained the following: "Subject to the provisions of this title, the United States District *court* for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred . . . shall have *exclusive jurisdiction* . . ." over tort claims permitted by the act. 60 Stat. L. 843 (1946). Italics added. This language was preserved intact in the 1947 amendment, 61 Stat. L. 722 (1947). When the judicial code was enacted in 1948, the jurisdiction and venue provisions were separated for the first time. 28 U.S.C. (1952) §§1346(b), 1402(b). Congressional hearings and reports concerning the judicial code fail, however, to indicate that Congress was aware of the change effected. See H. Rep. No. 308, 80th Cong., 1st sess. (1947); S. Rep. No. 1559, 80th Cong., 2d sess. (1948); H. Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 2055, 80th Cong., 1st sess. (1947). Even though Congress might have been entirely unaware of the change, there need be no resort to the preceding acts if the language of the judicial code is clear, for the code is not merely a codification of previously existing law; it is a positive *enactment* of law. See 62 Stat. L. 869 (1948); MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 75, 83 (1949).

[9] Section 1406(b): "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

[10] In this case a government attorney.

[11] United States v. Shaw, note 2 supra; Minnesota v. United States, note 2 supra. On the other hand, it is well settled that the United States may waive venue requirements just as any other party. Hoiness v. United States, 335 U.S. 297, 69 S.Ct. 70 (1948); Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 324 U.S. 635, 65 S.Ct. 821 (1945); MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 173, 189 (1949).

[12] See note 8 supra.

[13] In United States v. Yellow Cab Co., note 5 supra, the Court repudiated the doctrine that a statute which relinquishes governmental immunity to suit should be strictly construed in favor of the government.

the court in the principal case made a decisive determination that section 1402(b) was only a venue provision of the ordinary variety, the remainder of its reasoning would have been convincing.

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