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ing guidelines by the Supreme Court.[92] If the practical effect of such an order is found to permit an overwhelming number of small-claim consumer actions, judicial economy may well be served by congressional treatment which would permit an appeal of the dismissal of the class action as of right. It is more likely that the judicial machinery could overcome the difficulties inherent in managing a large class of consumers, than it could cope with the alternative host of individual actions. If, however, such individual actions are not maintainable, then dismissal of the consumer class action should have sufficient finality to fall within the scope of section 1291,[93] thus allowing the necessary judicial review of the district court determination.

S. KENNON SCOTT

VENUE, THE HOME OWNERS LOAN ACT, AND FEDERAL SAVINGS AND LOAN ASSOCIATIONS

The Supreme Court in 1939 defined venue as the place where a court may exercise its power to adjudicate a cause of action.[1] Thus, after a court determines that it has the power to adjudicate, it must apply the rules of venue to determine whether it may properly exercise that power.[2] The federal venue requirements, as enacted by Congress and interpreted by the courts, are intended to provide a convenient forum for the parties and to prevent actions from being litigated at a distance from the residences of the necessary witnesses or from the defendant's residence.[3] One of the

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[92]*See* Korn v. Franchard, 443 F.2d 1301, 1307 (2d Cir. 1971) (Friendly, J., concurring).

[93]Alternatively the importance of the order dismissing a class action may merit congressional treatment similar to that in 28 U.S.C. § 1292(a) (1970). Note 74 *supra*. The Supreme Court has noted that the exceptions to the requirement of finality which are found in section 1292(a)

> seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted.

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955) (footnote omitted).

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[1]Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). *See generally* 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 80 (2d ed. 1960); 1 J. MOORE, FEDERAL PRACTICE ¶ 0.140 (2d ed. 1964).

[2]308 U.S. at 168.

[3]In Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218, 223 (N.D. Ind. 1958), the court stated the following:

> Generally venue relates to the convenience of the parties and affords a defendant some protection against the threat of being forced to defend an action at a place far removed from his residence.

venue provisions, section 1391(e)[4] of title 28, states that if the defendant is an agency of the United States, it is amenable to suit in the district court of plaintiff's residence when there is no real property involved in the action. Another provision, section 1391(c)[5] of title 28, permits actions against a corporation in any judicial district in which the corporation is licensed to do business or is doing business.

In *Masterson v. First Federal Savings & Loan Association*,[6] plaintiffs, private citizens of New York, brought suit against First Federal for an alleged conversion of personal property.[7] First Federal was a savings and loan corporation with its stock owned entirely by its depositors.[8] It was organized and chartered under federal law and had its sole place of business in Connecticut.[9] Plaintiffs, however, brought the action in the Eastern District of New York, maintaining that venue was properly laid in their place of residence rather than defendant's, because for purposes of section 1391(e), a federal savings and loan association was an agent of the United States.[10] It was also argued that First Federal was licensed to do business in the Eastern District of New York and therefore venue was proper under section 1391(c).[11] The district court, finding these arguments insufficient, dismissed the complaint on defendant's motion.[12] This decision is of significance to out-of-state persons contemplating suits against federal savings and loan associations, because it implies that in actions against associations involving personal property, venue will be proper

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[4]28 U.S.C. § 1391(e) (1970) provides:

> A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

[5]28 U.S.C. § 1391(c) (1970) provides:

> A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

[6]53 F.R.D. 313 (E.D.N.Y. 1971).

[7]Plaintiffs in *Masterson* alleged that defendant had converted personal property consisting of the furnishings of a summer house on which defendant had foreclosed. Brief for Plaintiff at 3.

[8]53 F.R.D. at 314.

[9]*Id.*

[10]*Id.* Section 1391(e) also permits civil actions to be brought where the cause of action arose. Note 4 *supra.* The cause of action in *Masterson* arose in Connecticut, where the mortgage payments on the foreclosed property were to have been made.

[11]53 F.R.D. at 314. Note 5 *supra.*

[12]53 F.R.D. at 314.

only in the judicial district of the association's home office.[13]

Since no real property was involved in *Masterson,* the question was whether First Federal was an agency of the United States for purposes of section 1391(e).[14] It was argued that the Home Owners' Loan Act of 1933[15] established the relationship between First Federal and the United States as one of agency for purposes of venue. The Home Owners' Loan Act of 1933 authorizes the Federal Home Loan Bank Board (hereinafter the Board) to organize and charter federal savings and loan associations.[16] The Secretary of the Treasury may employ these associations as fiscal agents of the United States.[17] Plaintiffs argued that the Board's power to organize federal savings and loan associations and the federal government's ability to utilize the associations as fiscal agents established an agency relationship between First Federal and the United States.[18]

The district court, however, determined that no such agency relationship existed.[19] Since the Home Owners' Loan Act of 1933 does not define "agency of the United States" for purposes of venue, the court referred to section 451 of title 28, which contains the definition of agency for purposes of the venue provisions.[20] The term "agency", as contemplated by title 28, includes only those "corporation[s] in which the United States has a proprietary interest . . . ."[21]

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[13] *Id.* If real property is involved, the action may be brought where that property is situated. Note 4 *supra.*

[14] 28 U.S.C. § 1391(e) (1970).

[15] 12 U.S.C. §§ 1461-68 (1970).

[16] 12 U.S.C. § 1464(a) (1970) reads in part:

> In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized . . . to provide for the organization, incorporation, examination, operation, and regulation of associations . . . and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

[17] 12 U.S.C. § 1464(k) (1970) provides:

> When designated for that purpose by the Secretary of the Treasury, any Federal savings and loan association or member of any Federal Home Loan Bank may be employed as fiscal agent of the Government . . . .

[18] 53 F.R.D. at 314.

[19] *Id.* at 314-15.

[20] 28 U.S.C. § 451 (1970) provides in part:

> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

The definition of agency is "[a]s used in this title" and applies to all of title 28. 28 U.S.C. § 451 (1970).

[21] 28 U.S.C. § 451 (1970).

In *Acron Investments, Inc. v. Federal Savings & Loan Insurance Corp.*,[22] the Ninth Circuit stated in detail the meaning of a proprietary interest of the United States in a corporation. The phrase "corporation in which the United States has a proprietary interest . . ."[23] was held to mean "those governmental corporations in which stock is not actually issued, as well as those in which stock is owned by the United States. It excludes those corporations in which the interest of the Government is custodial or incidental."[24] In *Acron*, the United States had once owned all the stock in the Federal Savings and Loan Insurance Corporation although there was no stock outstanding at the time of the suit.[25] For this reason, the interest of the United States was considered more than "custodial or incidental"[26] and the corporation was held an agency of the United States for purposes of section 451.[27]

The same definition of proprietary interest as applied in *Acron* must be applied to the *Masterson* case. If the United States has a proprietary interest in First Federal under section 451, then the association is an agency of the United States.[28] First Federal, however, has outstanding stock and it is owned entirely by its depositors.[29] The United States has never owned any portion of the association's stock. While the Home Owners' Loan Act of 1933 gives the Board the power of supervision of

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[22]363 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 970 (1966). *Acron* was an action to foreclose trust deeds.

[23]28 U.S.C. § 451 (1970).

[24]363 F.2d at 240. The court cited the Reviser's Note to 28 U.S.C. § 451 (1970), which states: "The definitions of agency and department conform with such definitions in section 6 of the revised Title 18, Crimes and Criminal Procedure." *Id.* The *Acron* court then compared the definitions in title 28 to those in title 18 and found that the Reviser's Note to 18 U.S.C. § 6 (1948) states that:

> The phrase "corporation in which the United States has a proprietary interest" is intended to include those governmental corporations in which stock is not actually issued, as well as those in which stock is owned by the United States. It excludes those corporations in which the interest of the Government is custodial or incidental.

The court in *Acron* relied on Revisers' notes to the United States Code to establish the Federal Savings and Loan Insurance Corporation as an agency of the United States. The Supreme Court held Revisers' notes authoritative in interpreting the United States Code in United States v. National City Lines, 337 U.S. 78, 81 (1949).

[25]363 F.2d at 240.

[26]*Id.* The court stated that:

> Since the control which Congress and the United States exercise over the Corporation is clearly more than "custodial or incidental," it would appear that the Corporation fits within the definition of "agency" of 28 U.S.C. § 451 . . . .

[27]363 F.2d at 240.

[28]Note 24 *supra*.

[29]53 F.R.D. at 314.

federal savings and loan associations,[30] this does not in itself establish the agency relationship absent government ownership. It would appear, therefore, that the interest of the United States in a federal savings and loan association is merely custodial or incidental and that an association is not an agency for purposes of venue.

There is apparently only one other case, *Chase Savings & Loan Association v. Federal Home Loan Bank Board*,[31] which considered the issue of whether a federal savings and loan association is an agency of the United States for purposes of section 1391(e). Chase, a state-chartered savings and loan association, sued to enjoin the Board from permitting Liberty Federal Savings and Loan Association, a co-defendant in the action, to establish a branch office which would compete for Chase's business.[32] The suit was dismissed, on defendants' motion, for lack of proper jurisdiction over a suable entity.[33] The district court held, however, that there was an alternative ground which would require the dismissal of the action for improper venue under section 1391(e).[34] Venue was found improper in the judicial district of plaintiff's residence because Liberty was not "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States."[35] The effect of the district court decision in *Masterson* was to augment the *Chase* decision by specifically stating that a federal savings and loan association was not an agency of the United States for venue purposes. This resulted from the government's lack of the requisite proprietary interest in the association's stock.[36]

It was also contended in *Masterson*, however, that venue in New York should be sustained because First Federal was licensed to do business in the Eastern District of New York.[37] Section 1391(c) of title 28 allows a

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[30]12 U.S.C. § 1464(a) (1970). Note 16 and accompanying text *supra*.

[31]269 F. Supp. 965 (E.D. Pa. 1967).

[32]*Id.*

[33]*Id.* at 967.

[34]*Id.*

[35]The court stated that:

> . . . 28 U.S.C. § 1391(e) only applies where "*each* defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States" (emphasis supplied). Liberty does not qualify under any of the above-quoted language. Plaintiff has not called the court's attention to any other section of Title 28 U.S.C., Chapter 87, giving this court venue over this action.

269 F. Supp. at 967. The stock in the Liberty association was owned entirely by its members, as was that of First Federal Savings and Loan Association. *See, e.g.*, 53 F.R.D. 314.

[36]53 F.R.D. at 315.

[37]*Id. See* 28 U.S.C. § 1391(c) (1970). Note 5 and accompanying text *supra*.

suit to be brought against a corporation in any judicial district in which the corporation is licensed to do business or is doing business.[38] In its usual sense, the phrase "licensed to do business" has been construed to mean the actual receipt by a foreign corporation of "a license, certificate, or permit, which evidences a compliance with the laws of that state."[39] The Supreme Court has extended the meaning of licensed to do business by subjecting a corporation to the jurisdiction of a foreign state court if the corporation performs activities for which the foreign state requires a license.[40]

Plaintiffs in *Masterson* intended to show an implied license resulting from First Federal's having taken advantage of its authorization under section 1464(c) of title 12 to make loans secured by mortgages on real property located within one hundred miles of the home office of the association.[41] Absent this authorization, a federal savings and loan association would certainly not be licensed, because its activities would be confined entirely to its own judicial district. To determine whether an association is licensed to do business in another state, it is necessary to examine that state's license requirements. First Federal had not received a license from New York to lend monies to its residents. In fact, New York banking law does not require or even permit such a license to be issued.[42] Furthermore, although plaintiffs' residence is within one hundred miles of First Federal's home office,[43] an assumption that a license to

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[38]Note 5 *supra.*

[39]Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218, 220 (N.D. Ind. 1958).

[40]Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 445 (1952). The following language from *Perkins* indicates the Court's test:

> The amount and kind of activities which must be carried on by the foreign corporation in the state of the forum so as to make it reasonable and just to subject the corporation to the jurisdiction of that state are to be determined in each case. The corporate activities of a foreign corporation which, under state statute, make it necessary for it to secure a license and to designate a statutory agent upon whom process may be served provide a helpful but not a conclusive test.

[41]12 U.S.C. § 1464(c) (1970) provides:

> Such associations shall lend their funds only on the security of their savings accounts or on the security of first liens upon real property within one hundred miles of their home office . . . .

[42]*N.Y. Bank Law* § 359 (McKinney 1971) pertains to licensing of lenders and provides:

> This article shall not apply to any person, co-partnership, association, or corporation doing business under and as permitted by any other article of this chapter or by any law of this state relating to savings and loan associations or licensed pawnbrokers or by any law of the United States relating to banks or trust companies.

[43]53 F.R.D. at 315.

do business may be implied from the loan authorization ignores the express intent of Congress in regard to the nature of the associations.[44] An examination of pertinent sections of the Home Owners' Loan Act of 1933[45] indicates this intent. Section 1464(c) implies only limited rights of entry into other states.[46] An association may be expected to enter another state for purposes of inspecting or foreclosing on liened property, but Congress did not intend these limited entries to constitute a license to do business.[47]

Section 1464(a)[48] delineates the basic policy of Congress concerning the establishment of federal savings and loan associations. That section authorizes the Board to establish these associations, "giving primary consideration to the best practices of *local* mutual thrift and home-financing institutions in the United States."[49]

No special venue statute has been enacted which covers all civil actions involving federal savings and loan associations, but Congress has enacted venue provisions which localize actions between savings and loan associations and the Board.[50] The associations may sue the Board in the district court of the judicial district in which the home office of the association is located.[51] If an association wishes to resist an order of the Board, or if the Board finds it necessary to enforce such an order, the respective actions must be brought in the district court in the jurisdiction of the home office of the association.[52]

The Federal Home Loan Bank Board, under its congressional authorization to make rules respecting the associations,[53] has also indicated its intention to keep suits local by limiting the associations' activities in other states.[54] It is against the policy of the Board to approve the establishment

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[44]Justice Weinstein saw the issue in *Masterson* as . . . whether Congress, in authorizing federal savings and loan associations to make loans secured by mortgages on real property located outside of their respective home states, intended either express or implied sanctioning of activity which could reasonably be termed the transaction of business in such states. We conclude that no such intent was manifested.
53 F.R.D. at 315.

[45]12 U.S.C. §§ 1461-68 (1970).

[46]12 U.S.C. § 1464(c) (1970). Note 41 *supra.*

[47]Masterson v. First Fed. Sav. & Loan Ass'n, 53 F.R.D. 313, 315 (E.D.N.Y. 1971). Note 44 *supra.*

[48]12 U.S.C. § 1464(a) (1970). Note 16 *supra.*

[49]12 U.S.C. § 1464(a) (1970) (emphasis added).

[50]12 U.S.C. § 1464(d) (1970).

[51]*Id.* § 1464(d)(1).

[52]*Id.* § 1464(d)(3)(B)-(C).

[53]*Id.* § 1464(a).

[54]12 C.F.R. part 556 (1971).

of branch offices[55] or agencies[56] in states other than that of the home office of the association. The above mentioned limitations on the associations' activities in other states have the force and effect of law[57] and show that the associations were not intended to be "licensed to do business" for purposes of the venue provisions.[58]

Although the associations are not "licensed to do business" under section 1391(c), they might yet be subject to that section if they are "doing business" in foreign states.[59] There has been some confusion in the case law resulting from the use of the phrase "doing business" as a test for determining the state court's in personam jurisdiction over a foreign corporation and also for determining venue under section 1391(c).[60] There is some authority that the two tests are equivalent and that if the corporation is subject to the jurisdiction of the state where the federal court is sitting, it should also be held to be "doing business" for purposes of venue.[61]

The better view, however, appears to be that the two standards are not consistent.[62] In *International Shoe Co. v. Washington,*[63] the Supreme

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[55]*Id.* § 556.5(b)(2) provides:

> It is the Board's policy not to approve the establishment of a branch office or a mobile facility by such an association in a State other than that where the home office of the association is located.

[56]*Id.* § 556.6(c) provides:

> It is also the Board's policy not to approve the establishment of an agency in a state other than that in which the home office of the association is located.

[57]Community Fed. Sav. & Loan Ass'n v. Fields, 128 F.2d 705 (8th Cir. 1942). *See generally* Maryland Cas. Co. v. United States, 251 U.S. 342 (1920): United States v. Morehead, 243 U.S. 607 (1917).

[58]Masterson v. First Fed. Sav. & Loan Ass'n, 53 F.R.D. 313, 316 (E.D.N.Y. 1971). Justice Weinstein felt that the limited entries into other states did not constitute a license to do business:

> Defendant is empowered to enter the Eastern District of New York for limited purposes only . . . . An implied authorization to engage only in limited activity outside the state is not a license to do business under the venue provisions. 28 U.S.C. § 1391(c).

Id.

[59]28 U.S.C. § 1391(c) (1970). Note 5 *supra.*

[60]Rensing v. Turner Aviation Corp., 166 F. Supp. 790, 793 (N.D. Ill. 1958).

[61]Kanton v. United States Plastics, Inc., 248 F. Supp. 353 (D.N.J. 1965); Satterfield v. Lehigh Valley R.R. Co., 128 F. Supp. 669 (S.D.N.Y. 1955); General Elec. Co. v. Central Transit Warehouse Co., 127 F. Supp. 817 (W.D. Mo. 1955).

[62]*See* Carter v. American Bus Lines, Inc., 169 F. Supp. 460 (D. Neb. 1959), in which the court stated:

> It may thus be seen that the "doing business" test is a quantitative measure formerly used by the courts as a measure of constitutional power and now used by Congress as the legislatively desirable test of venue when it is desired to sue a corporation.

Id. at 470.

[63]326 U.S. 310 (1945).

Court abandoned "doing business" as a measure of state jurisdiction in favor of a test which requires that a foreign corporation have only "minimum contacts" with the forum state. This "minimum contacts" theory relates to a state's desire to protect its citizens from harmful activities of foreign corporations. If a corporation avails itself of the protection of a state's laws, it should be held subject to that state's jurisdiction.[64]

The "minimum contacts" test for jurisdiction, however, is less strict than the "doing business" test for purposes of venue.[65] This seems reasonable, since the federal venue legislation was designed for the convenience of both parties,[66] not merely for the protection of the plaintiff. Since the venue standard is more stringent, a district court may assert its jurisdiction over a foreign corporation and subsequently find venue improper.[67] In *Masterson,* the court did not discuss the basis for its jurisdiction over First Federal but proceeded to find venue improperly laid under section 1391(c). First Federal apparently had the requisite "minimum contacts" to be subject to the power of the New York court but was not doing business for venue purposes.

The tests which courts have applied to determine whether a corporation is doing business for purposes of venue have been considerably more comprehensive than "minimum contacts."[68] An illustrative case is *Frazier, III v. Alabama Motor Club, Inc.,*[69] which considered the following factors:

> the general character of the corporation, the nature and scope of its business operations, the extent of the authorized corporate activities conducted on its behalf within the forum district, the continuity of those activities, *and* its contacts within the district.[70]

Application of such a test to *Masterson* reveals First Federal's apparent lack of activities within New York State. First Federal may own property in New York through foreclosures on mortgages, but few other contacts can be envisioned due to the association's limited rights of entry into New

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[64]*Id.* at 319.

[65]Carter v. American Bus Lines, 169 F. Supp. 460 (D. Neb. 1959); Rensing v. Turner Aviation Corp., 166 F. Supp. 790 (N.D. Ill. 1958); Bar's Leaks Western v. Pollock, 148 F. Supp. 710 (N.D. Cal. 1957); Remington Rand, Inc. v. Knapp-Monarch Co., 139 F. Supp. 613 (E.D. Pa. 1956).

[66]Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218, 223 (N.D. Ind. 1958). Note 3 *supra.*

[67]Note 65 *supra.*

[68]*See, e.g.,* Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945); Paragon Oil Co. v. Panama Ref. & Petrochem. Co., 192 F. Supp. 259 (S.D.N.Y. 1961).

[69]349 F.2d 456 (5th Cir. 1965).

[70]*Id.* at 459 (emphasis added).

York. Furthermore, New York banking law is helpful in determining whether a foreign savings and loan corporation is "doing business" in the state.[71] No foreign savings and loan associations may do business in the state and such an association is not to be considered doing business because it secures loans by mortgages on New York real property.[72]

Since the rules of venue are intended for the convenience of litigants,[73] it is helpful to examine the 100 mile authorization[74] from the position of the borrower contemplating suit against a federal savings and loan association. If a borrower is relying on the association's loan authorization,[75] his only inconvenience in suing the association is traveling one hundred miles or less to the district court in the jurisdiction of the association's home office.[76] In contrast, if First Federal were considered "licensed to do business" or "doing business" for one hundred miles in all directions from its home office, the association could be greatly inconvenienced by an amenability to suit in many judicial districts.[77]

In *Paragon Oil Co. v. Panama Refining & Petrochemical Co.*,[78] it was stated that

> the Court must consider and balance the inconveniences. It is necessary to find that there is no imbalance of equities against the defendant and that it is not unreasonable to force the foreign corporation to defend an action in this jurisdiction. The principle which has evolved is, in fact, one of fairness.[79]

Application in *Masterson* of the balancing test as envisioned in *Paragon* resulted in the dismissal of plaintiffs' suit.[80] Subjection of defendant to

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[71]53 F.R.D. at 316.

[72]*N.Y. Bank. Law* § 408 (McKinney 1971) provides:

> 1. No foreign corporation shall transact the business of a savings and loan association within this state or maintain an office in the state for the purpose of transacting such business.
>
> 2. No foreign savings and loan association shall be considered to be doing business in this state by reason of engaging in the making, purchase, acquisition, holding, sale, assignment, transfer, servicing, collecting and enforcement of obligations or any interest therein secured by mortgages upon real property located in this state, or the foreclosure of such mortgages . . . .

[73]Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218, 223 (N.D. Ind. 1958).

[74]12 U.S.C. § 1464(c) (1970).

[75]*Id.*

[76]In *Masterson*, plaintiffs lived within the 100 mile radius. 53 F.R.D. at 316.

[77]*Id.*

[78]192 F. Supp. 259 (S.D.N.Y. 1961).

[79]*Id.* at 262.

[80]53 F.R.D. at 316.

venue in New York was held to place an unduly heavy burden on First Federal.[81]

Since the rules of venue are intended for the parties' convenience,[82] the result of *Masterson* would seem to be correct. Absent a proprietary interest in the United States, a federal savings and loan association would not properly seem to be an agency of the United States. The mere possibility that associations may be used by the Secretary of the Treasury as fiscal agents[83] would seem insufficient to change this. Furthermore, the local ownership of federal savings and loan associations would likewise seem to preclude a finding of "agency."

In addition, the associations should not be considered as licensed to do business in states other than their principal location. While authorized to secure loans within 100 miles, clearly their activities are severely limited. To hold that such savings and loan associations are thus impliedly licensed to do business would cause them extreme hardship. For example, in *Masterson,* First Federal would be subject to suit in nine judicial districts in seven states.[84]

Subjection of First Federal to venue in New York would have been burdensome, but it was confusion concerning proper forum which resulted in the dismissal of the suit. This confusion may continue until Congress or the courts provide more specific rules of venue for actions involving federal savings and loan associations and out-of-state plaintiffs. The effect of *Masterson* will hopefully be to preclude considering a savings and loan association such as First Federal an agency of the United States or doing business for purposes of section 1391. The proper forum will be the judicial district of the home office of the association, unless some other basis for venue is presented. This result is desirable, since it will provide a convenient and reasonable forum for the primarily local federal savings and loan associations.

JAMES G. THOMPSON

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[81] *Id.*

[82] Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218, 223 (N.D. Ind. 1958).

[83] 12 U.S.C. § 1464(k) (1970). Note 17 *supra.*

[84] 53 F.R.D. at 316.

ADDENDUM

A rehearing of the *Bernstein* case before the Fourth Circuit sitting en banc resulted in an equally divided court. *Bernstein v. Nationwide Mutual Insurance Co.*, No. 14,949 (4th Cir., Apr. 24, 1972). The opinion which was the subject of this comment was therefore withdrawn and the order of the trial court, *Nationwide Mutual Insurance Co. v. Stephens*, 313 F. Supp. 890 (W.D. Va. 1971), upholding Nationwide's right to rescind the insurance policy was affirmed without opinion. A dissenting opinion was filed by Bryan, J., the author of the withdrawn opinion, in which he was joined by Judges Sobeloff and Craven.

Judge Bryan's dissent reiterates the basis of his former opinion that automobile liability insurance is no longer a matter of private concern, but is one peculiarly subject to considerations of public policy. No. 14,949 at 5. The focus of the dissent is that public policy as reflected in the applicable statutes precluded Nationwide's attempt to avoid liability to Bernstein. It seems clear, therefore, that the dissent assumes the position taken by the California Supreme Court in deciding *Barrera v. State Farm Mutual Automobile Insurance Co.*, 71 Cal. 2d 659, 456 P.2d 674, 681-682, 79 Cal. Rptr. 106 (1969), that the insurance business is quasi-public in nature and, therefore, the rights and obligations of a liability insurer cannot be determined solely on the basis of rules pertaining to private contracts. See No. 14,949 at 11. However, the dissent fails to address, and it is not clear, how this position is to be reconciled with present Virginia statutes. The direct action statute, Va. Code Ann. § 38.1-380(2) (Repl. Vol. 1970), provides that an action may be maintained only "under the terms of the policy or contract," *Id.*, and § 38.1-336 (Repl. Vol. 1970) states that no recovery can be had upon a policy of insurance when there exists clear proof of material fraud in the procurement thereof. The comment, therefore, remains applicable to Judge Bryan's dissent.