Federal Venue Restrictions for Suits Against National Banks Held Inapplicable to Third-Party Claims

Anne A. Dillon
Federal venue restrictions for suits against national banks held inapplicable to third-party claims

Under federal law, a national bank may be sued in a state court in the county or city in which it is located. Although the language of the applicable venue statute appears to be permissive, in Mercantile National Bank v. Langdeau, the United States Supreme Court held that “national banks may be sued only in those state courts in the county where the banks are located.” Recently, however, in Lazarow, Rettig & Sundel v. Castle Capital


Id. at 561 (emphasis added). The Supreme Court has recognized only two exceptions to the general rule precluding suits against national banks in forums other than those in counties in which the bank is “located.” In Casey v. Adams, 102 U.S. 66, 67 (1880), the Court held that purely “local” actions may be brought in counties other than those specified in § 94. In addition, the Court has stated that the venue privilege may be waived by a failure to assert it, Charlotte Nat’l Bank v. Morgan, 132 U.S. 141, 145 (1889), or by conduct which could be construed as consent to be sued, National Bank of N. America v. Associates of Obstetrics and Female Surgery, Inc., 425 U.S. 460 (1976) (per curiam). Conduct sufficient to constitute consent appears to be limited to on-going business activity within the jurisdiction, including qualifying to do business or appointing an agent to receive service of process in a foreign district. Id. at 482 (Rehnquist, J., concurring).
Corporation, \(^{299}\) the Appellate Division, First Department, held that, where a third-party action is brought in good faith, a suit may be maintained against a national bank in the state courts of a county other than the county in which the bank is located.\(^{300}\)

Lazarow, Rettig & Sundel, a New York law firm, purchased a \$635,000\) interest in an Oklahoma limited partnership on behalf of its clients.\(^{301}\) As an inducement to the sale, the sellers undertook to obtain an \$800,000\) loan from Fidelity Bank, N.A. (Fidelity), which is located in Oklahoma.\(^{302}\) The sellers also promised to buy back the partnership interest if the loan was not obtained.\(^{303}\) Castle Capital Corporation (Castle), acting as middleman, guaranteed the buy-back obligation.\(^{304}\) When the deal ultimately collapsed,\(^{305}\) the law firm brought a breach of contract action against Castle for the return of the purchase price.\(^{306}\) Castle thereupon impleaded\(^{307}\) several

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\(^{300}\) Id. at 282-84, 407 N.Y.S.2d at 493-94.

\(^{301}\) Id. at 282, 407 N.Y.S.2d at 492. These clients sought to benefit from oil tax shelters.

\(^{302}\) Id., 407 N.Y.S.2d at 493. Securing a loan was essential if the transaction was to generate the anticipated tax shelter benefits for the purchasers.

\(^{303}\) Id. at 282-83, 407 N.Y.S.2d at 493.

\(^{304}\) Id. at 283, 407 N.Y.S.2d at 493.

\(^{305}\) There was some dispute concerning whether the sellers actually had arranged the loan and, if so, whether it qualified for favorable tax treatment. Id. at 282, 407 N.Y.S.2d at 493.

\(^{306}\) Id. at 283, 407 N.Y.S.2d at 492-93.

\(^{307}\) Impleader is authorized by CPLR 1007 (1976), which provides, in pertinent part, that a "defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him." Until recently, it was assumed that the impleader claim must either be for the same cause of action or rest upon the same ground as the main claim. E.g., Fladerer v. Needleman, 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968); Ellenberg v. Sydhav Realty Corp., 41 Misc. 2d 1078, 247 N.Y.S.2d 226 (Sup. Ct. Kings County 1964); accord, CPLR 1007, commentary at 35 (1976); 2 WK&M 1007.05, at 10-1117.

In Fladerer, a party who had contracted to purchase certain real property brought an action for breach of contract to convey marketable title when he learned that the seller's title was defective. 30 App. Div. 2d at 372-73, 292 N.Y.S.2d at 278. The defendant seller then impleaded the attorney who represented her when she purchased the property, alleging that the attorney was negligent in failing to discover the defect. Id. The court dismissed the third party claim, reasoning that the seller's liability to the plaintiff for breach of contract did not arise from the attorney's negligence, but rather from the existence of the title defect. Id. at 374-75, 292 N.Y.S.2d at 279-80.

Using similar reasoning, the lower court in Lazarow found that, since Castle's breach of contract with the plaintiff did not arise from the fraud and conspiracy allegedly perpetrated by the third-party defendants, but rather from Castle's refusal to comply with its buy-back guarantee, the third-party complaint could not be maintained. 63 App. Div. 2d at 287, 407 N.Y.S.2d at 495-96. The appellate division, however, reversed, concluding that the "best test" of the viability of a third-party claim is "simply whether the third party defendant may be liable to the third party plaintiff for damages for which the latter may be liable to plaintiff." Id., 407 N.Y.S.2d at 496 (citing Norman Co. v. County of Nassau, 63 Misc. 2d 965, 969-70, 314 N.Y.S.2d 44, 50 (Sup. Ct. Nassau County 1970)).
parties, including Fidelity, which were charged with fraud and conspiracy. The Supreme Court, New York County, dismissed the third-party complaint against Fidelity, holding that venue could properly be laid only in a state court in a county where Fidelity, a national bank, was "located."

It appears that the departments within the appellate division are still in conflict as to the applicability of the "Norman test." The first and second departments appear to adhere to the more liberal Norman approach. See, e.g., Lazarow, Rettig & Sundel v. Castle Capital Corp., 63 App. Div. 2d 277, 407 N.Y.S.2d 490 (1st Dep't 1978); Holloway v. Brooklyn Union Gas Co., 50 App. Div. 2d 603, 375 N.Y.S.2d 396 (2d Dep't 1975). The third and fourth departments, on the other hand, continue to require that the third party claim rest on the same theory as that of the main action. See, e.g., Fladerer v. Needleman, 30 App. Div. 2d 371, 292 N.Y.S.2d 277 (3d Dep't 1968); Cleveland v. Farber, 46 App. Div. 2d 733, 361 N.Y.S.2d 99 (4th Dep't 1974). Professor Siegel labels this latter approach as "rigid." D. Siegel, N.Y. Practice § 159, at 201 (1978).

In addition to upholding the third-party action against Fidelity, the appellate division found that the lower court had abused its discretion in granting Castle's request for an injunction to prevent the third-party defendants from proceeding in the independent action brought against them by Castle in Oklahoma. 63 App. Div. 2d at 287, 407 N.Y.S.2d at 496. The court reasoned that the requested injunction would be issued not against the Oklahoma courts, but rather against the persons of the third party defendants. Id. at 287-88, 407 N.Y.S.2d at 496.

Inasmuch as the distribution of the allegedly misleading documents was Fidelity's only activity in New York, it does not appear that any of the judicially created exceptions to the mandatory venue rule of § 94 are applicable to the facts in Lazarow. See note 298 supra.

In addition to upholding the third-party action against Fidelity, the appellate division found that the lower court had abused its discretion in granting Castle's request for an injunction to prevent the third-party defendants from proceeding in the independent action brought against them by Castle in Oklahoma. 63 App. Div. 2d at 288, 407 N.Y.S.2d at 496-97; see note 309 supra. Although a New York court, by virtue of the personal jurisdiction it has over New York domiciliaries, may enjoin them from proceeding in a foreign action, it generally will not exercise this authority unless "extreme and extraordinary" circumstances exist. E.B. Latham & Co. v. Mayflower Indus., 278 App. Div. 90, 94-95, 103 N.Y.S.2d 279, 282-83 (1st Dep't 1951); Paramount Pictures, Inc. v. Blumenthal, 256 App. Div. 756, 758, 11 N.Y.S.2d 768, 771 (1st Dep't 1939). Applying this principle in Lazarow, the appellate division...
In reversing the lower court's decision, the first department concluded that New York venue was proper in a third-party action against a national bank located in another state, provided the action was brought "in good faith." Justice Birns, who authored the unanimous opinion, declined to follow the view that the restrictive federal venue provisions are applicable to third-party suits against a national bank. Instead, the Lazarow court adopted the reasoning of those federal district courts which have concluded that "[t]he fact that [the third-party plaintiff] is a defendant, and therefore had no choice in the venue of the action, means that the control over that choice which Congress attempted to exert in the National Bank Act is not applicable." Noting the possible constraint imposed upon it by the Mercantile decision, the court found that decision to concluded that the state's long-arm statute, CPLR 302, should not be construed so broadly as to permit a New York court to enjoin pursuit of a foreign proceeding where the foreign jurisdiction's highest court has refused to stay the action. 63 App. Div. 2d at 288, 407 N.Y.S.2d at 496-97. E.B. Latham and Paramount Pictures were decided before the enactment of CPLR 302. Nevertheless, the important policy considerations of reciprocal "courtesy" and "mutual respect," for a foreign jurisdiction's ruling, Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923), would seem equally applicable to the situation in Lazarow. Thus, it would appear that New York courts are precluded from indirectly overriding the decision of a foreign court, despite the availability of "long arm" jurisdiction over a non-resident defendant.

The panel consisted of Justices Kupferman, Birns, Evans, Sullivan and Murphy, P.J.

The third-party defendant in Odette was a national bank which had been impleaded under FED. R. Civ. P. 14(a). The court raised the venue question sua sponte and held that, where venue is proper in the main action, it is not a valid defense that the third party action would not have been permitted if brought alone. 394 F. Supp. at 951 (citing 3 Moore's Federal Practice ¶ 14.28[2]).

404 F. Supp. at 669; see 63 App. Div. 2d at 284, 407 N.Y.S.2d at 494.
be inapplicable to the issues in Lazarow, since Mercantile "[did] not discuss third-party actions." 317

The Lazarow court's determination that the federal venue provision governing actions against national banks is inapplicable to third-party claims appears to be in direct conflict with both congressional intent 318 and pertinent Supreme Court decisions. 319 In permitting Castle to do as a third-party plaintiff what it could not do as a plaintiff, the first department's decision also appears to diverge from other states' decisions dealing with similar issues. 320


318 In restricting the forums in which suit properly may be brought against a national bank to those districts or counties in which the bank is "established" or "located," it was the intention of Congress to prevent "untoward interruption of a national bank's business." Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 43 (1977) (citations omitted). Enacted as an emergency financial stabilization measure during the Civil War, the original statute was revised in 1864 and was commonly known as the National Bank Act. Hicks, Banking and Venue: Fitting the Horse and Buggy Statute to a Supersonic Age, 29 MERCER L. REV. 797, 800 (1978).

319 See Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963). Mercantile involved a conspiracy suit brought in a state court against 145 defendants, two of which were national banks. Id. at 556. The Mercantile Court held that these banks could not be sued in a state court in a county other than the county in which the banks were located, although the obvious result was that all the defendants could not be gathered together and sued in a single action. Id. at 561. Significantly, the Court found that the inconvenience to the plaintiff of having to maintain separate suits against the banks was an "insufficient basis for departing from the command of the federal statute." Id. at 563-64 (citations omitted). A similar issue was raised in Radzanower, which involved a suit brought pursuant to the Securities Exchange Act of 1934. Enacted after the National Bank Act, this statute contains its own venue provision permitting a defendant to be sued wherever he may be found. 15 U.S.C. § 78aa (1976). Rejecting the plaintiff's contention that the venue provision of the Securities Act constituted an implied repeal of the narrower provision of the National Bank Act, the Radzanower Court stated that § 94 had not been "submerged by a later enacted statute covering a more generalized spectrum." 426 U.S. at 153. See also National Bank of N. America v. Associates of Obstetrics & Female Surgery, Inc., 425 U.S. 460 (1976) (per curiam).

The language in these decisions indicates the Court's belief that, absent waiver, it was the intention of Congress that only in those courts designated in the statute "could a national bank be sued against its will." 426 U.S. at 152 (citation omitted). This would appear to leave little room for interpretation and renders the validity of the decision in Lazarow highly questionable.

320 Although state courts outside New York apparently have not been confronted with the precise issue presented in Lazarow, they have addressed similar questions arising under § 94 of the National Bank Act. For example, in Security First Nat'l Bank v. Tattersall, 311 So. 2d 218 (La. 1975), the court held that the venue provisions of § 94 are applicable in any suit against a national bank, regardless of the procedural posture in which the suit is presented. 311 So. 2d at 222. Similarly, in First Nat'l Bank of Boston v. Avtek, Inc., 134 Vt. 392, 360 A.2d 80 (1976), a Vermont court refused to permit a counterclaim brought against a national bank which was located in another state, although the bank had initiated a foreclosure action in a Vermont state court. Finally, in Drum v. District Court, 169 Mont. 494, 548 P.2d 1377 (1976), the court concluded that § 94 "even prevents joinder in the same action of
restrictive venue statute governing suits against national banks has been criticized heavily,\textsuperscript{321} the weight of authority indicates that its mandatory rule may not be diluted by judicially created exceptions such as that suggested in \textit{Lazarow}.\textsuperscript{322}

When Congress enacted the venue provision, it was cognizant of the inconvenience caused a national bank by its being forced to defend in a foreign forum.\textsuperscript{323} Since the statute was passed with this in mind, the interest of national banks must have been deemed to outweigh the interest a plaintiff has in bringing a consolidated action. Thus it would appear that, until Congress acts to amend this section, state courts should dismiss third-party actions brought against national banks not "located" in the county in which suit is brought.\textsuperscript{324}

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The inconvenience and the interruptions of banking business thus discussed in 1889, have today been mitigated, if not, in fact, minimized, by present modes of rapid transportation and communication and by mechanical and electronic accounting systems and photostatic and microfilming processes, . . . and the present . . . liberalization of the rules respecting documentary evidence have further eased the burden incident to litigation in which banks may be involved. Thus the supposed objective of the statute has been in large part attained through other means.
\end{quote}

\textit{Id.} at 183-84, 123 N.Y.S.2d at 638. Similarly, the American Law Institute has flatly stated that § 94 "is impossible to defend" and has recommended repeal of this section, since "[t]here is no obvious reason why a national bank acquires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purposes of venue." \textit{ALI Study of the Division of Jurisdiction Between State and Federal Courts} 412-13 (1969); \textit{accord}, \textit{Radzanower v. Touche Ross & Co.}, 426 U.S. 148, 161-62 (1976) (Stevens, J., dissenting). \textit{See generally} Hicks, supra note 318, at 800-01; Steinberg, supra note 4, at 178-79. Professor Steinberg argues that the application of § 94 today "confers a privileged status to national banks at the expense of individual citizens." Steinberg, supra note 4, at 179 (footnotes omitted). \textit{See also} \textit{Swiss Israel Trade Bank v. Mobley}, 319 F. Supp. 374, 375 (S.D. Ga. 1970) (quoting \textit{Klein v. Bower}, 421 F.2d 338 (2d Cir. 1970)).

\textsuperscript{322} See notes 298, 318-320 supra.


\textsuperscript{324} \textit{Accord, Swiss Israel Trade Bank v. Mobley}, 319 F. Supp. 374 (S.D. Ga. 1970). In \textit{Swiss Israel}, the court, while noting the inconvenience § 94 imposes on litigants, stated that the "remedy for the situation must be provided by Congress." 319 F. Supp. at 375 (quoting \textit{Klein v. Bower}, 421 F.2d 338 (2d Cir. 1970)). It should be noted that, despite the criticisms leveled at § 94, Congress did not repeal the venue provision when it reexamined the National Bank Act in an attempt to eliminate "certain [national banking] laws which ha[d] become obsolete." \textit{Radzanower v. Touche Ross & Co.}, 426 U.S. 148, 158 n.16 (1976).