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DIVERSIFICATION AND SOPHISTICATION OF BANKING SERVICES AND EXCLUSIVE VENUE PRIVILEGE ON A COLLISION COURSE

J. Michael Nifong*

I. INTRODUCTION

The statute prescribing venue in actions against national banking associations, 12 U.S.C. § 94, requires that federal court actions be brought where the bank is "established," but that state court actions be brought where the bank is "located." Historically, the resulting exclusive venue privilege had a two-fold rationale: (1) to prevent interruption of national banking operations by the necessity of producing witnesses and documents in distant forums; and (2) to allay the fear that massive expansion of state banks would strangle the national banking system. However, the advent of national branch banking has undermined both that rationale and the exclusivity of the venue privilege.

By "establishing" branches in several "locations," national banking associations have left themselves open to the more liberal venue provisions long endured by their corporate counterparts. More importantly, changing bank practices have caused confusion in the application of section 94.

To compound the problem, it is settled law that while federal law controls the definition of a "branch," state law determines the


2. Section 94 provides:

Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located having jurisdiction in similar cases.


extent to which branches may be established and operated.\textsuperscript{7} States’ banking laws vary greatly.\textsuperscript{8} Further, under certain circumstances, the federal statute’s exclusive venue privilege can be waived.\textsuperscript{9}

The venue problems presented by the terms “established” and “located” cause most litigants to seek to circumvent the statute’s provisions. In addition to the waiver exception, there are also various procedural devices for doing so. Unfortunately, whether these procedural exceptions apply in a particular case is usually an issue for litigation.

Section 94 is not designed for today’s sophisticated banking transactions. It is obsolete. The distinction between “established” and “located” is not rationally justifiable. The statute causes senseless and expensive litigation. It should be revised, either by radical and systematic judicial construction or by congressional action.

II. THE ADVENT OF BRANCH BANKING

National banking associations were not permitted to engage in any branch banking until 1927.\textsuperscript{10} Therefore, in effect, the words “established” and “located” were originally synonymous.\textsuperscript{11} A bank was “established” in the county named in its charter.\textsuperscript{12} That county was the bank’s “principal place of business.”\textsuperscript{13} Since branch banking was not allowed, that county was also the bank’s “location.”\textsuperscript{14}

With passage of the McFadden Act,\textsuperscript{15} national banks were allowed to operate branches in the “city, town or village in which said association is situated,” if branch banking was expressly authorized for state banks under corresponding state law.\textsuperscript{16} This severe restriction on branch banking was slightly relaxed in 1933.\textsuperscript{17}

\begin{enumerate}
\item See discussion infra.
\item Leonardi v. Chase Nat’l Bank, 81 F.2d 19, 21-22 (2d Cir.), cert. denied, 298 U.S. 677 (1936).
\item Helco, Inc. v. First Nat’l City Bank, 470 F.2d 883, 884 (3d Cir. 1972).
\item Id.
\item Id.
\item Id.
\end{enumerate}
Congress allowed national banks to operate branches anywhere in the state in which the bank was chartered, but again subjected the federal permission to implementation through express state statutory authorization for state bank branching.\textsuperscript{18}

The trend of extending banking operations continued. In 1935 banks were permitted to create seasonal agencies, in the same county as the main office, to transact certain limited, statutorily defined banking functions within resort communities.\textsuperscript{19}

A 1952 amendment established more liberal guidelines for the retention of branches by national banks when the branch resulted from the conversion of a state bank or through other forms of corporate consolidation.\textsuperscript{20} Under the original National Banking Act, maintenance of such branches was restricted to a grandfather clause.\textsuperscript{21} The minimal capitalization requirements for branches were also abolished in 1952.\textsuperscript{22}

The expansion of branch banking in recent years has been phenomenal. As codified in the McFadden Act and as interpreted by the United States Supreme Court,\textsuperscript{23} state law is preeminent in determining the extent to which branches may now be established and operated. Forty-nine states and the District of Columbia have passed branch banking legislation.\textsuperscript{24} The laws vary greatly.\textsuperscript{25}

\begin{itemize}
\item 18. Id.
\item 20. Act of July 15, 1952, Pub. L. No. 543-753, § 2(b), 66 Stat. 633 (current version at 12 U.S.C. § 36(b)(1), (2) (1976)). Branches in existence at the time of consolidation or conversion may continue, upon the approval of the Comptroller of the Currency, if they could be established under existing state law.
\item 21. McFadden Act, Pub. L. No. 639-191, 44 Stat. 1228 (1927) (current version at 12 U.S.C. § 36(b) (1976)). State banks which were converted into or consolidated with a national banking association could retain and operate branches lawfully in existence on February 25, 1927.
\item 23. First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966), wherein a unanimous Court reasserted the policy of "competitive equality" and held that the Comptroller of the Currency is required to follow Utah law in deciding whether or not to allow branch banks in Utah. This decision resolved a conflict in the circuits by affirming Walker Bank & Trust Co. v. Saxon, 352 F.2d 90 (10th Cir. 1965), and reversing First Nat'l Bank v. Saxon, 352 F.2d 267 (4th Cir. 1965).
\item 24. Wyoming has no statute.
\item 25. Arizona, Maine, Maryland, Rhode Island, Vermont, and the District of Columbia have authorized unrestricted, statewide or districtwide branch banking. All six of these jurisdictions do, however, require an evaluation by the appropriate state regulatory agency. Alaska, California, Delaware, Idaho, Nevada, New Jersey, North Carolina, and South Carolina permit statewide branches with limitations regarding capital and surplus requirements. Connecticut, Indiana, Iowa, New York, North Dakota, Oregon, South Dakota, Utah, and
\end{itemize}
Even before these state laws were passed legalizing the establishment of branch banks, de facto branch banking existed. Holding companies and affiliates are two means which have been utilized by major banking institutions to obviate restrictions on branches. The former occurs where there are two corporations: the parent owning controlling stock in the subsidiary, but each retaining its separate charter. The latter envisions common stock ownership, officers and directors, but legal restrictions are satisfied by retention of separate charters.26

Despite the preeminence of state law on the subject of branch banking, state action may not interfere with national banks except as permitted by Congress.27 Further, federal law determines what is a "branch."28

The evolution of electronic fund transfer devices has stretched the definition of a "branch."29 Generally referred to as customer-bank communication terminals (CBCT's) and their derivatives, remote service units (RSU's), point-of-sale terminals (POS's) and automated teller units (ATU's), these technologically innovative

Wisconsin have enacted statutes generally permitting statewide branch banking, but limiting expansion into cities or towns where other state or national banks maintain their principal office. There is a myriad of differences in the laws of these nine states.

Connecticut, Hawaii, Louisiana, and Mississippi have adopted laws allowing branches outside the home county or district, but containing diverse geographic and capitalization requirements. Connecticut's law limits expansion into cities or towns where other banks maintain their principal offices. Georgia, Mississippi, New York and Oregon permit statewide or countywide branch banking with restraints predicated upon population. Mississippi's law also contains capitalization requirements. Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, and Wisconsin allow countywide branch banking, although some in conjunction with other restrictions. New Hampshire and Washington allow branches in the city or town where the principal bank is located. Hablutzel, State Regulation of Branch Banking, 16 Duq. L. Rev. 679 (1977-78).

26. Id. at 682.
28. First Nat'l Bank v. Dickinson, 396 U.S. 122 (1969). The Court held that to permit state law to define "branch" would allow the states to be "the sole judges of their own powers." In conclusion, the Court ruled: "Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term." Id. at 135.
12 U.S.C. § 36(f) provides:
The term "branch" . . . shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.
mechanisms are designed to simplify and expand banking services. From the outset, the Comptroller of the Currency and the judiciary took divergent positions on whether CBCT's should be included in the definition of branch. The Comptroller, believing the operation of CBCT's were in accord with sound banking and public policies, found CBCT's not to be branches of national banks, thereby leaving CBCT location decisions to the private rationality of business decisionmaking.\(^\text{30}\)

Initially, several district courts accepted the Comptroller's interpretative ruling, although one of these decisions was later reversed.\(^\text{31}\) The Court of Appeals for the District of Columbia, however, settled the issue that CBCT's are "branch banks."\(^\text{32}\) The decision caused removal of the Comptroller's ruling from the Code of Federal Regulations.

At this time CBCT's effect on the scope of the definition of section 94 is indeterminate, because CBCT's are not to be established more than fifty miles from the bank's main office or closest branch.\(^\text{33}\) Thus the overwhelming majority of CBCT's are in the same county where the national bank is established or located. But this too is subject to change. It is noteworthy that the National Bank Act\(^\text{34}\) was recently held to authorize a bank based in one state to charge its out-of-state customers interest at the rate authorized by its home state even though that rate violates the state

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(a) A national bank may make available . . . electronic devices or machines through which the customer may communicate to the bank a request to withdraw money either from his account or from a previously authorized line of credit, or an instruction to receive or transfer funds for the customer's benefit. The device may receive or dispense cash . . . subject to verification by the bank. Such devices may be unmanned or manned by a bona fide third party under contract to the bank.

. . . Any transactions . . . shall be subject to verification by the bank.

(b) Use of such devices at locations other than the main office or a branch office of the bank does not constitute branch banking.


usury laws of the bank’s nonresident customer’s state. This decision will certainly encourage further expansion of interstate and intrastate banking services via branches and perhaps later through CBCT’s.

III. Judicial Constructions of Section 94

Prior to 1963, it was unclear whether the phrase in section 94 "actions . . . may be had" was permissive or mandatory. Federal courts generally construed the phrase to be mandatory. State courts were split on the issue. However, in Mercantile National Bank v. Langdeau, the United States Supreme Court held that the phrase was mandatory. In Mercantile, the plaintiff was the receiver of a Texas insurance company in liquidation in a Texas state court in Travis County. Plaintiff was suing two national banks, and 143 other parties, for conspiracy to defraud. The two national banks were located in Dallas County, Texas. Neither had branches. The banks objected to being sued in the Travis County state court. They argued that under section 94 venue was exclusive in Dallas County.

The issue was appealed through to the Texas Supreme Court. The court held that section 94 was permissive; that is, it did not mandate exclusive venue in the court serving the county where the bank was located. The Texas Supreme Court also held that since under the Texas Insurance Code, venue was to be in the county where the delinquency proceedings were pending, that the court in Travis County had venue over the two national banks.

The United States Supreme Court reversed. National banks were quasi-public institutions and national in character. The leg-


38. For early cases holding that § 94 was permissive, see Annot., 86 A.L.R. 47 (1933).


40. Id.


42. Id.

43. Mercantile, 371 U.S. at 567.

44. The Court stated:
The legislative intent was to protect national banks from the inconvenience of being sued in distant forums.\textsuperscript{48} Permitting the Texas Insurance Code to prevail over section 94 would contravent the congressional intent.\textsuperscript{48} Section 94 was mandatory: venue was exclusive to the state court sitting in the county where the bank was located.\textsuperscript{47}

The Court was not sympathetic to the argument that mandatory construction would result in the plaintiff's having to bring two suits in two locations for the same cause of action.\textsuperscript{48} First, as to the plaintiff in Mercantile, the Court construed the Texas Insurance Code as allowing changing venue for all defendants to the court in Dallas County.\textsuperscript{49} That the plaintiffs and all the other defendants might be inconvenienced by the distant forum was a matter for legislative action; the Court could not change the law.\textsuperscript{50}

Mercantile's importance is highlighted by the rapid expansion of branch banking and services that took place during its fifteen year reign as the governing authority on section 94. Because the defendant banks in Mercantile had no branches, the Court did not have to address the issue of defining "location." Consequently, as branch banking became more extensive, construction of section 94 became more difficult.

In suits against branches of national banks, some courts held that venue was proper in the county where the branch was "located."\textsuperscript{51} Other courts held that "located" and "established" were synonymous, and that therefore, venue was exclusive in the county

\textsuperscript{48} Id. at 558-59 (quoting Van Reed v. People's Nat'l Bank, 198 U.S. 554 (1905)).
\textsuperscript{49} Id. at 561 n.12.
\textsuperscript{50} Id. at 560.
\textsuperscript{51} Id. at 561.
\textsuperscript{47} Id. at 563.
named in the bank's charter.\textsuperscript{52} Still other courts held that by opening a branch in a county different from the one where the national bank was chartered, the bank had waived its personal privilege of exclusive venue.\textsuperscript{53} The waiver theory was also argued to circumvent the exclusive venue privilege in federal courts. Unfortunately, most courts found the national banks' activities insufficient by themselves to constitute a waiver.\textsuperscript{54} Like the Court in Mercantile, most courts held that changing section 94 to comport with modern times was a matter for congressional action.\textsuperscript{55}

Citizens & Southern National Bank v. Bougas,\textsuperscript{56} decided in 1977, was the first step toward alleviating the harsh result of Mercantile. In Citizens & Southern, the United States Supreme Court held that a state court suit could be brought against a branch bank at the "location" of the branch.\textsuperscript{57} Citizens and Southern National Bank was chartered in Chatham County, Georgia.\textsuperscript{58} It maintained a branch in DeKalb County, Georgia. Bougas alleged that the DeKalb County branch had converted a $25,000 savings certificate which had been deposited as collateral for a note that Bougas had signed as surety.\textsuperscript{59} Suit was brought in DeKalb County. The bank moved to dismiss on the ground that under section 94 venue was exclusive in Chatham County. The motion was denied.\textsuperscript{60} On interlocutory appeal, the Georgia Court of Appeals affirmed.\textsuperscript{61} The United States Supreme Court granted certiorari to resolve the conflict among state courts as to the definition of a branch's "location" under section 94.\textsuperscript{62}

Mercantile was the starting point of the Court's analysis. The Court did not retreat from the position that section 94 was to be mandatorily construed. Rather, since Mercantile did not concern branch banking, the Court focused on the narrowly drawn issue of

\textsuperscript{52} Id.
\textsuperscript{53} Id. at 40, 41.
\textsuperscript{54} See, e.g., Northside Iron & Metal Co. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952).
\textsuperscript{55} See, e.g., United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970); Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952).
\textsuperscript{56} 434 U.S. 35 (1977).
\textsuperscript{57} Id. at 44.
\textsuperscript{58} Id. at 36-37.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
defining "located." First, the Court considered whether the terms "established" and "located" were synonymous. Certainly, before the advent of branch banking, they were. Equally certain, Congress could not have foreseen the advent of branch banking when it chose to use the two different words. However, the Congressional intent was to spare a national bank the inconvenience of defending suit in a distant forum. That intent could best be met by allowing venue in the place where the branch is "located." The Court also pointed out that improvements in data processing and transportation have largely dispelled the inconvenience concern.

_Citizens & Southern_ only solved part of the problem caused by section 94. The issue of defining "established" for purposes of federal court litigation, the issue of what activities constitute waiver of the exclusive venue privilege, and the issue of defining "located" for purposes of state court litigation against parent national banks are still unresolved.

The Court had the opportunity to consider both the "established" and the waiver issues in _Citizens & Southern_. It declined to do so.

As to the "established" issue, the Court noted that federal courts uniformly construe "established" to mean the place named in the bank's charter. The Court next stated that it was uncertain as to the correctness of that definition, but would refrain from addressing the issue in this case. In his concurring opinion, Justice Stewart emphasized that the Court was withholding approval of that definition.

The Court should have offered an alternative definition. As it

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63. _Id._ at 39.
64. _Id._ at 39-43.
65. _Id._ at 44 & n.10. The Court stated:

This interpretation of § 94 will not inconvenience the bank or unfairly burden it with distant litigation in violation of any congressional policy. We recognize that Congress adopts venue provisions in part for the convenience of the parties. . . . Litigation of this dispute in DeKalb County inconveniences no one to any real degree. Respondent chose to file his suit there. Petitioner has established a permanent business there, taking advantage of the commerce of the community. Its attorneys have their offices in adjoining Fulton County, part of the Atlanta metropolitan area. Litigation in DeKalb County cannot be more inconvenient than litigation in Chatham County, the place of chartering, some 200 miles away.

_Id._ at 44 n.10 (citations omitted).
66. _Id._ at 44.
67. _Id._ at 39, 44 n.9 ("established"); 38 (waiver).
68. _Id._ at 39.
69. _Id._ at 39, 44 n.9. See also Justice Stewart's concurring opinion, _id._ at 45.
70. _Id._ at 45.
stands now, the questionable definition which places emphasis on the charter is all the federal courts have. The result, reading Citizens & Southern together with Mercantile, is that while branches of national banks may be "located" at their geographical sites, they are still "established" in the county named in the charter. Thus, in federal litigation, venue against a branch is still exclusive in the county where the parent bank is located. Finding the terms "established" and "located" synonymous under the new definition of "located" would have provided a better solution.

Even in state court suits, Citizens & Southern has been narrowly read. In Marquette National Bank v. First of Omaha Service Corp., the Court held that operation of an extensive Bank Americard program was not sufficient to "locate" the bank for venue purposes. A national bank can only be "located" at the place named in its charter, or in the place where it maintains a branch.

Similarly, the Court of Civil Appeals of Alabama restricted Citizens & Southern to the letter when it held that venue was improper in the place where the bank's principal shareholder resided and had its principal place of business. Massachusetts, California, and Florida have also restricted Citizens & Southern to cases involving branch banking.

In a novel approach, the South Carolina Supreme Court allowed venue in a state action against Mellon Bank, which is chartered in Allegheny County, Pennsylvania. The court noted that Mellon Bank had "received and loaned money" in Sumter County, South Carolina. Therefore, it fit within the definition of a "branch" under 12 U.S.C. § 36(f). The court reasoned that a bank is "located" wherever it has a branch and, thus, venue was proper.

However, the South Carolina Supreme Court read Citizens &

72. Id. at 548.
73. Id. at 546 n.21.
79. Id. at 214. It is particularly interesting that Mellon Bank had "loaned" the money through its co-defendant, Associates Financial Services Company, Inc. Id.
80. Id. For the text of § 36(f), see note 28 supra.
81. 244 S.E.2d at 213 (citing Citizens & Southern, 434 U.S. 35 (1977) and Holsen v. Gosnell, 216 S.E.2d 539 (S.C. 1975), cert. denied, 423 U.S. 1048 (1976)).
Southern too broadly. In Citizens & Southern, the Court did not resolve whether maintenance of a branch waived the exclusive venue privilege. Consequently, it is uncertain whether state court action can be brought against the parent bank in the county where it maintains a branch. Reading Citizens & Southern together with Mercantile and Marquette, the answer seems to be "no." More importantly, in an action against both the branch and the parent bank, where each is located in a different county, it is uncertain whether two suits must be filed, one in each county, or whether venue lies against both in either county. Additionally, by refusing to hold that maintenance of a branch is ipso facto a waiver of the exclusive venue privilege, the Court perpetuated the venue problem in federal litigation. Pre-Citizens & Southern cases concerning waiver remain good precedent. As noted earlier, most of those cases found the national banks' activities insufficient to constitute a waiver. The Third,82 Fifth,83 Seventh,84 and Ninth85 Circuits held that the exclusive venue privilege may be waived only by inference from conduct inconsistent with the assertion of the privilege, or by declaration or conduct indicating a voluntary and intentional relinquishment or abandonment. Although these courts recognized that technological advancements reduce potential hardship, they concluded that amendment of section 94 was a matter of congressional concern.

Briefly, only a few pre-Citizens & Southern activities have been held to constitute a waiver of the exclusive venue privilege: (1) filing and submitting to over one hundred suits in another venue without objection;86 (2) refinancing, purchasing, and storing air-

82. Helco, Inc. v. First Nat'l City Bank, 470 F.2d 883 (3d Cir. 1972) (maintenance of branch; advertising; involvement in locale's fiscal affairs; and use of locale's courts insufficient to constitute a waiver).
83. Northside Iron & Metal Co. v. Dobson & Johnson Inc., 480 F.2d 798 (5th Cir. 1973) (neither maintenance of a branch nor commission of an intentional tort constitute a waiver).
84. Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952) (authorization to do business in another state for limited purpose of acceptance and execution of trusts and receipt of deposits of trust, and employment of a registered agent to accept service in relation to trust does not waive the exclusive venue privilege).
85. United States Nat'l Bank v. Hill, 434 F.2d 1019 (9th Cir. 1970) (although waiver was not discussed, the court relied on several waiver cases to hold that the definition of "establish" could not be expanded to allow venue at the location of a branch).
86. Reaves v. Bank of America, 352 F. Supp. 745 (S.D. Cal. 1973) (suit for wrongful possession brought in the Southern District of California against a branch; bank's principal place of business was Northern District of California; bank had 66 branches in Southern District; waiver, however, was predicated on fact that bank had been sued 338 times and had initiated suit 105 times in the Southern District without raising venue objections).
planes giving rise to a security interest; 87 (3) maintenance of a “full service bank” in another state; 88 (4) branch maintenance of all records relating to the branch, combined with computerized record systems; 89 and (5) joint liability as a trustee. 90

In contrast, the following activities have been held insufficient to constitute a waiver of the exclusive venue privilege: maintenance of a branch; 91 ownership of real property; 92 the commission of an intentional tort; 93 operation of credit card plans; 94 performance as an indenture trustee; 95 appointment of a receiver to manage apartment houses upon which the bank held a first mortgage; 96

87. Michigan Nat’l Bank v. Superior Court, 99 Cal. Rptr. 823 (Ct. App. 1972) (although a state case, it was relied on in Reaves v. Bank of America, 352 F. Supp. 745 (S.D. Cal. 1973)). In Michigan, the bank had no branches in California. The court used a minimum contacts jurisdictional approach. The court analogized the self-help activities relating to the repossession of airplanes to the use of state courts. 99 Cal. Rptr. at 830. Since a countersuit for matters arising out of court-processed repossession would have waived § 94, then so also did self-help where that was the subject of the complaint. Id. In Reaves, the court held that in-court proceedings relating to repossession of automobiles was an even stronger reason for finding waiver. 352 F. Supp. at 749.

88. Frankford Supply Co. v. Matteo, 305 F. Supp. 794 (E.D. Pa. 1969) (a bank “established” in New Jersey waived its right to be sued only in that state on a garnishment action when it maintained a full-service bank in Pennsylvania; the branch was permitted by a grandfather clause in the banking code). Cf. Robbins, Coe, Rubinstein & Shafran, Ltd. v. Ro Tek, Inc., 320 N.E.2d 157 (Ill. App. Ct. 1974) (garnishment proceedings are not actions against a bank and, therefore, § 94 does not apply).


90. County of Okeechobee v. Florida Nat’l Bank, 150 So. 124 (Fla. 1933) (a vintage state case; action was predicated on a tri-party trust agreement; the trustees were the national bank, a state bank, having its principal place of business in Okeechobee County, and the Okeechobee County Commissioners; finding a waiver avoided preventing joinder of the national bank as an indispensable party.

91. See, e.g., Bruns, Nordeman & Co. v. American Nat’l Bank & Trust Co., 394 F.2d 300 (2d Cir. 1968), cert. denied, 393 U.S. 855 (1968); Helco, Inc. v. First Nat’l City Bank, 470 F.2d 883 (3d Cir. 1972); Lodi v. Chase Nat’l Bank, 81 F.2d 19 (2d Cir.), cert. denied, 298 U.S. 677 (1936); Northside Iron & Metal Co. v. Dobson & Johnson, Inc., 480 F.2d 798 (5th Cir. 1973). See also First Nat’l Bank v. United States District Court, 468 F.2d 180 (9th Cir. 1972) (employment contract dispute between bank and branch employees; maintenance of branch does not constitute waiver; § 94 is not restricted to suits arising from banking functions and relations with bank customers).


tually providing to be governed by the laws of another state;\textsuperscript{97} and being authorized to do business in another state, issuing letters of credit pursuant to that authorization, and litigating over those letters of credit in the other state.\textsuperscript{98}

Post-	extit{Citizens & Southern} federal cases have reached conflicting results.

In \textit{Dawson v. First National Bank},\textsuperscript{99} plaintiffs were partners in a retail business which had been refused rental of store space in an Arizona shopping center. They filed an antitrust action in Arizona naming the First National Bank of Chicago as one of the defendants.\textsuperscript{100} It was undisputed that the bank was "established" in Chicago, Illinois. The issue was whether by its actions in Arizona, the bank had waived its privilege of exclusive venue in the district court serving Chicago.\textsuperscript{101}

The bank (1) was authorized to do business in Arizona; (2) had named a statutory agent within Arizona to receive service of process; (3) as trustee, owned and managed the shopping center; (4) as trustee, refused to rent store space to the plaintiffs; (5) as trustee, had purchased three additional parcels of improved Arizona real estate; and (6) as trustee, had brought suit in Arizona courts.\textsuperscript{102}

Of all those activities, only the second, naming a statutory agent for service of process, was held sufficient to constitute a waiver. The other activities had been held insufficient in prior cases.\textsuperscript{103} The court stated that "[t]he appointment of a statutory agent for service of process is an unequivocal action consistent only with an intent to consent to be sued in Arizona."\textsuperscript{104} In fact, the appointment of an agent had been a condition to being qualified to do business in the state as trustee.\textsuperscript{105} The trust was administered in Chicago.\textsuperscript{106}

Although \textit{Citizens & Southern} was specifically inapplicable because no branch banking was involved, the court was generally in-

\begin{itemize}
  \item \textsuperscript{97} Hills v. Burnett, 125 N.W.2d 66 (Neb. 1963).
  \item \textsuperscript{98} Douglass v. Industrial Nat'l Bank, 303 A.2d 359 (Conn. Super. Ct. 1972).
  \item \textsuperscript{100} \textit{Id.}
  \item \textsuperscript{101} \textit{Id.} at 89.
  \item \textsuperscript{102} \textit{Id.}
  \item \textsuperscript{103} \textit{Id.} at 90-91.
  \item \textsuperscript{104} \textit{Id.} at 91.
  \item \textsuperscript{105} \textit{Id.} at 89. \textit{But see} Buffum v. Chase Nat'l Bank, 192 F.2d 58 (7th Cir. 1951), \textit{cert. denied}, 342 U.S. 944 (1952), which prior to \textit{Citizens & Southern} had found these same activities insufficient to constitute a waiver.
  \item \textsuperscript{106} 453 F. Supp. at 89.
\end{itemize}
fluenced by that case. The Dawson court interpreted Justice Stewart's concurring opinion as liberalizing the exclusive venue privilege of national banks by its questioning of the restricted definition of "established."  

Citizens & Southern was specifically applicable to the branch banking situation in Allen v. Wachovia Bank & Trust Co. The court stated that "once a statutory term has been given a judicial construction that it would continue to be subject to judicial construction when the policy on which the statute is based changes." The court further characterized the exclusive venue privilege as "outmoded and antiquated." Nevertheless, the court did not accept the Citizens & Southern invitation to change the definition of "established." Instead, the court held that the maintenance of the branch was an implied waiver of the exclusive venue privilege.

An interesting fact pattern is presented by Stinnett v. Third National Bank, which involved a defamation suit brought in Minnesota against a bank chartered in Massachusetts. The bank had earlier brought suit in Minnesota against the plaintiffs on a promissory note issue, which was later settled. Certain purportedly defamatory news articles were annexed to the bank's complaint on the note. Although the court asserted that initiation of a suit in a foreign jurisdiction should not be construed as a general waiver by a national bank, the court held that waiver is present where a party to the prior litigation brings suit against a national bank, which suit "concerns causes of action that arise directly from the bank's suit." Inconvenience was a factor in the decision, but the bank's actions in initiating litigation were deemed to be an as-

107. Id. at 90. The Dawson court also cited the concurrence of Justice Rehnquist in National Bank of North America v. Association of Obstetrics, 425 U.S. 460 (1976), a case in which the Supreme Court held the provisions of § 94 to be mandatory but remanded to the state supreme court for a determination of the waiver issue. Dawson, 453 F. Supp. at 94. Justice Rehnquist believes § 94 to be equivalent to the general venue provisions of 28 U.S.C. § 1391(c), and thus that the exclusive venue privilege is waived upon the designation of a registered agent. 453 F. Supp. at 95.

109. Id. at 23.
110. Id.
111. Id. The court found that the combination of maintenance of a branch and the activities of transacting trusts, advertising, and prior utilization of Eastern District courts was sufficient to constitute a waiver. Id.
113. Id. at 1016.
114. Id. at 1017.
sumption of the risk.\textsuperscript{115}

Courts in two recent Florida cases have declined to find a waiver of the venue privilege where the national bank pursued quasi-banking functions in the state. Although the Fourth District Court of Appeal believed that section 94 had “outlived its usefulness,” it felt bound to adhere to its provisions because the defendant maintained no branches in the county where suit was pending.\textsuperscript{116} Mere ownership of land in the county was not deemed to be sufficient to establish a waiver.\textsuperscript{117}

The Florida Supreme Court, in concurring with the “decided weight of authority,” ruled that repossession of an automobile in the county was not sufficient to establish waiver of the venue privilege.\textsuperscript{118} While acknowledging the doctrine’s existence,\textsuperscript{119} the court did not cite \textit{Citizens \\& Southern}, apparently because the defendant bank had only one principal place of business.

A California appellate court decision defined waiver in restrictive terms and issued a writ of mandamus transferring the action to the county where the bank’s relevant records were located, per concession of bank counsel, and not to the county where the bank maintained its principal place of business.\textsuperscript{120}

Negotiating, issuing, and mailing a letter of credit and an indemnity agreement does not obviate the venue restraints of section 94, held the United States District Court.\textsuperscript{121} \textit{Mercantile} was cited, and its mandatory construction quoted as a primary authority for the ruling.\textsuperscript{122}

Filing a claim in related New York bankruptcy proceedings does not submit a Boston bank to the venue of its New York debtor-bankrupt, due to the prescriptions of section 94, and section 2a(7)


\textsuperscript{117} Id.


\textsuperscript{119} 358 So. 2d at 181.

\textsuperscript{120} Central Bank Nat’l Ass’n v. Superior Court, 146 Cal. Rptr. 503 ( Ct. App. 1978).

\textsuperscript{121} Stutsman v. Patterson, 457 F. Supp. 189, 191 (C.D. Cal. 1978).

\textsuperscript{122} Id. at 192.
of the Bankruptcy Act. 123 Additionally, the financing activities of the bank in New York were not considered to constitute a waiver of section 94. 124

IV. OTHER EXCEPTIONS TO SECTION 94

In addition to the exceptions to section 94 afforded by the waiver doctrine and by Citizens & Southern, there are also procedural devices available for avoiding the exclusive venue restrictions. The statute may not apply if the pending action has certain characteristics: (1) it is not an “action against” a national bank; (2) it is in rem or local in nature, rather than transitory; or (3) it is involved with counterclaims or third party actions.

Unless the litigation seeks to place liabilities against the bank, section 94 does not apply to prevent the chosen forum from exercising jurisdiction. 125 In Robbins, Coe, Rubenstein, & Shafran, Ltd. v. Ro Tek., Inc., 126 the Illinois Court of Appeals held that serving a national banking association with a writ of garnishment is not an action against the bank, and thus section 94 was not applicable.

In a well-reasoned opinion, the Robbins court emphasized that garnishment proceedings are not actions “against” the bank as required by section 94. 127 Few courts have seized upon that explicit language in the statute; probably because the statutory categories are akin to the distinctions between in rem proceedings and the transitory actions. There are few reported decisions dealing with this point. 128 Since the bank’s assets are not at issue, a defendant bank would not be expected to contest the matter vigorously.

Although containing no determinative statement, Robbins also indicates that garnishment actions are local in nature and hence, in citing Casey v. Adams, 129 the court finds another justification for

124. 5 Bankr. Ct. Dec. at 582.
126. Id.
128. See, e.g., Frankford Supply Co. v. Matteo, 305 F. Supp. 794 (E.D. Pa. 1969), where there was also a garnishment proceeding, but the court relied on waiver theory to avoid § 94.
129. 102 U.S. 66 (1880). Casey holds:

Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for would be in effect to declare that a national bank could not be sued at all in a local action where the thing about which the suit was
obviating the effect of section 94. Salient in Robbins is the belief that garnishment actions are remedial in nature and thus ancillary proceedings, independent of the main action. Since section 94's intent was to provide for the convenience of the institutions, local garnishment proceedings which do not interfere in a direct manner with banking operations nor result in disruption of their services do not come within the purview of section 94.

The Louisiana Supreme Court has held, however, that a determination of the right of possession is transitory and is therefore an action against the bank. Two Louisiana banks brought separate suits in the different parishes where they were located against the same debtor. First to procure a judgment was Security First National Bank which obtained its judgment in Rapides Parish. In attempting to satisfy the judgment, the bank had subpoenas issued and an order to show cause directed to the second creditor bank, National American, located in New Orleans Parish. National American held certificates for certain race horses owned by the mutual debtor, which Security First wanted to present at the public sale of the horses. Hardpressed, National American raised section 94 in defense to the subpoenas and the order to show cause; this defense was rejected by the lower courts.

The Louisiana Supreme Court found that the action was transitory and also ruled that the order to show cause was an action or proceeding against the second bank, and therefore had to be brought where National American was located.

The first judicial pronouncement that local actions were exempt from the exclusive venue prescriptions is found in Casey v. Adams, a case involving the predecessor to section 94, which is often discussed by courts interpreting section 94. Local and transitory are defined by state law. Generally speaking, a local,

brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

Id. at 68 (emphasis in original).

130. Robbins, 320 N.E.2d at 161.
131. Id.
133. Id. at 220-21.
134. Id. at 222-23.
135. 102 U.S. 66 (1880).
as distinguished from a transitory action, is an action seeking to determine interests or rights in property which may be pursued only at the property's location.\textsuperscript{138}

In \textit{Helco Inc. v. First National City Bank},\textsuperscript{139} the Third Circuit implied strongly that if an action is local in nature, the provisions of section 94 are not applicable. In accord is \textit{Aetna Casualty & Surety Co. v. Graves},\textsuperscript{140} another garnishment action, in which the court voiced its belief that section 94 is anachronistic. An Illinois court's opinion of section 94's effect on local actions is found in dicta in \textit{Tcherepnin v. Franz}.\textsuperscript{141} The court held that a fraudulent conveyance suit, brought by the receiver of a savings and loan association, is a transitory action.\textsuperscript{142}

Any useful distinction between a local and a transitory action depends solely on the character of the remedy sought.\textsuperscript{143} Transitory actions are defined as those in which the movant seeks a personal judgment against the defendant; "and, so far as jurisdiction is concerned, [they] may be brought before any competent court having subject matter jurisdiction and in personam jurisdiction over the defendant."\textsuperscript{144} Local actions are those in which recourse is directed against the property.

Procedural devices have in limited instances provided means to avoid the exclusive venue provisions. Apparently, rule 14(a), Federal Rules of Civil Procedure, provides such a means.\textsuperscript{145} In \textit{Odette}


\textsuperscript{140} 381 F. Supp. 1159 (W.D. La. 1974).

\textsuperscript{141} 439 F. Supp. 1340 (N.D. Ill. 1977).

\textsuperscript{142} \textit{Id.} at 1345.

\textsuperscript{143} MOORE'S FEDERAL PRACTICE, \textsuperscript{142}[2-1], at 1362-63 (2d ed. 1979).

\textsuperscript{144} \textit{Id.} \textsuperscript{142}[2-11], at 1362-63 (emphasis in original).

\textsuperscript{145} Fed. R. Civ. P. 14(a) provides:

\textit{(a) When Defendant May Bring in Third Party.} At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as
v. Shearson, Hammill & Co., 146 one of the defendant brokerage houses impleaded the National Bank of North America seeking contribution and indemnity for the bank's alleged responsibility for any misrepresentation made to the plaintiff's customer. As might be expected, the bank sought a section 94 dismissal claiming that the action was brought in the Southern District of New York and that although the bank conducted the majority of its business in the Southern District, its principal place of business was in the Eastern District of New York. 147 In a well-written opinion, District Judge Carter based his decision to deny the motion on a long line of cases and authorities holding that a third-party defendant has no basis to object to improper venue. 148

No cases relating specifically to section 94 were cited as authority in Odette. However, numerous decisions holding that venue requirements are to follow those of the primary action, predicated upon the expediency and simplification purposes behind rule 14(a) and the Federal Rules in general, formed the basis of the opinion. 149

provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. . . .

147. Id. at 950. At the time of suit, 76% of National Bank of North America's major divisions were located in the Southern District. It also had 27 full service branches located in the Southern District.
148. Id. at 951. In conclusion, in Odette, the court stated:
Since NBNA is a third-party defendant pursuant to Rule 14(a), I hold that it may not object to venue in the Southern District of New York. The purpose of Rule 14(a), to avoid multiplicity of actions, will be served by requiring NBNA to contest Shearson's claims in this proceeding rather than in a separate suit a few miles away in the Eastern District.

Id. at 952.
Evidently, Judge Carter did not find *Swiss Israel Trade Bank v. Mobley,* which failed to cite any previous authority whatsoever, to be persuasive. In *Swiss Israel,* a third-party complaint was dismissed for improper venue. *Swiss Israel* held section 94 to be germane in a third-party proceeding. It should be noted that one authority cites *Swiss Israel* for the supposition that rule 14 is superseded by section 94.

The federal counterclaim rule is another procedural tool which may be utilized to avoid section 94. In *First National Bank v. White,* the bank sued on a promissory note in the district where it was “established.” The defendants counterclaimed alleging mismanagement of collateral and they impleaded a third-party corporation which had managed the collateral under an agreement with the plaintiff bank.

Certain of the defendants also sought to change venue to the

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759 (S.D.N.Y. 1939)).
151. Id. at 375.
153. FED. R. Civ. P. 13 provides:
   (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.
   
   (g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.
   (h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

A bank joined as a defendant with a party over whom venue is proper is of no assistance. Joinder of a national bank with a defendant over whom venue is proper will not suffice to avoid the bank’s exclusive venue privilege. See, e.g., *Central Bank v. Boyles,* 355 So. 2d 98 (Ala. Ct. App. 1977).
155. Id. at 1334.
District of Utah, which motion was granted. The bank objected to the transfer, citing section 94.\textsuperscript{156} According to the Minnesota court, this was a case of first impression, and it therefore relied on other federal rules cases involving third-party matters, particularly \textit{Odette}.\textsuperscript{157} The court also criticized the holding in \textit{Swiss Israel}.\textsuperscript{158} The Minnesota court equated the compulsory counterclaim, which invokes ancillary subject matter jurisdiction, with a third-party action and held that a counterdefendant by selecting the original forum is thereby estopped from raising an improper venue objection.\textsuperscript{159}

The bank's reliance on the special venue statute was also found to be particularly inappropriate. The court reasoned that the statute was enacted for the convenience of banks in a different era, before the development of photocopying and computerized record keeping.\textsuperscript{160} There is indeed a fine line between the ancillary jurisdiction issue and the associated estoppel argument which were relied upon in \textit{White} and the more traditional notion that a bank in choosing the forum waives its right in a federal court suit to object to venue.\textsuperscript{161} The same waiver rationale applies to counterclaims raised in a state court action.\textsuperscript{162}

Despite the fact that section 94 has been the subject of criticism,\textsuperscript{163} the United States Supreme Court has held that its specific language has precedence over general jurisdictional provisions of the Securities Exchange Act of 1934. In \textit{Radzanower v. Touche Ross & Co.}\textsuperscript{164} the Court upheld a Second Circuit decision involving

\begin{itemize}
\item \textsuperscript{156} Id. at 1337.
\item \textsuperscript{157} Id. at 1338.
\item \textsuperscript{158} The court stated:
\begin{quote}
In two cases the courts have dismissed the third party claims because the main claim was not venued in the bank's home district, \textit{Southeast Guaranty Trust Co., Ltd. v. Rodman & Renshaw, Inc.}, 358 F. Supp. 1001 (N.D. Ill. 1973); \textit{Swiss Israel, supra}. In neither of these cases did the court offer any reasoning: each simply concluded that the bank was involved in a proceeding "against" it and could invoke the statute.
\end{quote}
\item \textsuperscript{161} \textit{420 F. Supp. at 1338} (emphasis added).
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} See, \textit{e.g.}, \textit{Exchange Nat'l Bank v. Abramson}, 45 F.R.D. 97, 105-06 (D. Minn. 1968) (citing \textit{General Electric Co. v. Marvel Rare Metal Co.}, 287 U.S. 430 (1932) wherein it was held that a plaintiff waives venue privileges with respect to any counterclaim).
\item \textsuperscript{162} Western Nat'l Bank v. Hix, 533 S.W.2d 839 (Tex. Ct. App. 1976).
\item \textsuperscript{163} See, \textit{e.g.}, \textit{Shetlin & Dickson, An Assault on the Venue Sanctuary of National Banks}, 34 Geo. Wash. L. Rev. 765 (1966).
\item \textsuperscript{164} \textit{426 U.S. 148} (1976). See \textit{also} \textit{Camp v. Guercio}, 464 F. Supp. 343 (W.D. Pa. 1979), wherein the specific language of § 94 was held to control over the general venue directives of
\end{itemize}
a conflict between the venue provisions of section 94 and those of section 27 of the Securities Exchange Act of 1934. In reaching his conclusion, Justice Stewart relied upon a basic principle of statutory construction that, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." "

Radzanower was a federal court action, and its holding is unlikely to be revised soon. If the Citizens & Southern rationale is expanded to include "established," however, a national banking association which does not have a branch in the district where a securities action is pending still would be able to invoke the venue privilege.

Interestingly, the petitioner in Radzanower attempted to argue waiver in its brief before the Court, but that issue was not raised in the petition for certiorari, and so was not canvassed by the Supreme Court.

V. Conclusion

Ironically, a seemingly simplistic statute designed to prevent inconvenience to a class of litigants which needed its protections in 1864, does nothing but create confusion today. One thing is certain: the statute was not designed to meet today's sophisticated banking transaction needs. The legislative branch has chosen to do nothing to remedy the situation, and as this review of case law has demonstrated, the judiciary has traditionally passed the issue back to the legislature or provided a patchwork of inadequate and inconsistent solutions.

One hundred and twenty-six years after its enactment, there is still no end in sight to litigation surrounding section 94. No court of law is able to explain or justify the distinction between "established," in the case of federal court actions, and "located" for issues litigated against national banks in state court proceedings. Only two years ago, the Supreme Court of the United States specifically held that the words were not synonymous, while declining to explain why. Thus, seemingly for no reason whatsoever, a plaintiff is confronted with two criteria.

166. 426 U.S. at 153.
167. Id. at 151 n.3.
168. Citizens & S. Nat'l Bank v. Bougas, 434 U.S. 35, 44 (1977). The Court stated: "Whatever the reason behind the distinction in words, it does exist, and we recognize it."
The law appears to be that a national bank may be sued in a state court action wherever it maintains a branch. This is assuming that the cause of action is directed against the activities of the branch and not the holding company or parent, all of which depend partly on the myriad of state branch banking laws which are applicable to national banking associations. If a branch bank and the parent or holding company (which need not be situated where the bank is located by the terms of its charter) are sued in the same action, where is venue proper? With the advent of both branch banking and complex and controlling state branch banking enactments, such litigation must be anticipated. A comparably complex procedural issue has not often confronted the judiciary; not one court has discussed such an issue, unless the suggestion of legislative relief is regarded as discussion. The statute in its present form is not equipped to provide an answer. Litigants can only hope that the judicial response will not perpetuate the wasteful practice of requiring separate suits.

In federal court, national banks must be sued, under the mandate of *Mercantile National Bank v. Langdeau*, where they maintain their principal place of business and are "established"; conversely, they are not subject to suit where they have only established a branch.

The waiver doctrine is much discussed in the cases, but it provides very little reliable guidance. Most of the recent decisions dealing with waiver involve branch banks. Since branch banking activity does not cross state lines while individual banking transactions do, the judiciary's hesitancy to expand the notion of waiver is indeed regrettable.

Procedural devices provide some relief. Third party matters and counterclaims definitely afford the means of avoiding the privilege whether it be cloaked as waiver or estoppel. Yet these devices are out of the plaintiff's control at the time suit is filed, and the astute banking attorney would not file a counterclaim until the dismissal route afforded by section 94 had been exhausted.

Branch banking is expanding, and the very definition of "branch" is undergoing change and expansion by virtue of CBCT's. No one can envision what future technology will bring. In addition, major banking institutions are now conducting business of all sorts on a nationwide basis. The diversified sophistication of banking services is phenomenal. State legislatures, with some success, are dealing with the banking responsibilities delegated to them.

It is imperative that the judiciary provide some principled solu-
tions to these venue puzzles. New interpretations will spur Congress to react to the change or to acquiesce through silence. In either case, litigants will be spared the senseless, expensive struggle with outworn precedents.