

9-24-2002

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Recommended Citation

Matthew J. Devoti & Steven D. Rineberg, *Noting the Absence: The Dilemma of Corporate Venue in Missouri With Respect to Foreign Corporations When Specific Statutes Fail to Define Residence*, 46 St. Louis U. L.J. (2002).

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**NOTING THE ABSENCE: THE DILEMMA OF CORPORATE VENUE
IN MISSOURI WITH RESPECT TO FOREIGN CORPORATIONS
WHEN SPECIFIC STATUTES FAIL TO DEFINE RESIDENCE**

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INTRODUCTION

“Venue in Missouri is determined solely by statute.”¹ Venue refers to the situs in which a court of competent jurisdiction may adjudicate an action.²

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1. State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991) (en banc). Judge Wolff noted in his concurrence in *State ex rel. Smith v. Gray* that “venue statutes have been with us since the earliest days of the Louisiana territory.” 979 S.W.2d 190, 194 (Mo. 1998) (en banc) (Wolff, J., concurring) (citing LAWS OF THE TERRITORY OF LOUISIANA, Ch. 38 (1807)). For a statutory analysis of the development of venue in Missouri, see Craig A. Adoor & Joseph J. Simeone, *The Law of Venue in Missouri*, 32 ST. LOUIS. U. L.J. 639 (1988); see also Steven D. Rineberg, Comment, *Twisted Currents: Navigating Through Corporate Venue in Missouri and the Quest to Simplify Its Construction*, 45 ST. LOUIS. U. L.J. 1055, 1064-70 (2001).

There are a variety of special venue provisions aside from those enumerated in Chapter 508 that indicate where a suit may be brought, hence “attorneys filing suit in Missouri pursuant to a particular act should look to the venue provisions of that act.” Adoor & Simeone, *supra*, at 639 n.4; see also *Smith*, 979 S.W.2d at 194 (Wolff, J., concurring) (indicating that there are “some 53 statutory sections specifying venue in particular situations”). This Comment will focus particularly on those venue statutes relating to the residence of domestic business corporations, insurance corporations, not-for-profit corporations, and foreign business corporations.

Locating the situs of a cause of action in a hospitable forum is important to both plaintiffs and defendants. Hence, venue is a catalyst for litigation in Missouri.³ Corporate residence for venue purposes is one particular aspect of venue that has repeatedly resulted in litigation.⁴

“Nearly all Missouri venue statutes can be readily understood by reading the language of the statutes themselves. By contrast, [however], venue provisions relating to corporations require an understanding of the statutory language, the Missouri business corporations statute, and decisions of [the Missouri Supreme Court].”⁵ While previous attention was paid to Missouri courts’ construction of the state’s venue statutes with respect to corporate residence,⁶ this Comment more narrowly focuses on the dilemma created when specific statutes fail to define the residence of foreign corporations and, to some extent, that of not-for-profit corporations. The three above-mentioned factors referenced by Judge Wolff in *State ex rel. Smith v. Gray*⁷ will therefore play an integral role in this Comment’s analysis of the corporate venue dilemma.

Part I of this Comment presents a brief overview of the development of law in Missouri regarding corporate residence for venue purposes. Part II analyzes the distinction between domestic business corporations and insurance corporations for purposes of corporate residence. That part illustrates the development of corporate residence with respect to insurance corporations and

2. See *Rothermich*, 816 S.W.2d at 196. The concept of venue differs from that of jurisdiction, as “jurisdiction relates to the power of the court to hear and determine the case.” *Sullenger v. Cooke Sales & Serv. Co.*, 646 S.W.2d 85, 88 (Mo. 1983) (en banc), *overruled by State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820 (Mo. 1994) (en banc). *Richardson v. Richardson* succinctly captured the essence of *DePaul Health Center*’s overruling of *Sullenger* when it noted: “There is no longer any requirement that the suit be filed in a ‘proper’ court and filing in a court of improper venue does not deprive the court of jurisdiction over the defendant.” 892 S.W.2d 753, 755-56 (Mo. Ct. App. 1994) (citing *DePaul Health Ctr.*, 870 S.W.2d at 822). Today, section 476.410 provides that “when a trial court finds venue to be improper, the case must be transferred to a circuit where venue is proper, rather than be dismissed.” *Rothermich*, 816 S.W.2d at 197; see also MO. REV. STAT. § 476.410 (2000).

3. See *DePaul Health Ctr.*, 870 S.W.2d at 820. Judge Robertson likened the case as just “another in a seemingly unending series of extraordinary writ actions in which civil tort plaintiffs and defendants enter protracted procedural plotting to embrace or avoid the generous juries of the City of St. Louis.” *Id.*

4. See *State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. 1939) (en banc); *State ex rel. O’Keefe v. Brown*, 235 S.W.2d 304 (Mo. 1951) (en banc); *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo. 1954) (en banc); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962) (en banc); *State ex rel. Dick Proctor Imps., Inc. v. Gaertner*, 671 S.W.2d 273 (Mo. 1984) (en banc); *Rothermich*, 816 S.W.2d 194; *DePaul Health Ctr.*, 870 S.W.2d 820; *Smith*, 979 S.W.2d 190.

5. *Smith*, 979 S.W.2d at 194 (Wolff, J., concurring).

6. Rineberg, *supra* note 1, at 1055.

7. *Smith*, 979 S.W.2d 190 (Wolff, J. concurring).

why, absent statutory guidance, the residence of insurance corporations for venue purposes is any county where it maintains an office or agent for the transaction of its business. Part II therefore lays the foundation for the discussion undertaken in Parts III and IV, which apply the domestic business/insurance corporation distinction to the issues of corporate residence for foreign corporations, and reviews the recent decision by the Missouri Supreme Court in *State ex rel. SSM Health Care St. Louis v. Neill*⁸ regarding not-for-profit corporations. Part V then proposes that the Missouri Supreme Court should apply the domestic business/insurance corporation distinction when deciding the issue of foreign corporation residence. In conclusion, Part VI establishes that, in the absence of a statute-based definition of residence, the residence of any corporation, in particular a foreign business corporation should be the location of its office or agents for the conduct of its usual and customary business.

I. THE DEVELOPMENT OF A GENERAL BUSINESS CORPORATION'S RESIDENCE FOR VENUE PURPOSES

“The primary purpose of Missouri’s venue statutes is to provide a convenient, logical and orderly forum for the resolution of disputes.”⁹ Rarely has there been confusion about venue when a corporation is the sole defendant or when there are multiple defendants, all of which are corporations. Under such circumstances, section 508.040 of the Missouri Revised Statutes is the applicable venue statute.¹⁰ Section 508.040 provides in pertinent part:

Suits against corporations shall be commenced either in the county where the cause of action accrued, . . . or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.¹¹

8. *State ex rel. SSM Health Care St. Louis v. Neill*, No. SC 84092, 2002 WL 1364121 (Mo. June 25, 2002) (en banc).

9. *State ex rel. Elson v. Koehr*, 856 S.W.2d 57, 59 (Mo. 1993) (en banc).

10. *See State ex rel. Webb v. Satz*, 561 S.W.2d 113, 115 (Mo. 1978) (en banc) (“The statute applies . . . when the only defendant is a single corporation, but to declare that it has no application when there are plural defendants, all corporations, is to ignore the broad language with which the statute begins.”). *See also State ex rel. Dick Proctor Imps., Inc. v. Gaertner*, 671 S.W.2d 273, 274 (Mo. 1984) (en banc) (holding that “[w]here all of the defendants are corporations, . . . the corporate venue statute applies”).

11. MO. REV. STAT. § 508.040 (2000). The first corporate venue statute in Missouri dates to 1845. *See* MO. REV. STAT. ch. 34 (1845). The current language of the corporate venue statute dates to 1866 and has remained unchanged since 1903. *See* MO. REV. STAT. tit. XXIV, ch. 62, § 26 (1866), providing: “Suits against corporations shall be commenced either in the county where the cause of action accrued, or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.” *See also* 1903 Mo. Laws 115, which included the additional language that “or in the case the corporation defendant is a railroad . . . running into or through two or more counties in this state, then in either of such

Pursuant to the corporate venue statute, venue is determined by the location of an office or agent for the transaction of the usual and customary business of the corporation.¹²

The confusion about corporate venue arises from the situation when a plaintiff joins an individual defendant with one or more corporate defendants. Missouri courts have long held that under such circumstances, section 508.010 of the Missouri Revised Statutes is the applicable venue statute.¹³ Generally, when a corporation is joined with an individual defendant, “the general venue statute, rather than [section] 508.040, which deals with suits against corporations, has been held to be the applicable statute.”¹⁴ The general venue statute provides:

Suits instituted by summons shall, except as otherwise provided by law, be brought:

1. When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;
2. When there are several defendants, and they reside in different counties, the suit may be brought in any such county;
3. When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;
4. When all the defendants are nonresidents of the state, suit may be brought in any county in this state;
5. Any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found;

counties” venue would be proper. For an abbreviated, yet informative, discussion on the development of the corporate venue statute, see *Webb*, 561 S.W.2d at 114-15.

12. “The venue statute . . . does not consider the amount of business transacted by a domestic corporation in a specific county. It focuses, instead, on the *office* of the agent for the transaction of business.” *Wadlow v. Donald Lindner Homes, Inc.*, 654 S.W.2d 644, 647 (Mo. Ct. App. 1983) (emphasis added). *But see State ex rel. SSM Health Care St. Louis v. Neill*, No. SC 84092, 2002 WL 1364121 (Mo. June 25, 2002) (en banc).

13. *See State ex rel. Columbia Nat’l Bank v. Davis*, 284 S.W. 464 (Mo. 1926) (en banc) (pioneering the discussion of the general venue/corporate venue distinction). In *Columbia National Bank*, the Supreme Court of Missouri held: “Section [508.010.2] fixes the venue of civil actions against corporations where they are joined as defendants with one or more other defendants and . . . [s]ection [508.040] fixes such venue only in actions where the corporation defendant is the sole defendant.” *Id.* at 470. *But see SSM Health Care St. Louis*, 2002 WL 1364121.

14. *State ex rel. Turnbough v. Gaertner*, 589 S.W.2d 290, 291 (Mo. 1979) (en banc).

6. In all tort actions the suit may be brought in the county where the cause of action accrued regardless of the residence of the parties, and process therein shall be issued by the court of such county and may be served in any county within the state; provided, however, that in any action for defamation or for invasion of privacy the cause of action shall be deemed to have accrued in the county in which the defamation or invasion was first published.¹⁵

Under sections 508.010.2 and .3, either of which may govern when a corporation and an individual are joined as defendants, “residence” of the corporate defendant is the criterion for venue – not the location of its office or agents for the conduct of business.¹⁶ “[T]he legislature’s desire to make residency determinative is evident from section 508.010’s use of residency as a key factor in determining venue.”¹⁷ Thus, there exists a fundamental question when operating under either section 508.010.2 or .3: What is the residence of a corporation for venue purposes when both a corporation and an individual are joined as defendants?

A. *Corporate Residence in Missouri Prior to 1943*

Until 1943, “no Missouri statute defined the ‘residence’ of corporations for venue purposes.”¹⁸ Prior to that date, the Missouri Supreme Court applied the common law rule that “a corporation’s residence may be wherever its corporate business is done.”¹⁹ In *State ex rel. Henning v. Williams*,²⁰ the court considered the location of the corporate defendant’s residence under section 508.010.²¹

The court in *Henning* was forced to reconcile the predecessors to section 508.010 and section 508.040.²² Consequently, the court determined that since

15. MO. REV. STAT. § 508.010 (2000).

16. MO. REV. STAT. § 508.010.2 (2000); MO. REV. STAT. § 508.010.3 (2000).

17. *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 864 (Mo. 2001) (en banc) (Stith, J., concurring) (commenting on the principal opinion’s approach and noting that under section 508.010, “no particular defendant has a right to have a case venued in the county where he or she resides”).

18. *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 192 (Mo. 1998) (en banc).

19. *Id.* (citations omitted).

20. *State ex rel. Henning v. Williams*, 131 S.W.2d 561 (Mo. 1939) (en banc). In *Henning*, the plaintiff brought suit against an individual resident of St. Charles County and Shell Petroleum Corporation, a foreign corporation licensed to do business in Missouri. *Id.* at 562. The corporate defendant maintained an office for the transaction of its business in the City of St. Louis. *Id.* Since there was a mix of corporate and individual defendants, the court in *Henning* relied on the decision rendered in *Columbia National Bank* for determining that section 508.010 was the applicable venue statute. *Id.*; see also *supra* note 13.

21. *Henning*, 131 S.W.2d at 562.

22. The predecessor statute to section 508.010 was codified at MO. REV. STAT. § 720 (1929). The predecessor statute to section 508.040 was codified at MO. REV. STAT. § 723 (1929).

the venue of actions against a corporation when sued alone pursuant to section 508.040 was in any county where the corporation had an office or agent for the transaction of its business, there was “no reason why [the corporate defendants’] residences should not be regarded as established in the same way when, perchance, they are joined as defendants with another, thereby fixing the venue under [section 508.010].”²³

Prior to 1943, the “residence” of a corporation for purposes of venue was consistently construed to be any county in which it maintained an office for the transaction of its business.²⁴ In 1943, however, the General Assembly adopted The General and Business Corporation Act of Missouri (“the Act”), which introduced the concept of a registered agent to Missouri law.²⁵ Besides requiring corporations to which it applied to maintain a registered office and agent in Missouri, the Act provided how and when a corporation shall change its registered agent or the address of its registered office and the capacity of the registered agent regarding service of process.²⁶

Language in section 10 of the 1943 Act, which today is codified at section 351.375.2, provides: “The location or residence of any corporation shall be deemed *for all purposes* to be in the county where its registered office is maintained.”²⁷ Upon the introduction of the concept of registered agent, issues relating to corporate residence began to proliferate.

B. Corporate Residence in Missouri After 1943

In 1951, the Missouri Supreme Court was confronted with essentially the same issue as was before the court in *Henning*: What is the residence of a corporation for venue purposes when a corporation and an individual are joined as defendants?²⁸ In the case of *State ex rel. O’Keefe v. Brown*,²⁹ the

For the legislative history of the predecessor statute to section 508.010, *Henning* directs one to look at *State ex rel. Standard Fire Ins. Co. v. Gantt*, 203 S.W. 964 (Mo. 1918) (en banc).

23. *Henning*, 131 S.W.2d at 565. In *Henning*, the corporate defendant was found to be a resident of the City of St. Louis. *Id.* See also *Smith*, where Judge Wolff observed:

The *Henning* case follows the common law rule that a corporation’s ‘residence may be wherever its corporate business is done,’ that is, ‘where its officers and agencies are actually present in the exercises of its franchises and in carrying on its business; and the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business.’

979 S.W.2d at 192 (Wolff, J., concurring).

24. See *Henning*, 131 S.W.2d at 565.

25. The General and Business Corporation Act of Missouri, 1943 Mo. Laws 410, 414; MO. REV. STAT. § 351.010 (2000).

26. 1943 Mo. Laws 419-20.

27. *Id.* at 420.

28. While the issue in *Henning* concerned the residence of a foreign corporation, the issue in *State ex rel. O’Keefe v. Brown* concerned the residence of a Missouri corporation. See *Henning*, 131 S.W.2d 561; *State ex rel. O’Keefe v. Brown*, 235 S.W.2d 304 (Mo. 1951) (en banc).

plaintiff argued that the court should follow the *Henning* line of reasoning with respect to determining the residence of the corporate defendant under section 508.010. The court rejected the plaintiff's argument, however, stating: "Presumably, it is [plaintiff's] theory that the residence of a corporation is wherever it operates and has an office and agent. That, however, is not the law as it is declared by the statutory and case law of this State."³⁰

The court in *O'Keefe* effectively overruled *Henning* when it rejected plaintiff's argument. Thus, rather than rely upon the common law for determining a corporate defendant's residence under section 508.010, *O'Keefe* changed course and looked to section 351.375 alone to base its decision.³¹ The court stated that section 351.375 "applies with equal force to venue statutes."³² Through its interpretation of such statutes, the court held that the exclusive "residence" of a corporation for purposes of venue under section 508.010 was in the county where the corporation maintained its registered agent.³³

The decision of *O'Keefe* effectively created two standards for determining venue in actions against corporations. *O'Keefe* directed that when a plaintiff files suit against both a corporation and an individual, the corporate defendant's residence is the county where its registered agent is located pursuant to section 508.010 and section 351.375.³⁴ Yet, when a corporation is the sole defendant, venue continues to be in any county where it maintains an office for the transaction of its business under section 508.040.³⁵

C. Criticizing *O'Keefe*: Anomalies of Statutory Construction

In subsequent cases, including *State ex rel. Whiteman v. James*³⁶ and *State ex rel. Bowden v. Jensen*,³⁷ the Missouri Supreme Court recognized and

29. *O'Keefe*, 235 S.W.2d 304. The underlying facts in *O'Keefe* arose from a motor vehicle collision. *Id.* at 305. The plaintiff brought suit in Dade County against a Missouri corporation and an individual defendant. *Id.* at 306. The corporate defendant had its registered agent located in Jasper County, while the individual defendant was a resident of Gentry County. *Id.* at 305. The corporate defendant, however, had an office for the transaction of its business in Dade County. *Id.* at 306.

30. *Id.* at 307.

31. In 1951, *O'Keefe* looked to section 351.375.4, which is the predecessor to the current codification at section 351.375.2. MO. REV. STAT. § 351.375.4 (1949) (current version at MO. REV. STAT. § 351.375.2 (2000)).

32. *O'Keefe*, 235 S.W.2d at 306.

33. *Id.*

34. *Id.*

35. The majority in *State ex rel. Whiteman v. James* conceded that such a statutory construction would result in the "anomaly" of a plaintiff being able to sue a corporate defendant alone in one county under section 508.040, but not in that same county if the corporation was joined with an individual resident of another county. 265 S.W.2d 298, 300 (Mo. 1954) (en banc).

36. *Id.* at 298.

37. *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962) (en banc).

extended the *O'Keefe* holding.³⁸ Both of these cases, however, occasioned strong criticism from certain judges on the court. In *Whiteman*, Judge Hyde stated that section 351.375 was not a venue statute, but rather that it merely authorized service on a corporation at its registered office.³⁹ Commenting on section 351.375, Judge Hyde stated: “[T]he most reasonable construction is that it only adds another office (the registered office) to those where service can be made and venue established.”⁴⁰

In *Bowden*, Judge Storckman asserted that the majority incorrectly construed and applied section 351.375, as had the court in the prior *O'Keefe* and *Whiteman* decisions. Judge Storckman stated that the *O'Keefe* and *Whiteman* “cases seem to regard the provision [section 351.375] as if it reads ‘for all purposes of venue,’ but it does not have that effect. At best, venue is only one of several purposes involved.”⁴¹ He also declared: “[I]t was not the legislative intent to destroy the effectiveness of [section 508.010.2] as it had been interpreted and construed” in *Henning*.⁴²

Perhaps the most ardent criticism of *O'Keefe*, however, came from Judge Wolff in *Smith*. There, he argued:

If section 351.375 is understood to designate the *exclusive* residence for venue purposes, then our previous attempts to reconcile [section 351.375 and 508.040] do not obey the command of the business corporation statute that the residence of a corporation ‘for all purposes’ is to be the county where its registered office is maintained. For venue purposes when the corporation is the sole defendant in a lawsuit, its ‘residence’ is a county where it has an office for the conduct of its usual business, in accordance with section 508.040, and this would conflict with the ‘all purposes’ language of section 351.375.⁴³

Continuing, Judge Wolff invited the Missouri Supreme Court to reexamine its prior holding that the residence of a corporation for venue purposes under section 508.010 is the location of its registered office.⁴⁴ He suggested:

38. The court in both *Whiteman* and *Bowden* extended the *O'Keefe* decision to apply to foreign corporations. See discussion *infra* notes 39-43.

39. *Whiteman*, 265 S.W.2d at 301 (Hyde, J., dissenting).

40. *Id.* Judge Hyde also admonished: “I do not think [section 351.375] should be held to control over the specific provisions of section 508.010 and 508.040, which were intended as venue statutes and which were left unamended.” *Id.*

41. *Bowden*, 359 S.W.2d at 353 (Storckman, J., dissenting) (emphasis added).

42. *Id.* at 354.

43. State *ex rel.* *Smith v. Gray*, 979 S.W.2d 190, 195 (Mo. 1998) (en banc) (Wolff, J., concurring).

44. “The statute [section 351.375], consistent with the venue statute [section 508.040], simply creates another venue choice—not the exclusive venue residence.” *Id.* at 195. As is apparent, this is in direct contradiction to the holding in *O'Keefe*, whereby the court held that section 351.375 did indeed provide for the exclusive venue residence of a corporation pursuant to section 508.010.2.

[T]he most logical way to reconcile the venue statutes and the business corporation statute is to hold that a business corporation for venue purposes is a resident of a county where it maintains an office for the transaction of its usual business (section 508.040) *and* a resident of a county where it maintains its registered office (section 351.375).⁴⁵

Judge Wolff sought to revisit the days of *Henning* where section 508.040 defined a corporation's residence and section 508.010 determined the propriety of venue.⁴⁶

D. *Evading the Wind of Change*

The issue of corporate residence for venue purposes came before the Missouri Supreme Court during the Fall of 2000 in the cases of *State ex rel. Armstrong v. Mason*⁴⁷ and *State ex rel. Taylor v. Clark*.⁴⁸ The procedural facts in both *Armstrong* and *Taylor* were identical. In *Armstrong*, suit was filed in the City of St. Louis; suit in *Taylor* was filed in Jackson County. The cause of action in both cases accrued elsewhere. On day one, the respective plaintiffs filed suit solely against a foreign corporate defendant.⁴⁹ On day two, plaintiffs filed amended petitions joining an individual defendant who was not a resident of the forum county but who was a citizen of Missouri. The defendants in each case moved to transfer for improper venue. Yet, when the defendants in each case moved to transfer for improper venue, the respective judges rendered inconsistent rulings.⁵⁰

While *Armstrong* and *Taylor* both dealt in part with the concept of "pretensive nonjoinder,"⁵¹ the cases actually centered on the issue of corporate

45. *Smith*, 979 S.W.2d at 196 (Wolff, J., concurring).

46. See Rineberg, *supra* note 1, at 1055. Furthermore, [t]he current construction of corporate residence for venue purposes should be replaced with a simplified and more logical formula; one which would lessen the need for procedural posturing by plaintiffs by establishing a corporation's residence for venue purposes as *either* the location of its office or agent for the conduct of its usual and customary business *or* the location of its agent for the service of process.

Id. at 1056 (emphasis in original).

47. *State ex rel. Armstrong v. Mason*, No. SC82669 (Mo. 2000) (en banc) (no opinion filed).

48. *State ex rel. Taylor v. Clark*, No. SC82915 (Mo. 2000) (en banc) (no opinion filed).

49. Section 508.040 was the governing venue statute because only corporate defendants were involved and venue in each case was proper when initially filed because each defendant maintained offices and agents within the respective forums.

50. Judge David Mason denied the motion to transfer *Armstrong* from the City of St. Louis. Judge Thomas Clark sustained the motion to transfer *Taylor* from Jackson County.

51. See *State ex rel. Breckenridge v. Sweeney*, 920 S.W.2d 901, 902 (Mo. 1996) (en banc), for a discussion of "pretensive joinder." There, the defendant argued that the plaintiffs joined a non-corporate defendant solely as a means of attaining venue in the county where one of the corporate defendant's registered agents was located. The doctrine of "pretensive nonjoinder" is a novel one, involving the allegation that a plaintiff brought suit against only a certain defendant or defendants initially to establish favorable venue. No case, however, discusses its application.

venue.⁵² The Supreme Court of Missouri issued preliminary writs of prohibition in each case, and each was set on an accelerated docket for briefing and argument. The cases were not consolidated, but were argued serially before the court on November 2, 2000, before different panels. Judge Holstein recused himself from the *Armstrong* case, thereby allowing Judge Spinden of the Western District Court of Appeals to sit in his stead. Judges Covington and Benton recused themselves from the *Taylor* case, with Judge Crane of the Eastern District Court of Appeals and Judge Spinden sitting in their stead. The result? The court quashed each of its preliminary writs without opinion, thus allowing the mutually repugnant decisions from the City of St. Louis and Jackson County to stand. The two panels examined the same facts, but apparently came to categorically different conclusions.

Armstrong and *Taylor* provided the Missouri Supreme Court with the opportunity to reexamine *O'Keefe* and its progeny, to note the complexity perpetuated by those cases, and to set forth a new statutory construction. Rather than the residence of a corporate defendant hinging on the nature of any defendant joined in the suit, the plaintiffs argued that a corporation's residence for venue purposes should be the location of its office or agent for the service of process and the location of its office for the conduct of its usual and customary business.⁵³ After *Armstrong* and *Taylor*, the issue remains unresolved.

While the dual-standard approach for determining corporate venue has resulted in a variety of litigation concerning the satellite issues of "pretensive

Perhaps the novelty of "pretensive nonjoinder" is defined by the fact that no statement in *DePaul Health Center* or its progeny requires a plaintiff to join all potential defendants at the first opportunity. See *State ex rel. DePaul Health Ctr. v. Mummert*, 870 S.W.2d 820, 823 (Mo. 1994) (en banc) (stating that "venue is determined as the case stands when brought") (emphasis added). In both cases, the plaintiffs relied in part on this language. The effect of *DePaul Health Center* has been watered down, however, by the Supreme Court of Missouri's decision in *Linthicum*. See discussion *infra* note 54.

52. Both *Armstrong* and *Taylor* focused on the illogical results that are sometimes occasioned by the court's current construction of Missouri's venue laws, whereby "the determination of proper venue for a corporation turns on the essentially inconsequential presence of a single unincorporated defendant." See Brief of Amicus Curiae Missouri Association of Trial Attorneys at 19, *State ex rel. Armstrong v. Mason*, No. SC82669 (Mo. filed Nov. 14, 2000). For an example of the confusion and illogical results which have been perpetuated by the court's improper construction, see *State ex rel. O'Keefe v. Brown*, 235 S.W.2d 304 (Mo. 1951) (en banc); *State ex rel. Whiteman v. James*, 265 S.W.2d 298 (Mo. 1954) (en banc); *State ex rel. Bowden v. Jensen*, 359 S.W.2d 343 (Mo. 1962) (en banc); *DePaul Health Ctr.*, 870 S.W.2d 820.

53. For an in-depth discussion on the idea that the residence of a general business corporation for venue purposes should be either the location of its office or agent for the conduct of its usual and customary business or the location of its registered office for the service of process, see Rineberg, *supra* note 1, at 1055.

nonjoinder” and the moment in time when venue vests,⁵⁴ the issue of importance for purposes of this Comment draws more narrowly from the expansive canvas of corporate venue law painted by *O’Keefe* and followed by its progeny. The focus is on the residence of foreign corporations and not-for-profit corporations. Yet, before one can delve into the quagmire that is foreign and not-for-profit corporation residence, one must first develop an understanding of how the Missouri Supreme Court has dealt with the issue of determining an insurance corporation’s residence under section 508.010 in the absence of a specific statute that speaks to the residence of the corporation.

II. THE INSURANCE CORPORATION DISTINCTION AND THE RETURN OF COMMON LAW RESIDENCE

In 1960, the case of *State ex rel. Stamm v. Mayfield*⁵⁵ introduced a new wrinkle into the court’s interpretation of Missouri venue law. Up until *Stamm*, *Whiteman* had been the controlling case for purposes of defining the residence of a foreign corporation.⁵⁶ While the corporation in *Stamm* was foreign, the new wrinkle introduced was that the corporate defendant was also an *insurance* corporation. Hence, *Stamm* presented the Missouri Supreme Court with its

54. The issue of when venue vests came before the Missouri Supreme Court in four cases during 2001. See *State ex rel. Fireworks Spectacular, Inc. v. Calvin*, No. SC83282 (Mo. 2001) (en banc) (no opinion filed); *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. 2001) (en banc); *State ex rel. Miracle Recreation Equip. Co. v. O’Malley*, No. SC83831 (Mo. Dec. 4, 2001) (en banc); *State ex rel. Landstar Ranger, Inc. v. Dean*, No. SC83832 (Mo. 2001) (en banc). In *Fireworks Spectacular, Inc.*, the plaintiff initially brought suit in the City of St. Louis against a nonresident of Missouri pursuant to section 508.010.4. Plaintiff then amended the suit to include Missouri resident defendants. At the time, none of the Missouri resident defendants were believed to be residents of the City of St. Louis. The issue of the propriety of venue in the City of St. Louis was argued before the Missouri Supreme Court on May 10, 2001. During the interim, however, it was discovered that a defendant in the case did in fact reside in the City of St. Louis. Thus, the issue became moot and was not decided by the Court.

In *Linthicum*, the plaintiff brought suit against a nonresident, individual defendant and established venue in the City of St. Louis pursuant to section 508.010.4. *Linthicum*, 57 S.W.3d at 856. Plaintiff then amended the suit to include additional Missouri resident defendants. *Id.* The court held that “[f]or purposes of section 508.010, a suit instituted by summons is ‘brought’ whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition.” *Id.* at 858. The Court in *Linthicum* also noted, though, that *DePaul Health Center* “does not hold to the contrary and still applies whenever a defendant is dismissed from a lawsuit rather than added to it.” *Id.*

55. *State ex rel. Stamm v. Mayfield*, 340 S.W.2d 631 (Mo. 1960) (en banc). The underlying action in *Stamm* centered on a suit filed in the City of St. Louis for damages arising out of an automobile collision. Suit was brought against a foreign insurance corporation that maintained an office for the transaction of its business in the City of St. Louis and against an individual defendant who was a resident of St. Louis County. *Id.* at 632.

56. *Whiteman*, 265 S.W.2d at 298. See discussion of a foreign corporate defendant’s residence *infra* section III.

first opportunity to decide the issue of where an insurance corporation's residence should be located for purposes of venue under section 508.010.2.⁵⁷

The court in *Stamm* began its opinion by referencing The General and Business Corporation Act of Missouri:

The [Act] requires the corporations to which it applies to have and maintain in Missouri a registered office and a registered agent. It also provides how and when a corporation shall change its registered agent or the address of its registered office and specifies the capacity of the registered agent especially as regards service of process. Sections 351.370, 351.375 and 351.380 of the Act govern domestic corporations in this regard, and [sections] 351.620, 351.625 and 351.630 apply to foreign corporations.⁵⁸

It is important to note at this point that, prior to *Stamm*, the court in *Whiteman* had utilized the relevant provisions of chapter 351 applicable to foreign corporations to hold that the residence of both domestic and foreign corporations under section 508.010.2 was controlled by section 351.375.⁵⁹ The Court in *Whiteman* construed section 351.375 to define the residence of foreign corporations joined with a non-corporate defendant because of the last sentence in section 351.625, which read: "Any such change either in the registered office or in the registered agent shall be made in the manner *as prescribed in section 351.375.*"⁶⁰

Aware of the court's reliance on chapter 351 in *Whiteman*, the court in *Stamm* observed that "insurance companies are not within the purview of [chapter 351] because they are among the corporations specifically excepted by [the] provisions of [section] 351.690."⁶¹ Hence, the court relied upon section 351.690, which at that time read in pertinent part:

The provisions of this chapter shall be applicable to existing corporations as follows:

1. Those provisions of this law . . . shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign . . .

57. *Stamm*, 340 S.W.2d at 632. The court noted that the issue was:

[W]hether an action may be maintained against a foreign insurance company and its employee, or either of them, in the county where the insurance company maintains its principal office when the insurance company has not filed with the secretary of state a designation of a registered office and registered agent, and the codefendant employee resides in a county other than that in which the suit is brought.

Id.

58. *Id.* at 633.

59. *See Whiteman*, 265 S.W.2d at 300.

60. MO. REV. STAT. § 351.625 (1949) (emphasis added) (repealed 1990).

61. *Stamm*, 340 S.W.2d at 633.

2. No provision of this law, other than those mentioned in subdivision (1), shall be applicable to banks, trust companies, *insurance companies*, building and loan associations, savings bank and safe deposit companies, mortgage loan companies, and nonprofit corporations;⁶²

Noting the language in section 351.690 with respect to insurance corporations, the court continued:

*The statutes under which insurance companies are organized and regulated are Chapters 374 through 381. Section 375.210 requires insurance companies to execute a power of attorney appointing the superintendent of insurance as its agent to receive service of all lawful process. The statutes relating to the organization and regulation of various kinds of insurance companies are frequently said to comprise a complete code and the exception of insurance companies from the operation of The General and Business Corporation Act is in keeping with the public policy of the state as expressed in statutes and the decisions of this court.*⁶³

And while section 375.210 required insurance companies to appoint the superintendent of insurance as their registered agent for service of process, the court determined that such statute was merely a service statute—not a venue statute.⁶⁴ Thus, because the language in section 351.690 expressly exempted insurance statutes from chapter 351 and section 375.210 did not operate as a venue statute, *Stamm* held that *Whiteman* was inapplicable.

The court in *Stamm*, however, did not stop there in rejecting *Whiteman*:

There is at least one other cogent reason why [*Whiteman*] is not decisive of this case. Section 351.375 applies to foreign corporations only to the extent that [section] 351.625 incorporates it by reference, and the last sentence of

62. *Id.* (quoting 1943 Mo. Laws 410) (emphasis added). The current version of section 351.690 reads, in relevant part:

The provisions of this chapter shall be applicable to existing corporations and corporations not formed pursuant to this chapter as follows:

1. Those provisions of this chapter . . . shall be applicable, to the same extent and with the same effect, to all existing corporations, domestic and foreign . . .
3. No provisions of this chapter, other than those mentioned in subdivision (1) of this section, and then only to the extent required by the statutes pursuant to which they are incorporated, or other than the provisions of section 351.347, or section 351.355, shall be applicable to *insurance companies*, savings and loan associations, corporations formed for benevolent, religious, scientific or educational purposes, and *nonprofit corporations*;

MO. REV. STAT. § 351.690 (2000) (emphasis added).

63. *Stamm*, 340 S.W.2d at 633 (emphasis added).

64. *Id.* at 634. Compare *Stamm*'s interpretation of section 375.210 with the court's interpretation of section 351.375 in *State ex rel. O'Keefe v. Brown*, whereby the Court held that section 351.375 "applies with equal force to venue statutes." 235 S.W.2d 304, 306 (Mo. 1951) (en banc).

[section] 351.375 which was the basis of the [*Whiteman*] decision is not properly includable in the reference.⁶⁵

Therefore, the court also held that *Whiteman* was overruled to the extent that it held section 351.375 was applicable to foreign corporations.⁶⁶ “Because the corporation involved in the present case is both an insurance company and a foreign corporation, the [*Whiteman*] case is not controlling.”⁶⁷

Although *Stamm* held that the residence of a foreign insurance corporation under section 508.010 was not governed by sections 375.210 or 351.375, the court failed to define exactly where the residence of a foreign insurance corporation should be located when joined with an individual defendant. It took nearly thirty years for the court to revisit this issue. In 1991, however, the case of *State ex rel. Rothermich v. Gallagher*⁶⁸ offered the Missouri Supreme Court the occasion to decide that very issue.

A. *Defining the Residence of Foreign Insurance Corporations Under Section 508.010.2*

“Missouri courts have heretofore established no definitive definition of residence of foreign insurance corporations for purposes of [section] 508.010(2).”⁶⁹ The task confronting the court in *Rothermich*, therefore, was to put an end to the uncertainty that had lingered since *Stamm* and establish the residence of a foreign insurance corporation. “Since Chapter 351 excludes insurance corporations from applicability, the definition of residence for business corporations taken from [section 351.375] has been found to be inapplicable to insurance corporations.”⁷⁰

Prior to answering the question concerning a foreign insurance corporation’s residence, *Rothermich* chose to summarize the state of venue law in Missouri circa 1991: (1) when any corporation is the sole defendant—domestic or foreign; insurance or business—section 508.040 is the governing venue statute;⁷¹ (2) when one or more corporations are sued together with one

65. *Stamm*, 340 S.W.2d at 633. The last sentence of section 351.375 reads: “The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” MO. REV. STAT. § 351.375.4 (1949) (current version at MO. REV. STAT. § 351.375.2 (2000)).

66. *Stamm*, 340 S.W.2d at 634.

67. *Id.*

68. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194 (Mo. 1991) (en banc). In *Rothermich*, the plaintiff brought suit in the City of St. Louis against a foreign insurance corporation and an individual defendant, who was a resident of St. Louis County. *Id.* at 195. Venue was based in the City of St. Louis because the foreign insurance corporation had an office for the transaction of its business there.

69. *Id.* at 197.

70. *Id.* at 198.

71. *Id.* at 197.

or more individual defendants, section 508.010 is the applicable venue statute;⁷² and (3) “for purposes of venue under [section] 508.010(2), foreign insurance corporations are treated differently from domestic and foreign general business corporations.”⁷³

Upon the court’s summary of Missouri venue law, *Rothermich* then defined where a foreign insurance corporation’s residence was located for purposes of venue under section 508.010. Under the general venue statute, the court held the residence of a foreign insurance corporation is any place the insurance corporation keeps an office or agent for the transaction of its usual and customary business.⁷⁴ The court explained its holding by stating:

Although cases have noted no distinction between business corporations and insurance corporations under the venue provisions of [section] 508.040, the use of the term ‘residence’ to determine venue under [section] 508.010(2) was found by courts to create a distinction between a business corporation whose residence was defined by statute and an insurance corporation *whose residence was not*.⁷⁵

While *Rothermich* effectively determined the residence of a foreign insurance corporation, the residence of a domestic insurance corporation remained undefined—still swirling in the twisted currents of Missouri venue law interpretation. Hence, it would take another case to calm the waters surrounding domestic insurance corporations.

B. Defining the Residence of Domestic Insurance Corporations Under Section 508.010.2

In *State ex rel. Smith v. Gray*,⁷⁶ it was conceded that section 508.010 was the governing venue statute. At issue, though, was where the residence of a

72. *Id.*

73. *Rothermich*, 816 S.W.2d at 197.

74. *Id.* at 200 (holding “the language of [section] 508.040 . . . to be persuasive in determining the definition of ‘residence’ of a foreign insurance corporation, pursuant to [section] 508.010”). Venue was deemed proper in the City of St. Louis, since the foreign insurance corporation maintained an office for the transaction of its business there. *Id.* at 201.

75. *Id.* at 198 (emphasis added).

76. *State ex rel. Smith v. Gray*, 979 S.W.2d 190 (Mo. 1998) (en banc). The underlying facts in *Smith* involve a suit for damages once again arising from a motor vehicle collision. *Id.* at 191-92. The plaintiff brought suit in Jackson County against a domestic insurance corporation, a general business corporation and an individual defendant. *Id.* The Missouri insurance corporation had its principal and home offices in Boone County, in addition to other offices throughout the state, including Jackson County. *Id.* The general business corporation had its registered office in Saline County, with no office or agent located in Jackson County. *Id.* The individual defendant was a resident of Saline County. *Id.* The issue in the case was whether the Missouri insurance corporation could be considered a resident of Jackson County, thereby making venue proper in that county pursuant to section 508.010.2. *Id.* at 192.

domestic insurance corporation should be located pursuant to that statute.⁷⁷ The court in *Smith* noted that “[a]lthough the 1943 law changed the rule for general and business corporations, it expressly *does not apply* to insurance corporations.”⁷⁸ The court observed that “[i]n the absence of a specific statute, the *Rothermich* opinion followed the *Henning* line of cases, reading sections 508.010(2) and 508.040 together.”⁷⁹ Therefore, by following *Rothermich*, the court in *Smith* determined that “[u]nder sections 508.010(2) and 508.040, foreign *and* domestic insurance corporations ‘reside’ for venue purposes in any county where they have or usually keep an office or agent for the transaction of their usual and customary business.”⁸⁰

The cases of *Stamm*, *Rothermich* and *Smith* illustrate the development of corporate residence for venue purposes regarding insurance corporations. The Missouri Supreme Court has held that, with respect to insurance corporations, the absence of statutory guidance results in their residence being defined by common law under *Henning*'s line of reasoning. Understanding the rationale imparted by the court in *Rothermich* and *Smith* is crucial because it serves as the foundation for the following analysis vis-à-vis the residence of foreign and not-for-profit corporations. The reason that such an understanding is crucial is that, as is the case with insurance corporations, the residence of both foreign and not-for-profit corporations is not defined by statute.

III. FOREIGN CORPORATIONS AND THE QUESTION OF RESIDENCE

It has been established that under section 508.010, the court looks to the residence of the defendants for purposes of venue. Section 508.010 has been held to be the applicable venue statute when general business corporations and insurance corporations—domestic or foreign—are joined with individual defendants.⁸¹ With respect to foreign corporations, however, a preliminary question exists as to whether any statute defines—expressly or indirectly—residence.

Section 351.375 states that “the location or residence of *any corporation* shall be deemed for all purposes to be in the county where its registered office

77. *Id.* at 191.

78. *Id.* at 192 (emphasis added).

79. *Id.* (citing *Rothermich*, 816 S.W.2d at 198, 200-01).

80. *Id.* at 193 (emphasis added).

81. *See generally* State *ex rel.* O’Keefe v. Brown, 235 S.W.2d 304 (Mo. 1951) (en banc); State *ex rel.* Whiteman v. James, 265 S.W.2d 298 (Mo. 1954) (en banc); State *ex rel.* Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962); State *ex rel.* Stamm v. Mayfield, 340 S.W.2d 631 (Mo. 1960) (en banc); State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194 (Mo. 1991) (en banc); State *ex rel.* Dick Proctor Imp., Inc. v. Gaertner, 671 S.W.2d 273 (Mo. 1984) (en banc); State *ex rel.* DePaul Health Ctr. v. Mummert, 870 S.W.2d 820 (Mo. 1994) (en banc); State *ex rel.* Smith v. Gray, 979 S.W.2d 190 (Mo. 1998) (en banc).

is maintained.”⁸² Due to an express provision, however, section 351.375 does not apply to a foreign corporation.⁸³ Section 351.015.6 defines “corporation” as used in chapter 351 as “corporations organized under this chapter or subject to some or all of the provisions of this chapter *except a foreign corporation*.”⁸⁴ A foreign corporation is defined by section 351.015.7 as “a corporation for profit organized under laws other than the laws of this state.”⁸⁵

Prior to the decision rendered in *Stamm*, the issue of the residence of a foreign corporation was first before the court in *Whiteman*.⁸⁶ As noted previously, at the time *Whiteman* was decided, sections 351.370, 351.375 and 351.380 directed the manner in which domestic corporations established their registered office and registered agent, while sections 351.620, 351.625 and 351.630 governed foreign corporations.

A. *The Foreign Corporation Distinction Prior to 1990*

Prior to 1990, three statutes directed the manner in which foreign corporations established their registered office and registered agent. Section 351.620 required a foreign corporation authorized to do business in Missouri to have and continuously maintain a registered office and a registered agent in Missouri.⁸⁷ Section 351.625 demanded that any change in the registered office or in the registered agent be made pursuant to the manner mentioned in section 351.375.⁸⁸ Finally, section 351.630 directed in part that service of process on a foreign corporation be directed to its registered agent.⁸⁹

In determining the residence of a foreign corporation, the court in *Whiteman* relied on section 351.625, which provided, as follows:

A foreign corporation may from time to time change the address of its registered office. A foreign corporation shall change its registered agent if the office of registered agent shall become vacant for any reason, or its registered agent becomes disqualified or incapacitated to act, or if it revokes the appointment of its registered agent. *Any such change either in the registered office or in the registered agent shall be made in the manner as prescribed in section 351.375.*⁹⁰

82. MO. REV. STAT. § 351.375 (2000).

83. *See* MO. REV. STAT. § 351.015.6 (2000).

84. *Id.* (emphasis added).

85. MO. REV. STAT. § 351.015.7 (2000).

86. State *ex rel.* *Whiteman v. James*, 265 S.W.2d 298 (Mo. 1954) (en banc). *Whiteman* prescribed that the residence of both domestic and foreign corporations under section 508.010.2 was controlled by section 351.375. *Id.* at 300.

87. MO. REV. STAT. § 351.620 (1949) (repealed 1990).

88. MO. REV. STAT. § 351.625 (1949) (repealed 1990).

89. MO. REV. STAT. § 351.630 (1949) (repealed 1990).

90. MO. REV. STAT. § 351.625 (1949) (repealed 1990) (emphasis added).

As is apparent from reading the language of the statute, the last sentence of section 351.625 actually referenced section 351.375. Because no language existed in the provisions regarding foreign corporations for changes in the registered office or in the registered agent, one had to look to section 351.375 for such language. This reference thus allowed the court to arguably validate its finding that section 351.375 dictated corporate residence—regardless of whether the corporation was domestic or foreign.

In *Whiteman*, the court effectively extended the *O'Keefe* decision, holding that section 351.375 also applied to foreign corporations, thereby establishing the exclusive residence of a foreign business corporation to be in the county of its registered agent. *Stamm* followed *Whiteman*, however, and overruled it to the extent that it held section 351.375 was applicable to foreign corporations.⁹¹

The court in *Stamm* held that “[s]ection 351.375 applies to foreign corporations *only to the extent* that [section] 351.625 incorporates it by reference, and the last sentence of [section] 351.375 which was the basis of the [*Whiteman*] decision is not properly includable in the reference.”⁹² Therefore, since the last sentence of section 351.375 “has nothing to do with the *manner* of changing registered offices or agents, it cannot be said to be incorporated by reference into section 351.625 relating to foreign corporations.”⁹³

Confronted with the seemingly conflicting decisions rendered by the court in *Stamm* and *Whiteman*, *Bowden* was forced to further elaborate on the domestic versus foreign corporation distinction and again consider the issue of foreign corporate residence. As was the case in both *Whiteman* and *Stamm*, separate provisions under chapter 351 applied to foreign corporations. *Stamm*, however, held that the last sentence of section 351.375 was inapplicable for purposes of determining the residence of foreign corporations—even though that statute was referenced in the last sentence of section 351.625. Therefore, pursuant to *Stamm*, the court in *Bowden* could seemingly not consider the residence provision of section 351.375 by virtue of the last sentence in section 351.625.

Yet, according to *Bowden*, *Stamm* was not controlling.⁹⁴ In regard to *Stamm*'s construction of sections 351.625 and 351.375, *Bowden* stated:

It will be noted that these several statutory provisions of the General and Business Corporation Act [pertaining to domestic and foreign corporations], . . . admittedly, had no application whatsoever to a *foreign*

91. State *ex rel.* Stamm v. Mayfield, 340 S.W.2d 631, 634 (Mo. 1960) (en banc) (holding that “[t]o the extent that it holds that the last sentence of [section] 351.375 is applicable to foreign corporations, [*Whiteman*] is disapproved [sic]”).

92. *Id.* at 633 (emphasis added).

93. *Id.* at 634.

94. State *ex rel.* Bowden v. Jensen, 359 S.W.2d 343, 348 (Mo. 1962) (en banc) (holding that “[t]he Stamm case is not controlling here, because the facts stipulated and the relationship of the parties in that case are not the same as in the case now before this court”).

insurance company, or to the particular foreign insurance company involved [in *Stamm*], or to the facts of the case before the court for decision; hence the conclusions stated, . . . as to the mentioned sections and the construction indicated were *unnecessary* to the disposition of the case before the court and hence they constituted mere obiter.⁹⁵

Basically, *Stamm* went beyond what it was required to decide. Thus, with *Stamm* no longer influencing the court's decision in *Bowden*, the court looked back to *Whiteman*:

The ultimate decision in the *Whiteman* case was not overruled by the decision in the *Stamm* case and the criticism of the *Whiteman* case, whether proper or improper, is not decisive of the issues in the case now before us for decision. On the other hand, *the facts and issues in the Whiteman case directly conform to the facts and issues in the present case.*⁹⁶

As was the case in *Whiteman*, “[a]s far as domestic corporations organized under the general business laws of Missouri are concerned that issue is settled by the closing sentence of [section] 351.375.”⁹⁷ And, as was the case in *Whiteman*, the court in *Bowden* once again looked to section 351.375 to determine the residence of a foreign corporation:

We think the only legally sound, practical and satisfactory construction to be placed upon [section 508.010.2] when considered together with [section] 351.625 is to hold, as we must and do, that a foreign business corporation ‘resides’ in the county where its registered office and registered agent is located under [section] 351.620. This conclusion is supported by the decision reached in the case of [*Whiteman*] . . . which has not been overruled, and is consistent with the statute applicable to *domestic* corporations, [section] 351.375, including the closing sentence thereof, and is also consistent with the conclusion reached by this court in [*O’Keefe*] . . . construing [section] 351.375.⁹⁸

Pursuant to *Bowden*, section 351.625 was once again found to incorporate by reference section 351.375, fixing the residence of a foreign corporation at the location of its registered agent.

95. *Id.* at 348 (emphasis added). *Stamm* actually mentioned in its decision that “[t]he contention that [section] 351.625 did not have the effect of incorporating by reference the last sentence of [section] 351.375 into the foreign corporation statutes was *not presented*.” 340 S.W.2d at 634 (emphasis added). Hence, *Stamm* would be hard-pressed to argue against *Bowden*'s contention that the court's discussion of section 351.375 in relation to section 351.625 was unnecessary.

96. *Bowden*, 359 S.W.2d at 349 (emphasis added).

97. *Id.* As noted previously, the closing sentence of section 351.375.2 reads: “The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” MO. REV. STAT. § 351.375.2 (1959).

98. *Bowden*, 359 S.W.2d at 350-51.

B. The Foreign Corporation Distinction After 1990

In 1990, however, the General Assembly repealed sections of the relevant provisions of chapter 351 pertaining to foreign corporations. In regard to section 351.625, section 351.588 was enacted in its place.⁹⁹ Section 351.588 contains no language defining the residence of a foreign corporation or referencing section 351.375. Thus, when the General Assembly enacted section 351.588 in 1990, the legislature not only repealed section 351.625 and its reference to section 351.375, it enacted the provision without any language establishing the residence of a foreign corporation to be “for all purposes” the county in which it maintains its registered office.¹⁰⁰ Hence, no statute now speaks to the residence of a foreign corporation.

IV. NOT-FOR-PROFIT CORPORATIONS AND THE QUESTION OF RESIDENCE

As stated above, section 508.010 generally governs the determination of venue when plaintiff joins as defendants a corporation with an individual. However, an exception exists precluding application of section 508.010 when a not-for-profit corporation is joined with an individual.¹⁰¹ Per a recent opinion of the Missouri Supreme Court, a special statute—section 355.176.4—governs venue when a not-for-profit corporation and an individual are sued together.¹⁰²

A. The Not-for-Profit Corporation Special Venue Statute and Its Subjugation of Section 508.010.2

Not-for-profit corporations organize under chapter 355.¹⁰³ A not-for-profit corporation is defined by statute as:

Nonprofit corporations may be organized under this chapter for any one or more of the following or similar purposes: charitable; benevolent; eleemosynary; educational; civic; patriotic; political; religious; cultural; social welfare; health; cemetery; social; literary; athletic; scientific; research; agricultural; horticultural; soil, crop, livestock and poultry improvement; professional, commercial, industrial, or trade association; wildlife conservation; homeowner and community improvement association; recreational club or association; and for the ownership and operation of water supply facilities for drinking and general uses; and for the ownership of sanitary sewer collection systems and waste water treatment facilities; or for the purpose of executing any trust, or administering any community chest, fund or foundation, to further objects which are within the purview of this

99. See MO. REV. STAT. § 351.588 (2000).

100. See *id.*

101. MO. REV. STAT. § 355.176.4 (2000).

102. *Id.*; State *ex rel.* SSM Health Care St. Louis v. Neill, No. SC 84092, 2002 WL 1364121 (Mo. June 25, 2002) (en banc).

103. See generally MO. REV. STAT. §§ 355.001, 355.020 (2000).

section. *No group, association or organization created for or engaged in business or activity for profit, or on the cooperative plan, provision for the incorporation of which is made by any of the incorporation laws of this state, shall be organized or operate as a corporation under this chapter.*¹⁰⁴

Not-for-profit corporations also retain their own special venue provision—section 355.176.4.¹⁰⁵ This statutory provision directs:

Suits against a nonprofit corporation shall be commenced only in one of the following locations:

1. The county in which the nonprofit corporation maintains its principal place of business;
2. The county where the cause of action accrued;
3. The county in which the office of the registered agent for the nonprofit corporation is maintained.¹⁰⁶

In *State ex rel. SSM Health Care St. Louis v. Neill*, the court held that section 355.176.4 expressly provides the exclusive venues in which a not-for-profit corporation can be sued in Missouri.¹⁰⁷ In that case, the court considered the narrow issue of whether section 355.176.4 or section 508.010 governs venue when a plaintiff joins a not-for-profit corporate defendant with an individual.¹⁰⁸ In reaching its conclusion, the court distinguished similar language employed in section 508.040 and drew strength from the variance in language used in other special venue statutes previously deemed by Missouri courts to provide exclusive jurisdiction.¹⁰⁹

104. MO. REV. STAT. § 355.025 (2000) (emphasis added).

105. MO. REV. STAT. § 355.176.4 (2000).

106. MO. REV. STAT. § 355.176.4 (2000) *repealed by* L. 1996, S.B. No. 768, section A. In 1998, however, the Supreme Court of Missouri held L.1996, S.B. No. 768 to be unconstitutional. *See St. Louis Health Care Network v. State*, 968 S.W.2d 145 (Mo. 1998) (en banc).

107. *SSM Health Care St. Louis*, 2002 WL 1364121, at *5.

108. *Id.* at *4-5. As an aside, the authors note that the General Assembly repealed section 355.176 in 1996, enacting in its stead a statute eliminating subsection 4, the provision governing venue of a suit against a nonprofit corporation. L. 1996, S.B. No. 768, section A. However, in 1998, the court held the law to be unconstitutional because the law failed to express clearly a single subject. *St. Louis Health Care Network v. State of Missouri*, 968 S.W.2d 145, 149 (Mo. 1998) (en banc). As such, the repealed version of section 355.176, including subsection 4, came back into effect.

109. *SSM Health Care St. Louis*, 2002 WL 1364121, at *4-5. Contrast section 508.040 and section 355.176.4. *See also*, MO. REV. STAT. §§ 508.050-.060 (2000). Section 508.050 provides: “Suits against municipal corporations as defendant *or codefendant* shall be commenced only.” MO. REV. STAT. § 508.050 (2000) (emphasis added). In *State ex rel. City of Bella Vista v. Nicholls*, the Eastern District held that section 508.050 prevailed over section 508.010 because of the insertion of the “or codefendant” language. 698 S.W.2d 44, 45 (Mo. Ct. App. 1985). In comparison, section 508.060 mandates that “[a]ll actions whatsoever against any county shall be

In *SSM Health Care St. Louis*, plaintiff brought a medical malpractice action against a not-for-profit corporation, SSM Health Care St. Louis, and a doctor for injuries sustained during birth.¹¹⁰ Defendant SSM filed a motion to transfer venue asserting that venue of the action should be determined under section 355.176.4.¹¹¹ Plaintiff opposed the motion, arguing that section 355.176.4 applied only when the suit is filed against one or multiple not-for-profit corporations.¹¹² Plaintiff argued that section 508.010 should apply, thereby making the residence of the not-for-profit corporate defendant determinative of proper venue. Drawing an analogy to the aforementioned interpretation of the applicability of section 508.040 when suit is brought against a for-profit corporation and an individual, the trial court denied the motion, holding that the general venue statute governs venue when plaintiff joins a not-for-profit corporation with an individual.¹¹³

In rejecting the analogy between the corporation and not-for-profit corporation venue statutes, the Missouri Supreme Court focused on the difference in wording between section 508.040 and section 355.176.4. Section 508.040 provides: “Suits against corporations *shall* be commenced . . .” in one of two locations.¹¹⁴ In contrast, section 355.176.4 directs that “[s]uits against a nonprofit corporation *shall* be commenced *only* in one of” three locations.¹¹⁵ Recognizing the insertion of the word “only” in section 355.176.4 and its absence in section 508.040, the court held that the use of both the words “shall” and “only” in section 355.176.4 signified the intention of the General Assembly to restrict venue to only those locations set forth in the provision even where plaintiff joins a nonprofit corporation with an individual.¹¹⁶

The opinion of the court in *SSM Health Care St. Louis* seemingly stands in contrast to its statement in *Smith* that “[w]hen individuals and corporations are sued in the same suit, section 508.010(2) governs.”¹¹⁷ According to the court, “section 355.176.4 limits permissible venues for suit against not-for-profit corporations only to one of the three locations designated in the statute, even when other defendants, including individuals, are also sued.”¹¹⁸ Furthermore, because the court held that section 355.176.4 governs venue, the court did not

commenced in the circuit court of such county.” MO. REV. STAT. § 508.060 (2000) (emphasis added).

110. *SSM Health Care St. Louis*, 2002 WL 1364121, at *1.

111. *Id.* at *1-2.

112. *Id.* at *2.

113. *Id.*

114. MO. REV. STAT. § 508.040 (2000) (emphasis added).

115. MO. REV. STAT. § 355.176.4 (2000) (emphasis added).

116. *State ex rel. SSM Health Care St. Louis v. Neill*, No. SC 84092, 2002 WL 1364121, at *5 (Mo. June 25, 2002) (en banc).

117. *State ex rel. Smith v. Gray*, 979 S.W.2d 190, 191 (Mo. 1998) (en banc).

118. *SSM Health Care St. Louis*, 2002 WL 1364121, at *5.

consider the issue of where a nonprofit corporation resides under section 508.010.¹¹⁹

B. The Absence of a Statute Explicitly Defining the Residence of a Not-for-Profit Corporation

With respect to not-for-profit corporations, the court has stated that residence is immaterial pursuant to a special venue statute. The authors believe, however, that had the court found section 355.176.4 not applicable and considered the issue of residence, the court would have found not-for-profit corporations—like insurance corporations—to be a resident of any county with an office or agent. Furthermore, because section 355.176.4 was previously repealed but later reinstated because of a finding of unconstitutionality,¹²⁰ there is the potential for the present-day language of section 355.176.4 to change in the future. Should such a change occur, it will be important to understand the analysis involved in determining the residence of a not-for-profit corporation because a statute does not exist explicitly defining its residence.

As demonstrated above, the court has interpreted section 351.375.2 to provide the exclusive residence of a domestic business corporation when section 508.010 is the applicable venue statute.¹²¹ It is also important to note, however, that not-for-profit corporations organize under chapter 355.¹²² Therefore, chapter 351 of the General and Business Corporation Act of Missouri does not apply to not-for-profit corporations. Section 351.015.6 defines “corporation” for purposes of chapter 351 as those corporations “organized under *this chapter* or subject to some or all of the provisions of the chapter.”¹²³ Furthermore, section 351.690.3 provides that “[n]o provisions of this chapter . . . shall be applicable to . . . *nonprofit corporations*.”¹²⁴

Prior to 1994, chapter 355 contained a provision identical to section 351.375.2. Section 355.170.1(2) provided: “The location or residence of any corporation shall be deemed *for all purposes* to be in the county where its

119. *Id.* at *3.

120. *See* St. Louis Health Care Network v. State, 968 S.W.2d 145 (Mo. 1998) (en banc) (finding L. 1996, S.B. No. 768 to be unconstitutional, which had previously repealed section 355.176.4).

121. *See* State *ex rel.* O’Keefe v. Brown, 235 S.W.2d 304 (Mo. 1951) (en banc). Under section 508.010.2, the residence of a domestic business corporation pursuant to section 351.375.2 is in the county where its registered agent is located. MO. REV. STAT. § 508.010.2 (2000).

122. *See generally* MO. REV. STAT. § 355.001 (2000); *see also* MO. REV. STAT. § 355.020 (2000).

123. MO. REV. STAT. § 351.015.6 (2000) (emphasis added).

124. MO. REV. STAT. § 351.690.3 (2000) (emphasis added). Section 351.690.3 also admonishes that chapter 351 does not apply to insurance corporations: “[n]o provisions of this chapter . . . shall be applicable to *insurance companies* . . .” *Id.*

registered office is maintained.”¹²⁵ In 1990, the court in *State ex rel. Steinhorn v. Forder*¹²⁶ relied on the residence provision of section 355.170.1(2) to locate the residence of the not-for-profit corporation in the county where its registered office was maintained. In 1992, the court in *State ex rel. Vaughn v. Koehr*¹²⁷ also visited the issue of not-for-profit corporate residence. While the issue was analogous to that in *Steinhorn*, there was a new twist in terms of the party defendants. In *Vaughn*, the defendants were a not-for-profit corporation and a general business corporation.

Accordingly, the court in *Vaughn* held that when a not-for-profit corporation and a business corporation are joined as defendants, section 508.040 is the applicable venue statute and the not-for-profit corporation can be sued in any county where it maintains an office for the transaction of its usual and customary business.¹²⁸ “If the legislature had intended that not-for-profit corporations be treated differently than general business corporations for purposes of venue, it could have easily so ordained.”¹²⁹ The court determined that “[t]he clear, unambiguous language of [section] 508.040 applies to *all* corporations.”¹³⁰

At the time of both the *Steinhorn* and *Vaughn* decisions, section 355.170.1(2) was still good law. In 1994, however, the General Assembly repealed section 355.170.1(2) and enacted section 355.161 in its place.¹³¹ Section 355.161 makes no provision regarding the residence of a not-for-profit corporation. Thus, no statute now speaks to the residence of a not-for-profit corporation.

125. MO. REV. STAT. § 355.170.1(2) (1986) (repealed 1994) (emphasis added). Compare with section 351.375.2, which provides: “The location or residence of any corporation shall be deemed for all purposes to be in the county where its registered office is maintained.” MO. REV. STAT. § 351.375.2 (2000).

126. *State ex rel. Steinhorn v. Forder*, 792 S.W.2d 51 (Mo. Ct. App. 1990).

127. *State ex rel. Vaughn v. Koehr*, 835 S.W.2d 543 (Mo. Ct. App. 1992). In *Vaughn*, plaintiff brought a medical malpractice action against a not-for-profit health care center and two other corporate defendants in the City of St. Louis. *Id.* at 543. The cause of action accrued in Cole County. *Id.* The corporate defendants, Doerhoff Surgical Services and Jefferson City Bone and Joint Clinic, Inc., maintained both registered agents and offices for the transaction of their business in Cole County. *Id.* The not-for-profit corporation, SSM Healthcare, maintained its registered agent in St. Louis County and operated a hospital in the City of St. Louis. *Id.* at 544. The plaintiff argued that venue was proper in the City of St. Louis because the not-for-profit corporate defendant maintained an office for the transaction of its business there. *Id.* Furthermore, the plaintiff argued that section 508.040 was the applicable venue statute because all three defendants were corporations. *Id.* The not-for-profit corporate defendant, however, argued that section 508.040 did not apply to not-for-profit corporations. *Id.*

128. *Id.* at 544. The court in *Vaughn* chose to ignore section 355.170.1(2) when faced with only corporate defendants.

129. *Id.*

130. *Id.* (emphasis added).

131. MO. REV. STAT. § 355.161 (2000).

V. ANALYSIS

“Venue in Missouri is determined solely by statute.”¹³² Pursuant to *O’Keefe* and its progeny, the proper venue statute when a corporation—any corporation—is joined with an individual defendant is section 508.010. Moreover, under section 508.010, residency is a primary issue.¹³³

Until 1943, no Missouri statute defined the “residence” of corporations for venue purposes.¹³⁴ Prior to that date, the Missouri Supreme Court applied the common law rule that a corporation’s “residence may be wherever its corporate business is done.”¹³⁵ Under common law, venue was proper against any corporation in any county where that corporation maintained an office or agent for the transaction of its usual and customary business.¹³⁶

In 1943, the General Assembly changed the law and expressly provided that the residence of a general and business corporation “shall be deemed for all purposes to be in the county where its registered office is maintained.”¹³⁷ In *O’Keefe*, the court interpreted this provision of section 351.375 to establish the residence of a Missouri corporation under section 508.010.¹³⁸ The court in *Whiteman* and *Bowden* then expanded its application of the provision to hold that a foreign corporation also resided in the county where it maintained its registered agent.¹³⁹ By implication, section 351.625 was held to establish the residence of foreign business corporations by reference to section 351.375.

While the court in *Whiteman* and *Bowden* looked to section 351.375 to determine foreign corporate residence, the court in *Steinhorn* did not have to look that far with respect to not-for-profit corporations because a statute actually defined the residence of a not-for-profit corporation.¹⁴⁰ In 1990, however, the General Assembly repealed section 351.625 and its reference to section 351.375. Then, in 1994, the General Assembly repealed the not-for-profit corporate residence statute, section 355.170.1(2). Since no statute currently provides for or incorporates by reference another provision establishing the residence of foreign and not-for-profit corporations operating in Missouri, a dilemma is therefore presented: in the absence of a specific statute defining residence, where should the residence of foreign and not-for-profit corporations be located?

132. State *ex rel.* Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. 1991) (en banc).

133. State *ex rel.* Linthicum v. Calvin, 57 S.W.3d 855, 864 (Mo. 2001) (en banc) (Stith, J., concurring).

134. State *ex rel.* Smith v. Gray, 979 S.W.2d 190, 192 (Mo. 1998) (en banc).

135. *Id.* at 192.

136. See, e.g., State *ex rel.* Henning v. Williams, 131 S.W.2d 561 (Mo. 1939) (en banc).

137. 1943 Mo. Laws 410, 420 (current version at MO. REV. STAT. § 351.375.2 (2000)).

138. See State *ex rel.* O’Keefe v. Brown, 235 S.W.2d 304 (Mo. 1951) (en banc).

139. See State *ex rel.* Whiteman v. James, 265 S.W.2d 298 (Mo. 1954) (en banc); see also State *ex rel.* Bowden v. Jensen, 359 S.W.2d 343 (Mo. 1962) (en banc).

140. See State *ex rel.* Steinhorn v. Forder, 792 S.W.2d 51 (Mo. Ct. App. 1990).

Noting the absence of a specific statute defining “residence” of an insurance corporation, the court in *Smith* cited with approval the *Henning* case for guidance:

The *Henning* case follows the common law rule that a corporation’s “residence may be wherever its corporate business is done,” that is, “where its officers and agencies are actually present in the exercise of its franchises and in carrying on its business; and that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business.”¹⁴¹

Prior to *Smith*, the court in *Rothermich* had also followed the same *Henning* line of reasoning. Hence, the same logic used by the court in *Rothermich* and *Smith* should be applied when determining the residence of foreign corporations, since the residence of neither is defined by statute. Obviously, as a result of *SSM Health Care of St. Louis*, the issue of residence of a not-for-profit corporation under section 508.010 proves immaterial due to the court’s reliance on section 355.176.4.

The court’s analysis in *Henning*, *Rothermich* and *Smith* effectively governs the situation when a statute fails to define the residence of a corporation for venue purposes. Reliance on these cases is crucial when deciding the issue of where to locate the residence of a foreign corporation. Pursuant to the analysis undertaken by the court in *Henning*, *Rothermich* and *Smith*, the residence of a foreign corporation and any corporation whose residence is not defined by statute should be in any county where the corporation maintains an office or agent for the transaction of its usual and customary business.

VI. CONCLUSION

The Missouri Supreme Court has yet to decide the issue of foreign corporate residence under section 508.010. Nevertheless, the issue remains ripe—dangling on the branch of inevitability. When the issue finally falls from the branch and lands squarely in the hands of the court, it will be necessary for the court to look to *Henning* and the common law of corporate residence to delineate the residence of a foreign corporation for venue purposes under section 508.010. As stated above, *Henning* directs that, absent statutory guidance, the residence of a corporation shall be any county where the corporation maintains an office for the transaction of its usual and customary business.¹⁴² Thus, the residence of a foreign corporation should be in any

141. State *ex rel.* *Smith v. Gray*, 979 S.W.2d 190, 192 (Mo. 1998) (en banc); *Slavens v. S. Pac. R.R. Co.*, 51 Mo. 308, 310 (Mo. 1873) (en banc); *see also* State *ex rel.* *Rothermich v. Gallagher*, 816 S.W.2d 194, 198 (Mo. 1991) (en banc) (recognizing a “distinction between a business corporation whose residence was defined by statute and an insurance corporation whose residence was not”).

142. *Henning*, 131 S.W.2d at 565.

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county where it maintains an office or agent for the transaction of its usual and customary business.

