



Summer 2010

Collective Venue and Equality among Corporations in New Mexico: Bank of America v. Apache Corp.

Aaron Holloman

Recommended Citation

Aaron Holloman, *Collective Venue and Equality among Corporations in New Mexico: Bank of America v. Apache Corp.*, 40 N.M. L. Rev. 317 (2010).

Available at: <https://digitalrepository.unm.edu/nmlr/vol40/iss3/4>

COLLECTIVE VENUE AND EQUALITY AMONG CORPORATIONS IN NEW MEXICO: *BANK OF AMERICA V. APACHE CORP.*

AARON HOLLOMAN*

I. INTRODUCTION

Choice of venue is an important litigation tactic. The choice is even more important in a state that is as geographically expansive and culturally diverse as New Mexico.¹

New Mexico's venue statute details in which counties it is appropriate to bring suit against a party.² In addition to designating counties where the cause of action arose or where the plaintiff resides, the statute allows suit to be brought against one defendant in the county where another defendant resides.³ A suit brought against one defendant in the county where another defendant resides is called "collective venue;" the plaintiff "collects" the defendants into one county based on the residence of one of the defendants. New Mexico courts have recently faced the question of whether this type of collective venue is applicable to foreign corporations.⁴ In construing the state's venue statute the New Mexico Supreme Court has ruled, in a series of cases, that a domesticated corporation's residence can establish venue for a resident defendant, but that a resident defendant's residence cannot establish venue for the domesticated corporation.⁵

These decisions created a situation in the New Mexico Court of Appeals case, *Bank of America v. Apache Corp.*, that demonstrated the inequality of the rule. In

* Aaron is a law student at the University of New Mexico, with J.D. expected in May 2011. The author would like to thank the law school faculty who were always willing to answer questions and provide input. Special thanks are due to Professor Ted Occhialino, without whose patience and guidance this note would not have been possible. The author would also like to thank his wife for her support.

1. As an illustration, consider a contested issue like local petroleum production. Santa Fe County, wary of the environmental impact of oil production, has created very strict drilling regulations, Santa Fe County, N.M., Ordinance 2008-19 (Dec. 10, 2008), and the local newspaper contains articles that reflect this wariness. See, e.g., Editorial, *Our View: Gas Guys Crying All the Way to the Bank*, SANTA FE NEW MEXICAN, Oct. 8, 2005, at A9; Paul Mlotok, Letter to the Editor, *My View: Oil Companies Exist for Profits*, SANTA FE NEW MEXICAN, Dec. 30, 2007, at F4. In contrast, more than 54.8 million barrels of oil were produced in southeastern New Mexico in 2009, N.M. OIL CONSERVATION DIVISION, NATURAL GAS AND OIL PRODUCTION (Mar. 31, 2010), and the population there is decidedly more pro-oil, see, e.g., *Our View: Lea County Rig Count Rising*, HOBBS NEWS-SUN, Nov. 29, 2009, at 6 (praising the increase in oilfield drilling as "wonderful news"), and Douglas Adece, Letter to the Editor, *Candidate Support*, ROSWELL DAILY RECORD, May 30, 2008, at A5 (writing in support of a candidate in part because of the candidate's concern about protecting the local oil industry). In the last U.S. Senate race, the candidates were divided along geographic lines on the local oil production issue. Steve Terrell, *The Oilman vs. the Enviro*, SANTA FE NEW MEXICAN, Jun. 22, 2008, at A1 (describing the different stances on energy issues of Udall, from Santa Fe, and Pearce, from Hobbs). Additionally, there has been concern in cases about the ability to even receive a fair jury trial in some counties. See State *ex rel.* S. Pac. Transp. Co. v. Frost, 102 N.M. 369, 371-72, 695 P.2d 1318, 1320-21 (1985) (Riordan, J., specially concurring), *overruled by* First Fin. Trust Co. v. Scott, 1996-NMSC-065, 929 P.2d 263.

2. See NMSA 1978, § 38-3-1(A), (F) (1988).

3. § 38-3-1(A). For the full range of available venues, see the statutory text *infra* accompanying note 9.

4. Bank of Am. v. Apache Corp., 2008-NMCA-054, ¶ 19, 184 P.3d 435, 440.

5. For brevity's sake, I will be using the following shorthand: a "resident corporation" is one that has incorporated in New Mexico; a "domesticated corporation" is a corporation incorporated outside of the state, but that has registered to do business in the state and has a statutory agent for service of process; a "non-resident corporation" is a corporation that has incorporated outside of the state without registering to do business in the state or designating a statutory agent; a "foreign corporation" refers generally to corporations that are not incorporated in New Mexico.

that case, a foreign domesticated corporation, one with a registered agent in Santa Fe, was able to establish proper venue in Santa Fe for a resident New Mexico corporation.⁶ However, Santa Fe was an improper venue for other domesticated corporations because they had statutory agents in other counties.⁷ Why the courts and the New Mexico Legislature would afford greater procedural protections to domesticated corporations over residents is not readily apparent.

This note examines the New Mexico Supreme Court's construction of the collective venue portion of the venue statute and how the *Apache* court arrived at the result that it did. Then this note considers the practical implications flowing from the present venue statute and the potential problems that may arise from the statute. Finally, this note proposes two possible solutions to those problems: the courts could implement one and the legislature could enact the other. In the face of the courts' hesitancy to address the policy issues underlying a change to the venue statute, this note proposes that the legislature amend the venue statute so that it better achieves its original purposes grounded in notions of equality.

II. BACKGROUND LAW

A. Venue

Venue designates the appropriate court in which a plaintiff may bring an action. It is different from jurisdiction, in that the designation of venue allocates judicial business among courts where subject matter and personal jurisdiction already exist for a particular case.⁸ The rules for venue are established by statute in New Mexico at NMSA 1978, section 38-3-1, which reads in relevant part:

All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:

(A) First, except as provided in Subsection F of this section relating to foreign corporations, all transitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides; or second, in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred; or third, in any county in which the defendant or either of them may be found in the judicial district where the defendant resides.

.....

(F) Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.⁹

6. *Bank of Am. v. Apache Corp.*, 2008-NMCA-054, ¶ 46, 184 P.3d 435, 442.

7. *Id.* ¶ 1, 184 P.3d at 437.

8. M.E. OCCHIALINO, *WALDEN'S CIVIL PROCEDURE IN NEW MEXICO* 2-1 (2d ed. 1988).

9. § 38-3-1(A), (F) (1988).

These provisions represent the legislature's "attempt to balance the common-law right of a defendant to be sued in his most convenient forum . . . with the right of the plaintiff to choose the forum in which to sue."¹⁰ In these provisions there are two things to note concerning proper venue based on the status of a foreign corporation. First, subsection (A), the "general venue" subsection, allows a resident defendant to be sued in any county where any plaintiff or any other defendant resides.¹¹ Second, subsection (F), the "non-resident/foreign corporation" subsection, allows a non-resident defendant to be sued in any county in the state, but a domesticated corporation with a statutory agent may be sued where the plaintiff resides or in the county where the statutory agent resides.¹² This difference in treatment between resident corporations and domesticated corporations forms the crux of the issue in this note.

In *Bank of America v. Apache Corp.*, a consolidation of two cases in the New Mexico Court of Appeals, the plaintiffs sued multiple defendants for injuries that occurred in Lea County.¹³ Venue in each case was set in Santa Fe County, based on the fact that one of the defendants, a domesticated corporation, had its agent in Santa Fe County.¹⁴ The court then had to answer the question of whether that venue was appropriate for the other defendants, both resident corporations and domesticated corporations with agents in other counties.¹⁵ In order to answer those questions the court relied on the New Mexico Supreme Court's recent examination of the venue statute.

B. Recent Development

Three recent New Mexico Supreme Court decisions have construed various pieces of the venue statute to establish the limits of proper venue for resident and domesticated corporations. The court first determined that a non-resident statutory agent with offices in New Mexico satisfies the residency requirement for venue in *Cooper v. Chevron U.S.A., Inc.*¹⁶ Then the court held that a non-resident corporation could not collect from a domesticated corporation in *Baker v. BP America Production Co.*¹⁷ Finally, the court held in *Gardiner v. Galles Chevrolet Co.* that a domesticated corporation *could*, however, collect a resident corporation.¹⁸ These decisions form the foundation for the court of appeals' holding in *Apache*.¹⁹

The recent development began in *Cooper*, where the New Mexico Supreme Court was faced with the relatively minor question—in terms of interpretation of the venue statute—of whether a domesticated corporation's non-resident statutory

10. *Team Bank v. Meridian Oil, Inc.*, 118 N.M. 147, 150, 879 P.2d 779, 782 (1994) (citation omitted).

11. § 38-3-1(A). This reads "resident defendant" because laws relating to non-residents and foreign corporations are provided for in subsection (F). § 38-3-1 (A), (F).

12. § 38-3-1(F). The full language regarding statutory agents is: "foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had . . ." *Id.*

13. 2008-NMCA-054, ¶¶ 3, 8, 184 P.3d at 437, 438.

14. *See id.* ¶ 11, 184 P.3d at 438–39.

15. *Id.*

16. 2002-NMSC-020, ¶ 21, 49 P.3d 61, 68.

17. 2005-NMSC-011, ¶ 19, 110 P.3d 1071, 1075.

18. 2007-NMSC-052, ¶ 1, 168 P.3d 116, 117.

19. *See Apache*, 2008-NMCA-054, ¶¶ 13, 22, 184 P.3d at 439, 441.

agent “resides” in the state for purposes of subsection (F) of section 38-3-1.²⁰ The defendants in the case asserted that venue was inappropriately located in the county where the statutory agent resided.²¹ They argued that the domesticated corporations did not reside in the state for venue purposes because the corporations’ statutory agent was itself a non-resident corporation.²²

Because at the time the venue statute was passed only resident New Mexicans could serve as statutory agents, the court held that “the term ‘resides’ could only have been intended to locate the statutory agent and not to distinguish between resident statutory agents and non-resident statutory agents.”²³ In finding that a domesticated corporation “resides” where its statutory agent has a New Mexico office (regardless of whether or not the agent is a resident or a non-resident statutory agent), the proper venue then, under the fourth provision of subsection (F) regarding residence of statutory agents, applied.²⁴ Under the facts of the case, even though the two domesticated corporations had statutory agents that were not residents, venue was still appropriate in Santa Fe County, where the statutory agents had a New Mexico office and thus where they “reside[d].”²⁵

In dictum, the supreme court said that the collective venue rule of subsection (A) would apply to properly joined defendants subject to subsection (F), even though the statute was silent on the matter, because it could “not discern any basis for applying a separate rule to multiple defendants when venue is based on the residence of a statutory agent.”²⁶ However, the point was not relevant to the holding in *Cooper* because, on appeal to the supreme court, the plaintiffs did not appeal the dismissal of the two defendants who did not have agents in Santa Fe County.²⁷

Having determined in *Cooper* that a domesticated corporation’s agent always resides where the office is located in the state for venue purposes, the court then took up the first major question of collective venue in *Baker*: whether a non-resident corporation could establish venue for a domesticated corporation.²⁸ The plaintiffs in *Baker* filed suit in Santa Fe County for an injury that occurred in San Juan County.²⁹ The majority of the defendants were non-resident corporations, and thus venue was proper for them in any county. The one domesticated corporation, BP American Production Company (BP), had its registered agent in Lea County.³⁰ The trial court, relying on *Toscano v. Lovato*, had found venue appropriate for BP based on the fact that subsection (A) allowed one defendant to establish venue for all the defendants.³¹ The supreme court in *Baker*, however, in revisiting the statute,

20. 2002-NMSC-020, ¶ 14, 49 P.3d at 66.

21. *Id.* ¶ 15, 49 P.3d at 66.

22. *Id.*

23. *Id.* ¶ 17, 49 P.3d at 67.

24. *Id.* ¶ 19, 49 P.3d at 67.

25. *Id.* ¶¶ 19, 21, 49 P.3d at 67, 68.

26. *Id.* ¶ 20, 49 P.3d at 68.

27. *Id.* ¶ 20 n.2, 49 P.3d at 68.

28. *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 5, 110 P.3d 1071, 1073.

29. *Id.* ¶ 2, 110 P.3d at 1072.

30. *Id.*

31. *Baker*, 2005-NMSC-011, ¶ 4, 110 P.3d at 1072. *Toscano* involved a tort action following a car accident. 2002-NMCA-022, ¶ 1, 40 P.3d 1042, 1043. The court of appeals allowed a non-resident insurance corporation defendant to establish venue for a resident defendant, *id.* ¶ 27, 40 P.3d at 1049, even though that meant

found that the holding in *Toscano* was an anomaly that improperly used policy to trump legislative intent.³²

In construing the statute, the court first set out to “give effect to the intent of the legislature.”³³ In doing so, it noted the distinctions between subsections (A) and (F). While subsection (A) allows for an action to be brought where any plaintiff or defendant resides in the event of multiple parties, subsection (F) “deletes the reference to multiple defendants.”³⁴ In contrast to the court in *Cooper*, the court in *Baker* read a limitation into the language of subsection (F) instead of a silence.³⁵ Because of this limitation, the court found that the holding and policy goals of *Toscano* led to an “overly broad” interpretation of the statute.³⁶ It would be contrary to legislative intent that a foreign corporation would comply with the registration statute only to be stripped of those protections because another corporation did not.³⁷ Therefore, the court held that “venue for a non-resident defendant, including a foreign corporation without a statutory agent, cannot determine proper venue for a foreign corporation with a statutory agent.”³⁸

The court finally explicitly addressed the idea of a domesticated corporation as a source of collective venue in *Gardiner*, where it was asked whether a domesticated corporation could establish venue for a resident corporation.³⁹ The plaintiff, a Bernalillo County resident, brought a wrongful death action in Santa Fe County for an accident that occurred in Bernalillo County.⁴⁰ The defendants included Galles Chevrolet—a resident corporation with an agent in Bernalillo County—and one domesticated corporation with a registered agent in Santa Fe County.⁴¹ Galles filed a motion to dismiss for improper venue, claiming that a domesticated corporation could not establish venue for a resident defendant because the “collection” language in subsection (A) did not apply to domesticated corporations.⁴² The trial court denied this motion as giving the statute too limited a reading.⁴³ The supreme court also disagreed with Galles’s interpretation, concluding that the two sections of the statute must be read together.⁴⁴ Subsection (F) acts as an exception to subsection (A) so that it does not limit the “good for one, good for all” rule of defendants establishing venue for others, except in cases of domesticated corporations.⁴⁵ The result of reading the two statutes together is that, “while a [domesticated]

that there would be no limit to proper venue for the resident defendant because venue is proper for a non-resident in any county, see NMSA 1978, § 38-3-1(F) (1875–76, as amended through 1988). The *Baker* court overruled *Toscano* on this point. *Baker*, 2005-NMSC-011, ¶ 18, 110 P.3d at 1075.

32. See *id.* ¶ 18, 110 P.3d at 1075.

33. *Id.* ¶ 13, 110 P.3d at 1074.

34. *Baker*, 2005-NMSC-011, ¶ 12, 110 P.3d at 1074.

35. *Id.*; see also *supra* notes 26–27. For the implications of this discrepancy, see *infra* Part IV.C.

36. *Baker*, 2005-NMSC-011, ¶ 15, 110 P.3d at 1075.

37. *Id.* ¶ 17, 110 P.3d at 1075.

38. *Id.* ¶ 19, 110 P.3d at 1075.

39. *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 1, 168 P.3d 116, 117.

40. *Id.* ¶ 2, 168 P.3d at 118.

41. *Id.*

42. *Id.* ¶ 9, 168 P.3d at 119.

43. *Id.* ¶ 3, 168 P.3d at 118.

44. *Id.* ¶ 10, 168 P.3d at 119.

45. *Id.*

corporation . . . may not be sued where another defendant resides, a resident defendant may.”⁴⁶

The court acknowledged that this construction favors domesticated corporate defendants and offered three justifications for the result.⁴⁷ First, the court stated that it was consistent with the text of the statute where subsection (F) operates as an exception to subsection (A).⁴⁸ Second, it was the legislature that adopted the policy reflected in the statute and it would be up to that body to make changes.⁴⁹ Third, using the residence of one foreign defendant’s statutory agent to establish venue for other defendants has been common practice in the past, and where it is consistent with the text and policy of the statute it should not be disturbed.⁵⁰

Considering the changes brought by *Cooper*, *Baker*, and *Gardiner*, the current venue law is: (1) a statutory agent resides in the county in which it is located for purposes of venue regardless of its status as a resident or non-resident statutory agent;⁵¹ (2) a non-resident corporation cannot establish collective venue for a domesticated corporation;⁵² and (3) a domesticated corporation can establish collective venue for a resident corporation.⁵³ The law contains an apparent bias in favor of domesticated corporations.⁵⁴ This apparent bias came to the forefront in the court of appeals’ holding in *Apache*.

III. STATEMENT OF THE CASE

In *Bank of America v. Apache Corp.*, the New Mexico Court of Appeals addressed the effects of collective venue on foreign corporations and resident corporations. The case is a consolidation of two cases having almost identical fact patterns.⁵⁵ In the first case, *S&D Ranch, L.L.C. v. Chesapeake Operating, Inc.*, plaintiffs, S&D Ranch, L.L.C., and Leo V. Sims, L.L.C., brought suit against multiple defendants in Santa Fe County for damage to the surface and subsurface soils and the freshwater aquifer on the plaintiffs’ property in Lea County caused by defendants’ oil and gas operations.⁵⁶ The court grouped the defendants into four categories for discussion of venue: (1) Santa Fe County Defendants (domesticated corporations with statutory agents in Santa Fe County); (2) Lea County Defendants (domesticated corporations with statutory agents in Lea County); (3) Foreign Defendants (non-resident corporations); and (4) a New Mexico Defendant (a resident New Mexico corporation with its principal place of business and statutory agent located in Eddy County).⁵⁷

In the second case, *Bank of America v. Apache Corp.*, the plaintiffs, Bank of America as the trustee of the Millard Deck Estate, brought suit against multiple

46. *Id.*

47. *Id.* ¶¶ 15–16, 168 P.3d at 120–21.

48. *Id.* ¶ 15, 168 P.3d at 120.

49. *Id.*

50. *Id.* ¶ 16, 168 P.3d at 121.

51. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 19, 49 P.3d 61, 67–68.

52. *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 19, 110 P.3d 1071, 1075–76.

53. *Gardiner*, 2007-NMSC-052, ¶ 10, 168 P.3d at 119.

54. *Id.* ¶ 15, 168 P.3d at 121.

55. 2008-NMCA-054, ¶ 2, 184 P.3d 435, 437.

56. *Id.* ¶ 3, 184 P.3d at 437.

57. *Id.* ¶ 4, 184 P.3d at 438.

defendants in Santa Fe County alleging similar contamination damages that occurred while the defendants were engaged in oil and gas operations on the plaintiff's property in Lea County.⁵⁸ These defendants were grouped similarly to the defendants in *S&D Ranch*, with an additional group termed the "San Juan Defendants" (domesticated corporations with statutory agents in San Juan County).⁵⁹

In both cases, the defendants that did not reside in Santa Fe County sought dismissal for improper venue under section 38-3-1.⁶⁰ Their motions were based on the assertion that they could not be collected to Santa Fe County based on the residence of one of the defendants.⁶¹ The trial court ruled in favor of the moving defendants, and the plaintiffs in both cases appealed.⁶²

On appeal, the New Mexico Court of Appeals sought to answer the questions raised by the proceedings in the lower court about whether the dismissal was appropriate as applied to the defendants under the collective venue rules of subsection (A) and subsection (F).⁶³ It divided the issue into two parts. First it determined the appropriate venue for the domesticated corporation defendants, and then it determined the appropriate venue for the resident defendants.⁶⁴

A. Domesticated Corporation Defendants

The court first addressed the question of whether a domesticated corporation could be collected into another venue based on the residence of another defendant. In following the trial court's reasoning, the court looked to *Baker v. BP America Production Co.*, relying on the New Mexico Supreme Court's holding there that "venue for a non-resident defendant, including a [non-resident corporation], cannot determine proper venue for a [domesticated corporation]."⁶⁵

As the *Baker* court pointed out, subsection (F) of the statute does not allow for collective venue like subsection (A).⁶⁶ Because the New Mexico Supreme Court found that the statute limits the available venues for domesticated corporation defendants, a defendant residing in Santa Fe County cannot establish venue for other domesticated corporation defendants with residence in other counties.⁶⁷ In the present cases the appropriate venue would be Lea County or San Juan County.⁶⁸

58. *Id.* ¶ 8, 184 P.3d at 438.

59. *Id.* ¶ 9, 184 P.3d at 438.

60. *Id.* ¶¶ 5, 10, 184 P.3d at 438. The defendants who did not reside in Santa Fe County included the Lea County and New Mexico Defendants in both cases and the San Juan County Defendant in the second case. *Id.* The court had an additional group in *S&D*, Cross Appeal Defendants, who also sought dismissal under subsection (D), which deals with venue when interests at land are at stake. The trial court denied this motion, *id.* ¶ 7, 184 P.3d at 438, and the court of appeals upheld the dismissal because the claims for damages do not satisfy the interest in land requirements of subsection (D), *id.* ¶ 33, 183 P.3d at 443. This issue is beyond the scope of this case note, and will not be discussed in further detail. *See supra* note 18.

61. *See Apache*, 2008-NMCA-054, ¶ 11, 184 P.3d at 438-39.

62. *Id.* ¶¶ 6-7, 10, 184 P.3d at 438.

63. *Id.* ¶ 11, 184 P.3d at 438-39. The court was also presented with the question of whether dismissal should have been granted for the Cross-Appeal Defendants under subsection (D). *See supra* note 60.

64. *Apache*, 2008-NMCA-054, ¶ 11, 184 P.3d at 437-38.

65. 2005-NMSC-011, ¶ 19, 110 P.3d 1071, 1075.

66. *Apache*, 2008-NMCA-054, ¶ 18, 184 P.3d at 440.

67. *Id.* ¶ 20, 184 P.3d at 440-41. Residence for a corporation is based on where the statutory agent is located. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 19, 49 P.3d 61, 67-68.

68. *Apache*, 2008-NMCA-054, ¶ 20, 184 P.3d at 440-41.

Plaintiffs then contended that *Cooper v. Chevron U.S.A., Inc.*, rather than *Baker*, controlled the case, in that *Cooper* dicta applied subsection (A) to both resident and domesticated corporations.⁶⁹ They relied on *Cooper*'s holding that, for foreign defendants, subsection (F) was controlling over subsection (A).⁷⁰ The *Apache* court reasoned that because the only remaining defendants on appeal in *Cooper* were the domesticated corporations with agents in Santa Fe County, the issue in *Cooper* was distinct from the present issue; thus, *Baker*, along with the "plain language of the venue statute," controlled.⁷¹ Therefore, the residence of one domesticated corporation could not be used to collect another domesticated corporation, whose statutory agent resided in a different county, to another venue. In *Apache*, that meant that the plaintiffs could not rely on the domesticated corporations with statutory agents in Santa Fe to establish Santa Fe as the appropriate venue for the domesticated corporations with statutory agents in Lea County and San Juan County.

In so holding, the court addressed the policy concerns of fairness and judicial efficiency.⁷² First, the court noted that plaintiffs would not have had to pursue multiple trials as they could have selected a county that would have been appropriate for all defendants: Lea County, where the cause of action arose.⁷³ Second, it found that the rule as applied in the case strikes a proper balance between the competing interests of the parties, since the construction of the statute only denied the plaintiffs of one of three venue options.⁷⁴

B. Resident Corporation Defendants

The court then addressed the second issue of whether collective venue was appropriate to resident corporation defendants with statutory agents in other counties.⁷⁵ The court relied on the New Mexico Supreme Court's decision in *Gardiner v. Galles Chevrolet Co.*⁷⁶ in finding that collective venue was appropriate. It noted that *Gardiner* held that the plain language of the venue statute does not afford the same protections to New Mexico defendants as it does to domesticated defendants.⁷⁷

Based on that reading of the statute, the court of appeals found that venue was appropriate in the present cases. Although the New Mexico Defendants did not have agents in Santa Fe County, venue was established under subsection (A) of the statute by the domesticated corporate defendant that did have an agent there.⁷⁸

The *Apache* opinion brought together the reasoning of the preceding decisions to show the different collective venue functions that the statute exercises over domesticated corporations and resident corporations. While the resident corpora-

69. *Id.*, ¶ 21, 184 P.3d at 441 (citing *Cooper v. Chevron U.S.A.*, 2002-NMSC-020, 49 P.3d 61).

70. *Id.*

71. *Id.*

72. *Id.* ¶ 25, 184 P.3d at 442.

73. *Id.* Both subsection (A) and subsection (F) allow venue to be established where the cause of action arose. NMSA 1978, § 38-3-1(A), (F) (1875-76, as amended through 1988).

74. *Apache*, 2008-NMCA-054, ¶ 25, 184 P.3d at 442.

75. *Id.* ¶ 26, 184 P.3d at 442.

76. 2007-NMSC-052, 168 P.3d 116.

77. *Apache*, 2008-NMCA-054, ¶ ¶ 30-31, 184 P.3d at 442-43.

78. *Id.*

tions were collected to Santa Fe County by the domesticated corporation with an agent there, the domesticated corporations with agents in different counties were granted “collection immunity,” in that one domesticated corporation could not be used to establish Santa Fe County as the proper venue because the other domesticated corporations did not reside there.⁷⁹

The resident defendants in the case claimed that such a rule favors domesticated corporations over resident corporations.⁸⁰ In addressing this concern the court looked back to the language of *Gardiner*.⁸¹ There the supreme court found that, while resident defendants are subject to broader venue options than domesticated corporations, it is possible that the legislature wanted to induce larger corporations to do business in New Mexico and to register and appoint an agent before doing so, and the disparity was for the legislature to address.⁸²

IV. RATIONALE

Apache rests on the supreme court’s statutory analysis of the venue statute in *Cooper*, *Baker*, and *Gardiner*. The analytical shift between *Cooper* and *Baker* regarding the “collection” language missing from subsection (F), provides a point at which the courts may come back and reconsider the statute.⁸³

A. Legislative Purpose of the Venue Statute

The ultimate goal of statutory construction is to “give effect to the intent of the legislature.”⁸⁴ In examining the venue statute, the courts used two steps to determine that intent: first, identifying the general goal of the venue statute, and second, finding the specific goals the legislature sought to achieve through subsection (F).

To identify the general goal of the venue statute, the New Mexico Supreme Court relied primarily on *Team Bank v. Meridian Oil, Inc.*⁸⁵ According to *Team Bank*, venue “relates to the convenience of the litigants”⁸⁶ and seeks to “balance the . . . right of the defendant to be sued in a convenient forum . . . with the right of the plaintiff to choose the forum in which to sue.”⁸⁷

From this general principle, the courts had to consider what purpose subsection (F) served in the statute. Generally, subsection (F) was seen as an encouragement for foreign corporations to comply with the registration laws by providing them with a benefit.⁸⁸ This benefit comes from giving foreign corporations that have a registered statutory agent “the same ‘weight’ in the venue balance as resident de-

79. *Id.* ¶¶ 20, 30–31, 184 P.3d at 440–43.

80. *Id.* ¶ 31, 184 P.3d at 443.

81. *Id.*

82. *Id.* (quoting *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 15, 168 P.3d 116, 120–21); see also *supra* note 49 and accompanying text.

83. See *infra* notes 142–43 and accompanying text.

84. *State v. Smith*, 2004-NMSC-032, ¶ 8, 98 P.3d 1022, 1025.

85. 118 N.M. 147, 879 P.2d 779 (1994). Each of the three primary cases here relied on the *Team Bank* principle. See *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 7, 168 P.3d 116, 119 (relying on *Baker*’s discussion of *Team Bank*); *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 6, 110 P.3d 1071, 1073; *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 18, 49 P.3d 61, 67.

86. *Team Bank*, 118 N.M. at 150, 879 P.2d at 782.

87. *Id.*

88. *Gardiner*, 2007-NMSC-052, ¶¶ 7, 11, 168 P.3d at 119, 120; *Baker*, 2005-NMSC-011, ¶ 19, 110 P.3d at 1075–76; *Cooper*, 2002-NMSC-020, ¶ 18, 49 P.3d at 67.

defendants.”⁸⁹ Relying on these principles as the basis for the legislative intent of the statute, the New Mexico Supreme Court proceeded to construe the language of the statute in *Cooper*, *Baker*, and *Gardiner*.

B. Plain Language

In each of these cases the court’s statutory interpretation begins with the plain language of the statute.⁹⁰ In *Cooper*, the court used the plain language meaning of “reside” to answer the question regarding the residence of domesticated corporations.⁹¹ It held that its definition of “reside” satisfied the *Team Bank* goals by giving foreign corporations with statutory agents the same “weight” as resident defendants.⁹²

The court then, in *Baker*, used the plain language of the statute to overrule the overly broad precedent of *Toscano*, reasoning that while one section, subsection (A), did allow for collective venue, another section, subsection (F), did not because it was missing the operative language from subsection (A).⁹³ Because subsection (F) applied specifically to foreign defendants, domesticated defendants could not be collected.⁹⁴

In *Gardiner*, the court returned to the definition from *Cooper* to determine whether a foreign corporation “resides” in the state for the sake of the collective venue provision of subsection (A).⁹⁵ The *Gardiner* court followed *Cooper* and used the plain language definition of “reside,” because it advanced the legislative goals as stated in *Team Bank*.⁹⁶

The New Mexico Court of Appeals in *Apache* relied on the plain language reading in the previous cases.⁹⁷ It first used *Baker*’s plain language reading of subsection (F) to decide that a domesticated corporation was not subject to the collective venue provisions of subsection (A);⁹⁸ this conclusion was supported by the policy arguments of *Baker* (relying on *Team Bank*), finding that they balanced the interests of the parties.⁹⁹ Similarly, the court relied on *Gardiner* to determine that subsection (A)’s “all defendants” included defendants covered by subsection (F) so that domesticated corporations could establish venue for the resident defend-

89. *Team Bank*, 118 N.M. at 150, 879 P.2d at 782.

90. See, e.g., *Cooper*, 2002-NMSC-020, ¶ 16, 49 P.3d at 67, relying on *Draper v. Mountain States Mut. Cas. Co.*, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994) (noting that “[t]o determine legislative intent we look first to the plain language of the statute and give words their ordinary meaning unless a different meaning is indicated” (citation omitted)).

91. *Cooper*, 2002-NMSC-020, ¶ 16, 49 P.3d at 67. The court employed the definition provided by *Black’s Law Dictionary*, which limits the residence to bodily presence as an inhabitant in a given place, BLACK’S LAW DICTIONARY 1310 (7th ed. 1999), and then corroborated that definition using the history surrounding the statute to reinforce the idea that “reside” could have no meaning other than this plain-language meaning as it applies to the statute, *Cooper*, 2002-NMSC-020, ¶ 17, 49 P.3d at 67.

92. *Cooper*, 2002-NMSC-020, ¶ 18, 49 P.3d at 67.

93. *Baker*, 2005-NMSC-011, ¶¶ 7–9, 13, 110 P.3d at 1073–74; see also *infra* note 145.

94. *Baker*, 2005-NMSC-020, ¶¶ 7–9, 110 P.3d at 1073. In *Gardiner* the court examined the interplay between subsection (A) and subsection (F). *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 8, 168 P.3d 116, 119.

95. *Gardiner*, 2007-NMSC-052, ¶ 9, 168 P.3d at 119.

96. *Id.* ¶¶ 11–12, 168 P.3d at 120.

97. *Bank of Am. v. Apache Corp.*, 2008-NMCA-054, ¶ 13, 184 P.3d 435, 439.

98. *Id.* ¶¶ 19–20, 184 P.3d at 440–41.

99. *Id.* ¶ 25, 184 P.3d at 442.

ants.¹⁰⁰ In applying the plain language principle, the *Apache* court followed the precedent of the previous supreme court opinions to conclude that a domesticated corporation had collection immunity that resident corporations did not share.¹⁰¹

C. Silence or Intentional Omission

When analyzing the plain text of the statute, the court was confronted with the problem that subsection (F) lacked the collective venue language of subsection (A).¹⁰² Between *Cooper* and *Baker*, a logical shift occurred in the statutory analysis regarding this absent language. This shift can be used to revisit the collective venue questions in order to resolve the problems that are present in the current state of the law.¹⁰³

In *Cooper*, the court made an argument based on logical inference about the relationship between the two sections of the statute.¹⁰⁴ The court saw subsection (F) as silent on the question of whether one defendant can establish proper venue for others, separate and apart from the allowance provided for in subsection (A).¹⁰⁵ From this silence, however, the court made a logical inference that there was “no basis for applying a separate rule to multiple defendants when venue is based on the residence of a statutory agent.”¹⁰⁶

While the result remained the same as in *Cooper*, an interpretational shift occurred in *Baker*. There, the court first noted that the statute provides separate rules in subsection (F) for a domesticated corporation that are different from the rules for other defendants as provided in subsection (A).¹⁰⁷ Then the court noted that within the special provision for domesticated corporations there is an implicit exclusion in that subsection (F) does not contain the provisions in subsection (A) that allow one defendant to establish venue for others.¹⁰⁸

The change from logic in *Cooper* to an implicit exclusion in *Baker*, which deletes the collection provision from subsection (F), ascribed new intentionality to the provision.¹⁰⁹ Because the primary goal in statutory construction is to give effect to the intent of the legislature, this new perceived statutory intention changed the way the statute could be interpreted and applied by the court later.¹¹⁰ If the provision was interpreted under the court’s previous logical inference, the court would have the power to change its interpretation later.¹¹¹ However, if the provision was

100. *Id.* ¶¶ 29–31, 184 P.3d at 442–43.

101. *See supra* note 79 and accompanying text.

102. Compare NMSA 1978, § 38-3-1(A) (1875–76, as amended through 1988) (“[T]ransitory actions shall be brought in the county where either the plaintiff or defendant, or any one of them in case there is more than one of either, resides.”), with § 38-3-1(F) (“[T]ransitory actions shall only be brought in the county where the plaintiff, or any one of them in case there is more than one, resides.”).

103. *See infra* notes 134–46 and accompanying text.

104. *See Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 20, 49 P.3d 61, 68.

105. *Id.*

106. *Id.*

107. *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 13, 110 P.3d 1071, 1074.

108. *Id.*

109. *See infra* text accompanying note 146.

110. *See supra* note 84.

111. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 965 P.2d 305, 315 (“[T]he principle of stare decisis does not require that we always follow precedent and may never overrule it. Instead, the doctrine states that in both common law and constitutional cases . . . any departure from [precedent] . . . demands special justification.” (changes in original) (citations and internal quotations omitted)).

intentionally omitted, courts are bound by the intention of the legislature.¹¹² By revisiting this shift in statutory construction, the court could resolve the potential problems that arise under the current law without the need for legislative intervention.¹¹³

V. ANALYSIS

A. Problem

Apache exemplified the potential problems of the venue statute when it condensed two situations into one case where the domesticated corporations received collection immunity while the resident corporations were collected. As the court has acknowledged, there now seems to be a preference in the venue calculus for domesticated corporations in that they cannot be collected by other defendants the way that resident corporations can.¹¹⁴ This different treatment upsets the *Team Bank* calculus—that domesticated corporations receive the same treatment as resident corporations—because the new rule causes plaintiffs to favor bringing suit where the defendant domesticated corporation resides, oftentimes to the detriment of the resident defendant.¹¹⁵ Additionally, the current venue rule is problematic because it creates a business environment that favors domesticated corporations over resident corporations, thereby giving rise to the potential abusive use of the venue statute.

1. Hypotheticals

A series of hypotheticals can best illustrate this problem. The initial hypothetical shows the simple application of venue and the *Team Bank* principles.¹¹⁶ Subsequent hypotheticals help to define the problems that currently exist in the law.

In the first hypothetical, a plaintiff residing in Grant County is injured in Lea County while working for a resident corporation with its residence in San Juan County.¹¹⁷ The plaintiff then has three possible sites where he may bring suit. Venue would be appropriate in Grant County as the plaintiff's residence, Lea County as the site where the cause of action originated, and in San Juan County, the defendant's residence.¹¹⁸ The balance between the plaintiff's right to choose the forum and the defendant's right to be sued in a convenient place is struck by allowing the plaintiff to have a choice of forums to sue in, but limiting those to places that are related to the action or are related to the plaintiff or defendant.¹¹⁹

112. *Bills v. All-Western Bowling Corp.*, 74 N.M. 430, 434, 394 P.2d 274, 277 (1964) (“[I]t is the province of this court to interpret the legislation; nevertheless we cannot depart from the express language of the act. We can only say that the legislature intended what was enacted.”).

113. See *infra* notes 142–46 and accompanying text.

114. *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 15, 168 P.3d 116, 121.

115. See *supra* Part IV.A.

116. See *id.*

117. Residence for a corporation is the location of its statutory agent. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 19, 49 P.3d 61, 67–68.

118. NMSA 1978, § 38-3-1(A) (1988).

119. The common law right of the defendant to be sued where he resides is then tempered and balanced with the plaintiff's ability to choose where to sue. See 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 3d § 3805 (2007) (describing the general plan of venue as having been the residence of the parties); *id.* § 3806 (describing the need for change to allow suits to be brought in other sites); see also 92A C.J.S. *Venue* § 80 (2000) (noting that “[t]he privilege

The second hypothetical considers the effect of adding another resident corporation as a defendant. The plaintiff, residing in Grant County, sues two resident corporations, one residing in San Juan County and another residing in Santa Fe County, for an injury that occurred in Lea County. The proper counties for venue include those from before, Grant, San Juan, and Lea, and now also Santa Fe County, as the residence of the second defendant corporation.¹²⁰ Each site is appropriate for all parties.¹²¹ Santa Fe is appropriate for the San Juan defendant by operation of the venue statute, which allows the defendants to be sued where “any of them in case there is more than one . . . , resides.”¹²² Allowing the San Juan defendant to be collected to Santa Fe County contravenes the common law justifications for venue, but is supported by the policy for allowing collection in general.¹²³ The plaintiff has no statutory incentive to prefer one site over another.

Adding a domesticated corporation as a defendant changes the plaintiff’s available venues. In the third hypothetical, a plaintiff residing in Grant County sues both a resident corporation residing in San Juan County and a domesticated corporation residing in Santa Fe County for an incident that occurred in Lea County. Now that the domesticated corporation defendant is added to the calculation, there are fewer appropriate venues. As before, either Grant County, as the residence of the plaintiff, or Lea County, as the site where the cause of action occurred, would be appropriate for all parties, but as for venue based on residence of the defendants, only Santa Fe County would allow for all the defendants to be sued in one trial. Should the plaintiff choose to bring suit in San Juan County, only the San Juan County defendant could be sued there.¹²⁴ By operation of the case law interpreting subsection (F), venue would be improper for the Santa Fe domesticated corporation in San Juan County.¹²⁵ In deciding between whether to sue in San Juan or Santa Fe County, the plaintiff would have to choose between two trials or one. The venue statute has the practical effect of eliminating the resident defendant corporation’s residence as an option in the calculus because the resident corporation cannot collect the domesticated corporation, thus functionally denying the resident defendant the opportunity to be sued in its home venue.

These situations illustrate the way that the construction of the current venue statute creates an inherent imbalance. When a domesticated corporation is a defendant, resident corporations are functionally deprived of their opportunity to be sued in a forum that is convenient to them. Such unequal treatment frustrates any attempts at balancing that the legislature might be trying to establish in venue calculations.

conferred on a defendant of being sued in the county of his or her domicile is a personal, valuable, and substantial right, which is not to be denied except in strict compliance with the law”).

120. § 38-3-1(A). See *supra* note 118 and accompanying text.

121. § 38-3-1(A).

122. *Id.*

123. See *supra* note 119. See generally 77 AM. JUR. 2D Venue § 32 (2006).

124. See *supra* note 118 and accompanying text.

125. *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 10, 168 P.3d 116, 119 (noting that “while a foreign corporation with a statutory agent may not be sued where another defendant resides, a resident defendant may”).

2. Potential for Abuse

The inherent imbalance in the statute has created a situation ripe for abuse. The current rule favoring domesticated corporations could act as an incentive for New Mexicans considering incorporation to forsake incorporating in their home state in order to take advantage of the litigation benefits under the venue rules.¹²⁶

As a potential defendant, a new corporation may not want to incorporate in New Mexico, where it would then be subject to suit anywhere that another defendant might reside.¹²⁷ A clever corporation could instead incorporate outside of the state, register to do business in the state, and then establish a registered agent in a county of its choosing, one where it could not be ousted by the application of collective venue.¹²⁸

For example, a corporation that intends to conduct the majority of its business in Lea County, and that would prefer to be sued in Lea County, could incorporate in Delaware and then establish a registered agent to receive service of process in Lea County.¹²⁹ That corporation would then be immune to being collected to another county based on the residence of a fellow defendant.¹³⁰ Additionally, if that corporation did the majority of its business in that county, it is much more likely that any future causes of action would arise in that county providing one more basis for keeping the suit there.¹³¹

Such potential advantage to be derived from calculated consideration of the existing rule could result in a disincentive for incorporating in the state. Whatever the New Mexico Legislature intended to do in granting a benefit to domesticated corporations, it could not have meant to create an incentive for corporations to *not* incorporate in the state. Under the current law, however, this is the practical effect. New Mexico stands to suffer a loss of tax revenue.¹³² Additionally, the state faces a potential for decline in business development in the state.¹³³

126. The decision about where to incorporate is a complicated one; I only mean to suggest that litigation advantages could play a role in the decision making process.

127. See *supra* note 114.

128. See NMSA 1978, § 53-17-1 (1975) (the statute permitting a foreign corporation to do business in the state); NMSA 1978, § 53-17-5 (1967, as amended through 2001) (the statute requiring a foreign corporation to designate a registered agent).

129. Practically speaking, the decision of where to incorporate is between Delaware and the corporation's home state. Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1135 (2008).

130. *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 10, 168 P.3d 116, 119.

131. Both subsections (A) and (F) allow for venue to be placed where the cause of action originated. Since the county where the cause of action arose would also be the domesticated corporation's residence, it would pose no threat to a corporation hoping to be sued in that county.

132. New Mexico has adopted the Uniform Division of Income for Tax Purposes Act. NMSA 1978, § 7-4-1 (1965, as amended through 1981). Under that act, a corporation's income is divided into "business" and "nonbusiness" income with the nonbusiness income going to the state of domicile. RICHARD D. POMP, *STATE & LOCAL TAXATION* 10-39 to 10-41 (6th ed. 2009). New Mexico stands to lose tax revenue from all nonbusiness income from businesses that choose to incorporate out of the state.

133. Significant development of corporate law only happens through resident corporations. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1091 (2000) (noting that "only businesses resident in or incorporated in a state will have sufficient interest or ability to participate in the political process"). Because New Mexico is basically competing against Delaware for incorporations, see *supra* note 129, the state needs to develop its corporate law structure or it risks creating another reason for a corporation to not incorporate in New Mexico. See Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 250-51 (1985) (describing how many

B. Solution

There are two potential solutions to this problem. One requires the courts to revisit the previous decisions discussed in this article (*Cooper*, *Baker*, *Gardiner*, *Apache*) and determine whether those decisions erred or miscalculated in allowing domesticated corporations “collection immunity.” The second requires the New Mexico Legislature to revisit the venue statute and amend it to eliminate the inequity caused by allowing domesticated corporations to be immune from collection.

1. Reinterpreting the Statute

In construing a statute the ultimate goal of the courts is to give effect to the intent of the legislature.¹³⁴ The courts have consistently held that the purpose of subsection (F) of the venue statute was to give a benefit to foreign corporations in order to encourage them to comply with the laws regarding registration of statutory agents.¹³⁵ Foreign corporations would gain the benefit of limiting the potential venue—they would be immune from collection as a reward for having registered to do business in the state and designating a statutory agent.¹³⁶

However, ending the analysis there does not resolve the issues presented in trying to establish balance in the statute, and it fails to consider an equality principle that seems to be the foundation for related statutes.¹³⁷ A secondary principle of statutory construction requires consideration of more than just the plain language of the statute in order to avoid the deceptive simplicity of a surface plain language application.¹³⁸ Courts are encouraged to look to other statutes *in pari materia* to give substance to the plain language of the statute.¹³⁹ Since the purpose of subsection (F) is to encourage all foreign corporations to comply with the registration laws, the relevant statutes *in pari materia* with the venue statute would be those that required registration of foreign corporations as of 1955, the year that subsection (F) was amended to include its current language.¹⁴⁰ The legislature explicitly stated that it was passing those statutes in order to give foreign corporations the

corporations choose to reincorporate in Delaware because the established caselaw creates legal certainty and reduces costs).

134. *State v. Smith*, 2004-NMSC-032, ¶ 8, 98 P.3d 1022, 1025.

135. *See supra* Part IV.A.

136. *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 13, 168 P.3d 116, 120; *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 19, 110 P.3d 1071, 1075–76.

137. *Team Bank v. Meridian Oil, Inc.*, 118 N.M. 147, 150, 879 P.2d 779, 782 (1994) (“[V]enue rules reflect an attempt to balance the common-law right of a defendant to be sued in his most convenient forum . . . with the right of the plaintiff to choose the forum in which to sue.”). For a discussion of how this balance is not achieved, see *supra* Part V.A.1.

138. *State v. Cleve*, 1999-NMSC-017, ¶ 8, 980 P.2d 23, 26 (“[C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning.” (citation and internal quotations omitted)).

139. *Cleve*, 1999-NMSC-017, ¶ 8, 980 P.2d at 26 (noting that the court “must examine the context surrounding a particular statute, such as its history, its apparent object, and other statutes *in pari materia*, in order to determine whether the language used by the Legislature is indeed plain and unambiguous” (citation omitted)). “*Pari material*” means “[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” BLACK’S LAW DICTIONARY 862 (9th ed. 2009).

140. 1955 N.M. Laws, ch. 258, § 1.

same benefit as resident corporations *but no more*.¹⁴¹ Underlying that section of the New Mexico statutes is a notion of equality that seeks to provide foreign corporations the benefit of equal treatment with a resident corporation but stops short of granting powers and rights beyond those of resident corporations.

The notion of an equality principle that underlies the statute provides courts with a means to revisit the previous decisions, construing the venue statute in light of this equality principle where they had failed to do so before.¹⁴² The courts would need to revisit the decisions in *Cooper* and *Baker*, and return to *Cooper's* logical approach as opposed to *Baker's* "intentional omission."¹⁴³ *Baker*, in changing its approach from *Cooper*, was in accord with the principle that there is a presumption of intentionality when a statute is silent.¹⁴⁴ This presumption cannot stand if it were contrary to the intention of the legislature and had the potential to bring about harmful results.¹⁴⁵

Therefore, to correct the problem of collection immunity, the court should return to the *Cooper* interpretation and find that there was a silence in the language subsection (F) of the statute. Silence does not compel collection immunity the way that intentionality does. The court can proceed using logic and legislative purpose to reach the conclusion that collection immunity is not an inherent part of the statute, and that the legislature can accomplish its goals without it. In revisiting the statute in light of the equality principle, the court would have to overrule both *Baker* and *Gardiner*. The statute and the law construing it would then state that domesticated corporations were granted the benefits of resident defendants by treating them equally for venue purposes. This would achieve the incentive to comply with the laws and reaffirm notions of equality among resident and domesticated corporations, while avoiding the traps caused under the previous interpretation allowing domesticated corporations collection immunity.¹⁴⁶

141. NMSA 1953, § 51-10-1 (1965) ("Foreign corporations . . . having complied with the law shall have the *same powers* and be subject to all liabilities and duties as corporations of a like character organized under the laws of this state; *but they shall have no other or greater powers.*" (emphasis added)). These statutes included the registration statute. NMSA 1953, § 51-10-4 (1965).

142. There is a presumption that when the legislature passes an inconsistent piece of legislation it is implicitly repealing the previous inconsistent legislation. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977) (stating that even though repeals by implication are not favored, the legislature is presumed to have meant to change the law when it enacted new law). While this might require overruling *Baker* and *Gardiner*, the courts could revisit the construction of the statute in light of the questions about adhering to the better policy and the idea of equality within the statutes, which had not been addressed in the cases.

143. See *supra* notes 104–113 and accompanying text; see also *supra* Part IV.C.

144. *State v. Jade G.*, 2007-NMSC-010, ¶ 28, 154 P.3d 659, 668 ("[W]hen the Legislature includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional.").

145. See *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, ¶ 34, 140 P.3d 498, 507 ("In construing a particular statute, a reviewing court's central concern is to determine and give effect to the intent of the legislature." (quoting *State ex rel. Kline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988)) (internal quotations omitted)); *Scott v. United States*, 54 N.M. 34, 38, 213 P.2d 216, 219 (1949) ("[Courts] are committed to the doctrine that statutes should be construed in the most beneficial way of which their language is susceptible to prevent absurdity, hardships or injustice, to favor public convenience, and to oppose all prejudice to public interests, and although imperfect in form, they should be sustained by the courts if they can be construed to give them sensible effect." (citations omitted)).

146. See *supra* Part V.A.

2. Rewriting the Statute

While a judicial solution is possible, the courts' general reluctance to address this problem means that the ultimate solution may rest with a change to the statute itself.¹⁴⁷ In considering a change to the statute, legislators should first determine what the venue laws were intended to accomplish. Then they should consider if the current state of the law achieves that policy and whether it is still good law in light of the problem created.

a. What Was the Legislature Trying to Accomplish?

Determining what policy underlies the venue statute requires consideration of the statute's history. The venue statute has gone through a number of changes, but the earliest iteration came about in New Mexico's territorial days. The New Mexico venue statute originally allowed foreign defendants to be sued in any county or district.¹⁴⁸ In 1955, the legislature amended the venue statute, adding subsection (F), which provided an exception to the traditional venue rules for foreign defendants that had registered to conduct business in the state.¹⁴⁹ The amendment differentiated between foreign defendants and domesticated corporations.¹⁵⁰ Because of this explicit distinction, courts have often concluded that the legislature was encouraging compliance with the registration rules among foreign corporations who intended to do business within the state.¹⁵¹ While the venue statute generally seeks to establish the traditional balance between convenience or efficiency with the rights of the parties,¹⁵² the specific addition of subsection (F) acts as an incentive for foreign corporations to register to do business in the state.¹⁵³

b. Is That Intent Still Served by the Current Law?

In light of these policy goals, it is important to consider whether the current law achieves those goals or frustrates them. To the extent that the venue law generally is supposed to establish the balance between efficiency and the rights of the parties, the present situation creates problems.¹⁵⁴ Allowing domesticated corporations collection immunity is a disadvantage to resident defendants. In multiple defendant cases in which a domesticated corporation is a co-defendant, collective venue

147. See, e.g., *Gardiner v. Galles Chevrolet Co.*, 2007-NMSC-052, ¶ 15, 168 P.3d 116, 121, (“[R]egardless of the policy choices that may have motivated the particular language of the venue statute, to the extent they are not reflected in the current statute, it is for the Legislature to address.”). In fact, the court’s hesitation in this area may be the result of timidity. Venue being a purely procedural matter, *Baker v. BP Am. Prod. Co.*, 2005-NMSC-011, ¶ 17, 110 P.3d 1071, 1075, the supreme court would be well within its bounds to create a venue rule to trump the statute where it saw fit, see *Sw. Cmty. Health Servs. v. Smith*, 107 N.M. 196, 198, 755 P.2d 40, 42 (1988) (noting that when it comes to a procedural matter court rules trump statutes).

148. 1875–76 N.M. Laws, ch. 2, § 1.

149. 1955 N.M. Laws, ch. 258, § 1.

150. Compare 1875–76 N.M. Laws, ch. 2, § 1 (“Suits may [be] brought against transient persons or non-residents in any county of this territory.”), with 1955 N.M. Laws, ch. 258, § 1 (“Suits may be brought against transient persons or non-residents in any county of this state, *except* that suits against non-resident foreign corporations, admitted to do business and which maintain a statutory agent in this State upon whom service of process may be had, shall only be brought [according to these provisions].” (emphasis added)).

151. *Gardiner*, 2007-NMSC-052, ¶ 13, 168 P.3d at 120; *Baker*, 2005-NMSC-011, ¶ 17, 110 P.3d 1071, 1075.

152. See *supra* notes 85–89 and accompanying text.

153. See *supra* note 151.

154. See *supra* Part V.A.

creates an incentive to not choose the resident defendant's home venue. Resident defendants are effectively denied the opportunity to be sued in their most convenient forum.¹⁵⁵ The statute thus frustrates the balance between resident and domestic corporations that the venue statute sought to achieve.

Another goal that subsection (F) of the statute is specifically trying to achieve is to incentivize foreign corporations to comply with the laws of the state requiring registration. The statutes regarding foreign corporations provide for penalties for failure to comply with the laws requiring registration to do business.¹⁵⁶ These laws also contain language that implies that the statute seeks to establish equality between resident and domesticated corporations.¹⁵⁷ Because penalties already exist in the statute, the legislature should consider whether an additional incentive is necessary to encourage foreign corporations to comply with the laws, especially if the incentive would violate the implied equality principle.¹⁵⁸

The present statute also has the potential to harm the business environment in New Mexico.¹⁵⁹ Giving domesticated corporations a venue advantage creates a disincentive for incorporation within the state.¹⁶⁰ The legislature should be wary of any statute that has the potential to hurt the economic culture in that way.

In light of these policy considerations and the antiquity of the statute, it is time for the legislature to be explicit in its intentions for foreign corporations and to rewrite the venue statute if the judicial construction favoring domesticated corporations over resident corporations is not the intent of the legislature.¹⁶¹ The amended statute should reestablish a balance in the venue equation by granting domesticated corporations the same procedural protections as resident corporations, but it should not burden the system by preferring domesticated corporations.

155. *See id.*

156. NMSA 1978, § 53-17-20 (1969) (stating that penalties include prohibiting foreign corporations from maintaining a cause of action in the state and pecuniary penalties).

157. *See* NMSA 1978, § 53-17-2 (1967) ("A foreign corporation which has received a certificate of authority . . . shall . . . enjoy the same, but no greater, rights and privileges as a domestic corporation . . . and . . . is subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character." (emphasis added)); *see also supra* note 141 and accompanying text.

158. *See supra* notes 141-42.

159. *See supra* Part V.A.2.

160. *See id.*

161. The venue statute has been very faithful to its original language over the years. *Compare* 1875-76 N.M. Laws, ch. 2, § 1, with 1955 N.M. Laws, ch. 258, § 1. Updating the statute would prove simple. If subsection (F) included the phrase "or defendant," like its counterpart in subsection (A), the statute would achieve this clarity:

Suits may be brought against transient persons or non-residents in any county of this state, except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall only be brought in the county where the plaintiff or defendant, or any one of them in case there is more than one, resides or in the county where the contract sued on was made or is to be performed or where the cause of action originated or indebtedness sued on was incurred or in the county where the statutory agent designated by the foreign corporation resides.

NMSA 1978, § 38-3-1(F) (1988) (emphasized text suggested by author).

Alternatively, subsection (F), instead of mimicking subsection (A), could direct the reader to subsection (A): "except that suits against foreign corporations admitted to do business and which designate and maintain a statutory agent in this state upon whom service of process may be had shall be brought according to provisions set forth in Subsection (A)." § 38-3-1(A) (alterations to original suggested by author). In this way the statute clearly demonstrates that domesticated corporations are afforded the same protections as resident corporations, but not provided more protections.

The problem with the current construction of the venue statute may be solved either judicially or legislatively. The courts, not having to rely on legislative process, might be able to provide the simpler solution. However, because it would require the supreme court to overrule two cases, and because the court is generally reluctant to speak on the policy issues, the better solution lies with the legislature. By amending New Mexico's antiquated venue statute, the legislature could cure the problems of collective immunity and prevent further procedural battles.

VI. CONCLUSION

Venue has important consequences in litigation, and New Mexico's present statute has been construed to allow domesticated corporations some procedural advantages that are denied to resident defendants. The result in *Apache* is evidence of the apparent discrepancy between the protections afforded domesticated and resident corporations. The current advantages for domesticated corporations create a potential for abuse and may act as an incentive for New Mexicans to incorporate outside of the state. However, a potential solution lies with both the courts and the legislature. The courts have the ability to reexamine the statute in light of the equality principle that underlies the New Mexico foreign corporations statutes. If the supreme court chooses not to do so, the New Mexico Legislature should revisit the venue statute and rectify the problems caused by the court's interpretation of it. Lest it irrevocably harm New Mexico's business climate, the venue statute must be revised.