Federal Question Jurisdiction: Must a Defendant Have Minimum Contacts with the State Whose Long-Arm Statute is Used to Serve Process?

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I. INTRODUCTION

Rule 4(e) of the Federal Rules of Civil Procedure authorizes the federal district courts to serve process either in accordance with a federal statute or "under the circumstances" in which the long-arm statute of the state where the district court is located permits service. Although the United States Code contains countless statutes that provide remedies at federal law, service is authorized by an accompanying federal statute in only a few of these. As a result, the long-arm statute of the state where the federal district court is located must be borrowed to serve the defendant with process in the overwhelming number of federal question cases.

This comment will explore whether the "under the circumstances" language in Rule 4(e) requires a defendant in a federal question case to have minimum contacts with the state whose long-arm statute is used to accomplish service. The United States Circuit Courts of Appeal are split over this issue. The First, Third, Fifth, Ninth, and Eleventh Circuits have determined that the "under the

1. Fed. R. Civ. P. 4(e) provides:
Whenever a statute of the United States . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute . . . . Whenever a statute . . . of the state in which the district court is held provides . . . for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.


3. Article III, § 2 of the United States Constitution grants federal courts with jurisdiction to hear cases "arising under" the United States Constitution, federal statutes, and treaties. This is known as federal question jurisdiction. Congress has conferred this jurisdiction upon the lower federal courts by statute. For example, 28 U.S.C. § 1331 permits federal district courts to exercise federal question subject matter jurisdiction in "all civil actions arising under the Constitution, laws, or treaties of the United States." Also, 28 U.S.C. § 1333 vests federal district courts with federal question subject matter jurisdiction in admiralty. And, Article III, § 2 permits federal district courts to hear cases between citizens of different states. This is known as diversity jurisdiction. 28 U.S.C. § 1332 vests the lower federal courts with diversity jurisdiction. The law that determines the rights of the parties in diversity cases is state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938); 28 U.S.C. § 1652.

circumstances language” in Rule 4(e) requires a defendant in a federal question case to have minimum contacts with the state where the federal district court is located.\(^5\) The Sixth and Seventh Circuits have reached the opposite conclusion; namely, that Rule 4(e) does not require a defendant in a federal question case to have minimum contacts with the forum state.\(^6\)

A brief discussion of the due process restraints placed upon the exercise of personal jurisdiction will bring the present issue into focus.

A. Personal Jurisdiction: The Minimum Contacts Test

Before a state court may exercise jurisdiction over a defendant, due process requires that the defendant have “certain minimum contacts” with the state so that “the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”\(^7\) When a federal court exercises diversity jurisdiction, the plaintiff’s cause of action is based upon state law.\(^8\) As the United States Supreme Court has stated, “a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State.”\(^9\) For this reason, it is uniformly accepted that a federal district court sitting in diversity is bound by the same jurisdictional constraints that a state court is.\(^10\) Thus, a defendant in a diversity case...

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6. Handley v. Indiana & Michigan Elec. Co., 732 F.2d 1265, 1272 (6th Cir. 1984); In re Oil Spill by Amoco Cadiz, 954 F.2d 1279, 1294 (7th Cir. 1992); United Rope Distrib., Inc. v. Seatriniuck Marine Corp., 930 F.2d 532, 534 (7th Cir. 1991). In April of 1993, the United States Supreme Court proposed an amendment to Rule 4(e). Proposed Rule 4(e)(1) provides:

> Unless otherwise provided by federal law, service upon an individual... may be effected in any judicial district of the United States pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of summons upon the defendant in an action brought in the courts of general jurisdiction of the state.

Rules of Civil Procedure, 146 F.R.D. 401, 409-10 (1993). If Congress fails to act, the revision will become effective on December 1, 1993. Although Proposed Rule 4(e) does not contain the troubling “under the circumstances” language, the “pursuant to the law of the state in which the district court is located” does not clarify whether a defendant must have minimum contacts with the forum state in a federal question case.


10. Mellon Bank (East) P.S.F.S., Nat'l Ass'n v. Farino, 960 F.2d 1217, 1221 (3d Cir. 1992); Command-Aire Corp. v. Ontario Mechanical Sales & Serv., Inc., 963 F.2d 90, 93-94 (5th Cir. 1992); Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991); Williams v. Bowman Livestock Equip.
case must have minimum contacts with the state where the federal district court is located.11

In a federal question case, the federal district court exercises the sovereign power of the United States and applies federal law to determine the rights and liabilities of the parties. In Federal Trade Commission v. Jim Walter Corp.,12 the Fifth Circuit was asked to determine whether due process required a defendant in a federal question case to have minimum contacts with the United States in general or with the particular state where the federal district court was located. Jim Walter was a Florida-based company; nonetheless, The Federal Trade Commission filed suit against it in Texas. Although Jim Walter lacked minimum contacts with Texas, it had minimum contacts with the United States.13 The Fifth Circuit held that minimum contacts with the United States was sufficient to satisfy due process in a federal question suit. Since “each federal court exercises ‘the judicial power of the United States,’” the Fifth Circuit concluded that “due process requires only that a defendant in a federal [question] suit have minimum contacts with the United States, ‘the sovereign that has created the court.’”14

B. Does Rule 4(e) of the Federal Rules of Civil Procedure Require a Defendant in a Federal Question Case to Have Minimum Contacts with the State Whose Long-Arm Statute is Used to Serve the Defendant with Process?

All of the other circuits that have considered what the due process test should be in a federal question case have reached the same conclusion that the Fifth Circuit did in Jim Walter; namely, that due process is satisfied in a federal question case if the defendant has minimum contacts with the United States.15 Nevertheless, the United States Circuit Courts of Appeal are split over whether the “under the circumstances” language in Rule 4(e) imposes the additional requirement that a defendant have minimum contacts with the state whose long-

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12. 651 F.2d 251 (5th Cir. Unit A July 1981).
13. Id. at 256.
14. Id.
arm statute is used to serve the defendant with process in a federal question case.\(^\text{16}\)

In *Burstein v. State Bar of California*,\(^\text{17}\) the Fifth Circuit was asked to consider this issue. Burstein, a Louisiana resident, had taken the California bar exam. After the California State Bar notified Burstein that she had failed the multi-state and the essay portions of the test, she filed suit in federal district court in Louisiana. She alleged that the Bar had violated her rights to due process and equal protection under 42 U.S.C. § 1983.\(^\text{18}\) *Burstein* was a federal question case, as *Jim Walter* was. Under the rationale of *Jim Walter*, due process would have been satisfied because the Bar had minimum contacts with the United States. However, in *Jim Walter* a federal statute was used to serve Jim Walter with process. By contrast, there was no federal statute in *Burstein* that authorized service of process for actions brought under 42 U.S.C. § 1983. Thus, under Rule 4(e), the only means available to serve the Bar with process was the Louisiana long-arm statute.

Since "minimum contacts" with the state is a "circumstance" that must exist before a state court can exercise jurisdiction over a defendant, the Fifth Circuit in *Burstein* concluded that the "under the circumstances" language in Rule 4(e) requires a defendant in a federal question case to have minimum contacts with the state whose long-arm statute is used to serve process.\(^\text{19}\) Since the Bar lacked minimum contacts with Louisiana, the Fifth Circuit held that the district court could not exercise jurisdiction over the Bar.

Although the Fifth Circuit is joined by the First, Third, Ninth, and Eleventh Circuits in this interpretation of Rule 4(e),\(^\text{20}\) the Sixth and Seventh Circuits have determined that Rule 4(e) does not require the defendant to have minimum contacts with the state.\(^\text{21}\) In *Handley v. Indiana & Michigan Electric Co.*,\(^\text{22}\) the plaintiff sued under the Jones Act.\(^\text{23}\) Since the Jones Act did not contain a provision that authorized service of process, Rule 4(e) required that the state long-arm statute be used to serve process. The Sixth Circuit held that the "under the circumstances" language in Rule 4(e) did not compel the defendant to have minimum contacts with the forum state when the defendant was served under the state long-arm statute in a federal question case.\(^\text{24}\) The Sixth Circuit concluded that the "under the circumstances" language in Rule 4(e) referred to the laundry list of circumstances that are typically enumerated in state long-arm statutes.

\(^{16}\) See supra notes 5 and 6.

\(^{17}\) 693 F.2d 511 (5th Cir. 1982).

\(^{18}\) Id. at 513.

\(^{19}\) Id. at 517.

\(^{20}\) See supra note 5.

\(^{21}\) See supra note 6.

\(^{22}\) 732 F.2d 1265 (6th Cir. 1984).


\(^{24}\) Handley, 732 F.2d at 1272.
under which the state legislature had authorized service of process.\textsuperscript{25} The "circumstance" in this case was the "contracting to supply services or goods in this Commonwealth" provision in the long-arm statute. Thus, the court determined that the defendant could be served with process because the plaintiff’s claim arose from the acts of the defendant in "contracting to supply services or goods in this Commonwealth" in accordance with the Kentucky long-arm statute.\textsuperscript{26} Since the "contracting to supply services or goods in this Commonwealth" language had been interpreted to allow the assertion of jurisdiction over any defendant who had minimum contacts with the state in a diversity case,\textsuperscript{27} the court concluded that the long-arm statute could be used to assert jurisdiction over any defendant who had minimum contacts with the United States in a federal question case.\textsuperscript{28} Thus, the Sixth Circuit determined that personal jurisdiction could be exercised over the defendant even though the defendant did not have minimum contacts with the state. The Seventh Circuit has reached the same conclusion in *United Rope Distributors, Inc. v. Seatriumph Marine, Corp.*\textsuperscript{29} and *In re Oil Spill by Amoco Cadiz.*\textsuperscript{30}

This comment will assess the split among the circuits over whether the "under the circumstances" language in Rule 4(e) requires a defendant to have minimum contacts with a particular state in a federal question case. As discussed above, due process requires only that a defendant in a federal question case have minimum contacts with the United States in general. Thus, the issue is whether Rule 4(e) imposes the requirement that a defendant have minimum contacts with the forum state, a requirement that is not mandated by the Constitution.

First, this comment will examine *Omni Capital International v. Rudolf Wolff & Co.*,\textsuperscript{31} the most recent decision by the United States Supreme Court that addressed service of process in federal question cases. Next, the interplay of Rules 4(f), 4(d), and 4(e) of the Federal Rules of Civil Procedure and the national contacts doctrine will be explored. This comment will consider the case law of the Sixth and Seventh Circuits, which have declined to interpret the language of Rule 4(e) to require minimum contacts with a particular state. Then, this comment will assess the jurisprudence of the First, Third, Fifth, Ninth, and Eleventh Circuits that has construed Rule 4(e) to require a defendant to have minimum contacts with the forum state.

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25. *Id.*
27. *Handley*, 732 F.2d at 1271 (citing *Poyner v. Erma Werke GMBH*, 618 F.2d. 1186, 1192 (6th Cir. 1980)).
29. 930 F.2d 532, 534 (7th Cir. 1991).
30. 954 F.2d 1279, 1294 (7th Cir. 1992).
\end{flushleft}
As will be discussed, the use of state long-arm statutes in federal question cases presents problems in obtaining jurisdiction over alien defendants. Also, the use of state long-arm statutes in federal question cases prevents the uniform application of federal law. These problems can be rectified if Congress enacts a federal statute that permits world-wide service of process in federal question cases. However, the liberal venue provisions in 28 U.S.C. § 1391(b)(1) and 28 U.S.C. § 1391(c) would permit a plaintiff who uses a world-wide service of process statute to obtain proper venue in an action against a corporate defendant in any district in the United States. An unfettered choice of venue would encourage forum shopping. Nevertheless, this problem can be resolved by amending the venue provision in 28 U.S.C. § 1391(c).

II. Omni Capital International v. Rudolf Wolff & Co.

In Omni, Omni Capital International and Omni Capital Corporation (two New York corporations) were approached by James Gourlay on behalf of Rudolf Wolff & Co., Ltd. (a British Corporation). The Omni companies agreed to allow Rudolf Wolff to serve as their broker on the London Metals Exchange. In the United States, the Omni companies marketed their investment program, which included the commodities handled by Rudolf Wolff. The advertisements proclaimed that participation in the investment program would result in federal income tax deductions.\(^{32}\)

The Internal Revenue Service, however, determined that the trading on the London Metals Exchange had not been at arm’s-length and that some members of the London Metals Exchange were engaged in price fixing. Because the investment program sponsored by the Omni companies included the commodities trading on the London Metals Exchange, the Internal Revenue Service disallowed the deductions that had been claimed by the participants in the Omni investment program. Shortly thereafter, some of the investors filed suit in the Eastern District of Louisiana. The plaintiffs' initial complaints alleged violations of section 17(a) of the Securities Act of 1933,\(^{33}\) sections 10b and 20 of the Securities Exchange Act of 1934,\(^{34}\) SEC Rule 10b-5,\(^{35}\) and the Louisiana Blue Sky Laws.\(^{36}\) When the Supreme Court recognized an implied private cause of action under the Commodities Exchange Act,\(^{37}\) the plaintiffs amended their complaint to assert a commodities claim under sections 4(b) and 9(b) of the CEA.\(^{38}\) The district court

\(^{32}\) Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415, 418 (5th Cir. 1986).
\(^{36}\) Omni, 484 U.S. at 100, 108 S. Ct. at 407.
\(^{38}\) 7 U.S.C. §§ 6(b), 13(b); Point Landing, Inc. v. Omni Capital Int'l, Ltd., 795 F.2d 415, 418 (5th Cir. 1986).
concluded that the CEA had preempted the plaintiffs' securities claims; therefore, it dismissed these securities claims.\textsuperscript{39}

The Omni defendants moved to implead Rudolf Wolff & Co., Ltd. and James Gourlay, a citizen and resident of England who was employed by Wolff to solicit business from the Omni companies.\textsuperscript{40} Initially, the district court determined that it could exercise jurisdiction over the third-party defendants because it concluded that Congress intended for the federal courts to exercise personal jurisdiction over alien defendants who were not present within the United States under the CEA if due process would permit the exercise of jurisdiction. The court concluded that the "quality and nature" of the third-party defendants' contacts with the United States were sufficient for the United States to assert jurisdiction consistently with due process.\textsuperscript{41}

Upon rehearing, the district court judge considered the effect that the Fifth Circuit's decision in \textit{DeMelo v. Toche Marine, Inc.}\textsuperscript{42} had upon its initial decision. In \textit{DeMelo}, the Fifth Circuit held that "when a federal question case is based upon a federal statute that is silent as to service of process, and a state long-arm statute is therefore utilized to serve an out-of-state defendant, Rule 4(e) requires that the state's standard of amenability to jurisdiction apply."\textsuperscript{43} Recognizing that the CEA was silent about service of process in private causes of action, the district court in \textit{Omni} held that "unless jurisdiction can be asserted under the Louisiana long-arm statute, there is no personal jurisdiction over Wolff or Gourlay."\textsuperscript{44} The district court determined that the requirements of the Louisiana long-arm statute were not met.\textsuperscript{45} Therefore, it dismissed all of the Omni defendants' third-party claims against Wolff and Gourlay, because it concluded that it could not exercise in personam jurisdiction over them.\textsuperscript{46}

On appeal in \textit{Point Landing, Inc. v. Omni Capital International, Ltd.}\textsuperscript{47} the Omni defendants did not contest the district court's finding that Wolff and Gourlay were not amenable to service under the Louisiana long-arm statute. They argued instead that the district court had erroneously determined that the CEA did not provide an independent basis for extra-territorial service of process under Rule

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  \item \textsuperscript{39} \textit{Omni}, 484 U.S. at 100, 108 S. Ct. at 407; \textit{Point Landing}, 795 F.2d at 418.
  \item \textsuperscript{40} \textit{Omni}, 484 U.S. at 99-100, 108 S. Ct. at 407.
  \item \textsuperscript{41} \textit{Id.} at 100, 108 S. Ct. at 407-08.
  \item \textsuperscript{42} 711 F.2d 1260 (5th Cir. 1983).
  \item \textsuperscript{43} \textit{Id.} at 1266.
  \item \textsuperscript{44} \textit{Omni}, 484 U.S. at 101, 108 S. Ct. at 408.
  \item \textsuperscript{45} The District Court concluded that the requirements of the Louisiana long-arm statute were not met in this litigation. It determined that even La. R. S. 13:3201(d) (1968), which allows a court to rely upon the effects that the defendant causes within the State, was "clearly not applicable" because it "applies only to a defendant who 'regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.'" \textit{Id.} at 108, 108 S. Ct. at 411. \textit{Id.} at 103, 108 S. Ct. at 409.
  \item \textsuperscript{46} \textit{Id.} at 99-102, 108 S. Ct. at 407-08.
  \item \textsuperscript{47} 795 F.2d 415 (5th Cir. 1986).
\end{itemize}
The basis for the defendants' assertion was that the language of CEA implicitly allowed for extra-territorial service.

The Fifth Circuit unanimously affirmed the district court's determination that the CEA had preempted the plaintiffs' securities claims and that service of process could not be effected under the CEA since none of its provisions authorized extra-territorial service. The Fifth Circuit explained that unlike the Securities Exchange Act, which explicitly "permits service of process 'wherever the defendant may be found,'" the CEA "is silent on the subject of process." Therefore, the Fifth Circuit concluded that authority for service could not be based upon the CEA.

In *Lapeyrouse v. Texaco, Inc.*, a panel of the Fifth Circuit suggested that it was not necessary for the defendant to have minimum contacts with the state in a federal question case when service was accomplished under the state's long-arm statute. In *Burstein v. State Bar of California*, which was decided only three days after *Lapeyrouse*, another panel of the Fifth Circuit held that the defendant must have minimum contacts with the state in a federal question suit when service of process is accomplished under the state's long-arm statute. "[A] federal court, even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it." The Fifth Circuit heard the *Omni* case en banc to determine whether *Lapeyrouse or Burstein* was correct.

Nine of the fifteen judges in *Point Landing* voted to adopt the *Burstein* rule: "Absent a rule or statute to the contrary, Federal Rule of Civil Procedure 4(e) permits a federal court to exercise jurisdiction over only those defendants who are subject to the jurisdiction of courts of the state in which the court sits." These judges maintained that the district court could only assert jurisdiction if Rule 4(e) of the Federal Rules of Civil Procedure authorized service of process. Rule 4(e) permits service in accordance with either a federal statute or "under the circumstances and in the manner prescribed" by the long-arm statute of the state where a federal district court sits. Since the CEA contained no express

48. *Id.* at 423.
49. *Id.* at 424.
51. *Point Landing*, 795 F.2d at 424.
52. *Id.*
53. *Id.*
54. 693 F.2d 581 (5th Cir. 1982), overruled by *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986).
55. *Id.* at 586.
56. 693 F.2d 511 (5th Cir. 1982).
57. *Id.* at 514.
58. *Id.*
59. *Id.* at 419 (citing *DeMelo v. Toche Marine*, 711 F.2d 1260, 1268 (5th Cir. 1983)).
60. *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986).
provision that authorized service upon the third-party defendants, and since the Omni defendants had not appealed the trial judge's ruling that Wolff and Gourlay were not amenable to service under the Louisiana long-arm statute, these nine judges concluded that the district court was unable to obtain in personam jurisdiction over the third-party defendants. The majority succinctly concluded: "[W]e cannot blink at the language of Rule 4(e). We cannot read the rule except as saying that absent specific congressional authority [in a federal statute], a federal district court has no personal jurisdiction over a defendant who cannot be reached by the long-arm statute of the state in which the district court sits."63

However, six of the fifteen Fifth Circuit judges in Point Landing dissented in part because they believed that the federal district court could obtain jurisdiction over Wolff and Gourlay even though they were not amenable to service under either the CEA or the Louisiana long-arm statute. The dissenters argued that because the aggregate of the third-party defendants' national contacts permitted the district court to assert jurisdiction consistently with due process, then Rule 4 of the Federal Rules of Civil Procedure should not be construed to preclude the exercise of jurisdiction that is constitutionally permissible. The dissenters reached this conclusion by relying upon Rule 82 of the Federal Rules of Civil Procedure, which provides: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."64 Moreover, the dissenters argued that the majority's construction of Rule 4 led to the "unjust, inconvenient, and expensive result of immunizing Wolff and Gourlay from liability"65 in violation of Rule 1 of the Federal Rules of Civil Procedure.66 Thus, the dissenters concluded that Rule 83, which allows "district judges . . . [to] regulate their practice in any manner not inconsistent with these rules,"67

62. 795 F.2d at 427.
63. Id.
64. Fed. R. Civ. P. 82. "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."
65. Point Landing, 795 F.2d at 428 (Wisdom, J., concurring in part and dissenting in part).
66. Fed. R. Civ. P. 1: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every activity."
67. Fed. R. Civ. P. 83 provides:

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.
would permit the district court to fashion an ad hoc rule for service of process. 68

The Supreme Court granted the Omni defendants' writ of certiorari. 69 Once again, the Omni defendants argued that the CEA allowed extra-territorial service of process. In the alternative, they asked the Supreme Court to adopt the position of the six judges in Point Landing who dissented in part by allowing the district court to create a common-law rule that would allow service upon the third-party defendants. 70

In a unanimous decision, the Supreme Court concluded that "a nationwide service provision for a private action was not implicit in the CEA." 71 Moreover, the Court rejected the position of the dissenters in Point Landing that the district court should be allowed to create an ad hoc rule for service of process. The Supreme Court explained that "[i]t seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized." 72 The Court reasoned that this longstanding assumption supported the argument against allowing the district courts to devise common-law rules to serve process because the federal courts could use these common-law rules to go beyond the limits Congress has placed upon the service power of the federal courts. Also, the Supreme Court concluded that the legislature, rather than the courts, was the appropriate body to fashion a service rule. 73

Adopting the position of the majority in Point Landing, the Supreme Court held that Rule 4 of the Federal Rules of Civil Procedure must authorize service of process. "[U]nder Rule 4(e), a federal court normally looks either to a federal statute or to the long arm statute of the State in which it sits . . . ." 74 Because the Supreme Court determined that the CEA did not authorize service, and because the Omni companies had not appealed the district court's determination that Wolff and Gourlay were not amenable to service under the Louisiana long-arm statute, the Court held that the district court lacked personal jurisdiction over these third-party defendants. 75

In Omni, the defendants had asked the Supreme Court to extend the state minimum contacts doctrine 76 by analogy to the federal courts, thereby permit-
ting the federal district court to consider the third-party defendants’ contacts with the United States as a whole.\(^7\) However, since the Supreme Court had determined that service upon the third-party defendants was not permitted under the CEA, and since the Omni defendants had conceded that Wolff and Gourlay could not be reached under the Louisiana long-arm statute, the Court concluded that it had “no occasion to consider the constitutional issues raised by [the national contacts] theory.”\(^8\)

After Omni the question that remains unanswered is whether the “under the circumstances” language in Rule 4(e) statutorily requires a defendant in a federal question case to have minimum contacts with the state where the district court is located when service is accomplished under the forum state’s long-arm statute. Uncertainty remains over the requirements that this language in Rule 4(e) imposes even though five circuits have held that a consideration of the defendant’s national contacts in a federal question case is constitutionally permissible.\(^9\)

The Sixth and Seventh Circuits have concluded that Rule 4(e) does not require an analysis of the defendant’s contacts with the state. These two circuits have determined that if the acts or omissions of the defendant are enumerated in the state’s long-arm statute and if the defendant has minimum contacts with the United States, then the federal court may assert jurisdiction over the defendant.\(^8\) By contrast, the First, Third, Fifth, Ninth, and Eleventh Circuits have interpreted Rule 4(e) to legislatively impose a state standard of amenability to jurisdiction upon the federal courts in federal question cases when a state long-arm statute is used to serve process.\(^8\) Thus, the defendant must have minimum contacts with the forum state.

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78. Id. (quoting Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 113 n.*, 107 S. Ct. 1026, 1032 n.* (1987)).
80. Handley v. Indiana & Michigan Elec. Co., 732 F.2d 1265, 1272 (6th Cir. 1984); In re Oil Spill by Amoco Cadiz, 954 F.2d 1279, 1294 (7th Cir. 1992); United Rope Distribs. v. Seatrim Triumph Marine, 930 F.2d 532, 536 (7th Cir. 1991).
III. THE INTERPLAY OF RULES 4(f), 4(d), AND 4(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE NATIONAL CONTACTS DOCTRINE

Although an extension of the minimum contacts test by analogy to the United States would seem to empower a federal district court to obtain personal jurisdiction over any defendant who has minimum contacts with the United States, Rule 4 of the Federal Rules of Civil Procedure limits the jurisdictional reach of the federal district courts. Although Rule 4 is phrased in terms of service of process, a restriction upon the ability of a court to serve process necessarily limits its jurisdictional reach. As the First Circuit explained in United Electrical, Radio and Machine Workers v. 163 Pleasant Street Corp., service of process and personal jurisdiction are “inextricably intertwined, since service of process is the vehicle by which the court obtains jurisdiction.”

As a general principle, Rule 4(f) authorizes service only within the state where the court is located. Under 4(d)(1), an individual defendant who is amenable to service under Rule 4(f) can be served “by delivering a copy of the summons and of the complaint to the individual personally” within the forum state. Although it is easy to ascertain if an individual defendant is physically present within the forum state, the “corporate personality is a fiction, . . . [and] it is clear that unlike an individual its [presence] . . . without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it.” For this reason, Rule 4(d)(3) of the Federal Rules of Civil Procedure provides that a corporation may be served by delivering a copy of the summons and the complaint “to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . . .”

82. 960 F.2d 1080, 1085 (1st Cir. 1992).
83. Fed. R. Civ. P. 4(f) states: “All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state.” However, Rule 14 (third party defendants) or Rule 19 (necessary parties) parties may be served if they are found within one hundred miles of the courthouse—regardless of state lines.
84. According to Fed. R. Civ. P. 4(d)(1), service shall be made: “Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally . . . .”
86. Fed. R. Civ. P. 4(d)(3) provides that:

Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
The interplay of 4(d)(3) and the national contacts test is illustrated in *First Flight Co. v. National Carloading Corp.* In *First Flight*, the plaintiff employed the defendant to transport a shipment of golf clubs from Chattanooga, Tennessee, to Los Angeles, California. After First Flight received the golf clubs and determined that they had been damaged during transit, it filed suit against National Carloading in Tennessee under the Interstate Commerce Act. National Carloading moved to implead Atchison, Topeka, and Santa Fe Railway Company, which it had hired to transport the golf clubs for part of the distance to California. Atchison's agent was served in accordance with Rule 4(d)(3) in Tennessee at a small office that Atchison maintained for two of its employees. Atchison argued that it lacked sufficient contacts with Tennessee to enable the district court to assert jurisdiction. However, the district court ruled that Atchison's contacts with the forum state were irrelevant because its national contacts satisfied due process. As the Ninth Circuit later explained in *Wells Fargo & Co. v. Wells Fargo Express Co.*:

"[I]n a federal question suit, Rules 4(f)—providing for service within the territorial limits of the state in which the district court is held, and 4(d)3—providing the manner for in-state service over foreign as well as domestic corporations, in combination give the district court the power and method of serving corporations which are present within the state under all circumstances consistent with the due process limits ...."

Since the district court in *First Flight* did not require Atchison to have minimum contacts with the forum state, due process served as the only limitation upon the exercise of jurisdiction by the federal district court. Due process in a federal question case requires only that a defendant have minimum contacts with the United States in general. Whether the defendant has any contacts with the forum state is constitutionally irrelevant.

Although Atchison was served within the forum state in *First Flight*, many defendants are not physically present within the state where the federal district court is located. As a result, federal district courts are often unable to use Rules

88. Id. at 732.
89. Id.
90. Id. at 732-36.
91. The *First Flight* court explained: "In the present case it is believed that the Court may exercise personal jurisdiction over Santa Fe. Santa Fe is incorporated within and does business throughout much of the United States. There are thus the requisite minimum contacts with the United States, and service has been made upon an acknowledged Santa Fe agent within the territorial limits of the Court's process." Id. at 740. Since Rule 4(d)(3) authorized service on the defendant, there was no need to borrow a state long-arm statute to accomplish service. Rule 4(e), by contrast, does not provide an independent basis for service. Either a federal statute or a state long-arm statute must provide the authority for service.
92. 556 F.2d 406 (9th Cir. 1977).
93. Id. at 424 n.19 (citations omitted).
4(d) and 4(f). Therefore, the court is required to look to Rule 4(e) for authorization to serve process beyond the territorial limits of the forum state. Rule 4(e) permits service in two circumstances: either in accordance with a federal statute, or "under the circumstances and in the manner prescribed" by the long-arm statute of the forum state.94

Some federal statutes that create a cause of action also authorize nationwide service of process.95 The Second, Fifth, Sixth, Seventh, and Ninth Circuits have determined that the strictures placed upon the service power of the federal district courts by Rule 4(f) are lifted when a federal statute permits nationwide service.96 In such situations, the service power of the district court becomes "co-extensive with the boundaries of the United States,"97 and the defendant's contacts with the state where the district court sits cease to be relevant.98 As the Fifth Circuit explained in Federal Trade Commission v. Jim Walter Corp.:99 "[E]ach federal court exercises the 'judicial power of the United States,' . . . [D]ue process requires only that a defendant in a federal suit have minimum contacts with the United States, 'the sovereign that has created the court.' . . ."100

The Ninth Circuit has held that the Clayton Act101 and the Securities Exchange Act102 authorize international service of process.103 The due process inquiry is the same under a federal statute that permits world-wide service of process as it would be under a federal statute that authorizes nationwide

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94. See supra note 1 for the text of Rule 4(e).
96. See supra note 15.
99. 651 F.2d 251 (5th Cir. Unit A July 1981).
100. Id. at 256 (citations and footnotes omitted).
service of process; a defendant must have minimum contacts with the United States in general. Of course, a statute that authorizes nationwide service of process cannot be used to serve a defendant outside the United States. 104

Thus, there are two scenarios in which the federal district court must rely upon a state long-arm statute to serve process upon a defendant in a federal question case. The first is when the federal statute that creates the plaintiff's cause of action does not provide an independent basis for service and the defendant cannot be served within the forum state under Rule 4(d)(1) or Rule 4(d)(3) as permitted by Rule 4(f). 105 The second is when the plaintiff's relief is based upon a federal statute that permits nationwide, but not world-wide, service of process and the defendant cannot be served within the United States. 106 When either of these two situations arise, the federal court must look to Rule 4(e) for authorization to serve process. Rule 4(e) permits service "under the circumstances" prescribed by the long-arm statute of the state where the district court is located when there is no federal statute that can be used to accomplish service. 107

As stated above, the circuits are split over the meaning of the "under the circumstances" language in Rule 4(e). The Sixth and Seventh Circuits have determined that the language in Rule 4(e) refers to those circumstances enumerated by the state long-arm statute in which service of process has been authorized by the state legislature. 108 These two circuits have concluded that if the state's long-arm statute allows service and the exercise of jurisdiction is permitted by due process, then the district court may assert jurisdiction over the defendant.

By contrast, the First, Third, Fifth, Ninth, and Eleventh Circuits have construed the "under the circumstances" language in Rule 4(e) to refer to the circumstances in which a court of the state where the federal court is located can

104. For example, in United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1086 (1st Cir. 1992), the First Circuit held that the Massachusetts long-arm statute was the only available means under Rule 4(e) to serve defendants in Scotland since ERISA permits nationwide rather than world-wide service.

105. For example, in Lorelei Corp. v. County of Guadalupe, 940 F.2d 717, 720 (1st Cir. 1991), the First Circuit held that 28 U.S.C. § 1343 did not permit service beyond the state where the district court was located. In Burstein v. State Bar of California, 693 F.2d 511, 514 (5th Cir. 1982), the Fifth Circuit held that 42 U.S.C. § 1983 does not provide for extra-territorial service of process.

106. See supra note 104. The First Circuit's discussion in United Elec. illustrates the difference between a statute authorizing nationwide service and one that allows world-wide service. Where the statute provides that "process may be served in any other district where a defendant resides or may be found," the reference to "district" means that the statute authorizes nationwide service. United Elec., 960 F.2d at 1086 (quoting 29 U.S.C. § 1132(e)(2) (1988)). By contrast, if the statute specifies "that process may be served wherever a defendant is found" without reference to federal districts, the statute authorizes world-wide service. Id. at 1086 n.6 (quoting 15 U.S.C. § 22 (1988)).

107. See supra note 1 for the text of Rule 4(e).

exercise personal jurisdiction. This interpretation requires the federal district court to pretend it is a state court for the purpose of attaining in personam jurisdiction even though federal law provides the basis for the plaintiff's relief. As the Fifth Circuit explained in DeMelo v. Toche Marine, Inc., service of process and personal jurisdiction are distinct concepts. "Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law. Service of process is simply the physical means by which that jurisdiction is asserted."

As the Supreme Court noted in Omni, the defendant must be amenable to service before a court may exercise jurisdiction. Thus, service of process must be accomplished before a court may exercise jurisdiction. Since the majority of the circuits have interpreted Rule 4(e) to require that a defendant have minimum contacts with the state, the district court is precluded from asserting jurisdiction over a defendant who lacks minimum contacts with the forum state, even the exercise of jurisdiction would satisfy due process because the defendant has minimum contacts with the United States in general.

Next, this comment will examine the cases in which the Sixth and Seventh Circuits determined that the "under the circumstances" language in Rule 4(e) of the Federal Rules of Civil Procedure does not require that the defendant have minimum contacts with the forum state.

IV. THE MINORITY VIEW

A. The Sixth Circuit

In Handley v. Indiana & Michigan Electric Co., the Sixth Circuit concluded that an analysis of the defendant's contacts with the forum state was unnecessary when the defendant was served under the state long-arm statute in a federal question case. The Sixth Circuit interpreted the "under the circumstances" language in Rule 4(e) to refer to those acts or omissions listed in the state long-arm statute in which the state legislature has authorized service of process. The court determined that the defendant could be served with

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110. 711 F.2d 1260 (5th Cir. 1983).
111. Id. at 1264 (citation omitted).
113. 732 F.2d 1265 (6th Cir. 1984).
114. Id. at 1272.
process because the plaintiff's claim arose from the acts of the defendant in "contracting to supply services or goods in this Commonwealth" in accordance with the Kentucky long-arm statute. Since the Kentucky long-arm statute had been interpreted to reach as far as was constitutionally permissible, the court reasoned that the long-arm statute could be used to serve process upon a defendant in a federal question case who had minimum contacts with the United States. Under this analysis, the Sixth Circuit concluded that personal jurisdiction could be exercised over the defendant even though the defendant did not have minimum contacts with the state.

B. The Seventh Circuit

After Omni was decided, the Seventh Circuit indicated in United Rope Distributors, Inc. v. Seatriumph Marine, Corp. that it agreed with the Sixth Circuit's conclusion that the "under the circumstances" language in Rule 4(e) does not require a federal district court to weigh the defendant's contacts with the forum state:

"[U]nder the circumstances" is a slim thread on which to hang a conclusion that federal courts exercising national powers should pretend that they are state courts exercising state powers. ... The language more naturally refers to the "circumstances" identified in the state statutes. Federal courts acquire personal jurisdiction only to the extent that state law authorizes service of process. When the state law authorizes this service, ... the federal court has jurisdiction unless the Constitution bars the door.

However, the Seventh Circuit's statements in United Rope are dicta since the plaintiff had asked the court to fashion a common-law rule to serve process. As the court stated, "Omni closed that route decisively." In In re Oil Spill by Amoco Cadiz, the Seventh Circuit adopted its earlier reasoning in United Rope when it held that the "under the circumstances" language in Rule 4(e) did not require a defendant who had been served in accordance with a state long-arm statute in a federal question case to have minimum contacts with the forum state. The court stated: "The requirement of minimum contacts is intended to ensure that the sovereign possesses a legitimate claim to assert power

116. Handley, 732 F.2d at 1271 (citing Poyner v. Erma Werke GMBH, 618 F.2d 1186, 1192 (6th Cir. 1980)).
117. Id. at 1272.
118. Id.
119. 930 F.2d 532 (7th Cir. 1991).
120. Id. at 536.
121. Id.
122. 954 F.2d 1279 (7th Cir. 1992).
over the defendant. When the national sovereign is applying national law, the relevant contacts are the contacts between the defendant and the sovereign's nation. 123 Since the court had determined that service was authorized by the state long-arm statute, it held that due process would permit it to consider the aggregate of the defendant's contacts with New York and Illinois to determine if the exercise of jurisdiction was fair. 124

In Stauffacher v. Bennett, 125 the plaintiff alleged violations of the Securities Exchange Act, Wisconsin law, and the Racketeer Influenced Corrupt Organizations Act (RICO). 126 The Seventh Circuit engaged in a separate jurisdictional inquiry for each of the plaintiff's claims. The court interpreted the Securities Exchange Act to authorize world-wide service of process if "the defendants have the same contacts with the United States as they would have to have with Wisconsin . . . under the 'presence' theory of extraterritorial jurisdiction." 127

Although the Seventh Circuit concluded that the Canadian defendant's contacts with the United States were insufficient for the federal district court to exercise jurisdiction, 128 it is unclear from the opinion what the Seventh Circuit meant by its reference to the "presence theory" of extraterritorial jurisdiction. Since the court had determined earlier in the opinion that the plaintiff's injury did not arise from the defendant's activities in the forum, perhaps the Seventh Circuit meant that due process would require the defendant to have more than "minimum contacts" with the United States since the plaintiff's cause of action was unrelated to the forum. This reading of the opinion would be consistent with the Supreme Court's decision in Helicopteros Nacionales de Colombia v. Hall, 129 a diversity case. The Supreme Court held in Helicopteros that due process requires the defendant's contacts with the forum to be "continuous and systematic," in accordance with Perkins v. Benguet Consolidated Mining Co., 130 when the plaintiff's cause of action does not arise out of the defendant's activities within the forum. 131

With respect to the allegations of fraud under Wisconsin law, the Seventh Circuit considered whether the defendants were amenable to service under the Wisconsin long-arm statute. The court concluded that the defendants could not be served because their activities in the state were not "substantial" in accordance with the Wisconsin long-arm statute. 132

In its discussion of the RICO claim, the Seventh Circuit noted that only nationwide, not world-wide, service of process was authorized by RICO. 133

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123. Id. at 1294 (citation omitted).
124. Id.
125. 969 F.2d 455 (7th Cir. 1992).
126. Id. at 457.
127. Id. at 461 (citations omitted).
128. Id.
130. 342 U.S. 437, 72 S. Ct. 413 (1952).
131. Helicopteros, 466 U.S. at 416, 104 S. Ct. at 1873.
132. Stauffacher, 969 F.2d at 457.
133. Id. at 460-61.
Therefore, the court reasoned that the Wisconsin long-arm statute must be used to accomplish service upon the alien defendants in Canada. However, the court then stated that “the analysis [on the RICO claim] is as above [on the state fraud claim].” It is unclear from the opinion what the Seventh Circuit meant by “analysis.” Although consistent with the Seventh Circuit’s opinions in United Rope and Amoco Cadiz as to whether the state long-arm statute in a federal question case must authorize service upon the defendant, the Seventh Circuit’s Stauffacher opinion conflicts with the earlier determination in United Rope and Amoco Cadiz that the jurisdictional inquiry is different in a federal question case than when the plaintiff’s relief is founded upon state law.

However, the distinction between federal question cases and diversity cases may reconcile Stauffacher with United Rope and Amoco Cadiz. In Stauffacher, the Seventh Circuit characterized the plaintiff’s cause of action as “mainly fraud and other violations of Wisconsin state law . . . garnished with RICO and federal securities claims.” Such a characterization leads to the conclusion that the court based its subject matter jurisdiction upon diversity of citizenship rather than upon the existence of a federal question. As the Supreme Court stated in American Well Works v. Layne & Bowler Co., “A suit arises under the law that creates the cause of action.”

Perhaps Stauffacher indicates that the Seventh Circuit is unwilling to permit the federal courts to exercise jurisdiction to the fullest extent that is consistent with due process when the federal claims asserted by the plaintiff are incidental to the plaintiff’s state law claims and state law provides the principal basis for the plaintiff’s relief. When the plaintiff’s cause of action is based primarily upon a state law claim as in Stauffacher, the plaintiff’s case arguably does not “arise under” the constitution or federal law; therefore, the plaintiff’s case should be classified as a diversity case, which would require the defendant to have minimum contacts with the state.

V. THE MAJORITY VIEW

The Fifth and Ninth Circuits are two of the five circuits that have explicitly held that an aggregation of the defendant’s national contacts is permitted by due

134. Id. at 461.
136. Stauffacher, 969 F.2d at 457.
138. Id. at 260, 36 S. Ct. at 586.
139. As the Supreme Court stated in Merrell Dow Pharmaceuticals, Inc. v. Thompson, “[a]lthough the constitutional meaning of ‘arising under’ may extend to all cases in which a federal question is an ingredient of the action, we have long construed the statutory grant of federal-question jurisdiction as conferring more limited power.” 478 U.S. 804, 807, 106 S. Ct. 3229, 3232 (1986).
140. See supra note 10.
process. Thus, the defendant must only have minimum contacts with the United States in general to satisfy constitutional requirements. However, these two circuits, in addition to the First, Third, and Eleventh Circuits, have concluded that when a defendant is served in accordance with a state long-arm statute in a federal question case, the "under the circumstances" language in Rule 4(e) imposes a state standard of amenability to jurisdiction. As the Fifth Circuit stated in Burstein v. State Bar of California, "the clear import of the 'under the circumstances' language" in Rule 4(e) is that a federal district court, "even in a federal question case, can use a state long-arm statute only to reach those parties whom a court of the state could also reach under it." Moreover, the Ninth Circuit in Go-Video, Inc. v. Akai Electric Co. interpreted Omni to compel this determination.

The First, Third, Fifth, Ninth, and Eleventh Circuits have concluded that the "under the circumstances" language in Rule 4(e) requires a two-step jurisdictional analysis: First, the state long-arm statute must allow the district court to exercise jurisdiction over the defendant. Second, the defendant must have sufficient contacts with the forum state so that the exercise of personal jurisdiction would be consistent with due process.

VI. THE PROCEDURAL DIFFICULTIES WITH SERVICE UNDER RULE 4(E)

A. Obtaining Jurisdiction Over Alien Defendants

As interpreted by the Sixth and Seventh Circuits, the "under the circumstances" language of Rule 4(e) does not require an alien defendant to possess minimum contacts with the state where the district court is located. Thus, under the minority view, that the defendant lacks minimum contacts with the forum state will not

141. FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. Unit A July 1981); Semegen v. Weidner, 780 F.2d 727, 730 (9th Cir. 1986).
142. United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1086 (1st Cir. 1992); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 291 (3d Cir. 1985); Burstein v. State Bar of California, 693 F.2d 511, 514 (5th Cir. 1982); In re Damodar Bulk Carriers, Ltd., 903 F.2d 675, 678-79 (9th Cir. 1990); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977).
143. 693 F.2d 511 (5th Cir. 1982).
144. Id. at 514.
145. 885 F.2d 1406 (9th Cir. 1989).
146. Id. at 1416.
prevent the court from exercising jurisdiction. However, the minority's view does require that service be authorized by the long-arm statute of the forum state. Thus, if the language of the long-arm statute does not authorize service of process on the defendant, then the plaintiff will have to select a forum located in a state where the language of the long-arm statute authorizes service.\footnote{148}

Rule 4(e) as interpreted by a majority of the circuits grants to many alien defendants immunity from suit in the United States. Under the first prong of the two-part test developed by the majority, the alien defendant may escape jurisdiction because the state long-arm is statutorily insufficient to allow the district court to obtain jurisdiction over him. Alternatively, the defendant's national contacts may be so scattered that they do not meet the minimum contacts threshold in any one state.\footnote{149} If an American plaintiff wishes to seek relief in either of these two situations, the majority's interpretation of Rule 4(e) requires him to sue in a foreign tribunal even though the aggregate of the alien defendant's national contacts would be sufficient to satisfy due process. As the dissent in \textit{Point Landing} stated:

In this federal question case, the effect of the majority's decision is to grant jurisdictional immunity to alien defendants who have done business in this country thereby destroying any real possibility of holding them accountable for their violation of federal statutes. This immunity is granted in spite of defendants’ apparently extensive contacts throughout the country, because the defendants’ contacts in Louisiana where the suit was filed, are so minimal that the state's long-arm statute cannot be used for service of process, under traditional \textit{International Shoe} principles.\footnote{150}

\section*{B. Under Both the Majority and Minority Views, Rule 4(e) Prevents the Uniform Application of Federal Law}

As interpreted by all of the circuits, Rule 4(e) may also prevent the uniform application of federal law. As the district court in \textit{Edwin J. Moriarty & Co. v. General Tire & Rubber Co.}\footnote{151} noted, the uniform application of federal law is undermined by the incorporation of a state standard of amenability to jurisdiction: “[I]n a case where the cause of action rests upon a federally-created right, ... national uniformity in enforcing that right should be the true guideline.”\footnote{152} Under the view adopted by the Sixth and Seventh Circuits, service upon a defendant may
be authorized by the long-arm statute of one state, but not by the long-arm statute of another state. Since service of process is a necessary pre-condition to the exercise of jurisdiction, the federal courts are unable to compel defendants who cannot be served to comply with federal law. Therefore, variations in the service power of the federal courts could result in the non-uniform enforcement of federal law.

Under the first part of the test adopted by the majority of the circuits, the long-arm statute of the state where a federal court is located may be statutorily insufficient to reach a particular defendant. However, a district court that sits in a state with a more liberal long-arm statute will be able to assert jurisdiction over the same defendant. The two-step test applied by the majority of the circuits that prevents the uniform application of federal law is illustrated in the following example: in Centronics Data Computer Corp. v. Mannesmann, A.G., the New Hampshire long-arm statute permitted the district court to assert jurisdiction over a German defendant who had participated in a conspiracy to violate the anti-trust laws of the United States. However, in I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp., another plaintiff filed suit against the same defendant on the same cause of action in a federal district court that sat in Minnesota. But in I.S. Joseph, the defendant was not subject to suit because the Minnesota long-arm statute did not statutorily allow service on the defendant and the defendant did not have minimum contacts with Minnesota.

VII. THE FEDERALISM CONCERNS THAT JUSTIFY THE ADOPTION OF A STATE STANDARD OF AMENABILITY TO JURISDICTION IN A DIVERSITY CASE ARE ABSENT IN A FEDERAL QUESTION CASE

When a federal district court exercises diversity jurisdiction, state law, rather than federal law, provides the basis for the plaintiff's relief. Since state law is to be applied by the federal district court, there are federalism concerns that justify the incorporation of a state standard of amenability to jurisdiction. As the Supreme Court stated in Guaranty Trust Co. v. York, "[A] federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." Moreover, the federal district court that sits in diversity "must ensure that the forum state does not unduly

154. See Berger, supra note 148, at 308-10.
156. Id. at 659.
158. Id. at 1025.
161. Id. at 108-09, 65 S. Ct. 1469-70.
encroach on a sister state’s interests.”162 Also, as the Seventh Circuit observed, “State-federal jurisdictional allocations would be thrown out of kilter if a federal court could give judgment in a diversity case that the state itself would have to dismiss.”

However, the federalism concerns that justify the imposition of a state standard of amenability to jurisdiction in diversity cases are absent in federal question cases.164 As the Sixth Circuit noted in Handley, when a federal court exercises federal question jurisdiction, “the federalism issue is of no relevance, for the court determines the parties’ rights and liabilities under uniform, national law. No state intrudes on another’s interests. The only relevant interest is the national one.”

Since the “under the circumstances” language in Rule 4(e) as interpreted by all of the circuits places some restrictions upon the service power of the federal courts, Congress could rectify this situation by adopting a provision that authorizes worldwide service of process in all federal question litigation.166

VIII. WORLD-WIDE SERVICE OF PROCESS

Although it may seem that enacting a world-wide service of process statute will result in a tremendous burden for the United States federal courts, there are three safeguards that can protect against this. First, federal question jurisdiction will only exist if the suit “aris[es] under the Constitution, laws, or treaties of the United States.”

165. Handley v. Indiana & Michigan Elec. Co., 732 F.2d 1265, 1269 (6th Cir. 1984) (quoting DeJames, 654 F.2d at 292 (Gibbens, J., dissenting)).
166. See supra notes 6 & 148. In April of 1993, the United States Supreme Court proposed Rule 4(K)(2) which will allow a federal district court in a federal question case to exercise personal jurisdiction over an alien defendant who has sufficient national contacts to satisfy due process, provided that the defendant is not subject to personal jurisdiction in the courts of general jurisdiction in any state. Rules of Civil Procedure, 146 F.R.D. 401, 416 (1993). Proposed Rule 4(K)(2) provides:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Id. Although the effect of this revision will ensure American plaintiffs a domestic forum in which they can sue an alien defendant who has minimum contacts with the United States, service under Proposed Rule 4(K)(2) is only available if the defendant cannot be served under any state long-arm statute. It could be expensive to prove that Proposed Rule 4(K)(2) is the only method available to serve the defendant. Gary B. Born and Andrew N. Vollmer, The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases, 150 F.R.D. 221, 227 (1993). For this reason, a federal statute that allows world-wide service in all federal cases would be preferable.
States.”167 All other cases will be deemed to be diversity suits in which the defendant must have minimum contacts with the state.168 Second, if the cause of action does not arise out of the defendant’s activities within the United States, due process requires that his contacts with the United States be “continuous and systematic.”169 Thus, the defendant’s national contacts must be more than just “minimum.” Finally, even if the defendant has sufficient contacts with the United States to satisfy due process, the federal district court can invoke the forum non conveniens doctrine and decline to hear the suit if it is of the opinion that the action would be more appropriately brought in the alien defendant’s country.170

A federal statute that allows world-wide service would empower the federal district courts in federal question cases to exercise jurisdiction over any defendant whose national contacts satisfied due process. Since the state jurisdictional lines drawn by Rule 4(f) and the “under the circumstances” language of Rule 4(e) would only apply in diversity suits, there would be no need for the district court in a federal question case to consider whether the state long-arm statute authorized service upon the defendant or to weigh the defendant’s contacts with the forum state. This federal statute would enable American plaintiffs to sue alien defendants in the United States if their national contacts satisfied due process. Moreover, a federal statute permitting international service would promote the uniform application of federal law. A federal statute that authorizes world-wide service of process is desirable because it would free federal courts from state jurisdictional constraints in federal question cases. However, as will be discussed below, the enactment of such a statute without a revision of 28 U.S.C. § 1391(c) will promote forum shopping by allowing plaintiffs to institute federal question suits against corporate defendants in any district in this country.

IX. CORPORATE VENUE WILL ALLOW FORUM-SHOPPING WITH A WORLD-WIDE SERVICE OF PROCESS STATUTE

In a federal question case, venue is proper wherever a defendant resides under 28 U.S.C. § 1391(b)(1).171 According to 28 U.S.C. § 1391(c), a corporation is deemed to reside in any district where it is subject to personal jurisdiction.172 A

168. See supra note 10.
171. 28 U.S.C. § 1391(b)(1) (1988) states: “A civil action wherein jurisdiction is not founded solely on citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State.”
172. 28 U.S.C. § 1391(c) (1988) provides:
For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district
federal statute that authorizes world-wide service of process would enable every federal district court in this country to assert in personam jurisdiction over a defendant who has minimum contacts with the United States. As a result, venue would be proper for corporate defendants in every district under 28 U.S.C. § 1391(b)(1) and (c).\textsuperscript{173}

Although the outcome of a federal question case is theoretically supposed to be the same regardless of where the suit is filed, in practice, different forums tend to produce different results. These differences may encourage plaintiffs to shop for the forum that offers the most favorable outcome. The combined effect of 28 U.S.C. 1391(b)(1) and (c) with a world-wide service of process provision would allow plaintiffs to choose any federal district in the country as the locale for their suit.

Many federal statutes are silent with respect to prescription, and the Supreme Court has held that the most analogous prescriptive period from state law should be borrowed when Congress has failed to provide a statute of limitations in a federal statute.\textsuperscript{174} Of course, differing statutes of limitations can encourage forum shopping. In \textit{Wilson v. Garcia},\textsuperscript{175} the Supreme Court held that the prescriptive period from state personal injury statutes should be borrowed if the plaintiff's suit is instituted under 42 U.S.C. § 1983.\textsuperscript{176} The result of \textit{Wilson} is that a section 1983 action that borrows the Louisiana statute of limitations will prescribe in one year under Louisiana Civil Code article 3492.\textsuperscript{177} But, a section 1983 action that incorporates the Mississippi statutes of limitations will prescribe in three years.\textsuperscript{178}

Another circumstance in which it would be advantageous for the plaintiff to forum-shop is where the federal courts differ in their interpretation of a particular federal statute. For example, the Ninth Circuit has determined that the doctrine of respondeat superior is not available to establish liability under section 10(b) of the Securities Exchange Act of 1934.\textsuperscript{179} By contrast, the Second Circuit has held that respondeat superior can be used to prove liability under the same statute.\textsuperscript{180}

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\textsuperscript{176} \textit{Id.} at 266-67, 105 S. Ct. at 1941-42.


\textsuperscript{179} \textit{Zweig v. Hearst Corp.}, 521 F.2d 1129, 1132-33 (9th Cir. 1975).

\textsuperscript{180} \textit{Marbury Management, Inc. v. Kohn}, 629 F.2d 705, 716 (2d Cir. 1980).
If the plaintiff files suit in a distant or inconvenient forum to obtain the advantage of a longer statute of limitations or a more favorable interpretation of a federal law, the defendant can move to transfer venue under 28 U.S.C. § 1404(a). However, the defendant bears the burden of convincing the court that the "interests of justice" require a transfer of the case to a more convenient forum. As the Supreme Court stated in Gulf Oil Corp. v. Gilbert, "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Moreover, if the defendant is denied his request for a venue transfer at the trial level, there is little chance of reversal on appeal since the appellate court must find that the trial judge abused his discretion. The Supreme Court in Van Dusen v. Barrack held that a venue transfer sought by the defendant under 28 U.S.C. § 1404(a) in a diversity case is only a change of courtrooms; therefore, the law to be applied in the case is not affected by the venue transfer. The lower federal courts, however, are split over whether a transfer of venue under 28 U.S.C. § 1404(a) results in a change of law in a federal question case.

When the plaintiff's cause of action is founded upon a federal statute that does not include a prescriptive period, and the statute of limitations must be borrowed from the law of the forum state, two district courts have concluded that a venue transfer does not affect the prescriptive period. In Thorn v. New York City Department of Social Services, the plaintiff commenced her suit in a district court located in Pennsylvania. The plaintiff's petition alleged violations of 42 U.S.C. § 1983. The plaintiff's suit had been timely instituted under the prescriptive period that was borrowed from Pennsylvania law. Nevertheless, the defendant successfully moved to transfer the suit to New York under 28 U.S.C. § 1404(a). Since the plaintiff's cause of action would have prescribed under the applicable

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181. 28 U.S.C. § 1404(a) (1988) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
184. Id. at 508, 67 S. Ct. at 843.
187. Id. at 639, 84 S. Ct. at 821.
New York statute of limitations, the defendant maintained that the plaintiff's suit should be dismissed. The court held that "[i]n determining the timeliness of Mrs. Thorn's section 1983 claims, this court must resolve the issue as it would have been resolved by the original forum, the Eastern District of Pennsylvania." In *Brick v. Dominion Mortgage & Realty Trust*, the district court had reached the same conclusion.

The decisions in *Thorn* and *Brick* are consistent with the Supreme Court's opinion in *Ferens v. John Deere*, a diversity case. In *Ferens*, the plaintiff was injured in Pennsylvania as the result of a defect in the defendant's tractor. Since John Deere was a corporation that engaged in business throughout the country, it had enough contacts with Mississippi for the exercise of jurisdiction to satisfy due process. The plaintiff had chosen to commence the suit in Mississippi to take advantage of the Mississippi statute of limitations and Mississippi tort law. The plaintiff successfully moved to transfer venue to Pennsylvania under 28 U.S.C. § 1404(a). The defendant argued that the plaintiff's suit should be dismissed because prescription had accrued under Pennsylvania tort law. The Supreme Court held that Mississippi tort law, including the statute of limitations, was to be applied as if the plaintiff's suit had remained in Mississippi. Since the plaintiff's cause of action had not prescribed under Mississippi law, the plaintiff was allowed to continue his suit in Pennsylvania.

By contrast, two district courts have determined that the case law of the circuit where the plaintiff's suit was commenced was not binding upon the transferee court when there was a change of venue under 28 U.S.C. § 1404(a). The plaintiffs in *Isaac v. Life Investors Insurance Co. of America* had originally filed suit in a federal district court in Alabama. The defendant's motion to transfer the case to Tennessee was granted by the Alabama district court. The issue before the Tennessee court was whether the plaintiffs' state law claims had been preempted by the Employment Retirement Income Security Act (ERISA). The Eleventh Circuit, whose decisions bind the Alabama transferor court, had determined that ERISA had preempted the plaintiff's state law claims. However, the Sixth Circuit, whose decisions bind the Tennessee district court, had not yet ruled upon the preemption issue. The Tennessee district court held that *Van Dusen* did not obligate it to follow the law of the Eleventh Circuit. "[W]hile the law of the transferor forum on federal issues merits close consideration, it is not binding on the transferee forum. Instead, each circuit must engage in independent analysis of

189. *Id.* at 1199.
190. *Id.* at 1197.
192. *Id.* at 299.
194. 494 U.S. at 520, 110 S. Ct. at 1278.
195. 494 U.S. at 519-20, 108 S. Ct. at 1278.
the issue, and it is only that circuit's decisions along with the Supreme Court, which bind the district courts in that circuit."

As stated above, in Van Dusen, the Supreme Court had held that the same law where the plaintiff filed his suit should be applied in the forum where the suit is transferred under 28 U.S.C. § 1404.198 The Isaac court concluded that the Van Dusen decision intended to prevent a defendant in a diversity case from using a venue transfer to avoid having the case decided under the law of the state where the plaintiff had filed suit. Since state law is not at issue in a federal question case, the Isaac court determined that Van Dusen was not applicable.199

The district court's conclusion in Scheinbart v. Certain-Teed Products200 was the same as that reached by the Isaac court when it determined whether a change of venue should be granted. The plaintiff had argued that the court should not grant the defendant's request for a venue transfer because the law in the Second Circuit where the suit was brought was more favorable than the law in the Third Circuit, to which her case would be transferred.201

Perhaps Thorn and Brick can be distinguished from Isaac and Scheinbart. Allowing a plaintiff to continue a suit that had been timely instituted in the original forum under a borrowed state statute of limitations does not require a district court to follow the law of a federal circuit court which is not in its direct chain of review or to adopt an analysis that may be in conflict with the case law of the circuit court that reviews its decisions.

A world-wide service of process statute would make venue proper in a suit against a corporate defendant in every federal district under 28 U.S.C. § 1391(b)1 and (c). Before a federal statute is enacted that authorizes world-wide service of process, the definition of corporate residence in 28 U.S.C. § 1391(c) for domestic corporations should be revised to prevent forum shopping by plaintiffs which will subject corporate defendants to inconvenient litigation. As the court in Energy Resources Group, Inc. v. Energy Resources Corp.202 stated: "The venue statutes were devised to achieve two basic purposes: to lay venue in a place having a logical connection with the parties to the litigation, and to afford the defendant some protection against the hardship of having to litigate in some distant place."203

If in federal questions suits, residence for domestic corporations was defined as the state where a corporation was incorporated, then venue would be proper in only one district, rather than in every district where the corporation is subject to personal jurisdiction under 28 U.S.C. § 1391. This venue revision would curtail

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197. Id. at 863.
199. Isaac, 749 F. Supp. at 863.
201. Id. at 710-11.
203. Id. at 233.
forum shopping. Venue for alien corporate defendants would not change, however, because it would remain proper in every district of the country under 28 U.S.C. § 1391(d).\(^\text{204}\) Also, venue would remain proper in the district where “a substantial part of the events or omissions giving rise to the claim occurred” under 28 U.S.C. § 1391(b)\(^2\) or wherever the defendant is “found” under 28 U.S.C. § 1391(b)\(^3\).\(^\text{205}\)

**X. CONCLUSION**

As Judge Wisdom stated in *Point Landing*, “A federal court’s service arm in a federal question case should not be handcuffed to the place of the court’s seat.”\(^\text{206}\) Federal courts should not be required to rely upon long-arm statutes enacted by state legislatures to acquire jurisdiction over defendants in federal causes of action. A federal statute authorizing world-wide service of process would allow American federal courts to obtain jurisdiction in federal question cases over alien defendants who possess sufficient contacts with the United States to satisfy due process. Moreover, a world-wide service of process statute will promote the uniform application of federal law, which will enhance its effectiveness.

*Lisa Rouchell*

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204. 28 U.S.C. § 1391(d) states: “An alien may be sued in any district.”
205. 28 U.S.C. § 1391(b) provides:
   A civil action wherein jurisdiction is not founded solely upon diversity of citizenship may . . . be brought . . . in (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.