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Federal Long-Arm Statute

*An avenue for asserting personal jurisdiction
of foreign nationals who are not focused in a particular state.*

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LITIGATORS practicing in the international arena need to be aware of an important but little-known provision of the Federal Rules of Civil Procedure governing when a federal court can assert personal jurisdiction over a foreign national with U.S. business interests not focused in any particular state. Under that rule, a foreign national that is not amenable to personal jurisdiction in any individual U.S. state may nonetheless be subject to jurisdiction in a federal court on federal claims, if that foreign national's contacts with the United States as a whole are sufficient to satisfy the requirements of due process. This article addresses the history and use of that rule, Federal Rule of Civil Procedure 4(k)(2), the so-called federal long-arm statute.

Rule 4(k)(2) was enacted in 1993 to fill a procedural gap identified by the U.S. Supreme Court in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). In that case, American investment advisors sought to implead a British broker in federal



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suits based on trades executed on a London-based commodities exchange. Federal jurisdiction was based upon the Commodity Exchange Act, which is silent as to service of process.

The British broker moved to dismiss for lack of personal jurisdiction. The district court initially rejected this motion because it concluded that the British broker's contacts with the United States as a whole supported a federal court's assertion of personal jurisdiction. As the result of a subsequent appellate court decision, however, the district court reversed itself, ruling that, because the CEA did not authorize service of process internationally, the court's jurisdiction was governed by Federal Rule of Civil Procedure 4(e), which authorized service of process only where the forum state could assert personal jurisdiction. The British broker's contacts with the forum

state were insufficient to support personal jurisdiction, so it was dismissed from the suit.

A unanimous Supreme Court affirmed. The Court held that a defendant must be amenable to service of process in the relevant federal court for that court to assert personal jurisdiction. *Id.* at 104. The version of Rule 4 of the Federal Rules of Civil Procedure applicable at that time permitted service of process subject either to independent federal law or to the law of the state in which the district court sat. The Court concluded that, because the CEA did not have a provision permitting service on the British broker in this instance, service was only proper if the state long-arm statute permitted it. Since the British broker lacked sufficient contacts with the state, the district court could not assert jurisdiction. *Id.* at 108.

Looking forward, the Court noted, "A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress." *Id.* at 111. The Advisory Committee took

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up this invitation, and Rule 4(k)(2) is the result.

Three Requirements

Rule 4(k)(2) provides: "If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service 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."

To establish jurisdiction under Rule 4(k)(2), the plaintiff must demonstrate that: (1) it has a cause of action arising under federal law, and is not relying upon diversity jurisdiction in bringing a suit in federal court, *United States v. Int'l Brotherhood of Teamsters*, 945 F.Supp. 609, 617 (S.D.N.Y. 1996); (2) the defendant is not subject to the jurisdiction of the courts of any state, *Richards v. Tsunami Softgoods, Inc.*, 239 F.Supp.2d 80, 87-88 (D. Me. 2003); and (3) the defendant's contacts with the United States as a whole are sufficient to satisfy the requirements of due process. *Norvel Ltd. v. Ulstein Propeller AS*, 161 F.Supp.2d 190, 206-07 (S.D.N.Y. 2001). While case law under Rule 4(k)(2) is still sparse, courts have examined and discussed all three requirements.

The requirement that the claim be based upon federal law is relatively straightforward. Among claims that will support subject-matter jurisdiction in federal court, only state-law claims brought in diversity are excluded. Thus, a claim based on a federal statute, such as the Lanham Act, is a claim based upon federal law. See, e.g., *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006). Claims based on admiralty law are claims based upon federal law under Rule 4(k)(2). *Norvel Ltd.*, 161 F.Supp.2d at 200. Claims for which the rule of decision will be based upon federal common law are also claims based upon federal law under Rule 4(k)(2). *United States v. Swiss American Bank*, 191 F.3d 30, 42 (1st Cir. 1999). Finally, a suit seeking enforcement of a decision issued by an Election Officer overseeing union elections pursuant to a Consent Decree enacted under RICO (Racketeer Influenced Corrupt Organizations Act) has been found to be a claim arising under federal law for Rule 4(k)(2)

purposes. *Int'l Brotherhood of Teamsters*, 945 F.Supp. at 618.

Jurisdiction in Any State

The second requirement, that the defendant at issue not be subject to the jurisdiction of the courts of any state, is the requirement that has raised the most unique set of problems: How is the court to determine that the defendant is not subject to personal jurisdiction in any state? Is the defendant required to cite one or more states that can assert personal jurisdiction, in essence forcing the defendant to consent to personal jurisdiction there? Is the plaintiff required to demonstrate that no state can assert personal jurisdiction over the defendant, obligating the plaintiff to undertake a 50-state survey of long-arm rules and demonstrate the defendant's lack of contacts with every state? Because this requirement can potentially force a party to argue against its own interests, courts have taken a variety of approaches to resolving it.

Judicial interpretation
of Rule 4(k)(2) is still
relatively limited. In today's
international business
climate, however, the rule
has enormous importance.

In *United States v. Offshore Marine Ltd.*, 179 F.R.D. 156 (D. V.I. 1998), the court applied a burden of proof analysis. Because the plaintiff has the burden to prove that the court has personal jurisdiction over the defendant, the court dismissed the case when the plaintiff was unable to demonstrate that the defendant was not subject to personal jurisdiction in any state.

Other courts have approached the issue in other ways. In *Int'l Brotherhood of Teamsters*, the court found this requirement satisfied because the defendant would not be amenable to service under the long-arm statute of the forum state. 945 F.Supp. at 618-20. In *Richards v. Tsunami Softgoods, Inc.*, the court held that the rule did not apply because the defendant would likely be subject to the personal jurisdiction of one or two other states. 239 F.Supp.2d at 87-88.

In *Norvel Ltd.*, the court asked the parties to brief the issue and permitted the plaintiff to identify the other jurisdictions most likely at issue in its papers. 161 F.Supp.2d at 200.

Two federal courts of appeals have formulated specific tests for this requirement. In *ISI Int'l, Inc. v. Borden Ladner Gervais L.L.P.*, 256 F.3d 548 (7th Cir. 2001), the U.S. Court of Appeals for the Seventh Circuit noted that "one might read Rule 4(k)(2) to make matters worse by requiring 51 constitutional decisions: The court must first determine that the United States has power and then ensure that none of the 50 states does so." The Seventh Circuit concluded, however, that "[c]onstitutional analysis for each of the 50 states is eminently avoidable by allocating burdens sensibly. A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed.... This procedure makes it unnecessary to traipse through the 50 states, asking whether each could entertain the suit." 256 F.3d at 552. Because the defendant in the action before the court did not concede that it was subject to personal jurisdiction in another state, the Seventh Circuit ruled that this requirement of Rule 4(k)(2) was satisfied and the defendant was not subject to the jurisdiction of any state.

The U.S. Court of Appeals for the First Circuit has taken a completely different approach. In *United States v. Swiss American Bank*, 191 F.3d 30 (1st Cir. 1999), the defendants, like the defendants in *Offshore Marine*, argued that the government was required to allege facts demonstrating that no state had personal jurisdiction over the defendants: "This paradigm in effect requires a plaintiff to prove a negative fifty times over—an epistemologically quandary which is compounded by the fact that the defendant typically controls much of the information needed to determine the existence and/or magnitude of its contacts with any given jurisdiction." 191 F.3d at 40.

In contrast, placing the burden on a defendant to demonstrate the applicability of this requirement "threatens to place a defendant in a 'Catch-22' situation, forcing it to choose between conceding its potential amenability to suit in federal court (by denying that any state court has jurisdiction over it) or conceding its potential amenability to suit in some identified state court." *Id.* at 41.

To avoid this dilemma, the First Circuit

formulated a different test. First, a plaintiff must make a prima facie case for the applicability of Rule 4(k)(2), under which the plaintiff would certify that, based on information readily available, the defendant is not subject to suit in the courts of general jurisdiction of any state. The plaintiff would also have to demonstrate that the defendant has sufficient contacts with the United States as a whole to justify the assertion of personal jurisdiction under Rule 4(k)(2). Once this prima facie case has been made, the burden shifts to the defendant to produce evidence demonstrating either that it is subject to the personal jurisdiction of a state, or that its contacts with the United States as a whole are insufficient. *Id.*

To date, no other circuit has adopted the First Circuit's test.¹ However, the Fifth Circuit and the D.C. Circuit have adopted the Seventh Circuit's approach and shifted the burden to the defendant to name a state in which it is subject to personal jurisdiction. *Adams v. Unione Mediterranea Di Sicurtà*, 364 F.3d 646, 651 (5th Cir.), cert. denied, 543 U.S. 979 (2004); *Mwani v. Bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005). Whether other circuits will follow the lead of the Seventh or First circuits or take their own paths in determining how to satisfy this vexing requirement is unclear.

Contacts With United States

The third requirement, demonstrating that the defendant's contacts with the United States as a whole satisfy the requirements of due process for the assertion of personal jurisdiction, follows the conventional approach for demonstrating that due process has been satisfied with respect to state long-arm statutes. Specifically, in determining whether the defendant has minimum contacts with the United States, the approach is the same as with respect to an individual state. If the defendant's contacts with the United States are "continuous and systematic," and the exercise of jurisdiction is reasonable, the district court can exercise general jurisdiction over the defendant for any claim, even one unrelated to those contacts.

If the stringent requirements for general jurisdiction are not satisfied, the court may still exercise specific jurisdiction over the defendant if the claim directly relates to or arises out of the defendant's contacts with the United States, the defendant has purposely availed itself of the benefits and protections afforded by U.S. law, and the

exercise of jurisdiction is reasonable under the circumstances.

United States v. Swiss American Bank, 274 F.3d 610 (1st Cir. 2001), contains an extensive analysis of general and specific personal jurisdiction under Rule 4(k)(2). After the district court ruled that the assertion of personal jurisdiction would not satisfy due process, the First Circuit concluded that, in the absence of offices or non-sporadic direct business activity in the United States, the defendant's conduct of business over the Internet and with correspondent banks that made it part of an international banking community that did business in the United States did not satisfy the "continuous and systematic" test for general jurisdiction. 274 F.3d at 619-20.

The First Circuit then concluded that there was an insufficient relationship between the claims asserted in the action and the United States to establish specific jurisdiction. 274 F.3d at 620-22. It rejected the plaintiff's argument that the claims were related to the United States because the defendant's actions caused "wrongful effects" there, concluding that the analysis of the effects of a defendant's activities in the forum should be focused on the defendant's purposeful availment of the laws of the forum prong rather than the relatedness prong. 274 F.3d at 622-24.

Other courts have been more willing to find specific jurisdiction's relatedness requirement satisfied because the defendant's activities caused effects in the United States. In *Int'l Brotherhood of Teamsters*, for example, the court concluded that the assertion of personal jurisdiction satisfied due process because, even though the defendant transacted no business in the United States, its interference with elections undertaken by an international union in Canada interfered with the United States' ability to eliminate corruption from the union pursuant to a RICO consent decree. 945 F.Supp. at 621-22. Similarly, in *Mwani v. Bin Laden*, the D.C. Circuit held that al Qaeda's bombing of U.S. embassies in Africa satisfied the relatedness test because their effects reverberated in

the United States, and because al Qaeda purposefully directed its terrorist activities at the United States. 417 F.3d at 13. As these cases demonstrate, the due process determination, whether for specific or general jurisdiction, and whether focused on a state or the United States under Rule 4(k)(2), is a fact-specific inquiry depending upon individual contacts that each defendant has with the United States.

Conclusion

Judicial interpretation of Rule 4(k)(2) is still relatively limited. In today's international business climate, however, the rule has enormous importance. If your client is a foreign corporation facing litigation with a U.S. citizen because of a business relationship functioning largely outside the United States, Rule 4(k)(2) may be your greatest impediment to avoiding U.S. litigation. On the other hand, if your client is an American citizen in a dispute with a foreign national, Rule 4(k)(2) offers an opportunity that would not otherwise exist to litigate the claim in the United States. Either way, Rule 4(k)(2) is a rule of great potential significance to any litigator practicing in the international arena.

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1. The First Circuit test was recently applied by a judge in the Southern District of New York. *Porina v. Marwood Shipping Co., Ltd.*, 2006 WL 2465819 at *3-*4 (S.D.N.Y. Aug. 24, 2006).

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