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NOTES

PERSONAL JURISDICTION OVER ALIEN CORPORATIONS IN ANTITRUST ACTIONS: TOWARD A MORE UNIFORM APPROACH

INTRODUCTION

Section 12 of the Clayton Act rests venue in antitrust suits against corporations “not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business” and allows service of process “in the district of which it is an inhabitant, or wherever it may be found.”¹ Although the jurisdictional import of section 12 is not explicit, most federal courts have gleaned from it a federal predicate for the exercise of in personam jurisdiction.² Other courts, however, reluctant to ascribe

¹ 15 U.S.C. § 22 (1976). In its entirety, Section 12 of the Clayton Act provides: Any suit, action or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (1976).

² *E.g.*, *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 684 (5th Cir. 1977); *B.J. Semel Assocs., Inc. v. United Fireworks Mfg. Co.*, 355 F.2d 827, 830-31 (D.C. Cir. 1965); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 317 (E.D. Pa. 1975); *see notes 37 & 89 and accompanying text infra. See generally* 16M J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 104.04[5][a] (1978). No federal statute of general applicability affords an express predicate for the assertion of personal jurisdiction. *Gkiasis v. Steamship Yiosonas*, 342 F.2d 546, 548 (4th Cir. 1965); 7 *VILL. L. REV.* 117, 117 (1961). Other federal jurisdictional predicates have been utilized in antitrust actions because of the uncertainty surrounding section 12's jurisdictional significance. In actions involving patent violations by alien defendants, plaintiffs have successfully established in personam jurisdiction by invoking 35 U.S.C. § 293 (1976), which confers long-arm jurisdiction in the District of Columbia based on the situs of a United States patent there. *E.g.*, *United States v. Farbenfabriken Bayer A.G.*, [1968] *TRADE CAS. (CCH)* ¶ 76,569 (D.D.C.), *cert. denied*, 393 U.S. 958 (1968); *see Gerber Scientific Instrument Co. v. Barr & Stroud, Inc.*, 383 F. Supp. 1238, 1240 (D. Conn. 1973); *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 227 (D.N.J. 1966). Similarly, although it has not yet been implemented in the antitrust context, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1976), provides a jurisdictional predicate for foreign sovereigns acting in their commercial capacities. *See Velvel, Antitrust Suits by Foreign Nations*, 25 *CATH. U. L. REV.* 1, 22-23 & n.94 (1975).

In contrast, the issue of subject matter jurisdiction over antitrust violations by alien defendants is rarely problematic. Under the rule laid down by Judge Learned Hand in

to the statute any jurisdictional significance per se,³ have adhered to the principles found in state long-arm statutes.⁴ The relative merit of employing state jurisdictional conventions or the federal standard arguably embodied in section 12 seems to be a largely academic question where the amenability of domestic corporations is at issue;⁵ since the components of antitrust venue and state long-arm jurisdiction are often analytically indistinguishable,⁶ a jurisdictional inquiry under either is likely to produce the same result. In the context of alien corporations, however, significance attaches to the jurisdictional basis used. While most state long-arm statutes

United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945), the federal courts have jurisdiction over the acts of foreign corporations if those acts are intended to have a substantial effect on American commerce and do in fact have such an adverse effect. For a general discussion of the extraterritorial application of United States antitrust laws to foreign violations, see Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187 (1966); Fukuda, *Jurisdiction in International Application of United States Antitrust Laws*, 12 CLEV.-MAR. L. REV. 125 (1963); Haight, *International Law and the Extraterritorial Application of the Antitrust Laws*, 63 YALE L.J. 639 (1954); Note, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L.J. 661, 661-62 (1955).

³ See, e.g., *McGuire v. Singer Co.*, 441 F. Supp. 210, 212-13 & n.2 (D.V.I. 1977); cf. *Kipperman v. McCone*, 422 F. Supp. 860, 870-73 (N.D. Cal. 1976) (28 U.S.C. § 1391(e) applies to service; in personam jurisdiction is function of minimum contacts with state); 1 MOORE'S FEDERAL PRACTICE ¶ 0.140[1.-1], at 1309 (2d ed. 1979) (venue provisions of 15 U.S.C. § 15 incorrectly labelled as jurisdictional).

Merely from its language, § 12 does not appear to prescribe a federal standard of jurisdiction; ostensibly, the first clause addresses venue and the second speaks to service of process. *McGuire v. Singer Co.*, 441 F. Supp. 210, 213 n.2 (D.V.I. 1977); see 51 CONG. REC. 14214, 15943 (1914). The legislative history of the Clayton Act is equally inconclusive on the intended jurisdictional implications of § 12. In both the Senate and the House debates, the legislators avoided an indiscriminate use of terms, see 51 CONG. REC. 9414, 9415, 9607, 14214, 15943 (1914), perhaps implicitly assigning to venue, service of process, and jurisdiction their strictly theoretical meanings. In addition, there are strong indications that Congress did not intend to affect the jurisdiction of the federal courts in any manner. One Senator noted: "[W]here the jurisdiction is already given and the right already secured, this speaks of the service of process and how it may be had—quite a different subject. There is no jurisdiction conferred here, and no right conferred except as to where a suit may be brought and how process may be served." *Id.* at 16048 (remarks of Sen. Chilton); see also *id.* at 9607, 9466, 9467, 16049. On the other hand, a proposal that would have directly addressed the jurisdictional issue, see *id.* at 9416-17 (remarks of Rep. Cullop), was summarily dismissed as unnecessary and confusing. *Id.* at 9417 (remarks of Rep. Floyd). This may be evidence of a general consensus that the matter received adequate coverage in the provision as enacted. See also *id.* at 16274.

⁴ See notes 21-27 and accompanying text *infra*.

⁵ Cf. Bloch, *Extraterritorial Jurisdiction of U.S. Courts in Sherman Act Cases*, 54 A.B.A.J. 781, 783 (1968) (issue of personal jurisdiction in antitrust cases not problematic); Victor & Hood, *Personal Jurisdiction, Venue & Service of Process in Antitrust Cases Involving International Trade: Amenability of Alien Corporations to Suit*, 46 ANTITRUST L.J. 1063, 1079-80 (1977) (issue of personal jurisdiction in antitrust cases not problematic).

⁶ See note 39 and accompanying text *infra*.

allow worldwide service of process, federal courts have generally noted the inability of section 12's process provision to reach corporate defendants that must be served outside the United States.⁷ These federal courts have permitted service on an alien corporation only through an agent "found" in the country.⁸ Necessity, therefore, apparently has prompted reliance on state jurisdictional standards for this class of defendants. Because of the significant number of foreign corporations engaging in international commerce with the United States, the accountability of aliens for any American anticompetitive activity is a particularly important concern.⁹

This Note initially will examine the implementation of state principles of jurisdiction in federal antitrust cases.¹⁰ A discussion and evaluation of the decisional law and statutory sources of a federal standard of amenability in antitrust actions will follow.¹¹ Finally, a federal standard derived from existing law and supported by judicial precedent will be suggested.¹²

⁷ See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 329-30 (E.D. Pa. 1975); *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70, 80 (S.D.N.Y. 1965).

⁸ E.g., *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 372 (D. Md.), *aff'd*, 554 F.2d 623 (4th Cir. 1975), *cert. denied*, 434 U.S. 923 (1977); *In re Siemens & Halske A.G.*, 155 F. Supp. 897, 898 (S.D.N.Y. 1957); *In re Elec. & Musical Indus., Ltd.*, 155 F. Supp. 892, 895 (S.D.N.Y. 1957); see notes 48-65 and accompanying text *infra*.

⁹ Cf. *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 565 (1980) (increase in interstate trade and advances in technology and transportation create need for more comprehensive jurisdictional standards).

Even though not subject to personal jurisdiction, antitrust defendants may suffer adverse consequences through restraint and forfeiture of inventory pursuant to § 6 of the Sherman Act, 15 U.S.C. § 6 (1976). See Note, *Extraterritorial Application of Federal Antitrust Laws: Delimiting the Reach of Substantive Law Under the Sherman Act*, 20 VAND. L. REV. 1030, 1032 n.12 (1967). Section 76 of the Wilson Tariff Act, 15 U.S.C. § 11 (1976), has a similar provision for imported goods. Although these provisions have been successfully utilized in a number of actions, see cases cited in K. BREWSTER, *ANTITRUST AND AMERICAN BUSINESS ABROAD* § 9.1.2 (1958), it is generally conceded that resort to restraint and forfeiture is a less desirable alternative to the antitrust plaintiff than a full-fledged adjudication yielding a personally binding judgment. *Id.* Similarly, a corporation over whom personal jurisdiction cannot be established may still be commercially and financially affected through the abrogation of contract rights or the reassignment of property in which it has an interest, even without making it a party to the proceedings. While this may provide a public examination of the absent party's conduct, such indirect enforcement is likewise less desirable. *Id.* § 4.1.7.

¹⁰ See notes 20-31 and accompanying text *infra*.

¹¹ See notes 32-97 and accompanying text *infra*.

¹² See notes 98-111 and accompanying text *infra*.

THE DIVERSE APPROACHES IN EXISTING LAW: FEDERAL VERSUS STATE BASES OF JURISDICTION

Jurisdiction in personam relates to the power of a court to subject a defendant to its adjudication through the issuance of process and to render an enforceable judgment.¹³ Modern formulations of personal jurisdiction¹⁴ thus involve a double-faceted inquiry: the amenability of the defendant to suit in a particular forum¹⁵ and the sufficiency of the notice afforded him.¹⁶ The concept of amenability may be defined as the existence of circumstances that connect the forum, the defendant, and the facts of the case so that it is fair and reasonable for the court to assert jurisdiction over a party.¹⁷ The judicial power vested in a court as a result of these contacts, however, may be exercised only following service of process, which generally fulfills the notice requirement.¹⁸ Thus, service of process, although not an independent source of power over a defendant, is a prerequisite to the exercise of personal jurisdiction founded upon sufficient grounds.¹⁹

State Long-Arm Statutes

Tentativeness on the part of courts in extending the reach of section 12's process clause to include service in foreign countries²⁰

¹³ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Japan Gas Lighter Ass'n v. Ronson Corp.*, 257 F. Supp. 219, 224 (D.N.J. 1966); *Victor & Hood*, *supra* note 5, at 1065; Note, *Venue in Private Antitrust Suits*, 37 N.Y.U.L. Rev. 268, 268 n.3 (1962).

¹⁴ Notions of personal jurisdiction have undergone great changes since its early territorial philosophy. Compare *Pennoyer v. Neff*, 95 U.S. 714 (1877) with *Green v. Chicago B. & Q. Ry.*, 205 U.S. 530 (1907) and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). See generally *Shaffer v. Heitner*, 433 U.S. 186 (1977). For a discussion of the doctrinal development of personal jurisdiction through *International Shoe*, see 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1067 (1969 & Supp. 1979).

¹⁵ See *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559, 564 (1980); Foster, *Judicial Economy; Fairness and Convenience of Place of Trial: Long-Arm Jurisdiction in District Courts*, 47 F.R.D. 73, 83-85 (1968).

¹⁶ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20 (1950); Foster, *supra* note 15, at 83-84.

¹⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 37-38 (1971); Foster, *supra* note 15, at 85.

¹⁸ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 320 (1950); 16M J. VON KALINOWSKI, *supra* note 2, at §§ 104.01, 104.03[1].

¹⁹ See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); Miller, *Implementing Current Theories of Jurisdiction, Venue and Service of Process—Proposals for Revision of the Ohio Statutes*, 29 OHIO ST. L.J. 116, 120, 127 (1968). Constitutional considerations of due process require that service be reasonably calculated to apprise the defendant of the pendency of the proceedings against it. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); Miller, *supra*, at 120.

²⁰ Only a few courts have adopted the construction that § 12 authorizes foreign service.

has been one factor triggering recourse to local procedural law in antitrust cases.²¹ It is settled that the Federal Rules of Civil Procedure authorize the use of local procedural law even in cases exclusively within the subject matter jurisdiction of the federal courts.²² Thus, it cannot reasonably be debated that the use of state jurisdictional standards in antitrust suits is at least technically permissible. The transaction of business and "tortious act" provisions of state long-arm statutes have most frequently been invoked to secure jurisdiction.²³ Where jurisdiction is predicated upon a transaction of business by the defendant within the state, these courts have reasoned that, because the defendant's forum activity has ful-

E.g., *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 79 (S.D.N.Y. 1965) (service allowed in Italy by registered mail). Although the *Hoffman* rule comports with judicial interpretations of similarly worded provisions, *see, e.g.*, *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1339-40 (2d Cir. 1972) (15 U.S.C. § 78aa); *SEC v. Briggs*, 234 F. Supp. 618, 621-22 (N.D. Ohio 1964) (15 U.S.C. §§ 77v(a), 78aa), and other courts have concurred by implication, *see Ag-Tronic, Inc. v. Frank Paviour, Ltd.*, 70 F.R.D. 393 (D. Neb. 1976), the number of courts subscribing to *Hoffman's* reasoning has been unimpressive, *see Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262 (E.D. Pa. 1975); *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, [1973-1] TRADE CAS. (CCH) ¶ 74,594 (S.D.N.Y. 1973). The hesitancy by the *Hoffman* and *Zenith Radio* courts can be shown, however, by their alternative holdings that service had also been valid under state law. *See* 402 F. Supp. at 329-30; 244 F. Supp. at 80.

²¹ *See* *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977); 2 MOORE'S FEDERAL PRACTICE ¶ 4.25[5] n.5, at 260-61 (2d ed. 1979) [hereinafter cited as 2 MOORE].

Other circumstances that appear to have triggered state long-arm analyses include the forum non conveniens doctrine, *see McGuire v. Singer Co.*, 441 F. Supp. 210 (D.V.I. 1977), the assertion by the plaintiff of a non-pendent state claim supported only by diversity, in addition to an antitrust claim, *see id.*; *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977); *McCrary Corp. v. Cloth World, Inc.*, 378 F. Supp. 322 (S.D.N.Y. 1974), the interposition of a federal claim, that does not receive the benefit of extraterritorial service, in conjunction with an antitrust claim, *see Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123 (D.N.H. 1975); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965), the apparently inadvertent use of state means of service of process, *see Black v. Acme Markets, Inc.*, 564 F.2d 681, 684 (5th Cir. 1977), and a determination that federal notions of piercing the corporate veil to obtain jurisdiction were not applicable, *see Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 849 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); 2 MOORE, *supra*, ¶ 4.25[6] n.37, at 278.

²² *See* *United States v. First Nat'l City Bank*, 379 U.S. 378, 381 (1965); *Wolfe v. Doucette*, 348 F.2d 635, 639 (9th Cir. 1965); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 133 (D.N.H. 1975); *Seymour v. Parke, Davis & Co.*, 294 F. Supp. 1257, 1259 (D.N.H. 1969), *aff'd*, 423 F.2d 84 (1st Cir. 1970); *United States v. Montreal Trust Co.*, 35 F.R.D. 216 (S.D.N.Y. 1964); Advisory Committee Note to FED. R. CIV. P. 4(e), *cited at* 2 MOORE, *supra* note 21 ¶ 4.01[21], at 32; 4 C. WRIGHT & A. MILLER, *supra* note 14, § 1115.

²³ *See, e.g.*, *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 847, 849 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977).

filled the transaction of business requirement for venue under section 12, those contacts also render jurisdiction proper.²⁴ In contrast, jurisdiction based upon the commission of a tortious act within the state has been analytically more distinct. Under the so-called "target theory" of jurisdiction, conspiratorial activities without the state having tortious consequences within the state may provide a sufficient jurisdictional predicate.²⁵ While the element of scienter has figured prominently in some instances in which jurisdiction has been upheld on a target basis,²⁶ the lesser threshold of foreseeability under general tort principles has also sufficed.²⁷

²⁴ See, e.g., *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 134 (D.N.H. 1975); *McCroxy Corp. v. Cloth World, Inc.*, 378 F. Supp. 322, 325 (S.D.N.Y. 1974); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 79-80 (S.D.N.Y. 1965). Some courts have departed from the more traditional indicia of a "transaction of business" by finding that the defendant had transacted business within the state by engaging in conduct elsewhere which produced in-state effects giving rise to the cause of action. See, e.g., *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 666-68 (D.N.H. 1977); *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842, 844-45 (D. Ore. 1972); *Mari-copa County v. American Petrofina, Inc.*, 322 F. Supp. 467, 469 (N.D. Cal. 1971); *Albert Levine Assocs. v. Bertoni & Cotti, S.p.A.*, 314 F. Supp. 169, 171 (S.D.N.Y. 1970). *But see* *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337, 344, 346 (E.D. Mich. 1977); *I.S. Joseph Co. v. Mannesman Pipe & Steel Corp.*, 408 F. Supp. 1023, 1024-25 (D. Minn. 1976).

²⁵ See, e.g., *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 685 (5th Cir. 1977); *Cherokee Laboratories, Inc. v. Rotary Drilling Servs. Inc.*, 383 F.2d 97, 103 (5th Cir. 1967); *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 848 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); *Jack O'Donnell Chevrolet, Inc. v. Shankles*, 276 F. Supp. 998, 1002-04 (N.D. Ill. 1967). The "target theory" appears to derive its authority from *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*, 344 F.2d 860, 864-65 (9th Cir. 1965). In *McGee*, the Supreme Court sustained the jurisdiction of a state court over a nonresident defendant based upon a finding that it deliberately and intentionally brought about in the forum the alleged injuries. 355 U.S. at 223.

Analogizing the relevant policy considerations to those involved in products liability cases, one court has concluded that there is "an even greater reason for reaching a manufacturer in antitrust cases—every buyer of such a 'tainted' product is injured and thus the injury is widespread," whereas injuries due to defectively manufactured products tend to be more localized and relatively infrequent. *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 847-48 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); *cf. Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842, 844-45 (D. Ore. 1972) (court analogized products liability cases in laying venue on a target basis).

²⁶ See, e.g., *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 848 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977); *Jack O'Donnell Chevrolet, Inc. v. Shankles*, 276 F. Supp. 998, 1002 (N.D. Ill. 1967).

²⁷ See, e.g., *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842, 844-45 (D. Ore. 1972). It appears that, unlike the cases in which the co-conspirator theory of venue was at issue, see note 44 *infra*, little concern has been expressed over the possibility that a

Reliance on these statutes could result in irregular enforcement of the antitrust laws,²⁸ however, because of the disparities in the scope of the long-arm statutes of the several states.²⁹ Moreover,

determination on the merits may ultimately show that jurisdiction or venue was improper. See *Iranian Shipping Lines, S.A. v. Moriates*, 377 F. Supp. 644 (S.D.N.Y. 1974); *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842 (D. Ore. 1972). *But see* *West Virginia v. Morton Int'l, Inc.*, 264 F. Supp. 689, 696 (D. Minn. 1967).

The use of a "target theory" of jurisdiction would appear to accord with the intent of the framers of the Clayton Act to provide antitrust plaintiffs with the broadest procedural discretion permissible under the Constitution, *see* note 99 *infra*, and at least one court has laid venue under § 12 on a "target" basis, *see* *Courtesy Chevrolet, Inc. v. Tennessee Walking Horse Breeders' & Exhibitors' Ass'n*, 344 F.2d 860 (9th Cir. 1965). According to the *Courtesy Chevrolet* court, a single act may be sufficient to fulfill the venue requirements under § 12's "transaction of business" provision. *Id.* at 865; *see* *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842, 844-45 (D. Ore. 1972). The court cautioned, however, that "in each case it is the totality of all the facts which determines whether the defendant is doing business, or found" so as to establish amenability to service within a district. 344 F.2d at 865.

²⁸ A striking example of irregular enforcement can be found by comparing *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023 (D. Minn. 1976), with *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977). In these cases, the same defendant, based upon comparable allegations and activities within each state, was found to be subject to the long-arm jurisdiction of New Hampshire, *id.* at 668, but unamenable to the judicial power of a federal court sitting in Texas, 408 F. Supp. at 1025. *See also* *Hartley v. Sioux City & New Orleans Barge Lines, Inc.*, 379 F.2d 354, 356 n.2 (3d Cir. 1967); *Gkiafis v. Steamship Yiosonas*, 342 F.2d 546, 549 (4th Cir. 1965).

²⁹ Two types of long-arm statutes are most adaptable to antitrust violations by alien defendants: the provisions that extend jurisdiction to due process limitations and the so-called split-tort provisions. State long-arm statutes judicially construed to be coextensive with constitutional due process include those enacted in Alaska, California, Georgia, Illinois, Kansas, Massachusetts, Minnesota, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Tennessee. 2 MOORE, *supra* note 21, ¶ 4.25[7] n.21, at 287-88.

Split-tort statutes permit personal jurisdiction based upon conduct occurring outside the state but having in-state effects. Several varieties of split-tort statutes exist, of which the most straightforward predicates jurisdiction on the occurrence of in-state injury, *see* 42 PA. CONS. STAT. ANN. § 5322(4) (Purdon 1979). More commonly, however, other conditions are also imposed. The more permissive statutes allow the assertion of personal jurisdiction based on the commission of a tortious act having foreseeable consequences in the state by a defendant who derives substantial revenue from interstate or international commerce. *See* CONN. GEN. STAT. ANN. § 52-59b(a)(3)(B) (West Supp. 1979); N.Y. CIV. PRAC. LAW. § 302(a)(e)(ii) (McKinney 1972). Others permit the exercise of jurisdiction based on foreseeable forum consequences plus other business activities with that particular state. *See, e.g.*, IND. CODE 34-5-1-1 § 4.4(3) (1976); MASS. GEN. LAWS ANN. ch. 223A, § 3(d) (West 1979); VA. CODE § 8.01-328.1(A)(4) (Supp. 1979). Moreover, two states have effectively codified the *Hanson v. Denckla* test, *see* 357 U.S. 235 (1958), of purposeful availment of the benefits of state law as a jurisdictional standard. *See* FLA. STAT. ANN. § 48.181(1) (West 1969); WYO. STAT. § 40-13-108(c) (1977).

Although more equivocal in their applicability to antitrust violations by nonresidents, statutes authorizing jurisdiction based upon the commission of a tortious act "within the state," *see, e.g.*, ILL. ANN. STAT. ch. 110, § 17(1)(b) (Smith-Hurd 1979), or "in whole or in

some states have refused either statutorily or judicially to extend their long-arm powers to constitutional limits,³⁰ and in light of doctrinal changes presently being effected in the area of state court jurisdiction,³¹ the validity of applying long-arm statutes to less targeted anticompetitive effects would seem to be questionable. For these reasons and others, some courts have applied a federal standard independent of the territorial and doctrinal constraints that restrict state court jurisdiction.

Section 12 of the Clayton Act and Scopphony

The majority of courts engaging in jurisdictional analyses under the antitrust laws have relied on federal standards of amenability.³² The most commonly used predicate for obtaining in personam jurisdiction over corporate antitrust defendants has been section 12 of the Clayton Act. Conducive to interpretation as either a plenary grant of national jurisdiction³³ or an embodiment of the traditional minimum contacts standard,³⁴ the statute arguably serves as a jurisdictional basis.³⁵ Since service of process is prob-

part within the state," see, e.g., TEX. CIV. CODE ANN. tit. 42, § 2031(b)(4) (Vernon Supp. 1980), have been interpreted sufficiently broadly by some courts in other contexts to be amenable to use in antitrust actions. See generally *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). But see *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977). Nevertheless, some states still adhere to more rigid tests of corporate presence, and thus their long-arm statutes may be unavailing. See, e.g., S.C. CODE § 5-9-240 (1977) (transaction of business).

³⁰ See 2 MOORE, *supra* note 21, ¶ 4.25[7] & n.22, at 287-88.

³¹ See *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980). In *World-Wide Volkswagen*, the Supreme Court held that the "minimal contacts" test of state court jurisdiction mandated more substantial contacts with the forum state than "the fortuitous circumstance that a single . . . automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." *Id.* at 566.

Of significance in the antitrust area was the Court's determination that foreseeability, in and of itself, is no talisman of constitutionality. *Id.* The Court apparently distinguished between probable, or even inevitable, extraterritorial effects and more calculated consequences. *Id.* Since all colorable substantive antitrust claims except price-fixing must be substantial, see Ongman, "Be No Longer a Chaos": *Constructing a Normative Theory of the Sherman Act's Extraterritorial Jurisdictional Scope*, 71 Nw. U. L. Rev. 733, 747 n.57 (1977), it is apparent that the foreseeability factor will be maximized in jurisdictional inquiries under the antitrust laws. Therefore, *World-Wide Volkswagen* may serve to limit the reach of state court jurisdiction over antitrust offenders.

³² See notes 37-97 and accompanying text *infra*.

³³ See notes 89-97 and accompanying text *infra*.

³⁴ See notes 37-40 and accompanying text *infra*.

³⁵ It has also been suggested that the conjunction of venue and process provisions in one statutory section imparts jurisdictional significance to the statute, notwithstanding that neither in isolation embodies a jurisdictional standard. See 65 MICH. L. REV. 395, 399 & n.25

lematic,³⁶ however, the benefit of section 12 in the context of alien defendants remains equivocal.

Most courts addressing the jurisdictional implications of section 12 have developed the test that once venue has been properly rested under the statute, nationwide service of process will satisfy the requirements of in personam jurisdiction.³⁷ Thus, under this view, the defendant must generally have minimal contacts with the district in which suit is brought. By conditioning jurisdiction and the availability of nationwide service on prior fulfillment of section 12's venue criteria,³⁸ these courts have implicitly recognized the coincidence between the components of antitrust venue and the traditional state court indicia of minimum contacts.³⁹ Section 12

(1966); cf. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 238 (2d Cir. 1963) (Clark, J., dissenting) (historical conjunction of federal venue and process provisions in the Judiciary Act of 1879 does not indicate that the federal venue statute "has always been a venue provision and nothing more").

³⁶ See text accompanying notes 7-8 *supra*.

³⁷ See, e.g., *Systems Operations, Inc. v. Scientific Games Dev. Corp.*, 414 F. Supp. 750, 752 (D.N.J. 1976), *rev'd on other grounds*, 555 F.2d 1131 (3d Cir. 1977); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 317 (E.D. Pa. 1975); *McCrorry Corp. v. Cloth World, Inc.*, 378 F. Supp. 322, 324-25 (S.D.N.Y. 1974); *C.C.P. Corp. v. Wynn Oil Co.*, 354 F. Supp. 1275, 1279 (N.D. Ill. 1973); *United States v. Burlington Indus., Inc.*, 247 F. Supp. 185, 188 (S.D.N.Y. 1965); Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1039-40 n.45 (1961). Several formulations of the "venue-plus-service equals jurisdiction" concept have emerged. One merely advances the theory that the exercise of jurisdiction by a federal court of proper venue based on service of federal process is constitutional. See Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 986 (1961). Another frames the applicable test in terms of pleading requirements: in pleading venue, the plaintiff must allege the in personam jurisdictional requirements of the forum. See *McGhan v. F.C. Hayer Co.*, 84 F. Supp. 540, 541 (D. Minn. 1949); 16M J. VON KALINOWSKI, *supra* note 2, § 105.02[2] n.35; Note, *Venue in Private Antitrust Actions*, 37 N.Y.U.L. REV. 268, 269 n.9 (1962). Other courts merely gloss over the constitutional issue by making the conclusory statement that in light of the venue findings, traditional notions of fair play and substantial justice would not be offended by the exercise of jurisdiction over the defendant. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 328-29 (E.D. Pa. 1975); cf. *Fooshee v. Interstate Vending Co.*, 234 F. Supp. 44, 52 (D. Kan. 1964) (Clayton Act § 4, 15 U.S.C. § 15). For the converse proposition that the court lacks personal jurisdiction on the ground of insufficient service of process due to improper venue, see *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1259 (E.D. Ky. 1972). For a proposal that even when federal jurisdiction is based on diversity, personal jurisdiction should exist where venue is proper, see Comment, *A Proper Basis for Amenity to Process in Federal Diversity Cases*, 42 MISS. L.J. 375, 389 (1971).

³⁸ *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 45 (D. Del. 1977); *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1024-25 (D. Minn. 1976); *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1258 (E.D. Ky. 1972); *Raul Int'l Corp. v. Nu-Era Gear Corp.*, 28 F.R.D. 368, 371 (S.D.N.Y. 1961); cf. 7 RUT.-CAM. L.J. 158, 165 (1975) (securities laws).

³⁹ Compare *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) with *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974) (per curiam). In deter-

posits venue standards comparable to now-familiar tests of state court jurisdiction that have already passed constitutional muster.⁴⁰ At least as narrow as the jurisdictional inquiry that traditionally precedes it,⁴¹ the special antitrust venue statute serves to ensure that a specific calculus of contacts exists between the litigant and the forum.⁴² Inasmuch as initial resort to section 12 venue merely avoids a duplicative jurisdictional inquiry,⁴³ it may seem that the

mining that the defendant did not transact business within the meaning of § 12, the court in *O.S.C. Corp.* considered the following factors, which are also used in a minimum contacts jurisdictional analysis: whether the defendant was registered to do business, whether it owned or leased real property, whether it maintained a bank account, whether it had salesmen, dealers, jobbers, or other agents for any business purposes, whether it solicited business, whether it had a branch office, and whether it warehoused inventory in the state. *Id.* at 1066; *cf. Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 55 F.R.D. 519, 531 (S.D.N.Y. 1972) (finding of agency under state law for purposes of jurisdiction over defendant on state claims satisfies venue requirements of § 4 of Clayton Act).

⁴⁰ See 16M J. VON KALINOWSKI, *supra* note 2, § 804 n.13.

⁴¹ *Victor & Hood*, *supra* note 5, at 1065.

⁴² *Id.*

⁴³ See *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 464 & n.4 (1962); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 370 (D. Md. 1975), *aff'd*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977); *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1257 (E.D. Ky. 1972); 16M J. VON KALINOWSKI, *supra* note 2, § 105.02[2]; *Victor & Hood*, *supra* note 5, at 1065; *cf. Rensing v. Turner Aviation Corp.*, 166 F. Supp. 790, 794 (N.D. Ill. 1958) (confusion caused by overlap between venue provision and criteria for in personam jurisdiction); *Ronson Art Metal Works, Inc. v. Brown & Bigelow, Inc.*, 104 F. Supp. 716, 724 (S.D.N.Y.), *aff'd per curiam*, 199 F.2d 760 (2d Cir. 1952) ("doing business" under general venue statute same as doing business for jurisdictional purposes).

A duplicative inquiry may even occur when courts lay venue in antitrust actions "where the claim arose" under the general venue provisions of 28 U.S.C. § 1391 (1976), rather than under § 12. These courts have reasoned that resting venue at the locus of the injury, as is done in tort actions arising under state law, is inappropriate because "antitrust actions are not susceptible to such simplistic rationale" and therefore have engrafted a due process type of qualification on the use of the "where the claim arose" provision. See *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 260 (E.D. Pa. 1968). Thus, a "weight of the contacts" test has been applied under which venue may be rested pursuant to the "where the claim arose" provision only in a district in which, for example, significant sales causing substantial injury were made by the defendant or overt acts constituting a significant and substantial element of the offense were committed. *Id.* at 260-61; see *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 45 & n.30 (D. Del. 1977); *Goggi Corp. v. Outboard Marine Corp.*, 422 F. Supp. 361, 365 (S.D.N.Y. 1976); *Ghazoul v. International Management Servs. Inc.*, 398 F. Supp. 307, 314-15 (S.D.N.Y. 1975); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 574 (N.D. Ill. 1975); *Redmond v. Atlantic Coast Football League*, 359 F. Supp. 666, 669-70 (S.D. Ind. 1973).

In *Iranian Shipping Lines, S.A. v. Moraites*, 377 F. Supp. 644 (S.D.N.Y. 1974), however, the court inferentially rejected the possibility that a minimum contacts-type inquiry was relevant in the determination of venue under the general venue provisions to the extent that it involved "an evaluation of a specific calculus of contacts." *Id.* at 647. Even that court tempered the literal application of the statute, however, by requiring an allegation of specific

only substantial objection that can be raised is that this reasoning evidences a degree of analytical imprecision, since, logically, jurisdiction should be obtained before it is determined whether venue is proper.⁴⁴ There is authority, however, that antitrust venue and the requirements for the constitutional exercise of personal jurisdiction may not necessarily be coextensive.⁴⁵ Facile reliance on the provi-

intent. *Id.* at 647-48.

Thus, because a due process inquiry is already made, it appears that compliance with these venue provisions will ensure that maintenance of suit in a district of proper venue will present no affront to traditional notions of fair play and substantial justice.

⁴⁴ Victor & Hood, *supra* note 5, at 1065. In *Leroy v. Great W. United Corp.*, 99 S. Ct. 2710 (1979), the Supreme Court held it proper to make a venue determination prior to ruling on a jurisdictional claim if it would allow the prepermission of the constitutional issues involved in personal jurisdiction. *Id.* at 2715-16.

One method of laying venue in antitrust actions that does not replicate a minimum contacts inquiry is the so-called co-conspirator theory of venue. Under this theory, the acts of one corporation party to an illegal combination may establish venue as to its co-conspirators if its in-state activities include a conspiratorial agreement or an overt act in furtherance of the conspiracy and if the acts or agreements may be said to constitute a transaction of business. See *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92, 96-98 (C.D. Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *California Clippers, Inc. v. United States Soccer Football Ass'n*, 314 F. Supp. 1057, 1065 (N.D. Cal. 1970); *West Virginia v. Morton Int'l, Inc.*, 264 F. Supp. 689, 691-92 (D. Minn. 1967); *Commonwealth Edison Co. v. Federal Pac. Elec. Co.*, 208 F. Supp. 926, 941-42 (N.D. Ill. 1962); *Periodical Distribs., Inc. v. American News Co.*, [1961] TRADE CAS. (CCH) ¶ 70,011 (S.D.N.Y. 1961); *Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc.*, 140 F. Supp. 401, 403 (E.D. Va. 1954). The use of the theory was first sanctioned to sustain the validity of service of process under a California long-arm statute in *Giusti v. Pyrotechnic Indus., Inc.*, 156 F.2d 351 (9th Cir.), *cert. denied*, 329 U.S. 787 (1946). The *Giusti* court reasoned that the resident conspirators were agents of the out-of-state parties and that the perpetration of monopolistic practices was tantamount to a transaction of business within the state. *Id.* at 354. Although the court expressly indicated that venue under § 12 was not at issue, *id.* at 354-55, the co-conspirator theory has since been used to rest antitrust venue as well.

While this approach has been supported by many commentators on the ground that it comports with the remedial purposes of the antitrust laws, see, e.g., Comment, *Venue Under the Clayton Act for Private Antitrust Suits*, 9 SYRACUSE L. REV. 159 (1957); 41 MINN. L. REV. 837, 839 (1957), many arguments may be advanced against the predication of venue on the in-state acts of a defendant's alleged co-conspirator. As a practical matter, since the propriety of venue depends on the verity of the conspiracy allegation, venue determinations will largely involve determinations on the merits. Byrnes, *Bringing the Co-Conspirator Theory of Venue Up-To-Date and Into Proper Perspective*, 11 ANTITRUST BULL. 889, 895 (1966); see *West Virginia v. Morton Int'l, Inc.*, 264 F. Supp. 689, 695 (D. Minn. 1967); *Ziegler Chem. & Mineral Corp. v. Standard Oil Co.*, 32 F.R.D. 241, 243 (N.D. Cal. 1962). One court, however, has been willing to overlook this duplication if there is proof of scienter. See *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 848 (S.D. Fla. 1975), *vacated on other grounds sub nom.* In *re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977). Most importantly, the co-conspirator theory has been severely discredited in Supreme Court dictum. In *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953), the Court designated it as a "frivolous albeit ingenious attempt to expand the [venue] statute." *Id.* at 384.

⁴⁵ See *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 134 (D.N.H. 1975); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 377 (D. Md. 1975), *aff'd*, 554 F.2d 623 (4th

sions of section 12 to secure personal jurisdiction over domestic defendants may therefore beg any constitutional issue involved, thereby guaranteeing due process only incidentally. More significantly, however, a venue inquiry will not reinforce the probability of this type of forum connection in the case of the alien defendant, since section 1391(d) of title 28 of the United States Code permits plaintiffs to rest venue over aliens "in any district."⁴⁶ Furthermore, because process cannot be served outside the United States under this jurisdictional view of the statute,⁴⁷ aliens not present within the United States may effectively evade jurisdiction.

In an attempt to overcome this problem, plaintiffs have sought to establish that the foreign corporation, through an agent, transacts business or may be "found" in the district in which the federal courts sits. The seminal case in this area is *United States v. Scophony Corp. of America*.⁴⁸ In *Scophony*, a British manufacturer (British Scophony) of television and transmission apparatus negotiated a series of agreements with American motion picture and television interests whereby Scophony Corporation of America (American Scophony) was formed as a jointly owned company to promote British Scophony's inventions in the United States.⁴⁹ When an ac-

Cir.), cert. denied, 434 U.S. 923 (1977); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 80 (S.D.N.Y. 1965). See also Note, *Jurisdiction of Federal District Courts Over Foreign Corporations*, 69 HARV. L. REV. 508, 508 (1956) (doing business within meaning of the venue statute distinguishable from doing business for jurisdictional purposes). Moreover, use of a venue provision as a cure for more fundamental jurisdictional defects may be inappropriate. See Comment, *Transfer in the Federal Courts in the Absence of Personal Jurisdiction*, 61 COLUM. L. REV. 902, 910 (1961); cf. *Hohensee v. News Syndicate, Inc.*, 286 F.2d 527, 530 (3d Cir. 1961) (federal transfer provisions are not intended to be a means of avoiding consequences of failure to secure proper service of process).

⁴⁶ 28 U.S.C. § 1391(d) (1976).

⁴⁷ As a threshold observation, the applicability of the venue provision of § 12 to foreign nationals seems highly questionable in light of the Supreme Court's statement in *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972), that aliens are "wholly outside the operation of all federal venue laws, general and special." *Id.* at 714. In holding the alien venue statute to be exclusively applicable in suits against aliens, however, *Brunette* may have ramifications in antitrust litigation above and beyond the singular issue of venue. Since many courts have found that the operability of extraterritorial process against corporate defendants depends on prior fulfillment of § 12's venue requirements, see note 38 and accompanying text *supra*, the extra-district service clause may be deemed unavailable to reach an alien under this view. As a result, unless § 12 is viewed differently, see notes 106-08 and accompanying text *infra*, service outside the district in which the federal court sits may only be made in compliance with state jurisdictional standards through Rule 4(e) of the Federal Rules of Civil Procedure, see note 87 *infra*.

⁴⁸ 333 U.S. 795 (1948).

⁴⁹ *Id.* at 798-99. Under the terms of the agreements, British Scophony transferred to American Scophony all its patents and other interests in its inventions in the Western

tion was commenced in the Southern District of New York for alleged antitrust violations, service of process on British Scophony was made in the district on the president and director of American Scophony and on an individual who was a mortgagee and officer of British Scophony and who held a comprehensive power of attorney over the British corporation's interests in the United States.⁵⁰ British Scophony moved for dismissal on the grounds that it did not transact business in the district within the meaning of section 12's venue provision and that it was not "found" within New York for purposes of service of process.⁵¹ Finding both venue and service proper,⁵² the *Scophony* Court held that a "practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character'" was contemplated in the determination of venue under section 12.⁵³ The activities of British Scophony in New York through American Scophony were found sufficient to constitute a "transaction of business" under this "practical, nontechnical business standard."⁵⁴ Moreover, "in view of his triple position as mortgagee, corporate officer and attorney-in-fact," the corporate agent served, for venue and service purposes, "was the company," and his presence in New York caused the defendant corporation to be "found within the district."⁵⁵

A significant feature of the *Scophony* decision in the area of personal jurisdiction over nonresident corporate defendants was its suspension of the traditional doctrine of "corporate separateness" in venue determinations under section 12.⁵⁶ As a general rule, the presence of a wholly owned subsidiary within the district is insufficient, in and of itself, to subject the absent parent to personal jurisdiction.⁵⁷ The *Scophony* Court noted, however, that when a cor-

Hemisphere, as well as its entire inventory in the United States. *Id.* at 799. The American interests became exclusive licensees under American Scophony's patents, and British Scophony was to receive one-half of all royalties from these licenses. *Id.*

⁵⁰ *Id.* at 816, 818.

⁵¹ *Id.* at 801-02.

⁵² *Id.* at 818.

⁵³ *Id.* at 807, 808.

⁵⁴ *Id.* at 810.

⁵⁵ *Id.* at 816.

⁵⁶ See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 402 F. Supp. 262, 319 (E.D. Pa. 1975); *In re Elec. & Musical Indus., Ltd.*, 155 F. Supp. 892, 896 (S.D.N.Y. 1957); *Waldron v. British Petroleum Co.*, 149 F. Supp. 830, 834-35 (S.D.N.Y. 1957).

⁵⁷ *Fooshee v. Interstate Vending Co.*, 234 F. Supp. 44, 50-51 (D. Kan. 1964); 2 MOORE, *supra* note 21, ¶ 4.25[6], at 272. The Supreme Court has held that for jurisdictional purposes, the legal separation of corporate entities is to be respected as long as "[t]he corporate separation, though perhaps merely formal, is real." *Cannon Mfg. Co. v. Cudahy Packing*

porate structure is deliberately manipulated for purposes of exploiting the American marketplace, the general rule will not apply.⁵⁸ Thus, the Court was able to circumvent the doctrine of corporate separateness without expressly overruling it.

A finding of agency tends to be crucial to the assertion of jurisdiction over an alien not present within the United States.⁵⁹ Jurisdiction has generally been dependent upon serving its American affiliate because section 12 has been interpreted as not providing for worldwide service of process. It has therefore been necessary to establish that the alien defendant was "found" within the district through the subsidiary and that the subsidiary qualified as agent for service of process.⁶⁰ The courts, therefore, have exhibited a willingness to depart from the more conventional gauges of corporate independence that have been dispositive in the case of the domestic defendant.⁶¹ Courts since *Scophony* have pierced the corporate

Co., 267 U.S. 333, 337 (1925).

⁵⁸ The Court distinguished manufacturing and selling entities such as those involved in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), by finding that British *Scophony* had originally pursued manufacturing and selling, but then shifted to a mode of exploiting patents by complex working arrangements in the nature of a joint venture requiring "constant supervision and intervention beyond the normal exercise of shareholders' rights by the participating companies' representatives." *Id.* at 816; see *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 842 n.9 (S.D. Fla. 1975), *vacated on other grounds sub nom. In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977). There is some debate whether *Scophony* implicitly overruled *Cannon* in the context of antitrust litigation. *Compare Frito Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243 (N.D. Tex. 1973) with *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064, 1067-68 (9th Cir. 1974) (per curiam) and *United States ex rel. Martin-Trigona v. Bankamerica Corp.*, [1974-1] TRADE CAS. (CCH) ¶ 74,916 (D.D.C.).

⁵⁹ Evasion of the corporate separation rule is not critical for antitrust plaintiffs if they are suing domestic corporations. See Note, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L.J. 661, 664 (1955). As long as the defendant transacts business in any federal district, it will be susceptible to suit there following service of process upon it in the district of its incorporation. *Id.* Thus, as applied to American corporations, the *Scophony* test merely serves to enhance the convenience of the plaintiff by multiplying the number of districts in which § 12 venue will be proper.

Even in serving nonresident domestic corporations pursuant to § 12, however, plaintiffs have occasionally complicated their jurisdictional burdens by serving process within the forum rather than in the district of the defendant's incorporation. See *Schwartzbaum, Inc. v. Evans, Inc.*, 44 F.R.D. 589, 592 (S.D.N.Y. 1968); *Raul Int'l Corp. v. Nu-Era Gear Corp.*, 28 F.R.D. 368, 371 (S.D.N.Y. 1961).

⁶⁰ See, e.g., *United States v. Scophony Corp. of America*, 333 U.S. 795 (1948); *In re Siemens & Halske A.G.*, 155 F. Supp. 897, 898 (S.D.N.Y. 1957); *In re Elec. & Musical Indus., Ltd.*, 155 F. Supp. 892, 895 (S.D.N.Y. 1957); *United States v. United States Alkali Export Ass'n, Inc.*, [1946-1949] TRADE CAS. (CCH) ¶ 57,481 (S.D.N.Y. 1946).

⁶¹ Jurisdiction over American corporations has been upheld following a determination that venue was proper as to a subsidiary where, for example, the parent has manifested control over subsidiary decisionmaking through controlling stock ownership or interlocking

veil if the domestic affiliate can be characterized as a partner in

directorates, see *Luria Steel & Trading Corp. v. Ogden Corp.*, 327 F. Supp. 1345, 1348 (E.D. Pa. 1971), and where the subsidiary functions as a sales or marketing arm of the absent parent, see *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 372 (D. Md. 1975), *aff'd*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

Although the *Scophony* Court rationalized its abrogation of the corporate separateness doctrine on the basis of British *Scophony's* extraordinary anticompetitive activities through its American subsidiary, see note 58 and accompanying text *supra*, the "normal exercise of shareholders' rights" by parent companies has been deemed sufficient to pierce the corporate veil for jurisdictional purposes in the period since *Scophony*. See, e.g., *Luria Steel & Trading Corp. v. Ogden Corp.*, 327 F. Supp. 1345, 1348 (E.D. Pa. 1971). It thus appears that the distinction drawn by the Supreme Court in the *Scophony* decision may have been a highly artificial one. Indeed, it has been suggested that the impetus behind the suspension of the traditional rule of corporate separation in *Scophony* was the alienage of the defendant, rather than its specific anticompetitive intent. See Note, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L.J. 661, 666 (1955).

The propriety of considering a defendant's alienage in determining its amenability to jurisdiction of the federal courts, beyond the realm of the corporate separateness doctrine, has been the subject of considerable commentary. Varying rationales have been advanced in support of considering alienage. Some courts have found that because American courts are available to alien defendants for the enforcement of their own rights, this should bring them within the "purposeful availment" test of *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). See *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975); Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. J. INT'L L. 487, 487 (1974). *But see Williams v. Canon, Inc.*, 432 F. Supp. 376, 379 (C.D. Cal. 1977); *Gerber Scientific Instruments Co. v. Barr & Stroud, Ltd.*, 383 F. Supp. 1238, 1240 (D. Conn. 1973). Others have postulated that it may be possible for a foreign corporation to do substantial business within the nation as a whole, while its aggregated contacts with any one domestic forum would not be sufficient to support personal jurisdiction. Thus, when a selection must be made not among domestic forums but between a domestic and a foreign forum, the preference for the local tribunal becomes more compelling. See *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 664 (D.N.H. 1977); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973). *But see 2 MOORE, supra* note 21, ¶ 4.25[5], at 262 (1979). It has likewise been suggested that the relative size of the defendant's operations and its international perspective may make it more reasonable to require it to defend in forums more distant or inconvenient than otherwise. See *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722, 728 (D. Utah 1973). Concerns for convenience of the defendant also seem to have been lightly dismissed when an alien is involved. For example, one court has noted that "[w]hen a defendant is a citizen of the United States, there are very real differences in convenience between litigating in a state where it does business or resides, and in one where it has only insignificant contacts The considerations are entirely different, however, when an alien is involved [An alien defendant often] has no reason based on fairness to prefer any one particular district to any other." *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 292 (D. Conn. 1975); see *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 663 (D.N.H. 1977). See also *United States v. Watchmakers of Switz. Information Center, Inc.*, 133 F. Supp. 40, 46 (S.D.N.Y. 1955).

The notion that a different standard of amenability may be applied to alien defendants is not without its skeptics, however. See *United States v. De Beers Consol. Mines, Ltd.*, [1948-1949] TRADE CAS. (CCH) ¶ 62,248 (S.D.N.Y. 1948); *United States v. Scophony Corp. of America*, 69 F. Supp. 666, 669 (S.D.N.Y. 1946), *rev'd and remanded*, 333 U.S. 795 (1948). *But see Frito-Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243, 250 (N.D. Tex. 1973) (citing *Boryk v. deHavilland Aircraft Co.*, 341 F.2d 666 (2d Cir. 1965)). Indeed, it has been sug-

worldwide competition⁶² or the alter ego of the alien parent.⁶³ Moreover, such a finding will not be precluded even if the United States corporation was not itself instrumental or implicated in the perpetration of the alleged antitrust violations, provided the American corporation is found to be "a mere adjunct of its parent."⁶⁴ Where this occurs, the activities of the absent parent are imputed to the American subsidiary.⁶⁵

While assertion of personal jurisdiction over aliens through service on American agents has expanded,⁶⁶ this approach is not entirely satisfactory; several courts still adhere nominally to the traditional rule of corporate separation in quashing service upon domestic agents,⁶⁷ despite the general repudiation of the rule in the

gested that more substantial activity within the United States should be required to bring a foreign national into an American court than to bring a citizen of the United States into a court of a sister state. "[T]he preparation and documentation of a case for trial in the United States may be vastly more difficult for the foreign corporation than for the firm which does most of its business here." K. BREWSTER, *supra* note 9, § 4.1.1.

⁶² See *In re Elec. & Musical Indus., Ltd.*, 155 F. Supp. 892, 895 (S.D.N.Y. 1957).

⁶³ See *In re Siemens & Halske A.G.*, 155 F. Supp. 897, 898 (S.D.N.Y. 1957). *Pre-Scophony* cases had upheld service on a wholly owned American subsidiary only where a contractual stipulation of general agency existed between the subsidiary and its parents. See *United States v. United States Alkali Export Ass'n, Inc.*, [1946-1947] TRADE CAS. (CCH) ¶ 57,481 (S.D.N.Y. 1946).

⁶⁴ See *United States v. Watchmakers of Switz. Information Center, Inc.*, 133 F. Supp. 40, 45 (S.D.N.Y. 1955). See generally K. BREWSTER, *supra* note 9, § 4.1.5; W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* § 3.5 (2d ed. 1973).

⁶⁵ *United States v. Watchmakers of Switz. Information Center, Inc.*, 133 F. Supp. 40, 45 (S.D.N.Y. 1955).

⁶⁶ See Note, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L.J. 661, 664 (1955).

⁶⁷ See, e.g., *Intermountain Ford Tractor Sales Co. v. Massey-Ferguson, Ltd.*, 210 F. Supp. 930, 938-39 (D. Utah 1962), *aff'd per curiam*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964). Proponents of the rule of corporate separateness cite possible adverse effects on international trade, see 210 F. Supp. at 932, and the possibility of reciprocally lenient treatment of American corporations by foreign courts, see 8 VAND. J. TRANSNAT'L L. 249, 255 (1974). While reliance on the rule may appear incompatible with later Supreme Court decisions, see *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), it is submitted that reference to the traditional doctrine of corporate separation may often be misleading. An illustration may be found in *Hayashi v. Sunshine Garden Prods., Inc.*, 285 F. Supp. 632 (W.D. Wash. 1967), *aff'd per curiam sub nom. Hayashi v. Red Wing Peat Corp.*, 396 F.2d 13 (9th Cir. 1968), wherein an Ohio corporation was sued for alleged antitrust violations in Washington. Its only contact with the state was through a wholly owned Canadian subsidiary that engaged in some business activity within the forum. 285 F. Supp. at 633. The court refused to exercise jurisdiction because the two corporations had maintained the requisite degree of separation prescribed by *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). 285 F. Supp. at 634; see *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (*per curiam*). It is suggested, however, that because the subsidiary was a nonresident of the forum state, itself subject to jurisdiction and process only extraterritorially, the merits of the case are considerably weaker than in cases in which the absent parent's subsid-

antitrust context. Additionally, analyses under the *Scophony* corporate separateness test still evince the parochial orientation that is characteristic of state court analyses⁶⁸ and may thus be unduly restrictive. Most importantly, however, service on an American agent continues to be unavailing where the alien corporation has successfully avoided even the appearance of domestic association. Although it did not directly comment on the jurisdictional implications of section 12,⁶⁹ the *Scophony* Court intimated, and the weight of commentary agrees,⁷⁰ that unless an American subsidiary may be deemed either the agent or alter ego of an alien corporation, or the defendant is sufficiently "present" within the United States in its own right, service of process may not be obtainable.⁷¹ Accordingly, this particular class of defendants may effectively enjoy jurisdictional immunity. Thus, even juxtaposing the *Scophony* rule with state long-arm statutes, a reasonably comprehensive scheme for the assertion of personal jurisdiction over alien defendants is not established.⁷²

iary is present within the forum.

⁶⁸ See, e.g., *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974) (per curiam).

⁶⁹ While the *Scophony* Court apparently disavowed the notion that its decision delineated a jurisdictional standard for antitrust litigation, see 333 U.S. at 804 n.13, its emphasis on practicality and reasonableness clearly resounded the doctrinal changes previously effected in the area of personal jurisdiction. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Indeed, in reaching its conclusion, the Court strained to distinguish the *Cannon* line of cases which, because they dealt specifically with the assertion of personal jurisdiction, did not necessarily appear apposite to the validity of service in its insular sense. See notes 13-19 and accompanying text *supra*.

⁷⁰ See, e.g., 2 MOORE, *supra* note 21, ¶ 4.25[5] & n.5, at 260-61; Beausang, *The Extraterritorial Jurisdiction of the Sherman Act*, 70 DICK. L. REV. 187, 193-94, 196 (1966); Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75, 84 (1973); Note, *Enforcement of United States Antitrust Laws Over Alien Corporations*, 43 GEO. L.J. 661, 664 (1955); Note, *Venue in Private Antitrust Suits*, 37 N.Y.U.L. REV. 268, 278 (1962); Note, *Long-Arm Application of the Sherman Antitrust Act to Industry in the Central American Common Market*, 22 U. FLA. L. REV. 235, 241 (1969).

⁷¹ 333 U.S. at 817. The Court stated that "process could not be issued to run for such corporations to the foreign countries of which they are 'inhabitants.'" *Id.*

⁷² One court has fashioned a broadly defined "fairness test" aimed at accommodating both the due process rights of the defendant and the regulatory nature of the antitrust remedy. See *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974). Although *Oxford First* was a securities fraud action in which process was served pursuant to the venue and extraterritorial process provision of the securities laws, 15 U.S.C. § 78aa (1976), the court indicated that the antitrust laws should be analyzed in the same manner. 372 F. Supp. at 201, 205. After finding that venue was proper, *id.* at 198, the court considered the plaintiff's assertion that a combination of proper venue and extraterritorial service of process fulfilled the requirements of in personam jurisdiction, *id.* at 196. While acknowledging that the venue requirement served as a statutory limitation on extraterritorial ser-

Section 12 of the Clayton Act and the Aggregate Contacts Test of Jurisdiction

Under another federal jurisdictional test, which has been infrequently invoked, federal courts have recognized that, in federally created causes of action, they may exercise personal jurisdiction over any defendant present within the United States on traditional territorial principles.⁷³ The case originating this jurisdictional standard—the national contacts test—is *First Flight Co. v. National Carloading Corp.*⁷⁴ The *First Flight* court observed that as a fundamental jurisdictional tenet, a sovereignty has personal jurisdiction over any defendant within its territorial limits, subject only to the ability of its courts to obtain service upon the defendant.⁷⁵ The court concluded, therefore, that “the material constitutional inquiry in [federal question cases] concerns not contacts with the physical territory of the court, but rather contacts with the sovereignty of which the court is an arm. And the sovereignty of which a federal court is an arm is, of course, the United States.”⁷⁶

The import of this theory in the assertion of personal jurisdiction over domestic defendants is to create personal jurisdiction nationally; as long as the defendant has the requisite minimum contacts with any federal district, jurisdiction in all districts will be proper.⁷⁷ In comparison, where an alien is the defendant, federal

vice, *id.* at 203 n.24, the *Oxford First* court concluded that treating venue as a restriction on nationwide service of process was not dispositive of the issue of in personam jurisdiction. *Id.* Instead of applying a strict constitutional standard comprised of traditional due process criteria, the court formulated a test in which the following factors were to be given equal weight: the extent of the defendant's contacts with the district in which the action is instituted; inconvenience to the defendant, calculated with reference to the interstate nature of its business, its distance from the forum, and its access to local counsel; judicial economy, including any possible adverse effects upon the integrity of the litigation; the probable situs of discovery; and the nature of the regulated activity and the extent to which the defendant's acts have an extraterritorial effect. *Id.* at 203-05. While the *Oxford First* fairness test may indeed be a creditable attempt to incorporate all the considerations that should bear on the question of amenability in areas such as securities and antitrust, it has not generally been followed. See, e.g., *Fitzsimmons v. Barton*, 589 F.2d 330, 334 (7th Cir. 1979). See generally 7 RUT.-CAM. L.J. 158 (1975).

⁷³ See generally *Pennoy v. Neff*, 95 U.S. 714 (1877).

⁷⁴ 209 F. Supp. 730 (E.D. Tenn. 1962). In *First Flight*, the plaintiff brought an action under 49 U.S.C. § 20(11) (current version at 49 U.S.C. § 20(11) (1976)) against a shipper for alleged damage to cargo during shipment.

⁷⁵ 209 F. Supp. at 736.

⁷⁶ *Id.* at 738.

⁷⁷ See *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709 (S.D.N.Y. 1978); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 358 (W.D. Mich. 1973); *Alco Standards Corp. v. Benalal*, 345 F. Supp. 14, 25 (E.D. Pa. 1972).

courts have exercised personal jurisdiction in federal question cases if the alien's contacts with the United States as a whole satisfy the due process clause of the fifth amendment.⁷⁸ In determining whether there is a sufficient nexus, the alien's American contacts have been aggregated, even though its affiliation with any one federal district would be insufficient to subject it to the jurisdiction of the state in which the court sits.⁷⁹ This jurisdictional predicate is known as the

Implementation of a territorial sovereignty theory was a constitutionally valid option available to Congress when it undertook to organize the federal court system. See Barrett, *Venue and Service of Process in Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608, 608 (1954); Mandarin, *Erie v. Tompkins: A Geography Lesson*, 5 DUQ. L. REV. 465, 471 (1966-1967). Insofar as the lawmakers forewent the opportunity to create general nationwide jurisdiction in the district courts, see Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520, 532 (1963), it may be suggested that judicial attempts to do so through a national contacts standard of amenability are improper. It should be remembered, however, that the organization of the district courts along state lines was at least partially a product of political rather than jurisdictional concerns. See Comment, *A Proper Basis for Amenability to Process in Federal Diversity Cases*, 42 MISS. L.J. 375, 376 n.3 (1971); Comment, *Federal Process and State Legislation*, 16 VA. L. REV. 421, 427 (1930). That the federal courts are territorially coterminous with the several states, therefore, does not necessarily reflect any substantive determinations. Indeed, the Supreme Court, although not speaking directly on the issue, has never indicated that the territorial nature of the district courts is of jurisdictional import in federal question cases. See, e.g., *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946); *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 622 (1925); *United States v. Union Pac. RR.*, 98 U.S. 569, 603-04 (1878). The Court has stated that "the jurisdiction of the [District] Courts of the United States is not created by, and does not depend on, the statutes of the several States." *Barrow Steamship Co. v. Kane*, 170 U.S. 100, 110 (1898). Moreover, the stress placed on the difference between diversity and federal question jurisdiction in more recent Supreme Court pronouncements, see *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), would seem implicitly to render the Court's findings with respect to the former inapplicable to the adjudication of federally created rights.

⁷⁸ See *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709 (S.D.N.Y. 1978); *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287, 290 (D. Conn. 1975); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 358 (W.D. Mich. 1973); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 25 (E.D. Pa. 1972).

⁷⁹ See, e.g., *Coats Co., Inc. v. Vulcan Equip. Co.*, 459 F. Supp. 654 (N.D. Ill. 1978) (patent infringement claim); *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706, 709 (S.D.N.Y. 1978) (admiralty action); *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, [1973-1] TRADE CAS. ¶ 74,594 (S.D.N.Y. 1973) (antitrust action); *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14, 25 (E.D. Pa. 1972) (stock fraud action); 9 VAND. J. TRANSNAT'L L. 435, 444 (1976); cf. Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. J. INT'L L. 487, 497-98 (1974) (aggregation of national contacts suited to exercise of jurisdiction over foreign sovereigns). But see *Honeywell, Inc. v. Metz Apparatewerke*, 509 F.2d 1137, 1143 n.2 (7th Cir. 1975); *Graham Eng'r Corp. v. Kemp Prods., Ltd.*, 418 F. Supp. 915, 919 & n.3 (N.D. Ohio 1976).

The controlling case for the aggregation theory is *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975). The *Cryomedics* plaintiff, a Connecticut corporation, brought a patent infringement suit against a British corporation headquartered in Great Britain. Process was served pursuant to Connecticut's long-arm statute as authorized by

aggregate contacts theory.⁸⁰ Of course, federal transfer provisions, as well as the territorial constraints of federal process, are available to remedy any special disabilities that may attach as a result of this broadened susceptibility to suit.⁸¹

The aggregate contacts test of jurisdiction has received only limited consideration in the antitrust context. In one case considering the test, *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*,⁸² a Greek corporation that sold plastic hose products to two Ohio firms was sued for alleged Sherman Act violations.⁸³ The district court, in dictum, embraced the notion that the United States as a whole could be the territorial predicate for the exercise of in personam jurisdiction in antitrust cases.⁸⁴ It noted, however, that Congress had failed to provide a means of service upon an alien corporation when service upon a corporate agent within the United States was not possible.⁸⁵ Concluding that service in the manner prescribed by state law was its only alternative under the Federal Rules of Civil Procedure,⁸⁶ the *Moriarty* court reasoned that such service could be effective only if the defendant met the qualifica-

Rule 4(e) and Rule 4(i)(1)(D). The court sustained jurisdiction, despite the defendant's limited contacts with Connecticut, by holding that a federal court may properly exercise personal jurisdiction over an alien defendant in federal question cases if the alien's contacts with the United States satisfy the due process clause of the fifth amendment. 397 F. Supp. at 290. If these contacts are sufficient, the court continued, the only restriction on the place of trial would be the doctrine of forum non conveniens. *Id.* For a discussion of the *Cryomedics* decision, see 9 VAND. J. TRANSNAT'L L. 435 (1976).

⁸⁰ *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287, 289-90 (D. Conn. 1975).

⁸¹ *Id.* at 290; *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354, 357 (W.D. Mich. 1973); *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 739 (E.D. Tenn. 1962); Note, *Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?*, 48 MINN. L. REV. 1131, 1147 (1964). See also ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS §§ 2372(a), 2374(b) (1968).

To the extent that an independent jurisdictional standard under the aggregate contacts test may geographically broaden corporate amenability to suit, issues of due process and equal protection may legitimately be raised. Cf. *American Motorists Ins. Co. v. Starnes*, 425 U.S. 637, 645-46 & n.6 (1976) (geographically broader venue available against out-of-state corporation could create equal protection problem). It appears, however, that courts have generally avoided an extreme application of the theory. Few courts have implemented the aggregate contacts test in the absence of any contact between the defendant and the forum district. For example, in *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973), although the court sustained jurisdiction where the alien had business activities only in states other than the forum state, the court granted a transfer on forum non conveniens grounds. *Id.* at 359.

⁸² 289 F. Supp. 381 (S.D. Ohio 1967).

⁸³ *Id.* at 384.

⁸⁴ *Id.* at 390.

⁸⁵ *Id.* & n.2.

⁸⁶ *Id.* (citing FED. R. CIV. P. 4(e)).

tions for amenability set forth in the state's long-arm statute.⁸⁷ The court was therefore compelled to undertake a long-arm jurisdictional analysis.

The persuasive impact of *Moriarty's* dictum appears to have been diminished by this procedural impracticability. Subsequently, courts addressing the aggregate contacts test in antitrust litigation have generally qualified its value as a jurisdictional predicate: a defendant's contacts with the United States may be one factor in establishing jurisdiction pursuant to state statute.⁸⁸

Incorporating the national contacts test into section 12, some courts have reasoned that by authorizing nationwide service of process, Congress legislatively granted the federal courts nationwide personal jurisdiction in antitrust actions.⁸⁹ This view has been

⁸⁷ *Id.* at 390. Rule 4(e) authorizes service of process to be made upon parties not found within the forum "under the circumstances and in the manner" prescribed by state statute. FED. R. CIV. P. 4(e)(2). The *Moriarty* court concluded that the phrase "under the circumstances" referred to state standards of amenability, 289 F. Supp. at 390. Thus, when service is made in a manner authorized by state law, the federal courts must also comply with state jurisdictional standards. *Id.*; accord, *Fitzsimmons v. Barton*, 589 F.2d 330, 333 n.2 (7th Cir. 1979); *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 685 (5th Cir. 1977); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416-18 (9th Cir. 1977); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1357 n.1 (S.D. Tex. 1978); 4 C. WRIGHT & A. MILLER, *supra* note 14, § 1075 (1969).

When a federal court implements the process provisions of Rule 4 that are operative without reference to state law, *see* FED. R. CIV. P. 4(d)(1)-(6), 4(i), it is able to do so without being subject to the substantive jurisdictional criteria of the states. *Gkiafis v. Steamship Yiononas*, 342 F.2d 546, 548-59 (4th Cir. 1965); *Navarro v. Sedco, Inc.*, 449 F. Supp. 1355, 1357-58 n.1 (S.D. Tex. 1978). Rule 4(i) prescribes methods of serving process in foreign countries when a federal or state law authorizes service. Occasionally, plaintiffs have successfully invoked Rule 4(i) pursuant to state long-arm statutes, even without undertaking an analysis of the defendants' contacts with the state. In *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975), for example, the court permitted the aggregation of the defendant's national contacts on a theory of territorial sovereignty for the purpose of satisfying Connecticut's corporate long-arm statute and, in turn, utilizing Rule 4(i)(1)(D)'s manner of service. *See* 397 F. Supp. at 288-91. It is submitted, however, that when service pursuant to state law under Rule 4(e) is not authorized because the defendant does not have sufficient contacts with the state to permit use of its long-arm statute, *see* 2 MOORE, *supra* note 21, ¶ 4.41-1, service under Rule 4(i) is impermissible, *see* *E. Walters & Co. v. Interastra, S.A.*, 67 F.R.D. 410, 411 (N.D. Ill. 1975).

⁸⁸ *See* *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659, 668 (D.N.H. 1977); *cf.* *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975) (patent infringement case).

⁸⁹ *See* *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 684 (5th Cir. 1977). One theory upon which nationwide jurisdiction may be premised is that § 12 implicitly incorporates the jurisdictional standards of the state of final process by providing that a defendant may be served in the district in which it is an inhabitant or is found. Similar treatment of the amenability problem has been given under another extraterritorial process provision. In *Coleman v. American Export Isbrandtsen Lines, Inc.*, 405 F.2d 250 (2d Cir. 1968), the plaintiff brought a

adopted in interpretations of similar statutory provisions.⁹⁰ For example, although the venue and nationwide service clauses of the securities laws⁹¹ do not expressly address in personam jurisdiction, it has been held that "it is reasonable to infer that Congress meant to assert personal jurisdiction" to the limits allowed by the fifth amendment's due process clause.⁹² Where nationwide service is statutorily permitted, therefore, a defendant will be "found" within the United States and thereby subject to federal in personam jurisdiction, if it has "sufficient contacts with the United States to support the fairness of the exercise of jurisdiction over him by a United States court."⁹³ Concomitantly, where process is served within the United States pursuant to a nationwide service clause, jurisdiction

personal injury action in the Southern District of New York. *Id.* at 251. Under the "100-mile bulge" provision of Rule 4(f) of the Federal Rules of Civil Procedure, the defendant served a third-party complaint on a Pennsylvania corporation at its principal place of business in Philadelphia. The third-party defendant moved to dismiss the complaint for lack of jurisdiction on the ground that the 100-mile bulge provision allowed extraterritorial service only where the out-of-state parties were already subject to the in personam jurisdiction of the court. *Id.* The United States Court of Appeals for the Second Circuit held that when service is made extraterritorially within the 100-mile bulge, it will be valid if the parties served have sufficient contacts with the state of service to be subject to suit there. *Id.* at 252-53. Under this view, plaintiffs seeking to utilize the extraterritorial provision of Rule 4(f) must look to the state of service to determine a defendant's amenability. *See* 4 C. WRIGHT & A. MILLER, *supra* note 14, § 1127. It is similarly true that a defendant served under § 12 will be subject to the general jurisdiction of the district of final service by virtue of its inhabitancy or being "found" there.

⁹⁰ *See* *Leroy v. Great W. United Corp.*, 99 S. Ct. 2710, 2721 (1979) (White, J., dissenting) (15 U.S.C. § 78aa); *Driver v. Helms*, 577 F.2d 147, 156 (1st Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (28 U.S.C. § 1391(e)); *Misko v. United States*, 77 F.R.D. 425, 427 (D.D.C. 1978) (28 U.S.C. § 1391(e)); *Garner v. Enright*, 71 F.R.D. 656, 660 (E.D.N.Y. 1976) (15 U.S.C. § 78aa); *Stern v. Gobeloff*, 332 F. Supp. 909, 912 (D. Md. 1971) (15 U.S.C. §§ 77v, 78aa).

For a compilation of federal statutes prescribing extradistrict service of process, see 2 MOORE, *supra* note 21, ¶ 4.33, 4.42[1].

⁹¹ 15 U.S.C. §§ 77v, 78aa (1976).

⁹² *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972).

⁹³ *Fitzsimmons v. Barton*, 589 F.2d 330, 333 & n.2 (7th Cir. 1979) (interpreting securities laws); *see* *Driver v. Helms*, 577 F.2d 147, 156 (1st Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 684 (5th Cir. 1977). *But see* 2 MOORE, *supra* note 21, ¶ 4.25[5], at 262; *cf.* Note, "Doing Business": Defining State Control Over Foreign Corporations, 32 VAND. L. REV. 1105, 1112-13 (1979) (minimum contacts, not fairness, should be the inquiry).

In *Fitzsimmons*, a securities fraud action, the seventh circuit drew upon *Shaffer v. Heitner*, 433 U.S. 186 (1977), in support of a nationwide jurisdictional approach. 589 F.2d at 332-33. The court suggested that the fairness standard of *Shaffer* refers not to the fairness of imposing the burdens of litigation in a distant forum upon a defendant but to the fairness of the exercise of judicial power by a particular sovereign. *Id.* at 333.

is not truly obtained extraterritorially;⁹⁴ thus, the sole relevant constitutional inquiry in the case of a domestic defendant is whether service of process was reasonably calculated to provide it with actual notice.⁹⁵

Only when personal jurisdiction is exercised over a defendant not resident within the United States, does service become truly extraterritorial. Whether an alien defendant is "present" within the United States for jurisdictional purposes, therefore, entails an inquiry into the substantiality and foreseeability of its domestic contacts.⁹⁶ In assuming this posture, federal courts may dispose of the jurisdictional issue in a fairly summary manner and may resolve questions of fairness and convenience by reference to the traditionally subordinate concepts of venue and forum non conveniens.⁹⁷

TOWARD A MORE UNIFORM STANDARD

From the foregoing, it can be seen that the issue of personal jurisdiction under the antitrust laws has not received uniform treatment. The multiplicity of approaches, each varying in scope and derivation, appears counterproductive in light of the national applicability of the antitrust laws. Indeed, the strong federal regulatory interest in the antitrust field would not seem to admit of such diverse enforcement.⁹⁸ Congressional intent to accord plain-

⁹⁴ See *Driver v. Helms*, 577 F.2d 147, 157 (1st Cir. 1978), cert. denied, 439 U.S. 1114 (1979); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); 2 MOORE, *supra* note 21, ¶ 4.25[5], at 260-61.

⁹⁵ *Driver v. Helms*, 74 F.R.D. 382, 391 (D.R.I. 1977), modified, 577 F.2d 147 (1st Cir. 1978), cert. denied, 439 U.S. 1114 (1979); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

⁹⁶ *Garner v. Enright*, 71 F.R.D. 656, 660-61 (E.D.N.Y. 1976); *Stern v. Gobeloff*, 332 F. Supp. 909, 912-13 (D. Md. 1971).

⁹⁷ See *Athletes Foot of Del., Inc. v. Ralph Libonati Co.*, 445 F. Supp. 35, 45-46 (D. Del. 1977); *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023, 1024-25 (D. Minn. 1976); *Phillip Gall & Son v. Garcia Corp.*, 340 F. Supp. 1255, 1258 (E.D. Ky. 1972). See also 7 RUT.-CAM. L.J. 158, 159 n.9, 165 (1975). One court has suggested that in authorizing nationwide service of process, Congress may have tacitly accepted the possibility that corporations charged with antitrust violations would have to endure suits in distant forums. The court reasoned that Congress' paramount concern was its regulatory interest in compelling defendants to defend where the plaintiff incurred his injuries. *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 202 (E.D. Pa. 1974).

⁹⁸ See Note, *The Role of State Law in Federal Antitrust Treble Damage Actions*, 75 HARV. L. REV. 1395, 1401-02 (1962). The Supreme Court's decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), seems to indicate that consideration of the substantive issues involved may be appropriate in jurisdictional determinations. The Court stated that much will depend on "the quality and the nature of the activity in relation to the fair and

tiffs the broadest procedural latitude consistent with the Constitution underscores the need for a single durable standard.⁹⁹ As a matter of fairness, moreover, a single jurisdictional standard would apprise a corporation of the quantitative and qualitative activities which could reasonably be expected to subject it to the personal jurisdiction of the federal district courts. Additionally, as a deterrent measure, a national uniform standard would be less conducive to strategic exploitation by defendants bent on jurisdictional evasion.¹⁰⁰

It has been demonstrated that none of the possible jurisdictional sources previously explored is entirely satisfactory, either on its merits or in its practicability.¹⁰¹ Despite its intuitive appeal, the utility of the aggregate contacts test of amenability is severely circumscribed in the context of alien corporations by the absence of proper procedural devices to effect service abroad.¹⁰² On the other hand, section 12 of the Clayton Act, indefinite in both nature and scope, has promoted analytical imprecision and tentativeness on the part of courts interpreting its provisions.¹⁰³ When taken in conjunction, however, these two sources may provide a comprehensive statutory scheme.

It seems that standardization of jurisdictional criteria in the antitrust context would best be facilitated by a liberal construction of section 12 and its complements in the Federal Rules, consistent with the intent of Congress to free federal service of process and jurisdictional standards from the territorial restrictions incumbent

orderly administration of the laws." *Id.* at 319; see K. BREWSTER, *supra* note 9, § 4.1.1. See also *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

⁹⁹ Section 12 was enacted in 1914 as a supplement to § 7 of the Sherman Act, 26 Stat. 210 (1890); see 51 CONG. REC. 9417 (1914), which had limited the judicial district in which an antitrust proceeding could be brought to that in which the defendant resided or was found. Under the venue provisions of § 7, most, if not all, antitrust prosecutions were brought in the district in which the defendant was incorporated. See *id.* at 9416. In terms of practical and economic realities, therefore, antitrust plaintiffs prior to the enactment of § 12 were faced with the onerous dilemma of either suing in multiple forums or selectively enforcing their rights against the more accessible party. To remedy this situation, the "transaction of business" test was included in the venue clause of § 12 to permit antitrust plaintiffs to institute actions in districts in which their injuries were incurred, see *id.* at 9414, 9415, 9467, 9608, which would more frequently coincide with their own places of residence. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 373-74 (1927). For a discussion of the period leading up to the revision of the antitrust laws, see Levy, *The Clayton Law—An Imperfect Supplement to the Sherman Law*, 3 VA. L. REV. 411, 414-17 (1916).

¹⁰⁰ See generally note 28 and accompanying text *supra*.

¹⁰¹ See notes 20-97 and accompanying text *supra*.

¹⁰² See notes 85-87 and accompanying text *supra*.

¹⁰³ See notes 37-45 and accompanying text *supra*.

on state courts. It is submitted that section 12 provides a jurisdictional plan of sufficient range to reach alien defendants if it is viewed as a codification of the aggregate contacts theory. Under this uniform approach, a foreign corporation could be sued in any district, provided its aggregate contacts with the United States make it fair and reasonable to subject it to the jurisdiction of the federal courts.¹⁰⁴ Due process in such cases, therefore, would be a function of the magnitude and foreseeability of the anticompetitive effects in the United States and the sufficiency of the alien's other American contacts.¹⁰⁵

Although a defendant may be amenable to a federal court's jurisdictional reach under this view of section 12, service of process on the alien may nevertheless be problematic. Where service on aliens could not be made in the United States, however, section 12 authorizes service "wherever [the corporation] may be found."¹⁰⁶ That federal process is thereby given a worldwide reach is a reasonable inference to be drawn from the language of the statute.¹⁰⁷ With a statutorily authorized service provision, the Federal Rules of Civil Procedure provides the manner of serving defendants both domestically and abroad, without resort to state procedure.¹⁰⁸ Fur-

¹⁰⁴ See notes 78-79, 96 and accompanying text *supra*.

Many courts that have refused to implement an aggregation theory of jurisdiction have done so on the ground that Congress had not provided for nationwide service of process for the particular claim asserted. See, e.g., *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418 (9th Cir. 1977) (trademark infringement); *Amburn v. Harold Forster Indus., Ltd.*, 423 F. Supp. 1302, 1304-05 (E.D. Mich. 1976) (patent infringement); *Graham Eng'r Corp. v. Kemp Prods., Ltd.*, 418 F. Supp. 915, 919-20 (N.D. Ohio 1976); *Ag-Tronic, Inc. v. Frank Paviour Ltd.*, 70 F.R.D. 393, 400 (D. Neb. 1976) (patent claim). *But cf.* *Stanley v. Local 926, Int'l Union of Operating Eng'rs*, 354 F. Supp. 1267, 1271 n.3 (N.D. Ga. 1973); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967) (courts imply that when extraterritorial service of process clause was available, such clause did not authorize service outside the United States).

¹⁰⁵ See note 96 and accompanying text *supra*.

¹⁰⁶ 15 U.S.C. § 22 (1976); see note 1 and accompanying text *supra*.

¹⁰⁷ See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 262, 329-30 (E.D. Pa. 1975); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70, 80 (S.D.N.Y. 1965). See also *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1339-40 (2d Cir. 1972); *SEC v. Briggs*, 234 F. Supp. 618, 622-23 (N.D. Ohio 1964).

¹⁰⁸ Rule 4(i) sets forth five methods of serving process when a federal or state statute authorizes service in a foreign country. FED. R. CIV. P. 4(i). Judicial construction of the Rule has expansively included within its purview those statutes that authorize service by reasonable implication, if not expressly. See 2 MOORE, *supra* note 21, ¶ 4.45. Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a) (1976), and § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1976), which contain provisions similar to that of § 12 of the Clayton Act, have been held to be proper statutory predicates for the implementation of service under Rule 4(i). E.g., *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 1000 n.61 (2d Cir.), *cert.*

thermore, since the alien venue statute will not rectify jurisdictional abuses,¹⁰⁹ it is implicit in this broad interpretation of section 12 that federal transfer provisions would continue to operate as a de facto limitation on federal jurisdictional power.¹¹⁰ Thus, little, if any, legislative action would be necessary to permit the effectuation of this federal standard.¹¹¹

CONCLUSION

In the 50 years since the enactment of section 12 of the Clayton Act, the federal courts have not formulated a consistent rule on the amenability of antitrust violators and service of process on these defendants. This may reflect a determination by the courts that, if resolution of the jurisdictional issue in a particular case is possible by resort to more traditional predicates, creation of a uni-

denied, 423 U.S. 1018 (1975); *SEC v. Briggs*, 234 F. Supp. 618, 621-22 (N.D. Ohio 1964). Since *Scophony* and decisions of like tenor predated the enactment of Rule 4(i), their restriction of antitrust process to the territorial United States does not lead inescapably to the conclusion that such a rule obtains today.

Rule 83 of the Federal Rules provides that "[e]ach district court by action of a majority of judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CIV. P. 83. Before the enactment of the Foreign Sovereign Immunities Act of 1976, *see note 4 supra*, courts seeking to assert in personam jurisdiction over foreign sovereigns sanctioned the use of this ad hoc provision to fashion a means of service when existing rules of procedure were unavailing. *See, e.g.*, *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 108-09 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966); *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.D.C. 1973). *But see Oster v. Dominion of Can.*, 144 F. Supp. 746, 748 (N.D.N.Y.), *aff'd sub nom. Clay v. Dominion of Can.*, 238 F.2d 400 (1956), *cert. denied*, 356 U.S. 936 (1957); *Clark County v. City of Los Angeles*, 92 F. Supp. 28, 32 (D. Nev. 1950). *See generally National Amer. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 635-36 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). Thus, although Rule 83 provides an arguable means of avoiding obeisance to state laws of amenability by making the manner of service subject only to judicial order, it fails to afford a uniform resolution of the service problems.

¹⁰⁹ *See note 46 and accompanying text supra.*

¹¹⁰ *See notes 93-97 and accompanying text supra.*

¹¹¹ One court has implemented this synthesis of statutory and extrastatutory approaches with no apparent affront to traditional notions of due process. *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, [1973-1] TRADE CAS. (CCH) ¶ 74,594 (S.D.N.Y. 1973); *see Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1339 (2d Cir. 1972) (jurisdiction under securities law). Several authorities have urged a similar jurisdictional approach. *See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 18 (1977); *Smit, International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1039 n.45 (1961).

Similarly, when the defendants are domestic corporations, the national contacts approach would create in personam jurisdiction in any district court. *See notes 77, 93-95 and accompanying text supra.* Section 12's venue criteria, of course, would restrict the place of suit and ensure a significant degree of forum connection.

form, albeit purely prospective, jurisdictional policy may be inappropriate. Inconsistency in the application of the antitrust laws would seem to undermine the strong federal interest in this area. But more significantly, this ad hoc treatment may allow some defendants, particularly aliens, to evade antitrust liability, although their perpetration of antitrust violations having direct and foreseeable effects in the country has effectively removed any due process obstacles to the assertion of jurisdiction by United States courts.

If section 12 is interpreted liberally, Congress' intent to render the antitrust defendant more accessible would be advanced. In addition, the alien corporation would be advised of the character and extent of activity that could reasonably be expected to subject it to liability. Moreover, although the national framework posed by the aggregate contacts theory may seem unfamiliar, the evaluation of jurisdictional contacts is a task routinely undertaken by federal courts on a microcosmic scale and therefore would not seem to exact an undue burden in its application. It is likely, nonetheless, that section 12 will continue to foster confusion and interpolation unless a single approach is adopted or the statute is clarified legislatively to define both its jurisdictional nature and its precise scope. Such clarification would forestall the implementation of state procedural conventions by plaintiffs who may be unaware of section 12's jurisdictional import or who underestimate its reach.

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