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The Use of a Rule 37(b)(2)(A) Sanction to Establish In Personam Jurisdiction

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COMMENTS

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I. INTRODUCTION

Federal Rule of Civil Procedure 37(b) authorizes sanctions against parties who abuse discovery procedures.[1] Among the sanctions specifically permitted is Rule 37(b)(2)(A), which provides for entry of an order establishing facts that might have been shown in information withheld by the sanctioned party.[2] In recent years federal district courts have resorted to this sanction as a convenient device to bring within their jurisdiction defendants who objected to the exercise of personal jurisdiction but who refused to disclose information that might have led to a finding of personal jurisdiction.

The earliest case that appears to authorize a 37(b)(2)(A) jurisdictional finding[3] is *Lekkas v. Liberian M/V Caledonia*.[4] In a per curiam opinion, the Fourth Circuit remanded an action to the district court for further discovery on the issue of personal jurisdiction. Though a 37(b)(2)(A) sanction had not been entered, the court noted that on remand the district court could enter a finding of jurisdictional facts if the defendant who had asserted the court's lack of personal jurisdiction should fail to

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1. FED. R. CIV. P. 37(b).

2. If a party . . . fails to obey an order to provide or permit discovery . . . the court may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action . . . .

Id. 37(b)(2)(A).

3. The term "jurisdictional finding" is used throughout this Comment to mean a finding by the district court of the facts necessary to support its jurisdiction. Thus, a 37(b)(2)(A) jurisdictional finding refers to the imposition of the Rule 37(b)(2)(A) sanction as a method of finding, or deeming established, the facts necessary to support jurisdiction.

4. 443 F.2d 10 (4th Cir. 1971).

provide sufficient information for the court to decide the issue.[5] Subsequently, the Third and Eighth Circuits have confronted the situation anticipated in *Lekkas* and have held a 37(b)(2)(A) jurisdictional finding to be a permissible sanction.

The Eighth Circuit followed *Lekkas* in *English v. 21st Phoenix Corp.*[6] A complaint was filed and discovery began in October 1976. The defendant's conduct during the discovery proceedings was not model. Its "[l]ack of cooperation, inadequate responses and dilatoriness . . . hampered the orderly progression of discovery."[7] After ten months of this evasiveness, the frustrated plaintiffs moved that the district court treat personal jurisdiction as established since the defendant was "deliberately avoiding and delaying discovery of the facts pertaining to [jurisdiction]."[8] The motion was originally denied, but when the defendant continually refused to comply with the discovery schedule set by the court, the sanction was entered on December 27, 1977, fifteen months after discovery had begun.[9] Hearing the case on appeal, the Eighth Circuit affirmed the 37(b)(2)(A) jurisdictional finding.[10]

Similar facts prompted the Third Circuit to uphold a 37(b)(2)(A) jurisdictional finding in *Compagnie des Bauxites de Guinea v. Insurance Co. of North America.*[11] Twenty-one foreign insurers were sued in the District Court of Pennsylvania for failure to pay a claim for damage to the plaintiff's bauxite crushing plant. The defendants filed objections to the court's personal jurisdiction, alleging that they were not "organized, licensed, or

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5. *Id.* at 11. The *Lekkas* decision was approved by the Second Circuit in Grammenos v. Lemos, 457 F.2d 1067, 1074 (2d Cir. 1972). Plaintiffs brought a personal injury action against foreign defendants, which the district court dismissed for failure of service of process and forum non conveniens. In reversing, the Second Circuit held that plaintiffs should have an opportunity to complete valid service of process. If service were complete, then under the *Lekkas* principles, the district court was to give plaintiffs an opportunity to inquire into the facts necessary to support their assertions that the district court had jurisdiction over the defendants. Though the court suggested defendants had a duty to provide information necessary to determine the jurisdictional issues, it did not specify what, if any, sanctions would be available if defendants refused to participate in the discovery. *Id.* at 1069-70, 1074.

6. 590 F.2d 723 (8th Cir. 1979).

7. *Id.* at 726.

8. *Id.* at 727.

9. *Id.* at 728.

10. *Id.*

11. 651 F.2d 877 (3d Cir. 1981), *cert. granted sub nom.* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinea, 50 U.S.L.W. 4553 (U.S. Nov. 2, 1981) (No. 81-440).

authorized to do business under the laws of Pennsylvania."[12] When the plaintiff attempted through discovery to elicit information from the defendants that might have shown minimum contacts, the defendants asserted that the requested discovery was too burdensome and steadfastly refused to participate.[13] For over two years the defendants sought extensions of time, forced the plaintiff to obtain motions to compel production, and then disregarded the deadlines set by the court. No claim was made that the court lacked jurisdiction to compel discovery.[14] The court warned the defendants that further noncompliance "would result in the imposition of a sanction under Fed. R. Civ. P. 37(b)(2)(A) consisting of a finding of in personam jurisdiction."[15] When the final discovery deadline expired, the defendants had produced only a few of the requested documents, despite assertions that the material would be forthcoming.[16] At this point, the district court imposed the threatened sanction.[17]

In an appeal before the Third Circuit, the defendants repeated their argument that the requested production was too burdensome and asserted for the first time that the district court had no authority to compel discovery on the question of jurisdiction.[18] The Third Circuit was not persuaded that the orders compelling discovery placed too heavy a burden on the defendants.[19] It disregarded the defendants' belated offer to allow plaintiffs to inspect their foreign records as merely a "defense strategy that simply [came] too late in these unduly protracted pretrial proceedings to be of major significance."[20] The Third Circuit also found the 37(b)(2)(A) jurisdictional finding completely justified by the defendants' consistent refusal to produce the requested discovery material.[21]

In reaching this result, the Third Circuit relied on the power of courts to use discovery procedures and sanctions when

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12. *Id.* at 881 (footnote omitted).

13. *Id.* at 881-82. Defendants claimed that the requested discovery would require over 150 London brokers to sift through hundreds of thousands of documents.

14. *Id.* at 882.

15. *Id.*

16. *Id.*

17. *Id.* at 883.

18. *Id.* at 882, 884-86.

19. *Id.* at 882.

20. *Id.* at 884.

21. *Id.* at 882-83.

determining the limits of their jurisdiction.[22] The Eighth Circuit supported its decision with similar reasoning and also focused on the capacity of defendants to waive objections to in personam jurisdiction.[23] The Fourth Circuit did not set forth the reasons for its conclusion that the 37(b)(2)(A) jurisdictional finding was an available sanction.[24]

Not all those who have considered the 37(b)(2)(A) jurisdictional finding have found it to be a permissible sanction. The Fifth Circuit, for one, was not persuaded by the *Lekkas* and *English* opinions. In *Familia de Boom v. Arosa Mercantil, S.A.*[25] it held that such a sanction violates due process.[26] Similarly, Judge Gibbons of the Third Circuit questioned the validity of a 37(b)(2)(A) jurisdictional finding. Dissenting in *Compagnie des Bauxites de Guinea,* Judge Gibbons suggested that while all 37(b)(2)(A) sanctions may not be violations of due process, a 37(b)(2)(A) jurisdictional finding should not be allowed when it establishes facts that are not likely to actually exist.[27] He joined the Fifth Circuit in criticizing the sanction as authorizing courts to create their own jurisdiction over a party who might otherwise be outside the court's jurisdiction.[28]

Although Gibbons' dissent and the *Familia de Boom* holding can be explained in terms that might not totally invalidate the sanction,[29] the significant issues involved in a 37(b)(2)(A)

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22. *Id.* at 882, 885.

23. *English,* 590 F.2d at 728 n.5.

24. The court merely directed that

> [i]f the defendants do not promptly and forthrightly disclose the facts necessary for decision of this issue, the district court should apply sanctions under Fed. R. Civ. P. 37, and for the purposes of this case, take as established that [the facts necessary to support jurisdiction exist]; or, if justice requires . . . enter a default judgment on the issue of liability.

Lekkas, 443 F.2d at 11.

25. 629 F.2d 1134 (5th Cir. 1980).

26. *Id.* at 1139.

27. *Compagnie des Bauxites de Guinea,* 651 F.2d at 890-91 (Gibbons, J., dissenting).

28. *Id.* at 892 n.4; *Familia de Boom,* 629 F.2d at 1139.

29. Judge Gibbons did not suggest that the sanction could never be used, but that the number of jurisdictional contacts necessary to impose jurisdiction was much higher than the minimal level used by the majority. He asserted that the "necessarily broad scope of the jurisdictional facts" assumed by the district court when there was no suggestion of "continuous corporate operations" within the jurisdiction made imposition of the sanction an abuse of discretion. *Compagnie des Bauxites de Guinea,* 651 F.2d at 889-91 (Gibbons, J., dissenting).

The Fifth Circuit's opinion can be distinguished from those of the Third and Eighth Circuits on several grounds. The sanctions adopted in the latter opinions were arguably

jurisdictional finding justify a thorough examination of the precedent and reasoning supporting each position. Whenever the sanction is imposed, crucial policies favoring the prevention of discovery abuse collide with the carefully limited power of courts to exercise jurisdiction over nonresident parties. The discovery process embodied in the Federal Rules of Civil Procedure[30] speeds the interparty flow of information and helps judges make informed decisions. Rule 37(b) sanctions are regarded by the courts as vital in the battle against chronic discovery abuse;[31] they must be available to penalize violators of the discovery rules and deter those who might otherwise be inclined to resist valid discovery efforts.[32] On the other hand, there are due process limits on the authority of courts to render judgments affecting nonresident parties.[33] The Supreme Court has recently stressed the importance of ensuring both fairness to the defendant and respect for the sovereignty of individual states when jurisdiction is exercised over a nonresident defendant.[34] A 37(b)(2)(A) sanction can be viewed as a unilateral extension of the court's personal jurisdiction over nonresident defendants as a punishment for claiming to be outside that jurisdiction.[35] Given the importance of respecting the proper limits of jurisdiction, such an extension may not be consistent with due process.

II. ANALYSIS

The Third and Eighth Circuits concluded that a court's ju-

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supported by alternate findings of minimum contacts. *Compagnie des Bauxites de Guinea*, 651 F.2d at 886 n.9; *English*, 590 F.2d at 728 n.6. The Fifth Circuit was unable to find from the record minimum contacts, or even the authentication of service of process. *Familia de Boom*, 629 F.2d at 1139-40. Additionally, the Fifth Circuit may have found it more difficult to accept the 37(b)(2)(A) jurisdictional finding because it was used to validate a sanction even more severe: default judgment. *Id.* at 1137.

30. FED. R. CIV. P. 26-37.

31. *See* Stanton v. Iver Johnson's Arms, Inc., 88 F.R.D. 290, 291 (D. Mont. 1980). *See generally* Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 CALIF. L. REV. 264 (1979).

32. Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980).

33. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-94 (1980).

34. *See id.;* Shaffer v. Heitner, 433 U.S. 186, 203-12 (1977); Hanson v. Denckla, 357 U.S. 235, 250-51 (1958). *See generally* Comment, *Federalism, Due Process, and Minimum Contacts:* World-Wide Volkswagen Corp. v. Woodson, 80 COLUM. L. REV. 1341 (1980).

35. "It is questionable whether a district court may concoct adjudicatory authority over a defendant by virtue of the defendant's flaunting the court's apparent lack of power." *Compagnie des Bauxites de Guinea*, 651 F.2d at 892 n.4 (Gibbons, J., dissenting).

risdiction to determine jurisdiction authorizes the use of a 37(b)(2)(A) jurisdictional finding. Although there is no clear authority to support this conclusion, imposition of the sanction allows a court to preclude an objection to in personam jurisdiction in order to further the policy of preventing undue delay in resolving the merits of a controversy. Since courts are currently empowered to find a waiver of the in personam defense for similar policy reasons, this use of the sanction should be permissible. In addition, several courts have suggested that by objecting to the jurisdiction of the court, the defendant may undertake an obligation to help the court resolve that objection within the framework of the discovery process. Allowing the sanction protects the integrity of the discovery process and aids the court in fairly determining jurisdictional issues.

However, imposing the sanction also places an increased burden on defendants. The limits on the use of the sanction imposed by the Federal Rules of Civil Procedure, the Rules Enabling Act,[36] and the principles of due process must also be considered. Entering the sanction in the form of a presumptive jurisdictional finding could guarantee that due process limits are not contravened, especially if the plaintiff is required to make a threshold showing of jurisdictional facts as a prerequisite to imposition of the sanction.

A. Jurisdiction to Determine Jurisdiction

A basic issue in analyzing Rule 37(b)(2)(A) is whether a court's inherent jurisdiction to determine jurisdiction includes the use of discovery sanctions in resolving jurisdictional issues. In affirming the use of the 37(b)(2)(A) jurisdictional finding, the Third and Eighth Circuits answered this question in the affirmative.[37] Judge Gibbons and the Fifth Circuit, on the other hand, admitted that a trial court has jurisdiction to determine jurisdiction, but concluded that this power cannot authorize a court to create jurisdiction on its own.[38] They suggested that the sanction reaches a result outside the scope of the Federal Rules of Civil Procedure.[39] Beyond these bare assertions, the courts have not

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36. 28 U.S.C. § 2072 (1976).

37. *Compagnie des Bauxites de Guinea*, 651 F.2d at 882, 885; *English*, 590 F.2d at 728 n.5.

38. *Compagnie des Bauxites de Guinea*, 651 F.2d at 892 n.4 (Gibbons, J., dissenting); *Familia de Boom*, 629 F.2d at 1139.

39. *Compagnie des Bauxites de Guinea*, 651 F.2d at 892 n.4 (Gibbons, J., dissent-

elaborated on the meaning and proper application of jurisdiction to determine jurisdiction.

The concept of jurisdiction to determine jurisdiction is well recognized by the courts,[40] and its existence is often characterized as "axiomatic."[41] The phrase is a shorthand way of stating that "[e]very court of general jurisdiction has power to determine whether conditions essential to its exercise [of jurisdiction] exist,"[42] both as to parties and subject matter.[43] In other words, a court has within its role as fact finder the power to find jurisdictional facts and assign legal consequences to those facts. Through this process the court can conclusively adjudicate its own jurisdiction against parties who are contesting it.[44]

Midway along the path which a court must travel to acquire jurisdiction over the parties before it, there lies a deep gulf between the existence of raw jurisdictional facts on one side and the establishment of valid jurisdiction on the other. Jurisdiction to determine jurisdiction is the court's authority to bridge that gulf. It is the court's power to find the facts which can be used to support its jurisdiction, and out of those facts, construct a bridge over the gulf in order to arrive at a determination that it has jurisdiction. A court has no authority to exercise its powers over parties when it has no jurisdiction. Consequently, until that bridge leading to jurisdiction has been erected, a court may not enter a judgment affecting the rights or duties of the parties.[45]

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ing); *Familia de Boom*, 629 f.2d at 1139.

40. Both proponents and opponents of the 37(b)(2)(A) jurisdictional finding accepted its existence. *Compagnie des Bauxites de Guinea*, 651 F.2d at 882; *Familia de Boom*, 629 F.2d at 1139; *English*, 590 F.2d at 728 n.5.

41. Hardy v. Bankers Life & Casualty Co., 232 F.2d 205, 209 (7th Cir.), *cert. denied*, 351 U.S. 984 (1956); Taylor v. Hubbell, 188 F.2d 106, 109 (9th Cir.), *cert. denied*, 342 U.S. 818 (1951). Perhaps as a consequence of this recognition, courts and commentators seldom dwell on the mechanics of the principle's operation longer than to explain circularly that " '[j]urisdiction to determine jurisdiction' refers to the power of a court to determine whether it has jurisdiction . . . subject to a review . . . ." Atlantic Las Olas, Inc. v. Joyner, 466 F.2d 496, 498 (5th Cir. 1972) (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 16, at 50 (2d ed. 1970)).

42. Texas & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co., 270 U.S. 266, 274 (1926).

43. Ripperger v. A.C. Allyn & Co., 113 F.2d 332, 333 (2d Cir.), *cert. denied*, 311 U.S. 695 (1940). *See* Armor Elevator Co. v. Phoenix Urban Corp., 493 F. Supp. 876, 881 (D. Mass. 1980).

44. Roberts v. Bathurst, 112 F.2d 543, 545 (5th Cir.), *cert. denied*, 311 U.S. 709 (1940).

45. Both subject matter and in personam jurisdiction must exist before a court can render a valid judgment. 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.25 [2], at 301-02 (2d ed. 1981). *See also* Employers Reinsurance Corp. v. Bryant, 299 U.S. 374,

The 37(b)(2)(A) jurisdictional finding has been used by the courts as a means of bridging the gap between the facts needed to establish jurisdiction and jurisdiction itself. The use of this sanction probes the degree to which a court may exercise its power over a defendant when the defendant is not yet within the court's jurisdiction. The sanction is a punishment meted out to the defendant for its failure to obey a court order compelling it to produce facts that could be used by the court to bridge the jurisdictional gap. Thus, the sanction compels the defendant to act before jurisdiction has been established. Since traditionally a court cannot require a defendant to act before a finding of jurisdiction, imposition of the sanction raises a difficult question: Does a court have the power to compel the defendant to aid the court in determining its jurisdiction when a positive resolution of jurisdiction is usually a prerequisite to the exercise of judicial compulsion over the defendant?

The Fifth Circuit answered this question in the negative.[46] It viewed the 37(b)(2)(A) jurisdictional finding as an impermissible exercise of bootstrap jurisdiction. According to this view, the sanction allows a court to start at the far side of the jurisdictional gulf by imposing a sanction to enforce a duty which exists only if the court has jurisdiction. That sanction then allows the court to build the jurisdictional bridge in reverse, arriving at a finding of the implied existence of jurisdictional facts, which must normally be shown independently of and prior to any exercise of jurisdiction over the parties. The sanction thus results in an ex post facto establishment by the court of its own jurisdiction.[47]

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381 (1936) (without personal jurisdiction a court may not proceed to a judgment); Pennoyer v. Neff, 95 U.S. 714, 732, 733-34 (1877) (a court's judgment has no validity unless the court possesses both subject matter and in personam jurisdiction).

46. *See Familia de Boom*, 629 F.2d at 1139.

47. A similar exercise of jurisdictional legerdemain was rejected in Pennoyer v. Neff, 95 U.S. 714 (1877). In this case the Court held that the trial court had no authority to adjudicate a defendant's rights in property within the court's jurisdiction when that property was not attached until after the judgment was entered. An attachment of property necessary to the judgment's validity could not retroactively validate the judgment.

> [The trial court's] jurisdiction . . . cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of the property of the defendant. . . . [T]he validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.

Id. at 728.

The Third and Eighth Circuits eschewed this characterization. They argued that since a court has the power to determine its own jurisdiction, when a defendant bars it from fairly exercising that power a court may permissibly assume that it has jurisdiction over the parties.

In upholding the imposition of a 37(b)(2)(A) jurisdictional finding, the Third and Eighth Circuits were building upon a solid foundation. There is ample authority that courts may use the discovery process to resolve jurisdictional issues.[48] Affidavits, interrogatories, depositions, or any combination of recognized methods of discovery are proper tools in finding jurisdictional facts.[49] Since Federal Rule of Civil Procedure 37(b) specifically authorizes the 37(b)(2)(A) sanction as a method of establishing facts, it is not illogical to assume that this sanction should be allowed to operate in conjunction with these other discovery mechanisms to establish jurisdictional facts.

However, that discovery on jurisdictional questions is available does not necessarily mean that discovery on jurisdictional issues may be compelled. Discovery sanctions may not be entered until a defendant has violated a discovery order.[50] No violation of an order enforcing a nonexistent duty should be punishable. Thus, a 37(b)(2)(A) sanction should not be available unless a defendant has a duty to participate in discovery on jurisdictional issues. Whether a duty to cooperate in discovery exists prior to a finding of jurisdiction is a question that must be resolved before determining the extent to which sanctions are available to enforce the duty.

On this issue there is very little specific authority to support the position of the Third and Eighth Circuits. A few courts have taken the first step toward approving the use of the sanction by entering orders compelling defendants to participate in discovery on jurisdictional issues.[51] But these courts did not consider

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48. *See* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430 n.24 (9th Cir. 1977); Grove Valve & Regulator Co. v. Iranian Oil Services Ltd., 87 F.R.D. 93, 96 n.8 (S.D.N.Y. 1980); 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.56[6] (2d ed. 1981).

49. Washington v. Norton Mfg., Inc., 588 F.2d 441, 443 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979).

50. FED. R. CIV. P. 37(b)(2); 4A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 37.03[2], at 37-55 to 37-66 (2d ed. 1981).

51. *In re* Uranium Antitrust Litigation, 480 F. Supp. 1138, 1151 (N.D. Ill. 1979); Commonwealth Oil Ref. Co. v. Houdry Process Corp., 22 F.R.D. 306, 308 (D.P.R. 1958). *Accord* Commonwealth of P.R. v. S.S. Zoe Colocotroni, 61 F.R.D. 653 (D.P.R. 1974) (at-

whether defendants had a duty to obey their orders issued prior to a finding of jurisdiction; they merely assumed that such a duty was the inevitable result of the basic availability of discovery on jurisdictional questions. That assumption seems logical, but it was not tested since the courts did not find it necessary to enforce the orders with sanctions.[52] Ultimately, the extent to which a court can compel the defendant to act will be coterminous with the extent to which sanctions are available to enforce the order.

The decision that most clearly approaches a holding that a defendant may be required to obey a court order issued prior to a finding of jurisdiction is *United States v. United Mine Workers of America*.[53] In that case the Supreme Court held that crim-

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torney required to produce documents relating to jurisdiction pending decision on work product objection).

52. *See supra* authorities cited at note 51.

53. 330 U.S. 258 (1947). One line of cases holds that a court without personal jurisdiction may use its power to aid a plaintiff in establishing personal jurisdiction over the defendant. In Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), the Supreme Court held that an action brought in an improper venue could be transferred to a district court where venue was proper, even if the transferring court had no personal jurisdiction over the defendant. Relying on this holding, the circuits have uniformly held that a district court has the power to transfer an action from a district where jurisdiction over the defendant could not be obtained to one in which it could be, even if the action were originally brought in an otherwise proper venue. *See* Smith v. Peters, 482 F.2d 799, 802-04 (6th Cir. 1973) (when a complaint was timely filed in Michigan within the applicable Kentucky statute of limitations, the court transferred the action to Kentucky, where service of process could be completed, despite the fact that the Kentucky statute of limitations had expired in the interim); Mayo Clinic v. Kaiser, 383 F.2d 653, 654-56 (8th Cir. 1967) (where plaintiff chose the wrong district because service of process could not be completed, the action could be transferred to a district where personal jurisdiction could be completed, despite expiration of statute of limitations in transferee state); Dubin v. United States, 380 F.2d 813, 814-16 (5th Cir. 1967). *See also* Bennett v. Computers Intercontinental, Inc., 372 F. Supp. 1082, 1085 (D. Md. 1974). These circuits base this result on the statute construed by the Supreme Court in *Goldlawr*, 28 U.S.C. § 1406(a), which allows transfer of actions brought in an improper venue. The same result has also been reached under 28 U.S.C. § 1404(a), which permits transfers for forum non conveniens. United States v. Berkowitz, 328 F.2d 358, 360-61 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964). Still other courts cite their inherent power as sufficient authority to transfer actions to districts where jurisdiction may be completed. *See* Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978); Froelich v. Petrelli, 472 F. Supp. 756, 758-60 (D. Hawaii 1979).

These decisions have been reached despite Justice Harlan's dissent in *Goldlawr* suggesting that the result of such transfers might be to confer the power to affect a defendant's substantive rights upon a district court lacking personal jurisdiction. Goldlawr, Inc. v. Heiman, 369 U.S. 463, 467-68 (1962). *See also* Ellis v. Great Southwestern Corp., 646 F.2d 1099, 1105 (5th Cir. 1981). To the extent that *Goldlawr* and subsequent cases permit a court without personal jurisdiction to enter an order having the practical effect of submitting the defendant to the jurisdiction of a different district court, when, in the

inal contempt sanctions may be used to compel a defendant to obey a temporary restraining order pending the trial court's determination of its subject matter jurisdiction.[54] These contempt sanctions are enforceable even if the court is later shown to have no jurisdiction of the subject matter.[55]

The full implication of this holding has not yet been determined.[56] In *United Mine Workers,* the district court had jurisdiction over the parties[57] and could thus exercise some degree of compulsion pending determination of its subject matter jurisdiction. Thus, the case is strong authority for allowing a 37(b)(2)(A) jurisdictional finding to establish subject matter facts when the court already has in personam jurisdiction over the parties. As a practical matter, this result has already been reached under Federal Rule of Civil Procedure 36.[58] At least two courts have held that Rule 36 has the sanctioning effect of establishing facts relating to subject matter jurisdiction when parties fail to respond to requests for the admission of jurisdictional facts.[59]

Whether *United Mine Workers* can be extended further than this is doubtful. The opinion did not hold that a defendant could be sanctioned when the court had no in personam jurisdic-

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absence of that order, defendant would have escaped any potential liability under plaintiff's claim, they are analagous to a 37(b)(2)(A) jurisdictional finding. Beyond this, the cases do not provide persuasive support for the use of a 37(b)(2)(A) jurisdictional finding. Though they suggest a circumstance in which a court without personal jurisdiction can enter an order which will affect defendant's substantive rights, this line of decisions does not hold that such an order may compel the defendants to engage in certain conduct before jurisdiction is established in the transferee court. The power to compel a defendant to obey a court order before jurisdiction has been established is the crucial premise upon which the 37(b)(2)(A) sanction is based.

54. *United Mine Workers,* 330 U.S. at 289-95.

55. *Id.* at 292-94.

56. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 16, at 50 (3d ed. 1976).

57. 330 U.S. at 294.

58. A party may serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact . . . .

. . . The matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection . . . .

FED. R. CIV. P. 36(a).

"Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Id.* 36(b).

59. Resnik v. La Paz Guest Ranch, 289 F.2d 814, 819 (9th Cir. 1961); Oroco Marine, Inc. v. National Marine Service, Inc., 71 F.R.D. 220, 221-22 (S.D. Tex. 1976), *rejected on other grounds in* Harrison v. Flota Mercante Grancolombiana, S.A., 577 F.2d 968, 987 (5th Cir. 1978).

tion.[60] Enforcement of civil sanctions was forbidden if the court's jurisdiction was later overturned.[61] Most importantly, the defendants were not compelled to aid the court in determining the jurisdictional question; they were merely restrained from affecting the subject matter of the action.[62]

In favor of the Fifth Circuit's position that a 37(b)(2)(A) jurisdictional finding cannot confer jurisdiction on the court, it must be noted that jurisdiction to determine jurisdiction cannot empower a court to extend "by judicial fiat . . . its jurisdiction over matters beyond the scope of the authority granted to it . . . ."[63] This inherent limit on a court's subject matter jurisdiction should have its analogue when the court exercises its power to determine in personam jurisdiction. A court cannot be free to arbitrarily find facts that have no basis in reality in order to clothe itself with jurisdiction over the parties.[64] Imposing a 37(b)(2)(A) jurisdictional finding on a defendant for refusing to comply with a discovery order could be viewed as such an arbitrary fact finding if the defendant was not under any duty to obey the order.

It is apparent that the concept of jurisdiction to determine jurisdiction is not dispositive on the issue of whether a 37(b)(2)(A) sanction is available to compel discovery. There is authority to support both positions. At this impasse, the words of Judge Noyes are applicable:

> It is sometimes said that every court has jurisdiction to determine its own jurisdiction. This is partly true and partly untrue. A court must as an incident to its general power to administer justice have authority to consider its own right to hear

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60. 330 U.S. at 294.

61. *Id.* at 295.

62. Defendants were punished for refusing to comply with a temporary restraining order prohibiting them from engaging in a nationwide coal strike pending the court's determination of its jurisdiction to render a declaratory judgment in the underlying contract dispute. *Id.* at 263-69, 290.

63. Stoll v. Gottlieb, 305 U.S. 165, 171 (1938). *See also* 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.25[2] (2d ed. 1979).

64. *Cf.* Chicago Life Ins. Co. v. Cherry, 244 U.S. 25 (1917). When a court has no jurisdiction it cannot render a binding decision "by its mere assertion of its own power . . . even where its power depends upon a fact and it finds the fact." *Id.* at 29-30 (citation omitted). This sort of fact finding could be overturned on appeal as "clearly erroneous." "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2585 (1971) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

> a cause. But the mere decision by a court that it has such right when it does not exist does not give it authority. A court by moving in a cause assumes authority, but the assumption does not confer it. All of which refinement, however, advances us little in determining the substantial jurisdictional question here.[65]

To resolve the issue, other principles must be considered.

B. Waiver of Objections to In Personam Jurisdiction

The Eighth Circuit held that a defendant's misconduct could amount to a waiver of any right to object to the exercise of in personam jurisdiction,[66] thus ratifying a 37(b)(2)(A) jurisdictional finding. As it had opposed the rationale of jurisdiction to determine jurisdiction, the Fifth Circuit also rejected any sanction "finding a waiver of the procedural prerequisites to the exercise of jurisdiction."[67] Neither court explored the theoretical underpinnings of a waiver of the in personam objection or examined the wide variety of situations in which such a waiver has been found.

Before such an examination is made, a clear distinction must be drawn between subject matter jurisdiction and in personam jurisdiction.[68] Subject matter jurisdiction is the authority granted to the courts to resolve particular classes of disputes.[69] That authority is typically conferred by Congress[70] or the Constitution.[71] It cannot be conferred or waived by the parties.[72] There is a presumption against the existence of subject matter jurisdiction; the plaintiff must affirmatively demonstrate its

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65. Brougham v. Oceanic Steam Navigation Co., 205 F.2d 857, 859 (2d Cir. 1913).

66. *English*, 590 F.2d at 728 n.5.

67. Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 436 (5th Cir. 1981) (citing *Familia de Boom*, 629 F.2d at 1139).

68. Failure to distinguish these concepts can be error. Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 699-700 (6th Cir. 1978). *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1063 (1969).

69. 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 60.25[2] (2d ed. 1979).

70. *E.g.*, 28 U.S.C. § 1333 (1976) (district courts have jurisdiction in civil admiralty and maritime cases).

71. *E.g.*, U.S. CONST. art. III, § 2, cl. 2 (Supreme Court has original jurisdiction in cases involving ambassadors and public ministers).

72. Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 699-700 (6th Cir. 1978); Employers Mut. Liab. Ins. Co. of Wis. v. Andrus, 39 F. Supp. 605, 607 (M.D. Ala. 1941); 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.02[3], at 4-45 (2d ed. 1981); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3522, AT 46-47 (1975).

existence.[73]

The plaintiff also has the burden of proving in personam jurisdiction when it is challenged by the defendant.[74] In contrast to subject matter jurisdiction, the exercise of in personam jurisdiction concerns a personal right.[75] Consequently, the actions of the parties may confer this type of jurisdiction or preclude an objection to its exercise. The large number of situations which precipitate a waiver of the in personam defense can be grouped into two broad categories: those in which the defendant consents to the jurisdiction and those in which, for policy reasons, the defendant is deemed to have waived the defense.[76] Examination of each category may suggest whether failure to obey a discovery order should result in the loss of the right to object to in personam jurisdiction.

A party may confer in personam jurisdiction upon the court by its express or implied consent. Thus, a contractual agreement,[77] appointment of an agent for service of process,[78] or other conditional or unconditional consent[79] will waive the defense. An agreement to arbitrate,[80] the initiation of a prior related action

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73. 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 8.07[1] (2d ed. 1981); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3522, at 45 (1975).

74. *Compagnie des Bauxites de Guinea*, 651 F.2d at 880-81; *Familia de Boom*, 629 F.2d at 1138; 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1351, at 565 (1969).

75. *See* Employers Mut. Liab. Ins. Co. of Wis. v. Andrus, 39 F. Supp. 605, 607 (M.D. Ala. 1941). "Jurisdiction of the subject-matter relates to the right of the court to hear and decide; jurisdiction of the parties concerns merely their personal privileges." *Id. See also* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 623 (1838) (dictum) (objection to service of process a personal privilege).

76. Courts often speak of waiver, consent, and estoppel as bases for the loss of the right to object to in personam jurisdiction. *See, e.g.*, Killearn Properties, Inc. v. Lambright, 377 N.E.2d 417, 418-19 (Ind. Ct. App. 1978). These categories suggest that a party's actual or constructive conduct may waive the objection, but there is no need to strictly differentiate them. They are merely a "literary preference"; the results they describe are identical. Nierbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939).

77. Albert Levine Assocs., Inc. v. Hudson, 43 F.R.D. 392, 393-94 (S.D.N.Y. 1967) (defendant signed contract consenting to jurisdiction of any court in New York); 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.02[3], n.22 (2d ed. 1981).

78. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315-16 (1964) (contractual agreement appointing an out-of-state individual to accept service of process submitted defendant to jurisdiction in that state).

79. De Dod v. Pullman Co., 57 F.2d 171, 171-72 (2d Cir. 1932) (an advance agreement to submit to a jurisdiction may be made conditional upon terms set by the waiving party).

80. Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, S.A., 243 F.2d 342,

within the jurisdiction,[81] a request for some form of affirmative relief,[82] or a stipulation to the court's jurisdiction[83] will also waive the defense of in personam jurisdiction.

These situations all demonstrate some intent to submit to the court's jurisdiction. In those instances in which a 37(b)(2)(A) jurisdictional finding has been entered, there was no evidence of either a constructive or implied intent to submit to the court's jurisdiction.[84] Thus, this category of waiver decisions does not support a preclusion of the defense for failure to obey a discovery order.

However, the category of cases in which for policy reasons the defendant is deemed to have waived the defense may support a preclusion of the defense by a 37(b)(2)(A) sanction. Federal Rule of Civil Procedure 12(h)(1)[85] operates to waive objections to in personam jurisidiction if they are omitted from a motion raising another objection available under the rule or if they are not asserted in the answer or first responsive pleading. This rule ensures that all objections to in personam jurisdiction are made early in the proceedings.[86] It effectuates the longstanding policy that the defense of lack of jurisdiction should not be used as a delaying tactic.[87] Rule 12(h)(1) and the decisions ren-

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347 (2d Cir. 1957).

81. Brown v. Hughes, 136 F. Supp. 55 (M.D. Pa. 1955)(by commencing an action for wrongful death stemming from a two-car accident, administratrix submitted to jurisdiction for claims brought against estate by occupant of other automobile).

82. Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967)(dictum) (personal jurisdiction can be conceded by seeking affirmative relief).

83. SEC v. Blazon Corp., 609 F.2d 960, 965 (9th Cir. 1979) (attorney, apparently carelessly, signed stipulation for extension of time which also stated that defendants acknowledged the jurisdiction of the court over them); Feldman Inv. Co. v. Connecticut Gen. Life Ins. Co., 78 F.2d 838, 840 (10th Cir. 1935)(defendant's signed stipulation conditionally confessing judgment was held to constitute a general appearance waiving the defense; before enactment of Federal Rules of Civil Procedure).

84. *See Compagnie des Bauxites de Guinea*, 651 F.2d 877; *Familia de Boom*, 629 F.2d 1134; *English*, 590 F.2d 726-28.

85. A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) [defenses consolidated in one motion], or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted . . . to be made as a matter of course.

FED. R. CIV. P. 12(h)(1).

86. *Compare* FED. R. CIV. P. 12(h)(3): "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

87. 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶¶ 12.02, 12.05, at 2241 (2d ed. 1981). "[T]here also exists a strong policy to conserve judicial time and effort; prelim-

dered under it demonstrate clearly that a defendant must be prompt and precise in raising the defense, or it will be lost.[88]

The policy of avoiding unnecessary delay is vigorously enforced. When there is any question about whether the defense of lack of in personam jurisdiction was properly raised, the fact that the defendant unduly delayed the proceedings by asserting the defense will weigh heavily towards the finding of a waiver.[89] At least one court has held that the defense would not be permitted to be asserted in the answer when the party excessively delayed filing the answer.[90] When the defense is raised but not pursued, it is also waived.[91]

The potential for undue delay of the proceedings by tardy assertion of a jurisdictional defense is the common factor in these decisions waiving the defense even after it has arguably been properly raised. The misconduct of a defendant who resists

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inary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or *quasi*-merits of a controversy." Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 547 (3d Cir. 1967). *See also* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 623 (1838)(dictum)(objection to service of process should be made early in the proceedings).

88. Bethlehem Steel Corp. v. Devers, 389 F.2d 44, 46 (4th Cir. 1968)(attorney's representation of defendant for eighteen months presumed to be authorized; defense waived since it wasn't presented in either pre-answer motion or answer); United States v. Article of Drug Designated B-Complex Cholinos Capsules, 362 F.2d 923, 926-27 (3d Cir. 1966) (defendant raised defense for first time in post-trial brief); Bavouset, v. Shaw's of San Francisco, 43 F.R.D. 296, 298-99 (S.D. Tex. 1967)(defense was waived when not raised until after defendant allowed the case to go to default).

89. *See* Rauch v. Day & Night Mfg. Corp., 576 F.2d 697, 699-702 (6th Cir. 1978). Defendant's technical argument that a motion to dismiss which omitted the jurisdictional objection was really a motion for summary judgment was held outweighed by conduct inconsistent with the defense which "succeeded in obtaining the . . . delay Rule 12 was designed to prevent . . . ." *Id.* at 702. In Alger v. Hayes, 452 F.2d 841 (8th Cir. 1972), an ambiguous objection to jurisdiction raised in the answer was waived when "the whole tenor of the pretrial proceedings" indicated that the defendant was prepared to accept a favorable verdict but intended to contest an unfavorable one. *Id.* at 844-45. When defendant actively participated in a hearing opposing a motion for an injunction the strong policy of conservation of judicial resources supported the waiver of a timely filed objection to jurisdiction. Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543, 545-47 (3d Cir. 1967). *See also* Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467, 469-70 (N.D. Cal. 1971)(securing stipulations extending time to respond to complaint estopped defendant from objecting to admittedly defective service of process when defendant would have gained "nothing but time"). Though in these cases there was a nominal degree of conduct which could be construed as indicating an intent to submit to jurisdiction, avoidance of undue delay was the imperative which persuaded the judges to find a waiver of objections to personal jurisdiction.

90. Spearman v. Sterling S.S. Co., 171 F. Supp. 287, 288-89 (E.D. Pa. 1959).

91. *See* Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1, 4 (D.C. Cir. 1977)(though raised in a motion to dismiss, the defense was waived when not argued before district or appellate courts).

discovery orders causes undue delay by postponing the determination of both the in personam objection and any eventual resolution of the underlying controversy. A Rule 12(h)(1) waiver of the right to object to in personam jurisdiction is one tool used to forestall the waste of judicial resources that would occur during this delay. Allowing a 37(b)(2)(A) jurisdictional finding to preclude any right to object to in personam jurisdiction will cut short that delay and thus further identical policies. The Rule 37(b)(2)(A) sanction should be permitted as the equivalent of a Rule 12(h)(1) waiver.

Of course, the problem with this approach is the difficulty of determining what constitutes misconduct and undue delay. Refusal to comply with discovery orders will cause delay, since it will be more difficult for plaintiff to prove the facts necessary to support jurisdiction. But the refusal is misconduct and the delay is improper only if one accepts the premise that the defendant has a duty to further the discovery process before the court has ruled on its jurisdictional objection. If a defendant has no obligation to assist the court in that process, then by refusing to engage in discovery on jurisdiction, the defendant is merely exercising an option available to any cautious litigant who does not wish to be flung headfirst into a protracted court battle. We thus return to the inevitable question which must be resolved before the use of the sanction can be approved: Does the defendant have a duty to comply with discovery orders made prior to a finding of jurisdiction?

Reference to cases involving the assertion of a defense to in personam jurisdiction shows that the defendant should be required to participate in this discovery process. Many of the decisions finding a waiver of the objection involve conduct that evidences express or implied intent to submit to jurisdiction. However, merely raising the objection may also imply a limited submission to the court's authority.[92] It has been noted that "whenever a party appears and challenges the jurisdiction of the court, he concedes that the court has authority to determine whether it has jurisdiction."[93] Registering its agreement with the *Lekkas* decision, the Second Circuit delineated a fundamental

92. In an extreme example, the Supreme Court held that a voluntary appearance solely to contest in personam jurisdiction could be converted by state statute into a complete submission to jurisdiction without violating due process. York v. Texas, 137 U.S. 15, 19-21 (1890).

93. Hinton v. Hinton, 395 A.2d 7, 10 (D.C. 1978).

ramification of this implied concession of authority: A party which contests the court's jurisdiction "submit[s] to an obligation to provide information pertinent to the court's [jurisdictional] decision."[94] These comments recognize that a party's challenge to the court's jurisdiction fairly implies consent to obey a court order whose purpose is to aid the court's resolution of the issue. If the party violates that order, then its previous consent to the order also authorizes a sanction as punishment for the violation.

This duty is consistent with the nature of the relief obtained when the defendant raises an objection to in personam jurisdiction. No defendant is compelled to defend an action brought in a court without jurisdiction over it; it may simply refuse to appear.[95] By doing so the defendant takes the risk of being required to overturn a default judgment in a collateral attack. When a defendant files a motion to dismiss for lack of jurisdiction it seeks to cut short that risk by quashing the action before it can proceed to judgment. To the extent the risk of a default judgment is avoided by such a motion, the defendant has obtained a degree of relief. It is not unjust to counterbalance that relief by imposing on the defendant a limited duty to provide information necessary to determine the issue. Once the defendant has raised the defense of lack of in personam jurisdiction, both parties have a right to a fair decision by the district court. The issue cannot be justly resolved unless the court has all the relevant information before it. When the information required to resolve the objection remains primarily in the exclusive control of the party who raised the objection, fairness to both parties dictates that the defendant be required to participate in the discovery process.[96] If it resists, then sanctions such as the 37(b)(2)(A) jurisdictional finding must be available to enforce court orders designed to guarantee that the court has sufficient information to determine the issue.

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94. Grammenos v. Lemos, 457 F.2d 1067, 1070 (2d Cir. 1972).

95. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931); Hinton v. Hinton, 395 A.2d 7, 10 (D.C. 1978).

96. "[A] defendant, thus challenging the court's jurisdiction, has no right to keep its records, personnel, and sources of information free from any access by the plaintiff through such reasonable discovery measures as are provided by the FRCP." Commonwealth Oil Ref. Co. v. Houdry Process Corp., 22 F.R.D. 306, 308 (D.P.R. 1958). *See also* Greene v. Oster, 20 F.R.D. 198, 199 (S.D.N.Y. 1957).

C. *Policy Factors*

Important judicial objectives, such as ensuring fair trials and encouraging orderly and efficient discovery, are affected by the availability of the Rule 37(b)(2)(A) jurisdictional finding. Abuse of discovery is rampant.[97] Rule 37 sanctions should be applied liberally in order to punish discovery abusers and to deter potential offenders.[98] In order to meet these goals, courts should be prompt to impose even severe sanctions.[99] Trial courts have recognized these sanctions as essential in controlling discovery abuses.[100] The 37(b)(2)(A) jurisdictional finding should be specifically recognized as a useful weapon in combating the chronic discovery problem.

Although the 37(b)(2)(A) sanction could itself be abused by plaintiffs attempting to avoid the difficult burden of proving jurisdiction when jurisdictional contacts are minimal or nonexistent, without it defendants will find it much easier to avoid compliance with discovery orders[101] and conceal jurisdictional facts.[102] Abuse of the sanction could easily be controlled. Judges could avoid frivolous 37(b)(2)(A) motions for jurisdictional findings by not compelling discovery on jurisdictional issues unless plaintiffs are initially able to show that their assertions are not unfounded.[103] The court could award reasonable expenses and attorney's fees to parties forced to defend against unreasonable motions to compel discovery on jurisdictional issues.[104]

On the other hand, to prohibit all use of the 37(b)(2)(A) jurisdictional finding would "leave the district judge in a quandry in trying to enforce his discovery order."[105] A holding that the defendant has no duty to engage in discovery on jurisdictional issues would cast serious doubt on the power of the court to impose any sanction for dilatory discovery before personal jurisdiction is established. Even if a 37(b)(2)(A) jurisdictional

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97. *See* Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 998-1001 (1980)(Stewart, Powell, Rehnquist, J.J., dissenting); Renfrew, *supra* note 31, at 264-67.

98. Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980).

99. Renfrew, *supra* note 31, at 275.

100. Stanton v. Iver Johnson's Arms, Inc., 88 F.R.D. 290, 291 (D. Mont. 1980)(defendant had default set aside, then failed to respond to court order compelling discovery until day set for hearing on motion for sanctions).

101. *See Familia de Boom,* 629 F.2d at 1139.

102. *See English,* 590 F.2d at 728 n.5.

103. *See infra* text at subsection D.3.

104. FED. R. CIV. P. 37 (a)(4).

105. *Familia de Boom,* 629 F.2d at 1139.

finding were the only prohibited sanction, other available sanctions would be comparatively ineffective. No other Rule 37(b) sanction would be as carefully tailored to the specific problem,[106] or as likely to prevent its reoccurrence. Parties might choose to pay contempt of court fines[107] and attorney's fees[108] rather than submit to jurisdiction.[109] Striking the pleadings[110] or preclusion of the defense[111] would be equivalent to a 37(b)(2)(A) jurisdictional finding and thus impermissible. Other "just"[112] sanctions could perhaps be devised, but judicial creativity would no doubt be thwarted by the problem of applying them against a defendant not shown to be within its jurisdiction.

The practical effect of ruling out the 37(b)(2)(A) sanction is to preclude plaintiff from discovery into jurisdictional issues when defendant refuses to allow the discovery. Faced with the knowledge that a court's order compelling discovery would be toothless—its bark clearly worse than its bite—many lawyers and defendants would feel little obligation to engage in discovery on jurisdictional issues.[113] Given the abuses already occurring under discovery procedures, this result should be avoided, not encouraged.

The use of a 37(b)(2)(A) sanction to find jurisdiction is consistent with the manner in which the sanction is imposed in establishing other facts. Discovery procedures aid the parties in collecting enough information to meet their respective burdens of proof. If one party withholds evidence that would damage the other party's ability to establish its case, then the court may consider that recalcitrance in determining whether a sanction is justified.[114] When defendants have willfully continued to disregard discovery orders, courts have deemed established facts that the plaintiff could not justly be required to prove without recourse to the discovery.[115] To hold otherwise would result in a

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106. *English*, 590 F.2d at 728. *See also Compagnie des Bauxites de Guinea*, 651 F.2d at 884.

107. FED. R. CIV. P. 37(b)(2)(D).

108. *Id.* 37(b), (d).

109. *See* Stanton v. Iver Johnson's Arms, Inc., 88 F.R.D. 290, 291 (D. Mont. 1980).

110. FED. R. CIV. P. 37(b)(2)(C).

111. *Id.* 37(b)(2)(B).

112. *Id.* 37(b)(2).

113. *See* Renfrew, *supra* note 31, at 278-79.

114. Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 504-05 (4th Cir.), *cert. denied*, 434 U.S. 1020 (1977).

115. International Union UAW v. National Right to Work Legal Defense and Educ. Found., Inc., 433 F. Supp. 474, 477-78 (D.C. Cir. 1977)(when defendants refused to dis-

Catch 22 situation.[116] The discovering party would be required to establish certain facts but be precluded from access to those facts. Delay, cost to litigants, and waste of judicial resources will be reduced as jurisdictional issues are resolved earlier in the proceedings. Fairness to the parties will be improved as those who have burdens of proof on issues are given access to relevant information within the scope of discovery. The ultimate resolution of those issues is likely to be more equitable when all the relevant facts are before the fact finder charged with determining the issue.

Authorizing the use of 37(b)(2)(A) jurisdictional findings will protect and promote the integrity of the discovery process, a goal courts recognize may properly be achieved through the imposition of sanctions.[117] Thus, an interpretation of Rule 37(b) which permits a jurisdictional finding is consonant with the overall purposes of the Federal Rules of Civil Procedure: It promotes a "just, speedy and inexpensive [trial]."[118]

D. Limits on the Use of a 37(b)(2)(A) Jurisdictional Finding

1. Federal Rule of Civil Procedure 82 and the Enabling Act

Rule 82 governs the construction of all other Federal Rules of Civil Procedure, including Rule 37(b)(2)(A): "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein . . . ."[119] Opponents of the 37(b)(2)(A) jurisdictional finding claim that this sanction may violate Rule 82.[120] As interpreted by courts and commentators, however, the jurisdiction referred to in Rule 82 is subject matter jurisdiction.[121] The rules can be,

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close evidence which was crucial to plaintiff's claims, despite the numerous hearings and court orders spanning four years of litigation, the interests of justice required imposition of a 37(b)(2)(A) sanction).

116. Fitzgerald v. Texaco, Inc., 521 F.2d 488, 455 n.1 (2d Cir. 1975) (Oakes, J., dissenting), *cert. denied*, 423 U.S. 1052 (1976). Judge Oakes argued, inter alia, that the trial court had unjustly precluded plaintiff from effective discovery on its jurisdictional assertions, even though plaintiff had offered some independent evidence of jurisdictional contacts. The majority characterized that evidence as insubstantial. *Id.* at 450.

117. EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1226 (7th Cir. 1980).

118. FED. R. CIV. P. 1.

119. FED. R. CIV. P. 82.

120. *Compagnie des Bauxites de Guinea*, 651 F.2d at 892 n.4 (Gibbons, J., dissenting). *See also Familia de Boom*, 629 F.2d at 1139.

121. Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444-46 (1946); 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.02[3], at 4-45 (2d ed. 1981); 7 *id.* Pt.

and have been, construed to extend jurisdiction over the person.[122] Rule 4(f),[123] for example, has been held to establish a distinct basis for the court's jurisdiction over the person.[124] In situations where a fact relating to personal jurisdiction is deemed established, the 37(b)(2)(A) jurisdictional finding is not violative of Rule 82.

If the jurisdictional finding established a fact relating to subject matter jurisdiction, the question would be closer. Rule 82 prevents Rule 37 from being construed to extend the subject matter jurisdiction otherwise granted to the court. Thus, Rule 37 may not expand classes of disputes in which jurisdiction is presently authorized or bring new ones within the court's power. A Rule 37(b)(2)(A) jurisdictional finding does neither. It operates only as a method of finding the facts upon which jurisdiction is based. It affects only the procedure for establishing subject matter jurisdiction, not its substantive content. This result is not contrary to Rule 82.

As a check on the power exercisable under the Federal Rules of Civil Procedure, Congress provided in the Enabling Act that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . . ."[125] A 37(b)(2)(A) jurisdictional finding should not be viewed as a violation of the Enabling Act. Rule 4(f) has been construed to allow an extension of in personam jurisdiction by expanding the territorial limits of process[126] without violating the Act. As another method to find the facts necessary to support jurisdiction within existing jurisdictional limits, the 37(b)(2)(A) sanction is even less objectionable. The reasoning used by the Supreme Court in upholding Rule 4(f) makes it

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2, ¶ 82.02[1].

122. 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3141, at 212 (1973).

123. [P]ersons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim . . . may be served in the manner stated in . . . this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced.

FED. R. CIV. P. 4(f).

124. *See* Sprow v. Hartford Ins. Co., 594 F.2d 412, 416 (5th Cir. 1979). *See also* Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250, 252 (2d Cir. 1968); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764, 771 (S.D.N.Y. 1974); Jacobs v. Flight Extenders, Inc., 90 F.R.D. 676, 678-79 (E.D. Pa. 1981); Pillsbury Co. v. Delta Boat & Barge Rental, Inc., 72 F.R.D. 630, 632 (E.D. La. 1976). *Contra* Deloro Smelting & Ref. Co. v. Englehard Minerals & Chems. Corp., 313 F. Supp. 470 (D.N.J. 1970).

125. 28 U.S.C. § 2072 (1976).

126. *See supra* notes 122 & 124.

clear that the 37(b)(2)(A) sanction does not contravene the purpose and language of the Enabling Act.[127] The use of a 37(b)(2)(A) jurisdictional finding

> does not operate to abridge, enlarge or modify the rules of decision by which [the] court will adjudicate [the parties'] rights. It relates merely to "the manner and means by which a right to recover . . . is enforced." In this sense the rule is a rule of procedure and not of substantive right, and is not subject to the prohibition of the Enabling Act.[128]

2. Due process constraints

Basic due process requires that a court have jurisdiction over the parties affected by its judgment and limits the power of a court to render a judgment against a nonresident defendant.[129] Courts considering the effect of the 37(b)(2)(A) jurisdictional finding have debated the extent to which those limits bar its use. Though an exhaustive consideration of the numerous and complex principles woven into the concept of due process is beyond the scope of this Comment, at least some of its ramifications should be explored.

The Fifth Circuit viewed the sanction as going beyond a court's inherent power to determine jurisdiction by allowing the unilateral establishment of power over the parties.[130] This, it asserted, violates the "limitations of sovereignty under due process."[131] In reaching this conclusion, the Fifth Circuit may have been referring to the Supreme Court's decision in *World-Wide Volkswagen v. Woodson*,[132] which held that due process requires state courts to respect the sovereign limits of their own jurisdiction.[133] Dissenting from the Third Circuit's holding, Judge Gib-

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127. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445-46 (1946).

128. *Id.* at 446 (citation omitted).

129. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

130. *Familia de Boom*, 629 F.2d at 1139.

131. *Id.*

132. 444 U.S. 286 (1980).

133. The minimum contacts doctrine "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292.

> "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of the territorial limitations on the power of the respective States . . . ." Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location

bons also relied on *World-Wide Volkswagen* when he suggested that the effect of the sanction was to create jurisdiction in the absence of any independent power over the defendants.[134]

Such an argument has an understandable appeal. A 37(b)(2)(A) jurisdictional finding could perhaps be attacked as an arbitrary and impermissible exercise of the power to find facts.[135] One suspects it was to avoid this characterization that the Third and Eighth Circuits referred to independent findings of jurisdictional contacts in upholding the sanction.[136]

However, the due process limits imposed by *World-Wide Volkswagen* need not be construed to bar a 37(b)(2)(A) jurisdictional finding. The minimum contacts rule is based on the dual requirements that any assertion of jurisdiction must be fair to the defendant and within the court's power.[137] It is difficult to argue that the imposition of a sanction establishing jurisdiction is unfair to a party who not only raised the issue, but had both warning of its impending invocation and ample opportunity to avoid it.[138] Parties asserting that they must be treated with "fair play and substantial justice"[139] should be prepared to treat the court and its judicial processes with similar respect. Parties may argue that they have no duty to comply with a court order until in personam jurisdiction is established, but this may not be entirely true.[140] If the "fair and orderly administration of the laws"[141] is to be protected within the adjudication process,[142]

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for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

Id. at 294 (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958)).

134. *Compagnie des Bauxites de Guinea,* 651 F.2d at 892 n.4 (Gibbons, J., dissenting).

135. *See supra* notes 63 & 64 and accompanying text.

136. After concluding that imposition of a 37(b)(2)(A) jurisdictional finding did not violate due process, the Eighth Circuit appeared to retreat somewhat from its holding by relying on an independent showing of minimum contacts. It stated that "[t]he complete record below reveals that [defendant] had sufficient minimum contacts with Nebraska." *English,* 590 F.2d at 728 n.6. The Third Circuit was careful to base its decision squarely on the 37(b)(2)(A) jurisdictional finding, but it did "not overlook the reality that CBG's contention that the excess insurers did do business in Pennsylvania was not fanciful." *Compagnie des Bauxites de Guinea,* 651 F.2d at 886 n.9.

137. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

138. *See Compagnie des Bauxites de Guinea,* 651 F.2d at 882-83; *English,* 590 F.2d at 727.

139. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)(quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

140. *See supra* notes 92-96 and accompanying text.

141. International Shoe Co. v. Washington, 326 U. S. 310, 319 (1945). *See also*

then a duty to comply with reasoned, prudent orders that assist the court to fairly resolve jurisdictional issues should be recognized.[143] Asserting this minimal burden on a defendant who has raised the issue may be one of the inherent social costs of an orderly and effective court system.

The "power" component of minimum contacts[144] requires that courts give due respect to the territorial and sovereign limits of their authority by not infringing on the domain of other coequal jurisdictions.[145] Comparing a 37(b)(2)(A) jurisdictional finding to a waiver of the right to object to in personam jurisdiction indicates that this power component does not preclude use of the 37(b)(2)(A) sanction. The minimum contacts doctrine is generally not construed to limit a court's power to find a waiver of a defense to in personam jurisdiction. The doctrine was originally established as an alternative to the traditional "presence" basis of jurisdiction.[146] Those courts that have touched on the issue indicate that conduct amounting to a waiver is analagous to physical presence.[147] Consequently, most courts consider the question of waiver independently from the existence of minimum contacts.[148] A waiver of the in personam defense forecloses

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World-Wide Volkswagen, 444 U.S. at 294.

142. The phrase "fair and orderly administration of the law" is often used in reference to interstate allocation of jurisdiction. *See* Comment, *supra* note 34, at 1347. Its use is also appropriate to describe the goal of ensuring fair dispute resolution within a single jurisdiction through effective adjudicatory procedures.

143. Those courts which imply a limited submission to jurisdiction when a party makes an objection to jurisdiction may be recognizing such a duty. *See supra* notes 94-96 and accompanying text.

144. *See supra* note 137.

145. *See World-Wide Volkswagen*, 444 U.S. at 291-94; Comment, *supra* note 34, at 1343. The "power" rationale for assertions of jurisdiction has been persuasively criticized in Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956), and Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. the Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U.L. REV. 363, 364-81 (1980).

146. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

147. *See* Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, 243 F.2d 342, 347 (2d Cir. 1957); Atlanta Shipping Corp. v. Cheswick-Flanders & Co., 463 F. Supp. 614, 618 (S.D.N.Y. 1978).

148. For example, see the following opinions, which find a waiver without referring to the existence or absence of minimum contacts. National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964); Petrowski v. Hawkeye-Sec. Ins. Co., 350 U.S. 495 (1956) (per curiam); Rauch v. Day & Night Mfg. Corp., 576 F.2d 697 (6th Cir. 1978); Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1 (D.C. Cir. 1977); Bethlehem Steel Corp. v. Devers, 389 F.2d 44 (4th Cir. 1968); Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc., 376 F.2d 543 (3d Cir. 1967); Albert Levine Assocs., Inc. v. Hudson, 43 F.R.D. 392 (S.D.N.Y. 1967); Nations

a party from asserting that there are not contacts sufficient to support jurisdiction. Thus, a waiver is a sufficient basis for the exercise of jurisdiction even in the absence of minimum contacts.[149]

A 37(b)(2)(A) jurisdictional finding furthers the same policy[150] and has the same preclusionary effect as a waiver of in personam jurisdiction. After the sanction is entered, the defendant is deemed within the jurisdiction of the court even if minimum contacts could not have been shown. Since the minimum contacts principle does not bar a waiver of the in personam defense, neither should it prohibit the entry of a 37(b)(2)(A) jurisdictional finding.

The principle of reasonableness underlies all assertions of jurisdiction.[151] Under the aegis of minimum contacts,[152] courts have developed "fairly definite bases of jurisdiction,"[153] but these are not necessarily exclusive.[154] "Other bases of jurisdiction which satisfy the basic requirement of reasonableness"[155] may also be developed. A 37(b)(2)(A) sanction imposed upon a wilfully disobedient party is a reasonable response to a situation that threatens the integrity of courts to adjudicate jurisdictional issues effectively. The defendant's refusal to participate in the discovery process prevents the plaintiff from meeting its burden

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Enterprises, Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978); Rock Island Bank & Trust Co. v. Stauduhar, 59 Ill. App. 3d 892, 375 N.E.2d 1383 (1978); Williams v. Indiana Refrigerator Lines, Inc., 612 S.W.2d 350 (Ky. 1981); Security Mgt., Inc., v. Schoofield Furniture Indus., 272 S.E.2d 638 (S.C. 1980).

149. *See* Monesson v. National Equip. Rental, Ltd., 594 S.W.2d 780, 781 (Tex. Civ. App. 1980).

The use of the minimum contacts test has been expanded in recent years. *See* Shaffer v. Heitner, 433 U.S. 186 (1977). Professor Hazard has suggested that minimum contacts be the basis for all jurisdictional assertions. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241. There may be a recent trend towards an independent consideration of jurisdictional contacts, even when a waiver has been found. "[B]ecause I realize the difficulty in discerning the boundaries of when jurisdictional defenses may be waived by conduct rather than by failure to abide by the requirements set forth in Rule 12(h), I think it prudent to address . . . the defendant's contentions regarding personal jurisdiction . . . ." Marquest Medical Products, Inc. v. EMDE Corp., 496 F. Supp. 1242, 1246 (D.C. Colo. 1980). For an assertion that minimum contacts must exist in addition to a waiver, see Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 985-87 (N.D. Ill. 1980). This does not yet appear to be the general rule.

150. *See supra* text pp. 118-19.

151. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 24 comment b (1971).

152. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

153. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 39 comment a (1971).

154. *Id.*

155. *Id.*

of proving jurisdictional facts and precludes the court from making a fair and fully informed decision on the validity of defendant's objection to in personam jurisdiction. Authorizing a 37(b)(2)(A) jurisdictional finding ameliorates these potential inequities. Such a result helps ensure a fair trial to all litigants and should be consistent with due process.

3. The requirement of an independent showing of jurisdictional contacts

Even if imposition of the 37(b)(2)(A) sanction is not a per se violation of due process, there are limits on the circumstances in which the sanction should be invoked. In *United States v. United Mine Workers of America*[156] the Supreme Court indicated that criminal sanctions would not be available if plaintiff's assertion of jurisdiction had been frivolous.[157] This suggests that a plaintiff must make some independent showing that jurisdictional contacts are likely to exist as a prerequisite to a motion seeking imposition of the sanction.

As a practical matter, this threshold standard has been read into the Federal Rules of Civil Procedure. Like other Rule 37(b) sanctions, a 37(b)(2)(A) jurisdictional finding is not available to a plaintiff until it has obtained a court order compelling discovery.[158] District courts have consistently refused to compel production on jurisdictional issues unless the plaintiff has shown that a real possibility of establishing jurisdiction exists.[159] If plaintiff's assertions of jurisdiction are frivolous[160] or insubstantial,[161] no discovery on the issue will be allowed. This showing is probably sufficient to meet the requirements of *United Mine Workers.*

E. Using a 37(b)(2)(A) Sanction to Shift the Burden of Proof

The Third and Eighth Circuits approved the use of a

156. 330 U.S. 258 (1947). *See supra* text accompanying notes 53-62.

157. 330 U.S. at 293.

158. FED. R. CIV. P. 37(b)(2); 4A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 37.03[2], at 37-55 to 37-66 (2d ed. 1981).

159. *See, e.g.,* H.L. Moore Drug Exchange, Inc. v. Smith, Kline and French Labs, 384 F.2d 97, 98 (2d Cir. 1967); Grove Valve & Regulator Co. v. Iranian Oil Services, Ltd., 87 F.R.D. 93, 96 (S.D.N.Y. 1980).

160. Surpitski v. Hughes-Keenan Corp., 362 F.2d 254, 255 (1st Cir. 1966).

161. Fitzgerald v. Texaco, Inc., 521 F.2d 448, 450 (2d Cir. 1975).

37(b)(2)(A) sanction to conclusively establish the requisite jurisdictional facts; the Fifth Circuit found this result impermissible. An alternative not considered by the circuits is to enter the sanction as a preliminary or presumptive finding of jurisdiction. Under this two-step approach, the sanction would presume jurisdictional facts established and shift the burden of producing evidence on jurisdictional issues from the plaintiff to the defendant. After entry of the sanction, the defendant would have the opportunity to prove itself outside the court's jurisdiction by showing a lack of minimum contacts. Though the task of proving a negative would undoubtedly be difficult, at least the defendant would not be immediately and irrevocably swept within the court's jurisdiction.

Entering the sanction as a presumptive finding of jurisdiction is a response consistent with the situation that necessitates it. In early state decisions, failure to produce documents resulted in sanctions deeming established the facts allegedly shown by the documents.[162] Those facts were presumed to exist by virtue of the sanctioned party's culpable actions.[163] Similarly, the conduct of a defendant who in bad faith refuses to disclose information bearing on jurisdiction may imply that jurisdictional contacts do exist.[164]

A defendant who prevents the plaintiff from meeting its burden of proving jurisdiction may reasonably be required to bear that burden itself. This is especially appropriate since usually the information and documents relevant to the defendant's contacts with the forum state are more available to the defendant than to the plaintiff.[165] The Fifth Circuit's conclusion that the burden of proving jurisdiction should not be shifted to a dilatory defendant, even when defendant's refusal to engage in discovery forecloses the plaintiff from meeting that burden,[166]

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162. McClure v. McClintock, 150 Ky. 265, 271, 150 S.W. 332, 334 (1912); Amite Bank & Trust Co. v. Standard Box & Veneer Co., 177 La. 954, 966-67, 149 So. 532, 536 (1933).

163. *See supra* authorities cited at note 162.

164. If the defendant has no duty to comply with discovery orders issued prior to a finding of jurisdiction, then this assumption is not permissible.

165. *See* Commonwealth Oil Ref. Co. v. Houdry Process Corp., 22 F.R.D. 306 (D.P.R. 1958). Allowing defendant to avoid discovery on jurisdictional issues "would amount to shutting all doors to plaintiff to obtain proof of the existence of the 'minimum contacts' which are indispensable for supporting an issue as to which said plaintiff has the 'onus probandi.' " *Id.* at 308. *See also* Greene v. Oster, 20 F.R.D. 198, 199 (S.D.N.Y. 1957).

166. *Familia de Boom,* 629 F.2d at 1138.

seems particularly harsh and unwarranted.[167]

Currently, other judicial presumptions operate to shift the burden of producing evidence regarding jurisdictional issues. For example, in certain situations, the defendant can be required to prove a certain location is not its domicile for purposes of diversity jurisdiction.[168] A party seeking to overcome a 37(b)(2)(A) jurisdictional presumption is placed in a situation analogous to that which it would have faced if it had decided to take the risk of a default judgment instead of appearing and challenging the court's jurisdiction; in collaterally attacking a default judgment, the defendant would have been required to show that the court entering the judgment did so without in personam jurisdiction.[169] Thus, the practical effect of a 37(b)(2)(A) presumptive jurisdictional finding is to impose no greater a burden on the defendant than it would have faced had it ignored the purported exercise of jurisdiction and sought to overturn it later.

A 37(b)(2)(A) sanction establishing a presumption of jurisdiction is consistent with the policies generally governing discovery procedures and sanctions. It is a form of conditional sanction because the sanctioned party has an opportunity to avoid its full impact. It is narrowly drawn and rationally related to the misconduct:[170] Its imposition could only encourage further disclosure efforts from a defendant seeking to ameliorate an unfavorable situation. Since these disclosures would come later during the litigation, extensive pretrial delay over jurisdictional skirmishes could be reduced.[171] These factors suggest that a

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167. Dissenting in *Compagnie des Bauxites,* Judge Gibbons did not advocate such an extreme position. He recognized that if a plaintiff were effectively precluded from meeting its burden of proof the sanction might be justified. 651 F.2d at 891-92 (Gibbons, J., dissenting). He argued, however, that the "plaintiff should have to do the initial traveling" to the location of defendants' records. *Id.* at 891. Only after such a "home base" inspection was refused by the defendant would plaintiff be precluded from meeting its burden. *Id.* at 891-92. Though a general rule to that effect would interfere with the discretion normally granted the district court in discovery matters, it is a reasonable guideline if one opts to favor defendants in jurisdictional questions. Judicial analysis of jurisdictional issues—including this one—is inevitably affected by a basic policy decision to favor either plaintiffs or defendants. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1127-28 (1966).

168. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3612, at 719-20 (1975).

169. 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 55.10[1], at 55-232 to -233 (2d ed. 1981).

170. *See Compagnie des Bauxites de Guinea,* 651 F.2d at 884.

171. If a court later determined it had no in personam jurisdiction, much money and time might be wasted. In this respect a presumptive sanction would be inferior to a

37(b)(2)(A) sanction presuming jurisdiction would be a useful and effective alternative to the more severe conclusive finding of jurisdiction.

III. Conclusion

Ultimately, whether the 37(b)(2)(A) jurisdictional finding is allowed will be influenced by such policy decisions as whether the plaintiff or defendant will be favored on jurisdictional questions, whether the scope and purposes of discovery are broad enough to encompass such a sanction, and whether our judicial system may properly command a degree of obedience from a party not conclusively shown to be within its jurisdiction.

Courts are permitted to find a waiver of objections to in personam jurisdiction when the policy of avoiding improper delay is promoted, or when the conduct of the parties indicates an intent to submit to the jurisdiction of the court. Courts also have jurisdiction to enter findings delineating the extent of their authority over the parties. Whenever a defendant enters a court and moves for dismissal under Rule 12(b) of the Federal Rules of Civil Procedure, it should be required to cooperate with the court and other litigants to the extent necessary under those rules to ensure a just resolution of its objection. As an adjunct to the power to determine jurisdiction and as the equivalent of a waiver of a jurisdictional defense, a Rule 37(b)(2)(A) jurisdictional finding is a proper and effective means of enforcing that duty of cooperation.

An adequate protection against judicial abuse of the sanction is provided by the requirement that the plaintiff make an initial showing of jurisdictional facts as a prerequisite to obtaining an order compelling discovery. If a conclusive and final determination of jurisdiction under a Rule 37(b)(2)(A) sanction is viewed as too harsh a punishment, an alternative sanction establishing only a presumptive finding of jurisdiction is available. Defendants would be left with ample opportunity to rebut that finding if it is incorrect. The 37(b)(2)(A) sanction establishing jurisdiction should be allowed to take its place alongside the

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conclusive one; but if the choice is between the presumptive sanction or none at all, then the presumptive sanction is preferable. Civil actions are already subject to a tardy dismissal for lack of subject matter jurisdiction. 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice ¶ 0.60[4] (2d ed. 1981). To add another circumstance in which the action could be dismissed on jurisdictional grounds at a late stage of the proceedings would not greatly increase the risk of wasted resources.

other Rule 37 sanctions, protecting the integrity of the discovery processes and furthering the Federal Rules of Civil Procedure as a device to ensure "just, speedy and inexpensive" trials.[172]

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172. FED. R. CIV. P. 1.