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# Putting Personal Jurisdiction within Reach: Just What Has Rule 4(k)(2) Done for the Personal Jurisdiction of Federal Courts

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# Putting Personal Jurisdiction Within Reach: Just What Has Rule 4(k)(2) Done for the Personal Jurisdiction of Federal Courts?

Dora A. Corby\*

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\* J.D., University of the Pacific, McGeorge School of Law, to be conferred 1999; B.S., Eastern Michigan University, 1991. I would like to thank my husband, Adam, for his support and endless patience. I would further like to thank Professor Michael Vitiello who instilled in me an enthusiasm for civil procedure and taught me to always look for the issues "lurking in the dark." This comment is dedicated to the memory of Linda Duggan-Byrum.

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I. INTRODUCTION

Most people who decide to sue believe they merely hire a lawyer to file suit and their day in court will be guaranteed. However, some are surprised to learn that before a federal court will even hear the case, a dispute may arise as to whether the defendant can be sued in the particular court where the plaintiff has filed his complaint. To have a case heard in federal court, the federal court must have personal jurisdiction over the defendant.<sup>1</sup>

A statute authorizing personal jurisdiction is needed for a federal district court to assert personal jurisdiction over the defendant.<sup>2</sup> In most instances, the federal court relies on the long-arm statute of the state where the federal district court sits.<sup>3</sup> However, if the claim is based on a federal law that allows nationwide service of process, the federal statute then provides the authorization to assert personal jurisdiction.<sup>4</sup>

An anomaly seems to arise when a federal court, asserting personal jurisdiction over a defendant who violated *federal* law, must use a *state* long-arm statute to assert personal jurisdiction.<sup>5</sup> In 1987, the Supreme Court addressed the issue of

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1. See *Pennoyer v. Neff*, 95 U.S. 714, 720 (1877) (setting out a general proposition that for a court to be competent to hear a case there must be, in addition to subject matter jurisdiction, jurisdiction over the person); 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 5.01 (2d ed. 1991) [hereinafter CASAD, JURISDICTION] (recognizing that federal courts, like state courts, are required to assert jurisdiction over the person before they can hear the case). See generally 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1069 (2d ed. 1987 & Supp. 1998) (discussing how personal jurisdiction is extended by federal courts).

2. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (stating that for a court to exercise personal jurisdiction beyond the state boundaries where the district court sits, there must be a statute authorizing service of process).

3. See FED. R. CIV. P. 4(k)(1)(A) (indicating the methods that a federal court may use as authorization for asserting personal jurisdiction over a defendant, including borrowing the state's long arm); see also *infra* notes 39-46 and accompanying text (discussing the role of long-arm statutes in personal jurisdiction).

4. See FED. R. CIV. P. 4(k)(1)(D) (explaining the methods a federal court may use as authorization for asserting personal jurisdiction over a defendant including authorization by a "statute of the United States").

5. See Stanley E. Cox, *Jurisdiction, Venue, and Aggregation of Contacts: The Real Minimum Contacts and Federalism Questions Raised by Omni Capital, International v. Rudolf Wolff & Co.*, 42 ARK. L. REV. 211, 215 (1989) (intimating that "where a federal court is adjudicating a federal claim involving a federal statute," it is anomalous to limit the personal jurisdiction reach to that of the state); Leslie M. Kelleher, *The December 1993*

whether a foreign defendant who violated federal law may be sued in the United States if there is neither a state long-arm statute reaching the defendant nor a provision allowing for nationwide service of process.<sup>6</sup> In *Omni Capital International v. Rudolf Wolff & Co.*,<sup>7</sup> *Omni*, the third-party plaintiff, argued that when a defendant has violated federal law, a federal long arm should apply and because none currently existed, the Supreme Court should create one.<sup>8</sup> However, the Supreme Court held that if a federal long arm was needed, Congress and the Advisory Committee for the Federal Rules of Civil Procedure would be the appropriate bodies to create it.<sup>9</sup> Accordingly, in 1993 when the Federal Rules of Civil Procedure were amended, Congress created the first federal long-arm statute by adding Rule 4(k)(2).<sup>10</sup>

When a new rule or statute is enacted, the legal community awaits to see how the courts apply the new law. With Rule 4(k)(2), the interest is whether the newly created federal long arm would find any real use. Five years have passed since the enactment of Rule 4(k)(2) and the lower federal courts have had many opportunities to interpret its meaning.<sup>11</sup> This Comment reviews the usefulness of Rule 4(k)(2) in asserting jurisdiction over defendants who violate federal law and who are unable to be reached by any individual state's long-arm statute.

Part II of this Comment discusses how federal courts established personal jurisdiction prior to the enactment of Rule 4(k)(2) of the Federal Rules of Civil Procedure.<sup>12</sup>

In Part III, this Comment examines *Omni Capital International v. Rudolf Wolff & Co.*<sup>13</sup> This case called for the creation of a federal long-arm statute to be used in situations where a defendant who violated federal law could not be reached by any

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*Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 *TOURO L. REV.* 7, 35 (1995) (suggesting inconsistency in the situation where a defendant who violated federal law and can satisfy the constitutional requirements for personal jurisdiction, cannot be brought before the court because that defendant cannot meet the state requirements for personal jurisdiction); see also Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 *TEX. L. REV.* 1589, 1596 (1992) [hereinafter Casad, *Personal Jurisdiction*] (asserting that "there is no good reason why contacts with the state in which the federal court sits should be necessary in cases arising under federal law").

6. See *Omni Capital Int'l*, 484 U.S. at 109-11 (stating that a defendant who is not amenable to jurisdiction under the long-arm statute of any state may not be sued in federal court in the United States).

7. 484 U.S. 97 (1987).

8. See *Omni Capital Int'l*, 484 U.S. at 108-11 (noting that *Omni Capital* was suggesting that the Court use its power to create federal common law to establish a federal long-arm statute).

9. See *id.* at 109-11 (refusing to use judicially created law to assert personal jurisdiction over the foreign defendants).

10. See FED. R. CIV. P. 4(k) advisory committee's note (1993) (stating Rule 4(k)(2) was enacted in response to the suggestion by the Supreme Court in *Omni Capital Int'l*); see also FED. R. CIV. P. 4(k)(2) (allowing a federal court to assert personal jurisdiction over a defendant if the claim arises under federal law and the defendant is not amenable to jurisdiction in any other state).

11. See *infra* Part V (analyzing how federal courts have interpreted Rule 4(k)(2)).

12. See *infra* Part II (explaining how personal jurisdiction was asserted prior to Rule 4(k)(2)).

13. 484 U.S. 97 (1987); see *infra* Part III (reviewing the facts and analysis of *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)).

states' long-arm statute or by a federal statute that allows for nationwide service of process.<sup>14</sup> The Supreme Court pointed out that the *Omni* situation created a gap in the federal courts' assertion of personal jurisdiction.<sup>15</sup> That gap allowed some defendants who violated federal law to escape litigation in the United States.<sup>16</sup>

Part IV focuses on the adoption of the federal long-arm statute provided in Rule 4(k)(2). This Part also explores the purpose behind Rule 4(k)(2) and examines how the rule should be applied according to the Advisory Committee.<sup>17</sup> This section closes by re-examining *Omni Capital International* under Rule 4(k)(2) to determine whether a federal long arm would have subjected the third-party defendants to personal jurisdiction.<sup>18</sup>

Part V examines how the lower federal courts have interpreted Rule 4(k)(2).<sup>19</sup> This Part looks specifically at the language "arising under federal law" and the various ways it has been interpreted.<sup>20</sup> It also considers the requirement that limits the application of Rule 4(k)(2) to defendants who are not amenable to suit in any court of general jurisdiction.<sup>21</sup> Additionally, this Part analyzes who has the burden of proof to show that the defendant is not amenable to jurisdiction in any other court of general jurisdiction.<sup>22</sup> Lastly, this Part looks at how the courts using Rule 4(k)(2) perform the due process analysis.<sup>23</sup>

Finally, this Comment concludes that Rule 4(k)(2) has closed the gap that the Supreme Court indicated such a rule would fill.<sup>24</sup> This Comment further concludes that while Rule 4(k)(2) has found some utility by now providing some plaintiffs with a forum to bring their cases, there are still developing issues regarding the mechanics for applying the rule that the Supreme Court will have to address.<sup>25</sup>

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14. See *Omni Capital Int'l*, 484 U.S. at 109-11 (suggesting that Congress, the Advisory Committee and the Supreme Court work together to enact a statute authorizing the assertion of personal jurisdiction over a defendant who violates federal law and is not amenable to jurisdiction because the state long-arm statute could not reach the defendant).

15. See *infra* Part III.C (recognizing that there is a need for a federal long-arm statute and the Supreme Court's refusal to create a federal common law rule).

16. See *infra* notes 116-27 and accompanying text (demonstrating that prior to Rule 4(k)(2) the federal courts' jurisdictional reach did not extend to some defendants).

17. See *infra* Part IV.A-C (discussing the enactment, purpose and function of Rule 4(k)(2)).

18. See *infra* Part IV.D (pointing out that if a rule like Rule 4(k)(2) had been available, then the third-party defendants could have been sued in Louisiana).

19. See *infra* Part V (examining how Rule 4(k)(2) has been applied by the lower federal courts).

20. See *infra* Part V.A (analyzing the interpretation of the language "arising under federal law").

21. See *infra* Part V.B (surveying how the courts have looked at the language "not subject to the jurisdiction of the courts of general jurisdiction of any state").

22. See *infra* notes 242-44 and accompanying text (examining who has the burden of proof to show that the defendant is not amenable to jurisdiction in any court of general jurisdiction in any state).

23. See *infra* Part V.C (considering the analysis courts have used in establishing that the assertion of personal jurisdiction under Rule 4(k)(2) does not violate due process).

24. See *infra* Part VI (concluding that Rule 4(k)(2) reaches foreign defendants who violate federal law and have enough contacts with the United States to justify the assertion of personal jurisdiction).

25. See *infra* Part VI (concluding that although Rule 4(k)(2) is useful, the Supreme Court must resolve developing splits among the lower courts).

## II. PERSONAL JURISDICTION OF FEDERAL COURTS PRIOR TO RULE 4(K)(2)

Two requirements must be met for a federal district court to assert personal jurisdiction.<sup>26</sup> First, a statute must authorize service of process on those defendants not found in the state where the federal court sits.<sup>27</sup> Second, the assertion of personal jurisdiction must not violate due process.<sup>28</sup>

### A. Historical Development of Statutory Authorization of Service of Process

The Judiciary Act of 1789 was the first statute establishing the jurisdictional reach of federal courts.<sup>29</sup> Congress tied the assertion of personal jurisdiction in federal courts to service of process.<sup>30</sup> Under the Judiciary Act of 1789, a federal court could only exercise personal jurisdiction over those defendants who could be served within the immediate local district in the state where the federal district court was located.<sup>31</sup> Service of process could only be made in the district where the defendant was “an inhabitant” or in the district where the defendant “shall be found at the time of serving [the summons].”<sup>32</sup>

In 1938, Congress enacted the Federal Rules of Civil Procedure, and created Rule 4 to authorize service of process.<sup>33</sup> Federal courts were no longer limited to serving process only within the immediate local district where the court was located, but could now serve process anywhere within the boundaries of the state.<sup>34</sup>

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26. See 1 CASAD, JURISDICTION, *supra* note 1, § 1.01[2] (explaining that both the service of process and the due process requirements must be met for the assertion of jurisdiction to be proper).

27. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (stating that for a court to exercise personal jurisdiction beyond the state boundaries where the district court sits, there must be a statute authorizing service of process); see also *Kohler Co. v. Titon Indus., Inc.*, 948 F. Supp. 815, 817 (E.D. Wis. 1996) (recognizing that “there must be authorization for service of summons on the defendant”).

28. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that due process requires that the defendant have certain minimum contacts with the forum where the case is to be brought and that the suit not “offend traditional notions of fair play and substantial justice” (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940))).

29. See *Casad, Personal Jurisdiction*, *supra* note 5, at 1594 (noting that the creation of the federal courts’ jurisdictional reach began with the Judiciary Act of 1789).

30. Service of process has two functions: (1) to give notice to the defendant of the claim against him or her; and (2) to obtain personal jurisdiction over the defendant. See 4 WRIGHT & MILLER, *supra* note 1, § 1069 (intimating that “service of process is the preliminary inquiry into whether the court has the power to summons a defendant before it”). Without proper service of process, personal jurisdiction cannot be properly asserted by the federal court. *Id.*

31. See *Casad, Personal Jurisdiction*, *supra* note 5, at 1594 (recalling that the creation of the federal courts’ jurisdictional reach was contained in the Judiciary Act of 1789).

32. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79.

33. See FED. R. CIV. P. 4 advisory committee’s note (1937) (creating a federal rule for service of process by federal courts).

34. FED. R. CIV. P. 4 (1937); see 4 WRIGHT & MILLER, *supra* note 1, § 1061 (noting that with the enactment of Rule 4 of the Federal Rules of Civil Procedure, the federal courts could serve process within the territorial boundaries of the entire state instead of being limited to serving process only within the immediate district where

A federal court could assert personal jurisdiction over a defendant who could be served anywhere within the state in which the district court sat.<sup>35</sup> Thus, personal jurisdiction was territorially based and the concept of personal jurisdiction was grounded in the principles of federalism and state sovereignty.<sup>36</sup>

When Congress amended Rule 4 in 1963, the personal jurisdiction concept moved away from federalism and state sovereignty toward the idea that personal jurisdiction is a “function of the individual liberty interests preserved by the Due Process Clause.”<sup>37</sup> This expansion allowed courts to reach beyond the state’s borders and bring the defendant back to the state where the defendant purposefully availed himself of the benefits and protections of that state’s laws.<sup>38</sup>

Under the 1963 amendments, Congress authorized three methods for serving process and hence asserting personal jurisdiction over a defendant not located within the state.<sup>39</sup> First, the federal court could borrow the state’s long-arm statute<sup>40</sup>

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the district court was located).

35. FED. R. CIV. P. 4(f) advisory committee’s note (1937). However, Rule 4 is not the source of the federal courts’ authority to assert jurisdiction because the Federal Rules of Civil Procedure cannot create jurisdiction. *See* FED. R. CIV. P. 82 (expounding that the Federal Rules of Civil Procedure are not to “extend or limit the jurisdiction of the United States district courts”). Rule 4, however, is only a statute (or rule) authorizing service of process in the federal courts. *Id.*

36. *See generally* *Pennoyer v. Neff*, 95 U.S. 714 (1877) (holding that based on the ideas of federalism and state sovereignty, personal jurisdiction was limited to the presence of the defendant in the forum state).

37. *See* *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-03 (1982) (asserting that personal jurisdiction must be a part of the individual liberty of the Due Process Clause because a defendant in an action is given the opportunity to waive personal jurisdiction); *see also* FED. R. CIV. P. 4 (1963) (authorizing service of process beyond the state where the district court is located).

38. *See* *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (stating that a defendant is subject to personal jurisdiction when he “purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”).

39. FED. R. CIV. P. 4 advisory committee’s note (1963).

40. There are generally two types of long-arm statutes. One type of long-arm statute provides a “laundry list” of requirements that the defendant must meet before the plaintiff can serve the defendant with process. *E.g.*, N.Y. C.P.L.R. 302 (McKinney 1990). The New York long-arm statute states:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

*Id.* § 302(a).

The other type of long-arm statute extends service of process to the full extent of due process. *E.g.*, CAL. CIV.

for service of process outside of the state.<sup>41</sup> Second, the federal court could rely on any federal statute authorizing nationwide service of process.<sup>42</sup> Third, the federal court could extend service of process within 100 miles of the district court if using Rule 14 (Third-Party Practice)<sup>43</sup> or Rule 19 (Joinder of Persons Needed for Just Adjudication).<sup>44</sup> Prior to the enactment of Rule 4(k)(2), these were the only methods Congress authorized the federal courts to use in asserting personal jurisdiction over a defendant. These changes greatly expanded the jurisdictional reach of federal courts because the court could now go beyond the territorial borders of the state where it was located to assert personal jurisdiction as long as the state long-arm statute allowed for it.<sup>45</sup> But the greatest expansion allowed the federal courts to reach anywhere in the United States when there is a federal statute authorizing nationwide service of process.<sup>46</sup>

### B. Due Process Analysis

In addition to statutory authorization for service of process, the assertion of personal jurisdiction cannot violate due process.<sup>47</sup> The due process analysis involves a two-pronged inquiry: first, the defendant must have sufficient minimum contacts with the forum where the plaintiff filed suit;<sup>48</sup> and second, the assertion of personal jurisdiction in that forum must be fair or convenient to the defendant.<sup>49</sup> Therefore, due process limits a court's ability to assert personal jurisdiction over a defendant.

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PROC. CODE § 410.10 (West 1973). The California long-arm statute states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." *Id.*

41. FED. R. CIV. P. 4(e) advisory committee's note (1963).

42. FED. R. CIV. P. 4(f) advisory committee's note (1963).

43. See FED. R. CIV. P. 14(a) (allowing for a defending party to implead a third party who is not already a party to the action who may be liable to the defendant).

44. See FED. R. CIV. P. 19 (requiring that persons who should be parties to the lawsuit be "joined" to the suit if complete relief cannot be accorded among the parties already in the suit or if the person's interests will be affected by the suit).

45. See FED. R. CIV. P. 4(e) (1963) (expanding the jurisdictional reach of federal courts beyond the borders of the state).

46. See FED. R. CIV. P. 4(f) (1963) (allowing the federal courts the authority to reach beyond the state to serve process).

47. See *supra* note 28 and accompanying text (explaining that the due process analysis requires the assertion of personal jurisdiction must be fair).

48. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316-20 (1945) (emphasizing that the defendant must have minimum contacts with the forum in which the suit is to be brought).

49. See *Asahi Metal Indus. Co. v. Superior Court (Cheng Shin Rubber Indus. Co.)*, 480 U.S. 102, 113-15 (1987) (stating that the due process analysis for personal jurisdiction requires that it be fair and convenient to subject the defendant to jurisdiction in the court the plaintiff has chosen); accord *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980); *International Shoe Co.*, 326 U.S. at 316.



1. *Minimum Contacts*

The minimum contacts analysis requires a court to determine whether the defendant has sufficient contacts with the forum such that trying the case in the court the plaintiff chose does not violate the defendant's due process rights.<sup>50</sup> First, the court decides whether the relevant forum with which the defendant must have contacts is the state where the plaintiff has filed the action or the United States as a whole.<sup>51</sup> Second, the court determines if the nature and character of the contacts are sufficient such that due process is not violated.<sup>52</sup>

a. *Relevant Forum*

Which forum the court looks to in determining whether the defendant has sufficient minimum contacts depends on the type of statute authorizing service of process. Rule 4 allows federal courts either to borrow a state long-arm statute or to look to a federal statute authorizing nationwide service of process.<sup>53</sup> If borrowing the state long-arm statute, the federal district court evaluates the defendant's contacts with the state where the court sits.<sup>54</sup> Therefore, because the federal court is utilizing a state statute, the minimum contacts analysis is based on the Due Process Clause of the Fourteenth Amendment.<sup>55</sup>

If the federal court obtains service of process pursuant to a federal statute authorizing nationwide service of process,<sup>56</sup> then the relevant forum that the

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50. See *International Shoe Co.*, 326 U.S. at 319 (holding that due process requires that the defendant have certain minimum contacts with the forum).

51. See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 255-56 (5th Cir. Unit A July 1981) (explaining that when a federal statute allows nationwide service of process, then under the Fifth Amendment Due Process Clause, the court considers the defendant's contacts with the United States as a whole).

52. See *International Shoe Co.*, 326 U.S. at 317-18 (describing the nature and characteristics required for the assertion of jurisdiction).

53. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 105 (1987) (mentioning that a federal court normally looks to a federal statute authorizing nationwide service of process or a state long-arm).

54. See *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290, 295-97 (3d Cir. 1985) (stating that in the absence of a statute authorizing nationwide service of process the federal court must use the state long-arm statute and evaluate the defendant's contacts with the state under the Due Process Clause of the Fourteenth Amendment).

55. See U.S. CONST. amend XIV (guaranteeing that: "No state shall . . . deprive any person of life, liberty of property, without due process of law."). See generally *International Shoe Co.*, 326 U.S. 310 (standing for the general proposition that when asserting personal jurisdiction over a defendant outside the state, the defendant must have sufficient minimum contacts with the forum so as not to violate the Due Process Clause of the Fourteenth Amendment); 4 WRIGHT & MILLER, *supra* note 1, § 1067.1 (pointing out that the federal courts apply the same minimum contacts doctrine as the state courts); 4 WRIGHT & MILLER, *supra* note 1, § 1067.1 (emphasizing that even though the minimum contacts analysis is used by federal courts, there is some resistance to accepting the proposition that a federal court's jurisdiction is limited by "state boundaries").

56. There are numerous federal statutes allowing for nationwide service of process. *E.g.*, 15 U.S.C.A. § 22 (West 1997) (Clayton Act); 15 U.S.C.A. § 78aa (West 1997) (Securities and Exchange Act); 18 U.S.C.A. § 1965 (West 1984) (Racketeer Influenced and Corrupt Organizations); 28 U.S.C.A. § 1608 (West 1994) (Foreign Sovereign Immunities Act); 28 U.S.C.A. § 2361 (West 1994) (Federal Interpleader Act).

defendant is required to have minimum contacts with is the United States as a whole (i.e., national contacts).<sup>57</sup> Courts analyze the defendant's contacts with the United States when utilizing a federal statute authorizing nationwide service of process because it appears inconsistent to perform a minimum contacts analysis by evaluating only the defendant's contacts with the state when the court is to be evaluating the defendant's contacts with the forum.<sup>58</sup> While the United States Supreme Court has never resolved the question of whether federal courts can use national contacts, lower federal courts addressing the issue have considered national contacts when performing the due process analysis under the Fifth Amendment.<sup>59</sup>

*b. Nature of Contacts*

Once a federal court establishes the relevant forum, it must then evaluate the nature and character of the defendant's contacts with the forum to determine if those contacts are sufficient such that "the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>60</sup> To make this determination, the federal court looks at the connection between the contacts and the cause of action.<sup>61</sup> When the contacts are continuous and systematic and the cause of action arises out of those contacts, the defendant has the requisite contacts to support the assertion of personal jurisdiction.<sup>62</sup> Sporadic and isolated contacts that are connected to the cause of action may also give rise to the assertion of personal jurisdiction in those instances when the defendant has purposefully availed<sup>63</sup> himself of the privileges of having

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57. See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 256 (5th Cir. Unit A July 1981) (holding that because the United States created the federal courts, the United States is the relevant place from which to measure contacts); see also *United States SEC v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997) (listing circuits that have held that when personal jurisdiction is based on a federal statute providing nationwide service of process, the defendant's contacts with whole United States are considered).

58. See 4 *WRIGHT & MILLER*, *supra* note 1, § 1067.1 (indicating that courts found it difficult to reconcile authorization of nationwide service of process and the "strict application of the minimum contacts doctrine").

59. See *id.* (emphasizing that although the United States Supreme Court has not addressed the issue of using contacts with the United States as a whole, lower federal courts apply national contacts when using a federal statute authorizing nationwide service of process to assert personal jurisdiction); see also *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 103 n.5 (1987) (noting that the Court was not going to decide whether courts are to base the due process analysis on the Fifth instead of the Fourteenth Amendment when the case is based on federal law).

60. *International Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); see *id.* at 319 (stating that for due process to be satisfied, the nature and quality of the defendant's contacts with the forum must be evaluated).

61. See *id.* at 316-18 (discussing the relationships between the assertion of personal jurisdiction and the nature and character of the defendant's contacts with the forum).

62. See *id.* at 316-17 (noting that personal jurisdiction may be asserted over a defendant whose contacts with the forum have been continuous and systematic and arise out of the cause of action).

63. See *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (declaring that the defendant's minimum contacts must include acts done to purposefully avail the defendant of the "privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws").

conducted activities in the forum.<sup>64</sup> Requiring that the defendant purposefully avail himself of the privileges of the forum makes it reasonable to believe that the defendant has notice and the expectation that he may be haled into court there.<sup>65</sup>

There are, however, instances when the defendant's contacts with the forum do not arise out of or relate to the suit.<sup>66</sup> Courts will not assert personal jurisdiction over a defendant whose contacts with the forum are sporadic and isolated and not connected with the cause of action.<sup>67</sup> However, personal jurisdiction may be asserted over a defendant whose contacts do not arise out of or relate to the cause of action if the contacts are continuous and systematic.<sup>68</sup>

## 2. Fairness and Convenience

The fairness and convenience prong, as with the minimum contacts prong, involves determining whether it would be improper to assert personal jurisdiction over the defendant in the forum where the suit is filed.<sup>69</sup> This prong of the due process analysis is only reached if it is first shown that the defendant has the required minimum contacts with the forum.<sup>70</sup> Courts refer to this prong of the due

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64. See *International Shoe Co.*, 326 U.S. at 318 (contending that personal jurisdiction may be asserted over a defendant whose contacts with the forum are "single or occasional" because of the "nature and quality" of the contacts); see also *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 n.8 (1984) (characterizing the assertion of personal jurisdiction as specific jurisdiction when the defendant's contacts with the forum arise out of or are related to the cause of action).

65. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (asserting that the defendant's contacts with the forum should be such that he can reasonably expect to be haled into court).

66. See *International Shoe Co.*, 326 U.S. at 317-18 (noting that a defendant may have contacts with a forum that do not arise out of the cause of action asserted in the complaint).

67. See *id.* at 317 (indicating that if the defendant's contacts with the forum do not arise out of the cause of action and are only isolated and single events, then it would be unreasonable to assert personal jurisdiction over the defendant).

68. See *Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n.9 (remarking that a court can assert general jurisdiction when the defendant's contacts with the forum do not arise out of the cause of action); *International Shoe Co.*, 326 U.S. at 318 (recognizing that personal jurisdiction may be asserted over those defendants whose contacts with the forum are continuous even if the cause of action does not arise out of those contacts). Compare *Helicopteros Nacionales de Colombia*, 466 U.S. at 415-20 (emphasizing that a defendant's contacts—one trip to the forum by a company executive on business, acceptance of checks drawn on a bank in the forum, and purchases made from businesses in the forum—were not sufficient to assert personal jurisdiction over the defendant), with *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952) (determining that the defendant's extensive contacts with the forum—president of the company resided in the forum and conducted business from that forum, kept company files in the forum, did company banking in the forum, held board of directors' meetings in the forum—justified the assertion of personal jurisdiction).

69. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985) (stating that a court must determine whether it is fair to assert personal jurisdiction over the defendant).

70. Compare *World-Wide Volkswagen Corp.*, 444 U.S. at 294 (acknowledging that even if it would be fair and convenient to assert personal jurisdiction over the defendant, the court must first establish minimum contacts with the forum), with *Burger King Corp.*, 471 U.S. at 477 (indicating that the court may assert personal jurisdiction on a lesser showing of minimum contacts, if it is fair to try the defendant in the chosen forum).

process analysis as the “reasonableness balance.”<sup>71</sup> Reasonableness relates to whether the exercise of personal jurisdiction comports with “traditional notions of fair play and substantial justice.”<sup>72</sup> Courts balance five factors when assessing whether the exercise of personal jurisdiction is reasonable: (1) the burden on the defendant of litigating in the forum the plaintiff has chosen; (2) the state’s interest in adjudicating the dispute; (3) the plaintiff’s interest in litigating in the forum he chose; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies;” and (5) “the shared interest of the several States in furthering fundamental substantive social policies.”<sup>73</sup> However, lower courts are split over whether to apply a fairness/reasonableness balance when analyzing the defendant’s contacts with the United States as a whole.<sup>74</sup>

With fifty states and fifty long-arm statutes, it appears that any defendant would be subject to personal jurisdiction in at least one federal district court.<sup>75</sup> However, the possibility remains that some defendants may not be subject to the personal jurisdiction of any state.<sup>76</sup> This possibility created a gap in the federal courts personal jurisdictional reach. Falling into the gap were defendants who violated federal law but did not have enough contacts with any one state to be reached by any state’s long-arm statute.<sup>77</sup> As a result, defendants escaped litigation in the United States even though they violated the law.<sup>78</sup> This gap in the personal jurisdiction of federal courts was brought to center stage in *Omni Capital International v. Rudolf Wolff & Co.*<sup>79</sup>

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71. See *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 437 (S.D.N.Y. 1996) (using the term “reasonableness prong” when referring to the consideration of whether the assertion of personal jurisdiction is fair and reasonable); *Evans v. American Surplus Underwriters Corp.*, 739 F. Supp. 1526, 1531 (N.D. Ga. 1989) (referring to the analysis conducted to determine whether the assertion of jurisdiction is fair, as the “reasonableness prong”).

72. *International Shoe Co.*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

73. See *World-Wide Volkswagen Corp.*, 444 U.S. at 292 (laying out the five factors a court should consider when deciding whether the assertion of personal jurisdiction is fair).

74. See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. Unit A July 1981) (indicating that the Supreme Court has never required more than minimum contacts to support jurisdiction); *id.* (“Fairness” is a component of the jurisdictional test, but has no relevance to determining the constitutionality of Congressional regulation.”). But see *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203-04 (E.D. Pa. 1974) (adopting a fairness test).

75. See *infra* notes 139-40 and accompanying text (explaining that defendant may be subject to the personal jurisdiction in that state where the defendant is domiciled).

76. See *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (suggesting that a statute may be needed to allow for service of process when a defendant is not amenable to the jurisdiction of any state); Kelleher, *supra* note 5, at 35 (stating that a defendant may not have sufficient contacts with any state as a forum to satisfy due process, but will have contacts sufficient with the United States to justify asserting personal jurisdiction).

77. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (describing how a “problem” exists when defendant has violated federal law but has insufficient contacts with any state to meet the requirements of the Fourteenth Amendment).

78. See Kelleher, *supra* note 5, at 35 (indicating that when the defendant is not reached by any long-arm statute, the defendant would be “shielded from the application of the federal law”).

79. 484 U.S. 97 (1987).

III. SETTING THE STAGE FOR ENACTING RULE 4(K)(2)

A. *Omni Capital International v. Rudolf Wolff & Co.*<sup>80</sup>

In 1987, the Supreme Court was asked to expand the jurisdictional reach of the federal courts in *Omni Capital International v. Rudolf Wolff & Co.*<sup>81</sup> In *Omni Capital International*, investors from Louisiana sued New York corporations *Omni Capital International, Ltd.* and *Omni Capital Corp. (Omni)* in the federal district court for the Eastern District of Louisiana.<sup>82</sup> *Omni*, through its brokers, offered an opportunity to invest in silver trading.<sup>83</sup> Investors were told that they would receive tax advantages from the investment.<sup>84</sup>

When the investors discovered that information was incorrect and there would be no tax advantage, they brought suit claiming they had been fraudulently induced into investing.<sup>85</sup> *Omni* then impleaded as a third party defendant, *Rudolf Wolff & Co.*, a British corporation.<sup>86</sup> *Rudolf Wolff & Co. (Wolff)* had initially approached *Omni* about handling sales of *Omni's* commodities on the London Metals Exchange.<sup>87</sup> *Omni* then agreed to hire *Wolff* as its broker.<sup>88</sup> *Omni* also impleaded as another third party defendant, *James Gourlay*, a British citizen and resident working for *Wolff*.<sup>89</sup> *Gourlay* facilitated the sale of *Omni's* commodities to the investors.<sup>90</sup>

The investors brought suit under the Commodities Exchange Act (CEA) contending they were fraudulently induced into investing.<sup>91</sup> While the suit was pending, the Supreme Court held that the CEA contained an implied private right of action.<sup>92</sup> *Wolff* and *Gourlay* then filed a motion to dismiss for lack of personal jurisdiction.<sup>93</sup> This issue brought the case before the Supreme Court.

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80. *Id.*

81. *Id.*

82. *Omni Capital Int'l*, 484 U.S. at 99.

83. *Id.*; see *Cox*, *supra* note 5, at 214 (noting that the investments dealt in silver commodities).

84. *Omni Capital Int'l*, 484 U.S. at 99.

85. See *id.* (stating that the Internal Revenue Service would not allow the investors to claim deductions for the investment because the trades on the London Metal Exchange were not "bona fide arm's length transactions").

86. See *id.* at 99-100 (contending that if *Omni* was liable it was because *Wolff* and *Gourlay's* trading activities were improper).

87. See *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 418 (5th Cir. 1986) (reporting that *Wolff* approached *Omni* to solicit business from them).

88. *Omni Capital Int'l*, 484 U.S. at 99.

89. *Id.*

90. *Id.*

91. *Id.* at 100.

92. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 393 (1982) (holding that the Commodities Exchange Act contains a private right of action).

93. *Omni Capital Int'l*, 484 U.S. at 100.

B. *Could the Federal Court Assert Personal Jurisdiction Over Wolff and Gourlay?*

The starting point for deciding whether the federal court could have asserted personal jurisdiction is to determine if there was a statute authorizing service of process on a defendant not found within the district.<sup>94</sup> In *Omni Capital International*, the Supreme Court had to determine what statute would be used as the basis for asserting personal jurisdiction over Wolff and Gourlay.<sup>95</sup> The Court pointed out that federal courts most often find authorization from either a federal statute allowing for nationwide service of process or one of the Federal Rules of Civil Procedure.<sup>96</sup> The Supreme Court stated that Rule 4(e) allowed a federal court to use either a federal statute authorizing nationwide service of process or the long-arm statute of the state where the district court was located to determine if the defendant was amenable to service.<sup>97</sup>

Omni argued that the CEA contained an implied authorization of nationwide service of process.<sup>98</sup> Omni claimed that the CEA implied a private right of action and that other provisions of the CEA allowed for nationwide service of process.<sup>99</sup> Because other provisions of the CEA provided for nationwide service of process, Omni suggested that the Court should imply nationwide service of process for the newly found implied private right of action.<sup>100</sup>

However, the Supreme Court held that there was no implied nationwide service of process provision.<sup>101</sup> Justice Blackmun explained that while Congress knew how to provide explicitly for nationwide service of process in other provisions of the CEA, Congress had not specifically provided for nationwide service of process under a private right of action.<sup>102</sup> Furthermore, during the course of Omni's appeal, Congress amended the CEA specifically to include a private right of action, but

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94. See *id.* at 104 (noting that there must be a statute authorizing service of process for a court to assert personal jurisdiction over a defendant); *supra* notes 26-28 and accompanying text (pointing out that a federal court's assertion of personal jurisdiction involves a two-part analysis).

95. See *Omni Capital Int'l*, 484 U.S. at 104-08 (determining whether personal jurisdiction could be asserted by using the Louisiana long-arm statute or asserted by finding that the CEA implied nationwide service of process); *id.* at 104 (recognizing that there must be a statute authorizing service of process for a court to assert jurisdiction over a defendant); see also *supra* notes 26-28 and accompanying text (indicating that federal courts perform a two-part analysis to determine whether they can assert personal jurisdiction).

96. *Omni Capital Int'l*, 484 U.S. at 105. At the time of *Omni Capital International*, the provision of the Federal Rules of Civil Procedure that authorized service of process was Rule 4(e).

97. *Id.*

98. *Id.*

99. *Id.* at 103.

100. *Id.*

101. *Id.* at 106.

102. *Id.* Justice Blackmun stated that "[i]nasmuch as Congress carefully provided for service section by section in the CEA, we would not automatically graft nationwide service [of process] onto the implied private right of action." *Id.* at 107 (emphasis added).

remained silent about nationwide service of process.<sup>103</sup> The amendment to the CEA did not apply to Omni, and Justice Blackmun found it persuasive that Congress still declined to provide for nationwide service of process.<sup>104</sup>

Without a federal statute authorizing nationwide service of process, the federal court would have to borrow Louisiana's long-arm statute in order to assert personal jurisdiction over Wolff and Gourlay.<sup>105</sup> However, even Omni had to concede that Louisiana's long-arm statute could not stretch far enough to reach Wolff and Gourlay.<sup>106</sup> When Omni impleaded Wolff and Gourlay as third-party defendants, Louisiana's long-arm statute was limited and contained only a list of specific activities,<sup>107</sup> of which at least one must be met for the court to assert personal jurisdiction.<sup>108</sup> The best chance Omni had of exercising personal jurisdiction over Wolff and Gourlay was under a provision that allowed the court to "rely on the effects that defendant causes within the State."<sup>109</sup> The district court held that this provision did not apply because it "applies only to a defendant who 'regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state.'"<sup>110</sup> During the course of litigation, Louisiana amended its long-arm statute.<sup>111</sup> Although the new long-arm statute was broader, neither of the parties addressed whether Wolff and Gourlay could be reached by this new long arm.<sup>112</sup> Therefore, because no statute authorized service of process to reach Wolff and Gourlay, personal jurisdiction could not be asserted.<sup>113</sup>

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103. *Id.* at 105-08.

104. *See id.* (noting that the amendment would not apply because it was not retroactive).

105. *Id.* at 108.

106. *Id.*

107. For a court to exercise personal jurisdiction, the long arm required that the defendant's action with the state must result from:

(a) transacting any business in this state;

(b) contracting to supply services or things in this state;

(c) causing injury or damage by an offense or quasi offense committed through an act or omission in this state;

(d) causing injury or damage in this state by an offense or quasi offense committed through an act or omission outside of this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

*Id.* at 101 n.4 (quoting the Louisiana long-arm statute in effect at the time the suit was filed).

108. *See id.* (setting out the Louisiana long-arm statute in effect at the time the suit was filed).

109. *Id.* at 108.

110. *See id.* (quoting LA. REV. STAT. ANN. § 13:3201(d) (West 1968)).

111. *See* LA. REV. STAT. ANN. § 13:3201 (West 1991) (extending personal jurisdiction to the limits of the United States Constitution).

112. *See Omni Capital Int'l*, 484 U.S. at 102 n.4 (observing that the Court did not consider exercising personal jurisdiction under the new amendment because none of the parties argued the new statute would apply); *see also infra* Part IV.D (discussing where personal jurisdiction may have been asserted over Wolff and Gourlay).

113. *See Omni Capital Int'l*, 484 U.S. at 111 (holding that personal jurisdiction could not be asserted over Wolff and Gourlay).

C. Who Should Fill the Gap in Federal Court Personal Jurisdiction?

Omni realized the suit would be dismissed because Wolff and Gourlay lacked sufficient contacts to satisfy Louisiana's long-arm statute.<sup>114</sup> Nonetheless, because the cause of action was based on federal law, Omni argued that the district court should look at Wolff and Gourlay's contacts with the United States to determine whether personal jurisdiction was proper.<sup>115</sup> The Supreme Court recognized that a gap existed in the exercise of personal jurisdiction.<sup>116</sup> This gap occurred when a foreign defendant, who violated federal law, was unreachable by any state long-arm statute and there was no federal statutory authorization for nationwide service of process.<sup>117</sup>

In *Omni*, the Supreme Court addressed the issue of whether a federal court could use federal common law to authorize extraterritorial service of process when a state long-arm statute could not reach a defendant in a case involving a federal question.<sup>118</sup> In this case, Wolff and Gourlay were not amenable to service of process and, therefore, presumably, could not be sued in any court in the United States.<sup>119</sup> The dissenters in the Court of Appeals argued that in situations where the defendant is not amenable to service of process by any of the methods under Rule 4, the federal court should fill the gap "by creating their own rule authorizing service of process."<sup>120</sup>

When Congress created the federal courts under the Judiciary Act of 1789, Congress only authorized a federal court to serve process within its district.<sup>121</sup> The

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114. See *id.* at 102-03 (recounting the Fifth Circuit's holding that without a statute authorizing service of process the district court could not assert personal jurisdiction over Wolff and Gourlay).

115. *Id.* n.5.

116. See *id.* at 111 (recommending that there needs to be a service of process provision to reach those defendants who violated federal law but were unreachable by any state's long-arm statute); Holly A. Ellencrig, Comment, *Expanding Personal Jurisdiction Over Foreign Defendants: A Response to Omni Capital International v. Rudolf Wolff & Co.*, 24 CAL. W. INT'L L.J. 363, 367-68 (1994) (stating that in *Omni* there was a gap in the federal court's jurisdiction that the Supreme Court should fill).

117. *Omni Capital Int'l*, 484 U.S. at 111.

118. See *id.* at 108-11 (discussing the issue of whether the Supreme Court could by judicial opinion authorize service of process over defendants outside of the state where the district court was located); Ellencrig, *supra* note 116, at 367 (explaining that *Omni* wanted the Court to use federal common law to authorize extraterritorial jurisdiction); see also Casad, *Personal Jurisdiction*, *supra* note 5, at 1595 (noting that some courts view the question of amenability to service as an "independent federal standard," thereby allowing the court to look at the defendant's contacts the United States as a whole in federal question cases).

119. See *Omni Capital Int'l*, 484 U.S. at 111 (holding that Wolff and Gourlay were not amenable to personal jurisdiction in Louisiana). But see *infra* Part IV.D (demonstrating that even if Rule 4(k)(2) had been available, it still would not have helped the Louisiana federal court in asserting jurisdiction over Wolff and Gourlay because they may have been amenable to jurisdiction in New York).

120. See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 432 (5th Cir. 1986) (dissenting opinion) (arguing that in a federal question a court should use nationwide service of process and consider the defendants' contacts with the United States); see also *Omni Capital Int'l*, 484 U.S. at 108 (noting the Fifth Circuit's dissenters' argument and pointing out that the legislature left a gap in the exercise of personal jurisdiction by federal courts).

121. See *Omni Capital Int'l*, 484 U.S. at 108 (recalling that a district court could not serve process outside of its immediate local district).



Supreme Court acknowledged that in order to reach a defendant not located within the federal courts' territorial boundaries, specific legislation authorizing the extraterritorial exercise of personal jurisdiction was necessary.<sup>122</sup> Thus, without adequate authority for the federal courts to engage in common law rule making, the courts cannot extend personal jurisdiction.<sup>123</sup>

Justice Blackmun declared that the Court "would not fashion a rule for service in this litigation even if [it] had the power to do so."<sup>124</sup> He further pointed out that since the creation of lower federal courts by the Judiciary Act of 1789, Congress had created the rules governing personal jurisdiction of federal courts.<sup>125</sup> Blackmun determined that it was unwise for the Court to make its own rules authorizing service of process and that Congress, and those who propose the Federal Rules of Civil Procedure (the Advisory Committee), were better able to determine when service of process should be authorized.<sup>126</sup> The Court recognized the result of its opinion would be that some defendants could not be sued for their violations of federal law because the federal courts did not have the power to assert personal jurisdiction over them.<sup>127</sup>

The opinion of the Court concluded by making a recommendation that a "narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes."<sup>128</sup> Hence, it was up to Congress to fill the gap in federal court personal jurisdiction jurisprudence.

#### IV. GIVING THE FEDERAL COURTS LONGER ARMS—THE NEW RULE 4(K)(2)

##### A. Purpose of Rule 4(k)(2)

Following the Supreme Court's suggestion, Congress, along with the Supreme Court and the Advisory Committee, amended Rule 4 in 1993.<sup>129</sup> As a result of the amendment, the federal district courts finally were provided with a long-arm statute

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122. *Id.* at 109.

123. *See id.* (noting that it is not entirely clear that federal courts would have the power to create a common law rule extending personal jurisdiction to reach those outside the district where the federal district court sits).

124. *Id.*

125. *Id.* at 108-09.

126. *Id.* at 109-11.

127. *See id.* at 111 (admitting that, by its decision, Wolff and Gourlay would escape having to answer in federal district court for violating federal securities law).

128. *Id.*

129. FED. R. CIV. P. 4 (1993). *See supra* notes 126-28 (explaining that the Supreme Court believed that it would be up to Congress and the Advisory Committee for the Federal Rules of Civil Procedure to create a narrowly tailored provision to reach a defendant who could not be reached by any state long-arm statute when he has violated a federal law).

that allows for nationwide service of process for claims arising under federal law where the defendant is not amenable to jurisdiction in any other court of general jurisdiction in any state.<sup>130</sup> As the Advisory Committee pointed out, the adoption of Rule 4(k)(2) was necessary to fill the gap in the enforcement of federal law so that a defendant is not “shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts.”<sup>131</sup>

The Advisory Committee made clear that Rule 4(k)(2) addresses a very specific situation.<sup>132</sup> The situation arises when the defendant is not a resident of the United States and does not have sufficient contacts to satisfy the long-arm statute of any state “or [to] meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction.”<sup>133</sup> However, that same defendant might have sufficient contacts with the United States for the federal courts to apply federal law.<sup>134</sup> Therefore, Rule 4(k)(2) has very limited application as it only applies to those defendants who violate federal law and are not amenable to the jurisdiction of any state.

### B. Does Rule 4(k)(2) Apply Only to Foreign Defendants?

Rule 4(k)(2) establishes the federal court’s personal jurisdiction over “any defendant.”<sup>135</sup> This broad language appears to apply to both those defendants who are United States residents *and* to those defendants who are from foreign countries.<sup>136</sup> Nevertheless, the Advisory Committee asserted that Rule 4(k)(2) applies when the defendant is not a resident of the United States.<sup>137</sup>

The Advisory Committee’s reading of the term “any defendant” is consistent with the purpose of Rule 4(k)(2) in closing the gap that existed in the jurisdictional

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130. Rule 4(k)(2) states:

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

FED. R. CIV. P. 4(k)(2).

131. FED. R. CIV. P. 4(k)(2) advisory committee’s note (1993).

132. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (stating that Rule 4(k)(2) addresses the problem “when the defendant was a non-resident of the United States having contacts with the United States sufficient to justify the application of United States law and to satisfy federal standards of forum selection, but having insufficient contact with any single state to support jurisdiction under state long-arm legislation”).

133. FED. R. CIV. P. 4(k)(2) advisory committee’s note (1993); see Kelleher, *supra* note 5, at 35 (describing Rule 4(k)(2) as a “fall-back provision”).

134. FED. R. CIV. P. 4(k)(2) advisory committee’s note (1993).

135. *Id.* (emphasis added).

136. See FED. R. CIV. P. 4(k)(2) (using only the term “any defendant” with no specific reference to foreign or United States residents); Kelleher, *supra* note 5, at 37 (recognizing that the plain language of Rule 4(k)(2) “is not explicitly limited to alien defendants”).

137. See generally FED. R. CIV. P. 4(k)(2) advisory committee’s note (1993) (implying that Rule 4(k)(2) was needed for those situations where a defendant residing outside the United States violates federal law).

reach of federal courts.<sup>138</sup> Furthermore, it is reasonable to assume that the term “any defendant” would apply only to foreign defendants because domicile<sup>139</sup> is still considered a sufficient basis for asserting personal jurisdiction.<sup>140</sup> For example, if a defendant is domiciled in Michigan, then the defendant would be amenable to the jurisdiction of the state courts of Michigan.<sup>141</sup>

If domicile is enough for a state to bring an absent defendant within the forum state’s jurisdictional reach, then domicile within the United States should be enough for federal courts to assert personal jurisdiction when the relevant forum is the United States.<sup>142</sup> Therefore, if the domicile of the defendant within a state is sufficient to assert jurisdiction, then the defendant is subject to the jurisdiction of the state court where the defendant is domiciled.<sup>143</sup> Rule 4(k)(2) applies only if the defendant cannot be amenable to the jurisdiction of any court of general jurisdiction.<sup>144</sup> Thus, the plaintiff cannot use Rule 4(k)(2) because the defendant would be amenable to jurisdiction in the state where he is domiciled.<sup>145</sup> Accordingly, Rule 4(k)(2) should reach only foreign defendants.<sup>146</sup>

In addition, Rule 4(k)(2) may not be necessary if the plaintiff can find and personally serve the foreign defendant when he is in the United States.<sup>147</sup> For example, if the defendant is in New York on business and the plaintiff is able to find him and personally serve him, personal jurisdiction will be proper in New

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138. See *supra* notes 76-78 (explaining that a gap existed in the federal courts’ ability to assert personal jurisdiction prior to the enactment of Rule 4(k)(2)).

139. See *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (defining domicile as the place of a person’s permanent home, to which he has the intent to return whenever he is absent).

140. See *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (holding that domicile provides a basis for asserting personal jurisdiction over a defendant outside the state); Kelleher, *supra* note 5, at 37 (indicating that United States citizens will be amenable to the personal jurisdiction of the state court where they are domiciled). *But see* *Shaffer v. Heitner*, 433 U.S. 186, 209 (1977) (implying that even if presence of property provides the basis for personal jurisdiction, a due process analysis may still be required).

141. See *supra* text accompanying notes 139-40 (stating that the assertion of personal jurisdiction may be based on the defendant’s domicile).

142. See *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (noting that being a United States resident subjects the defendant to the jurisdiction of federal laws).

143. See *supra* text accompanying notes 138-42 (asserting that domicile may be a basis for personal jurisdiction).

144. FED. R. CIV. P. 4(k)(2).

145. See FED. R. CIV. P. 4(k)(2) (indicating that Rule 4(k)(2) may not be used if the defendant is amenable to personal jurisdiction in the courts of general jurisdiction in any state).

146. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (indicating that the problem that created the gap in a federal court’s exercise of personal jurisdiction existed when the defendant was a non-resident of the United States). *But see* Kelleher, *supra* note 5, at 38 (hypothesizing that a plaintiff could use Rule 4(k)(2) on a United States citizen, if the state long-arm statute does not allow for domicile as a basis for asserting personal jurisdiction and the act, which is the subject of the suit, is committed by the defendant in the country where he or she is now residing).

147. See *Burnham v. Superior Court (Francie Burnham)*, 495 U.S. 604, 619 (1990) (asserting, in a plurality opinion, that presence may still be a basis for asserting personal jurisdiction).

York. Thus, Rule 4(k)(2) may not be applied if the plaintiff chooses to serve the foreign defendant personally while he is in the United States.<sup>148</sup>

### C. Constitutional Limitations

As explained earlier, personal jurisdiction is a two step analysis requiring a statute authorizing service of process and a due process inquiry.<sup>149</sup> The due process inquiry is itself a two-pronged examination involving the assessment of whether the defendant has sufficient minimum contacts with the forum and whether it is fair or reasonable to assert jurisdiction over the defendant.<sup>150</sup> Federal courts will use the Fifth Amendment Due Process Clause for the personal jurisdiction due process analysis because the Fifth Amendment limits federal government action and Rule 4(k)(2) is a *federal* rule applied by *federal* courts.<sup>151</sup> Lower courts are split over whether or not to carry out a reasonableness balance when a federal statute provides for nationwide service of process and the due process analysis is based on the Due Process Clause of the Fifth Amendment.<sup>152</sup> However, the Advisory Committee suggests that federal courts will be required to do a reasonableness analysis.<sup>153</sup>

The Advisory Committee indicated how the lower federal courts are to proceed when performing a due process analysis.<sup>154</sup> It contended that the exercise of personal jurisdiction under the Fifth Amendment requires a federal court to consider whether haling the defendant into court would comport with the notions of "fair play and substantial justice."<sup>155</sup> The Advisory Committee advised district courts to

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148. See FED. R. CIV. P. 4(k)(2) (suggesting that Rule 4(k)(2) may not be used if the defendant is amenable to personal jurisdiction in the courts of general jurisdiction in any state).

149. See *supra* Part II (explaining the mechanics of exercising personal jurisdiction).

150. See *supra* Part II.B (discussing the due process analysis).

151. See FED. R. CIV. P. 4(k) advisory committee's note (1993) (pointing out that constitutional limitations placed on the exercise of personal jurisdiction under Rule 4(k)(2) will be derived from the Fifth Amendment Due Process Clause, thereby allowing an evaluation of the defendant's contacts with the entire United States).

152. See *FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. Unit A July 1981) (indicating that the Supreme Court has only required a minimum contacts analysis to support jurisdiction); *id.* ("Fairness is a component of the jurisdictional test, but has no relevance to determining the constitutionality of Congressional regulation. . ."). But see *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 203-04 (E.D. Pa. 1974) (adopting a fairness test).

153. See FED. R. CIV. P. 4(k) advisory committee's note (1993) (implying that a reasonableness balance should be performed when using Rule 4(k)(2) by citing cases that have performed a reasonableness balance). The Advisory Committee cited both *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) and *Asahi Metal Industry, Co. v. Superior Court (Cheng Shin Rubber Industrial, Co.)*, 480 U.S. 102 (1987). See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-85 (1985) (discussing reasonableness balance); see also *Asahi Metal Indus., Co. v. Superior Court (Cheng Shin Rubber Indus., Co.)*, 480 U.S. 102, 113-16 (1987) (conducting a reasonableness balance). Note, however, that both of these cases involved a cause of action based on state law and did not involve Fifth Amendment Due Process.

154. See generally FED. R. CIV. P. 4(k) advisory committee's note (1993) (explaining how to apply Rule 4(k)(2)).

155. See FED. R. CIV. P. 4(k) advisory committee's note (1993) (supporting this assertion by citing to *Asahi Metal Industry, Co.*, 480 U.S. at 108-13; *Burger King Corp.*, 471 U.S. at 476-78; *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982); and *World-Wide Volkswagen Corp. v. Woodson*,

be “especially scrupulous to protect aliens who reside in a foreign country.”<sup>156</sup> The Advisory Committee quoted *Asahi Metal Industry v. Superior Court*,<sup>157</sup> stating that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.”<sup>158</sup>

The foreign defendant who is brought to the United States under Rule 4(k)(2) is not bound to the plaintiff’s choice of forum but may utilize the venue statutes to move the case to a more convenient forum.<sup>159</sup> If the forum is inconvenient for the parties or the witnesses, then, in the interest of justice, the district court may transfer the case to another district where the case could have been brought.<sup>160</sup> Another option for the district court is to dismiss the case if the venue is improper.<sup>161</sup> These options are available to help resolve “most conflicts between the full exercise of . . . [personal] jurisdiction permitted by [Rule 4(k)(2)] and the Fifth Amendment requirement of ‘fair play and substantial justice.’”<sup>162</sup> Although not mentioned by the Advisory Committee, forum non conveniens is also still available to the defendant.<sup>163</sup> The Advisory Committee may not have mentioned forum non conveniens because it may only have been concerned with assuring that Rule 4(k)(2) does not in anyway supersede or impede the venue statutes.<sup>164</sup>

#### D. Could Rule 4(k)(2) Have Been Applied to the Facts of *Omni*?

In *Omni Capital International*, when the Supreme Court suggested the creation of a narrow federal service of process statute, the Court implied that such a statute

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444 U.S. 286, 293-94 (1980), which announced the fair play and substantial justice requirement).

156. FED. R. CIV. P. 4(k) advisory committee’s note (1993).

157. 480 U.S. 102 (1987).

158. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (quoting *Asahi Metal Indus., Co.*, 480 U.S. at 115). It should be noted that *Asahi Metal* involved a cause of action based on state law, but the same general principle should apply when federal courts assert personal jurisdiction, because in both situations the defendant is a foreigner.

159. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (noting that the venue statutes are not affected by Rule 4(k)(2)).

160. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (citing 28 U.S.C. § 1404, the federal change of venue statute).

161. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (citing 28 U.S.C. § 1406, the federal statute which cures defects in venue); see also 28 U.S.C.A. § 1406(a) (West 1993) (allowing a district court to “dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought”); *infra* note 163 and accompanying text (suggesting that the doctrine of forum non conveniens would be available for the defendant to have the case dismissed if the forum were so inconvenient for the defendant).

162. FED. R. CIV. P. 4(k) advisory committee’s note (1993).

163. See Ellencrig, *supra* note 116, at 376-77 (noting that the federal common law doctrine of forum non conveniens would be available to defendants). Forum non conveniens is a doctrine by which a federal court may dismiss an action because the venue is so inconvenient for the defendant. See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6, 247 (1981) (listing the factors the federal courts should consider when deciding a motion for forum non conveniens, and asserting that the fact that the change in forum may result in laws less favorable to the plaintiff is not a consideration).

164. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (referencing only the venue statutes 28 U.S.C.A. §§ 1391, 1404, 1406 (West 1993 & Supp. 1998)).

would subject Wolff and Gourlay to personal jurisdiction in federal court.<sup>165</sup> Rule 4(k)(2) has a very narrow application, as it only applies when the cause of action arises under federal law and no long-arm statute of any state can reach the defendant.<sup>166</sup> So, could Wolff and Gourlay have been sued in federal court in Louisiana if Rule 4(k)(2) had been available?

To determine if Rule 4(k)(2) is applicable, two threshold questions must be answered.<sup>167</sup> The first question is whether the cause of action alleged in the suit arises under federal law.<sup>168</sup> If the answer is yes, then the next question is whether the defendant is amenable to jurisdiction in any other state.<sup>169</sup> If that answer is no, then Rule 4(k)(2) can be applied to assert personal jurisdiction and the court would then proceed with the due process analysis.<sup>170</sup>

In *Omni Capital International*, the cause of action arose from an alleged violation of the Commodity Exchange Act, a federal statute.<sup>171</sup> Therefore, the cause of action arose under federal law and the first threshold would be cleared. The second threshold is a little higher. The court would need to determine whether Wolff and Gourlay would be unreachable by all fifty states' long-arm statutes.<sup>172</sup>

Based on the facts laid out in the lower courts' opinions, Wolff and Gourlay may have been reached by the New York long-arm statute because of the nature and

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165. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (acknowledging that under Rule 4, at the time the case was being decided, Wolff and Gourlay would not be subject to personal jurisdiction and further suggesting that a narrow federal service of process provision could reach them).

166. FED. R. CIV. P. 4(k)(2).

167. See *infra* notes 192-94 and accompanying text (pointing out that assertions of personal jurisdiction involve a three-part analysis; the first two parts determine if Rule 4(k)(2) is applicable and the third requires a due process analysis).

168. See FED. R. CIV. P. 4(k)(2) (stating that Rule 4(k)(2) applies to "claims arising under federal law"); *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 434 (S.D.N.Y. 1996) (separating Rule 4(k)(2) into three elements, the first of which requires that the cause of action must arise under federal law).

169. See FED. R. CIV. P. 4(k)(2) (insisting that the defendant not be "subject to the jurisdiction of the courts of general jurisdiction of any state"); *Aerogroup Int'l, Inc.*, 956 F. Supp. at 434 (declaring that Rule 4(k)(2)'s second element requires that the defendant not be amenable to jurisdiction in any court of general jurisdiction in any state).

170. See FED. R. CIV. P. 4(k)(2) (asserting that under Rule 4(k)(2) the federal courts' exercise of personal jurisdiction is to comport with "the Constitution and laws of the United States"); *Aerogroup Int'l, Inc.*, 956 F. Supp. at 434 (stating that defendant's contacts with the United States must be sufficient so as not to violate due process requirements).

171. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 100 (1987) (indicating that the complainant charged Omni and Wolff with violations of the Commodities Exchange Act).

172. See FED. R. CIV. P. 4(k)(2) (requiring that the defendant not be amenable to jurisdiction in any other court of general jurisdiction before utilizing Rule 4(k)(2)).

character of their contacts with New York.<sup>173</sup> The New York long-arm statute provides:

[A] court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state. . . .<sup>174</sup>

New York federal courts interpret the above section as requiring the plaintiff to show that the defendant has purposefully availed himself of “the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws.”<sup>175</sup> In addition to purposeful availment, there must be a substantial nexus

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173. See *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 417-19 (5th Cir. 1986) (relating the underlying facts of the case, and stating that Wolff and Gourlay “approached Omni in New York to solicit Omni’s business,” and billed Omni for over £105,000 for commissions). See generally *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at app. B, Omni Capital Int'l*, 484 U.S. at 97 (No. 86-740) (stating the facts of the case, specifically that preliminary meetings between Gourlay and Omni took place in New York).

174. N.Y. C.P.L.R. 302(a) (McKinney 1990). The New York long-arm statute also provides that a person is subject to personal jurisdiction if he or she:

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.

*Id.* However, none of these provisions would apply to Wolff or Gourlay. With any tortious act committed outside New York, the injury caused by the tort in New York must be direct and not remote or consequential. See *Interface Biomedical Lab. Corp. v. Axiom Med., Inc.*, 600 F. Supp. 731, 738 (E.D.N.Y. 1985) (pointing out that any injury must be direct and not remote or consequential). Any injury caused to Omni (for example, loss of sales) would have been a consequence of the improper trading actions made by Wolff and Gourlay on behalf of the investors because they were injured by not being allowed tax deductions for their commodities investments. See *Omni Capital Int'l*, 484 U.S. at 99-100 (stating that the underlying lawsuit involved allegations of fraud and misrepresentation against Omni, who then impleaded Wolff and Gourlay). Therefore, because the injury was remote and indirect, personal jurisdiction would not be asserted over Wolff and Gourlay.

With any tortious act committed within New York, the actual injury must take place in New York, and the out-of-state resident committing the tort must be physically present in New York when the tort is committed. See *Roth v. El Al Israel Airlines, Ltd.*, 709 F. Supp. 487, 490 (S.D.N.Y. 1989) (requiring that the out-of-state resident actually be in New York when the tort is committed). Omni believed that any of its liability stemmed from Wolff and Gourlay’s improper trading activities. See *Omni Capital Int'l*, 484 U.S. at 99-100 (indicating that Omni believed Wolff and Gourlay’s trading activities caused the investments to be non-deductible, thereby leading to Omni’s possible liability). Those activities took place in London, not in New York. See *id.* at 99 (stating that trading activities took place on the London Exchange). There were no facts to indicate that either Wolff or Gourlay owned property in New York. See N.Y. C.P.L.R. 302(a)(4) (McKinney 1990) (permitting personal jurisdiction to be asserted over any defendant who owns property in New York).

175. *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 956 F. Supp. 1131, 1135 (S.D.N.Y. 1997) (quoting *CutCo. Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986)).

between the transaction and the cause of action.<sup>176</sup> Determining whether that nexus exists involves looking at the totality of the defendant's contacts with the state.<sup>177</sup> A meeting in New York and letters following up on the meeting provide a sufficient basis for an assertion of personal jurisdiction if the meeting had some "substantial or critical relationship to the matters" of the litigation.<sup>178</sup>

Under the facts of the case, Wolff, through its agent Gourlay,<sup>179</sup> approached Omni about selling Omni's commodities on the London Metals Exchange.<sup>180</sup> Preliminary negotiations for the deal took place in New York, Omni's place of business.<sup>181</sup> However, the finalized agreement was entered into in London.<sup>182</sup> When the trading was complete, Wolff mailed confirmation slips to Omni in New York.<sup>183</sup> Wolff also sent bills for commission to Omni in New York totaling over £105,000.<sup>184</sup> However, Rudolf Wolff, Co. had no offices, employees or telephone listings in any state in the United States and was not licensed to do business within the United States.<sup>185</sup>

Personal jurisdiction could possibly have been asserted over Wolff and Gourlay because of the nexus between the negotiations and the injury to the plaintiffs. The contract that was negotiated between Omni and Wolff through Gourlay provided this nexus.<sup>186</sup> Also, the meeting between Omni and Wolff through Gourlay in New York was critical to the relationship that formed the contract.<sup>187</sup> That contract served

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176. See *McGowan v. Smith*, 419 N.E.2d 321, 323 (N.Y. 1981) (noting that there must be a substantial nexus between the cause of action and the contacts from the business transactions).

177. See *Manhattan Life Ins. Co. v. A.J. Stratton Syndicate*, 731 F. Supp. 587, 592 (S.D.N.Y. 1990) (indicating that the court does not necessarily look at a single contract or event but looks at the totality of the defendant's contacts with the state).

178. See *id.* at 593 (stating that a single meeting in New York may be enough to assert personal jurisdiction).

179. There was some discussion in the unpublished district court opinion as to whether Gourlay was an agent of Wolff's when Gourlay was trying to solicit business from Omni. However, Gourlay conducted business in Wolff's offices, he corresponded on Wolff's stationary, and in connection with the Omni deal, Gourlay received commission checks from Wolff. Therefore, the district court held that Wolff should have known that Gourlay was acting under apparent authority from Wolff and thus, acted as Wolff's agent. See *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at app. B-20 to B-21, Omni Capital Int'l, v. Rudolf Wolff*, 484 U.S. 97 (1987) (No. 86-740) (indicating that Gourlay acted with apparent authority from Wolff and was therefore Wolff's agent).

180. See *Omni Capital Int'l*, 484 U.S. at 99 (describing the relationship between Omni, Wolff and Gourlay).

181. See *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at app. B-11, Omni Capital Int'l*, 484 U.S. 97 (No. 86-740) (recounting that Gourlay went to New York and met with Omni to discuss commodities trading).

182. See *id.* at B-12 (explaining that Gourlay came to New York to begin negotiations with Omni for trading Omni's commodities on the London Metals Exchange).

183. See *id.* at B-19 (noting that confirmation slips were sent to New York by Wolff).

184. See *Point Landing, Inc. v. Omni Capital Int'l*, 795 F.2d 415, 418 (5th Cir. 1986) (revealing that Wolff sought out Omni and contracted with them to sell Omni's commodities for commission).

185. *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at app. B-17 to B-18, Omni Capital Int'l*, 484 U.S. 97 (No. 86-740).

186. See *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 99 (1987) (noting that the plaintiffs' claimed their injuries resulted from the commodities trading contracted between Omni and Wolff).

187. See *Point Landing, Inc.*, 795 F.2d at 418 (reporting that Wolff approached Omni to solicit business from them).



as the basis for the litigation.<sup>188</sup> In this case, if Omni had not contracted with Wolff and Gourlay, then the plaintiffs would not have suffered their financial injury. Therefore, personal jurisdiction likely could have been asserted over Wolff and Gourlay under the New York long-arm statute. If personal jurisdiction could have been asserted over Wolff and Gourlay in New York, the federal court would not have been able to use Rule 4(k)(2).<sup>189</sup>

Given that Rule 4(k)(2) could not be utilized under the facts of Omni, one question arises: Does Rule 4(k)(2) have any real use in asserting personal jurisdiction? Now that cases analyzing Rule 4(k)(2) have made their way through the judicial system, it remains to be seen whether the newly created federal long-arm statute has found any real use and whether Rule 4(k)(2) has been applied consistently with the Advisory Committee's recommendation.

#### V. HOW LOWER FEDERAL COURTS HAVE INTERPRETED RULE 4(K)(2)

Most of the cases litigating issues involving Rule 4(k)(2) have been resolved at the district court level.<sup>190</sup> Some issues have been relatively easy to settle, while others have led to more questions.<sup>191</sup> Although federal district courts finally have a federal long-arm statute with the enactment of Rule 4(k)(2), just how useful has it been?

The Rule 4(k)(2) analysis can be broken down into three elements: first, there must be a claim arising under federal law; second, the defendant must not be amenable to personal jurisdiction in any court of general jurisdiction in any state; and third, the exercise of personal jurisdiction must be consistent with the Constitution in light of the defendant's contacts with the United States as a whole.<sup>192</sup> The first two elements are used in determining whether the rule is

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188. See *Omni Capital Int'l*, 484 U.S. at 99 (relating that the cause of action arose out of the trading on the London Metals Exchange and that Wolff and Gourlay made those trades for Omni pursuant to their business arrangement).

189. See FED. R. CIV. P. 4(k)(2) (requiring that for Rule 4(k)(2) to be applicable the defendant must not be amenable to jurisdiction in any court of general jurisdiction in any state).

190. Only three cases have reached the circuit courts of appeals: *United States SEC v. Carrillo*, 115 F.3d 1540 (11th Cir. 1997); *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996); *American Tel. & Tel. Co v. Compagnie Bruxelles Lambert*, 94 F.3d 586 (9th Cir. 1996).

191. See *infra* Part V.A-C (noting how the courts have interpreted Rule 4(k)(2)). One of the easier issues has been the refusal to apply Rule 4(k)(2) to defendants who reside in the United States. See, e.g., *Kohler Co. v. Titon Indus. Inc.*, 948 F. Supp. 815, 820-21 (E.D. Wis. 1996) (refusing to apply Rule 4(k)(2) to a domestic defendant).

192. See *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 434 (S.D.N.Y. 1996) (summarizing Rule 4(k)(2) as having these three elements).

applicable to the particular case at bar.<sup>193</sup> The third element requires a due process analysis under the Fifth Amendment.<sup>194</sup>

### A. Arising Under Federal Law

A split is developing in the lower federal courts as to the meaning of the phrase “arising under federal law.”<sup>195</sup> In *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*,<sup>196</sup> the federal district court stated that Rule 4(k)(2) “only provides federal courts with personal jurisdiction over a foreign defendant in *federal question* cases.”<sup>197</sup> According to the Advisory Committee, the “arising under federal law” language was used to address the situation that arose in *Omni Capital International*.<sup>198</sup> That situation involved a foreign defendant being sued under a federal law, thereby creating a federal question.<sup>199</sup> The Supreme Court recommended in *Omni Capital International* that a provision authorizing service on an alien defendant should be based on claims involving federal questions.<sup>200</sup> Although the Advisory Committee did not directly state that the language “arising under federal law” limits application of Rule 4(k)(2) to federal question cases, it used language very similar to the federal statute which creates the federal courts’ subject matter jurisdiction.<sup>201</sup> The use of language similar to the federal question statute shows that the Advisory Committee is tenacious about conforming to the narrow purpose of the federal long-arm—assuring that those who violate federal law may be sued in a United States court.<sup>202</sup>

193. See *United States v. International Bhd. of Teamsters*, 945 F. Supp. 609, 617 (S.D.N.Y. 1996) (stating that the first two elements of Rule 4(k)(2) determine whether Rule 4(k)(2) is applicable to the case).

194. See *id.* (explaining that the third element looks to whether the defendant has aggregate contacts with the United States).

195. Compare *infra* text accompanying notes 197-202 (limiting Rule 4(k)(2) to federal question cases), with *infra* text accompanying notes 203-17 (interpreting Rule 4(k)(2) as applicable to more than federal question cases).

196. 872 F. Supp. 81 (S.D.N.Y. 1995).

197. *Eskofot A/S*, 872 F. Supp. at 87 (emphasis added).

198. See *supra* notes 132-34 and accompanying text (emphasizing that Rule 4(k)(2) was enacted to address a very specific situation—one in which a defendant violates federal law and is not amenable to the personal jurisdiction of any court of general jurisdiction in any state).

199. FED. R. CIV. P. 4(k)(2); see FED. R. CIV. P. 4(k)(2) advisory committee’s note (1993) (utilizing the specific words “arising under federal law” when drafting Rule 4(k)(2)).

200. See *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (suggesting that Congress and the Advisory Committee could create a narrowly tailored service of process provision for federal question cases).

201. See 28 U.S.C.A. § 1331 (West 1993) (setting out federal question subject matter jurisdiction: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); FED. R. CIV. P. 4(k) advisory committee’s note (1993) (declaring that Rule 4(k)(2) does not apply to claims based on state law or the law of another country even if subject matter jurisdiction is based on diversity of citizenship); *Eskofot A/S*, 872 F. Supp. at 87 (construing the “arising under” language to apply to claims in which there is a federal question).

202. See *supra* notes 132-34 and accompanying text (stating the purpose for Rule 4(k)(2)). Should the case before the federal court also have related claims, the Advisory Committee explicitly stated that supplemental jurisdiction can be used in connection with Rule 4(k)(2) to bring in those related claims. See FED. R. CIV. P. 4(k) advisory committee’s note (1993) (emphasizing that 28 U.S.C.A. § 1367 can be used to bring the related claims

Other courts, however, have held that “arising under federal law” is not limited to federal questions.<sup>203</sup> In *World Tanker Carrier Corp. v. MV Ya Mawlaya*,<sup>204</sup> the Fifth Circuit Court of Appeals held that the language “arising under federal law” applies to any federal law and is not to be read as narrowly as it is in 28 U.S.C. § 1331 (federal question subject matter jurisdiction).<sup>205</sup> Looking at the rule’s plain language, the circuit court noted that the text of Rule 4(k)(2) does not limit the rule to just federal question cases but “incorporates all substantive federal law claims.”<sup>206</sup> Additionally, the circuit court looked at the Advisory Committee notes and the rule’s legislative history to support its holding that Rule 4(k)(2) is to be read to apply to any federal law.<sup>207</sup>

Using the Advisory Committee notes, the Fifth Circuit observed that Rule 4(k)(2) “authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state.”<sup>208</sup> Moreover, the Fifth Circuit claimed that by using the word “any” to qualify “federal law,” the advisory committee intended for Rule 4(k)(2) to apply to all claims arising under “substantive federal law.”<sup>209</sup> The Fifth Circuit relied on the Advisory Committee’s statement that the “arising under” language applies when a defendant is sued under federal law but not under state law.<sup>210</sup> By that statement, the Fifth Circuit believed that the Advisory Committee intended that in cases arising under state law, Rule 4(k)(2) would not apply, thereby drawing a line between cases arising under state law and cases arising under federal law.<sup>211</sup> The court claimed that if the Advisory Committee meant for Rule 4(k)(2) to apply only to federal questions, then the Advisory Committee would have stated explicitly that “arising under” only applied to federal

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into federal court).

203. See generally *World Tanker Carriers Corp. v. MV Ya Mawlaya*, 99 F.3d 717, 722 (5th Cir. 1996) (holding that the language “arising under federal law” applies to federal substantive law and to admiralty cases); *West Africa Trading & Shipping Co. v. London Int’l Group*, 968 F. Supp. 996, 999 (D.N.J. 1997) (declaring that “arising under federal law” applies to all cases subject to federal law, not just federal question cases); *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F. Supp. 1232, 1235 (D.V.I. 1997) (concluding that “arising under federal law” is not limited to federal question cases).

204. 99 F.3d 717 (5th Cir. 1996).

205. See *World Tanker Carriers Corp.*, 99 F.3d at 720-21 (holding that “arising under federal law” applies broadly to all federal substantive law).

206. See *id.* (noting that the text of Rule 4(k)(2) does not limit its use only to federal question cases).

207. See *id.* at 720-22 (finding support from the Advisory Committee notes and the legislative history of Rule 4(k)(2)).

208. *Id.* at 721 (quoting FED. R. CIV. P. 4(k)(2) advisory committee’s note).

209. See *id.* (asserting that by using the word “any” before “federal law” the Advisory Committee intended Rule 4(k)(2) to have a broad reach).

210. See *id.* (“This narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country.”) (quoting FED. R. CIV. P. 4(k)(2) advisory committee’s note).

211. See *id.* (asserting that the Advisory Committee intended Rule 4(k)(2) to apply to cases arising under federal law and not those arising under state law).

question cases and not to cases in diversity.<sup>212</sup> Because that statement was not made, the circuit court concluded that “arising under federal law” was to be applied broadly and not restricted to federal question cases.<sup>213</sup>

Finally, relying on legislative history, the circuit court emphasized that Rule 4(k)(2) is intended to correct the anomaly in the federal courts’ assertions of personal jurisdiction.<sup>214</sup> The court revisited the purpose for the rule, which was to fill the gap existing in personal jurisdiction jurisprudence in federal courts.<sup>215</sup> The circuit court noted that nothing in the legislative history suggests that Rule 4(k)(2) relates only to 28 U.S.C. § 1331 (federal question subject matter jurisdiction).<sup>216</sup>

The “arising under federal law” language can be read to apply to more than just federal question cases. However, the cases that read the language more broadly all dealt with maritime law or admiralty.<sup>217</sup> In the future, it will be interesting to see if this interpretation of Rule 4(k)(2) finds application outside of maritime and admiralty cases as in cases where there is no federal question on the face of the complaint but federal law does apply.

### *B. Are the Defendants Really Not Subject to the Jurisdiction of the Courts of General Jurisdiction of Any State?*

For a federal court to exercise personal jurisdiction, Rule 4(k)(2) states that the defendant must not be amenable to jurisdiction in *any* other state.<sup>218</sup> Some courts look only at the long-arm statute of the state where the district court sits to decide whether the defendant is amenable to jurisdiction in that state. However, those courts do not look at the possibility of the assertion of personal jurisdiction in any of the other forty-nine states.<sup>219</sup> Further, in one case, the federal district court did not

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212. See *id.* (indicating that Rule 4(k)(2) was enacted to correct the anomaly that existed when federal courts had to consider the defendant’s contacts with the state despite the fact the defendant violated federal law).

213. See *id.* at 722 (holding that Rule 4(k)(2) applies to all substantive federal law claims).

214. See *id.* (relying on legislative history to maintain its position that Rule 4(k)(2) applies to federal law generally).

215. See *supra* notes 76-78 and accompanying text (describing the gap that existed); see also *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987) (intimating that there are some defendants who violate federal law who cannot be sued because they cannot be reached by any state’s long-arm statute).

216. See *World Tanker Carriers Corp.*, 99 F.3d at 722 (stating there was no indication that Rule 4(k)(2) “was meant as a companion to 28 U.S.C.A. § 1331”).

217. See *generally id.* at 723 (declaring that the language “arising under federal law” applies to federal substantive law and to admiralty cases); *West Africa Trading & Shipping Co. v. London Int’l Group*, 968 F. Supp. 996 (D.N.J. 1997) (finding Rule 4(k)(2) applicable in admiralty and maritime cases); *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F. Supp. 1232 (D.V.I. 1997) (applying Rule 4(k)(2) to maritime case).

218. See FED. R. CIV. P. 4(k)(2) (requiring that, for Rule 4(k)(2) to be applicable, the defendant must not be “subject to the jurisdiction of the courts of general jurisdiction of any state”).

219. See *In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. 909, 914 (S.D. Ohio 1997) (asserting that even “if the defendant does not have sufficient minimum contacts with the forum state,” then Rule 4(k)(2) authorizes the exercise of personal jurisdiction); *Kohler Co. v. Titon Indus., Inc.*, 948 F. Supp. 815, 817-18 (E.D. Wis. 1996) (stating that if there is no federal statute providing service of process, then the court must determine if the defendant is amenable to jurisdiction under the long-arm statute of the state where the district court sits); *United States v.*

even mention that the defendant was not amenable to jurisdiction in any of the fifty states.<sup>220</sup> However, Rule 4(k)(2) requires that the defendant cannot be amenable to jurisdiction in “any state.”<sup>221</sup>

Why are courts skirting around this element of the rule? The courts appear to misunderstand the language of the rule when they state that Rule 4(k)(2) only applies if the defendant does not have sufficient minimum contacts with the state where the district court sits.<sup>222</sup> In *United States v. International Brotherhood of Teamsters*,<sup>223</sup> the New York Southern District Court indicated that if Rule 4(k)(2) did not apply, then jurisdiction would have to be asserted using the state long arm.<sup>224</sup> Interestingly, the court also analyzed whether the defendant was amenable to jurisdiction in New York under the New York long-arm statute.<sup>225</sup> However, the court never mentioned the language of Rule 4(k)(2), which states that defendant cannot be amenable to the jurisdiction of any court of general jurisdiction of any state, nor did the court look to any other states to see if the defendant was amenable to jurisdiction there.<sup>226</sup> The court did not explain why it failed to address the requirement that the defendant not be amenable to the jurisdiction of any court of general jurisdiction in any state.<sup>227</sup>

In other cases, the facts simply do not indicate that there were any contacts with the United States.<sup>228</sup> In *Bank Brussels Lambert v. Credit Lyonnais*,<sup>229</sup> the district court went straight into analyzing whether the defendant had the requisite minimum contacts with the United States to enable the court to assert personal

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International Bhd. of Teamsters, 945 F. Supp. 609, 618-19 (S.D.N.Y. 1996) (indicating that if Rule 4(k)(2) does apply, then the court’s personal jurisdiction would be limited by New York’s long-arm statute).

220. See generally *Bank Brussels Lambert v. Credit Lyonnais*, 192 B.R. 73, 79-80 (S.D.N.Y. 1996) (holding that Rule 4(k)(2) was applicable because the defendant had the requisite minimum contacts with the United States, yet there is no mention that defendant was not amenable to jurisdiction in any of the other states).

221. See FED. R. CIV. P. 4(k)(2) (emphasis added).

222. See *In re Telectronics Pacing Sys., Inc.*, 953 F. Supp. at 914 (asserting that Rule 4(k)(2) authorizes the exercise of personal jurisdiction “if the defendant does not have sufficient minimum contacts with the forum state”); *Kohler Co.*, 948 F. Supp. at 817 (stating that the court must look to see if the defendant is amenable to jurisdiction under the long-arm statute of the state where the district court sits when there is no federal statute providing service of process); *International Bhd. of Teamsters*, 945 F. Supp. at 618-19 (indicating that when Rule 4(k)(2) is inapplicable, the court must rely on the state long-arm statute to assert personal jurisdiction).

223. 945 F. Supp. 609 (S.D.N.Y. 1996).

224. See *International Bhd. of Teamsters*, 945 F. Supp. at 618 (indicating that if Rule 4(k)(2) did not apply then the court would have to rely on the state long-arm statute to assert personal jurisdiction).

225. See *id.* at 619-20 (determining whether the defendant would be amenable to jurisdiction in New York).

226. See *id.* at 618-19 (determining whether the defendant is amenable to jurisdiction in New York).

227. See generally *id.* at 619-20 (analyzing only the New York long-arm statute before applying Rule 4(k)(2)); see also *Kohler Co.*, 948 F. Supp. at 818-19 (looking only to the state long-arm statute of Wisconsin before attempting to assert jurisdiction under Rule 4(k)(2)).

228. See generally *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81 (S.D.N.Y. 1995) (indicating that the only contacts with the United States were the reverberant effects of actions taken by the defendant outside the United States).

229. 192 B.R. 73 (S.D.N.Y. 1996).

jurisdiction under Rule 4(k)(2).<sup>230</sup> The court gave no real indication there were any facts that could have subjected the defendant to jurisdiction in any court of general jurisdiction.<sup>231</sup> The court merely made mention in a footnote that both parties were aliens.<sup>232</sup> Possibly the court believed that, because both parties were foreign companies, Rule 4(k)(2) should apply.<sup>233</sup>

Some courts do analyze whether the defendant would be amenable to jurisdiction in other states, including the state where the district court is located.<sup>234</sup> In *Aerogroup International, Inc. v. Marlboro Footworks, Ltd.*,<sup>235</sup> the district court was aware that to apply Rule 4(k)(2), the defendant must not be amenable to personal jurisdiction in any court of general jurisdiction in any state.<sup>236</sup> Therefore, the district court looked to see if the defendant was amenable to jurisdiction in New York before deciding whether Rule 4(k)(2) could be used to reach the defendant.<sup>237</sup> In addition, the court determined whether the defendant was amenable to personal jurisdiction under the *Massachusetts* long-arm statute.<sup>238</sup> Because the defendant conducted some business in Massachusetts, the district court concluded that Massachusetts was the only other place the defendant could be subject to personal jurisdiction.<sup>239</sup> Similarly, before asserting personal jurisdiction under Rule 4(k)(2), the district court in *Pharmachemie B.V. v. Pharmacia S.p.A.*<sup>240</sup> stated it would need to examine the state long-arms of New Mexico and Ohio because the defendant admitted having contacts with those states.<sup>241</sup>

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230. See *Bank Brussels*, 192 B.R. at 79-80 (evaluating only the defendant's contacts with the United States as a whole).

231. See generally *id.* (discussing only the application of Rule 4(k)(2)).

232. See *id.* at 79 n.5 (noting that both plaintiffs and defendants were aliens).

233. See *id.* (giving no reason for why the court went straight to analyzing Rule 4(k)(2) other than noting that both defendants were aliens).

234. See *Warn v. M/Y Maridome*, 961 F. Supp. 1357, 1368 (S.D. Cal. 1997) (finding that the foreign defendant would be amenable to jurisdiction in Virginia); *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 432-34 (S.D.N.Y. 1996) (determining whether defendant would be amenable to jurisdiction in New York or Massachusetts, the only two places, according to the facts, the defendant had any contacts); *Pharmachemie B.V. v. Pharmacia S.p.A.*, 934 F. Supp. 484, 487 (D. Mass. 1996) (analyzing whether defendant would be subject to personal jurisdiction in Ohio and New Mexico because, under the facts, the defendant had some contacts there).

235. 956 F. Supp. 427 (S.D.N.Y. 1996).

236. See *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 434 (S.D.N.Y. 1996) (reciting the requirements of Rule 4(k)(2)).

237. See *id.* at 432-34 (ascertaining whether the defendant was amenable to personal jurisdiction in New York so that the defendant would be amenable to personal jurisdiction in the courts of general jurisdiction in the state of New York).

238. See *id.* at 434-38 (applying the Massachusetts long-arm statute to the facts alleged in the case).

239. See *id.* at 429-32 (stating, in setting out the facts of the case, that one of the defendants was from Massachusetts and the foreign defendant conducted business with the Massachusetts defendant).

240. 934 F. Supp. 484 (D. Mass. 1996).

241. See *Pharmachemie B.V.*, 934 F. Supp. at 486-87 (noting that to apply Rule 4(k)(2) the defendant cannot be amenable to the jurisdiction of any court of general jurisdiction in any state, and in this case the defendant had contacts with Ohio and New Mexico).

A remaining question is which party has the burden of proving that the defendant is not amenable to jurisdiction in any of the fifty states.<sup>242</sup> Need the plaintiff show that the defendant is not amenable to personal jurisdiction in *all* of the fifty states? Or must the plaintiff merely show that the defendant is not amenable to personal jurisdiction in the state where the suit is filed, thereby shifting the burden to the defendant to establish that he cannot be reached in any other state? As to this last question, the defendant would be caught in a “Catch-22” situation. In most cases, the defendant would file a motion to dismiss for lack of personal jurisdiction.<sup>243</sup> If the defendant is required to prove that he is not amenable to jurisdiction in any of the other forty-nine states, he may end up proving he is amenable to personal jurisdiction in another state, thus establishing the proper forum in which the plaintiff may file in order to sue him.<sup>244</sup>

In *United States v. Offshore Marine, Ltd.*,<sup>245</sup> the district court held that it was not the defendant’s burden to prove that it was not amenable to personal jurisdiction in any other state.<sup>246</sup> The court emphasized that because the plaintiff sought to use Rule 4(k)(2), the plaintiff should have the burden of proving that all requirements of Rule 4(k)(2) were met.<sup>247</sup> The court also cautioned that plaintiffs would not be allowed to conduct additional discovery to prove that the defendant was not amenable to jurisdiction in any other state.<sup>248</sup> The court further stated that before plaintiffs attempt to use Rule 4(k)(2), they should conduct discovery sufficient to establish a prima facie case of personal jurisdiction over the defendant.<sup>249</sup> Therefore, if discovery is allowed for jurisdictional purposes, plaintiffs must sufficiently broaden their scope to establish that the defendant is not amenable to jurisdiction in any of the fifty states.<sup>250</sup>

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242. See Kelleher, *supra* note 5, at 36 (questioning who has the burden of proof when the defendant “challenges the assertion of jurisdiction under Rule 4(k)(2)”).

243. See FED. R. CIV. P. 12(b)(2) (allowing the defendant to make a motion to dismiss for lack of personal jurisdiction).

244. See FED. R. CIV. P. 4(k)(2) (stating that the rule is only applicable if the defendant is not amenable to jurisdiction in any court of general jurisdiction of any state).

245. No. CIV.1994-40, 1998 WL 199687 (D.C.V.I. 1998).

246. See *United States v. Offshore Marine, Ltd.*, No. CIV.1994-40, 1998 WL 199687, at \*4 (D.C.V.I. 1998) (holding that the plaintiff, who seeks to use Rule 4(k)(2), must prove that defendant is not amenable to personal jurisdiction in any court of general jurisdiction in any state in order to survive a motion to dismiss for want of personal jurisdiction).

247. See *id.* (noting that when the defendant raises the defense of lack of personal jurisdiction, the burden is on the plaintiff to show that there are facts sufficient such that it is proper to assert personal jurisdiction over the defendant).

248. See *id.* (pointing out that the plaintiff needs to conduct comprehensive discovery).

249. See *id.* (refusing to allow the United States to conduct additional discovery to make its prima facie showing that the assertion of personal jurisdiction over the defendant is proper).

250. See *id.* (correcting the plaintiff’s inaccurate assumption that jurisdictional discovery is limited to the jurisdiction where the suit is brought); *id.* (asserting that jurisdictional discovery is only limited to questions regarding jurisdiction but is not limited as to its scope).

## C. Due Process Analysis Under the Fifth Amendment and Rule 4(k)(2)

Under Rule 4(k)(2), the assertion of personal jurisdiction cannot violate the defendant's right to due process under the Fifth Amendment.<sup>251</sup> There are two lines of analysis developing when district courts evaluate minimum contacts.<sup>252</sup> One line of cases considers three factors in assessing a foreign defendant's contacts with the forum.<sup>253</sup> Those factors are: (1) whether the defendant is transacting business in the United States; (2) whether the defendant is doing an act in the United States; and (3) whether the defendant's activities are having an effect in the United States by an act done elsewhere.<sup>254</sup> In *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*,<sup>255</sup> for example, the court adopted this approach in deciding whether the defendant had sufficient minimum contacts with the forum.<sup>256</sup>

However, in *Aerogroup International, Inc. v. Marlboro Footworks, Ltd.*,<sup>257</sup> the district court noted that the factors used in *Eskofot* are not the only factors to consider when determining whether the defendant has the appropriate minimum contacts needed to assert personal jurisdiction.<sup>258</sup> The district court applied the traditional minimum contacts analysis and its factors developed by *International Shoe Co. v. Washington*<sup>259</sup> and its progeny.<sup>260</sup>

Both of these cases were decided in the same district, yet two different approaches were used to analyze the minimum contacts.<sup>261</sup> The difference depends on the procedural stage of the case: in *Eskofot*, the parties had not yet engaged in discovery so the court used the three factors to determine if the defendants were

251. See FED. R. CIV. P. 4(k)(2) (stating that Rule 4(k)(2) is applicable "[i]f the exercise of jurisdiction is consistent with the Constitution").

252. See *infra* notes 253-54 and accompanying text (laying out one type of minimum contacts analysis); *infra* notes 258-60 and accompanying text (summarizing the traditional minimum contacts analysis developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny).

253. See *Eskofot A/S v. E.I. Du Pont De Nemours & Co.*, 872 F. Supp. 81, 87 (S.D.N.Y. 1995) (deciding to use the minimum contacts analysis employed in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972)); see also *Warn v. M/Y Maridome*, 961 F. Supp. 1357 (S.D. Cal. 1997) (adopting the three part test used in *Eskofot*); *Western Equities, Ltd. v. Hanseatic, Ltd.*, 956 F. Supp. 1232-1237-38 (D.V.I. 1997) (applying the three factor test utilized in *Eskofot*).

254. See *Eskofot*, 872 F. Supp. at 87 (adopting a minimum contacts analysis that requires the defendant to meet at least one of the three factors).

255. 872 F. Supp. 81 (S.D.N.Y. 1995).

256. See *id.* at 87-89 (using the three factors to evaluate the defendant's minimum contacts with the forum).

257. 956 F. Supp. 427 (S.D.N.Y. 1996).

258. See *Aerogroup Int'l, Inc.*, 956 F. Supp. at 439 n.17 (pointing out that the three factors used in *Eskofot* "are not exclusive but were simply factors relevant to its facts").

259. 326 U.S. 310 (1945).

260. See *Aerogroup Int'l, Inc.*, 956 F. Supp. at 439-42 (applying the traditional minimum contacts analysis).

261. See *supra* notes 253-54 and accompanying text (laying out one type of minimum contacts analysis); *supra* notes 258-60 and accompanying text (discussing the traditional minimum contacts analysis developed by *International Shoe v. Washington*, 326 U.S. 310 (1945) and its progeny).



subject to personal jurisdiction.<sup>262</sup> When no discovery has taken place, the plaintiff merely needs to make “legally sufficient allegations of jurisdiction.”<sup>263</sup>

Yet, in *Aerogroup International, Inc.*, the parties had already engaged in discovery; therefore, the burden was placed on the plaintiff to defeat the motion to dismiss for lack of jurisdiction.<sup>264</sup> The plaintiff was required to make a *prima facie showing* which included an “avertment of facts that, if given credit by the . . . trier of fact, would be sufficient to establish jurisdiction over the defendant.”<sup>265</sup> Thus, in order to establish personal jurisdiction, plaintiff was required to meet the more “fact-oriented” findings required by the traditional personal jurisdiction jurisprudence (general and specific jurisdiction).<sup>266</sup>

When district courts are deciding which analysis to use, they should consider the procedural posture of the case.<sup>267</sup> If the parties have not yet engaged in discovery, the courts can use the minimum contacts analysis discussed above where the court considers the three factors.<sup>268</sup> Otherwise, the court should analyze personal jurisdiction under *International Shoe* and its progeny because it is more fact specific.

## VI. CONCLUSION

In 1993, Rule 4(k)(2) was adopted to provide the federal courts with their own federal long arm. However, that federal long arm has a very short reach. In *Omni Capital International v. Rudolf Wolff & Co.*,<sup>269</sup> the Supreme Court pointed out that some defendants who violated federal law escaped litigation because they did not have sufficient contacts with any one state to be reached by the state’s long-arm statute.<sup>270</sup> Because of this, the Court suggested that a narrowly tailored service of process rule should be adopted to allow federal courts to assert personal jurisdiction over defendants in this situation.<sup>271</sup> Rule 4(k)(2) filled the gap pointed out by the

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262. See *Eskofot A/S*, 872 F. Supp. at 87-88 (applying the three factors to determine if the defendant was subject to personal jurisdiction).

263. *Aerogroup Int’l, Inc.*, 956 F. Supp. at 432 (emphasis added).

264. See *id.* (stating that the plaintiff’s burden to show that the defendant is not subject to personal jurisdiction is dependent on the procedural posture of the case).

265. *Id.*

266. See generally *id.* (deciding the issue of personal jurisdiction after discovery has taken place by analyzing both general and specific jurisdiction).

267. See *supra* notes 262-66 and accompanying text (explaining which minimum contacts analysis is used before discovery has taken place and which analysis is used after discovery has taken place).

268. See *supra* text accompanying note 254 (listing the factors the courts should use).

269. 484 U.S. 97 (1987).

270. See *Omni Capital Int’l*, 484 U.S. at 111 (indicating that some defendants escaped having to answer for their violations of federal law); see also *supra* notes 76-78 (explaining the gap that existed in the federal courts’ ability to assert personal jurisdiction over certain defendants).

271. See *supra* note 128 and accompanying text (quoting the suggestion made by the Supreme Court for a narrowly tailored service of process rule).

Supreme Court by providing the federal courts with a federal long arm.<sup>272</sup> Despite the fact that Rule 4(k)(2) has a very narrow reach, it has found some utility by the federal courts.<sup>273</sup>

The Advisory Committee has given some guidance as to how federal courts should apply Rule 4(k)(2).<sup>274</sup> Specifically, the Advisory Committee has indicated that Rule 4(k)(2) applies only to foreign defendants and federal question cases.<sup>275</sup> However, the Fifth Circuit has held that Rule 4(k)(2) applies to admiralty cases.<sup>276</sup>

Despite this guidance and the plain language of the rule, some courts appear to ignore a portion of the rule.<sup>277</sup> Rule 4(k)(2) requires that for the rule to be applicable, the defendant cannot be amenable to jurisdiction in any court of general jurisdiction of any state.<sup>278</sup> Notwithstanding this clear language, some federal courts fail to explain whether the defendant was amenable to jurisdiction in any of the fifty states.<sup>279</sup> All federal courts should, however, follow the lead of those federal district courts that analyze whether the facts indicating the defendant has contacts with a particular state are enough to assert personal jurisdiction under that state's long-arm statute.<sup>280</sup> At the very least, the federal courts should briefly explain that the facts just do not indicate the plaintiff would not be subject to jurisdiction in the courts of general jurisdiction in any of the fifty states.

While the Advisory Committee and the plain language of the rule gives some guidance as to how Rule 4(k)(2) is to be applied, some issues are not addressed by the Advisory Committee or the language of the rule. First, it is unclear as to which party carries the burden of proof to show that the defendant is not amenable to the jurisdiction of any court of general jurisdiction of any state.<sup>281</sup> The plaintiff should

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272. See generally *World Tanker Carriers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717 (5th Cir. 1996) (asserting personal jurisdiction under Rule 4(k)(2) because a foreign defendant violated maritime law and did not have enough contacts with the United States to subject the defendant to the long-arm statute of Louisiana); *Pharmachemie B.V. v. Pharmacia S.p.A.*, 934 F. Supp. 484 (D. Mass. 1996) (applying Rule 4(k)(2) in a case where the defendant (an Italian company) was alleged to have infringed on a patent under federal law but did not have enough contacts with any one state for a federal court to assert personal jurisdiction under a state long arm).

273. See *supra* Part V (discussing how the federal courts have utilized Rule 4(k)(2)).

274. See *supra* Part IV.A-D (analyzing the Advisory Committee notes).

275. See *supra* notes 199-201 and accompanying text (stating that the Advisory Committee intended Rule 4(k)(2) to apply to federal question cases); *supra* Part V.A (demonstrating that Rule 4(k)(2) applies only to foreign defendants).

276. See *supra* text accompanying notes 203-16 (providing the reasoning of the Fifth Circuit's holding that Rule 4(k)(2) also applies to admiralty cases).

277. See *supra* Part V.B (looking at how the lower courts have considered the requirement that the defendant must not be amenable to the personal jurisdiction of any court of general jurisdiction).

278. See FED. R. CIV. P. 4(k)(2) (requiring that defendant not be amenable to jurisdiction in any other state).

279. See *supra* notes 222-33 and accompanying text (asserting that some states appear to ignore the plain language of Rule 4(k)(2)).

280. See *supra* notes 234-41 and accompanying text (showing that some courts analyze whether, under the facts, the defendant could be amenable to the jurisdiction of any of the courts of general jurisdiction).

281. See *supra* notes 242-50 and accompanying text (examining who has the burden of proof to show the defendant is not amenable under any state long-arm statute).

bear this burden because it is the plaintiff who wishes to bring the suit.<sup>282</sup> Therefore, the plaintiff's must establish that jurisdiction is proper.<sup>283</sup>

Additionally, when analyzing due process concerns, the courts apply two different types of minimum contacts analyses.<sup>284</sup> Even though *International Shoe* and its progeny is a Fourteenth Amendment Due Process analysis, it could easily be applied as a Fifth Amendment Due Process analysis.<sup>285</sup> Because the Supreme Court has already determined that *International Shoe* and its progeny meet the dictates of fairness required by due process under the Fourteenth Amendment, courts should, by analogy, apply *International Shoe*.<sup>286</sup> This should create less confusion as to due process concerns because the courts and practitioners are familiar with the analysis.

While there will always be litigation over the proper forum before the true issues of a case are addressed, Rule 4(k)(2) provides a federal long arm which enables the courts to assert jurisdiction over a defendant who violated federal law and is unable to be reached by any one state's long-arm statute. Rule 4(k)(2) has utility and will continue to allow more plaintiffs to get into federal court so the merits of their cases will be addressed.

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282. See *supra* note 247 and accompanying text (concluding that it is the plaintiff's burden to show that defendant is not amenable to jurisdiction under any state's long-arm statute).

283. See *supra* note 249 and accompanying text (requiring the plaintiff to establish a prima facie showing that personal jurisdiction is proper).

284. See *supra* Part V.C (analyzing the due process analyses employed by federal courts when utilizing Rule 4(k)(2)).

285. Compare *United States SEC. v. Carrillo*, 115 F.3d 1540, 1543 (11th Cir. 1997) (using the due process analysis developed under the Fourteenth Amendment in a case examining procedural due process under the Fifth Amendment) with *FTC v. Jim Walter Corp.*, 651 F.2d 251, 257 (5th Cir. Unit A July 1981) (using the minimum contacts portion of the due process analysis developed in *International Shoe* while refusing to do a reasonableness balance).

286. See *supra* Part II.B (detailing the due process analysis developed from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny).