THE NATIONAL
LAW JOURNAL
DAILY UPDATES ON WWW.NLJ.COM NEWS FOR THE PROFESSION MONDAY, NOVEMBER 17, 2008
An incisivemedia publication

INTERNATIONAL LAW

FEDERAL LONG-ARM STATUTE

By Peter Trooboff

SINCE THE amendment of the Federal Rules of Civil Procedure in 1993 to include Rule 4(k)(2), U.S. courts have resolved important issues arising under this federal long-arm statute for securing personal jurisdiction over non-U.S. defendants for civil claims arising under federal law. These cases demonstrate that U.S. courts have to date generally taken a cautious and constructive approach to this potentially far-reaching provision. They also provide lessons on issues that litigants may face in future cases involving the rule.

Rule 4(k)(2) filled a gap in the service of process that the U.S. Supreme Court identified in a 1987 case involving fraud claims against U.K. defendants for alleged violations of the Commodity Exchange Act. *Omni Capital International Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). That court held that the statute did not include a provision for nationwide service for private causes of action. The defendants also had insufficient contacts with the state where the district court was located, so service could not be made under Rule 4(e) using the state long-arm statute. The court hinted strongly that Congress might want to enact legislation to fill the gap.

There must be sufficient nationwide contacts

Picking up on the Supreme Court's suggestion, the Advisory Committee on the Federal Rules proposed Rule 4(k)(2). The Supreme Court adopted the committee's recommendation. Under the rule, as adopted, the nonresident defendant sued under federal law must have insufficient state contacts to be amenable to service under the long-arm statute of any state. Service becomes possible under the rule if the defendant has sufficient nationwide contacts to satisfy the due process requirements of the Fifth Amendment.

Cases applying Rule 4(k)(2) show that U.S. courts have taken a cautious and constructive approach to this provision.

Recognizing the risk of abuse, the committee noted the reiterated warning in *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 115 (1987), that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." This concern led the committee to caution that "[t]he district court should be especially scrupulous to protect aliens who reside in a foreign country from forum selection so onerous that injustice could result." The provision does not apply to claims based only on U.S. state law, whether statutory or common, or the law of another country.

Neither the new provision nor the committee explained how federal courts would show that the defendant is, in the terms of the rule, as rewritten in 2007, "not subject to jurisdiction in any state's courts of general jurisdiction." Would the plaintiff need to make this showing for all 50 states? Further, would a defendant's defense on this ground be tantamount to a submission to jurisdiction under the long-arm statute of another state?

In *U.S. v. Swiss American Bank*, 191 F.3d 30 (1st Cir. 1999), the 1st U.S. Circuit Court of Appeals considered this issue in a suit by the United States under federal law to recover from foreign banks deposits that a felon convicted for racketeering and money laundering conceded were fruits of his criminal activity. After a U.S. court had issued a forfeiture ruling in the criminal case, the defendant foreign banks disbursed these funds to the foreign government where they were organized or controlled. The United States based its claims on conversion, unjust enrichment and breach of contract, which the court held in this case had their source in federal law.

The 1st Circuit determined initially that the Massachusetts long-arm statute would not reach the defendants because the tortious injury to the United States had occurred in the foreign country. The defendants argued that the United States had failed to show that the defendants were not subject to personal jurisdiction in the 49 other states. Judge Bruce Selya rejected imposing a requirement for "a plaintiff to prove a negative fifty times over—an epistemological quandary which is compounded" by the defendant's control over the relevant information as

Peter Trooboff *is senior counsel to Covington & Burling in Washington. Robert J. White, a third-year student at George Washington University Law School, provided valuable legal research for this column.*

to the number and extent of contacts with other jurisdictions. Id. at 40. The court explained that an analogous problem arose in assigning burden of proof since the defendant could be placed in the "Catch-22 position" of defending against Rule 4(k)(2)'s applicability by conceding jurisdiction under another state's long-arm statute.

To resolve this dilemma, the 1st Circuit fashioned a "special burden-shifting framework" under which the plaintiff is required to make a prima facie showing of satisfying the elements of the rule, including the sufficiency for Fifth Amendment purposes of the defendant's nationwide contacts. In addition, the plaintiff is required to certify that "based on information readily available to plaintiff and his counsel" no state's long-arm statute is applicable. Id at 41. Relying on an analysis proposed by Professor Stephen B. Burbank, the 1st Circuit determined that the burden then shifts to the "defendant to produce evidence which, if credited, would show" amenability to service under a state long-arm statute or insufficiency of nationwide contacts for Fifth Amendment purposes.

Other circuits have also placed the ultimate burden on the defendant but with a somewhat less nuanced and finely balanced approach than the framework outlined in *Swiss American*. The 7th Circuit ruled that Rule 4(k)(2) applies if the defendant who contests the reach of the long-arm statute of the state where the district court is located "refuses to identify any other [state] where suit is possible." *ISI Int'l Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001).

In upholding jurisdiction for civil claims under the Alien Tort Claims Act arising from the 1998 bombing of the U.S. embassy in Nairobi, Kenya, Judge Merrick Garland characterized this 7th Circuit approach as "eminently sensible." He found that defendants Osama bin Laden and al-Queda "have not conceded to the jurisdiction of any other state" and for due process purposes had "purposefully directed" their terrorist activities at residents of the United States. *Mwini v. bin Laden*, 417 F.3d 1, 11-12 (D.C. Cir. 2005). Other circuits, including the 5th and the 9th, have also followed this framework.

In most of the circuit cases to date under the rule, the plaintiffs asserted specific jurisdiction over the defendants in which the cause of action arose out of the nationwide contacts of the defendants. A plaintiff could rely equally upon the rule for showing the "continuous and systematic general business contacts" required for asserting general jurisdiction when the cause of action is unrelated to the U.S. contacts. The courts appear to have heeded the Supreme Court's admonition in *Asahi* and have applied the "more stringent minimum contacts test" for unrelated causes of action. See, e.g., *Porina v. Marward Shipping Co. Ltd.*, 521 F.3d 122, 128-29 (2d Cir. 2008).

Since federal law provides for protection of intellectual property rights, Rule 4(k)(2) is becoming a potentially valuable basis for supporting infringement claims against non-U.S. parties. Recent cases show that plaintiffs face delicate tactical issues in relying on the rule.

For example, *Smith v. Pat & Jane Emblems Inc*, No. Civ. 05-127, 2005 WL 3032535 (D. Maine Nov. 10, 2005), concerned alleged trademark infringement by a Taiwanese defendant. The district court refused to apply the rule in part because the New York long-arm statute appeared potentially applicable and the plaintiff had not certified otherwise. This ruling teaches that plaintiffs relying on the rule will want to show sufficient nationwide contacts of the defendant to satisfy Fifth Amendment due process requirements. Yet they should avoid showing too many contacts with any one state lest they undermine the required showing that no state long-arm statute applies.

A different lesson emerges from *Technology Patents LLC v. Deutsche Telekom A.G.*, No. AW-07-3012, 2008 WL 4031076 (D. Md. Aug. 29, 2008), in which the plaintiff brought proceedings against 131 international telecommunications companies, including service providers and manufacturers from more than 30 countries, for alleged infringement of a patent relating to a global paging and text-messaging system that utilizes the Internet. Judge Alexander Williams Jr. found that the presence of the defendants within Maryland would not satisfy 14th Amendment due process requirements and that exercising jurisdiction would be unreasonable. He relied upon this same analysis to reach a similar conclusion under the Fifth Amendment even though the defendants' U.S. contacts were "on a larger scale." The plaintiff had apparently failed to reformulate its Rule 4(k)(2) argument to show, if possible, that due process requirements were satisfied by the defendants' conduct throughout the United States even if insufficient for jurisdiction in Maryland.

Jurisdiction arose based on Web sites in '50 Cent' case

Finally, Internet conduct formed the basis of the jurisdictional claim in *Jackson v. Grupo Industrial Hotelero S.A.*, No. 07-22046-CIV, 2008 WL 4648999 (S.D. Fla. Oct. 20, 2008). In this Lanham Act claim for trademark infringement, well-known rapper "50 Cent" (Curtis James Jackson) sought relief against a Mexican corporate defendant, its owner and general manager for promoting a Mexican nightclub by unauthorized use of Jackson's "G-Unit" trademark. The district court held that Florida's long-arm statute was inapplicable because the alleged injury had not occurred within the state. The defendants' alleged U.S. contacts arose principally from allegedly infringing advertisements that appeared on its own and other Web sites, including some interactive ones. Some more traditional media advertising was also alleged. Without analyzing these contacts in detail, Judge Paul Huck held that the plaintiff had made "a *prima facie* showing of constitutionally adequate minimum contacts." In future Internet cases when the plaintiff does not have such a high-profile nationwide business, satisfying the due process standard may be considerably more difficult. NLJ

Reprinted with permission from the November 17, 2008 edition of the NATIONAL LAW JOURNAL © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprintscustomerservice@incisivemedia.com. ALM is now Incisive Media, www.incisivemedia.com. # 005-11-08-0012