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Personal Jurisdiction in the Bankruptcy Context: A Need for Reform

Edward Adams
University of Minnesota Law School, adams006@umn.edu

Rachel E. Iverson

PERSONAL JURISDICTION IN THE BANKRUPTCY CONTEXT: A NEED FOR REFORM

*Edward S. Adams**
*Rachel E. Iverson***

Suppose Corporation X, a Minnesota computer corporation, files a petition to reorganize under Chapter 11 of the Bankruptcy Code[1] in the United States Bankruptcy Court for the District of Minnesota. Suppose also that thirty-five days prior to this filing, Corporation X had paid Corporation Y, a Canadian trucking corporation and one of its creditors, $100,000 to haul goods to one of Corporation X's Canadian customers. Conjecture that, immediately after Corporation X's Chapter 11 filing, the debtor in possession[2] of Corporation X[3] commences an adversary proceeding[4] against Corporation Y to recover the $100,000 as property of the bankruptcy estate pursuant to Section 547(b) of the Bankruptcy Code,[5] which permits a debtor in possession to avoid a pre-petition transfer that is a preference.[6] A question then arises as to whether the United States

* Associate Professor of Law and Director of Center for Law and Business Studies at University of Minnesota Law School; 1985 B.A. *magna cum laude* from Knox College, Galesburg, Illinois; 1988 J.D. *cum laude* from University of Chicago Law School, Chicago, Illinois.

** Associate Attorney at Rider, Bennett, Egan & Arundel in Minneapolis, Minnesota; 1992 B.A. *magna cum laude* from Valparaiso University, Valparaiso, Indiana; 1995 J.D. *magna cum laude* from University of Minnesota, Minneapolis, Minnesota.

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. § 101-1330 (1994)).

2. *See* 11 U.S.C. § 1101(1) (1994) (defining "debtor in possession" as "debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case . . .").

3. Typically, the existing managers of a corporation are allowed to remain in control of the reorganized company as the debtor in possession. Only under rare circumstances will an outside party be appointed trustee of the debtor-corporation. *See In re* Sharon Steel Corp., 871 F.2d 1217, 1225-26 (3d Cir.) (holding that the appointment of an outside trustee is the exception), *later proceeding*, 100 B.R. 767 (Bankr. W.D. Pa. 1989).

4. An adversary proceeding is a form of litigation commenced in bankruptcy court and governed by the Bankruptcy Rules. *See* BANKR. R. 7001-7087; *see also* 9 COLLIER ON BANKRUPTCY ch. 7001 (Lawrence P. King ed., 15th ed. 1995).

5. 11 U.S.C. § 547(b) (1994) (listing ways a trustee can avoid transferring property).

6. *See id.* § 547; *see also* Susan Block-Lieb, *Fishing in Muddy Waters: Clarifying the Common Pool Analogy as Applied to the Standard for Commencement of a Bankruptcy*

Bankruptcy Court in Minnesota has the authority to assert jurisdiction over Corporation Y. If jurisdiction is within this court's dominion, it is unclear whether the power derives from evaluating Corporation Y's aggregate contacts with the United States, or from analyzing Corporation Y's minimum contacts with the state of Minnesota. This Article examines the important quandary United States bankruptcy courts face when they attempt to gain personal jurisdiction over foreign defendants in bankruptcy cases.

Jurisdiction in bankruptcy cases is idiosyncratic, due to its derivation. The Bankruptcy Act provided that bankruptcy jurisdiction rested with the federal district courts.[7] Shortly after Congress enacted the Bankruptcy Code, district courts began referring virtually all bankruptcy cases to referees in bankruptcy.[8] These referees soon became known as bankruptcy judges, and district court judges would appoint them to six-year terms.[9] This peculiar history has caused subject matter jurisdiction and personal jurisdiction in bankruptcy law to evolve in a unique manner.[10]

Case, 42 AM. U. L. REV. 337, 352 n.42 (1993) (stating an avoidable preference may occur upon a voluntary payment by the debtor, depending on the timing and financial picture of the debtor).

7. ROBERT L. JORDAN & WILLIAM D. WARREN, BANKRUPTCY 900 (2d ed., 1989).

8. *Id.*

9. *Id.* A bankruptcy judge's finding of facts will only be set aside if clearly erroneous; additionally, his or her orders are final. *Id.*

10. *See* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 971 (1985) (discussing personal jurisdiction in bankruptcy courts); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 53-54, *later proceeding*, 459 U.S. 813 (1982). In *Northern Pipeline*, the Supreme Court invalidated the subject matter jurisdiction of the bankruptcy courts in non-core proceedings. *See id.* at 87. The *Northern Pipeline* decision altered the jurisdictional capabilities of bankruptcy judges. Following *Northern Pipeline*, bankruptcy judges were not authorized to hear non-core proceedings, such as state law causes of action. *Id.* n.40. Bankruptcy judges were empowered to hear only matters which "related to" the bankruptcy case. *Id.* at 85. Disagreement exists on the question of whether Rule 7004(d) is consistent with due process in a case involving partly bankruptcy and partly state law matters. Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991). In the bankruptcy proceeding, no "minimum contacts" analysis is necessary, but for state law matters, *International Shoe's* "minimum contacts" analysis is necessary. *See id.* at 1244-47. This Article focuses exclusively on core proceedings and does not address the ramifications of a plaintiff's attempt to assert personal jurisdiction over a foreign defendant in a non-core proceeding. For more detailed information on this subject, see J.T. Moran Fin. Corp. v. American Consolidated Fin. Corp., (*In re* J.T. Moran Fin. Corp.), 124 B.R. 931 (S.D.N.Y. 1991); Douglas G. Baird, *Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon*, SUP. CT. REV. 25, 36-37 (Philip B. Kurland et al. eds., 1982); David P. Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1982).

In bankruptcy, a special set of rules governs a defendant's amenability to service of process.[11] Specifically, Rule 7004(d)[12] dictates a bankruptcy court's right to assert jurisdiction nationwide, and Rule 7004(e)[13] controls service of process in foreign countries. The differences between the service of process rules governing bankruptcy cases and the procedural rules governing other civil cases[14] create special problems of interpretation.[15] In particular, the expansive grant of jurisdictional power that rule 7004(d) delegates to bankruptcy courts has made it difficult for those courts to apply a personal jurisdiction analysis to foreign defendants.

As nationwide contact is the minimal requirement to establish jurisdiction under Rule 7004(d) over domestic defendants,[16] the minimum contacts test[17] becomes redundant when applied to a United States resident.[18] When a foreign defendant is involved, however, ambiguity appears when determining the correct application of the Bankruptcy Rules'

11. BANKR. R. 7004; *see also* 9 COLLIER ON BANKRUPTCY, *supra* note 4, at ch. 7004

12. Rule 7004(d) states: "Nationwide Service of Process[:] The summons and complaint and all other process except a subpoena may be served anywhere in the United States." BANKR. R. 7004(d).

13. The Rule states:

> Service on Debtor and Others in Foreign Country[:] The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) [of the Federal Rules of Civil Procedure] in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) [of the Federal Rules of Civil Procedure].

BANKR. R. 7004(e).

14. The Bankruptcy Rules state, in effect, that the parallel provision under the Federal Rules of Civil Procedure is the version of Rule 4 that was in effect on January 1, 1990. *See* BANKR. R. 7004(g); *see also* FED. R. CIV. P. 4. In 1993, Congress substantially revised Rule 4.

15. *See, e.g.*, Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1242-43 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991); Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sandborn Corp.), 835 F.2d 1341, 1344 (11th Cir.) (declaring that "[f]ederal Bankruptcy Rule 7004(d) provides for nationwide service of process and thus is the statutory basis for personal jurisdiction . . . not Florida's long-arm statute"), *cert. granted*, 486 U.S. 1054 (1988), *and rev'd*, 492 U.S. 33 (1989).

16. *See* BANKR. R. 7004(d); *see also Diamond Mortgage*, 913 F.2d at 1244 (explaining that a defendant's contact with a state is irrelevant when the United States is exercising power over the defendant).

17. The "minimum contacts" test is set forth in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

18. *See Diamond Mortgage*, 913 F.2d at 1244. *But see Granfinanciera*, 835 F.2d at 1344 n.8 (discussing the lack of consensus among courts as to whether minimum contacts analysis is necessary where jurisdiction was obtained over a domestic defendant through nationwide service of process).

jurisdictional provisions. This ambiguity causes two principle questions to arise. Should a court revert to the state long-arm provisions, thereby allowing a foreign defendant to evade the jurisdictional reach of the United States bankruptcy courts more easily than a domestic defendant? Are the constitutional standards established in *International Shoe Co. v. Washington*[19] violated when a bankruptcy court "aggregates" a foreign defendant's contacts with the United States to justify the assertion of personal jurisdiction?

Some courts have refused to assert jurisdiction over foreign defendants because the defendant lacked sufficient minimum contacts with the forum state,[20] while other courts have used minimum aggregate contacts with the United States to justify the assertion of personal jurisdiction.[21] Some courts have viewed Rule 7004(d)'s clear and expansive language as a vehicle to gain jurisdiction over foreign defendants who are not subject to jurisdiction on state contacts alone.[22] The broad nature of Rule 7004(d) has confounded Rule 7004(e)'s applicability, by offering judges a window of opportunity to expand their jurisdictional boundaries. In short, courts have failed to resolve the interpretational difficulties surrounding service of process under Rule 7004(e) in a uniform manner.[23] These interpretive difficulties are compounded by the recent amendments to Rule 4 of the Federal Rules of Civil Procedure (FRCP 4), which now provides that:

> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant . . . . (2) If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the

19. 326 U.S. 310, 316 (1945) (requiring defendants to possess "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

20. *See* Lone Star Indus. v. Compania Naviera Perez Companc (*In re* New York Trap Rock Corp.), 155 B.R. 871, 885-88 (Bankr. S.D.N.Y.), *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994).

21. *See* Ace Pecan Co. v. Granadex Int'l Ltd. (*In re* Ace Pecan Co.), 143 B.R. 696, 699-701 (Bankr. N.D. Ill. 1992).

22. *Id.* at 701 (deriving a "broad authority" to assert jurisdiction from congressional intent evident in the Bankruptcy Rules).

23. *See, e.g.*, Nordberg v. Granfinanciera, S.A. (*In re* Chase & Sandborn Corp.), 835 F.2d 1341, 1344 (11th Cir.) (ignoring Rule 7004(e) and asserting jurisdiction through Rule 7004(d) and FRCP 4(e)), *cert. granted*, 486 U.S. 1054 (1988), *and rev'd*, 492 U.S. 33 (1989); *In re* New York Trap Rock Corp., 155 B.R. at 887 (reading Rule 7004(e) and FRCP 4 as only allowing jurisdiction if the state long-arm statute is satisfied).

> person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.[24]

This Article analyzes and evaluates the debate concerning a bankruptcy court's ability to assert personal jurisdiction over a foreign entity. Additionally, this Article advocates that the Bankruptcy Rules be amended to conform to the new federal long-arm statute, FRCP 4. More specifically, this Article asserts and demonstrates that: (1) the current status of the law in bankruptcy cases regarding personal jurisdiction is uncertain; (2) prior to the 1993 amendments to FRCP 4, some courts improperly broadened the jurisdiction of bankruptcy courts by allowing them to assert power over defendants by focusing on a defendant's nationwide contacts as opposed to contacts with the forum state; and (3) in light of the new expansion of FRCP 4, Congress should enact a parallel version of the federal long-arm statute in Rule 7004(e).

Part I of this Article outlines the Supreme Court's standard on personal jurisdiction, thereby exploring the nature of service of process and personal jurisdiction, both in general civil litigation and in bankruptcy litigation. Part II of this Article analyzes and distinguishes the approaches courts have utilized in assessing whether bankruptcy courts may use aggregate nationwide contacts when asserting jurisdiction over a foreign defendant. Finally, Part III of this Article recommends that Rule 7004 be updated to reflect changes in the amended version of FRCP 4. By enacting the federal long-arm statute in FRCP 4(k)(2), Congress closed a loophole through which foreign defendants were permitted to conduct business in the United States while evading legal responsibility for their actions in the United States. As a result, the Bankruptcy Rules should follow the trend the 1993 amendments to FRCP 4 began by closing this parallel loophole in the bankruptcy context. Explicit expansion of Rule 7004(e)'s scope, to encompass foreign defendants as amenable to service under a federal long-arm statute, would prevent the existing judicial error in interpretation from continuing.

I. SERVICE OF PROCESS

Traditionally, service of process upon a defendant has been required before a case could commence.[25] Rendering service upon a defendant

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

25. Service of process provides a means by which courts gain jurisdiction over parties. *E.g.*, Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 538 (9th Cir. 1986); *see also* DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON PLEADING AND PROCEDURE STATE AND FEDERAL 440, 458-464 (6th ed. 1989) (explaining service of process).

does not, however, necessarily confer jurisdiction over that defendant.[26] A court must have *in personam*[27] jurisdiction over the defendant for a proceeding to be legitimate.[28] As the United States Supreme Court made clear in *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*,[29] a court may not assert its power arbitrarily over an unwilling defendant:

> "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." Thus, before a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.[30]

Because courts must have a basis to assert jurisdiction, questions of personal jurisdiction often become tangled in an analysis of whether the defendant has a constitutionally sufficient relationship with the forum.[31] In some instances, the ability to assert personal jurisdiction is clear. Traditionally, a court obtains personal jurisdiction over the defendant by the defendant's presence within the particular state where the court sits.[32]

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26. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (requiring, for federal court to exercise personal jurisdiction, a "constitutionally sufficient relationship between the defendant and the forum" in addition to a basis for service of summons).

27. An action against a person is defined as an "[a]ction seeking judgment against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property . . . ." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

28. Noxon Chem. Prod. Co., Inc. v. Leckie, 39 F.2d 318, 319-20 (3d Cir.) (declaring that jurisdiction over the person is necessary for the court to have power to decide the action), *cert. denied*, 282 U.S. 841 (1930).

29. 484 U.S. 97 (1987).

30. *Id.* at 104 (citation omitted). The Court justified its ability to create a constitutional standard for personal jurisdiction by citing the Due Process Clause. *Id.* The Court has established this standard virtually without exception under the Due Process Clause. *See* William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 606-10 (1993) (discussing the constitutional source of personal jurisdiction).

31. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (finding personal jurisdiction lacking because "[p]etitioners carr[ied] on no activity whatsoever" in the forum state); Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc., 657 F. Supp. 1182, 1194 (D. Kan.) (requiring both a statutory analysis and a due process analysis where issues of personal jurisdiction exist), *later proceeding*, 674 F. Supp. 321 (D. Kan. 1987).

32. *E.g.*, Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 140 (2d Cir. 1930).

Also, a defendant's voluntary submission to the court's jurisdiction constitutes a waiver of the right to object to jurisdiction.[33]

In more difficult cases, the revolutionary test for determining the constitutional sufficiency of a defendant's relationship with a forum, and thereby a court's ability to assert personal jurisdiction over that defendant, derives from *International Shoe Co. v. Washington*.[34] In *International Shoe*, the Court established the "minimum contacts" standard for resolving whether personal jurisdiction exists.[35] Under this standard, a nonresident defendant is amenable to service of process only if the defendant has certain "minimum contacts" with the forum state[36] such that the assertion of jurisdiction over the defendant does not violate "traditional notions of fair play and substantial justice."[37]

The Court further developed the personal jurisdiction test into a distinct two-part inquiry in *Burger King Corp. v. Rudzewicz*.[38] First, and most importantly, the Court asserted that an analysis of the defendant's[39] connections with the forum state should be done.[40] To satisfy the initial half of the test, the defendant must have minimum contacts with the state where the court sits.[41] More specifically, to measure the defendant's contacts adequately, a court must distinguish between general and specific

33. This submission may occur in the form of filing an answer to a plaintiff's complaint, appearing generally before the court, or submitting any other motion or proceeding to the power of the court. *See* Pond v. Simpson, 146 N.E. 684, 684-85 (Mass. 1925) (discussing the concepts of general and specific appearances); McNaughton v. Broach, 260 N.Y.S. 100, 104-05 (N.Y. App. Div. 1932) (discussing non-residents who refuse to consent to jurisdiction); Mississippi Valley Dev. Corp. v. Colonial Enter., Inc., 217 N.W.2d 760, 763-64 (Minn. 1974) (discussing positive actions to obtain relief).

34. 326 U.S. 310 (1945).

35. *Id.* at 316-19.

36. *Id.* at 316 (requiring minimum contacts with the forum state to satisfy the requirements of due process).

37. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

38. 471 U.S. 462 (1985).

39. Only the defendant's contacts need to be evaluated. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775 (1984), *later proceeding*, 815 F.2d 857 (2d Cir. 1987). The plaintiff's contacts with the forum are generally irrelevant. *Id.* at 779. *See also* Richman, *supra* note 30, at 618-21 (summarizing relevant case law and concluding that only a defendant's contacts are considered in a personal jurisdiction issue).

40. *Burger King*, 471 U.S. at 474. The first prong of the personal jurisdiction analysis has typically been deemed the most important aspect of the inquiry. By assuring that a defendant has requisite minimum contacts with the forum, the subsequent fairness portion of the test is often satisfied. *Cf.* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-16 (1987) (concluding assertion of personal jurisdiction over the defendant would offend notions of fair play and substantial justice, notwithstanding the defendant's sufficient minimum contacts with the forum state).

41. *Burger King*, 471 U.S. at 474 (reaffirming that the Constitution requires the defendant to have minimum contacts with the forum state for jurisdiction to be warranted).

jurisdiction.[42] General jurisdiction exists when a defendant has substantial and numerous contacts with the forum state. If a defendant has adequate contacts to support general jurisdiction, then inquiry under the first prong of the test is complete.[43] If a defendant has limited contact with the forum state, but the cause of action brought by the plaintiff arises out of, or relates to these contacts, then the defendant may be required to face suit in the forum based on those specific contacts.[44]

Second, the opinion maintained that a court should assess the fairness of asserting jurisdiction in a particular situation.[45] In measuring the "fairness" prong of the personal jurisdiction test,[46] a court may refuse to assert personal jurisdiction, even when the defendant has accrued the requisite minimum contacts.[47] Additionally, the factors weighing into the fairness analysis may differ slightly where the defendant is a resident of a foreign country.[48]

The constitutional standard for personal jurisdiction described in *International Shoe* is effected principally through state long-arm statutes.[49] Each state's statute varies in its wording and reach.[50] While some states have enacted long-arm statutes that extend to the constitutional limit,[51]

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42. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.8, n.9 (1984).

43. *Id.* at 414 n.9. The *Helicopteros* Court did not find general jurisdiction over the defendant in Texas, despite the defendants use of a Texas corporation for helicopter transportation, purchase of materials in Texas, and employment of a Texas company to train its pilots. *Id.* at 410-11.

44. *Id.* at 414.

45. *See Burger King*, 471 U.S. at 476; *see also* Richman, *supra* note 30, at 601 (discussing the fact-specific nature of personal jurisdiction inquiries).

46. "Fairness" can be measured by evaluating an amorphous set of factors including: the forum's interest in adjudicating the claim, the plaintiff's need to litigate in a particular forum, and the burden on the defendant. *Burger King*, 471 U.S. at 476-77. *See* Richman, *supra* note 30, at 626; Leslie W. Abramson, *Clarifying "Fair Play and Substantial Justice": How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 444 (1991) (discussing the *Asahi* Court's application of the fairness standard).

47. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (holding that California courts could not assert personal jurisdiction absent a more compelling showing of fairness).

48. Richman, *supra* note 30, at 627-28 n.179 (highlighting differences in asserting personal jurisdiction over domestic and alien defendants); Abramson, *supra* note 46, at 465 (stating that courts recognize the necessity of a different analysis when a foreign defendant is challenging jurisdiction).

49. *See* Richman, *supra* note 30, at 638-39.

50. *Compare* LA. REV. STAT. ANN. § 13:3201 (West 1991) *with* KAN. STAT. ANN. § 60-308(b) (1983 & Supp. 1993) (listing a number of acts, that if engaged in, will result in jurisdiction arising).

51. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973) (allowing the exercise of jurisdiction "on any basis not inconsistent with" the state or United States Constitution).

others have enacted more limited long-arm statutes.[52] Consequently, although a defendant may be served with process constitutionally if the *International Shoe* test is satisfied, some states require more substantial contacts before their courts will assert jurisdiction. *International Shoe* enunciated merely the baseline requirements for a court to assert personal jurisdiction.[53]

Prior to the 1993 amendments to FRCP 4, the minimum contacts test was applied to foreign defendants in the same manner as it was applied to domestic residents.[54] As a result, foreign defendants could evade a court's jurisdiction if they did not satisfy the minimum contacts requirement under the applicable state long-arm statute.[55] To assure foreign entities would be subject to suit in the United States, Congress amended FRCP 4 to include a federal long-arm statute.[56] Pursuant to this rule, in a federal claim, if a foreign entity lacks sufficient contacts with an individual state, but has accrued sufficient contacts with the United States as a whole, then a court within the United States can assert personal jurisdiction over the foreign defendant. In short, the provision becomes operative when a "defendant has had contacts with the nation as a whole sufficient to support jurisdiction along the lines of a 'long arm' inquiry."[57]

Typically, in bankruptcy proceedings, courts have not had to engage in the *International Shoe* analysis to assert personal jurisdiction over domestic defendants because Rule 7004(d) permits nationwide service of process,[58] effective upon any defendant anywhere in the United

52. *See, e.g.*, GA. CODE ANN. § 9-10-91 (1982 & Supp. 1995) (listing specific instances when jurisdiction will exist); MD. CODE ANN. CTS. & JUD. PROC. § 6-103 (1995) (listing similar items); N.Y. CIV. PRAC. L. & R. §§ 301, 302 (McKinney 1990 & Supp. 1995).

53. *See* International Shoe v. Washington, 326 U.S. 310, 319 (1945) (stating that the Court's "boundary line" should not be applied mechanically).

54. FED. R. CIV. P. 4, 28 U.S.C.A. cmt C4-35 (West 1995) [hereinafter Comment C4-35.] Commentators, however, have noted that asserting personal jurisdiction over foreign defendants requires a more detailed analysis of the two-pronged contacts and fairness test. Differences in legal systems and additional travel costs can impose a greater burden in asserting jurisdiction over foreign defendants than on domestic defendants. Because a foreign country's legal system may be less sympathetic to plaintiffs, a plaintiff that is denied relief in the United States will often have no alternative remedy; therefore, a court's refusal to assert jurisdiction can have serious consequences. *See* Richman, *supra* note 30, at 628 n.179.

55. *See* Richman, *supra* note 30, at 628 n.179.

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

57. Comment C4-35, *supra* note 54.

58. *See* GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (*In re* GEX Kentucky, Inc.), 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987) (stating that bankruptcy courts are not required to apply the minimum contacts test because they have automatic jurisdiction in matters arising in bankruptcy), *later proceeding*, 100 B.R. 887 (Bankr. N.D. Ohio 1988); McGraw v. Allen (*In re* Bell & Beckwith), 41 B.R. 697, 699 (Bankr. N.D. Ohio 1984), *later proceeding*,

States.[59] Thus, the minimum contacts theory, upon which personal jurisdiction is usually based, is inapplicable.[60] In order for a bankruptcy court to exercise jurisdiction over a defendant, a summons simply must have been served upon the defendant properly,[61] and the proceeding must be related to a bankruptcy matter.[62] A court may then obtain jurisdiction over the defendant if there is a significant connection between the defendant and the court.[63] Importantly, when the matter is a core proceeding,[64] any domestic person may be served without the aid of a long-arm statute.[65]

The ability to serve process anywhere in the United States under Rule 7004(d)[66] allows the trustee or the debtor in possession to consolidate all litigation regarding the assets of the debtor.[67] Because of an overriding intent to create a comprehensive, uniform treatment of bankruptcy issues in the Bankruptcy Code, Congress placed no geographical limits on bankruptcy related service of process.[68] By authorizing nationwide service of process, Congress alleviated the need for each bankruptcy court to evaluate the propriety of service of process in domestic cases. Rule 7004(d) restricts, however, the nationwide service of process capability to the United States. The term United States is used commonly to refer to any

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44 B.R. 656 (Bankr. N.D. Ohio 1994); *In re* Schack Glass Indus. Co., Inc., 20 B.R. 967, 970 (Bankr. S.D.N.Y. 1982).

59. The precise meaning of "United States" is defined neither in the Bankruptcy Code nor in the Bankruptcy Rules. Pursuant to 28 U.S.C. § 151, the definition governing the United States District Courts states that "United States" typically means every jurisdiction in which a district court is located. *See* 9 COLLIER ON BANKRUPTCY, *supra* note 4, ¶ 7004.06 at 7004-38.

60. *See GEX Kentucky*, 85 B.R. at 434.

61. Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987) (" '[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.' ") (quoting Mississippi Publishing Corp. v. Murphree, 326 U.S 438, 444-45 (1946)).

62. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 74, *later proceeding*, 459 U.S. 813 (1982).

63. *Omni Capital*, 484 U.S. at 104.

64. *See* 28 U.S.C. § 157(b)(2) (1988) (listing some of the matters constituting core proceedings). A bankruptcy judge has the authority to hear and determine "all core proceedings arising under" the Bankruptcy Code. *Id.* § 157(b)(1).

65. BANKR. R. 7004(d).

66. *See id.*

67. *See* Jeffrey T. Ferriell, *The Perils of Nationwide Service of Process in a Bankruptcy Context*, 48 WASH. & LEE L. REV. 1199, 1202 (1991) (discussing that section 1409 of the Federal Judicial Code permits most ligation in a bankruptcy case to be heard in the forum where the petition was filed).

68. BANKR. R. 7004(d) (authorizing nationwide service of process); *see also* 9 COLLIER ON BANKRUPTCY, *supra* note 4, ¶ 7004.06.

jurisdiction in which a district court is located.[69] Courts have denied challenges to Rule 7004(d)'s broad grant to national personal jurisdiction[70] because venue and abstention provisions protect defendants from having to endure distant litigation.[71]

II. The Problem of Foreign Defendants

An important jurisdictional difficulty arises when a foreign entity is involved in a bankruptcy proceeding. Rule 7004(e) governs service of process upon a foreign entity and describes several circumstances under which such service is permissible.[72] Unlike Rule 7004(d), however, the rule for foreign service does not permit universal service upon any defendant notwithstanding their residence. Explicitly, Rule 7004(e) allows service on a foreign entity in only a few limited circumstances: (1) upon the debtor or a related person;[73] (2) upon a party to an adversary proceeding, if the court is in possession of some disputed property;[74] or (3) if a particular federal or state statute authorizes the service.[75] Rule 7004(e)'s indication that nationwide amenability to service was not intended to be imposed upon foreign defendants has led courts on widely divergent tracks of analysis in determining permissible service of process. Some courts have used their state's long-arm statute in conjunction with the *International Shoe* test to determine amenability to service.[76] Other courts have examined the defendant's minimum aggregate contacts with the United States to find a basis for personal jurisdiction.[77] The 1993 amendments to FRCP 4 further complicated this issue, because the Bankruptcy Rules were not changed to parallel the new rule 4. Accordingly, it is uncertain whether bankruptcy courts should expand their ability to

69. *See* 9 Collier on Bankruptcy, *supra* note 4, ¶ 7004.06 (stating that "United States" includes Puerto Rico, Guam, and the Virgin Islands).

70. Teitelbaum v. Choquette & Co., Inc., (*In re* Outlet Department Stores, Inc.), 82 B.R. 694, 697-99 (Bankr. S.D.N.Y. 1988) (upholding the constitutionality of Rule 7004(d)); *see also* Ferriell, *supra* note 67, at 1204.

71. *Teitelbaum*, 82 B.R. at 699; *see also* Bankr. R. 9030 (providing that the Bankruptcy Rules do not limit or extend the venue rules governing bankruptcy courts).

72. Bankr. R. 7004(e) (allowing service upon the debtor, upon any party in order to determine or protect property rights, and upon any person if authorized by statute).

73. Bankr. R. 7004(e)(A).

74. Bankr. R. 7004(e)(B).

75. Bankr. R. 7004(e)(C).

76. *See, e.g.*, Lone Star Indus. v. Compania Naviera Perez Companc (*In re* New York Trap Rock Corp.), 155 B.R. 871, 887-89 (Bankr. S.D.N.Y.) (applying New York's long-arm statute and finding insufficient contacts to assert jurisdiction), *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994).

77. *See* Ace Pecan Co., Inc. v. Granadex Int'l, Ltd. (*In re* Ace Pecan Co.), 143 B.R. 696, 701 (Bankr. N.D. Ill. 1992) (finding sufficient contacts with the United States to justify jurisdiction).

reach foreign defendants to mirror the changes to FRCP 4 without statutory authorization.[78]

Rule 7004(e) incorporates the service requirements delineated in FRCP 4(d)(1) and (d)(3),[79] which describe three specific instances where service upon a foreign entity is permissible.[80] Most disputes arise from Rule 7004(e)(C), which "permits service of process upon a foreign entity if authorized by a federal or state statute referred to in FRCP 4(c)(2)(C)(i) or 4(e).[81] FRCP 4(c)(2)(C)(i) permits service on an out-of-state defendant pursuant to state law—in other words, the long-arm statute of the state in which the federal court sits.[82] Accordingly, a court may assert personal jurisdiction over any person, including foreign entities, fitting within the confines of the applicable state long-arm provision.[83] FRCP 4(e), in turn, provides courts with the ability to assert personal jurisdiction over defendants pursuant to a statute or order.[84] Periodically, special statutes have been enacted to effect nationwide service upon defendants, notwithstanding the typical constitutional "minimum contacts" restraints.[85] Under these specific circumstances, bankruptcy courts may assert personal jurisdiction over foreign defendants by virtue of Rule 7004(e)(C).[86]

Notwithstanding the existence of Rule 7004(e)(C), canons of statutory construction indicate a broad interpretation of Rule 7004(e) is inappropriate. Congress had the ability to enact a broad provision, as evidenced by 7004(d), but failed to do so under Rule 7004(e). As the concept of

78. *Cf.* Levant Line, S.A. v. Marine Enter. Corp. (*In re* Levant Line, S.A.), 166 B.R. 221, 233 (Bankr. S.D.N.Y. 1994) (explaining that the new FRCP 4 arguably permits worldwide service of process).

79. BANKR. R. 7004(g) (stating that the subdivisions of Rule 4 in effect on January 1, 1990, not the 1993 amendments, are the applicable provisions). Any subsequent amendments to the rule should have no effect until the Bankruptcy Rules are specifically amended. *See* BANKR. R. 7004(g) advisory committee's notes.

80. *See supra* notes 73-75 and accompanying text.

81. *See* BANKR. R. 7004(e)(C).

82. Lone Star Indus. v. Compania Naviera Perez Companc (*In re* New York Trap Rock Corp.), 155 B.R. 871, 887 (Bankr. S.D.N.Y.), (applying New York's long-arm statute because no federal statute, including the Bankruptcy Code, permitted service on the defendant); *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994).

83. DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 1254 (2d ed.1990).

84. FED. R. CIV. P. 4(e).

85. *See* Marsh v. Kitchen, 480 F.2d 1270, 1273 n.8 (2d Cir. 1973) (explaining that Congress has the authority to enact broad process of service); Interstate Commerce Comm'n v. Agricultural Coop. Ass'n, 34 F.R.D. 497, 498 (S.D. Iowa 1964) (stating that Congress may enact laws permitting service of process across state lines).

86. *Cf. Agricultural Coop Ass'n*, 34 F.R.D. at 498 (discussing when process may be served).

expressio unius[87] suggests, the fact that Congress enacted broad service provisions in 7004(d), but did not do the same in 7004(e), indicates that the omission was intentional.[88] Accordingly, Rules 7004(d) and (e) should not be read together to form a broad interpretation. If we assume Congress did not intend duplicative provisions, it would be an error to read the two provisions together. Additionally, the fact that Congress enacted a rule addressing the procedure for service upon a foreign entity further indicates that Rule 7004(e) is the sole applicable provision regarding foreign service. Furthermore, extending a bankruptcy court's reach based upon a grant of power in Rule 7004(d), ignores the enactment of Rule 7004(e).[89] Finally, the Bankruptcy Code as a whole suggests it should not be read in isolation, but rather each section should be read in context with the others. As the Supreme Court noted in *Kokoszka v. Belford*,[90] the Court will interpret a particular clause in connection with the entire statute so that its construction reflects the will of the legislature.[91] Congress enacted all of the provisions as one, intending each to supply a specific meaning to the others.[92]

For similar reasons, Rule 7004(d) cannot be construed as a "statute" within the meaning of FRCP 4(e).[93] The word "statute" refers to an explicit grant of power, as exemplified in the RICO or Securities Acts' statutes.[94] Although including "rules" within the meaning of "statute" may not seem overzealous, allowing a nationwide service of process rule would distort the meaning of Rule 7004(e). Congress carefully enumer-

87. "The maxim 'expressio [or inclusio] unius est exclusio alterius' means 'inclusion of one thing indicates exclusion of the other.' . . . [T]he enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 638 (2d. ed. 1995).

88. *See* Tate v. Ogg, 195 S.E. 496, 499 (Va. 1938) (declaring that the maxim *expressio unius* applies to statutes); *see also* ESKRIDGE & FRICKEY, *supra* note 87, at 638 (explaining that *expressio unius* is a notion of negative implication).

89. *See supra* note 87 (discussing the maxim).

90. 417 U.S. 642 (1974).

91. *Id.* at 650 (stating that the Court will look at the entire statute, including the objects and policies behind it).

92. ESKRIDGE & FRICKEY, *supra* note 87, at 643 (noting that legislatures enact entire statutes, without differentiating the weight to be accorded to specific sections).

93. Lone Star Indus. v. Compania Naviera Perez Companc (*In re* New York Trap Rock Corp.), 155 B.R. 871, 887 (Bankr. S.D.N.Y.) (finding that no federal statute, including Rule 7004(d), authorized jurisdiction over the defendant), *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994); Old Electric, Inc. v. RCP, Inc. (*In re* Old Electric Inc.), 142 B.R. 189, 190-91 (Bankr. N.D. Ohio 1992) (finding it "odd" to try to qualify Rule 7004(d) as a statute under FRCP 4(e)).

94. Lisak v. Mercantile Bancorp., Inc., 834 F.2d 668, 671-72 (7th Cir. 1987) (discussing RICO), *cert. denied*, 485 U.S. 1007 (1988); Fitzsimmons v. Barton, 589 F.2d 330, 332 (7th Cir. 1979) (discussing the Securities Exchange Act of 1934).

ated the circumstances under which a foreign defendant could be amenable to process. This careful construction of Rule 7004(e) would seem to preclude the subsequent incorporation of Rule 7004(d). Furthermore, in *Old Electric, Inc. v. RCP, Inc.*, (*In re* Old Electric Inc.),[95] the bankruptcy court for the Northern District of Ohio noted the incongruity of stringing these provisions together. The court avoided such a result by applying ordinary meanings to the words "statute" and "order."[96] Thus, Rule 7004(d) should not be bootstrapped onto Rule 7004(e) by defining Rule 7004(d) as a federal statute.

Many of the decisions addressing the scope of personal jurisdiction in the Rule 7004(e) context, however, have been misplaced. For example, in *Nordberg v. Granfinanciera S.A. (In re Chase & Sandborn)*[97] the United States Court of Appeals for the Eleventh Circuit held that Rule 7004(d) constitutes a "statute" within the meaning of FRCP 4.[98] Consequently, the defendants' contacts with the United States, not with the forum state, composed the basis for determining personal jurisdiction.[99] The court, relying on the defendants' contacts with the United States, stated that the defendant should be subject to nationwide service of process—implying that the Florida long-arm statute was irrelevant.[100] The court glossed over the question of whether a rule constitutes a statute, and thereby failed to recognize the depth of the personal jurisdiction problem. Moreover, the court disregarded the fact that the bankruptcy rule provisions for foreign defendants were separated from the nationwide service of process provision. The court simply intertwined the two rules in order to create an all-encompassing worldwide service provision.

Likewise, in *Ace Pecan Co., Inc. v. Granadex International Ltd.* (*In re Ace Pecan Co.*)[101] the court was anxious to create a broad standard for amenability to service, and misconstrued Rule 7004(e) despite concluding that the term "statute" could not apply to Rule 7004(d).[102] The bankruptcy court for the Northern District of Illinois correctly noted that the

95. 142 B.R. 189 (Bankr. N.D. Ohio 1992).

96. *Id.* at 192. The court stated it would be a strained interpretation to include "rule" within "statute." *Id.*

97. 835 F.2d 1341, 1344, 1348 (11th Cir.), *cert. granted*, 486 U.S. 1054 (1988), *and rev'd*, 492 U.S. 33 (1989). While more widely recognized for its impact upon the right to a jury trial in a bankruptcy proceeding, this decision does briefly discuss jurisdiction. *Id.*

98. *Id.* at 1344. The court maintained that it would be ignoring the first sentence of FRCP 4(e) to not read Rule 7004(d) as a statute. *Id.*

99. *Id.*

100. *Id.*

101. 143 B.R. 696 (Bankr. N.D. Ill. 1992).

102. *Id.* at 698-99. If the court had concluded that Rule 7004(e) was a statute, under FRCP 4(e), it could have authorized service on foreign defendants. *See id. But see* FED. R. CIV. P. 4(f) (amending the rules for service on those in foreign countries).

minimum contacts requirement, upon which personal jurisdiction is generally founded, was inapplicable in federal question bankruptcy proceedings because Rule 7004(d) authorizes nationwide service.[103] The basis for the court's determination was a series of prior cases involving domestic disputes[104] that had acknowledged readily that the *International Shoe* minimum contacts test was merely an academic pursuit when the defendant was a resident of the United States.[105] For instance, in *Hirsch v. Vlerbaum* (*In re Colonial Realty Company*),[106] the defendant, an Ohio resident, claimed that a Connecticut bankruptcy court could not legitimately exercise personal jurisdiction over him because he lacked sufficient contacts with the forum state.[107] The court rejected this argument based on Rule 7004(d), stating: "The defendant admits that he is a resident of Ohio . . . . Therefore, there can be no question that the defendant has sufficient contacts with the United States for a federal court constitutionally to exercise personal jurisdiction over him."[108]

Next, the *Ace Pecan* court recognized that when the defendant resides in a foreign country, a different issue is presented, and the proper analysis should focus on Rule 7004(e).[109] After concluding that Rule 7004(d) was inapplicable, the court analyzed Rule 7004(e) to determine the bounda-

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103. *In re Ace Pecan*, 143 B.R. at 698 (noting that a majority of the courts find the minimum contacts test inapplicable).

104. *Id.* (citing Diamond Mortgage Corp. v. Sugar, 913 F.2d 1233, 1244 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991)); Teitelbaum v. Choquette & Co., Inc., (*In re* Outlet Dept. Stores, Inc.), 82 B.R. 694 (Bankr. S.D.N.Y. 1988); GEX Kentucky, Inc. v. Wolf Creek Collieries Co. (*In re* GEX Kentucky, Inc.), 85 B.R. 431, 434 (Bankr. N.D. Ohio 1987).

105. Lone Star Indus. v. Compania Naviera Perez Companc (*In re* New York Trap Rock Corp.), 155 B.R. 871, 889 (Bankr. S.D.N.Y.) (stating "where a federal statute provides for nationwide service of process, the question of whether a domestic corporation, for example, is amenable to service is academic"), *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994).

106. 163 B.R. 431 (Bankr. D. Conn. 1994).

107. *Id.* at 432.

108. *Id.* at 433 (citing Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979)). The defendant also argued that the court lacked a statutory basis to assert jurisdiction. *Id.* The court disagreed, ruling Rule 7004 was a valid statutory basis. *Id.* *See* Diamond Mortgage Corp. v. Sugar; 913 F.2d 1233, 1244 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991). The court stated:

> [W]hether there exist[s] sufficient minimum contacts between the attorneys and the State of Illinois has no bearing upon whether the United States may exercise its power over the attorneys pursuant to its federal question jurisdiction. Certainly, the attorneys have sufficient contacts with the United States to be subject to the district court's *in personam* jurisdiction.

Id.

109. Ace Pecan Co., Inc. v. Grandex Int'l Ltd. (*In re* Ace Pecan Co., Inc.), 143 B.R. 696, 698 (Bankr. N.D. Ill. 1992) (explaining that Rule 7004(d) is limited to domestic service of process).

ries of service upon a foreign defendant.[110] The court ignored the *International Shoe* minimum contacts test, and asserted that "when a federal court is exercising jurisdiction over an alien defendant on a federal law claim, the contacts should be measured with the United States as a whole."[111] Thus, rather than solely relying upon state contacts, the court focused on nationwide contacts as a basis for asserting personal jurisdiction.[112]

While unique in the bankruptcy context, the *Ace Pecan* analysis mirrors the parameters of other federal legislation. Under RICO[113] or the Securities Exchange Act of 1934,[114] for example, Congress has enacted specific provisions permitting nationwide service.[115] While admitting that the aggregate contacts test was most often used only upon explicit authorization by other federal statutes,[116] the *Ace Pecan* court enunciated several rationales for applying the aggregate contacts rule in a bankruptcy proceeding.[117] First, because the issues concerned federal law, neither state sovereignty nor state policy would be impinged upon federally.[118] Second, the court was concerned about the possibility of foreign corporations

110. *Id.*

111. *Id.* at 700 (citing Max Daetwyler Corp. v. Meyer, 762 F.2d 290 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985)). Although the court used *Max Daetwyler* to support its aggregate contacts contention, it failed to realize that *Max Daetwyler* determined that only where a federal statute authorizes nationwide service of process may the aggregate contacts test be used. *Max Daetwyler*, 762 F.2d at 297. In the absence of such a statute, the Max Daetwyler court indicated that the forum state's long-arm statute should be used. *See id.* at 295.

112. *Ace Pecan*, 143 B.R. at 700 (declaring that the aggregate contacts analysis includes the *International Shoe* test, but applies to the entire United States).

113. *See* Lisak v. Mercantile Bancorp, Inc., 834 F.2d 668, 672 (7th Cir. 1987) (stating that RICO's grant of nationwide service does not impact upon the Due Process Clause), *cert. denied*, 485 U.S. 1007 (1988).

114. *See* Fitzsimmons v. Barton, 589 F.2d 330, 332-33 (7th Cir. 1979) (upholding the validity of nationwide service of process under § 27 of the 1934 Securities Exchange Act).

115. 15 U.S.C. § 78(u) (1994) (detailing the Securities Exchange Act of 1934's provisions regarding nationwide service); 18 U.S.C. § 1965 (1994) (showing the RICO provisions regarding service of process).

116. *Ace Pecan*, 143 B.R. at 700; *see, e.g.*, First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 736 (E.D. Tenn. 1962) (claiming "that a sovereignty has personal jurisdiction over any defendant within its territorial limits"); Max Daetwyler Corp. v. Meyer, 762 F.2d 290, 293-94 (3d Cir.) (stating that where it is a question of personal jurisdiction regarding federal rights, national contacts is the focus), *cert. denied*, 474 U.S. 980 (1985); *Fitzsimmons*, 589 F.2d at 332 (allowing national service of process upon a defendant pursuant to the Securities Exchange Act of 1934 because of sufficient national contacts); *Lisak*, 834 F.2d at 671-72, (claiming that a federal court has jurisdiction in a federal question case, such as under federal racketeering laws, because contact at a national level is sufficient for the court to exercise the power of the United States).

117. *Ace Pecan*, 143 B.R. at 700.

118. *Id.*

violating American laws without repercussion, simply due to the lack of sufficient contacts to warrant suit in a particular forum state.[119] Third, citing dicta from *United Rope Distributors v. Seatriumph Marine Corp.*,[120] the court claimed that unlike diversity jurisdiction,[121] where a court has federal question jurisdiction,[122] it need not " 'absorb the 'whole law' of the state . . . .' "[123] Next, the court determined that "[t]he Bankruptcy Code requires uniformity in its enforcement," making national contacts a more appropriate analytical tool because of the concern for national uniformity.[124] Lastly, the *Ace Pecan* court viewed Rule 7004(d), which allows nationwide service of process, as evidence of Congress' intent to allow bankruptcy courts wide jurisdiction.[125] The court noted these reasons in adopting the aggregate contacts analysis because it felt that such an analysis was fair and reasonable when examining whether an alien defendant was subject to federal court jurisdiction, even absent specific statutory authority.[126]

Despite substantial inquiry into the subject, the *Ace Pecan* court blatantly failed to follow precedent or appropriate statutory guidelines.[127] The court, relying only upon a combination of case dicta and vague policy arguments, disregarded the statutory threshold for ascertaining personal jurisdiction over a non-resident alien defendant.[128] Even after the court acknowledged explicitly that Rule 7004(e) offered no such statutory authority in bankruptcy proceedings,[129] the *Ace Pecan* court proceeded to apply the aggregate contacts test.[130] Had the court properly followed legal, instead of policy arguments, it would have analyzed the sufficiency

119. *Id.* (citing Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1238-39 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981)).

120. 930 F.2d 532 (7th Cir. 1991).

121. Diversity jurisdiction grants the district courts jurisdiction where the amount in controversy is greater than $50,000, and is between citizens of different states, or of foreign states. 28 U.S.C. § 1332 (1988).

122. Federal question jurisdiction grants the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

123. *Ace Pecan*, 143 B.R. at 701 (quoting *United Rope Distributors*, 930 F.2d at 535).

124. *Id.* at 701.

125. *Id.* (refusing to ignore Congress' intent behind the nationwide service of process provision).

126. *Id.* at 700-01. The court noted that fairness and reasonableness were key considerations. *Id.* at 701.

127. *See id.* at 698-701 (discussing at length both applicable statutory and case law).

128. *See id.* at 700-701 (relying on "persuasive reasons" set forth by courts and commentators for using aggregate contacts).

129. *See id.* at 699 ("No federal statute authorizes service on [the] foreign defendants . . . ").

130. *See id.* at 701.

of the defendant's contacts with the state under the state's long-arm statute.[131] In contrast to the erroneous decisions in both *Granfinanciera*[132] and *Ace Pecan*,[133] several courts have addressed the personal jurisdiction standards in the context of foreign defendants in bankruptcy correctly.[134] The courts in *Bonapfel v. Cascade Imperial Mills, Ltd.*, (*In re All American of Ashburn, Inc.*),[135] *R.M.R. Corp. v. Clare Bros. Ltd.*, (*In re R.M.R. Corp.*),[136] and *Old Electric Inc. v. RCP Inc.*, (*In re Old Electric, Inc.*),[137] for instance, have all engaged in an accurate, albeit superficial, analysis of the issue. In *All American*, the plaintiff attempted to bring an adversary proceeding against a foreign defendant, Cascade Imperial Mills.[138] Cascade argued that its contacts with the plaintiff in the state of Georgia consisted of one shipment of goods and, therefore, did not amount to "transacting business,' " as required to obtain jurisdiction under the Georgia long-arm statute.[139] In an analysis of the bankruptcy rules, the court determined that the proper inquiry into the personal jurisdiction dispute required application of the state long-arm statute.[140] The court surmised correctly that Rule 7004(e) contained the guiding language on this procedural question when it noted that:

> Subparagraph (C) of Rule 7004(e) . . . permits service in a foreign country whenever such service is authorized by applicable federal or state law. There appears to be no federal statute authorizing foreign service of a preference complaint, and jurisdiction over [Cascade] could therefore be asserted only if service is permitted by Georgia's long-arm statute.[141]

Like the *All American* decision, in *R.M.R. Corp. v. Clare Brothers Ltd.* (*In re R.M.R. Corp.*)[142] the Bankruptcy Court for the District of Maryland used the defendant's contacts with the forum state to determine the appropriateness of asserting personal jurisdiction.[143] The plaintiff/debtor

131. *See id.* at 699-700.

132. 835 F.2d 1341 (11th Cir.), *rev'd*, 492 U.S. 33 (1989); *see also supra* notes 97-100 and accompanying text (discussing *Granfinanciera*).

133. 143 B.R. 696 (1992); *see also supra* notes 101-31 and accompanying text (discussing *Ace Pecan*).

134. *See infra* notes 135-51 and accompanying text (reviewing cases which properly address jurisdiction over a foreign defendant in a bankruptcy case).

135. 78 B.R. 355 (Bankr. N.D. Ga. 1987).

136. 133 B.R. 759 (Bankr. D. Md. 1991).

137. 142 B.R. 189 (Bankr. N.D. Ohio 1992).

138. *All American*, 78 B.R. at 356.

139. *Id.* at 357.

140. *Id.* The court was quick to note that its holding did not imply that foreign defendants could retain preferential transfers. *Id.*

141. *Id.* (citation omitted).

142. 133 B.R. 759 (Bankr. D. Md. 1991).

143. *Id.* at 762-64.

brought a claim against a Canadian company to recover receivables.[144] Because the defendant denied meeting the minimum contact requirement for doing business in Maryland, the company objected to the court's personal jurisdiction.[145] The court first determined that no federal statute granted it jurisdiction.[146] Consequently, the court then concluded that it was only through applicable state law that it could obtain personal jurisdiction over the defendant.[147]

In *Old Electric Inc. v. RCP Inc. (In re Old Electric)*[148] the bankruptcy court for the Northern District of Ohio also evaluated the intricate bankruptcy personal jurisdiction issues. In *Old Electric*, the debtor filed an adversary proceeding against a foreign corporation to recover allegedly preferential transfers.[149] The court rejected the plaintiff's claim that Rule 7004(d) was a 'statute' under FRCP 4(e) allowing service in Canada,[150] for fear it would improperly "transmute a rule authorizing nationwide service of process into a rule authorizing worldwide service."[151]

Fortunately, the decision of *Lone Star Industries Inc. v. Compania Naviera Perez Companc (In re New York Trap Rock)*[152] provides an elaborate explanation for utilizing state contacts, not nationwide contacts, in bankruptcy. In *New York Trap Rock*, the defendants moved to dismiss the claim based on the court's lack of personal jurisdiction.[153] As a result of the defendant's motion, the burden shifted to the plaintiff/debtor to establish personal jurisdiction.[154] The court noted that Congress did not intend to create worldwide service of process in bankruptcy cases because, otherwise, Congress would have enacted a bankruptcy provision

144. *Id.* at 759-60. The plaintiff was a Maryland corporation that manufactured motors. *Id.* at 759.

145. *Id.* at 760 (asserting that the court must rely on the state long-arm statute).

146. *Id.* at 761 (declaring, "[t]his court finds that there is no federal statute which specifically authorizes service on the foreign Defendant in this adversary complaint").

147. *Id.* The court specifically rejected plaintiff's argument for an aggregate contacts analysis. *Id.* at 764. The court applied the Maryland long-arm statute and ultimately concluded that it did not have personal jurisdiction over the defendant. *Id.* at 765.

148. 142 B.R. 189 (Bankr. N.D. Ohio 1992).

149. *Id.* at 189.

150. *Id.* at 190-92. The court differentiated the word "statute" from the word "rule." *Id.* at 191.

151. *Id.* at 190. The court concluded that jurisdiction might be obtained via a state long-arm statute. *Id.* at 192.

152. 155 B.R. 871 (Bankr. S.D.N.Y.), *aff'd*, 160 B.R. 876 (S.D.N.Y 1993), *and aff'd in part and rev'd in part*, 42 F.3d 747 (2d Cir. 1994).

153. *Id.* at 878 (noting lack of personal jurisdiction as one of the defendant's affirmative defenses).

154. *Id.* at 885 (requiring debtor to establish a prima facie case of personal jurisdiction).

authorizing it.[155] The court concluded that the defendant must be amenable to service of process under the New York long-arm statute in order for the court to exercise jurisdiction because no federal statute granted it jurisdiction to serve alien defendants.[156] Thus, to be subject to the New York Bankruptcy Court's jurisdiction, the defendants must fall under New York State's long-arm statute.[157]

In *Levant Line, S.A. v. Marine Enterprises Corp. (In re Levant Line, S.A.)*,[158] the only decision to consider bankruptcy personal jurisdiction following the 1993 Amendments to FRCP Rule 4, the court dodged the Rule 7004(e) jurisdictional issue by deciding that the defendant lacked sufficient contacts with both New York and with the United States.[159] In analyzing bankruptcy personal jurisdiction over the foreign defendant, the court began by appropriately disregarding Rule 7004(d) as the governing precept,[160] relying instead on Rule 7004(e).[161] The court noted correctly that subsection (C) of Rule 7004(e) was the only applicable provision.[162] This subsection required the court to look either to a state long-arm statute or to a federal statute to determine "whether a defendant is amenable to service."[163] Because no federal statute was implicated, the court, accordingly, focused on New York's long-arm statute.[164]

The court observed that the state long-arm statute provided jurisdiction over a defendant corporation "if that corporation is 'doing business' in New York."[165] To constitute "doing business" in New York "a corporation must be operating within New York with a fair measure of permanence and continuity."[166] The *Levant* court analyzed the defendant foreign corporation's contacts with New York and determined that the

155. *Id.* at 889; *see supra* notes 87-92 and accompanying text (describing legislative intention based upon legislative acts).

156. *New York Trap Rock*, 155 B.R. at 887. The court granted the defendant's motion to dismiss for lack of personal jurisdiction. *Id.* at 890.

157. *Id.* at 887. A basis for jurisdiction under New York's statute was to be transacting business within New York. *Id. See supra* note 52.

158. 166 B.R. 221 (Bankr. S.D.N.Y. 1994).

159. *See id.* at 231, 233-34.

160. *Id.* at 229 (disregarding Rule 7004(d) because it governed service only in the United States).

161. *Id.* (relying on Rule 7004(e) because it controlled service in foreign countries).

162. *Id.* The court found subsection (A) inapplicable because the defendant was a non-debtor, and (B) inapplicable because it contemplated property sufficient for *in rem* jurisdiction. *Id.*

163. *Id.* The court refers to either of these two statutory avenues absent the defendant either being an inhabitant in the state or consenting to service. *Id.* at 230.

164. *Id.*; *see also* N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1990) (stating New York's long-arm requirements).

165. *Levant*, 166 B.R. at 230.

166. *Id.* (clarifying statutory requirements through the use of case law).

defendant was not subject to its jurisdiction under the state's long-arm statute.[167] After disqualifying service on the defendant pursuant to state long-arm provisions, the court also considered whether the 1993 amendment to FRCP 4 may have broadened the scope of inquiry when determining personal jurisdiction in matters requiring international service.[168] The court conducted an analysis under a broadened inquiry, but, concluding no change in its result on jurisdiction, ultimately refused to base its holding on the amended rule.[169]

III. A Proposed Statutory Modification

As evidenced in *Levant*'s dicta, the amended version of FRCP 4 can alter the traditional personal jurisdiction analysis for federal courts.[170] In particular, amended FRCP 4(k)(2) expands the federal judiciary's ability to assert jurisdiction in federal question cases.[171] Rather than permit the exercise of jurisdiction only when a defendant has adequate contacts with the forum state, amended FRCP 4 allows courts to exercise jurisdiction based upon nationwide contacts.[172] The amended rule addresses the concern that, because of differing jurisdictional standards under various state long-arm statutes, a foreign defendant could be amenable to process in one state but not another, despite having the same contacts with both states.[173] FRCP 4 creates a federal long-arm statute, which, in effect, should prevent such inconsistencies.[174]

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167. *Id.* at 230-33.

168. *Id.* at 233. The *Levant* court examined the implications of such an expanded authority under the federal rules. *Id.*

169. *Id.* at 233-34 (stating, "[e]ven applying the broader test, I do not find that [the foreign defendant] purposefully availed itself of the privilege of conducting activities within the United States").

170. *See id.* at 233 (explaining that the amended rule may allow for worldwide service, absent analysis under state requirements for jurisdiction, where the foreign defendant has minimum national contacts); *see also* FED. R. CIV. P. 4(f).

171. *See* FED. R. CIV. P. 4(k)(2); *see also* 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, 363-64 (1994) (discussing expanded jurisdiction of the court in federal question cases).

172. *See* FED. R. CIV. P. 4(k)(2) ("If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, [service is 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 state courts); *see also* Comment C4-35, *supra* note 54 (commenting on the new federal long-arm statute).

173. *See* Ellencrig, *supra* note 171, at 368-69 (discussing arbitrariness in the application of federal law when using state long-arm statutes to establish jurisdiction).

174. *See* Comment C4-35, *supra* note 54 (noting that FRCP 4(k)(2) becomes effective when the defendant has had sufficient contacts on a national level under long-arm analysis); Ellencrig, *supra* note 171, at 369 (predicting uniformity).

Beyond the dicta in *Levant* interpreting Rule 7004(e) under amended FRCP 4,[175] the likely impact of the amendment remains uncertain. Accordingly, this Article recommends that the Bankruptcy Rules be revised to enact a provision espousing worldwide service of process in bankruptcy cases. Because bankruptcy court jurisdiction relies upon federal question jurisdiction,[176] a worldwide service of process provision would not conflict with or overbroaden amended FRCP 4.[177] Amending the Bankruptcy Rules in a manner consistent with amended FRCP 4 would serve the admirable goals enunciated in the *Ace Pecan* decision: (1) the assurance that bankruptcy court jurisdiction be exercised to its fullest scope;[178] and (2) the need for federal jurisdictional in bankruptcy cases to be addressed uniformly.[179]

IV. Conclusion

The present version of Rule 7004 is inadequate to serve process on foreign entities who lack a domestic presence. The text of this rule indicates clearly that analysis under the state long-arm statute is the most appropriate method for determining bankruptcy personal jurisdiction over foreign defendants. Although some courts have misconstrued the Bankruptcy Rule on this issue, the amendments to FRCP 4 have vast implications on traditional interpretation of international bankruptcy jurisdiction. The new amendments to FRCP 4 create a federal long-arm statute in federal question cases. This empowers a court to assert jurisdiction over foreign defendants under a nationwide minimum contacts test, if such contacts are insufficient for jurisdiction under the state's long-arm statute. To avoid confusion about the full scope of amended FRCP 4, to align the Federal Rules of Civil Procedure and Bankruptcy, and to prevent foreign defendants from being immune to suit, Congress should amend the Bankruptcy Rules to allow bankruptcy courts a broader ability to assert personal jurisdiction over foreign defendants.

175. *See supra* notes 170-72; Levant Line, S.A. v. Marine Enter. Corp. (*In re* Levant Line, S.A.), 166 B.R. at 221, 233 (Bankr. S.D.N.Y. 1994) (explaining that the amended rule may allow for worldwide service, absent analysis under state requirements for jurisdiction, where foreign defendant has minimum national contacts); *see also* Fed. R. Civ. P. 4(f).

176. *See Levant*, 166 B.R. at 229 (clarifying the fact that a bankruptcy judge has authority under federal question jurisdiction).

177. *See supra* note 174; *see also* Comment C4-35, *supra* note 54 (commenting on the new federal long-arm statute).

178. Ace Pecan Co., Inc. v. Granadex Int'l Ltd., (*In re* Ace Pecan Co., Inc.), 143 B.R. 696, 701 (Bankr. N.D. Ill. 1992).

179. *Id.*