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NO. 63297-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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RALPH'S CONCRETE PUMPING, INC.,

Petitioner/Plaintiff,

v.

CONCORD CONCRETE PUMPS, INC.,

Appellant/Defendant.

**FILED**  
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STATE OF WASHINGTON

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PETITION FOR REVIEW

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## **I. Introduction**

The Division I Court of Appeals opinion sought to be reviewed, holding that RCW 4.28.185 sets forth the required manner for service of process on defendants located in a foreign country, conflicts with Division III's decision in *Marriage of Tzarbopoulos*, 125 Wn. App. 273, 104 P.3d 692 (2004) and the plain meaning of CR 4(i) promulgated by Order of this Court. CR 4(i) establishes alternative provisions for service in a foreign country. The decision sought to be reviewed fails to recognize that CR 4(i) specifies alternative provisions for service in a foreign country that are "also sufficient." In doing so, the Court of Appeals reaches a result incompatible with CR 4(i) and similar provisions in the federal courts. The issues raised by this petition are matters of substantial public interest that should be determined by the Supreme Court.

## **II. Identity of Petitioner**

The Petitioner is Ralph's Concrete Pumping Inc., a Washington corporation, ("Ralph's") the Respondent below and the Plaintiff in the Superior Court.

## **III. Citation to Court of Appeals Decision**

Ralph's seeks review of the decision of the Court of Appeals, Division One, in *Ralph's Concrete Pumping, Inc. v. Concord Concrete*

*Pumps, Inc.*, Cause No. 63297-3-1. The decision was filed February 22, 2010. (*Slip. Op.* attached at Appendix A-1 to 12).

#### **IV. Issues Presented**

RCW 4.28.185 authorizes service upon a party not an inhabitant of or found within the state. The statute further describes a manner for service which when followed is sufficient for the service to be valid.

Does CR 4(i) establish alternative provisions for service in a foreign country which when followed are also sufficient for such service to be valid?

Does RCW 4.28.185 establish the exclusive manner for serving a defendant in a foreign country?

Does CR 4(e)(1) condition the applicability of CR 4(i) on the absence of any provision prescribing the manner of service in RCW 4.28.185?

#### **V. Statement of the Case**

This matter arises out of Concord Concrete Pumps, Inc.'s ("Concord") agreement to sell a 2007 32 meter Concord concrete pump on a 2007 Mack truck to Ralph's. The agreement was the result of Concord's sales representative soliciting the purchase at Ralph's Seattle location. CP at 135 and 138-39. Rather than deliver a 2007 pump on a 2007 truck,

Concord delivered to Ralph's a 2006 pump on a 2006 truck. CP at 139.

This action ensued.

Concord is a foreign corporation which did business in Washington despite not being qualified to do so. It has no offices in Washington and has no registered agent in Washington. Unable to serve Concord in Washington, Concord was served with the summons and complaint as provided by CR 4(i)(1)(D) by mail requiring a signed receipt addressed to Concord at its business address in British Columbia, Canada. A Concord representative acknowledged receipt of the summons and complaint by signing a U.S. Postal Global Express delivery receipt. *Slip Op.* at 2.

It is undisputed that Ralph's did not personally serve Concord. *Id.* It is undisputed that Ralph's did not follow the manner of service provided for by RCW 4.28.185 (personal service with a filed affidavit to the effect that service cannot be made within the state). It is undisputed that Concord is not an inhabitant of or found within the state. CP 40.<sup>1</sup>

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<sup>1</sup> CP 40 is the Declaration of Isidro Flores, Concord's President and Owner. Concord actually argued that it was so much not in Washington that the State lacked jurisdiction over the company. Brief of Appellant at 20-27. Personal jurisdiction was proper however because the company transacted business in the State, had independent contractors soliciting business on its behalf within the State, delivered the merchandise at issue to Ralph's in the State, had property within the State, and purposefully entered into a transaction within the State from which the cause of action arose. *See*, CP 41, 76-78, 135 and 138-139. *See generally*, *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989); *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 501 P.2d 290 (1972);

Despite being properly served under CR 4 (i)(1)(D), Concord did not respond to the summons, and Ralph's moved for an Order of Default. CP at 7-12. Although Concord was properly served with the motion, it failed to file any response. The Superior Court then entered its order granting the motion for default. CP 13-15. After the order was entered, Ralph's filed its motion for a default judgment. CP 16-19. The Superior Court subsequently entered a default judgment. CP 24-26. After Ralph's took steps to enforce the judgment by attaching some of Concord's property located in Nevada, Concord made a special appearance in Superior Court and moved to vacate the judgment and set aside the default. CP 27-28. The Superior Court denied Concord's motion. CP 154-156. Concord subsequently filed its appeal. CP 157-162.

In the Court of Appeals, Concord argued that Ralph's failed to serve in the manner provided by RCW 4.28.185. Brief of Appellant at 8-20. It disputed that CR 4(i) methods of service were available to Ralph's "unless and until" it complied with RCW 4.28.185(4)'s affidavit requirement and that even if the affidavit was filed "only a single specific method of service – personal service" was authorized by the statute. Brief of Appellant at 15.

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*Tyler Pipe v. Department of Revenue*, 105 Wn.2d 318, 715 P.2d 123 (1986) and see, RCW 4.28.185(1).

Ralph's contended that CR 4(i) creates alternative methods for service on parties in foreign countries and that it need not serve as provided in RCW 4.28.185. Ralph's relied on CR 4(i)'s express language that its methods for service are "also sufficient." Brief of Respondent at 15-20.

The Court of Appeals *sua sponte* at oral argument raised the legal issue whether CR 4(e) conditions the applicability of CR 4(i) to the absence of any provision in RCW 4.28.185 prescribing the manner of service. Despite not receiving any briefing on this issue, the Court of Appeals concluded that the alleged condition of CR 4(e) was not met and the service by mail provisions of CR 4(i)(1)(D) were unavailable because RCW 4.28.185 requires personal service, RCW 4.28.185 requires an affidavit to be filed for the personal service to be valid and Ralph's failed to comply with the method of service described in RCW 4.28.185. *Slip Op.* at 6.

## **VI. Argument**

### **A. Standard of Review**

The adequacy of service is a question of law subject to *de novo* review. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992).

**B. Service Pursuant to CR 4(i)(1)(D) Was Sufficient Service.**

**1. RCW 4.28.185 Authorizes Service On Concord.**

RCW 4.28.185(2) authorizes service of process upon any person who is subject to the jurisdiction of the courts of this state as provided by RCW 4.28.185(1). RCW 4.28.185(1)(a) establishes that the transaction of business within this state is sufficient for the state to have jurisdiction over a person. Concord transacted business within this state. Therefore, RCW 4.28.185 authorizes service upon Concord.<sup>2</sup>

**2. CR 4 (i) Provides For Alternative Methods of Service.**

CR 4 (i)(1)(D) provides:

*Manner.* When a statute ... authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: ... (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served ....

RCW 4.28.185 authorizes service upon Concord; Concord is not an inhabitant of or found within the state; thus, it is “also sufficient” if Concord is served by mail in a foreign country. CR 4(i)(1)(D).

The words “also sufficient” make clear that the service need not follow the manner of service provided for in RCW 4.28.185, the statute

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<sup>2</sup> In Part D of the Argument, *infra*, we discuss the method for service described in RCW 4.28.185(2) as well as the condition for such service to be effective set forth in RCW 4.28.185(4).

authorizing service. In addition, the heading to CR 4(i) reads, “Alternative Provisions for Service in a Foreign Country.” The words “alternative provisions” make clear that these provisions are an alternative to whatever provisions that might be necessary under RCW 4.28.185. If it were otherwise, there would be no need for such words.

Thus, the plain meaning of CR 4(i)(1)(D) is that Ralph’s service of Concord by mail was sufficient. *See generally, Marriage of Tsarbopoulos*, 125 Wn. App. 273, 104 P.3d 692 (2004) (Division III concluded that satisfying the service requirements of Greece were a sufficient service under CR 4(i)(1)(A)).<sup>3</sup>

**3. CR 4(e) Does Not Condition the Applicability of CR 4(i). Rather, The Use of Different Words Demonstrates That the Rule’s Subparts Have Different Meanings.**

CR 4(e)(1) reads,

*Generally.* Whenever a statute ... provides for service of a summons ... upon a party not an inhabitant of or not found within the state, service may be made under the

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<sup>3</sup> The Court of Appeals’ attempt to distinguish *Marriage of Tsarbopoulos*, 125 Wn. App. 273, 104 P.3d 692 (2004) is inadequate. *See*, Slip Op. at 8. While *Tsarbopoulos* did not discuss CR 4(e) and relied on RCW 26.27.081 for jurisdiction, the decisions directly conflict. The *Tsarbopoulos* court held that service need not be made in the manner provided by the statute because (i) “the term used throughout the statute is ‘may’. As a result, we interpret [the statute] as providing permissive or discretionary methods [for service] rather than mandatory ones” and (ii) CR 4(i)(1). Here, these same grounds were deemed insufficient to permit Ralph’s to serve in a manner other than provided by RCW 4.28.185. In addition, the Court of Appeals ruled without any briefing on the interplay of CR 4(e) and CR 4(i) and did not address any of the four additional reasons for applying CR 4(i) set forth in Part B 3 *infra* or the federal court decisions consistent with applying CR 4(i) in this case.

circumstances and in the manner prescribed by the statute ... or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.

The presence of the requirement in CR 4(e)(1), the *general* rule governing service of process on parties not within the state, that the manner prescribed in the statute authorizing service is to be followed in serving such parties coupled with the absence of such a requirement in CR 4(i) evidences that the manner described in RCW 4.28.185 need not be followed for service proceeding under CR 4(i), the *alternative* rule for serving parties in a foreign country.

First, subpart (e) of civil rule 4 is introduced with the word “*generally*.” Subpart (i) of civil rule 4 is introduced as the “*alternative provisions*.” Alternative provisions are the exception to a general rule. CR 4(i) is an exception to what is required under CR 4(e). CR 4(e) sets forth the general rule to follow when serving a party outside Washington but within the United States. CR 4(i) sets forth the alternative rule to follow when serving a party outside the United States, in a foreign country.

Second, the absence of a requirement in one part of a rule coupled with the presence of the requirement in another part of the rule is evidence that a different meaning is intended between the two subparts. *See generally, State v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976)

(“Where, as here, different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.”) *See also, State v. Kuberka*, 35 Wn. App. 909, 671 P.2d 260 (1983) (Presence of court rule requiring contemporaneous recording of telephonic testimony coupled with absence of requirement for contemporaneous recording of other information led court to conclude that the additional information need not be recorded contemporaneously.)<sup>4</sup> If this Court had intended that the manner prescribed in the statute authorizing service had to be followed when serving in a foreign country, this Court would have included the requirement in CR 4(i). The requirement is not in CR 4(i). Thus, no such requirement exists when serving in a foreign country.

Third, if the method of service in RCW 4.28.185 had to be followed when serving in a foreign country, CR 4(i) would rarely be applicable.<sup>5</sup> RCW 4.28.185 is always a statutory source for personal jurisdiction when serving a party not present in Washington. *See, e.g., Tsarbopoulos*. Thus, if RCW 4.28.185’s service method has to be followed, there would hardly be a need for CR 4(i) and it would certainly be drafted differently.

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<sup>4</sup> *See also, Ockerman v. King Cty*, 102 Wn. App. 212 (2000) (Express requirement in one section and the absence of such requirement in second section evidence a conscious decision by legislature).

<sup>5</sup> The single rare instance would be an *in rem* proceeding where the thing at issue is in Washington but a party in a foreign country needs to be served. CR 4(i) was not intended for only those rare circumstances.

Fourth, public policy favors not requiring the manner prescribed in the statute authorizing service to be followed when serving in a foreign country. Typically, the practical ability of a Washington resident to effectuate personal service in a foreign country is substantially more cumbersome than in the United States. Thus, CR 4(i) authorizes service by various means reasonably calculated under all the circumstances to give actual notice. The very existence of CR 4(i) evidences a public policy that finds personal service outside the country to be potentially overly burdensome.

**C. Federal Courts Similarly Apply Analogous Federal Rules.**

Despite the presence of rules analogous to CR 4(e), the federal courts apply rules analogous to CR 4(i) even when the statute authorizing service specifies a different manner of service.<sup>6</sup> *See, e.g., Pizzabioche v.*

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<sup>6</sup> When CR 4(e) and (i) originally became effective July 1, 1967, they were patterned after the Federal Rules of Civil Procedure then in effect. Subdivision (i) was added to Fed.R.Civ. P.4 by the 1963 Amendment. The Advisory Committee Notes accompanying the 1963 Amendment which added subdivision (i) explained the relationship between Fed.R.Civ. P.4 (e) and (i) as follows:

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of the court of a State, it is always sufficient to carry out the service in a manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient.

*See, Appendix A-29 (emphasis supplied); also see, Lemme v. Wine of Japan Import, Inc., 631 F.Supp. 456, 462 (E.D.N.Y. 1986) quoting the Advisory Committee Note.*

*Vinelli*, 772 F.Supp. 1245, 1247-1249 (M.D. Fla. 1991) (holding that utilization by plaintiffs of one of the methods set out in Fed.R.Civ.P. 4(i) is sufficient to effect proper service of process upon a defendant who resides in a foreign country even though the basis of jurisdiction and authority for service was a long-arm statute which contained a provision specifying a manner of service);<sup>7</sup> *Louis Dreyfus Corp. v. McShares, Inc.*, 723 F.Supp. 375, 377-378 (E.D.La. 1989) (stating that several methods of service on a foreign defendant were available under Fed.R.Civ.P.4, although none were successfully accomplished, including (1) pursuant to state law [i.e., the Louisiana long-arm statute] as provided in Fed.R.Civ.P.4(c)(2)(C)(i), (2) by mailing as provided in Fed.R.Civ.P. 4(c)(2)(C)(ii) and (3) as a “final option” as set forth in Fed.R.Civ.P. 4(i)).

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When the language of a Washington rule and its federal counterpart are substantially the same, Washington courts may look to decisions and analysis of the federal rules for guidance. *American Discount Corp. v. Saratoga West*, 81 Wn.2d 34, 37, 499 P.2d 869 (1972).

Fed.R.Civ.P.4(i) was replaced by amendment in 1993.

<sup>7</sup> Fla.Stat. §48.193, the Florida long-arm statute, is similar to RCW 4.28.185 and subdivision (3) specifically provides that “[s]ervice of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state as provided in §48.194. The service shall have the same effect as if it had been personally served within the state.” *See*, Appendix A-61-62; *Cf.*, RCW.4.28.185(2).

**D. RCW 4.28.185 Does Not Require A Particular Method Of Service of Parties in Foreign Countries.**

The above argument demonstrates that even if RCW 4.28.185 by its terms *requires* personal service and/or an affidavit such service is not required for service to be sufficient under CR 4(i). The conclusion that the methods for service described in CR 4(i) are also sufficient is further supported by the fact that RCW 4.28.185 does not require any particular method of service.

RCW 4.28.185(1) authorizes service upon any person who is subject to the jurisdiction of the courts of this state. RCW 4.28.185(2) permits such service to be made by personal service as provided by RCW 4.28.180, but it does not require such service. The statute reads,

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, *may* be made by personally serving the defendant outside this state, as provided in RCW 4.28.180... .  
(emphasis added).

If personal service was required, the statute would not have used the word “may.” It would have used the word “must.” *See, Canyon Lumber Co. v. Sexton*, 93 Wash. 620, 626, 161 P.841 (1916) *and see, Housing Authority of Pasco v. Pleasant*, 126 Wn. App. 382 (2005) (The legislature’s use of may instead of must makes it permissive.) *See also,*

*Ravenscroft v. Water Power Co.*, 87 Wn. App. 402, 942 P.2d 991 (1997)  
(Discretion is afforded by use of the word may instead of shall.).<sup>8</sup>

RCW 4.28.185(6) confirms that personal service and any other requirements in RCW 4.28.185 are permissive and not mandatory. It reads, “[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.”

CR 4(i) provides Ralph with the right to serve by mail in a foreign country. This right is a right provided by law. RCW 2.04.180, RCW 2.04.190 and RCW 2.04.200 are clear legislative acknowledgments that the Supreme Court has the power to make rules governing serving process, that such rules are the law and that any statute in conflict with the Court’s rules is without force. Thus, by the inclusion of subpart (6), RCW 4.28.185 by its own terms does not attempt to describe the required methods for service of parties in a foreign country.<sup>9</sup>

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<sup>8</sup> All cases that appear to find that RCW 4.28.185 requires personal service and an affidavit are cases involving service within the United States where the “requirements” are applicable under CR 4(e). See generally, *Schnell v. Tri-State Irrigation*, 22 Wn. App. 788, 591 P.2d 1222 (1979) and *RCL Northwest, Inc. v. Colorado Resources, Inc.* 72 Wn. App. 265, 864 P.2d 12 (1993). Here, the service occurred outside the United States where the alternative provisions of CR 4(i) apply.

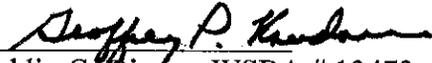
<sup>9</sup> RCW 4.28.185(4)’s “requirement” that personal service outside the state shall be valid only when a certain affidavit is filed adds nothing. First, Ralph’s did not attempt personal service. Second, in context, the affidavit requirement is intended to be a condition on the method of personal service described in RCW 4.28.185. Third, for the reasons described in text, RCW 4.28.185(6) makes clear that the affidavit “requirement” would not condition service by any other means allowed by court rule.

## VII. Conclusion

For the reasons expressed above, as well as the reasons discussed in the Brief of Respondent, Concord was properly served by mail in a foreign country. CR4(i)(1)(D). Such service is sufficient service. Therefore, the Court of Appeals decision in this matter should be reversed.

Respectfully submitted, this 24<sup>th</sup> day of March, 2010.

THE DINCES LAW FIRM

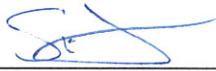
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CERTIFICATE OF SERVICE

I, Sydney Henderson, hereby certify that I am over the age of eighteen and not a party to this action. On March 24, 2010, I caused to be served the foregoing Petition for Review via Hand Delivery, via legal messenger to the following:

Gavin W. Skok  
Mindy L. DeYoung  
Riddell Williams P.S.  
1001 Fourth Avenue, Suite 4500  
Seattle, WA 98154

Dated this 24<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
Sydney Henderson

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2010 MAR 24 PM 2:24

# **APPENDIX A**

**Slip Opinion February 22, 2010**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RALPH'S CONCRETE PUMPING, INC., )	No. 63297-3-I
a Washington corporation, )	
)	DIVISION ONE
Respondent, )	
)	
v. )	
)	
CONCORD CONCRETE PUMPS, INC., )	PUBLISHED
a foreign corporation, )	
)	FILED: <u>February 22, 2010</u>
Appellant. )	
)	
)	

Cox, J. — At issue is whether service of process by mail on a foreign corporation pursuant to Superior Court Civil Rule (CR) 4(i)(1)(D) is sufficient to confer personal jurisdiction in Washington courts where personal service under the long-arm statute, RCW 4.28.185, was not made. Because CR 4 conditions service under that court rule on a statute providing for foreign service that contains “no provision prescribing the manner of service,” and the long-arm statute expressly provides for personal service, service under CR 4 was not authorized here. Moreover, Ralph’s Concrete Pumping, Inc. failed to make and file an affidavit that established that “service cannot be made within this state,” as required by the long-arm statute. Accordingly, the default judgment against Concord Concrete Pumps, Inc. is void. We reverse.

The dispositive facts are undisputed. Ralph's is a corporation registered in Washington State. Concord is a corporation registered in British Columbia, Canada, where it maintains offices. This action arises out of an alleged breach of a contract under which Ralph's agreed to purchase a concrete pump and truck from Concord.

Ralph's sued Concord for breach of contract, alleging damages in excess of \$100,000. Ralph's served Concord in Canada by mail, in accordance with CR 4(i)(1)(D). A Concord representative acknowledged receipt of the summons and complaint by signing a U.S. Postal Global Express delivery receipt.

It is undisputed that Ralph's neither personally served Concord nor filed the affidavit required under Washington's long-arm statute.

Concord did not answer or otherwise respond to the summons and complaint and Ralph's obtained a default judgment against Concord exceeding \$175,000.

Thereafter, Concord made a special appearance, moving to vacate the default judgment. Concord argued that the judgment was invalid because the trial court did not have personal jurisdiction since Ralph's failed to comply with the long-arm statute. The trial court denied the motion.

Concord appeals.

## **PERSONAL JURISDICTION**

### *Service of Process*

Concord argues that the default judgment against it should be vacated for

lack of personal jurisdiction because Ralph's failed to comply with Washington's long-arm statute, RCW 4.28.185, which requires personal service and an affidavit attesting that service cannot be made within the state. We agree.

A Washington court may assert personal jurisdiction over an out-of-state defendant if the long-arm statute is satisfied and if the assumption of jurisdiction meets the requirements of due process by comports with traditional notions of fair play and substantial justice.<sup>1</sup> Because statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly construed.<sup>2</sup>

Proper service of process is basic to personal jurisdiction.<sup>3</sup> "Mere receipt of process and actual notice alone do not establish valid service of process."<sup>4</sup>

We review de novo a trial court's denial of a motion to vacate a default judgment for lack of jurisdiction.<sup>5</sup> Moreover, we also review de novo questions of statutory interpretation.<sup>6</sup>

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<sup>1</sup> State ex rel. Coughlin v. Jenkins, 102 Wn. App. 60, 64, 7 P.3d 818 (2000).

<sup>2</sup> Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 177, 744 P.2d 1032 (1987) (citing State ex rel. Hopman v. Superior Court for Snohomish County, 88 Wash. 612, 617, 153 P. 315 (1915)).

<sup>3</sup> Pascua v. Heil, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005).

<sup>4</sup> Haberman, 109 Wn.2d at 177 (citing City of Spokane v. Dep't of Labor & Indus., 34 Wn. App. 581, 584, 663 P.2d 843, review denied, 100 Wn.2d 1007 (1983)).

<sup>5</sup> ShareBuilder Sec., Corp. v. Hoang, 137 Wn. App. 330, 334, 153 P.3d 222 (2007).

<sup>6</sup> Id.

Here, Ralph's does not dispute that it failed to personally serve Concord, as the long-arm statute requires. We look first to that statute to determine the effect of the failure to comply with the personal service requirement.

The long-arm statute, RCW 4.28.185(2), specifies the required manner of service of process on defendants located outside of this state who are subject to the jurisdiction of Washington courts based on the acts specified in the statute:

Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by **personally serving** the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.<sup>7</sup>

RCW 4.28.180 specifies the form and method of service of the summons to be used in effectuating personal service outside of the state.

In this case, Ralph's did not personally serve Concord. Rather, Ralph's mailed the summons to Concord's British Columbia offices, in accordance with CR 4(i)(1)(D). Ralph's claims that court rule is a permissible alternative to the personal service requirement of the long-arm statute.

CR 4(i)(1)(D) provides:

(i) Alternative Provisions for Service in a Foreign Country.  
(1) Manner. When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:

(D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served.

Ralph's argues that the above subdivision of CR 4 applies because it

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<sup>7</sup> (Emphasis added.)

permits service by any form of mail that requires a signed receipt, and for two additional reasons. First, the long-arm statute, RCW 4.28.185(2), uses permissive rather than mandatory language: service of process "**may** be made by personally serving the defendant outside [of the] state."<sup>8</sup> Second, RCW 4.28.185(6) states that the long-arm statute does not limit the right to serve process by any other method provided by law:

Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

We conclude that these arguments are unpersuasive.

The chief problem with Ralph's argument that service by mail under CR 4(i)(1)(D) is a permissible alternative to the personal service requirement of the long-arm statute is that the argument ignores other material provisions of CR 4. Specifically, CR 4(e)(1) provides:

Generally. Whenever a statute or an order of court thereunder provides for service of a summons . . . upon a party not an inhabitant of or found within the state, service may be made under the circumstances and in the manner prescribed by the statute or order, **or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.**<sup>9</sup>

As Ralph's correctly observes, "[a] rule of court must be construed so that no word, clause or sentence is superfluous, void or insignificant."<sup>10</sup> Here, the statute that provides for service of a summons on a person not found within this

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<sup>8</sup> (Emphasis added.)

<sup>9</sup> (Emphasis added.)

<sup>10</sup> State v. Durham, 13 Wn. App. 675, 679, 537 P.2d 816 (1975) (internal citations omitted).

state is the long-arm statute. CR 4(e)(1) expressly conditions service on a foreign party under the provisions of that rule on the absence of any "provision prescribing the manner of service" in the relevant statute providing for out-of-state service. But the long-arm statute expressly provides for personal service of a summons on an out-of-state defendant.

Because the condition of CR 4(e)(1) is not met for purposes of the long-arm statute, the service by mail provisions of CR 4(i)(1)(D) do not apply here. Accordingly, service of the summons was invalid.

Ralph's argues that the service provisions of CR 4(i)(1)(D), a court rule, should prevail over the service requirements of RCW 4.28.185(2), a legislative enactment on procedure, in the event of a conflict. Assuming the validity of this statement of law, it is inapplicable in this case because there is no conflict between the court rule and the statute. The statute controls.

In re Marriage of Tsarbopoulos,<sup>11</sup> on which Ralph's relies, does not require a different result here. That was a dissolution proceeding in which a wife moved with her children to Washington and commenced a proceeding to dissolve the marriage to her husband, who remained in Greece.<sup>12</sup> The wife directed the process server to serve a summons and petition for dissolution of marriage at her husband's office.<sup>13</sup> The summons was left with a person who

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<sup>11</sup> 125 Wn. App. 273, 104 P.3d 692 (2004).

<sup>12</sup> Id. at 277.

<sup>13</sup> Id.

worked with the husband.<sup>14</sup> The husband did not appear in the proceeding, and the court entered a dissolution decree, parenting plan, and child support order by default.<sup>15</sup> Months later, the husband appeared and moved to vacate the orders, claiming the court lacked personal jurisdiction because service of process was invalid.<sup>16</sup> The superior court granted the motion to vacate the orders.<sup>17</sup>

The court of appeals reversed the vacation of the marital status order.<sup>18</sup> According to the court, Washington courts have jurisdiction to enter a dissolution decree if one party is domiciled in Washington and the other party is served by a method authorized by Washington's court rules and statutes.<sup>19</sup> CR 4(i)(1)(A) permits service in a foreign country in a manner prescribed by the laws of that country.<sup>20</sup> The husband had been personally served with the summons in accordance with the laws of Greece.<sup>21</sup> Thus, service was sufficient in that case.<sup>22</sup>

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<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id. at 278.

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Id.

Seizing on this portion of the court's discussion in Tsarbopoulos, Ralph's argues that the service of summons by mail under CR 4(i)(1)(D) in this case conforms to the manner of service prescribed by British Columbia for sufficient service in an action in its courts of general jurisdiction and thus confers jurisdiction on Washington courts. We disagree.

As we have already explained, the alternative provisions for service in a foreign country discussed in CR 4(i) are conditioned on CR 4(e). Specifically, service in a manner prescribed by the rule is permissible only when "a statute . . . provides for service of a summons . . . upon a party not an inhabitant of or found within the state" and "there is no provision prescribing the manner of service." Here, the long-arm statute mandates personal service. Thus, CR 4(i) does not apply.

The Tsarbopoulos court did not have occasion to examine the interaction of CR 4(i) and CR 4(e) because the court had "jurisdiction to enter a decree of dissolution if one party is domiciled in Washington State and the other party is served by a method authorized by Washington's court rules and statutes."<sup>23</sup> The method of service was authorized by court rule and was therefore valid. Thus, Tsarbopoulos does not stand for the proposition that mere compliance with the service rules of Canada makes service of process by mail sufficient to establish personal jurisdiction in this case.

This case is not a marriage dissolution case, but rather one arising from a

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<sup>23</sup> Tsarbopoulos, 125 Wn. App. at 278.

claim that Concord subjected itself to the jurisdiction of this state by one or more of the acts specified in the long-arm statute. Application of the principles that arise from a marriage dissolution and child custody action governed by the Uniform Child Custody Jurisdiction Act, chapter 26.27 RCW, and the Uniform Marriage and Divorce Act, chapter 26.09 RCW, simply does not provide proper guidance in the case before us. Tsarbopoulos is distinguishable.

Ralph's did not personally serve Concord as required by Washington's long-arm statute. CR 4(i)(1)(D) was not an effective alternative method of service to establish personal jurisdiction over Concord. "Basic to litigation is jurisdiction, and first to jurisdiction is service of process. When a court lacks personal jurisdiction over a party, the judgment obtained against that party is void."<sup>24</sup> Here, the default judgment entered against Concord is void because the court lacked personal jurisdiction due to insufficient service of process.<sup>25</sup>

*Long-Arm Statute Affidavit*

Concord provides another reason why the default judgment against it should be vacated even if service by mail is permitted under CR 4(i)(1)(D). Concord argues that Ralph's failure to comply with the affidavit requirement of

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<sup>24</sup> Rodriguez v. James-Jackson, 127 Wn. App. 139, 143, 111 P.3d 271 (2005) (internal citations omitted); see also In re Marriage of Hill, 53 Wn. App. 687, 689-90, 769 P.2d 881 (1989) (vacating default judgment because of failure to make personal service on out-of-state defendant); Haberman, 109 Wn.2d at 177-78 (strict compliance with personal service requirement required).

<sup>25</sup> In re Marriage of Markowski, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988) ("Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void.").

RCW 4.28.185(4) is fatal. We agree.

RCW 4.28.185(4) states that personal service outside the state “shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.” No such affidavit was made or filed.

“Substantial, rather than strict, compliance with RCW 4.28.185(4) is permitted.”<sup>26</sup> “[S]ubstantial compliance means that, viewing all affidavits filed prior to judgment, the logical conclusion must be that service could not be had within the state.”<sup>27</sup> If there is no compliance with the affidavit requirement of RCW 4.28.185(4), personal jurisdiction does not attach to the defendant and the judgment is void.<sup>28</sup>

Here, it is undisputed that Ralph’s did not file an affidavit as required by the long-arm statute. The default judgment is void for lack of personal jurisdiction.

Ralph’s argues that no affidavit was required in this case because it served Concord under the alternative method provided in CR 4(i)(1)(D), which does not require the filing of an affidavit. As we have explained, CR 4 does not provide an effective alternative method of service in this case. The lack of the affidavit required by the long-arm statute is fatal to personal jurisdiction. The

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<sup>26</sup> ShareBuilder Sec., 137 Wn. App. at 334; see also Sammamish Pointe Homeowners Ass’n v. Sammamish Pointe LLC, 116 Wn. App. 117, 124, 64 P.3d 656 (2003); Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 472, 403 P.2d 351 (1965).

<sup>27</sup> ShareBuilder Sec., 137 Wn. App. at 334-35.

<sup>28</sup> Id. at 335.

default judgment is void for this additional reason.

### ATTORNEY FEES

Concord argues that it is entitled to attorney fees under RCW 4.28.185(5). We hold that the relevant statute does not support an award of fees in this case.

RCW 4.28.185(5), the statute on which Concord relies, provides:

In the event the defendant is *personally served* outside the state on causes of action enumerated in [RCW 4.28.185], and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.<sup>[29]</sup>

"When the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written."<sup>30</sup> Here, the plain words of the statute make clear that attorney fees are only allowed if the defendant was *personally served*. Concord was not personally served. Service by mail was the alternative that Ralph's used. Fees are not awardable.

We reverse the order denying Concord's motion to vacate the default judgment and set aside the entry of default.

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<sup>29</sup> (Emphasis added.)

<sup>30</sup> State v. Newlum, 142 Wn. App. 730, 744, 176 P.3d 529, review denied, 165 Wn.2d 1007 (2008) (quoting Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997)).

Cox, J.

WE CONCUR:

Schindler, CT

Grosse, J

## **Statutes and Rules**

## Revised Code of Washington

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 **Revised Code of Washington**  
 **TITLE 2 COURTS OF RECORD**  
 **CHAPTER 2.04 SUPREME COURT**

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**RCW 2.04.180** The supreme court may from time to time institute such rules of practice....

The supreme court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court en banc and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court en banc and in departments, as may be deemed most conducive to the due administration of justice.

[1909 chap. 24 sec. 8; 1890 p 323 sec. 12; RRS sec. 13.]

**NOTES:**

Cf. Title 1 RAP and RAP 18.10.

## Revised Code of Washington

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 **Revised Code of Washington**  
 **TITLE 2 COURTS OF RECORD**  
 **CHAPTER 2.04 SUPREME COURT**

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**RCW 2.04.190** The supreme court shall have the power to prescribe, from time to time,....

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

[1987 chap. 202 sec. 101; 1925 Ex.Sess. chap. 118 sec. 1; RRS sec. 13-1.]

**NOTES:**

Cf. Title 1 RAP.

**Intent – 1987 chap. 202:** "The legislature intends to:

- (1) Make the statutes of the state consistent with rules adopted by the supreme court governing district courts; and
- (2) Delete or modify archaic, outdated, and superseded language and nomenclature in statutes related to the district courts." [1987 chap. 202 sec. 1.]

Court of appeals – Rules of administration and procedure: Wash. Rev. Code **2.06.030**.

## Revised Code of Washington

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- Revised Code of Washington**
  - TITLE 2 COURTS OF RECORD**
  - CHAPTER 2.04 SUPREME COURT**
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**RCW 2.04.200** When and as the rules of courts herein authorized shall be promulgated....

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

[1925 Ex.Sess. chap. 118 sec. 2; RRS sec. 13-2.]

**NOTES:**

Cf. CR 81(b), RAP 1.1(g).

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## Revised Code of Washington

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 **Revised Code of Washington**  
 **TITLE 4 CIVIL PROCEDURE**  
 **CHAPTER 4.28 RCW COMMENCEMENT OF ACTIONS**

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**RCW 4.28.180** Personal service of summons or other process may be made upon any party....

Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same and be served in like manner as personal summons within the state, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

[1959 chap. 131 sec. 1; 1895 chap. 86 sec. 3; 1893 chap. 127 sec. 11; RRS sec. 234.]

**NOTES:**

Cf. CR 4(e), CR 12(a), CR 82(a).

Service of process on nonresident motor vehicle operator: Wash. Rev. Code 46.64.040.

## Revised Code of Washington

**Revised Code of Washington**  
**TITLE 4 CIVIL PROCEDURE**  
**CHAPTER 4.28 RCW COMMENCEMENT OF ACTIONS**

**RCW 4.28.185** (1) Any person, whether or not a citizen or resident of this state, who....

(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

(a) The transaction of any business within this state;

(b) The commission of a tortious act within this state;

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter **26.09** RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW **4.28.180**, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on

causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

[1977 chap. 39 sec. 1; 1975-'76 2nd Ex.Sess. chap. 42 sec. 22; 1959 chap. 131 sec. 2.]

**NOTES:**

Cf. CR 4(e), CR 12(a), CR 82(a).

Uniform parentage act: Chapter 26.26 Wash. Rev. Code.

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## Revised Code of Washington

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**Revised Code of Washington**  
**TITLE 26 DOMESTIC RELATIONS**  
**CHAPTER 26.27 RCW UNIFORM CHILD CUSTODY JURISDICTION ACT**  
**ARTICLE 1 GENERAL PROVISIONS**

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RCW 26.27.081 (1) Notice required for the exercise of jurisdiction when a person is....

(1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed for service of process by the law of the state in which the service is made or given in a manner reasonably calculated to give actual notice, and may be made in any of the following ways:

(a) Personal delivery outside this state in the manner prescribed for service of process within this state;

(b) By any form of mail addressed to the person to be served and requesting a receipt; or

(c) As directed by the court, including publication if other means of notification are ineffective.

(2) Proof of service outside this state may be made:

(a) By affidavit of the individual who made the service;

(b) In the manner prescribed by the law of this state or the law of the state in which the service is made; or

(c) As directed by the order under which the service is made.

If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

[2001 chap. 65 sec. 108.]

## Superior Court Civil Rules

### **Superior Court Civil Rules**

### **SUPERIOR COURT CIVIL RULES (CR)**

### **2. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS (Rules 3-6)**

#### **RULE 4. PROCESS**

##### **(a) Summons - Issuance.**

(1) The summons must be signed and dated by the plaintiff or his attorney, and directed to the defendant requiring him to defend the action and to serve a copy of his appearance or defense on the person whose name is signed on the summons.

(2) Unless a statute or rule provides for a different time requirement, the summons shall require the defendant to serve a copy of his defense within 20 days after the service of summons, exclusive of the day of service. If a statute or rule other than this rule provides for a different time to serve a defense, that time shall be stated in the summons.

(3) A notice of appearance, if made, shall be in writing, shall be signed by the defendant or his attorney, and shall be served upon the person whose name is signed on the summons. In condemnation cases a notice of appearance only shall be served on the person whose name is signed on the petition.

(4) No summons is necessary for a counterclaim or cross claim for any person who previously has been made a party. Counterclaims and cross claims against an existing party may be served as provided in rule 5.

##### **(b) Summons.**

(1) *Contents.* The summons for personal service shall contain:

(i) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;

(ii) A direction to the defendant summoning him to serve a copy of his defense within a time stated in the summons;

(iii) A notice that, in case of failure so to do, judgment

will be rendered against him by default. It shall be signed and dated by the plaintiff, or his attorney, with the addition of his post office address, at which the papers in the action may be served on him by mail.

(2) *Form.* Except in condemnation cases, and except as provided in rule 4.1, the summons for personal service in the state shall be substantially in the following form:

SUPERIOR COURT OF WASHINGTON  
FOR [\_\_\_\_\_] COUNTY

\_\_\_\_\_, )  
Plaintiff, ) No. \_\_\_\_\_  
v. ) Summons [20 days]  
\_\_\_\_\_, )  
Defendant. )

**TO THE DEFENDANT:** A lawsuit has been started against you in the above entitled court by \_\_\_\_\_, plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this summons and complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State of Washington.

[signed] \_\_\_\_\_  
\_\_\_\_\_

Print or Type Name  
( ) Plaintiff ( ) Plaintiff's Attorney  
P.O. Address \_\_\_\_\_

Dated \_\_\_\_\_

Telephone Number \_\_\_\_\_

**(c) By Whom Served.**

Service of summons and process, except when service is by publication, shall be by the sheriff of the county wherein the service is made, or by his deputy, or by any person over 18 years of age who is competent to be a witness in the action, other than a party. Subpoenas may be served as provided in rule 45.

**(d) Service.**

(1) *Of Summons and Complaint.* The summons and complaint shall be served together.

(2) *Personal in State.* Personal service of summons and other process shall be as provided in RCW 4.28.080-.090, 23B.05.040, 23B.15.100, 46.64.040, and 48.05.200 and .210, and other statutes which provide for personal service.

(3) *By Publication.* Service of summons and other process by publication shall be as provided in RCW 4.28.100 and .110, 13.34.080, and 26.33.310, and other statutes which provide for service by publication.

(4) *Alternative to Service by Publication.* In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

(5) *Appearance*. A voluntary appearance of a defendant does not preclude his right to challenge lack of jurisdiction over his person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b).

**(e) Other Service.**

(1) *Generally*. Whenever a statute or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or not found within the state, service may be made under the circumstances and in the manner prescribed by the statute or order, or if there is no provision prescribing the manner of service, in a manner prescribed by this rule.

(2) *Personal Service Out of State - Generally*. Although rule 4 does not generally apply to personal service out of state, the prescribed form of summons may, with the modifications required by statute, be used for that purpose. See RCW 4.28.180.

(3) *Personal Service Out of State - Acts Submitting Person to Jurisdiction of Courts*. [Reserved. See RCW 4.28.185.]

(4) *Nonresident Motorists*. [Reserved. See RCW 46.64.040.]

**(f) Territorial Limits of Effective Service.**

All process other than a subpoena may be served anywhere within the territorial limits of the state, and when a statute or these rules so provide beyond the territorial limits of the state. A subpoena may be served within the territorial limits as provided in rule 45 and RCW 5.56.010.

**(g) Return of**

Service. Proof of service shall be as follows:

(1) If served by the sheriff or his deputy, the return of the sheriff or his deputy endorsed upon or attached to the summons;

(2) If served by any other person, his affidavit of service endorsed upon or attached to the summons; or

(3) If served by publication, the affidavit of the

publisher, foreman, principal clerk, or business manager of the newspaper showing the same, together with a printed copy of the summons as published; or

(4) If served as provided in subsection (d)(4), the affidavit of the serving party stating that copies of the summons and other process were sent by mail in accordance with the rule and directions by the court, and stating to whom, and when, the envelopes were mailed.

(5) The written acceptance or admission of the defendant, his agent or attorney;

(6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.

(7) In case of service otherwise than by publication, the return, acceptance, admission, or affidavit must state the time, place, and manner of service. Failure to make proof of service does not affect the validity of the service.

**(h) Amendment of Process.**

At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

**(i) Alternative Provisions for Service in a Foreign Country.**

(1) *Manner.* When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or (E) pursuant to the means and terms of any applicable treaty or convention; or (F) by diplomatic or consular officers when authorized by the

United States Department of State; or (G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

(2) Return. Proof of service may be made as prescribed by section (g) of this rule, or by the law of the foreign country, or by a method provided in any applicable treaty or convention, or by order of the court. When service is made pursuant to subsection (1)(D) of this section, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

**(j) Other Process.**

These rules do not exclude the use of other forms of process authorized by law.

[Amended effective January 1, 1972; July 1, 1977; September 1, 1978; July 1, 1980; September 1, 1985; September 1, 1989; September 1, 1993; September 1, 1994.]

**Federal Rules &  
Advisory Committee Note**

AMENDMENTS EFFECTIVE ON JULY 1, 1963 (PARTIAL LIST)

Rule 4. Process

(b) SAME: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. *When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.*

(d) SUMMONS: PERSONAL SERVICE.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the [service is made] *district court is held* for the service of \*641 summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) SAME: [OTHER SERVICE] *Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court *thereunder* provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state *in which the district court is held*, service [shall] *may* be made under the circumstances and in the manner prescribed by the statute[, rule,] or order [][[.]], or, *if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.*

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when *authorized* by a statute of the United States or by these rules, [so provides,] beyond the territorial limits of that state. *In addition, persons who are brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.*

(i) *Alternative Provisions for Service in a Foreign Country.*

(1) *Manner.* When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction, or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court.\*642 Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) *Return.* Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

#### Advisory Committee's Note

*Subdivision (b).* Under amended amended subdivision (e) of this rule, an action may be commenced against a nonresident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as may be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

*Subdivision (d)(4).* This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. Cf. N.J. Rule 4:5-2. See also the amendment of Rule 30(f)(1).

*Subdivision (d)(7).* Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in McCoy v. Siler, 205 F.2d 498, 501-2 (3d Cir.) (concurring opinion), *cert. denied*, 346 U.S. 872, 74 S.Ct. 120, 98 L.Ed. 380 (1953), that the ef-

fective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see Holbrook v. Cafero, 18 F.R.D. 218 (D.Md.1955); Pasternack v. Dalo, 17 F.R.D. 420 (W.D.Pa.1955); cf. Super Prods. Corp. v. Parkin, 20 F.R.D. 377 (S.D.N.Y.1957), or by reading paragraph (7) as not limited by subdivision (f). See Giffin v. Ensign, 234 F.2d 307 (3d Cir.1956); 2 Moore's Federal Practice, ¶ 4.19 (2d ed. 1948); 1 Barron & Holtzoff, Federal Practice & Procedure § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi.L.Rev. 751 (1960). See also Olberding v. Illinois Central R.R., 201 F.2d 582 (6th Cir.), *rev'd on other grounds*, 346 U.S. 338, 74 S.Ct. 83, 98 L.Ed. 39 (1953); Feinsinger v. Bard, 195 F.2d 45 (7th Cir.1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, e.g., Ill. Ann. Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis. Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, 243 F.2d 342 (2d Cir. (1957)); Kappus v. Western Hills Oil, Inc., 24 F.R.D. 123 (E.D. Wis. 1959); Star v. Rogalny, 162 F.Supp. 181 (E.D. Ill. 1957). It has also been held that the clause of paragraph (7) which \*116 permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See Farr & Co. v. Cia. Intercontinental de Nav. de Cuba, *supra*. But cf. Sappia v. Lawro Lines, 130 F.Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

*Subdivision (e).* For the general relation between subdivisions (d) and (e), see 2 Moore, *supra*,

¶ 4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, *supra*, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, *supra*, ¶ 4.32, at 1004; Smit, *International Aspects of Federal Civil Procedure*, 61 *Colum.L.Rev.* 1031, 1036-39 (1961). *But see* Commentary, 5 *Fed.Rules Serv.* 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader; process and procedure); 28 U.S.C. § 1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick v. Devon Syndicate, Ltd.*, 307 U.S. 299, 59 S.Ct. 877, 83 L.Ed. 1303 (1939); *Clark v. Wells*, 203 U.S. 164, 27 S.Ct. 43, 51 L.Ed. 138 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, *Attachment and Garnishment in the Federal Courts*, 59 *Mich.L.Rev.* 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co. v. Read*, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir.1944); 7 *Moore's Federal Practice* ¶ 64.05 (2d ed. 1954); 3 *Barron & Holtzoff, Federal Practice & Procedure* § 1423 (Wright ed. 1958); *but cf.* Note, 13 *So.Calif.L.Rev.* 361 (1940).

The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants is brought within the custody of the court and some appropriate service is made upon them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, *supra*, at 374-80; Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 *F.R.D.* 105, 106 (1956); Note, 34 *Corn.L.Q.* 103 (1948); Note, 13 *So.Calif.L.Rev.* 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as \*117 amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

*Subdivision (f)*. The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a

subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R. v. Erie Avenue Warehouse Co.*, 5 F.R.Serv.2d 14a.62, Case 2 (3d Cir.1962); *Dery v. Wyer*, 265 F.2d 804 (2d Cir.1959); *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213 (2d Cir.1955); *Lesnik v. Public Industrials Corp.*, 144 F.2d 968 (2d Cir.1944); *Vaughn v. Terminal Transp. Co.*, 162 F.Supp. 647 (E.D.Tenn.1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, *supra*, § 4.01[13] (Supp.1960); 1 Barron & Holtzoff, *supra*, § 184; Note, 51 Nw.U.L.Rev. 354 (1956). But cf. Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber v. Graber*, 93 F.Supp. 281 (D.D.C.1950); *Teele Soap Mfg. Co. v. Pine Tree Products Co., Inc.*, 8 F.Supp. 546 (D.N.H.1934); *Mitchell v. Dexter*, 244 Fed. 926 (1st Cir.1917); *In re Graves*, 29 Fed. 60 (N.D.Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 66 S.Ct. 242, 90 L.Ed. 185 (1946).

*Subdivision (i)*. The continual increase of civil litigation having international elements makes it advisable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515 (1953); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory*, Proc.A.B.A., Sec. Int'l & Comp.L. 34 (1959); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum.L.Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service

must be found in a statute of the United States or a statute or rule \*118 of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amend Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me.Rev.Stat., ch. 22, § 70 (Supp.1961); Minn.Stat. Ann. § 303.13 (1947); N.Y.Veh. & Tfc. Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, e.g., *Chapman v. Superior Court*, 162 Cal.App.2d 421, 328 P.2d 23 (Dist.Ct.App.1958); *Sperry v. Fliegers*, 194 Misc. 438, 86 N.Y.S.2d 830 (Sup.Ct.1949); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951); *Rushing v. Bush*, 260 S.W.2d 900 (Tex.Ct.Civ.App.1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill. Ann. Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis. Stat. § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein. Subdivision (i) introduces considerable further flexibility by permitting the foreign service and the return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore "sovereign," acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, *supra*, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridical

Committee, *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures* 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See *ibid.*

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

*Subdivision (i)(1).* Subparagraph (a) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra.*

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See \*119 *In re Letters Rogatory out of First Civil Court of City of Mexico*, 261 Fed. 652 (S.D.N.Y.1919); Jones, *supra*, at 543; Comment, 44 Colum.L.Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting

foreign service do not specifically provide for service by personal delivery abroad, see e.g., 35 U.S.C. §§ 146, 293; 46 U.S.C. § 1292; Calif.Ins.Code § 1612; N.Y.Veh. & Tfc. Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, e.g., Hawaii Rev.Laws §§ 230-31, 230-32 (1955); Minn.Stat. Ann. § 303.13 (1947); N.Y.Civ.Prac. Act, § 229-b; N.Y.Veh. & Tfc. Law § 253, and it has been sanctioned by the courts even in the absence of statutory provision specifying that form of service. *Zurini v. United States*, 189 F.2d 722 (8th Cir.1951); *United States v. Cardillo*, 135 F.Supp. 798 (W.D.Pa.1955); *Autogiro Co. v. Kay Gyroplanes, Ltd.*, 55 F.Supp. 919 (D.D.C.1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to by the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, e.g., 35 U.S.C. §§ 146, 293; 38 U.S.C. § 784(a); 46 U.S.C. § 1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. *Cf.* Rule 45(c); N.Y.Civ.Prac.Act §§ 233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unim-

peded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is this alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another "sovereign," may be particularly offensive to the foreign country. See generally Smit, *supra*, at 1040-41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining \*120 the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

*Subdivision (i)(2)*. When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See Jones, *supra*, at 537; Longley, *supra*, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc. v. La Metropolitana*, 183 F.Supp. 357 (S.D.N.Y.1960).

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## **Out of State Cases**

## Loislaw Federal District Court Opinions

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LEMME v. WINE OF JAPAN IMPORT, INC., (E.D.N.Y. 1986)

631 F. Supp. 456

Raymond LEMME, Individually and as assignee of certain rights of Wine Imports of America, Ltd., a New York Corporation, Plaintiff, v. WINE OF JAPAN IMPORT, INC. and Konishi Brewing Co., Ltd., Defendants.

No. 84 CV 2362.

United States District Court, E.D. New York.

March 28, 1986.

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[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]

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Epstein, Becker, Borsody & Green, P.C., New York City, for plaintiff.

Wender, Murase & White, New York City, Konishi Brewing Co., Douglas A. Danzig, for defendants.

### MEMORANDUM AND ORDER

McLAUGHLIN, District Judge

This is a motion by defendant Konishi Brewing Co., Ltd. ("Konishi"), a Japanese corporation with its principal place of business in Japan, to dismiss plaintiff's complaint for lack of personal jurisdiction, insufficiency of process and insufficient service of process. Fed.R.Civ.P. 12(b)(2), (4), (5). Although a default judgment against Konishi has been noted, no one has questioned the propriety of defendant's motion, and both parties have briefed the personal jurisdiction issue. The Court will therefore treat defendant's motion as one for relief from a default judgment as well as for dismissal. Fed.R.Civ.P. 60(b)(4). For the reasons developed below, Konishi's motion is denied.

*Facts*

Plaintiff brought this diversity action against Konishi and Wine of Japan Import, Inc. ("Wine of Japan") for damages caused by defendants' alleged breach of a June 16, 1975 agreement (the "Agreement") between Wine of Japan and Wine Imports of America, Ltd. ("Wine Imports"). Wine Imports was a New York corporation of which plaintiff, a New Jersey citizen, was an officer and director. Wine of Japan is a New York corporation.

Under the Agreement, Wine Imports would purchase certain wine products for distribution in the United States. All sales were to be made f.o.b. Japan. In addition, the Agreement contained a clause providing for consent to jurisdiction in New York.

On August 4, 1975, Konishi, a major shareholder of Wine of Japan, lent its credit to the deal by guaranteeing "the performance of each and every term and condition of [the Agreement] as if said obligations, representations and warranties were of and made by it, or the conditions and terms of said Agreement were to be performed and [sic] by it."<sup>[fn1]</sup> Konishi signed this agreement in Japan.

Konishi is a Japanese corporation with its principal place of business in Japan. It is not licensed to do business in New York. Konishi maintains no offices, employees or bank accounts in New York, owns no property here, and never solicits business or advertises its products in this state. Its only tangible contact with New York is that it sends a representative to an annual wine wholesalers' trade show here.

Konishi shares no common directors or officers with Wine of Japan, but it does

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own twenty-seven percent of Wine of Japan's stock. Konishi sells all its products to Crown Trading Co., Ltd. ("Crown Trading"), a Japanese corporation, which in turn exports the products to the United States. Konishi owns none of the stock of Crown Trading and exports no products to the United States itself.

#### *Discussion*

##### *1. Lack of a Basis for Personal Jurisdiction*

Upon a motion to dismiss for lack of personal jurisdiction, a district court may rely on the affidavits, permit discovery in aid of the motion, or conduct an evidentiary hearing. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). Upon analysis it is clear that the jurisdictional issue in this case<sup>[fn2]</sup> may be resolved by examination of the pleadings and affidavits alone.

a. *Jurisdiction Under C.P.L.R. § 302(a) (1)*

In the first of his three theories, plaintiff argues that this Court has jurisdiction over Konishi under New York C.P.L.R. § 302(a) (1). Section 302(a) permits a court to assert jurisdiction over a non-domiciliary 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. . . .," provided plaintiff's claim arises out of the transaction or contract. Plaintiff argues that when Konishi signed the guaranty, it "contract[ed] . . . to supply goods or services in the state."

Plaintiff relies on *Culp & Evans v. White*, 524 F.Supp. 81 (W.D.N.Y. 1981). In that case the Court sustained personal jurisdiction on the basis of the "contracts anywhere" clause of section 302(a) (1) over a non-domiciliary who had signed guaranties for a construction contract that was to be performed in New York. *Id.* at 82-83; accord *Chemco International Leasing, Inc. v. Meridian Engineering, Inc.*, 590 F.Supp. 539, 542-44 (S.D.N.Y. 1984). Here, however, the contract Konishi guaranteed was to be performed in Japan. When a foreign corporation sells goods f.o.b. out-of-state, it does not, under section 302(a) (1), perform its contract in New York. *Agrashell, Inc. v. Bernard Sirotta Co.*, 344 F.2d 583, 588-89 (2d Cir. 1965). Because Wine of Japan was to perform its contract in Japan, no personal jurisdiction exists over Konishi on the basis of the "contracts anywhere" clause of section 302(a) (1).

b. *Jurisdiction Based on Agency*

In the second of his arguments, plaintiff asserts that Konishi is doing business in New York through its agent<sup>[fn3]</sup> Wine of Japan, and is thus subject to jurisdiction under C.P.L.R. § 301. To find jurisdiction based on agency, plaintiff must establish that Wine of Japan "acted in this state for the benefit of and with the knowledge and consent of [Konishi] and [Konishi] must exercise some element of control over [Wine of Japan]." *Louis Marx & Co. v. Fuji Seiko Co.*, 453 F.Supp. 385, 390 (S.D.N.Y. 1978); see *Selman v. Harvard Medical School*, 494 F.Supp. 603, 611 (S.D.N.Y.), *aff'd without opinion*, 636 F.2d 1204 (2d Cir. 1980).

Construing plaintiff's papers in the light most favorable to him, <sup>[fn4]</sup> he has

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alleged the following: that Konishi is a twenty-seven percent shareholder in Wine of Japan; that Konishi knew that plaintiff would be contracting with Wine of Japan; that plaintiff, on a trip to Japan as Wine of Japan's guest, met with Konishi officials; that Konishi and Wine of Japan used a similar

trademark on their stationery; and that plaintiff negotiated with a Wine of Japan representative to obtain the Konishi guaranty. These facts, however, do not make Wine of Japan Konishi's agent.

An inference of agency may be warranted when a foreign corporation and another corporate entity doing business in the state are commonly owned, see *Furman v. General Dynamics Corp.*, 377 F.Supp. 37, 43 (S.D.N.Y. 1974); *Delagi v. Volkswagenwerk AG of Wolfsburg Germany*, 29 N.Y.2d 426, 431, 328 N.Y.S.2d 653, 656, 278 N.E.2d 895, 897 (1972); Restatement (Second) of Agency § 14M, but that is not the case here. The crucial issues are whether the foreign corporation controls the New York corporation, *id.*, and whether the two corporations agree that the latter is acting primarily for the foreign corporation's benefit, *id.* § 14L.

Plaintiff argues that Wine of Japan became Konishi's agent when the plaintiff insisted to a Wine of Japan representative that Konishi guarantee Wine of Japan's performance. The mere communication to Konishi of plaintiff's request for the guaranty, however, does not establish that Wine of Japan was acting as Konishi's agent. Nothing in plaintiff's allegations demonstrates that Konishi exercised any control over Wine of Japan - let alone an amount sufficient to make Wine of Japan its agent - or that Wine of Japan acted primarily for Konishi's benefit. Analytically, plaintiff's argument is that in a suretyship relationship the principal obligor is the agent of the surety for jurisdictional purposes. No authority is cited for this startling proposition, and I decline to adopt it.

Nor has plaintiff established an apparent agency relationship between the two defendants. Plaintiff has adduced no facts to show that Konishi has at any time manifested to him or the community at large that Wine of Japan is its agent. Nor is there any evidence that Konishi ratified the acts of Wine of Japan or in any other way acted in a manner that would make it liable as a principal.

In sum, plaintiff has shown only that Wine of Japan sold products originally distributed by Konishi in Japan, that Konishi knew of the Agreement between Wine of Japan and plaintiff, and that Konishi guaranteed it. This is simply not enough to establish an agency.

### c. *Consent to Jurisdiction*

Plaintiff's final theory is that Konishi consented to jurisdiction in this Court by signing the guaranty. Its argument is straightforward: because the underlying contract (between plaintiff and Wine of Japan) contains a consent-to-jurisdiction clause, the guarantor must "perform" that term by submitting to

jurisdiction in this forum. Konishi responds that a non-domiciliary guarantor does not become amenable to suit in a forum just because the principal obligor consented to jurisdiction in the underlying contract.

Where C guarantees that B will perform his contract with A, jurisdiction over B does not carry with it jurisdiction over C. Plaintiff must establish a basis of jurisdiction over each defendant. Consent, of course, is a well established basis of personal jurisdiction, [fn5] and plaintiff argues that  
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this is precisely what we have here: Konishi guaranteed

the obligations, representations and warranties made by Wine of Japan Import, Inc. including the performance of each and every term and condition of an Agreement dated June 16, 1975 as if said obligations, representations, and warranties were of and made by it, or the conditions and terms of said Agreement were to be performed and [sic] by it.

Konishi undertook to guarantee more than simply the delivery of the products ordered by plaintiff; it adopted as its own each and every term and condition of the Agreement. This emphatic expression of intent to assume every obligation under the contract necessarily included the consent-to-jurisdiction clause. To interpret this clause narrowly by giving it the most niggardly reading possible is neither good jurisprudence nor good economics. See *Export Ins. Co. v. Mitsui S.S. Co.*, 26 A.D.2d 436, 437-38, 274 N.Y.S.2d 977, 980 (1st Dep't 1966).

Konishi relies on *Pal Pools, Inc. v. Billiot Bros., Inc.*, 57 A.D.2d 891, 394 N.Y.S.2d 280, 281 (2d Dep't 1977), for the proposition that a guarantor cannot be deemed to have consented to jurisdiction merely because the underlying agreement it guarantees contains a consent-to-jurisdiction clause. There, as here, the underlying contract contained a jurisdictional consent clause. There, however, the guaranty agreement contained only a choice of law provision. Thus, it was reasonable to conclude that the parties had carefully distinguished between the two documents, intending only that the guarantors be governed by the substantive law of New York, not that they be subject to its jurisdiction as well.

Here, by contrast, there is no indication that the parties intended any such distinction. Indeed, the guarantee virtually incorporates the contract by reference. In such a situation, the only reasonable interpretation is that the consent-to-jurisdiction clause was meant to bind both Wine of Japan and Konishi.

Similarly, in *General Electric Credit Corp. v. Toups*, No. 85 CV 1740 (S.D.N.Y. Aug. 13, 1985) [Available on WESTLAW, DCTU database] (available on LEXIS, Genfed library, Dist. file), a loan agreement and certain corporate guarantees contained consent clauses, but there was no mention of jurisdiction in the assumption agreements on which plaintiff was attempting to sue. Because the assumption agreements mentioned only selected provisions of the loan agreements, the court concluded that the parties did not intend the consent-to-jurisdiction clause to be assumed. The court indicated, however, that the result might be different if the assumption agreement incorporated by reference a document containing a consent-to-jurisdiction clause. That is precisely the situation here.

Purely as a matter of economics, it is "only realistic to assume that the guarantee [was an] important inducement," *Panos Inv. Co. v. District Court*, 662 P.2d 180, 183 (Colo. 1983), for Wine Imports to do business with Wine of Japan. The first draft of the original contract between Wine Imports and Wine of Japan actually included Konishi as a party to the contract (Affidavit of Raymond Lemme ("Lemme Aff.") ¶ 2, at 2). Plaintiff agreed to Wine of Japan's request that Konishi be omitted, but "insisted . . . that Konishi provide [Wine Imports] with a full and unrestricted guarantee of each and every term of [the] Agreement with Wine of Japan" (Lemme Aff. ¶ 2 at 2).

In these circumstances Konishi could "reasonably anticipate being hauled into court [in New York]," *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980), and it would be unfair to allow it now to evade jurisdiction here.

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## 2. Process

Konishi also argues that the complaint should be dismissed because of insufficient process and insufficient service of process. Fed.R.Civ.P. 12(b)(4), (5). It argues that because the summons and complaint were not properly delivered or translated, this Court never obtained jurisdiction over the defendant.

### a. Service of Process

Fed.R.Civ.P. 4(e)<sup>[fn6]</sup> provides that the authority for effecting foreign service must be found in a federal statute or a statute or court rule of the state in which the district court sits.<sup>[fn7]</sup> A method enumerated in the authorizing statute is always sufficient to effectuate service. See Advisory Comm. Note to 1963 Amendment to Fed.R.Civ.P. 4. Fed.R.Civ.P.

4(i) [fn8] "introduces considerable further flexibility by permitting the foreign service . . . to be carried out in any of a number of other alternative ways that are also declared to be sufficient." *Id.* The methods described in 4(i) may be limited, however, if a treaty on service exists between the countries of the plaintiff and the defendant. See C. Wright & A. Miller, *Federal Practice & Procedure* § 1133 (1985 Supp.) at 258.

The United States and Japan have entered into the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (The "Hague Convention" or "Convention"), 20 U.S.T. 361, T.I.A.S. No. 6638, reprinted in 28 U.S.C.A. Fed.R.Civ.P. 4 (West Supp. 1985), which proves a mechanism by which a party who is authorized by the laws of his own country to serve process can do so in a way that is acceptable to the country in which he makes service, see *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir.), cert. denied, 454 U.S. 1085, 102 S.Ct. 642, 70 L.Ed.2d 620 (1981).

The Convention outlines several methods for serving judicial documents and permits signatory nations to object to any or all of them. Thus, if authorized to serve abroad

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under Rule 4(e), a party may serve a document using any Rule 4(i) method, as long as the country receiving service has not objected to it in the Hague Convention or otherwise. See *id.* at 288-89; D. Siegel, Supplementary Practice Commentary C4-34, 28 U.S.C.A. Fed.R.Civ.P. 4 (West Supp. 1985), at 70-71.

On May 31, 1984, this court signed an *ex parte* order under Rules 4(e) and (i) permitting plaintiff to give a copy of the summons and complaint to Wine of Japan for delivery to Konishi. It also allowed plaintiff to arrange for a Japanese attorney to send a second set of the papers to defendant through Japan's postal service. The summons (but not the complaint) mailed to Konishi had been translated into Japanese. A receipt of service was signed by Konishi and returned to the Japanese attorney, who had the receipt translated into English and then forwarded it to plaintiff's attorney in New York.

Konishi contends that because Wine of Japan was and is not the agent of Konishi, delivery of the summons and complaint to the former does not establish jurisdiction over the latter. It also states that the service was insufficient because it is invalid under the Hague Convention. Article Ten of that document reads as follows:

Provided the State of destination does not object,  
the present Convention shall not interfere with -

(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

The government of Japan, however, has specifically objected "to the use of the methods of service referred to in subparagraphs (b) and (c) of Article 10." Hague Convention, 28 U.S.C.A. Fed.R.Civ.P. 4 (West Supp. 1985), at 97 n. 12. It permits personal service on a defendant to be made only by a representative of the nation's designated Central Authority, as provided for in Articles Two through Six of the Convention. Thus, Konishi argues, the personal service in Japan was invalid because it was not executed through the Central Authority.

Plaintiff does not challenge the assertion that Wine of Japan is not Konishi's agent for service of process. Rather, it contends that the mail service on Konishi was proper, noting that Japan has not objected to subparagraph (a) of Article Ten, which permits judicial documents to be sent by mail. Konishi points out in response that Section 10(a) refers to "the freedom to send judicial documents," while sections 10(b) and 10(c) refer to "the freedom to effect service of judicial documents" (emphasis added). Thus, it argues, section 10(a) permits mail delivery only of interlocutory papers such as interrogatories; service of process, in contrast, may be accomplished only through the Central Authority, because Japan has objected to sections 10(b) and 10(c).

"Although there is some merit to the proposed distinction, it is outweighed by consideration of the entire scope of the convention." *Shoei Kako Co., Ltd. v. Superior Court, San Francisco*, 33 Cal. App.3d 808, 821, 109 Cal.Rptr. 402, 411 (1973). In light of the fact that the Convention "purports to deal with the subject of service abroad. . . . [t]he reference to 'the freedom to send judicial documents by postal channels, directly to persons abroad' would be superfluous unless it was related to the sending of such documents for the purpose of service." *Id.* The only other courts to address this issue have

agreed. See *Weight v. Kawasaki Heavy Indus., Ltd.*,  
597 F.Supp. 1082, 1085-86 (E.D. Va. 1984); *Chrysler Corp. v. General Motors Corp.*, 589 F.Supp. 1182, 1206 (D.D.C. 1984); see also  
Practical Handbook on  
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the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, at 15 ("Japan has not declared that it objects to service through postal channels.").

Konishi disagrees with these authorities, noting that it would be incongruous for Japan to require that personal service be made only through the Central Authority but also to permit service by mail. This argument makes sense if one assumes that the only concern is the reliability of the method used. If, however, Japan's interest is in promoting the use of the least intrusive means of notifying its citizens of lawsuits filed against them, it would be logical to permit only representatives of the Central Authority or the postal service to serve process. In other words, Japan may have rejected sections 10(b) and 10(c) because it is more concerned with who is arriving on the doorstep of its citizen to serve process than with how that process is served. If so, there is no incongruity involved in Japan's requirement that service be made only through the mail or the Central Authority.<sup>[fn9]</sup>

Accordingly, I conclude that the prevailing interpretation of Article Ten of the Hague Convention as applied to Japan is sound and that the service by mail in this case is therefore proper.

#### b. Sufficiency of Process

Konishi's final contention is that the process itself was insufficient because Article Five of the Convention requires that the papers be translated into Japanese in order for the service to be valid. This argument fails for two reasons.

In the first place, the translation "requirement"<sup>[fn10]</sup> is triggered only when it is the Central Authority that serves the document. See Hague Convention Article 5, 28 U.S.C.A. Fed.R.Civ.P. 4 (West Supp. 1985), at 88 ("If the document is to be served [by the Central Authority], the Central Authority may require the document to be written in, or translated into, the official language . . . of the State addressed."). Where the method used is direct postal service under section 10(a), the document need not be translated. *Weight v. Kawasaki Heavy Indus. Ltd.*, *supra*, 597 F.Supp. at 1086.

In the second place, the summons in this case was translated, so Konishi had actual notice of the existence of the proceeding

against it. See generally *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342, 85 L.Ed. 278 (1940) (If form of service "employed is reasonably calculated to give [the defendant] actual notice of the proceedings and an opportunity to be heard. . . . the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.") (citation omitted). I thus conclude that the fact that the complaint was not translated into Japanese does not render the process insufficient.

#### Conclusion

For the reasons stated above, Konishi's motion to vacate the default judgment and dismiss the complaint for lack of jurisdiction is denied.

SO ORDERED.

[fn1] The guaranty is poorly translated. It is signed by the president of Konishi and states "We . . . guarantee the obligations . . . [of] Wine of Japan . . . as if said obligations . . . were . . . to be performed by *it*" (emphasis added). Read literally, the provision would be meaningless. The only reasonable interpretation is that the parties intended to say "as if [those obligations] were . . . to be performed by *us*."

[fn2] Because this is a diversity action, state law — in this case that of New York — governs the issue of personal jurisdiction. See *Braman v. Mary Hitchcock Mem. Hospital*, 631 F.2d 6, 7 (2d Cir. 1980); *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 225-26 (2d Cir. 1963).

[fn3] It has been said that the term "agent" has a broader meaning in the jurisdictional sense than when used in a common law context. See *Merkel Associates, Inc. v. Bellofram Corp.*, 437 F.Supp. 612, 617 n. 2 (W.D.N.Y. 1977).

[fn4] While the burden is ultimately on the plaintiff to prove by a preponderance of the evidence that the court has personal jurisdiction over the defendant, when no evidentiary hearing is held on a motion to dismiss for lack of jurisdiction, the court must view the pleadings and affidavits in the light most favorable to the plaintiff. See *Guardino v. American Savings & Loan Ass'n of Florida*, 593 F.Supp. 691, 694 (E.D.N.Y. 1984); *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa*, 428 F.Supp. 1237, 1241 (S.D.N.Y. 1977).

[fn5] The Supreme Court has recently noted that

because the personal jurisdiction requirement is a waivable right, there are a "variety of legal arrangements" by which a litigant may give "express or implied consent to the personal jurisdiction of the court." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 [72 L.Ed.2d 492] (1982). For example, particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. See *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). Where such forum-selection provisions have been obtained through "freely negotiated" agreements and are not "unreasonable and unjust," *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513 (1972), their enforcement does not offend the process.

*Burger King Corp. v. Rudzewicz*, \_\_\_ U.S. \_\_\_, 105 S.Ct. 2174, 2182 n. 14, 85 L.Ed.2d 528 (1985).

[fn6] Fed.R.Civ.P. 4(e) states:

*Summons: Service Upon Party Not Inhabitant of or Found Within State.*

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of the court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the

statute or rule.

[fn7] Konishi has not questioned the existence of authority under state law for effectuating foreign service under Rule 4(e).

[fn8] Fed.R.Civ.P. 4(i) states, in relevant part:

*Alternative Provisions for Service in a Foreign Country.*

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

[fn9] One court has indicated that in the eyes of the defendant's country, use of the mails might even be preferable to use of the Central Authority. See *Chrysler Corp. v. General Motors Corp.*, *supra*, 589 F.Supp. at 1206 ("[S]ervice . . . by registered mail may . . . be viewed as the least intrusive means of service — i.e., the device which minimizes the imposition upon the local authorities . . .") (quoting *F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1313 & n. 68 (D.C. Cir. 1980)).

[fn10] The translation provision is actually not even mandatory. It states that the Central Authority *may* require translation. See Hague Convention Article 5, 28 U.S.C.A. Fed.R.Civ.P. 4 (West Supp. 1985), at 88.

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## Loislaw Federal District Court Opinions

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LOUIS DREYFUS CORP. v. McSHARES, INC., (E.D.La. 1989)

723 F. Supp. 375

LOUIS DREYFUS CORP., Plaintiff, v. McSHARES, INC., Defendant and Third Party Plaintiff, v. INTER-INDUSTRY INSURANCE CO., Third-Party Defendant.

Civ. A. No. 88-5489.

United States District Court, E.D. Louisiana.

October 16, 1989.

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### MEMORANDUM AND ORDER

SEAR, District Judge.

This matter comes before the Court on third-party defendant Inter-Industry Insurance Company's motion to set aside the default entered against it on June 27, 1989 and to dismiss for insufficient service and lack of personal jurisdiction. Because Inter-Industry Insurance Company was not properly served prior to the entry of default, the entry of default must be set aside. Further, the Court concludes that it lacks personal jurisdiction over Inter-Industry Insurance Company.

### FACTS

Plaintiff Louis Dreyfus Corp. ("Dreyfus") hired McShares, Inc. ("McShares") to fumigate some of Dreyfus's grain storage tanks located at Dreyfus's plant in Reserve, Louisiana. The work was performed by Research Fumigation Co. ("Fumigation"), a subsidiary of Research Products Co. ("Products"). Products is a division of McShares.

On September 24, 1988, a fire started in one of Dreyfus's tanks, damaging the tank and the grain stored within. Dreyfus filed this action on December 14, 1988 against McShares, Products, Fumigation, and Zurich

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Insurance Co, alleging that the fumigation work caused a chemical reaction which in turn started the fire in the tank. Dreyfus invoked this Court's diversity jurisdiction under

28 U.S.C. § 1332. On May 12, 1989, McShares, also alleging diversity, filed a third party complaint against Inter-Industry Insurance Company, Ltd. ("Inter-Industry"), a company organized under the law of Isle of Man, British Isles. Inter-Industry had written a general products liability insurance policy for Products. Named as an insured under the policy was "Research Fumigation Company, Division of McShares, Inc."

Prior to the entry of default, McShares attempted on two occasions to serve Inter-Industry in two different ways. On May 12, 1989, McShares had the clerk issue two summons. McShares served one copy upon the Louisiana Secretary of State and one copy upon Inter-Industry at an old address. The process sent directly to the old address was never received. The process sent via the Secretary of State was received on July 3, 1989, six days after the default was entered in this court. When McShares realized that the original service had been sent to the wrong address, McShares had the clerk reissue the summons and complaint on June 27, 1989. Again, McShares served Inter-Industry and the Secretary of State. The summons and complaint sent directly to Inter-Industry was sent via Emery Air Express. Inter-Industry received the summons and complaint on June 29, 1989.

Because Inter-Industry failed to appear, plead, or otherwise defend, McShares moved for an entry of default against Inter-Industry on June 23, 1989; a default was entered against Inter-Industry on June 27, 1989. By its motion filed on August 17, 1989, Inter-Industry seeks to set aside the default and to dismiss the third party claim against it on the grounds of insufficiency of service and lack of personal jurisdiction.

#### DISCUSSION

A judgment rendered without personal jurisdiction is void. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). Therefore, if Inter-Industry was improperly served, this court never had jurisdiction over Inter-Industry, and the entry of default must be set aside.

Rule 4 of the Federal Rules of Civil Procedure provides several ways to serve a foreign defendant. Although McShares attempted at least two methods of service on at least two separate occasions, McShares never fully complied with any of the methods set forth in Rule 4.

First, Rule 4(c)(2)(C)(i) provides that a foreign corporation may be served "pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of the State." In cases involving foreign

insurers, service under Louisiana law may be accomplished in two ways. Service under the long-arm statute, La.Rev.Stat. Ann. § 13:3201 is effective if "[a] certified copy of the citation and of the petition" is sent to the defendant "by registered or certified mail." La.Rev. Stat. Ann. § 13:3204. The record reflects that McShares never served Inter-Industry by registered or certified mail prior to the entry of default, and therefore McShares' attempts to serve Inter-Industry are ineffective under the long-arm statute.

Louisiana also has a provision explicitly providing for service of process upon foreign insurers - La.Rev.Stat Ann. § 22:1253(B).<sup>[fn1]</sup> This was one of the avenues McShares attempted to utilize in serving Inter-Industry. For proper service under § 22:1253(B), a number of steps must be followed. First, the plaintiff's attorney must deliver two copies of the summons and complaint to the secretary of state. The secretary will then send the copies by registered mail to the defendant's last known address. Within 10 days after delivery

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of the summons and complaint to the secretary of state, the plaintiff's attorney must send, by registered mail, notice of service and a copy of the complaint to the defendant's last known address. Finally, the receipt of plaintiff's notice, plus an affidavit from the plaintiff's attorney stating that he has complied with the provisions of § 22:1253(B), must be filed in the record. Because McShares failed to file the requisite receipts and affidavits of compliance, both attempts to serve Inter-Industry through the Secretary of State under § 22:1253(B) failed.

Rule 4 provides also that service may be accomplished by mailing: 1) a copy of the summons and complaint; 2) 2 copies of the notice and acknowledgement; and 3) a stamped, self-addressed envelope to the defendant directly. Rule 4(c)(2)(C)(ii). This was the second method of service McShares intended to use. According to the rule, if no acknowledgement is received within 20 days after mailing, the plaintiff must effect personal service under Rule 4(c)(2)(A) or (B). In this case, McShares did not receive an acknowledgement within 20 days after the first direct mailing (that is, by June 1), nor did McShares effect personal service after June 1. Therefore, McShares failed to meet the requirements of Rule 4(c)(2)(C)(ii).

The final option available to McShares is set forth in Rule 4(i) - Alternative Provisions for Service in a Foreign Country.<sup>[fn2]</sup> The only applicable provision here is Rule 4(i)(1)(D): "it is sufficient if service of the summons and complaint is made . . . by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of court to

the party to be served."

The two mailings requiring return receipts (as required by Rule 4(i)(1)(D)) are the Emery mailing received on June 29, 1989<sup>[fn3]</sup> and the Secretary of State's mailing received on July 3, 1989. As no mailing to Inter-Industry was addressed and dispatched by the clerk of court, service was not accomplished under Rule 4(i).

Inter-Industry was not properly served prior to the entry of default; nor was Inter-Industry properly served as of July 3, 1989. Because service has not been accomplished properly upon Inter-Industry, the entry of default is void and must be set aside. See *Leab v. Streit*, 584 F. Supp. 748, 760 (S.D.N.Y. 1984). Actual notice does not remedy otherwise defective service, *id.*, citing *Wuchter v. Pizzutti*, 276 U.S. 13, 48 S.Ct. 259, 72 L.Ed. 446 (1928); nor did Inter-Industry waive its objection when it failed to come forward within twenty days of this technically defective service. "Although there would not appear to be any constitutional infirmity in holding that [the defendant] did waive its objection in this case, since actual notice was received, the better approach seems to be to start the twenty day period for waiver when in personam jurisdiction is obtained by valid service." *Leab*, 584 F. Supp. at 760.

Although Inter-Industry was not properly served as of July 3, 1989, the preceding discussion does not entirely dispose of the question of Inter-Industry's further participation in this case for the simple reason that McShares again attempted to serve process upon Inter-Industry on September 1, 1989. Assuming without deciding that service was properly effected on September 1, 1989 or shortly thereafter, I turn to Inter-Industry's motion to dismiss for lack of personal jurisdiction.

In a diversity case, a federal district court may exercise in personam jurisdiction over a foreign defendant only to the extent permitted by state law. *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279 (5th Cir.), modified on other grounds, 853 F.2d 292 (5th Cir. 1988). In order to determine  
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whether jurisdiction exists over Inter-Industry, two questions must be answered. First, does Louisiana law permit the exercise of jurisdiction over a foreign insurer, and second, does Inter-Industry have such minimal contacts with the State of Louisiana such that the exercise of jurisdiction over Inter-Industry comports with traditional notions of fair play and substantial justice? *International Shoe v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

With respect to the first question, the Louisiana long-arm statute provides: "[A] court of this state may exercise personal

jurisdiction over a non-resident on any basis consistent with the . . . Constitution of the United States." La.Rev.Stat. Ann. § 13:3201(B).<sup>[fn4]</sup> Therefore, under the long-arm statute, "the sole inquiry into jurisdiction over a non-resident is a one-step analysis of the constitutional due process requirements." *First Guaranty Bank of Hammond v. Attorneys Liability Assurance Society, Ltd.*, 515 So.2d 1080, 1083 (La. 1987).

In evaluating the strength of a defendant's contacts with the forum state, it must appear "that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985), quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). One aspect of this inquiry includes an analysis of whether the defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475, 105 S.Ct. at 2183, quoting *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958). If the contacts are "random, fortuitous, or attenuated," or the result of the "unilateral activity of another party or third person," jurisdiction cannot be supported. *Burger King*, 105 S.Ct. at 2183.

Of the cases exploring the due process limits on personal jurisdiction, the case most on point is *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1958). In *McGee*, an Arizona insurer had sold a life insurance policy to a California insured. Subsequently, a Texas insurer took over the Arizona company. Despite the fact that the Texas insurer had no office or agents in California, and never solicited or did any insurance business in California except the one policy, the Supreme Court held that where the policy was delivered to California, premiums were paid from California, and the insured was a California resident, California did not violate due process by exercising jurisdiction over the Texas insurer.

Inter-Industry has no office in Louisiana, does not write policies in Louisiana, and delivers no policies to Louisiana. The Inter-Industry insurance policy at issue in this case was written in Isle of Man and delivered to McShares in Kansas. Fumigation — a subsidiary of a division of McShares — is a Louisiana resident and a named insured. At this point, it is unknown whether McShares or Fumigation (or both) pays the premiums on the policy, but it appears that all correspondence from Inter-Industry (or its agent, Beauman & Beauman, Ltd.) relating to the claim, including correspondence concerning the appointment of a Metaire adjuster to investigate the claim, was sent to Kansas. In addition, the

Metaire adjuster was employed by another company ("U.A.C.").

On these facts, Inter-Industry's contacts with Louisiana do not satisfy even the *McGee* standard. The only apparent contact with Louisiana is the insurance policy, and a contract, standing by itself, is insufficient to support jurisdiction. *Cf. Burger King, supra, 105 S.Ct. at 2185* ("If the question is whether an individual's contract with an out-of-state party alone can automatically

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establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.") (emphasis in original). Because of the insurance policy, Inter-Industry had to contact the Metaire adjuster, but Inter-Industry cannot be said to have purposefully availed itself of the privilege of conducting business in Louisiana. Rather, Inter-Industry's contacts with Louisiana result from the unilateral activity of McShares and its subsidiaries. While Inter-Industry might reasonably anticipate being haled into court in Kansas, its contacts with Louisiana are too attenuated to support jurisdiction here.<sup>[fn5]</sup>

Accordingly, IT IS ORDERED that the default entered against third-party defendant Inter-Industry is SET ASIDE, and

IT IS FURTHER ORDERED that defendant Inter-Industry is DISMISSED from this action for lack of personal jurisdiction over Inter-Industry.

[fn1] When suing a foreign insurer under Louisiana's insurance code, service may be effected pursuant to either the long-arm statute or the insurance statute. See *Travelers Indemnity Co. v. Atlantic Express Line, 837 F.2d 187, 189* (5th Cir. 1988); *First Guaranty Bank v. Attorneys Liability Assurance Society, Ltd., 515 So.2d 1080, 1083* (La. 1987).

[fn2] I say "final" because although Rule 4(e) describes the manner of service upon a party not inhabitant of or found within the state, Rule 4(e) simply encompasses the methods discussed herein.

[fn3] Emery Air Express does not require a signed receipt from the recipient unless specifically requested by the sender. I have assumed for purposes of this discussion that the mailing in question did require a return receipt, although there is nothing in the record to verify this.

[fn4] As discussed *supra* at 377, Louisiana has a statute that asserts jurisdiction over non-resident insurers "transacting business" in Louisiana (La.Rev.Stat. Ann. § 22:1253). However, the long-arm statute makes this statute "unnecessary." *First Guaranty Bank of Hammond v. Attorneys Liability Assurance Society, Ltd.*, 515 So.2d 1080, 1083 (La. 1987).

[fn5] Compare *First Guaranty Bank v. Attorneys Liability Assurance Society, Ltd.*, 515 So.2d 1080 (La. 1987), in which the Louisiana Supreme Court held that a Bermuda company which provided legal malpractice insurance to four large Louisiana law firms over a period of five years, collected premium payments wired directly from New Orleans to Bermuda, and sent a representative to New Orleans to meet with various insureds was subject to personal jurisdiction in Louisiana.

**Loislaw Federal District Court Opinions**

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PIZZABIOCCHÉ v. VINELLI, (M.D.Fla. 1991)

772 F. Supp. 1245

Jorge PIZZABIOCCHÉ, Rodolfo Deambrosi, Enrique Gonzalez, Guillermo Caballero, Osvaldo Fraga, Individually and Derivatively for Full Service Storage Corp., a Florida corporation, Plaintiffs, v. Guillermo VINELLI, Urbano E. Garcia-Tobar, Irene Hamernik, Luis F. Bustelo, Robert J. Termotto, F. Andrew Daltroff, Harvey Youngquist, and Dufaur Corporation, Defendants.

No. 89-243-CIV-FTM-17B.

United States District Court, M.D. Florida,

Fort Myers Division

September 6, 1991.

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Judith M. Korchin, Holland & Knight, Miami, Fla., Carl H. Winslow, Jr., Ft. Myers, Fla., for plaintiffs Jorge Pizzabiocche, Rodolfo Deambrosi, Enrique Gonzalez, Guillermo Caballero, Osvaldo Fraga and Full Service Storage.

Theodore Lawton Tripp, Jr., Garvin & Tripp, P.A., Ft. Myers, Fla., for defendant Robert J. Temotto.

Norman Malinski, Hertzberg & Malinski, P.A., Miami, Fla., for defendant F. Andrew Daltroff.

Steven Carta, Peper, Martin, Jensen, Maichel & Hetlage, Ft. Myers, Fla., for defendant Harvey Youngquist.

Gordon R. Duncan, Duncan, Engvalson & Mitchell, Ft. Myers, Fla., for defendant Dufaur Corp.

ORDER

KOVACHEVICH, District Judge.

This motion is before the Court on the motion of Defendants, Irene Hamernik (Hamernik), Luis Felix Bustelo (Bustelo), and Urbano E. Garcia-Tobar (Garcia-Tobar), filed pursuant to Rule 12 of the Federal Rules of Civil Procedure, to quash service of process and also on the motion of Defendants, Hamernik and Bustelo to dismiss Plaintiffs' complaint for lack of personal jurisdiction.

#### FACTUAL BACKGROUND

Plaintiffs, Jorge Pizzabioche, Rodolfo Deambrosi, Jose Enrique Gonzalez, Guillermo Caballero, Osvaldo Fraga (Plaintiff shareholders) bring their action individually and derivatively for FULL SERVICE STORAGE CORP. (FULL SERVICE) against Guillermo Vinelli (Vinelli), Garcia-Tobar, Hamernik, Bustelo, Robert J. Termotto (Termotto), F. Andrew Daltroff (Daltroff), Harvey Youngquist (Youngquist), and Dufaur Corporation (Dufaur). Each of the individual defendants is a citizen and resident of the Republic of Argentina. Dufaur is a corporation organized under the laws of New York with its principal place of business in New York.

All plaintiff shareholders except Deambrosi are citizens and residents of the Republic of Argentina. Deambrosi is a citizen and resident of Uruguay. Full Service Storage is a Florida corporation with its principal place of business in Fort Myers, Florida.

Plaintiffs rely on the provisions for service of process in a foreign country set out in Rule 4 of the Federal Rules of Civil Procedure to prove adequate service of process

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over defendants Hamernik, Bustelo, and Garcia-Tobar. In Plaintiffs' memorandum of law in opposition to Defendants Hamernik, Bustelo, and Garcia-Tobar's motion, Plaintiffs allege that they utilized the method of personal delivery to Defendants set forth in Rule 4(i)(1)(E) of the Federal Rules of Civil Procedure. Plaintiffs further allege that no applicable treaty or binding provision of international law exists that mandates compliance with any other means of service of process besides personal delivery of process.

Defendants Hamernik, Bustelo and Garcia-Tobar object to the Plaintiffs' method of service process, claiming that Plaintiffs' service of process is insufficient under the Inter-American Convention on Letters Rogatory signed at Panama, January 30, 1975, as amended by the Additional Protocol thereto, signed at Montevideo, Uruguay, on May 29, 1979. The Defendants claim that because the United States, Argentina and

Uruguay are signatory countries of the Convention and the Additional Protocol that service according to the Additional Protocol requires service in triplicate of letters rogatory, which must be sent through and officially sealed by a "Central Authority" in each State of destination where the process is to be served. Plaintiffs rely on the provisions of the Florida Statutes Section 48.193, Florida's long-arm statute, and 15 U.S.C. § 78aa, to establish personal jurisdiction over Defendants Hamernik and Bustelo. In Plaintiffs' memorandum of law in opposition to Defendants Hamernik and Bustelo's motion for dismissal for lack of personal jurisdiction, Plaintiffs allege four bases for jurisdiction over the Defendants Hamernik and Bustelo:

- 1) Defendant Bustelo engaged in substantial and not isolated activities within this state by continuous participation in corporate business in Florida for four years, solicited capital contributions for the company by telephone from Florida, and sent company correspondence and telecopies from Florida;
- 2) Defendants Bustelo and Hamernik committed tortious acts within the State of Florida by numerous misrepresentations to Plaintiff shareholders to induce them to invest in the corporation and to continue to hold shares in the corporation, failing to disclose to Plaintiffs the true purchase price of the property and the true identity of the property seller and Defendant Bustelo committed a tortious act within the State of Florida by breaching his fiduciary duty to both the corporation and Plaintiff shareholders;
- 3) Defendants Hamernik and Bustelo operated, conducted and engaged in a business or business venture within the State of Florida;
- 4) Defendants Hamernik and Bustelo are charged with violations of the Securities Exchange Act of 1934, which authorizes nationwide service of process and additionally provides for service of process in a foreign country.

In addition Plaintiffs allege that Defendants Hamernik and Bustelo have established meaningful contacts with the State of Florida for jurisdiction over the Defendants to satisfy the Due Process Clause.

Defendants object to this Court's assertion of jurisdiction

over them, claiming that Plaintiff's jurisdictional allegations are insufficient under both the Florida long-arm statute and federal due process requirement.

## CONTROLLING PRINCIPLES OF LAW

### *Service of Process*

Service of process in federal court is governed by the provisions of Rule 4 of the Federal Rules of Civil Procedure. Rule 4(i) sets out alternative provisions for service of process in a foreign country:

Federal Rule 4(i) provides:

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: . . .  
. . . or (c) upon an individual, by delivery to the individual personally, and upon a corporation, or partnership or association,

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by delivery to an officer, a managing or general agent. . . . Service under (c) or (e) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court . . .

Utilization by Plaintiffs of one of the methods of service set out in Rule 4(i) is sufficient to effect proper service of process upon a defendant who resides in a foreign country. However, the provisions of Rule 4(i) only apply in the instances where service in a foreign country is not prohibited by an international treaty. *Fout v. Allegheny Regional Hospital, Inc.*, 111 F.R.D. 467 (W.D.Va. 1986) (citing, *Harris v. Browning-Farris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D.La. 1984)).

The United States, Argentina and Uruguay are signatory countries to the Inter-American Convention on Letters Rogatory signed at Panama, January 30, 1975, as amended by the Additional Protocol thereto, signed at Montevideo, Uruguay, on May 8, 1979. The Inter-American Convention and the Additional Protocol provide in relevant part:

## "II. SCOPE OF THE CONVENTION

### "Article 2

"This Convention shall apply to letters rogatory, issued in conjunction with proceedings in civil and commercial matters held before the appropriate judicial or other adjudicatory authority of one of the State Parties to this Convention, that have as their purpose:

"a. The performance of procedural acts of a merely formal nature, such as service of process, summons or subpoenas abroad.

## "I. SCOPE OF PROTOCOL

### "Article 1

"This Protocol shall apply only to those procedural acts set forth in Article 2(a) of the Inter-American Convention on Letters Rogatory hereinafter referred to as "the Convention." For the purposes of this Protocol, such acts shall be understood to mean procedural acts (pleadings, motions, orders and subpoenas) that are served and requests for information that are made by a judicial or other adjudicatory authority of another State Party and are transmitted by a letter rogatory from the Central Authority of the State of origin to the Central Authority of the State of destination."

Inter-American Convention on Letters Rogatory, January 30, 1975, Art. 2 and Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, Art. 1.

## PERSONAL JURISDICTION

In a federal diversity action such as this, the presence or absence of personal jurisdiction is determined according to the law of the state in which the district court sits. *Bloom v. A.H. Pond Co., Inc.*, 519 F. Supp. 1162, 1165 (S.D.Fla. 1981). The court must first look to the applicable state long-arm statute. *Groome v. Feyh*, 651 F. Supp. 249, 250-51 (S.D.Fla. 1986).

Florida Statutes Section 48.193 provides in relevant part:

1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his personal representative to the

jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state.

(b) Committing a tortious act within this state.

. . . .

. . . .

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of

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this state, whether or not the claim arises from that activity.

*Fla.Stat.* § 48.193 (1989).

Satisfaction by Plaintiff of any one of the jurisdictional bases alleged in his Complaint is sufficient to confer jurisdiction on this Court.

Once the court has determined that jurisdiction is proper under the state long-arm statute, it must then consider whether assertion of jurisdiction comports with federal due process requirements. *Williams Electric Co. Inc. v. Honeywell, Inc.*, 854 F.2d 389, 392-92 (11th Cir. 1988); see also *Groome*, 651 F. Supp. at 254; *Bloom*, 519 F. Supp. at 1171-72. Due process requirements are satisfied only if a defendant has purposefully established minimum contacts within the forum state such that maintenance of the suit there does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 317, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). A defendant's conduct and connection with the forum state must be such that he would reasonably anticipate being haled into court thereto. *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

#### FINDINGS

#### *Service of Process*

Personal service of process on Defendants Hamernik, Bustelo, and Garcia-Tobar pursuant to the alternate provisions in Rule 4(i) of the Federal Rules of Civil Procedure is sufficient service of process. The Inter-American Convention and the Additional Protocol do not prohibit service of process in Argentina and Uruguay. The Inter-American Convention states that it shall apply to letters rogatory; it does not state that letters rogatory are the only means of serving process in the signatory countries. By merely outlining the procedures necessary to effectively use a letter rogatory, the Inter-American Convention does not prohibit other methods of service of process. Therefore, Plaintiffs' compliance with Rule 4(i) is proper service of process in Argentina and Uruguay of Defendants Hamernik, Bustelo, and Garcia-Tobar.

Defendants' assertion that the Inter-American Convention and the Additional Protocol should be interpreted in accordance with the case law interpreting the Hague Convention is incorrect. Argentina and Uruguay are not signatory countries to the Hague Convention. Further, the Hague Convention unlike the Inter-American Convention prohibits all methods of service on foreign signatory countries that does not comply with the Hague Convention requirements.

#### *Personal Jurisdiction*

In order to invoke the substantial activity provision of the Florida long-arm statute, plaintiffs must show that the defendant has engaged in "substantial and not isolated activity" with Florida. *Fla. Stat. § 48.193(2)* (1989). Plaintiffs have shown that Defendant Bustelo was engaged in substantial and not merely an isolated activity within the State of Florida. In a four year period Bustelo made at least six trips to Fort Myers, Florida in which he personally engaged in making decisions concerning Full Service. Bustelo was also a director and an officer of World Plaza Development Corporation, a Florida corporation, that managed the daily business of the Full Service mini-warehouse storage business. Bustelo also made a telephone call from Florida requesting money for construction of the Full Service mini-warehouses. Additionally, Bustelo, while in Florida, telecopied a recommendation to Plaintiffs that the business should be sold and he sent a letter to Plaintiffs concerning the Plaintiffs' refusal to place a second mortgage on the project. Moreover, while in Florida, Defendant exercised control over the corporate records, made copies of all stock certificates issued, and caused notices for an annual meeting of Full Service to be sent out to the Plaintiffs. Therefore, based on these substantial activities within the State of Florida, Defendant Bustelo is subject to the jurisdiction of this Court

pursuant to Florida Statutes section 48.193(2) (1989).

Plaintiffs have also shown that Defendant Hamernik has committed tortious acts within the State of Florida which renders Hamernik subject to the jurisdiction of this Court pursuant to Florida Statutes section 48.193(1)(b) (1989). For the purposes of this section of the long-arm statute, the place of the injury is the location of the tortious act. *Lee B. Stern & Co., Ltd. v. Green*, 398 So.2d 918, 919 (Fla. 3d DCA 1981).

First, Defendant Hamernik made numerous misrepresentations to Plaintiffs that induced them to invest in Full Service, a Florida corporation, and to continue to hold shares in the Corporation. Defendant Hamernik also attended a business meeting in Florida in which she failed to disclose to plaintiffs that the purchase price of the property was almost two times greater than its true market price and that the true identity of the property seller was William Mills, trustee and not Defendant Youngquist. Additionally, Hamernik aided and abetted the fraud perpetrated on Plaintiffs by failing to disclose this necessary information when she attended a meeting where fraudulent misrepresentations were made to Plaintiff Pizzabioche. These tortious acts clearly caused injury within the State of Florida and make Hamernik amenable to the jurisdiction of this Court based on section 48.193(1)(b) of the Florida Statutes.

Further, when all contacts are considered, due process is not offended by the exercise of this Court's jurisdiction over Defendants Bustelo and Hamernik. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985), the Court stated: "So long as a commercial actor's efforts are purposefully directed towards residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* at 476, 105 S.Ct. at 2184. In the instant case, Defendants Bustelo and Hamernik's contacts with the State of Florida are not so attenuated that the traditional notions of fair play and substantial justice noted in *International Shoe* would be offended. Accordingly, it is

ORDERED that Defendants' Motion for Seeking Quashal of Service of Process is DENIED and Defendants' Motion for Dismissal for Lack of Personal Jurisdiction is DENIED.

DONE and ORDERED.

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## **Out of State Statutes**

## Florida Statutes

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**Florida Statutes**  
**TITLE VI CIVIL PRACTICE AND PROCEDURE**  
**CHAPTER 48 PROCESS AND SERVICE OF PROCESS**

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### 48.193 Acts subjecting person to jurisdiction of courts of state. -

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state.

(c) Owning, using, possessing, or holding a mortgage or other lien on any real property within this state.

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(e) With respect to a proceeding for alimony, child support, or division of property in connection with an action to dissolve a marriage or with respect to an independent action for support of dependents, maintaining a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(2) A defendant who is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

(3) Service of process upon any person who is subject to the jurisdiction of the courts of this state as provided in this section may be made by personally serving the process upon the defendant outside this state, as provided in s. 48.194. The service shall have the same effect as if it had been personally served within this state.

(4) If a defendant in his or her pleadings demands affirmative relief on causes of action unrelated to the transaction forming the basis of the plaintiff's claim, the defendant shall thereafter in that action be subject to the jurisdiction of the court for any cause of action, regardless of its basis, which the plaintiff may by amendment assert against the defendant.

(5) Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereinafter provided by law.

**History.** — s. 1, ch. 73-179; s. 3, ch. 84-2; s. 3, ch. 88-176; s. 3, ch. 93-250; s. 281, ch. 95-147.