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I

INTRODUCTION

The proposition seems straightforward. Federal courts, applying federal law, should be able to exercise jurisdiction over parties having adequate contacts with the United States. This is especially important in admiralty actions, which often implicate worldwide commerce and involve substantial ties with the United States.

This jurisdictional dilemma, however, has been anything but straightforward. Obtaining jurisdiction over parties having numerous contacts with the United States, but lacking minimum contacts with an individual state necessary to satisfy the Constitution’s due process requirements, has long frustrated federal courts and litigators. Until recently, Rule 4 of the Federal Rules of Civil Procedure limited service of process to the procedures found under a specific substantive federal statute or a state long-arm statute.1 In

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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 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 of a summons, notice or order upon a party not a resident, or found within the state, or (3) for service of a summons, notice or order 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 rule.
cases not involving federal statutory service procedures, state long-arm jurisdiction required that the defendant have minimum contacts with the state. Thus, even if a defendant had substantial contacts across the United States, the absence of adequate contacts with the forum state rendered service impossible. One solution was a nationwide contacts test in cases involving federal law with service provided by a state long-arm statute. Another possible solution was a new federal common law rule for service of process in such cases. The Supreme Court has yet to decide the first approach, but rejected the latter in *Omni Capital International v. Rudolf Wolff & Co.*² In that case, the Court called upon Congress to revise the Federal Rules to allow service in some cases involving federal law.

In 1993, the rules were revised, and Rule 4(k)(2)³ was the result. That rule provides for national service, and consequently national minimum contacts, in cases involving federal law when the defendant is not subject to the jurisdiction of any state court. The provision's purpose is to answer the Court's concerns in *Omni* by filling the previously existing service gap.⁴

A question remains whether Rule 4(k)(2) applies in admiralty actions,⁵ which are not covered by the federal question jurisdiction found in 28 U.S.C. § 1331.⁶ More precisely, does the use of the words "federal law" in Rule 4(k)(2) imply broader coverage than federal question jurisdiction? If so, Rule 4(k)(2) could prove an invaluable tool for the admiralty lawyer.

To date, most courts addressing the issue have found Rule 4(k)(2) applicable in admiralty cases.⁷ Although admiralty has often had certain advantages in exercising jurisdiction for maritime attachment and *in rem* actions,⁸ problems remain with exercising jurisdiction over certain foreign

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⁵Advisory Committee Note of 1993, 1 J. Moore, Moore's Federal Practice § 4App.09[2], at 4App.-58 (3d ed. 1997) [hereinafter Advisory Note].
⁸See infra text accompanying notes 42–84.
⁹See T. Schoenbaum, Admiralty and Maritime Law §§ 18–2 & 18–3, at 884–904 (2d ed. 1994). These specialized means for obtaining jurisdiction in admiralty cases have been left whole despite the Supreme Court's holding that the presence of property within the state without otherwise meeting the minimum contacts requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), was
defendants in maritime cases. Given the nature of maritime trade, a foreign
defendant could easily have contacts with the United States as a whole, but
lack adequate contacts with any particular state.

Suppose, for example, that a collision occurs in the Mediterranean
between a vessel owned by a United States citizen and a foreign-owned
craft. That craft never calls at United States ports, making it impossible to
bring an in rem action. In addition, although the corporation owning the
foreign vessel has contacts throughout the United States, no individual state
has adequate contacts to support jurisdiction. Rule 4(k)(2) may be the only
method for obtaining jurisdiction. Even if the vessel is subject to attachment
in the United States, the cause of action may not provide for a lien on the
vessel or the potential liability may exceed the value of the vessel when an
in personam action is available and the Limitation Act9 unavailable.

Despite the confusion relating to Rule 4(k)(2)’s coverage, this author
believes that the rule does apply to admiralty cases and that the several court
decisions that have so held should be followed. Rule 4(k)(2) serves to foster
important admiralty policies relating to uniformity, predictability, and
efficiency. Indeed, there is no reason to limit admiralty jurisdiction while
expanding the courts’ jurisdiction in other areas of federal law. Given that
admiralty is a uniquely international legal regime, Rule 4(k)(2)’s extension
is particularly appropriate in cases involving maritime interests.

Beginning with a short history of national contacts jurisprudence and the
adoption of Rule 4(k)(2), this article next reviews the relevant case authority.
A close analysis of the rule establishes that admiralty should be included.
Finally, the article details the appropriate standards when applying Rule
4(k)(2) in admiralty cases.

II
THE DEVELOPMENT OF RULE 4(K)(2)
A. Development of a National Contacts Test

In order for a federal court to exercise personal jurisdiction over a
defendant, two requirements must be met. First, there must be statutory
authorization for the exercise of jurisdiction. Second, the court’s exercise of
jurisdiction must not violate the due process requirements of either the Fifth

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946 U.S.C. app. §§ 181–89 (allowing vessel owners to limit their liability to the value of the vessel
after an accident plus any freight owing).
or the Fourteenth Amendments.\textsuperscript{10} In federal diversity actions, the courts generally must apply state long-arm provisions and look only to the state contacts to determine whether jurisdiction is appropriate.\textsuperscript{11} In other cases, the courts have to rely on a state long-arm statute or the specific provisions of a substantive federal statute allowing for the exercise of jurisdiction.\textsuperscript{12} In many situations, federal statutes contain jurisdictional sections that provide for nationwide or worldwide service of process.\textsuperscript{13} These statutes have been interpreted by the courts as allowing a national minimum contacts test.\textsuperscript{14}

More difficult issues arise in cases involving a federal claim having no statutory provision providing for jurisdiction or service of process. In these cases, the courts have to use the state long-arm provision to attain jurisdiction.\textsuperscript{15} This does not necessarily mean, however, that the minimum contacts must be with the state, rather than the national jurisdiction. Most circuit courts determined that former Federal Rule of Civil Procedure 4(e) required minimum contacts with the state for jurisdiction in a federal question case.\textsuperscript{16} A strong minority view, however, held that the federalism concerns presented by the Fourteenth Amendment did not exist in a federal court applying federal law.\textsuperscript{17} These courts applied a national contacts test, even when using a state long-arm statute.

Thus, the situation was somewhat confusing. Fourteenth Amendment due process analysis applied in diversity cases in federal court. In cases where a


\textsuperscript{11}See, e.g., Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302 (3d Cir.), cert. denied, 117 S. Ct. 583 (1996); Doe v. National Medical Servs., 974 F.2d 143, 145 (10th Cir. 1992); Dehmlow v. Austin Fireworks, 963 F.2d 941, 945 (7th Cir. 1992); Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991); DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1264 (5th Cir. 1983); Data Disc, Inc. v. Systems Tech. Assocs., Inc., 557 F.2d 1280, 1286 (9th Cir. 1977).


\textsuperscript{13}See G. Born, International Litigation in United States Courts 174–75 (2d ed. 1996); Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406 (9th Cir. 1989); Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309 (9th Cir. 1985).

\textsuperscript{14}Born & Vollmer, supra note 12, at 222.

\textsuperscript{15}Casad, Personal Jurisdiction in Federal Question Cases, 70 Tex. L. Rev. 1589, 1594 (1992).


federal statute provided for nationwide or worldwide service process or had specific jurisdictional provisions, the courts could use a national contacts analysis. In a large class of cases applying federal law, however, the courts had to depend on state long-arm statutes for service. In these cases, it was unclear whether a state or national minimum contacts analysis was appropriate.18

B. Omni Capital International

The Supreme Court had an opportunity to further develop a national contacts approach in Omni Capital International v. Rudolf Wolff & Co.19 The issue was whether the federal courts could exercise personal jurisdiction over an alien defendant in an implied cause of action created by the Commodity Exchange Act (CEA),20 even though the defendant was not subject to the state long-arm statute and no federal statute specifically authorized jurisdiction. The Court declined to extend the federal courts’ jurisdiction.

Petitioner Omni argued that the district court’s jurisdiction in an implied CEA action is limited only by the Due Process Clause of the Fifth Amendment. Respondents Wolff and Gourlay urged that without an applicable federal service rule or statute, the district court lacked jurisdiction regardless of due process requirements. Omni countered that all that was necessary were minimum national contacts and notice, that the CEA implicitly authorized nationwide service, and that a common law service of process should fill the gaps left by Rule 4.21

Justice Blackmun’s unanimous opinion for the Court addressed Omni’s arguments in turn. First, he rejected the assertion that jurisdiction only required minimum national contacts and notice. Omni contended that once

18As one commentator observed:

United States courts and commentators have devoted comparatively little attention to the constitutional limitations on personal jurisdiction over foreign defendants. As a result, lower courts have taken a variety of inconsistent approaches to judicial jurisdiction questions in international cases. These divergent approaches have had the undesirable effect of treating similarly situated foreign litigants in unpredictable, disparate ways.

Id. at 43.


21484 U.S. at 103.
created by Congress,\textsuperscript{22} federal district courts could freely exercise personal jurisdiction, subject only to due process limitations. Justice Blackmun pointed out that prior to exercising jurisdiction, there must be service.\textsuperscript{23}

The service requirement went to Omni’s next two arguments, that the CEA implicitly authorized service or that common law service should be created to fill the gaps. Justice Blackmun first looked at Rule 4(e), which allowed service out-of-state under either a federal statute or a state long-arm statute.\textsuperscript{24} He rejected the notion that the CEA contained an implied service provision, even though other CEA provisions permitted nationwide service. In fact, Justice Blackmun saw a contrary Congressional intent. After all, Congress had amended the CEA to endorse a judicially-created private cause of action without specifically providing for nationwide service.\textsuperscript{25} Moreover, Congress specifically provided for nationwide service in certain sections of the CEA, but acted differently than when it adopted the securities laws, which contain general provisions for nationwide service applicable to more than one section.\textsuperscript{26} This showed that in the CEA, Congress only intended to provide for service in the individual sections where they were specifically provided for by the statute. The Court accordingly did not feel that it could “automatically graft nationwide service onto the implied private right of action.”\textsuperscript{27}

Justice Blackmun also rejected Omni’s call for the creation of a new common law service rule. First, he questioned the Court’s power to make such a rule because common law courts lack the power to serve process outside their districts.\textsuperscript{28} In addition, such a ruling would require a determination that Rule 4(e) and (f) were not meant to be exclusive. In any event, a new service provision would require the Court to “find adequate authority for common-law rulemaking.”\textsuperscript{29}

Ultimately, Justice Blackmun decided that it did not matter whether the Court possessed the requisite power because the Court was not inclined to fashion a new service rule.\textsuperscript{30} He pointed out that the Court had always

\textsuperscript{22}The Constitution provides for Congress to “ordain and establish” the lower federal courts. U.S. Const. art. III, § 1.

\textsuperscript{23}484 U.S. at 104.

\textsuperscript{24}See supra note 1 for the text of Rule 4(e) at the time of the decision.

\textsuperscript{25}484 U.S. at 106.

\textsuperscript{26}Id. at 107.

\textsuperscript{27}Id.

\textsuperscript{28}This restriction was retained in the Judiciary Act of 1789, but later removed. Id. at 109 n.10. In Robertson v. Railroad Labor Bd., 268 U.S. 619, 622–23 (1925), the Court had held that legislative action would be necessary to extend the courts’ jurisdiction. Justice Blackmun admitted that International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), with its rejection of strict territoriality as a basis for the exercise of jurisdiction, “may have undercut” Robertson. 484 U.S. at 109 n.10.

\textsuperscript{29}Id. at 109.

\textsuperscript{30}Id.
insisted on legislation to expand service and Congress had probably relied on that history. Because Congress could limit the courts' service of process, judicial caution before expanding that power unilaterally would be wise.\textsuperscript{31} In fact, Justice Blackmun suggested that Congress was in a better position to consider such a change and should fill the gap created by Rule 4:

We are not blind to the consequences of the inability to serve process on Wolff and Gourlay. A narrowly tailored service of process provision, authorizing service on an alien in a federal-question case when the alien is not amenable to service under the applicable state long-arm statute, might well serve the ends of the CEA and other federal statutes. It is not for the federal courts, however, to create such a rule as a matter of common law. That responsibility, in our view, better rests with those who propose the Federal Rules of Civil Procedure and with Congress.\textsuperscript{32}

Unfortunately, the Omni opinion did nothing to clear up the question of whether a federal court could use a national contacts test when applying a state long-arm statute. The Court pointed out that the Louisiana long-arm statute did not provide a different result because the district court had found it inapplicable, and Omni had not argued otherwise.\textsuperscript{33} Thus, there was no occasion to consider the national contacts issue.\textsuperscript{34}

C. Adoption of Rule 4(k)(2)

Federal Rule of Civil Procedure 4(k)(2) was adopted in response to the issues raised in Omni. It provides:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.\textsuperscript{35}

There are three basic requirements under the rule. First, the suit must arise under federal law. Second, the defendant cannot be subject to the jurisdiction of the courts of general jurisdiction in any state. Finally, the defendant’s

\textsuperscript{31}Id. at 110.
\textsuperscript{32}Id. at 111.
\textsuperscript{33}Id. at 108.
\textsuperscript{34}Id. at 102 n.5 (quoting similar abstention language from Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)).
contacts with the nation as a whole must be sufficient to satisfy Fifth Amendment due process requirements. The Advisory Committee Note points out that the provision’s purpose was to plug the gap created under previous law. Under that law a non-resident defendant with insufficient contacts with any particular state to justify the exercise of jurisdiction under the Fourteenth Amendment, but with sufficient contacts with the nation to allow the exercise of such jurisdiction, was allowed to escape from the courts’ jurisdiction, even when a federal claim was at issue. Under Rule 4(k)(2) such a defendant can be brought into court; indeed, the rule would allow service anywhere in the world.

III
RULE 4(K)(2)’S APPLICABILITY IN ADMIRALTY

Because Rule 4(k)(2) only went into effect in 1993, the decisions relating to its applicability in maritime law cases are just beginning to appear. With only one exception, a district court decision overruled on appeal, these cases have found the rule applicable in admiralty. This does not mean, however, that the matter is settled. The United States District Court for the Southern District of New York has stated in a non-admiralty case that, “Rule 4(k)(2) only provides federal courts with personal jurisdiction over a foreign defendant in federal question cases and only if the foreign defendant has sufficient contacts with the United States.”

A. District Court Decisions on the Applicability of Rule 4(k)(2) in Admiralty

In the early district court cases looking at whether Rule 4(k)(2) applies in admiralty, the courts did not hesitate to apply the rule. In a cargo contamination case, Nissho Iwai Corp. v. M/V Star Sapphire, plaintiff Nissho Iwai sued a number of defendants for damages done to its ethylene dichloride on a voyage from Brazil to Japan. Several foreign defendants

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37 See supra note 4.
38 Id.
40 See infra text accompanying notes 57–84.
43 The defendants consisted of the following:
moved to dismiss, arguing that the requisite minimum contacts to support jurisdiction were not present. Plaintiffs countered that adequate nationwide contacts existed for jurisdiction under Rule 4(k)(2). The United States District Court for the Southern District of Texas applied Rule 4(k)(2) and a national contacts test to deny the motion to dismiss. The opinion showed no question in the judge’s mind that admiralty claims were within the meaning of the term “federal law” as used in the rule and that the rule was applicable to the case.44

The United States District Court for the Southern District of New York reached the same result, but provided greater explanation, in United Trading Co. v. M.V. Sakura Reefer.45 In that case, the plaintiff sought compensation from the ship and its owner, Alvin Shipping, for the deterioration of kiwi on a voyage from Chile to Belgium. The defendants moved to dismiss, arguing inadequate contacts to support jurisdiction. The court agreed that the contacts would not support jurisdiction under the New York long-arm statute.46 On the other hand, the plaintiff pointed to the contacts with the nation as a whole under Rule 4(k)(2). Defendants contended that admiralty law was not federal law as contemplated by the rule.

Judge Scheindlin’s decision began by addressing the argument that the rule was a reaction to the Omni case, which had called for a narrowly tailored rule to deal with the service gap in federal question cases. The judge found this argument unconvincing. After all, six years had elapsed between Omni and the passage of the new provision. In any event, Judge Scheindlin pointed out that nothing about the “Omni decision forecloses the possibility that cases ‘arising under federal law’ may include admiralty cases.”47

Looking to the Advisory Committee Note, the decision focused on the repeated use of the term “federal law.” It noted that the Advisory Committee certainly could have used “federal question” had that been what was intended. Finally, the court pointed to a myriad of decisions describing

\[\ldots\] Defendant tanker, the M/V Star Sapphire, a vessel owned by Defendant Tripos, a Liberian corporation. Defendant Sunship, a Swedish Corporation, is the manager/agent for Defendant Tripos. Plaintiff also has sued Defendant Stolt-Nielsen, Inc., which was involved with the management, operation, and maintenance of the Star Sapphire during the voyage, and Defendant Stolt Tankers, Inc., a company based in the United States, that has a long-term pool agreement with Defendants Tripos and Sunship regarding the use of the Star Sapphire. \ldots Defendants Tripos and Sunship have impleaded Grow Group, Inc., Devoe Coatings Company, and Devoe Coatings B.V., which were the manufacturers, installers, and retailers of the marine tank coating \ldots installed in the tanks of the Star Sapphire.

Id. at 510.

44See id. at 513. For a discussion of the court’s actual application of the rule to the facts of the case, see infra text accompanying notes 143–45.


46Id. at *2–3.

47Id. at *4.
admiralty as "federal law" to show that admiralty is indeed part of the federal law covered by Rule 4(k)(2). The rule would apply in an admiralty case.  

In In re Libel and Petition of Gemini Navigation, S.A., a tort action and limitation claim arising out of an allision between a vessel and an offshore gas production rig in the Gulf of Mexico, the court found jurisdiction under the applicable Texas long-arm statute. It stated, however, that had the state long-arm statute not provided jurisdiction in this admiralty action, there still would have been personal jurisdiction under Rule 4(k)(2).  

In Western Equities, Ltd. v. Hanseatic, Ltd., the owner of a luxury yacht and its insurer sued the M/V Pari and its owner for damages resulting from a collision that occurred in Falmouth Harbor, Antigua, West Indies. The defendant owner moved to dismiss for lack of jurisdiction. The plaintiffs asserted that jurisdiction could be had under Rule 4(k)(2). Once again, the core issue was whether admiralty constituted federal law under the rule. The court began by pointing out that the case was one of first impression in the Third Circuit. Reviewing the rule’s plain language, the court found it applicable to "federal law in the broad, substantive, generic sense." Echoing earlier decisions, the opinion noted that the drafters could very well have used the term "federal question" if that is what they had intended. In addition, the court found support in that four of five district court decisions had applied the rule in admiralty and that the one contrary opinion had been reversed on appeal.  

Finally, in Carter v. LaGloria Shipping, the plaintiff made a claim for damages under the general maritime law and the Longshore and Harbor

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48 For a discussion of the court’s application of the rule, see infra text accompanying notes 146–49.  
50 Id. at 1956 n.10. The court noted that the rule would be applicable despite the fact that it was adopted after the suit was filed because applying the rule would not constitute a manifest injustice. Id.  
52 Although the Pari had not been arrested prior to this action, the plaintiffs alleged that the vessel could come within the court’s jurisdiction while the action was pending. Id. at 1233–34.  
53 Id. at 1235.  
54 See infra text accompanying notes 57–84. This reversal apparently got the lawyers in the Western Equities case in some trouble with the judge. Apparently both the plaintiff and the defendant failed to notify the court of the reversal despite the fact that four weeks elapsed prior between the reversal and the filing of the defendant’s brief. The court commented: The failure of both defendants and plaintiffs to advise the court of such a pertinent decision before the oral argument . . . borders on sanctionable conduct. The Court emphasizes that it does not condone conduct by counsel which reflects careless legal research at best.  
Workers Compensation Act. With no real discussion, the court determined that these claims were federal in nature and that the rule applied.\textsuperscript{56}

\section*{B. World Tanker Carriers}

The first and so far only circuit court opinion discussing whether Rule 4(k)(2) applies to admiralty cases came from the Fifth Circuit in \textit{World Tanker Carriers Corp. v. M/V Ya Mawlaya}.\textsuperscript{57} The dispute arose out of a collision between the \textit{M/V Ya Mawlaya} and the \textit{M/V New World} in international waters near Portugal. The \textit{New World}, a tanker registered in Hong Kong and owned by Liberian World Tanker Carriers Corp., was on a voyage from Gabon to France. The Cyprus-registered \textit{Ya Mawlaya} was taking soy beans from Louisiana to Italy. The ownership of the \textit{Ya Mawlaya} was somewhat in question. World Tanker claimed that the owner was Kara Mara Shipping Company of Cyprus, but appellees, including Kara Mara,\textsuperscript{58} claimed that the real owner was Vestman Shipping Company. In any case, both were named as defendants in the suits that were to follow.

The resulting conflagration caused damage to both vessels and their cargo. In addition, eight individuals were killed and others were injured. A number of lawsuits resulted. World Tanker brought suit against Kara Mara under the general maritime law for damages caused to the \textit{New World}. Cereol Italia Srl., the owner of the goods, brought a claim against both World Tanker and Kara Mara, and crew members of the \textit{New World} who were killed or injured or their survivors sued both World Tanker and Kara Mara.\textsuperscript{59} Facing all these actions, Kara Mara filed for limitation of liability, and the actions were consolidated in the United States District Court for the Eastern District of Louisiana.

At this point, Kara Mara moved to dismiss the consolidated actions except for the limitation act proceeding, contending that the court lacked personal jurisdiction over it. World Tanker urged two possible bases for personal jurisdiction in this case. First, minimum contacts between the defendant and Louisiana made it appropriate to exercise jurisdiction under the Louisiana long-arm statute. World Tanker also contended that the national contacts test provided by Rule 4(k)(2) separately supported jurisdiction. The district court granted the motion to dismiss, finding no prima facie case for minimum

\textsuperscript{56}Id. at *19.

\textsuperscript{57}99 F.3d 717 (5th Cir. 1996), rev'g 1996 AMC 747 (E.D. La. 1996).

\textsuperscript{58}In addition to Kara Mara, the appellees included: Holbud Ship Management Ltd.; Holbud Ltd.; Hydery (P), Ltd.; Spexex Shipping Company, Limited; SNP Ship Management and Consultation Bureau of Bombay; SNP Shipping Services Private Ltd.; Roshanali Rajabali Merali Dewji; Hasnain Merali; and Shaukat A. Merali. Id. at 719 n.1.

\textsuperscript{59}Id. at 719.
contacts under the Louisiana statute and ruling that the case did not arise under federal law, as required by Rule 4(k)(2). Citing only Omni as support and with no substantive discussion of the issue, the district court equated federal law with federal question cases, which the court found not to include admiralty claims.

Deciding World Tanker's unopposed appeal, the Fifth Circuit reversed and remanded for additional discovery to determine whether adequate nationwide contacts supported jurisdiction under Rule 4(k)(2). Given this holding, it was unnecessary to consider World Tanker's Louisiana long-arm argument. Instead, the court focused on the key issue, whether claims "arising under federal law" include admiralty claims. Judge Duhé first noted that the rule's text does not use the term "federal question"; instead, the rule's plain meaning included "all substantive federal law claims." Citing support in the Advisory Committee Note, the court pointed to the statement that Rule 4(k)(2) "authorizes the exercise of territorial jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state." This choice of the expression "any federal law" instead of the terminology from the federal question statute was construed as demonstrating the Advisory Committee's intent to extend the rule's coverage beyond federal question cases.

The Fifth Circuit next looked to the Note portion distinguishing Rule 4(k)(2) coverage arising under federal law from those arising under state law or the law of another country. The court reasoned that if the Committee had wanted to equate federal law with federal question, the comparison would have been between federal law and diversity jurisdiction, which serves as the other basis for the exercise of subject matter jurisdiction.

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60Id. at 720.
611996 AMC at 750. The court was apparently less than convinced by World Tanker's arguments. Despite the fact that Kara Mara had failed to comply with the court's jurisdictional discovery orders, the court found that "[t]he allegations of jurisdiction are frivolous and it would not be just to sanction Kara Mara by ordering that jurisdiction is established." Id.
62The appellant's brief advised the Fifth Circuit that "counsel for appellees have notified the court that they have been dismissed as counsel and that appellees do not intend to file briefs or appear in this appeal." Brief for Appellant at iv., World Tanker Carriers Corp. v. M/V Ya Mawlaya, 99 F.3d 717 (5th Cir. 1996).
6399 F.3d at 720 n.4.
64Id. at 720.
65Id. at 721 (emphasis added by the court).
66The language under analysis provided: "[t]his narrow extension of the federal reach applies only if a claim is made against the defendant under federal law. It does not establish personal jurisdiction if the only claims are those arising under state law or the law of another country. . . ." Id.
67Id.
choice to compare federal law with state law accordingly indicated a broader, more substantive meaning for the term federal law in Rule 4(k)(2).

Looking at the rule’s history also convinced the court that a broader reading was appropriate. If Rule 4(k)(2) had been passed to work with the federal question provision, then it would make sense to give the two items the same meaning. Instead of an addition to the subject matter jurisdiction of the courts, Rule 4(k)(2) was a widening of in personam jurisdiction meant to fill the gap left by the previous Rule 4 and criticized by the Supreme Court in Omni.\textsuperscript{68} The court concluded that Rule 4(k)(2) applied to all federal substantive law claims.\textsuperscript{69}

Despite this conclusion, the court still felt it necessary to determine "whether federal law incorporates admiralty law."\textsuperscript{70} The Fifth Circuit felt that the district court may have mistakenly relied on the Supreme Court’s decision in Romero v. International Terminal Operating Co.,\textsuperscript{71} which held that general maritime law claims are not federal questions. Although that case may have important implications for removal jurisdiction and the right to a jury trial,\textsuperscript{72} nothing in Romero undercut the notion that admiralty is part of federal law. Indeed, Judge Duhé pointed out that the Romero case consistently referred to "federal maritime law" and "accepted uncritically the idea that general maritime law constitutes our national law."\textsuperscript{73}

Turning to constitutional and statutory analysis, Judge Duhé’s analysis began with the foundational constitutional provision extending the federal judicial power to "all Cases of admiralty and maritime Jurisdiction."\textsuperscript{74} He then moved on to the Judiciary Act of 1789\textsuperscript{75} and its modern descendent, 28 U.S.C. § 1333, which provide the district courts with exclusive original jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."\textsuperscript{76} Thus, federal courts can hear any admiralty case, and state courts

\textsuperscript{68}484 U.S. at 108–10.
\textsuperscript{69}World Tanker, 99 F.3d at 722.
\textsuperscript{70}Id.
\textsuperscript{71}358 U.S. 354 (1959).
\textsuperscript{72}The Fifth Circuit cited In re Dutile, 935 F.2d 61, 63 (5th Cir. 1991), which used Romero to show why admiralty cases generally cannot be removed to federal court. Another Fifth Circuit case, Rachal v. Ingram Corp., 795 F.2d 1210 (5th Cir. 1986), relied on Romero to establish there is no right to a jury trial in admiralty.
\textsuperscript{73}99 F.3d at 722. The court also pointed to the Supreme Court’s decision in Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917), in support of the view that admiralty is a part of federal law. For additional discussion of this case and issues presented by maritime uniformity in the oil pollution context, see Swanson, Federalism, the Admiralty, and Oil Spills, 27 J. Mar. L. & Com. 379 (1996).
\textsuperscript{74}U.S. Const. art. III, § 2, cl. 3.
\textsuperscript{75}Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9, now codified at 28 U.S.C. § 1333.
\textsuperscript{76}28 U.S.C. § 1333(1). The updated version replaced the 1789 Act’s "the right of a common law remedy where the common law is competent to give it" with "all other remedies to which they are
may have concurrent jurisdiction over some cases. The court found it important, however, that the language does not give state courts the right to apply state substantive law in a case involving admiralty issues. Indeed, Judge Duhé emphasized that state law only applies in exceptional cases under the maritime but local doctrine—"when the matter is maritime in nature but there is neither an applicable federal statute governing the claim nor a perceived need for uniformity of maritime law." The maritime law of the United States is thus substantively federal.

The court buttressed this conclusion by looking at the important policies supporting admiralty's special status in the Constitution. The first of these is the need for nationwide uniformity of admiralty law. Second, the court pointed to the large body of federal statutory and federal judge-made law that constitute the corpus of admiralty law. In addition, the opinion addressed the Supreme Court's recent decision in Yamaha Motor Corp., U.S.A. v. Calhoun and decisions from the Fifth Circuit stating in various ways that admiralty law is federal law. Finally, the court relied on the fact that all other district courts considering the issue had found Rule 4(k)(2) applicable in admiralty cases.

Having determined that Rule 4(k)(2) applied in admiralty, the court turned to its operation in the instant case. In order to find jurisdiction, the plaintiff had to show that national minimum contacts existed so as not to offend "traditional notions of fair play and substantial justice," as required by constitutional due process analysis. The court found that the lower court's determination that Rule 4(k)(2) was inapplicable precluded World Tanker from meeting this burden. It accordingly remanded the case for further jurisdictional discovery.

C. Why Rule 4(k)(2) Should Apply in Admiralty Actions

The arguments against applying Rule 4(k)(2) in admiralty have a simple appeal, but are readily rebutted. The first such contention emphasizes

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7799 F.3d at 723.
8299 F.3d at 723.
83Id.
84Id. at 724.
legislative history, noting that the rule was created in response to Omni's call to expand the courts' jurisdiction in "federal question" cases. One might reasonably conclude that the new rule should apply only to federal question cases, which do not include admiralty causes of action. The plain meaning of the new rule, however, comfortably addresses this contention. Rule 4(k)(2) and the Advisory Committee Note that accompanies it use the term "federal law" consistently. Certainly the drafters and Congress understood federal question jurisdiction and would have used more specific terminology had that been what they meant. Indeed, the drafters' choice of "federal law" instead of the "federal question" language in Omni must have been a conscious decision to look to the entire body of federal law rather than just that covered by the federal question doctrine.

Another argument that Rule 4(k)(2) should not apply in admiralty most likely relates to an incorrect reading of the Supreme Court's decision in Romero v. International Terminal Operating Co. Although that decision found that general maritime law actions are not federal questions for the purpose of establishing jurisdiction under 28 U.S.C. § 1331, the opinion actually supports the notion that general maritime law claims in admiralty are federal law. Romero was a suit brought by an injured Spanish sailor against his Spanish-owned ship under the Jones Act and general maritime law theories of unseaworthiness, maintenance and cure, and negligence. The district court dismissed the Jones Act claim, finding that the Act provided no remedy for an alien sailor against a foreign shipowner under the particular facts of this case. Diversity was inapplicable because the parties were not diverse. The Second Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict among the circuits relating to the application of federal question jurisdiction to admiralty claims.

The Supreme Court began by addressing the Jones Act claim. It found that the lower courts had improperly dismissed the claim because they had confused the issue of whether jurisdiction existed with whether the complaint stated a cause of action. The plaintiff's allegations established jurisdiction and should have survived jurisdictional scrutiny. The lower

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86 The ship, the S.S. Guadalupe, was owned by a Spanish corporation, Compania Transatlantica, and was registered in Spain.
88 There were also claims against the ship's New York husbanding agent, a New York stevedoring company, and a New York carpentry establishment that was preparing the ship for a grain shipment. The claims against the husbanding agent were dismissed by the district court because it was not the plaintiff's employer and did not have operation and control of the vessel. The other claims were dismissed for lack of diversity. 358 U.S. at 358.
89 Id. at 358–59.
courts should then have proceeded to determine whether a cause of action was stated.90

The opinion next faced the federal question claim, starting with an analysis of 28 U.S.C. § 1331, which grants the federal courts jurisdiction over “all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States. . . .”91 The issue splitting the circuits was whether this language gave a plaintiff the right to bring a general maritime claim on the federal courts’ law, as opposed to admiralty, side.92 In other words, are general maritime law claims federal questions?

The Court began its analysis with Article III of the Constitution, which impliedly made three grants:

(1) It empowered Congress to confer admiralty and maritime jurisdiction on the “Tribunals inferior to the supreme Court”. . . . (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law “inherent in the admiralty and maritime jurisdiction,” . . . and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution.93

Having delineated these constitutional admiralty powers, the Court moved on to Congress’ exercise of the power in the Judiciary Act of 1789. Section 9 of that legislation gave exclusive admiralty jurisdiction to the district courts, but recognizing the need for concurrent jurisdiction with the state courts, included the saving to suitors clause: “saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.”94 The Act also provided for diversity jurisdiction.95

The Judiciary Act of 1875 added federal question jurisdiction. The revised statute provided for jurisdiction over “all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. . . .”96 The Court found it extremely important that this language was copied from the Constitutional grant found in Article III, section 2, clause 1 of the Constitution, which provided that the judicial power of the United States extends “to all Cases, in Law and Equity, arising under this Constitution, the

90Id. at 359.
92The Court pointed out that the First Circuit had allowed the exercise of such jurisdiction, while the Second and Third Circuits had found no jurisdiction. 358 U.S. at 359.
93Id. at 360–61.
94Act of Sept. 24, 1789, 1 Stat. 76.
95358 U.S. at 362.
96The Court noted that there had been an earlier attempt to grant federal question jurisdiction in 1801 which was repealed in 1802. Id. at 363.
Laws of the United States, and treaties made, or which shall be made, under their Authority." Consequently, both the admiralty and federal question provisions of the Judiciary Act had constitutional underpinnings in Article III, but those underpinnings were separate and distinct from one another, creating separate and distinct classes of jurisdiction.\textsuperscript{97} The framers had used "precise, differentiating and not redundant language."\textsuperscript{98} Justice Frankfurter quoted from Chief Justice Marshall's opinion in \textit{American Insurance Co. v. Canter}:

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity.\textsuperscript{99}

Accordingly, the opinion concluded that the 1875 amendment was not intended to include admiralty, "an entirely separate" and distinct class of cases.\textsuperscript{100}

The \textit{Romero} Court's reasoning simply does not address whether Rule 4(k)(2) applies to admiralty cases. Although the jurisdictional grants of the Judiciary Acts of 1789 and 1875 closely track the separate provisions of Article III, indicating that admiralty and federal question jurisdiction are separate sources of personal jurisdiction, Rule 4(k)(2) does not rely on any particular constitutional grant. Instead, it takes a larger view of federal law that encompasses both admiralty and federal question cases.\textsuperscript{101} Indeed, under Justice Frankfurter's analysis, the rule's drafters should have used the language of the constitutional grant if they meant to rely solely on the "federal question" provision of Article III. Instead, they chose the more generic "federal law," clearly establishing their desire to cover all federal substantive law, including admiralty.

In addition to the statutory and constitutional construction, Justice Frankfurter suggested that history buttressed the Court's position that the 1875 addition did not include admiralty. The Court pointed out that the Judiciary Act of 1875 resulted from the need to extend the federal courts' powers during Reconstruction.\textsuperscript{102} There was no concomitant need to enlarge admiralty jurisdiction, which had found its traditional jurisdictional grant adequate. The Court said that such a change in admiralty jurisdiction would have been "revolutionary," greatly limiting the role of

\textsuperscript{97}Id. at 363–65.
\textsuperscript{98}Id. at 364.
\textsuperscript{99}26 U.S. (1 Pet.) 511, 545 (1828).
\textsuperscript{100}\textit{Romero}, 358 U.S. at 366.
\textsuperscript{101}See generally Wright & Miller, supra note 1, § 1067.1, at 96.
\textsuperscript{102}358 U.S. at 368.
the traditional admiralty jurisdiction in the application of maritime law. If maritime law cases were federal questions,\textsuperscript{103} most could be brought on the law side with a jury, limiting the utility of admiralty jurisdiction to cases in which an \textit{in personam} remedy was inadequate to satisfy the judgment.

Justice Frankfurter also pointed out that in the seventy-five years since the passage of the Judiciary Act of 1875, no one had ever argued for the construction being presented in the instant case.\textsuperscript{104} Moreover, when Congress had wanted to provide for a trial on the law side of an admiralty matter, it had done so explicitly in the legislation.\textsuperscript{105}

The Court's historical review provides no meaningful support to the argument that Rule 4(k)(2) does not apply to admiralty. Although the 1875 extension of federal jurisdiction was not based on the need to increase federal admiralty power, the same cannot be said for Rule 4(k)(2). As has been shown above,\textsuperscript{106} the new rule's purpose was to fill the gaps created by the previous Rule 4 allowing foreign defendants with numerous national contacts, but inadequate contacts with a particular state, to escape the federal courts' jurisdictional reach in federal law cases. Very few areas of law are as international in focus as admiralty, which has long needed to extend its jurisdiction to assist vessels, sailors, creditors, and tort victims in claims against ships that are here today but gone tomorrow. In a modern setting, where there is even greater international intercourse, the need for admiralty to extend its reach outward is paramount.

Unlike the suggestion that admiralty be included in § 1331, Rule 4(k)(2) does nothing revolutionary. Rule 4(k)(2) does not apply to admiralty cases, with no jury except when provided for by statute. No floodgates would open on the law side. Rather than limiting traditional admiralty jurisdiction, Rule 4(k)(2) provides a modest extension. In addition, Rule 4(k)(2) was only recently adopted; following its adoption, courts applied it almost immediately to admiralty cases.

The \textit{Romero} Court also was concerned that equating admiralty with federal question would dramatically affect the allocation of power between federal and state authorities. Previously, maritime actions brought in state court under the saving to suitors clause could not be removed to federal court. If admiralty fell within federal question jurisdiction, such cases would be removable to federal court,\textsuperscript{107} undercutting the balance between state and

\textsuperscript{103}Id. at 369.
\textsuperscript{104}Id. at 369–70.
\textsuperscript{105}Id. at 371.
\textsuperscript{106}See supra text accompanying notes 35–39.
\textsuperscript{107}28 U.S.C. § 1441(b) provides in part: "Any civil action of which the district courts have original
federal courts in the Judiciary Act of 1789. The Court felt that state courts played an important role in admiralty law's development. Although admittedly state law must give way when maritime uniformity so requires, the Court pointed out that numerous areas of state law interact with federal admiralty law. The plaintiff's reading of § 1331 would destroy that subtle balance.

Justice Frankfurter was also concerned about the judicial difficulties that would result from including admiralty in § 1331. For instance, § 1331 could only be invoked if the action arose under federal law. This would require the court initially to determine whether the action was based on state or federal law. Justice Frankfurter opined that such difficult determinations have been avoided by refusing to address the applicable law in the absence of an actual conflict. In other words, when no conflict exists between state and admiralty law, the court need not decide the issue. Should a conflict arise, the resolution demands a specific, factual setting, and Justice Frankfurter felt that this assisted the courts in reaching good results. In contrast, requiring an initial determination of which law applies, even when no conflict exists, would be detrimental to the process of federal-state accommodation. The Court also believed that this new interpretation could restrict the venues available for the litigation of admiralty issues.

Unlike the inclusion of admiralty within federal question jurisdiction, including admiralty within Rule 4(k)(2)'s ambit will not adversely affect federal-state relations. In order for the rule to apply, the action must be one that could not have been brought in state court because the defendant is not subject to jurisdiction there. Thus, there is no ability to remove to federal court, as there would have been under the federal question doctrine.

Similarly, the rule does not undercut the state's important role in the development of admiralty law. Again, Rule 4(k)(2) only covers cases heard in federal court—ones that could not have been brought in a state court or decided under state law. In other words, states would have no opportunity to develop maritime law in such actions. Since federal courts are

jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

108586 U.S. at 372.
109Id. at 373–74.
110Id. at 375–76.
111Historically, litigants of diverse citizenship with an admiralty dispute could choose their venue under the relatively liberal venue provisions applied in diversity cases. More restrictive venue provisions apply in a case where jurisdiction is founded on a basis other than diversity. This is true even when diversity exists. Thus, making all admiralty claims federal questions would have a serious effect on venue issues. Id. at 377.
112There is some question: how important the state role should be. For an argument that the state role has been too great in the area of oil pollution, see Swanson, supra note 73.
the primary arbiters of admiralty law, giving them this slight advantage is not unwise. Inclusion of admiralty within federal question jurisdiction would have a much greater effect by making most maritime cases brought in state court removable to federal courts, divesting the states of any significant role in the development of a healthy federal-state relationship.

It is true that the rule’s application would make the federal court initially determine whether federal or state law applies, forcing an issue that Justice Frankfurter found useful to avoid. The courts would undertake this process, however, only in cases involving defendants not subject to state jurisdiction. The cases will generally have international ramifications, where the federal interest is at its greatest and the state interest is relatively small. Although the state naturally has an interest in protecting its citizens, this interest is most greatly undercut if no United States forum can hear the case. In those cases, United States plaintiffs may be relegated to foreign courts without adequate protection for their interests. The benefits obtained from this delimitation of federal competence surely outweigh Justice Frankfurter’s concerns.

Juxtaposed against the perceived difficulties, Justice Frankfurter could find little beneficial in including admiralty within federal question jurisdiction. He argued that the only support for including admiralty within federal question coverage was “a formal syllogism:” the Act of 1875 gave the courts jurisdiction over cases arising under the Constitution and laws of the United States; maritime law is federal law based on the Constitution’s grant of the admiralty and maritime power; therefore, the 1875 Act provides jurisdiction for admiralty cases. Nonetheless, Justice Frankfurter was certain that the Act was not intended to cover admiralty and maritime jurisdiction. Although the Act’s words could be read to include admiralty, both history and policy showed that the courts’ jurisdiction should not be extended and maritime jurisdiction should not be drastically changed. The Court concluded that there was no diversity jurisdiction, but that general maritime claims might be heard in the district court as pendant to diversity or Jones Act claims.

Although including admiralty within the federal question jurisdiction would yield nothing beneficial, the marriage of Rule 4(k)(2) and admiralty nicely supports the policies of both. Admiralty jurisdiction under the rule promotes the primary goals of maritime jurisdiction: efficiency, predictability, uniformity, and the furtherance of the interests of the United States maritime industry. Efficiency will be furthered because the presence of an expanded admiralty jurisdiction will make it more likely that all interested

113 386 U.S. at 377-78.
114 Id. at 380-81.
115 See Gilmore & Black, supra note 5, § 1-17, at 47-50; 1 S. Friedell, Benedict on Admiralty § 105, at 7-9 to 7-13 (7th rev. ed. 1997); F. Marais, Admiralty in a Nutshell 5-13 (3d ed. 1996).
parties will be brought into one action.\textsuperscript{116} For example, in a collision case—where it has always been possible to obtain \textit{in rem} jurisdiction over the vessel should it arrive in a United States port—it may now be possible to obtain jurisdiction over a foreign owner or a lien holder with United States contacts as well. All claims can be litigated in one action. It may also be possible to bring numerous defendants into one action and avoid the possibility of having present defendants blame absent ones for the damages.\textsuperscript{117} One trial including all defendants and causes of action will generally be more efficient than a hodgepodge of cases around the world.

Including admiralty in Rule 4(k)(2) should also assist predictability, at least for United States citizens. More disputes arising between United States interests and foreign ones will be amenable to the jurisdiction of United States courts, applying a relatively uniform United States admiralty law. This should make the outcome of these cases more predictable for those involved in the maritime trade.

Uniformity should also be well-served by this view of the rule. More cases will be subject to the jurisdiction of the federal courts, which are entrusted with the responsibility of creating a uniform set of admiralty laws.\textsuperscript{118} This uniformity is not only national, but international, and the United States legal system has played a great role in the development of a worldwide admiralty jurisprudence.\textsuperscript{119} Allowing United States courts to decide these additional cases can only increase United States influence. In addition, the primacy of federal power in admiralty will be served by expanding federal jurisdiction to these additional cases.

Finally, the extension of admiralty jurisdiction over certain foreign entities will foster United States interests by creating a level playing field for the United States maritime industry. Foreign businesses that conduct a significant amount of business in the United States should be subject to United States law. Prior to the passage of the rule, these businesses could avoid United States law by not concentrating contacts within any one state.


\textsuperscript{117}Note, supra note 116, at 445.

\textsuperscript{118}See D. Robertson, Admiralty and Federalism 146–47 (1970).

\textsuperscript{119}For example, the United States led the way in the creation of legislation to allocate losses in the carriage of goods by sea. Most national legislation and international agreements are based, to some extent, on the United States' Harter Act. See N. Healy & D. Sharpe, Cases and Materials on Admiralty 332 (2d ed. 1986). Of course, the United States has not always been a leader. It has shown a real lack of leadership in the area of ocean pollution, in which the United States has refused to agree to international regimes for the prevention and clean-up of such pollution. See Swanson, supra note 73, at 407–11.
Of course, United States businesses must comply with domestic laws, sometimes putting them at a disadvantage vis-a-vis foreign-owned enterprises outside the jurisdiction of United States courts. The rule solves this problem by requiring that all entities with substantial United States contacts play by the same rules.

The policies behind the passage of the Rule 4(k)(2) also support the inclusion of admiralty within the meaning of federal law. The purpose of the amended rule was to close a gap created by the constitutional limitation on the state’s exercise of personal jurisdiction and the former Rule 4’s reliance on state long-arm statutes for service. 120 Foreign defendants with significant contacts with the United States were allowed to escape liability in United States courts due to this legal gap. Rule 4, as previously applied, had the same effect in admiralty. With the exception of the in rem and quasi in rem procedures provided in the Supplemental Admiralty Rules, the admiralty plaintiff relies on the same Rule 4 as any other federal court plaintiff. The same gap exists when the admiralty plaintiff has to rely on the state long-arm statute to serve the defendant. Given that the rule was meant to provide a workable solution in the international service context, there is every reason to believe that it was intended to apply equally in admiralty, a most international area of the law.

A review of the language, history, and policies supporting Rule 4(k)(2) and admiralty law all suggest that the rule was meant to include admiralty as “federal law.” The argument that the rule should not apply in admiralty is limited to a strained analysis of the rule’s origins in the Omni case and misplaced reliance on the Supreme Court’s federal question analysis in the Romero decision. Indeed, Romero repeatedly refers to admiralty as federal law. 121 Ultimately, all courts must give Rule 4(k)(2) the reasonable reading supported by the rule’s language and hold that admiralty naturally falls within its coverage.

IV
APPLICATION OF RULE 4(K)(2)
A. General Standards for Applying Rule 4(k)(2)

Although relatively few admiralty decisions actually apply Rule 4(k)(2), court decisions in non-maritime cases help establish when Rule 4(k)(2) will

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120 Advisory Note, supra note 4. One author has referred to the problem as “immunity by diffusion,” which occurs when a defendant has plentiful contacts with the United States but lacks adequate contacts with any particular state to support jurisdiction. See Frasch, National Contacts as a Basis for In Personam Jurisdiction Over Aliens in Federal Question Suits, 70 Cal. L. Rev. 686, 692 (1982).
121 358 U.S. at 367–73.
provide jurisdiction. In general, the judicial approach has not been surprising. Some cases refuse to apply the rule because the cause of action was brought prior to the rule’s adoption or the plaintiff failed to show that the defendant was not amenable to suit in a state court of general jurisdiction.\footnote{One case which applied both these arguments to dismiss a suit is United States v. Construcciones Electromecanicas, S.A., 1995 WL 572004 (E.D. La. 1995). See also United States v. International Brotherhood of Teamsters, 945 F. Supp. 609, 617 (S.D.N.Y. 1996). The requirement that a defendant not be amenable to jurisdiction in any state court puts the defendant in a somewhat amusing position. In order to defeat jurisdiction under the rule, it may be forced to argue that jurisdiction does exist in a state court.}

Under the latter scenario, the court must apply the long-arm statute of each state possibly having jurisdiction to determine whether jurisdiction actually exists in any state. The court can only find jurisdiction under Rule 4(k)(2) if there is no state with jurisdiction.\footnote{See Pharmacemie B.V. v. Pharmacia S.p.A., 934 F. Supp. 484 (D. Mass. 1996), and Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427 (S.D.N.Y. 1996). In an admiralty action, the United States District Court for the Eastern District of Louisiana dismissed an argument that Rule 4(k)(2) provided a basis for jurisdiction. Because the defendant was a citizen of Delaware, and therefore subject to that state’s jurisdiction, the Rule’s requirement that the defendant not be subject to the jurisdiction of the courts of any state was not met. Alfred C. Toepfer Int’l, Inc. v. M/V Osland, 1997 AMC 1702 (E.D. La. 1997).}

Most decisions focus on the requirement that the defendant have the requisite contacts with the United States as a whole to meet the due process strictures of the Fifth Amendment.\footnote{See, e.g., Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81, 87 (S.D.N.Y. 1995) (finding jurisdiction under Rule 4(k)(2) where a foreign entity’s participation in an attempt to monopolize commerce had an effect in the United States), and United States v. International Brotherhood of Teamsters, 945 F. Supp. 609, 617 (S.D.N.Y. 1996). The courts apply the due process clause of the Fifth Amendment, which is applicable to federal authorities, rather than those of the Fourteenth Amendment, which is applicable to the states.}

Although the judicial approach to evaluate adequate contacts looks familiar to anyone who has studied the Fifth and Fourteenth Amendments in other contexts, it is too early to say whether analysis of Rule 4(k)(2) will always reflect those traditional decisions. Of course, the Supreme Court’s personal jurisdiction jurisprudence has rightly been labeled “confusing,” “bankrupt,” and “complex.”\footnote{See Weinraub, A Map Out of the Personal Jurisdiction Labyrinth, 28 U.C. Davis L. Rev. 531 (1995), and Casad, supra note 15, at 1589–90.}

Nevertheless, the courts applying the rule have essentially used this same analysis in measuring the defendant’s minimum contacts with the nation as a whole. The courts begin by determining whether the exercise of jurisdiction “would offend ‘traditional notions of fair play and substantial justice.’”\footnote{See Eskofot, 872 F. Supp. at 87 (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987)), and Kohler, 948 F. Supp. at 818. The Advisory Committee Note agrees that the appropriate standard is a nationwide contacts test under the Fifth Amendment: There remain constitutional limitations on the exercise of territorial jurisdiction by federal courts over persons outside the United States. These restrictions arise from the Fifth Amendment rather than the Commerce Clause.} Important to this analysis in the admiralty context is the Advisory
Committee Note’s caution that special care should be exercised before asserting jurisdiction in the international realm.\textsuperscript{127}

In *American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*,\textsuperscript{128} the Ninth Circuit rejected a claim of jurisdiction under the rule because of inadequate direct contacts with the United States. Although the plaintiffs had argued that the attendance of one of the defendant’s employees at the board meetings of another defendant in New York and Pennsylvania satisfied a national contacts test, the court found them insignificant. If the contacts had been adequate, the court reasoned, they would have supported jurisdiction in one of those states, making the rule inapplicable.\textsuperscript{129}

In making the nationwide minimum contacts determination, the courts in the Second Circuit, where the majority of cases have arisen, have looked to three factors: "(1) transacting business in the United States, (2) doing an act in the United States, or (3) having an effect in the United States by an act done elsewhere."\textsuperscript{130}

The first two factors are familiar to most American lawyers. The final factor is often used in international litigation and looks to whether the defendant has acted elsewhere, causing an effect within the United States.\textsuperscript{131} The effect must be “substantial, direct, and foreseeable.”\textsuperscript{132}

\textsuperscript{127} *Eskenof*, 872 F. Supp. at 87 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987)).

\textsuperscript{128} 94 F.3d 586 (9th Cir. 1996) (finding no jurisdiction in a case brought for violation of the Comprehensive Environmental Response, Compensation and Liability Act where the defendant had no direct contacts with the United States).

\textsuperscript{129} Id. at 590 n.6. This analysis begs the question. Under a national contacts test, contacts in individual states that are inadequate for jurisdiction in that state may aggregate with other contacts to create minimum contacts with the nation as a whole.

\textsuperscript{130} *Eskenof*, 872 F. Supp. at 87 (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972)). See *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 192 B.R. 73, 79 (S.D.N.Y. 1996) (finding that accounts receivable passing through a New York account and the sending of wire communications to defraud parties in the United States were enough to satisfy minimum contacts), and *United States v. International Brotherhood of Teamsters*, 945 F. Supp. 609, 618 (S.D.N.Y. 1996). One decision in the Southern District of New York has correctly held that these factors are not an exclusive list but are merely the factors most relevant to the facts in *Leasco*. See *Aerogroup Int’l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 439 n.17 (S.D.N.Y. 1996).

\textsuperscript{131} See *Eskenof*, 872 F. Supp. at 87 (citing *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1033 (2d Cir. 1990)), and *Teamsters*, 945 F. Supp. at 618.

\textsuperscript{132} *Teamsters*, 945 F. Supp. at 620.
B. Admiralty Cases Applying Rule 4(k)(2)

In the Fifth Circuit’s opinion in World Tanker,133 the court did not decide whether Rule 4(k)(2) provided jurisdiction because the lower court had not given World Tanker adequate jurisdictional discovery. Still, the case gives some guidance on how the statute should be applied. In order to establish jurisdiction, the plaintiff must show whether the defendant has “contacts with the nation as a whole sufficient to satisfy due process concerns.”134 This requires a determination of whether jurisdiction “would offend ‘traditional notions of fair play and substantial justice.’”135 The court noted that the plaintiff has the burden of making a prima facie showing of nationwide minimum contacts.136

District court opinions in admiralty offer some additional guidance. Pacific Employers Insurance Co. v. M/T Iver Champion137 involved cargo damage on a voyage from the United States to Rotterdam. The suit was brought by the shipper’s insurer against the vessel owner’s insurer under the Louisiana direct action statute. The defendant argued that Rule 4(k)(2) was inapplicable because the suit was based on the Louisiana direct action statute, rather than federal law, as required by the rule. The court disagreed because the suit’s substantive basis was the Carriage of Goods by Sea Act (COGSA),138 a federal statute regulating the relationship between carriers and shippers. The Louisiana statute merely provided a mechanism for recovery of a federal right.139

The court proceeded to the minimum contacts analysis, noting that the standard was whether the insurance company has sufficient contacts with the United States as a whole so that the exercise of jurisdiction would not be contrary to “traditional notions of fair play and substantial justice.”140 The court found that adequate contacts existed. The defendant insured 435 United States entities, including its second largest client, and 27% of its revenues came from the United States. In addition, the defendant had a number of ties to correspondents in the United States, had appointed an agent for service of process, invested millions of dollars with United States financial entities, and had representatives travel to the United States regularly. The court found these contacts sufficient to satisfy due process requirements.

133See supra note 57.
13499 F.3d at 723.
135Id.
136Id.
1371995 AMC 2280 (E.D. La. 1995).
1391995 AMC at 2286–87.
140Id. at 2287.
Finally, the court felt it necessary to determine the reasonableness of exercising jurisdiction in the United States.\textsuperscript{141} Pointing out that the case had already been underway for four years, the damage happened in the United States, and the defendant had previously defended other suits in the United States, the court determined that jurisdiction would not be unreasonable.\textsuperscript{142}

Similar standards were applied by the district court in \textit{Nissho Iwai}.\textsuperscript{143} There the court found that the defendants “for a number of years have both had systematic and continuous contacts with the United States in connection with their ongoing shipping enterprises.”\textsuperscript{144} These included a complex set of agreements through which the defendants participated in a tankers pool that operated out of the United States.\textsuperscript{145} The court found that the arrangement constituted a joint venture in the United States from which the defendants profited, and jurisdiction under the rule was accordingly appropriate.

In \textit{Sakura Reefer},\textsuperscript{146} the United States District Court for the Southern District of New York gave additional guidance. Citing earlier Southern District cases applying the rule in a non-admiralty context, the court used the three-factor test outlined above to determine whether minimum contacts existed.\textsuperscript{147} In determining whether a party had transacted business, the court

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\textsuperscript{141}Id. at 2288 (citing Asahi).
\textsuperscript{142}Id.
\textsuperscript{143}See supra note 42.
\textsuperscript{144}\textit{1996 AMC} at 514.
\textsuperscript{145}The court described the arrangement as follows:

\ldots Defendant Sunship manages three vessels, the \textit{Blue Sapphire}, the \textit{Sun Sapphire}, and the \textit{Star Sapphire}. The \textit{Star Sapphire} is owned by Tripos; the \textit{Blue Sapphire} is owned by Chemical Transportation, Ltd.; and the \textit{Sun Sapphire} is owned by Chemical Shipping, Ltd. The \textit{Star Sapphire} has been to the United States at least seventeen times \ldots and the \textit{Blue Sapphire} and the \textit{Sun Sapphire} have each been to the United States at least once. All three vessels belong to the Stolt Tankers pool. The Stolt Tankers pool has its main office in Greenwich, Connecticut. Sunship acts as an agent for all three shipowners in their dealings with the Stolt Tankers pool and communicates with the pool on a regular basis, approximately twice a month. When vessels managed by Sunship are in the United States, Sunship pays the vessel's American suppliers. Johansson [the president of Sunship] has been to the United States at least fifty times looking for people to invest in Sunship or looking for investments for Sunship.

Pursuant to the STJS Agreement between Tripos and Stolt Tankers, Defendant Tripos is also a member of the Stolt Tankers pool. Stolt Tankers, Inc., which is one of the pool members, is based in Houston, Texas. \ldots [T]he Stolt Tankers pool operates the \textit{Star Sapphire}, Sunship manages the vessel, and Tripos receives a share of the profits. \ldots The Stolt Tankers pool also pays certain expenses associated with the \textit{Star Sapphire} as part of the pool. Whenever money is transferred from the Stolt Tankers pool to Tripos, Tripos receives a telex from the pool in Greenwich. \ldots Johansson \ldots regularly attended board meetings of the STJS held either in Houston \ldots or Greenwich. \ldots

\textsuperscript{146}See supra note 45.
\end{flushright}
decided that it had to look to the "totality of defendant’s activities within the forum." The question became whether the defendant had "engaged in useful activity in the forum, thus invoking the benefits and protection of that forum’s law." In this case, the only contacts shown by the plaintiff were one visit by defendant’s ship to the port of Philadelphia and a bank account in New York. Without meaningful analysis, the court found these contacts inadequate to support jurisdiction under Rule 4(k)(2).

In Western Equities, the court applied the same three factors and, once again, refused jurisdiction. The plaintiffs had alleged that numerous visits to the United States by the defendant’s luxury yacht were enough to amount to transacting business under the first factor of the test. The court rejected this contention, stating that the visits were not made to conduct business in the United States. The luxury charter’s course was dictated by the client, not the defendant. Therefore, the numerous calls at United States ports were insufficient to support jurisdiction. In addition, the fact that the defendants used United States brokers to charter and attempt to sell the vessel was not enough to show that any business was transacted in the United States. None of the defendant’s employees ever entered the United States and no monetary transactions took place here. Therefore, the first factor did not suggest jurisdiction.

The second factor looks to where the instant act occurred. Here the court pointed out that the act took place outside the jurisdiction of the United States, and plaintiffs accordingly could not prevail under this aspect of the test.

The third factor requires that there be some effect in the United States due to an act done elsewhere. In this case, the court found that there had been no allegations of an effect in the United States. The corporations were foreign, and there was no evidence of an impact on United States commerce. Even had such an effect been shown, the court would have required that it be foreseeable that the defendants might be hauled into a United States court to answer for their acts. Hence, the court declined jurisdiction under the rule.

Thus, although Rule 4(k)(2) does expand the reach of admiralty jurisdiction in some cases involving foreign defendants, the national minimum contacts test applied under the rule has its limits. In order for courts to find jurisdiction, the defendant’s contacts with the United States must have been substantial.

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\[148\] 1996 WL 374154 at *5.
\[149\] Id.
\[150\] See supra note 51.
\[151\] 956 F. Supp. at 1237.
\[152\] Id. at 1238.
\[153\] Id.
V

CONCLUSION

Prior to the adoption of Federal Rule of Civil Procedure 4(k)(2), a defendant with numerous contacts with the United States as a whole, but lacking minimum contacts with any particular state, could often avoid a federal court’s exercise of personal jurisdiction. Because the court was forced to rely on the state long-arm statute in cases involving the application of federal law, most courts decided that the Fourteenth Amendment’s due process limitations on the states applied to them as well. After the Supreme Court rejected a request for a court-created mechanism for service of process in these cases and suggested that the remedy should come through the rule revision process, Rule 4(k)(2) was adopted.

The rule provides for worldwide service of process in cases involving the application of federal law when the defendant is not subject to the jurisdiction of a state court and the federal court’s exercise of jurisdiction does not violate the Constitution. The key question for the admiralty lawyer is whether the words “federal law” include admiralty. The early decisions have answered the question affirmatively, and the language of the rule as well as its history and admiralty policies suggest that these early decisions are correct. The admiralty is particularly susceptible to the abuses that occur due to the gap created by the former Rule 4 and the Fourteenth Amendment due process requirements. Admiralty lawyers should be pleased with this small and natural extension of jurisdiction.

Because the rule is relatively new, relatively few cases have applied it. As with most jurisdictional analysis, judicial attention has focused on the existence of minimum contacts, creating a highly fact-based and unpredictable jurisprudence. To date, the courts have used a fairly traditional approach to the minimum contacts test, applying standard analysis in a national context. Arguably different concerns exist in a national setting, where federalism concerns are diminished. Only time will tell whether a more unique Fifth Amendment analysis will develop under the rule.

In any event, Rule 4(k)(2) provides the admiralty lawyer with a new weapon. Allowing the federal courts to exercise jurisdiction over admiralty cases based on national contacts should create greater efficiency in litigation and fairness of results. Ultimately, although the expansion of jurisdiction is relatively small, it should give litigants and the courts the necessary flexibility to address claims that should properly be heard in a United States court applying admiralty law.