

## The Federal Long-Arm: The Uses of Diversity, or 'Tain't So, McGee

RICHARD H. SEEBURGER\*

The due process clause of the fourteenth amendment to the Constitution of the United States prevents the courts of a state from exercising in personam jurisdiction over a defendant who never has had any contacts with that state. Whether the due process clause of the fifth amendment would similarly limit the United States District Court for that district, sitting in diversity jurisdiction, has yet to be answered. There are presently a number of situations in which federal courts exercising diversity jurisdiction do reach absent parties a state court could not. These deserve critical examination since they, along with some Supreme Court dicta, serve as authority for a proposition which, if fully utilized, could have a profound impact on individuals in our federal system.

The American Law Institute (ALI) has proposed expansion of diversity of citizenship jurisdiction in heretofore frustrating multi-party, multi-state situations,<sup>1</sup> primarily to reach those absent who are necessary for a just adjudication of the claim. The fact that territorial limitations constitutionally prevent any state from achieving jurisdiction to resolve such a dispute<sup>2</sup> suggests to the ALI that the solution, if any, is to be found at the federal level, arguably in the article III authority for diversity jurisdiction. This proposed new jurisdiction, original and by removal, with only minimal diversity required, would encompass those cases in which there are several parties necessary for a just adjudication who are not all amenable to service under any one state's jurisdiction.<sup>3</sup> Another proposed change, in interpleader, makes a corporation incorporated in more than one place a citizen of that jurisdiction which will establish diversity.<sup>4</sup>

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\*Professor of Law, University of Pittsburgh School of Law. A.B., Dickinson University, 1957; LL.B., Harvard University, 1960; LL.M., 1964.

<sup>1</sup>American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (1969) [hereinafter cited and referred to in text as STUDY].

<sup>2</sup>Hanson v. Denckla, 357 U.S. 235 (1958). See quotation in note 29 *infra*.

<sup>3</sup>ALI STUDY, *supra* note 1, §§ 2371, 2373. Section 2371 provides for original jurisdiction when defendants necessary for a just adjudication of plaintiff's claim are beyond the reach of any one state. Section 2373 provides for removal when a dispersed party is necessary to a defendant. Section 2374(b) proposes giving the district courts nonreviewable discretion on motion or sua sponte to transfer such cases to any other district for the convenience of the parties or witnesses, or otherwise in the interest of justice.

<sup>4</sup>*Id.* § 2375.

The ALI, conscious that its proposals raise constitutional issues, appended Supporting Memorandum B to the *Study*.<sup>5</sup> The memorandum is brief but, given the paucity of available authority, brevity is not its principal weakness. It suffers from addressing the wrong issue. It attempts to show a federal power to provide for nationwide service of process in all diversity cases rather than those limited situations to which the ALI *Study* was addressed. Secondly, it does not confront a concern that has been voiced in several lower federal courts, a possible fifth amendment due process *limitation* on such service of process.

The memorandum proceeds from the assertion that most existing authority draws no distinction between congressional power to provide for nationwide service of process in cases involving the enforcement of federal law and the power so to provide in diversity of citizenship cases. The dearth of authority to the contrary is taken as proof of the existence of a power never exercised as such and in any event never directly challenged. The memorandum asserts that the pattern of not crossing state lines in diversity cases is a product of congressional choice rather than constitutional limits.<sup>6</sup> The existing authority relied on consists of Supreme Court dicta and two statutes which provide for extraterritorial service of process in stockholder's derivative actions and interpleader cases.

This Article will examine the authorities relied on by the memorandum and other authorities, including developments since the appearance of the ALI *Study* in which rights beyond state lines have been affected by the actions of United States courts sitting in diversity. Finally, this Article will suggest a constitutional justification for extra-state service of process in some, but not all, diversity cases, while recognizing an important difference between cutting off the interests of an absent plaintiff and imposing liability on an absent defendant.

## I. THE ALI'S AUTHORITIES

The most prominent authority cited in the *Study* is the statement of a unanimous Supreme Court (Mr. Justice Jackson not participating) that "Congress could provide for service of process anywhere in the United States."<sup>7</sup> This dictum by the Supreme Court must be

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<sup>5</sup>*Id.* at 437-41.

<sup>6</sup>That the former is true does not establish the latter. The memorandum points out that for one year under the Judiciary Act of 1801 one district did disregard state lines, encompassing the District of Columbia and parts of Maryland and Virginia. Act of Feb. 13, 1801, Ch. 4, §§ 4, 21, 2 Stat. 89, 96, *repealed* Act of March 8, 1802, Ch. 8, § 1, 2 Stat. 132. The early Congresses were not the final word on the powers of federal courts under article III. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 87 (1803).

<sup>7</sup>*Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946). The issue was whether Federal Rule 4(f) could authorize service of process in the Southern

taken as especially considered, since it came only a year after the Court's extensive treatment of the extraterritoriality of state court jurisdiction in *International Shoe Co. v. Washington*.<sup>8</sup> The primary authority for the Court's assertion was *Toland v. Sprague*.<sup>9</sup> Neither case, however, involved service of process beyond that which the state court could have accomplished.<sup>10</sup> Such a statement from a Supreme Court without contradiction or dissent, albeit with only fiat authority, is certainly impressive. Further, the statement implicitly contains two critical assertions. The first is that there resides somewhere in the Constitution the grant of substantive power to provide for nationwide service of process in a diversity case. The second is that this power is in no way limited by the due process clause of the fifth amendment.<sup>11</sup>

The memorandum also draws support from the majority's refusal to respond to Mr. Justice Black's dissent in *National Equipment Rental, Ltd. v. Szukhent*,<sup>12</sup> in which he directly raised the

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District of Mississippi when a diversity action was properly laid in the Northern District. Subsequently Mr. Justice Jackson in his plurality opinion in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), said, "The defendant here does not challenge the power of Congress to assure justice to the citizens of the District by means of federal instrumentalities, or to empower a federal court within the District to run its process to summon defendants here from any part of the country." *Id.* at 590. The basis for federal jurisdiction in this case, however, was not diversity.

<sup>8</sup>326 U.S. 310 (1945).

<sup>9</sup>37 U.S. (12 Pet.) 300 (1838). The following statement appears in the case: "Congress might have authorized civil process from any circuit court, to have run into any state of the Union." *Id.* at 328. This diversity case was commenced, however, by a writ of foreign attachment against the property of the absent defendant, expressly authorized today under Federal Rule 4(e). The Court cited no authority for its statement.

<sup>10</sup>The Court also cited two other cases, *United States v. Union Pac. R.R.*, 98 U.S. 569 (1878), and *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925), neither of which was a diversity case.

<sup>11</sup>Whether such due process limits apply when jurisdiction is based on *federal question* has not been authoritatively answered. See *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191 (E.D. Pa. 1974) and the discussion of authorities at 198-205. The court applied "traditional procedural due process notions as a part of a judicial fairness test rather than impose the *International Shoe* mandate of due process on federal nationwide service of process statutes." *Id.* at 203 (emphasis in original). The court overruled the objections of California defendants to suit in Pennsylvania based on false and misleading financial statements, inducing an exchange of stock, because the defendants knew that their financial statements would be sent to and used by the plaintiff concern in Pennsylvania. Should such limitations apply in federal question jurisdiction, it seems clear they would apply in diversity.

<sup>12</sup>375 U.S. 311 (1964). The pertinent language in the dissent is as follows:

It has been established constitutional doctrine since *Pennoyer v. Neff* was decided in 1878, that a state court is without power to serve its process outside the State's boundaries so as to compel a resident of another State against his will to appear as a defendant in a case where a personal judgment is sought against him. This rule means that an individual has a

point. In issue was whether defendants were properly served under Federal Rule 4(d)(1) and that turned on the factual dispute of whether they had appointed a particular individual their agent for receiving service of process in their contract with plaintiff. The majority ruled they had, so no comment on the point raised in the dissent was necessary.<sup>13</sup>

Finally, the memorandum draws support from the acceptance in lower federal courts without apparent question of two acts of

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constitutional right not to be sued on such claims in the courts of any State except his own without his consent. The prime value of this constitutional right has not diminished since *Pennoyer v. Neff* was decided. Our States have increased from 38 to 50. Although improved methods of travel have increased its speed and ameliorated its discomforts, it can hardly be said that these almost miraculous improvements would make more palatable or constitutional now than in 1878 a system of law that would compel a man or woman from Hawaii, Alaska, or even Michigan to travel to New York to defend against civil lawsuits claiming a few hundred or thousand dollars growing out of an ordinary commercial contract.

It can of course be argued with plausibility that the *Pennoyer* constitutional rule has no applicability here because the process served on the Szukhents ran from a federal, not a state, court. But this case was in federal court solely because of the District Court's diversity jurisdiction. And in the absence of any overriding constitutional or congressional requirements the rights of the parties were to be preserved there as they would have been preserved in state courts. Neither the Federal Constitution nor any federal statute requires that a person who could not constitutionally be compelled to submit himself to a state court's jurisdiction forfeits that constitutional right because he is sued in a Federal District Court acting for a state court solely by reason of the happenstance of diversity jurisdiction. The constant aim of federal courts, at least since *Erie R. Co. v. Tompkins*, has been, so far as possible, to protect all the substantial rights of litigants in both courts alike. And surely the right of a person not to be dragged into the courts of a distant State to defend himself against a civil lawsuit cannot be dismissed as insubstantial. Happily, in considering this question we are not confronted with any congressional enactment designed to bring nonstate residents into a Federal District Court passed pursuant to congressional power to establish a judicial system to hear federal questions under Article III of the Constitution, or its power to regulate commerce under Art. I, § 8, or any of the other constitutionally granted congressional powers; we are dealing only with its power to let federal courts try lawsuits when the litigants reside in different States. Whatever power Congress might have in these other areas to extend a District Court's power to serve process across state lines, such power does not, I think, provide sound argument to justify reliance upon diversity jurisdiction to destroy a man's constitutional right to have his civil lawsuit tried in his own State. The protection of such a right in cases growing out of local state lawsuits is the reason for and the heart of the *Pennoyer* constitutional doctrine relevant here.

*Id.* at 330-32 (Black, J., dissenting) (citations omitted).

<sup>13</sup>It is clear that the state rules could have authorized service of process. The focus of the dissent above quoted was on *Erie* rather than due process. It may well have been prompted by Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

Congress authorizing such nationwide service of process.<sup>14</sup> Support, rather, should be drawn from the lack of direct challenge.

The "support" that Supporting Memorandum B lends, then, is simply the assertion that there is no difference in federal court between the authority of Congress to provide for nationwide service of process to enforce federal laws that have a nationwide effect and its authority to provide for nationwide service of process to enforce laws whose effect has a territorial limitation by virtue of their authority being derived from state sovereignty.

There are, however, areas of support not relied on by the Memorandum — at the Supreme Court, congressional, and lower federal court levels — which suggest a difference between reaching absent plaintiffs and absent defendants. It is to these authorities this Article now turns.

## II. OTHER AUTHORITIES

Nationwide service of process<sup>15</sup> in statutory interpleader<sup>16</sup> cases has more authority behind it than the fact that Congress thought it could do it. Of the cases<sup>17</sup> that have reached the Supreme Court, resort to nationwide service of process was had in all but one.<sup>18</sup> In one

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<sup>14</sup>The memorandum cites by way of reference *Steinberg v. Hardy*, 90 F. Supp. 171 (D. Conn. 1950), involving 28 U.S.C. § 1695, providing for extraterritorial service of process over the corporation in stockholder's derivative actions, and *Great Lakes Auto Ins. Group v. Shepherd*, 95 F. Supp. 1 (W.D. Ark. 1951), involving 28 U.S.C. § 2361, providing for such service over claimants in interpleader cases. While what Congress thought about its powers is clear from a reading of the statutes, it is difficult to see what the reference to these two cases adds. Furthermore, the issue was not raised in the *Steinberg* case. A more appropriate citation would have been *Overfield v. Pennroad Corp.*, 113 F.2d 6 (3d Cir. 1940), the only case involving such a direct challenge under that statute. The authority given by the circuit court there was a perfunctory reference to cases involving a federally created cause of action, including those cited in note 10 *supra*. The interpleader case is an interesting reference. There were cross-claims between defendant claimants unrelated to the fund deposited in court. As to those defendants who were served under the statute but who did not submit themselves to the jurisdiction of the court, the claims were *dismissed*, albeit on the grounds that they were unauthorized under Federal Rule 13(g) since they did not arise out of the same transaction or occurrence. See discussion in note 88 *infra*.

<sup>15</sup>28 U.S.C. § 2361 (1970).

<sup>16</sup>*Id.* § 1335.

<sup>17</sup>*Griffin v. McCoach*, 313 U.S. 498 (1941) is excluded from consideration here since there was no appeal from the grant of relief in interpleader below. The sole question before the Supreme Court was the choice of law rule in second stage interpleader, *i.e.*, the dispute among the claimants once the stakeholder is given relief by a discharge from liability beyond the fund deposited in the court.

<sup>18</sup>*Levinson v. United States*, 258 U.S. 198 (1922). The citizenship of the claimants does not appear. It would seem that jurisdiction was not based on diversity, but rather on 28 U.S.C. § 1345 with the United States as plaintiff. In any event, the Court said, "[A]s all the parties consented to jurisdiction we do not feel called upon to raise a question on that score." *Id.* at 200. Certainly the Court could not have been referring to

case relief was denied.<sup>19</sup> Of the remaining cases, three involved problems of subject matter jurisdiction under 28 U.S.C. § 1335<sup>20</sup> and one involved a problem of jurisdiction to grant ancillary relief.<sup>21</sup> In none of these six cases was a challenge to nationwide service of process made and the Supreme Court itself gave no indication that a future challenge would be fruitful.

A second, and perhaps more far-reaching, area of support not relied on by the ALI may be found in the acquiescence of the Supreme Court and Congress<sup>22</sup> in certain amendments to the Federal Rules of Civil Procedure in 1963 and 1966 authorizing district courts to "reach" parties beyond the boundaries of the state in which the court sits.

In 1963, amendments to Federal Rule 4(f) were adopted to provide for service beyond the territorial limits of the state, but within 100 miles of the place in which the action is commenced or to which it is assigned or transferred for trial, for persons who are brought in as parties pursuant to Federal Rule 13(h) as additional parties, or Federal Rule 14 as third parties, or Federal Rule 19 as additional parties joined when needed for a just adjudication.<sup>23</sup>

In 1966 a rewriting of the class action provisions of Federal Rule 23 was adopted, changing the impact of a judgment adverse to extraterritorial class members. Rule 23(c)(2) now requires a member of a "spurious" class to "opt out" rather than permitting him to "opt in." The new class provided for in Federal Rule 23(b)(2), designed to cover actions in the civil rights field in which "the party opposing the class has acted or refused to act on grounds generally

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subject matter jurisdiction. In context, however, it seems probable the reference is not to personal jurisdiction either, but to "equitable jurisdiction" to grant relief in interpleader, since it was suggested the stakeholder did not stand indifferent as then required by 28 U.S.C. § 1335.

<sup>19</sup>The eleventh amendment was held to preclude federal jurisdiction in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). An executor was unable to interplead the different states which claimed his decedent was their resident for purposes of inheritance taxes. The Court held that the possibility of conflict of decisions between the courts of two states is not forbidden by the Constitution. Thus a suit against the tax collectors was held to be a suit against the states since the officers would not be acting beyond the limits of the states' lawful power. *But cf.* *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961), discussed *infra* at note 95.

<sup>20</sup>*State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934). In the first two cases the Court raised the issue itself.

<sup>21</sup>*Dugas v. American Sur. Co.*, 300 U.S. 414 (1937).

<sup>22</sup>The Congress does not always acquiesce in the product of the Advisory Committee of the Judicial Conference. See 28 U.S.C.A. Legislative History, FEDERAL RULES OF EVIDENCE, at 825-26.

<sup>23</sup>The Advisory Committee cited *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), as authority so to provide.

applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole," provides no "opt out" opportunity.<sup>24</sup>

### III. RECENT LOWER FEDERAL COURT PRACTICES

Lower federal courts have considered the extraterritorial impact of the 1963 and 1966 amendments. In addition they have decided a number of cases since the ALI *Study* involving statutory interpleader and pendent jurisdiction of a state claim on a federal cause of action, when nationwide service of process was used. Many of the courts were not as satisfied as the ALI was with the legitimacy of nationwide service of process in any and all diversity cases. Their concern was not, as was Justice Black's,<sup>25</sup> with the source of federal power so to provide, but rather with limitations on any such power that fundamental fairness notions of due process might impose.

Those lower federal courts that confronted the issue did not seek to equate the minimal contacts standard applied under *McGee v. International Life Insurance Co.*<sup>26</sup> with that which might be applicable to the exercise of federal power. The basis of the state court's power is that it is sovereign within a defined territorial area.<sup>27</sup> That this is a necessary limitation upon power became somewhat obscured in the cases dealing with the "presence" of foreign corporations.<sup>28</sup>

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<sup>24</sup>Congress was careful, however, to limit extraterritoriality in the Multidistrict Litigation Act, 28 U.S.C. § 1407 (1970), authorizing transfer only for pretrial purposes and requiring remand to the original district for trial. "Pretrial proceedings" has been held to include the granting of summary judgment. *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974). The Rules of Procedure of the Judicial Panel on Multidistrict Litigation provided for transfer for trial across district lines, § 5.3, or across circuit lines, § 5.4, but only in compliance with 28 U.S.C. § 1404(a) (1970), to a district where the action might have been brought, *i.e.*, where service over the defendant could have been obtained.

<sup>25</sup>See note 12 *supra*.

<sup>26</sup>355 U.S. 220 (1957).

<sup>27</sup>*Pennoyer v. Neff*, 95 U.S. 714, 723 (1877):

[T]he exercise of jurisdiction which every State is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give ex-territorial operation to its laws, or to enforce an ex-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated, and be resisted as usurpation.

<sup>28</sup>See, *e.g.*, *McGee v. International Life Ins. Co.*, 355 U.S. at 222-23:

Since *Pennoyer v. Neff*, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the

However, the point was forcefully reasserted in *Hanson v. Denckla*.<sup>29</sup> Assuming the power of the federal government to provide for service of process across state lines in diversity cases, it is not restricted by the inherent limitations of a territorial sovereignty, *i.e.*, the encroachment on another sovereign, at least in those kinds of cases over which no one state could acquire jurisdiction. While the lower federal courts seemed to assume the power to cross state lines for certain purposes, they were uncomfortable with the notion that such power can run to the outermost limits of the borders of the United States of America.

The cases considered in the lower federal courts, in order of their complexity, involve (1) pendent jurisdiction, (2) Federal Rule 4(f), (3) Federal Rule 23, and (4) 28 U.S.C. § 2361.

#### A. *Pendent Jurisdiction*

A problem of extraterritoriality under the doctrine of pendent jurisdiction arises when a complaint based on a federal cause of action for which nationwide service of process has been authorized<sup>30</sup>

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subject of prolific controversy, particularly with respect to foreign corporations. In the continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations. See Henderson, *The Position of Foreign Corporations in American Constitutional Law*, c. V. More recently in *International Shoe Co. v. Washington*, the Court decided that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

(citations omitted).

<sup>29</sup>357 U.S. 235, 251 (1958):

Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he had the "minimum contacts" with that State that are a pre requisite to its exercise of power over him.

<sup>30</sup>See, *e.g.*, 15 U.S.C. §§ 78aa, 77v(a) (1970).



contains a count based on state law. Courts which have considered the issue have split fairly evenly, all agreeing that the issue is only one of statutory construction.<sup>31</sup> Those dismissing the pendent claim view Congress as having intended to authorize service for the limited purpose of deciding the "case" created by federal law.<sup>32</sup> Pendent jurisdiction, it is argued, goes only to subject matter jurisdiction and not to personal jurisdiction. That argument, however, was turned around by the only circuit court to consider the point directly:

Congress has bestowed upon the United States District Courts the power to extend their writ extraterritorially so as to compel a personal appearance before them. Once the defendant is before the court, it matters little, from the point of view of procedural due process, that he has become subject to the court's ultimate judgment as a result of territorial or extraterritorial process. Looked at from this standpoint, the issue is not one of territorial in personam jurisdiction — that has already been answered by the statutes — but of subject matter jurisdiction. It is merely an aspect of the basic pendent jurisdiction problem.<sup>33</sup>

*B. Federal Rule of Civil Procedure 4(f)*

Much the same reasoning has been used in the lower federal courts to support the 100 mile bulge amendment to Federal Rule 4(f) in 1963. Since the bulge provision is limited to service under Federal Rule 14 (upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him) or under Federal Rule 19 (upon a person needed for a just adjudication), the subject matter is properly seen as ancillary rather than pendent.

When the original subject matter jurisdiction is not based on diversity the additional party, who was served only on the state rather than the federal cause of action (but who could have been made subject to the federal cause by Congress in order to completely adjudicate the federal cause of action under ancillary jurisdiction), presents a problem not significantly different from that of the party who is served under a federal cause of action but must also respond to a state cause of action under pendent jurisdiction. Thus in *Coleman v. American Export Isbrandtsen Lines, Inc.*<sup>34</sup> a longshoreman allegedly

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<sup>31</sup>See Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423 (1970).

<sup>32</sup>See, e.g., *Wilensky v. Standard Beryllium Corp.*, 228 F. Supp. 703, 705-06 (D. Mass. 1964); Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1965).

<sup>33</sup>*Robinson v. Penn Central Co.*, 484 F.2d 553, 555 (3d Cir. 1973).

<sup>34</sup>405 F.2d 250 (2d Cir. 1968).

injured in New Jersey on defendant's ship sued the shipowner in New York, and a claim over was made against the Philadelphia stevedoring corporation not doing business in New York. Congress could have given a cause of action against the stevedoring company just as it could completely subsume a pendent state claim based on a controversy which it could regulate exclusively. The problem therefore is not of constitutional dimensions when the basis of jurisdiction originally was not diversity and the 100 mile bulge is limited to Rules 14 and 19.<sup>35</sup>

However, when the original cause of action is based exclusively on state law, the problem of service under Rule 4(f) cannot be resolved on the basis of Congress' ability to provide for the convenient resolution of federally based claims. Only one such case arose, *Pierce v. Globemaster Baltimore, Inc.*,<sup>36</sup> in which a diversity action was brought in Maryland against a Maryland manufacturer of rope whose negligence allegedly caused the rope to break resulting in the death in Pennsylvania of plaintiff's decedent. Defendant filed a third party complaint under Federal Rule 14, served in eastern Pennsylvania under amended Federal Rule 4(f) against the retailer, claiming that any defect in the rope was caused by him, and against the decedent's employer, claiming he failed to provide the decedent, a painter, with a safe place to work.<sup>37</sup> The court saw *Coleman* as settling the validity of Rule 4(f), regardless of the subject matter jurisdiction. It saw no constitutional problem, given *Hanna v. Plumer*<sup>38</sup> and the availability of nationwide service of process in interpleader cases.

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<sup>35</sup>The Reporter to the Advisory Committee in his Memorandum on Comments to Rule 4 relied on the statutory service provisions of the stockholder's derivative suit, 28 U.S.C. § 1695 (1970), and interpleader, 28 U.S.C. § 2361 (1970). See Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. REV. 1053, 1061 (1963).

<sup>36</sup>49 F.R.D. 63 (D. Md. 1969).

<sup>37</sup>The typical fact situation under Rule 14 would be the obverse of this one, the "vouching in" by an insured against his insurer, an employer against his employee or a retailer against a distributor or manufacturer, when there is a duty of indemnification. Notice may cross state lines and the prior judgment is given collateral estoppel effect against the vouchee. In these cases, as with warranty, there is no personal jurisdiction over the absent vouchee. Rather it is his pre-existing duty to indemnify that binds the vouchee subsequently.

<sup>38</sup>380 U.S. 460 (1965). An executor in a diversity case was served by leaving copies of the summons and complaint at his home with his wife pursuant to F.R.C.P. (4)(d)(1) rather than in hand as required by state law. The Court held the Rule was within the Enabling Act and without the Erie rule. For a discussion on whether these are mutually exclusive categories see: Chayes, *Some Further Last Words on Erie: The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974). *Hanna* does not hold anything arguably procedural is therefore constitutional. Reliance on it in *Pierce* begs the question.

*Pierce* is the only case to squarely raise the issue of the *power* of the federal government to provide for service across state lines. It did not consider limitations based on fundamental fairness, but in that regard the third party defendants were Pennsylvanians who could have been made to travel much farther than 100 miles within the state, to a place far less convenient, such as Pittsburgh, rather than to Baltimore, Maryland.

### C. Class Actions

A third area of potential extraterritorial effect in diversity jurisdiction is found in class actions, in particular the 1966 amendments affecting the "spurious" class provisions of Federal Rule 23(b)(2) and (3). The Advisory Committee's Notes observed of the old rule that, "[T]he judgments in 'true' and 'hybrid' class actions would extend to the class (although in somewhat different ways); the judgment in a 'spurious' class action would extend only to the parties, including the intervenors."<sup>39</sup> The new rule binds the members of the "spurious" class who have been given notice and who do not request exclusions.

The binding effect of class action judgments on absent non-parties was early challenged and confirmed. In *Smith v. Swormstedt*<sup>40</sup> the Court held: "The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."<sup>41</sup> Not only were the plaintiffs representing a class, but the defendants were being sued as a class. The dispute was between the southern and northern travelling ministers of the Methodist Episcopal Church over a fund and property in Cincinnati held by an unincorporated body politic in Ohio also named as a defendant. The action was filed in Ohio, where all the property in dispute was located. *Supreme Tribe of Ben Hur v. Cauble*<sup>42</sup> was similar, involving a class action by representatives of Class A certificate owners brought in Indiana concerning the power of a fraternal benefit association organized under Indiana law to create Class B benefits, allegedly diluting the Class A benefits.

The importance of the in rem-in personam distinction and its applicability to class actions seemed immaterial until *Christopher v.*

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<sup>39</sup>FED. R. CIV. P. 17 to 23.2.

<sup>40</sup>57 U.S. (16 How.) 288 (1853). The class action was deemed an equitable remedy. There appears to have been no challenge to any extraterritorial impact of such remedies raised in a state court.

<sup>41</sup>*Id.* at 303.

<sup>42</sup> 255 U.S. 356 (1921).

*Brusselback*.<sup>43</sup> An Illinois federal court judgment levying an assessment upon stockholders of an insolvent federal joint stock land bank located there was held *not* to be res judicata to Ohio stockholders. The Supreme Court ruled that mere membership in the corporation (class) was not consent to jurisdiction for in personam liability under the facts of the case, although otherwise, “[I]t is enough that in every case the stockholder has assumed or retained his membership in the corporation after the warning of the statute, or of rules governing the corporation, of which he knew or had opportunity to know, that the benefits of membership carry with them the risk that the corporation may stand in judgment for him.”<sup>44</sup> The Court referred to the class action provisions as preserving “unimpaired the jurisdiction of Federal courts of equity in a class suit to render a decree binding upon absent defendants *affecting their interest in property within the jurisdiction of the court.*”<sup>45</sup>

Recent cases, however, have focused rather on the issue of the adequacy of representation<sup>46</sup> and this concern seems an echo of the statement in *Smith v. Swarmstedt* quoted above.<sup>47</sup> The modern impetus for this is found in *Hansberry v. Lee*,<sup>48</sup> a case ironic because

<sup>43</sup>302 U.S. 500 (1938).

<sup>44</sup>*Id.* at 504.

<sup>45</sup>*Id.* at 505 (emphasis added).

<sup>46</sup>See Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589 (1974). Adequacy of representation does not eliminate the need for notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974).

<sup>47</sup>See text accompanying note 40 *supra*.

<sup>48</sup>311 U.S. 32 (1940). The theoretical justification of protection through adequacy of representation may be undercut by the line of cases beginning with *Fuentes v. Shevin*, 407 U.S. 67 (1972), in which the Court rejected the argument that no prior hearing was needed if substantive rights could be protected through subsequent return of property and award of damages. The Court noted that while due process tolerates some variance in form of the hearing appropriate to the nature of the case, the opportunity for a hearing must exist. There was no suggestion that the forum should be anything other than one with competent jurisdiction. Under Federal Rule 23(c)(2), requiring the absent party to request exclusion imposes no great burden. The absent party is not entitled to actual notice, however, but only “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” This language is taken from *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-74 (1974). The Court in *Mullane* assumed that notice would not, and was not calculated to, come to the attention of all persons with an interest in the common trust fund for which an accounting was sought. To the argument that the proceeding was in personam the Court responded:

The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification.

But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification

that binding effect was denied, although it could have been granted had the first case proceeded explicitly on an in rem basis rather than as a class action. The controversy concerned a large area in Chicago subject to racially restrictive agreements entered into by some 500 landowners, which was to become effective when signed by owners of ninety-five percent of the frontage. A class action was brought to enforce it and the parties stipulated that the ninety-five percent requirement had been met. In a subsequent suit to enforce the agreement, the trial court found that owners of only fifty-four percent had signed the agreement, but that the issue was res judicata because of the prior class action. The Supreme Court of Illinois reversed and was affirmed by the United States Supreme Court which said:

Those who sought to secure its benefits by enforcing it could not be said to be in the same class with or represent those whose interest was in resisting performance, for the agreement by its terms imposes obligations and confers rights on the owner of each plot of land who signs it. If those who thus seek to secure the benefits of the agreement were rightly regarded by the state supreme court as constituting a class, it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be

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for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of the law, or in other issues, or the reasoning which underlies them, we do not rest the power of the state to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of the state in providing means to close trusts that *exist by the grace of its laws* and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

399 U.S. at 312-13 (emphasis added). But this power of the state, whether proceeding under an "in rem" label or not, to adjudicate the interests of nonresidents in a trust fund admittedly situated there, or against the trustee who owes his legal status to the laws of that state, involves no intrusion on the territorial sovereignty of another state. The same cannot necessarily be said of the state's power to adjudicate the rights or liabilities of a nonresident in a spurious class action. The common questions of fact or law in such a class action do not exist by grace of the federal law. The federal interest in adjudicating them is not the same as New York's in *Mullane*.

said to be acting in the interest of any others who were free to deny its obligation.<sup>49</sup>

There are apparently no cases which successfully impose in personam liability on an absent class defendant. Cases under Federal Rule 23 in which absent plaintiffs have been bound by an adverse "spurious" class action judgment — in which only their interests in a chose in action or a cause of action were cut off—have not yet been based on diversity jurisdiction.<sup>50</sup> The fact that an absent plaintiff might not be bound before the 1966 amendments led one defendant to argue that an absent class plaintiff ought not take advantage of a successful class action. This "mutuality" argument was rejected in that instance, since the plaintiff was in fact a party to the original action.<sup>51</sup>

#### D. Interpleader

It is natural that the ALI proposal should rely heavily on the

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<sup>49</sup>311 U.S. at 44. For a recent discussion of adequacy of representation, see *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), holding that failure to appeal is not adequate representation if the representative was given retroactive benefits and the rest of the class was not. The case was a class action by drivers with suspended licenses, brought under Federal Rule 23(b)(2), seeking a declaratory judgment on the validity of a state's law on financial responsibility for motorists involved in accidents. It was governed by the intervening decision in *Bell v. Burson*, 402 U.S. 535 (1971). Although only implicit in the quotation in note 48 *supra*, it has been held that determination of adequacy of representation made prior to certifying the class is not binding on absent class members and may be challenged in a collateral proceeding. *Research Corp. v. Edward J. Funk & Sons Co.*, 15 Fed. Rules Serv. 2d 580 (N.D. Ind. 1971).

<sup>50</sup>In *re Four Seasons Securities Laws Litigation*, *Arthur Anderson & Co. v. Ohio*, 502 F.2d 834 (10th Cir. 1974), and *Phillips v. Clark*, 525 F.2d 500 (10th Cir. 1975), denying relief under Federal Rule 60(b), which would have permitted absent plaintiffs to opt out after settlement. The court concluded they could have opted out earlier and that the representation leading to a settlement in retrospect was adequate. There are apparently no cases involving a challenge to the binding effect of a class action by an absent member who did not have the right to opt out. In *National Student Market Litigation v. Barnes Plaintiffs*, 530 F.2d 1012 (D.C. Cir. 1976) there was a failure of proof by the moving class members that they had not received notice. Another situation in which an absent party can be bound is found in Federal Rule 19(a), providing that a person needed for a just adjudication who is beyond the reach of process can be joined as an involuntary plaintiff in a "proper case." Such cases are those in which there is a pre-existing duty to permit the name to be used as a plaintiff and the situation is similar to the vouching in or warranty situation discussed in note 37 *supra*. See *Independent Wireless Tel. Co. v. R.C.A.*, 269 U.S. 459 (1926).

<sup>51</sup>*Schrader v. Selective Serv. Sys. Local Bd. No. 76*, 329 F. Supp. 966 (W.D. Wis. 1971), *rev'd on other grounds*, 470 F.2d 73 (7th Cir.), *cert. denied*, 409 U.S. 1085 (1972).

provision for nationwide service of process in statutory interpleader cases.<sup>52</sup> It is a widely used provision of long standing.<sup>53</sup>

The nature of jurisdiction in interpleader has been the subject of dispute in the lower federal courts, notwithstanding the lack of challenge to nationwide service of process in those cases reaching the Supreme Court.<sup>54</sup> There is disagreement whether jurisdiction is in rem, quasi in rem, or in personam. The matter becomes critical if there are cross-claims.

Assume *A*, *B* and *C* were all residents of California. *A* owns a yacht and hires *B* to repair it for him for \$15,000, to be held in escrow by *C* pending successful completion of the work. *A* moves to Maine and *B* to Hawaii. *C*, while visiting his friend *A* in Maine, is told that the work was not successfully completed. *B* informs *C* the work is done and demands the money. *C* files an interpleader action in the United States District Court for the District of Maine,<sup>55</sup> depositing the \$15,000 with the court and serving *A* in Maine and *B* in Hawaii. *A*, alleging that the work was not performed, files a counterclaim for the fund and, alleging \$50,000 damage by virtue of *B*'s work on the boat, cross-claims against *B*.<sup>56</sup>

Plainly a Maine state court could not give judgment against *B* for the alleged damage to the boat if he does not submit to the court's jurisdiction. However, the statutes and rules contemplate that the

<sup>52</sup>28 U.S.C. § 2361 (1970) provides that in interpleader actions brought under section 1335 of that title "a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States Court affecting the property, instrument or obligation . . . until further order . . . ."

<sup>53</sup>First adopted in 1917, 39 Stat. 929, it antedates 28 U.S.C. § 1695 (1970), covering stockholder's derivative actions, adopted April 16, 1936, ch. 230, 49 Stat. 1213. There is yet another statutory provision having effect across state lines, 28 U.S.C. § 1404(a) (1970), adopted June 25, 1948, ch. 646, 62 Stat. 937, providing for a change of venue. It is similar to 28 U.S.C. § 1406(a) (1970), providing for transfer to a jurisdiction where the action could have been brought in order to cure improper venue, in that the transferee court has personal jurisdiction over the defendant, and the transferor court does not. *Hoffman v. Blaski*, 363 U.S. 335 (1960). Section 1406(a) differs from section 1404(a) in that the defendant may move under section 1404(a) to transfer the case even when venue is proper, forcing the plaintiff to try the case in a district where *plaintiff* is not subject to service of process. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964). Apparently no plaintiff, on defendant's section 1404(a) motion, has objected to the court's powers.

<sup>54</sup>*See* notes 17-21 *supra*.

<sup>55</sup>Venue is set where a claimant resides. 28 U.S.C. § 1397 (1970).

<sup>56</sup>The pertinent language of Federal Rule 13(g) is "arising out of the transaction or occurrence . . . or relating to any property that is the subject of the original action." Clearly if there were no escrow arrangement and the suit was only between *A* and *B* the counterclaim would be compulsory as arising out of the "transaction or occurrence" within the meaning of Federal Rule 13(a). *See* 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1410 (1969).

United States District Court sitting in diversity may do so.<sup>57</sup> The jurisdiction of the cross-claim is ancillary, which supplies the basis for subject matter jurisdiction. Is it a basis for personal jurisdiction in the federal court?

The nature of the court's jurisdiction over the claimants in an interpleader action should be viewed as a product of the nature of an interpleader action. Conventional wisdom, if not received knowledge, had it that the *relief* afforded by interpleader was essentially in personam although the basis of the jurisdiction was essentially in rem, whether reference was to the original "strict" bill in interpleader on the law side or the bill in the nature of a bill in interpleader on the equity side. The latter was clearly a device of the Chancellor. The origin of the former is a matter of some dispute, although relief is always the discharge of the stakeholder-plaintiff from personal liability upon the deposit of payment into court. Then the claimants, "enjoined" from suing the stakeholder-plaintiff, fight it out among themselves in the "second stage." Whether the first stage is viewed as giving essentially legal or equitable relief, there were four strict requirements:

The equitable remedy of interpleader . . . depends upon and requires the existence of the following conditions: 1. The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded. 2. All the adverse titles or claims must be dependent. 3. The person asking relief—the plaintiff—must not have any claim or interest in the subject matter. 4. He must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.<sup>58</sup>

Equity's development of a bill in the nature of a bill in interpleader gave relief when the stakeholder violated the third requirement by claiming an interest in the subject matter and when there was some basis for equitable relief other than the possibility of multiple liability or inconsistent judgments.<sup>59</sup> Even if the first stage of strict

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<sup>57</sup>*But see* *Marine Bank & Trust Co. v. Hamilton Bros., Inc.*, 55 F.R.D. 505 (W.D. Fla. 1972), discussed in note 88 *infra*.

<sup>58</sup>J. POMEROY, EQUITY JURISPRUDENCE § 1322 (1883).

<sup>59</sup>

A bill in the nature of a bill of interpleader is one in which the complainant seeks some relief of an equitable nature concerning the fund or other subject-matter in dispute, in addition to the interpleader of conflicting claimants. The complainant is not required, as in strict interpleader, to be indifferent stakeholder, without interest in the subject-matter. It is essential, however, that the facts on which he relies entitle him to equitable, as distinguished from legal, relief; he is not permitted, under the guise of a bill in equity, to



interpleader gave an equitable remedy that involved the in personam relief of an injunction against the claimant-defendants suing the discharged stakeholder-plaintiff for the res, the original basis of jurisdiction is seen to be in rem. Relief in the first stage of strict interpleader, even if viewed as equitable, nonetheless had as its ancestor common law interpleader, used in a "real" or in rem action like detinue.<sup>60</sup>

Whatever the original requirements of interpleader,<sup>61</sup> Pomeroy's four requirements were contained in the original federal statute. They were, however, much modified by subsequent amendments.<sup>62</sup> These changes were due almost entirely to the writing of Professor Zechariah Chafee, Jr., who drafted the 1936 amendments.<sup>63</sup> Presently the first three of Pomeroy's requirements are expressly abolished under both statutory and Rule<sup>64</sup> interpleader.<sup>65</sup> The ability

litigate a purely legal claim or interest in the subject-matter . . . .

J. POMEROY, EQUITY JURISPRUDENCE § 1481 (4th ed. 1919).

<sup>60</sup>There is a view that no writ of interpleader was available at common law, but that it was available only as a defensive measure. See Rogers, *Historical Origins of Interpleader*, 51 YALE L.J. 924 (1942). Plainly it was available in response to detinue actions brought by several claimants to lost goods casually found, or to a bailee given goods to be delivered to a third person upon the happening of a certain event.

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1. The "classic" requirements for interpleader are not in any proper sense classic but are in fact of fairly late origin in the history of equitable jurisdiction.

2. The four requirements for interpleader stated by Pomeroy originated in the improvisations *ad hoc* and achieved generalization and authority by virtue of credulous extensions of precedent.

3. Of the four requirements, one—the requirement that the claimants' titles be "derivative" or from a "common source" — is plainly insupportable; another — that the stakeholder not dispute the extent of his liability — is the subject of divided authority concealed by the suppositious "bill in the nature of interpleader"; another — that the stakeholder have no "independent liability" to either claimant — was a response to a now obsolete procedural difficulty; and the remaining one — that the claims relate to "the same debt or duty" — is question-begging.

Hazard & Moskowitz, *An Historical and Critical Analysis of Interpleader*, 52 CAL. L. REV. 706, 749-50 (1964).

<sup>62</sup>39 Stat. 929 (1917); 43 Stat. 976 (1925); 44 Stat. 416 (1926); 49 Stat. 1096 (1936).

<sup>63</sup>Professor Chafee's writings include: *Modernizing Interpleader*, 30 YALE L.J. 814 (1921); *Interstate Interpleader*, 33 YALE L.J. 685 (1924); *Interpleader in the United States Courts*, 41 YALE L.J. 1134 (1932), 42 YALE L.J. 41 (1932); *Federal Interpleader Bill: Draft and Memorandum*, prepared for the Section on Insurance Law of the American Bar Association (May 1934); *The Federal Interpleader Act of 1936*, 45 YALE L.J. 963, 1161 (1936); *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377 (1940); *Broadening the Second Stage of Interpleader*, 56 HARV. L. REV. 541, 929 (1943).

<sup>64</sup>Federal Rule 22 interpleader is not part of the present discussion, since it contemplates personal service under Federal Rule 4, and not service across state lines.

<sup>65</sup>*Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 875, 926-27 (1958).

to file counterclaims under Federal Rule 13 would seem to eliminate the fourth requirement of no independent liability.<sup>66</sup> Federal interpleader today seems to contemplate relief when jurisdiction cannot be viewed as either in rem or quasi in rem. This may not be the case and therefore such actions might be maintainable in state courts. It was, however, failure of relief in a state court that led to adoption of the federal statute in the first place. That failure should be reviewed before turning to the current disputes on the nature of interpleader jurisdiction in the lower federal courts and the possibility of cross-claims between absent claimants.

The case is, of course, *New York Life Insurance Co. v. Dunlevy*<sup>67</sup> and the failure or refusal of the Court to apply the quasi in rem jurisdictional base of *Harris v. Balk*.<sup>68</sup> The difficulty flows both from the problem of locating the situs of intangible property and the fictitious ubiquity of corporations. The issue for our purposes is whether *Mullane*<sup>69</sup> will permit the reification and localization of such property so that a court can give in rem or quasi in rem judgments even though the property holder may be in more than one territorial jurisdiction at any one time. The answer seems to be "yes."

In *Harris* the property was an admitted debt which was attached by the civil arrest of the debtor by a creditor of the creditor. This asset was in effect reified by the debtor's admitting the debt and depositing a bond as a condition for his release. The debtor then notified, but did not serve, his creditor in another state. In a subsequent suit by that creditor against the debtor in the other state,

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<sup>66</sup>The proper historical conception of interpleader has been stated thusly: A person against whom two or more persons make claim may bring an action for determination whether he is liable to one or several of the claimants, and if so to what extent, whenever:

(a) the claims involve contentions of fact, or contentions of mixed law and fact, such that the plaintiff may sustain double or multiple liability as a consequence of the contentions being determined inconsistently; or

(b) the claims may exhaust a limited fund to which the claimants look for recovery.

Hazard & Moskowitz, *supra* note 61, at 762-63.

<sup>67</sup>*New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

<sup>68</sup>198 U.S. 215 (1905). Notwithstanding *Harris*, the Third Circuit recently declared quasi in rem jurisdiction unconstitutional on the basis of *Fuentes v. Shevin*, 407 U.S. 67 (1972), apparently even as a means of establishing jurisdiction when the res would not be restrained after appearance. *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976). Judge Gibbons concurred on the ground that the minimum contacts test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) for personal jurisdiction applies also to quasi in rem jurisdiction and thus limits *Harris*. Subsequently another panel invalidated the Delaware sequestration procedure on the latter ground. *U.S. Industries, Inc. v. Gregg*, 540 F.2d 142 (3d Cir. 1976). A broad array of challenges to that procedure, which does not permit a special or limited appearance, is presented in *Greyhound Corp. v. Heitner*, 361 A.2d 225 (Del. 1976), *appeal filed sub nom.* *Shaffer v. Heitner*, 45 U.S.L.W. 3004 (June 15, 1976) (No. 75-1812).

<sup>69</sup>See quotation in note 48 *supra*.

the Supreme Court held the defendant could plead his deposit in the first suit as a defense, since he had given notice. The practical effect was to hold that the original obligation has a situs where the debtor was and, when attached, could be treated like a res for jurisdictional purposes.<sup>70</sup>

In *Dunlevy* the debtor did not admit its liability to anyone in particular, but only that it owed the sum to one of two claimants, not knowing which because of a disputed assignment.<sup>71</sup> Here again the nonresident claimant was given notice but not served. Here, however, that claimant was allowed to prevail in the second suit and the debtor was not permitted to plead the deposit in court in an interpleader action in the first state or that the property had been awarded to the other claimant.<sup>72</sup> The holding seems to indicate that if the stakeholder does not admit the property belongs to the absent claimant, or the court does not so adjudicate, there is nothing of the nonresident's in the state over which to extend quasi in rem jurisdiction, thus leaving the absent claimant with notice free to argue later that there was.

This distinction has been advanced more formally in *Atkinson v. Superior Court*<sup>73</sup> in which Justice Traynor said *Dunlevy* was an interpleader action initiated by the stakeholder, whereas *Harris* was garnishment or attachment. The former involved a disputed claim, the latter an undisputed claim. In *Atkinson* the question was

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<sup>70</sup>Note that the attaching creditor was not claiming title to or an existing right to immediate possession in the thing attached. At common law the writ of garnishment was closely related to interpleader, but was allowed only in an action for detinue, involving chattels real. There the defendant could garnish or call in a third party who also had a claim. The writ of *scire facias* would issue against the third party, who then became the defendant in the detinue action, with the garnishee out of court discharged from further liability.

<sup>71</sup>The debtor was a corporation doing business in more than one state. Nothing was made to turn on the potential problem of deciding in which state the debt would be located if the *Harris* rule of the debt following the debtor were to be applied to such corporations. The case was decided as though the debtor were an individual.

<sup>72</sup>As the caption suggests, the stakeholder-debtor was an insurance company. The 1917 Act, 39 Stat. 929, authorized filing of interpleader by "any insurance company or fraternal benefit society." The 1925 amendment, 43 Stat. 976, expanded this to "any insurance company or association or fraternal or beneficial society." The 1926 amendment, 44 Stat. 416, added casualty companies and surety companies. The final changes in 1936, 49 Stat. 1096, include "any person, corporation, association, or society" and added relief in the form of a bill in the nature of a bill in interpleader. The Act always required a deposit or bond. Federal Rule 22 interpleader does not expressly require deposit or bond. See Urborn, *Multiple Claims from One Accident: Federal Interpleader*, 34 INS. COUNSEL J. 343 (1967), urging this benefit of Rule interpleader. However, Rule interpleader requires in personam jurisdiction in the first instance, and in any event, the court has discretion in requiring deposit or bond. See *United States v. Coumantaros*, 146 F. Supp. 51 (S.D.N.Y. 1956).

<sup>73</sup>49 Cal. 2d 338, 316 P.2d 960 (1957).

whether New York trustees were indispensable parties to a California class action brought by California employees against California employers to decide whether certain royalties were wages so that their diversion to New York trusts would be in violation of a collective bargaining agreement. The employers alleged their willingness to pay the royalties as wages, but alleged the conflicting demands of the New York trustees. The court held that since the case was not one of the stakeholder invoking the jurisdiction of a court remote from the claimant for the purpose of terminating his obligation, or one where the stakeholder seeks to have conflicting claimants adjudicate their rights in a forum of his own choice, the court could find no distinction between quasi in rem jurisdiction over a nonresident's chose in action admittedly his and jurisdiction to establish that it was never his.<sup>74</sup> The court found the minimum contacts required by due process satisfied.<sup>75</sup>

Statutory interpleader was intended to overcome the *Dunlevy* problem<sup>76</sup> and as noted above<sup>77</sup> this has apparently been successful. While no direct challenge to nationwide services of process was made in the Supreme Court in *State Farm Fire and Casualty Co. v.*

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<sup>74</sup>The situs of the chose in action as California was not challenged. When the stakeholder is a corporation present in more than one state, unless the obligation can be reified and localized, no one state has exclusive territorial jurisdiction to foreclose the interest of nonresident claimants without infringing on the sovereignty of another state. See *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961), discussed in note 94 *infra*. In *Steele v. G.D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973), the court treated the problem of locating the situs of the debt of a multi-state corporation (admittedly generally present) in a manner similar to locating the corporate presence by evaluating the contacts with the state of the transaction giving rise to the debt.

<sup>75</sup>For a general discussion of the impact of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), on the problem, see Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 281-88, and von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). The "minimum contacts" theory has been the subject of a great deal of commentary. See, e.g., Comment, *Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 DUKE L.J. 725. It has been suggested that full faith and credit rather than due process is the proper focus where subsequent impact on non-residents is involved. *Pennoyer v. Neff*, 95 U.S. 714 (1877), is blamed for equating full faith and credit with due process and then focusing on due process alone. See Comment, *Long Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 305 (1970).

<sup>76</sup>See *Sanders v. Armour Fertilizer Works*, 292 U.S. 190 (1934). Note that in statutory interpleader the concerns expressed by Justice Traynor in *Atkinson* would be expressed in terms of venue in the federal courts. In any event, the distinction between permitting a claimant to reify the debt, but not permitting the stakeholder to reify it where another claimant is located, is elusive at best.

<sup>77</sup>See cases cited at notes 18-21 *supra*. Since no challenge has been made in the Supreme Court, there has been no occasion to pass on the jurisdictional consequences of the amendments cited in note 62 *supra*.

*Tashire*,<sup>78</sup> such a challenge was made below but expressly was not passed on.<sup>79</sup> The Ninth Circuit ruled that claimants with unliquidated tort claims were not claimants within the meaning of section 1335,<sup>80</sup> and on this point the Supreme Court reversed. While holding that interpleader jurisdiction was properly invoked, the Supreme Court ruled that the injunction affecting the second stage was improper, thus avoiding the issue. The language used, however, recognized the traditional distinction between in rem or quasi in rem in the first stage proceeding, and personal jurisdiction in the second stage.<sup>81</sup>

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<sup>78</sup>386 U.S. 523 (1967).

<sup>79</sup>*Tashire v. State Farm Fire & Cas. Co.*, 363 F.2d 7 (9th Cir. 1966).

<sup>80</sup>The case went to the circuit court on an interlocutory appeal from the grant of a preliminary injunction. 28 U.S.C. § 1292(a)(1) (1970). The action was commenced in the United States District Court for the District of Oregon, where a potential claimant, a passenger in a truck, resided. The plaintiff, insurer of the truck driver which collided with a Greyhound bus in California, deposited the full limits of the policy in court in Oregon. Injured bus passengers, including both Canadians and Americans, had already instituted actions in California, claiming more than \$1,000,000 in damages. Plaintiff insurer sought a declaration of no coverage and, in the alternative, a discharge from liability beyond the policy limits already deposited. In addition, the insurer sought discharge from the duty to defend the truck driver and an order requiring all claimants to establish liability in the Oregon proceeding and no other. A preliminary injunction against the nonresident claimants prosecuting their claims elsewhere was issued, and later was broadened at Greyhound's request to include suits against it and its driver.

<sup>81</sup>386 U.S. 533-34.

The fact that State Farm had properly invoked the interpleader jurisdiction under § 1335 did not, however, entitle it to an order both enjoining prosecution of suits against it outside the confines of the interpleader proceeding and also extending such protection to its insured, the alleged tortfeasor. Still less was Greyhound Lines entitled to have that order expanded so as to protect itself and its driver, also alleged to be tortfeasors, from suits brought by its passengers in various state or federal courts. Here, the scope of the litigation, in terms of parties and claims, was vastly more extensive than the confines of the "fund," the deposited proceeds of the insurance policy. In these circumstances, the mere existence of such a fund cannot, by use of interpleader, be employed to accomplish purposes that exceed the needs of orderly *contest with respect to the fund*.

There are situations, of a type not present here, where the effect of interpleader is to confine the total litigation to a single forum and proceeding. One such case is where a stakeholder, faced with rival claims to the fund itself, acknowledges—or denies—his liability to one or the other of the claimants. In this situation, the fund itself is the target of the claimants. It marks the outer limits of the controversy. It is therefore, reasonable and sensible that interpleader, in discharge of its office to protect the fund, should also protect the stakeholder from vexatious and multiple litigation. In this context, the suits sought to be enjoined are squarely within the language of 28 U.S.C. § 2361 . . . .

(footnote omitted) (emphasis added).

Lower federal courts have often recognized the difference between the nature of the jurisdiction and the nature of the relief as between the first and second stages. It has been said that the relief to the stakeholder is not *in rem*,<sup>82</sup> and that the jurisdiction is neither *in rem* nor *in personam*.<sup>83</sup> The relief to the stakeholder against and among the claimants has been to adjudicate only the interest in the *res*.

There is no case imposing personal liability on a claimant "personally served" under nationwide service when that claimant was not otherwise subject to personal jurisdiction, such as by entering an appearance or filing a counterclaim. The only holdings are to the contrary. In *Hallin v. C.A. Pearson, Inc.*<sup>84</sup> the court, in denying a cross-claim, summarized the law as follows:

It has been held that one defendant-claimant in such an interpleader action may not assert an *in personam* cross-claim against another defendant-claimant, who is a non-resident of the state in which the action is brought and thus not otherwise subject to process, where the non-resident defendant, although served, did not appear in the action to assert any claim to the interpleader fund. *Stitzel-Weller Distillery v. Norman*, 39 F.Supp. 182 (W.D.Ky. 1941); *Hagan*

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<sup>82</sup>"The payment of the amount of the debt into court does not make interpleader a proceeding *in rem*, but it is merely a condition precedent to relief from double vexation . . ." Chafee, *Interstate Interpleader*, 33 YALE L.J. 685, 711 (1924). See *Humble Oil & Ref. Co. v. Copeland*, 398 F.2d 364 (4th Cir. 1968) and *Commercial Security Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972). In *Knoll v. Socony Mobil Oil Co.*, 369 F.2d 425 (10th Cir. 1966), the court stated it had *no jurisdiction* to enjoin the claimants from making other claims elsewhere with reference to the same transaction. It stated its jurisdiction was *in personam* only as to the fund. The case is a strong one, for it does not appear that nationwide service of process was availed of, and in any event the claimants had already filed a counterclaim for the fund, thus arguably submitting themselves to jurisdiction of the court. It is not clear whether the court was referring to subject matter jurisdiction or personal jurisdiction. In this regard the relief requested was not dissimilar from that disallowed in *Tashire*. See notes 80 & 81 *supra*.

<sup>83</sup>*United States v. Coumantaros*, 146 F. Supp. 51 (S.D.N.Y. 1956); *Metropolitan Life Ins. Co. v. Skov*, 45 F. Supp. 140 (D. Ore. 1942). See also Traynor, *Is This Conflict Really Necessary*, 37 TEX. L. REV. 657, 663 (1959), urging complete elimination of the distinction between *in rem* and *in personam* actions. Compare *Aetna Life Ins. Co. v. DuRoure*, 123 F. Supp. 736 (S.D.N.Y. 1954), in which the claimants were nationals of France and the United States. Claimants sought interest on the theory plaintiff unreasonably delayed paying the fund into court. The court held the delay justified because the French claimants did not come to the United States until shortly before the interpleader action and the teaching of *Dunlevy* prevented the stakeholder from converting its personal obligation into an *in rem* proceeding by depositing the sum into court. While the court stated *in personam* jurisdiction was needed over the claimants, it is not clear that it meant the kind of jurisdiction necessary to impose liability.

<sup>84</sup>34 F.R.D. 499 (N.D. Cal. 1963).

v. Central Avenue Dairy, 180 F.2d. 502, 17 A.L.R.2d 735 (9th Cir. 1950); Great Lakes Auto Ins. v. Shepherd, 95 F.Supp. 1 (W.D.Ark. 1951).

It has also been held, however, that in such case an appearing defendant-claimant, against whom an in personam cross-claim has been asserted by another appearing defendant-claimant may waive any objection which it might otherwise have had thereto. Coastal Air Lines v. Dockery, 180 F.2d 874 (8th Cir. 1950).<sup>85</sup>

Subsequent cases have cited *Hallin* and followed it.<sup>86</sup> To the argument that the court *must* entertain the cross-claim because it arises out of the same "transaction or occurrence"<sup>87</sup> the only court specifically addressing itself to that issue said the rule's application would run counter to the policy of Congress of encouraging adverse claimants to come and assert their interests in the interpleaded property, and it should not be used as a tool to expand jurisdiction over nonresidents.<sup>88</sup>

#### IV. JUSTIFICATION OTHER THAN NATIONWIDE SERVICE OF PROCESS

The ALI proposals for extending diversity jurisdiction to the multi-state, multi-party situation are bottomed on the broad principle of the availability of nationwide service of process in diversity cases. While the Supreme Court in dicta has said such was permissible, there is only one case upholding the imposition of liability when the issue was squarely raised, and that was in a district court.<sup>89</sup> In all other cases the courts disclaimed jurisdiction to impose personal liability on the nonresident defendant.<sup>90</sup> In other words,

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<sup>85</sup>*Id.* at 501-02. The *Shepherd* case, ironically, is the one relied on by the ALI in its Supporting Memorandum B. See note 14 *supra*.

<sup>86</sup>*Mahaney v. Doering*, 260 F. Supp. 1006 (E.D. Pa. 1966); *Marine Bank & Trust Co. v. Hamilton Bros.*, 55 F.R.D. 505 (M.D. Fla. 1972).

<sup>87</sup>FED R. CIV. P. 13(g).

<sup>88</sup>*Marine Bank & Trust Co. v. Hamilton Bros.*, 55 F.R.D. at 507. The interpleaded fund was a \$15,000 escrow account to be paid a nonresident claimant on completion of successful repairs to the second claimant's boat. The second claimant's cross-claim of \$50,000 for damages to the boat was disallowed. Only one case has allowed a cross-claim, *Bank of Neosho v. Colcord*, 8 F.R.D. 621 (W.D. Mo. 1949), but that was a proceeding under Rule 22 interpleader in which there was already in personam jurisdiction, since personal service of the claimants must have been made under Federal Rule 4. Because of the lower jurisdictional amount and the necessity of only minimal diversity, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, the only procedural advantage of Rule interpleader is the availability of cross-claims. However, in *Preferred Risk Mut. Ins. Co. v. Greer*, 289 F. Supp. 261 (D.S.C. 1968) cross-claims in Rule interpleader were disallowed because the interpleader jurisdiction even there was held to be in rem.

<sup>89</sup>See text accompanying note 36 *supra*.

<sup>90</sup>See text accompanying notes 84-86 *supra*.

those situations which lend support to the legitimacy of nationwide service of process are those that bind absent plaintiffs, cases over which a state court could have exercised jurisdiction, through the devices of reifying a chose in action for quasi in rem jurisdiction, or of representation in the class action.<sup>91</sup> This latter assertion, of course, assumes *Dunlevy* does not survive and the limiting distinctions in *Atkinson* do not stand.

Another potential barrier to the exercise of state court jurisdiction is the other aspect of *Dunlevy* mentioned earlier: assuming the attachment of quasi in rem jurisdiction to the chose in action, where may that be accomplished when the debtor is a corporation present in many jurisdictions at once? Under statutory interpleader the stakeholder may locate it by depositing it in a federal court where a claimant is found. There may be some question whether a state court has that power. *Western Union Telegraph Co. v. Pennsylvania*<sup>92</sup> suggests the continuing validity of *Dunlevy* by focusing on the territorial nature of state sovereignty, and the state's inability under the due process clause in some circumstances to locate the situs of the res. Pennsylvania was attempting to escheat some unclaimed funds from undelivered and unreturned money orders in the hands of Western Union, some of which had already been escheated by New York. The Supreme Court said that since several states could claim in rem jurisdiction over the funds Pennsylvania did not have the *power* to protect Western Union from any other claim by another state since its judgment would not be entitled to full faith and credit as against those other claimant states.<sup>93</sup>

The same sort of problem would seem to be present under

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<sup>91</sup>See also Note, *Consumer Class Actions With a Multi-State Class: A Problem of Jurisdiction*, 25 HASTINGS L.J. 1411 (1974). Federal class actions do not purport to bind the absent members through personal service. The provision for service on the absent corporation under 28 U.S.C. § 1695 (1970) can also be viewed as permitting the minority stockholder to turn the corporation's potential claim into a chose in action for quasi in rem jurisdiction. Of similar effect is defendant's transfer under 28 U.S.C. § 1404(a) (1970).

<sup>92</sup>368 U.S. 71 (1961).

<sup>93</sup>Statutory interpleader would be unavailable to Western Union because of the eleventh amendment. See note 19 *supra*. The solution is to require an action by the claiming state in the original jurisdiction of the United States Supreme Court for a declaration of rights against other claiming states and the stakeholder. The Supreme Court has subsequently decided that the location of the res is at the last known address of the creditor, although it acknowledged that such a rule was not produced by "statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity." *Texas v. New Jersey*, 379 U.S. 674, 683 (1965). When there is no such address available, the state of incorporation of the stakeholder may escheat. *Pennsylvania v. New York*, 407 U.S. 206 (1972).



proceedings similar to that in *Seider v. Roth*.<sup>94</sup> That case arose from an accident in which a New Yorker was injured by a non-New Yorker whose liability carrier was doing business in New York. The insurance company's obligation to its insured was attached in New York as the quasi in rem jurisdictional base for adjudicating the New Yorker's claim against the non-New Yorker.<sup>95</sup> On the surface this judicially enacted direct action statute is like *Harris* and unlike *Dunlevy* in that the garnishee admits an obligation to an out of stater, albeit an inchoate or contingent one. However, the location of the obligation is problematical. The insurance company does business in more than one state and, unlike under statutory interpleader, has not attempted to reify the obligation by depositing a sum with the court. Suppose a Pennsylvanian was also injured in the same accident by the same insured and the insurance company was attached in Pennsylvania where it was also doing business. The New York Court of Appeals, in response to a due process challenge, merely cited *Harris* for the proposition that when there is in personam jurisdiction there is in rem jurisdiction.<sup>96</sup> Here, however, the eleventh amendment would be no bar to statutory interpleader by the insurance company.<sup>97</sup> The interest of no other state in its sovereign capacity would be infringed by permitting a state court to localize a chose in action in interpleader as federal courts sitting in diversity may do. The claimant to the fund never had a right to anticipate that the fund would be located or could be reified in his own state unless, of course, the fund is deemed located in the state where the accident took place. In that case both the insurance company and the insured—the alleged debtor of the claimant to the fund—would be subject to in personam jurisdiction there,<sup>98</sup> so quasi in rem jurisdiction would be unnecessary.

In any event, should *Dunlevy* remain a bar in state courts, provision for the reification and location of choses in action held by multi-state corporations can be made by Congress.<sup>99</sup> Other devices, without resort to nationwide service of process, could be employed.

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<sup>94</sup>17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

<sup>95</sup>*Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954) differs in that it was a choice of law case permitting Louisiana to enforce its direct action statute against an insurer qualified to do business in Louisiana for an accident occurring there, even though the contract of insurance had a "no action" clause valid under the law of the state where it was written.

<sup>96</sup>*Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). *Western Union* was not mentioned.

<sup>97</sup>Interpleader would not, however, force the Pennsylvanian to litigate liability in New York. See note 80 *supra*.

<sup>98</sup>*Hess v. Pawloski*, 274 U.S. 352 (1927).

<sup>99</sup>See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964) (commerce clause) and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (fourteenth amendment). In some

Indeed, most of the cases granted transfer by the Panel on Multidistrict Litigation are those involving federal question jurisdiction in which Congress could grant nationwide service of process or in which a state could reach the case through use of its long arm.<sup>100</sup> The fact that a state might decline to extend personal jurisdiction as far as the due process clause would allow is no bar to authorizing a federal court sitting in diversity to do so.<sup>101</sup>

## V. CONCLUSION

The American Law Institute has made a modest proposal for expansion in diversity jurisdiction that contemplates nationwide service of process imposing personal liability on defendants outside the forum district. Authority for such process is seen in the article III provision establishing the lower federal courts and vesting original diversity jurisdiction in them. Reliance is placed on Supreme Court dicta and two statutes so authorizing. These authorities involve actual or potential federal question jurisdiction, and situations in which a state court might exercise its power over absent parties through long arm or variants of in rem jurisdiction. Subsequent to the ALI proposal, various other practices and procedures have been authorized which lend colorable support to the existence of such power, but these, with one exception,<sup>102</sup> could similarly be provided for in state courts or under federal question jurisdiction. However,

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instances, but by no means all, a state might have the interest and the contacts to declare itself the situs. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>100</sup>As of January 10, 1974, there were 148 groups of multidistrict litigation in which transfer was granted, broken down into the following types:

Antitrust (35); Securities (28); Mass Disaster (28); Patent/Copyright (11); Products Liability (1); Contract (1); Environmental (2); Consumer Class Actions (1); Miscellaneous (5).

Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1003-04 (1974). Cases arising arguably outside the scope of the commerce clause, such as mass disasters or contracts, could be reached by a state long arm. If a state may reach a defendant because the cause of action arose there, why may it not reach a prospective plaintiff? See McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707 (1976). The "typical litigation situations" involving necessary parties under Rule 19 have been put under twelve headings in 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1613-24 (1972). They are:

Contracts (Joint obligations, Assignments, Partnership and Agency); Copyrights, Patents and Trademarks; Corporations and Shareholders; Declaratory Judgments; Federal, State and Local Governments; Funds, Property Rights, Trusts, and Estates; Insurance; Labor Management Relations; Real Property; Superior and Subordinate Public Officials; Torts and Workmen's Compensation; Miscellaneous Cases.

Again, it appears that the great bulk of these cases could be reached under federal question jurisdiction or by a state through a long arm or quasi in rem jurisdiction.

<sup>101</sup>*Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (en banc).

<sup>102</sup>*Pierce v. Globemaster Baltimore, Inc.*, 49 F.R.D. 63 (D. Md. 1969).

common to most of the situations is a "quasi" quasi in rem adjudication of the existing interests of absent plaintiffs. The imposition of liability on distant defendants, of concern to the ALI, raises questions about the source of the power so to act, as well as the issue of a fifth amendment due process limitation—a concern of lower federal courts which the proposal did not consider.<sup>103</sup> The ability of a court in Maine to impose liability on a defendant in California or Hawaii on a non-federal cause of action in which the defendant does not have sufficient minimal contacts with Maine to satisfy fourteenth amendment due process requirements suggests a basic reordering in federal-state relationship and individual rights.<sup>104</sup> While there may be only a very small number of defendants who could not otherwise be reached under any state's long arm or any federal question jurisdiction, so that the inconvenience of traveling across the country would reach only a few additional defendants, it is the correspondingly small number of parties who would be benefited that suggests action on the proposal be put off further.<sup>105</sup> So small a benefit is not worth validating so far-reaching a principle. It may be that this doubtful proposition is an idea whose time has passed.

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<sup>103</sup>Compare again the recognition of this distinction by the Supreme Court in *Christopher v. Brusselback*, 255 U.S. 356 (1921).

<sup>104</sup>This is not to suggest that the exercise of such power creates problems under *Erie* as suggested by Professor Abraham. See Note 13 *supra*. The concurrence of Mr. Justice Harlan in *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) is persuasive on that score.

<sup>105</sup>A small number would undercut an argument of jurisdiction by necessity. Judge Friendly believes further study is needed on these proposals, especially in light of development of state court jurisdiction via long arms. H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 150 (1973). See also Currie, *The Federal Courts and the A.L.I.*, 36 U. CHI. L. REV. 1, 29-32 (1968). Indeed, California seems to have gone the whole route, extending jurisdiction where it seems fair, without reference to a nexus in the state with the cause of action. See *Cornelison v. Chaney*, 16 Cal. 3d 143, 545 P.2d 264 (1976), in which the California Supreme Court upheld constructive service of process over a Nebraska freight hauler who made about 20 trips a year to California and who was involved in an accident with a California driver in Nevada.