From the Vault

Personal Jurisdiction in Bankruptcy Cases: You’ve Got Mail
by Mark Desgrosseilliers

The call comes in from your client: “These deadbeats are paying me 10 cents on my claim and I get my mail this morning and there’s a complaint and summons waiting for me. They are now suing me for $3 million! In Delaware! I run a scrap business in Wyoming and have only been to Delaware on my way to New York. Cost me $5 to drive through and took all of 15 minutes. Can they sue me in Delaware?”

The answer surprisingly is yes. Notwithstanding that bankruptcy courts have limited subject-matter jurisdiction, they have broad—and, in most cases, nationwide—personal jurisdiction. So, set aside all that you learned in law school about minimum contacts and service and brace yourself for a journey into the wonderful world of in rem and federal bankruptcy jurisdiction, where efficiency often trumps traditional notions of fair play and substantial justice and a trip to the mailbox can lead to litigation across the country.

Personal Jurisdiction Generally in Diversity and Federal Jurisdiction Cases
As we learned in classes on civil procedure, the U.S. Supreme Court has, in a long line of cases beginning with Pennoyer v. Neff, delineated the ability of state courts (and, by extension, federal courts sitting in diversity) to exercise jurisdiction over out-of-state defendants consistent with the Due Process Clause of the Fourteenth Amendment. Specifically, in determining whether a court can hale a defendant into its hallowed halls, courts look generally to the defendant’s contacts with the forum and whether such contacts are sufficient such that compelling the defendant to appear in a lawsuit in a state would not run afoul of “traditional notions of fair play and substantial justice.” Even where a defendant held property in a state, if the defendant’s contacts with such state were not substantial, the Supreme Court held that the state could not exercise personal jurisdiction over the defendant consistent with the due process restrictions imposed by the Fourteenth Amendment. As commentators have noted, and as the Supreme Court has expressly stated, the constitutional limits on a state court’s exercise of personal jurisdiction over a foreign defendant flows from concerns about (1) the burden on the individual defendant and (2) the limits of states “as coequal sovereigns in a federal system.”

The Supreme Court has not, to date, directly decided the extent to which the Fifth Amendment might impose limits on a federal court’s exercise of personal jurisdiction over an out-of-state defendant in cases involving federal questions, including but not limited to bankruptcy-related matters. Lower courts addressing challenges to personal jurisdiction have, however, certainly in the bankruptcy context, generally given short shrift to any argument that a federal court addressing a federal question has any constraints on personal jurisdiction when a federal statute expressly allows such nationwide service of process. Indeed, Rule 4(k) of the Federal Rules of Civil Procedure expressly provides that:

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or
(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction; and
(B) exercising jurisdiction is consistent with the United States Constitution and laws.

Thus, for non-U.S. defendants, an exercise of personal jurisdiction is permitted where such exercise is consistent with the U.S. Constitution and laws. United States citizens and/or business or other entities can, in contrast, be sued in any federal court, irrespective of such defendants’ ties to a specific state and, therefore,
federal district, where Congress has enacted a specific statute permitting such suit. Otherwise, in the absence of a federal statute (or perhaps a federal rule as addressed below) authorizing nationwide service of process,11 the personal jurisdiction of the federal court necessarily rests, consistent with Federal Rule 4, on the long-arm statute of the forum state.12 It remains an open question whether, where Congress has passed a law authorizing service and personal jurisdiction on a nationwide basis, courts then look to the defendant’s contacts with (1) the specific district or forum state or (2) more expansively, the defendant’s contacts with the United States to determine if the exercise of personal jurisdiction is consistent with the Due Process Clause of the Fifth Amendment.13

**Personal Jurisdiction in Bankruptcy Cases**

In the bankruptcy realm, statutes limit the subject-matter jurisdiction of bankruptcy courts14 and the venue where bankruptcy cases15 (and proceedings arising therein16) may be filed, but there is no statute conferring nationwide personal jurisdiction. Instead, bankruptcy courts look to Rule 7004 of the Federal Rules of Bankruptcy Procedure as the statutory authority pursuant to which such courts may summon your Wyoming client into court in Delaware.

Bankruptcy Rule 7004 applies in adversary proceedings, which is essentially any lawsuit instituted in a bankruptcy case (including the always popular preference and fraudulent transfer actions under §§ 547 and 548 of the Bankruptcy Code) and contested matters pursuant to Bankruptcy Rule 9014.17 By its terms, Bankruptcy Rule 7004 incorporates part of Federal Rule 4 (excluding Rule 4(k), as discussed above) and adds a number of different provisions. Importantly, and as a nod to efficiency, service of process in bankruptcy cases can be, and generally is, accomplished by simply mailing a copy of a notice and motion or a complaint and summons to the defendant or affected party in interest.18 Moreover, Bankruptcy Rule 7004(f) provides for nationwide personal jurisdiction “with respect to a case under the [Bankruptcy] Code or a civil proceeding arising under the [Bankruptcy] Code.”19 Three requirements must be met, however, for a bankruptcy court to have personal jurisdiction over a party: (1) service of process has been made in accordance with Bankruptcy Rule 7004 or Federal Rule 4, (2) the court has subject-matter jurisdiction under § 1334 of Title 28 of the U.S. Code, and (3) exercise of jurisdiction is consistent with the Constitution and laws of the United States.20

There are a few important takeaways in addressing personal jurisdiction in a bankruptcy case, certainly from the perspective of creditor or defendant in an action brought in connection with a bankruptcy case. First, bankruptcy courts addressing personal jurisdiction have largely ignored any distinction between a federal rule and a federal statute and have generally rested their “statutory” authority for exercising personal jurisdiction over foreign defendants on Bankruptcy Rule 7004.21 Second, in determining whether the exercise of personal jurisdiction over a defendant “is consistent with the Constitution and laws of the United States” bankruptcy courts have not generally looked to the defendant’s contacts with the forum state, but instead to the defendant’s contacts nationwide.22 Thus, the inquiry for such bankruptcy courts becomes not whether the defendant could reasonably be expected to be haled into a federal court in Delaware, but whether such defendant could reasonably be expected to be forced into a federal court in any state. Fourth, as with any other lawsuit, lack of personal jurisdiction will be deemed waived if not properly and timely raised.23

Finally, failure to respond, particularly to a complaint, in a bankruptcy case can have the same dire consequences as failing to respond to a complaint served by a process server. Such consequences include entry of a default judgment that the debtor, trustee, or successor to either can then seek enforcement against your clients’ assets, waiver of any right to object to the ability of a bankruptcy court to enter a final order, denial of your client’s claim, and any recovery at all from the bankruptcy estate and the like. Indeed, in a recent case in the U.S. Bankruptcy Court for the Southern District of New York, Judge Martin Glenn decided that his court had jurisdiction to enter default judgments against Hong Kong defendants, all of which were properly served in accordance with the Hague Convention and chose not to respond.24 The defendants’ failure to respond to a complaint that had been properly served on such defendants constituted consent to the bankruptcy court’s entry of a final judgment.

**Conclusion**

As a practical matter, the exercise of personal jurisdiction over out-of-state and foreign (i.e., non-U.S.) defendants by a single bankruptcy court in most cases makes eminent sense. Debtors, generally speaking, lack sufficient resources to litigate matters in many different jurisdictions. Indeed, such widespread litigation is often the very thing that brought the debtors to the door of the bankruptcy court. Moreover, having a single forum to address the distribution of the reorganization assets and to gather assets, including property in the hands of non-debtors, and to recover funds that were fraudulently transferred or transferred in preference to the payment of other similarly situated creditors helps to ensure consistency of treatment of such creditors. If a creditor has a significant issue with litigating in a faraway jurisdiction, such creditor can move to transfer venue of the entire bankruptcy case or of the specific contested matter or adversary proceeding in which it is involved.

However, that which is practical is not always that which is permitted by the Constitution. Moreover, the lack of any statute, as opposed to a Bankruptcy Rule, indicating congressional intent to confer nationwide personal jurisdiction in bankruptcy cases (even if such a grant of personal jurisdiction were permissible in light of the due process protections that might be available to your client under the Fifth Amendment) adds additional infirmity to the argument that bankruptcy courts can assert such personal jurisdiction. Nor does the prospect of an uncertain and undoubtedly costly fight to transfer venue of a bankruptcy case or a proceeding within a bankruptcy case provide a ready solution for any fundamental lack of personal jurisdiction in the first place.

It remains to be seen whether any creditor or other defendant in a bankruptcy lawsuit will have occasion and/or the economic incentive to appeal an adverse personal jurisdiction decision and obtain, at last, a decision from the Supreme Court on the limits of the ability of federal bankruptcy courts to exercise personal jurisdiction consistent with the due process considerations under the Fifth Amendment. It is also uncertain whether, in any such constitutional challenge Bankruptcy Rule 7004, which is on its face not a statute, provides sufficient support for the bankruptcy court’s personal jurisdiction over foreign and out-of-state defendants. However, until a party obtains this clarification, it is clear your Wyoming client can be sued in Delaware and can be served effectively by mail. Accordingly, your

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client would be best advised to respond (while preserving any personal jurisdiction arguments for a later date and a higher court). ☉

Endnotes


6Int’l Shoe Co., 326 U.S. at 316.


9See, e.g., Bristol-Myers Squibb v. Super. Ct. of Cal., 137 S. Ct. 1773, 1783 (2017) (“Since our decision concerns the due-process limits on the exercise of specific jurisdiction by a state, we leave open the question of whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court.”); Richard J. Mason, Is the Concept of Nationwide Service of Process in Jeopardy, ABI J. 74 (Oct. 2017). In her article, Fullerton sets forth a very comprehensive history of Supreme Court cases touching on personal jurisdiction and the Fifth Amendment. Fullerton notes that in United States v. Union Pac. R.R. Co., 98 U.S. 569 (1878), the Court stated “that Congress could, as ‘a matter of legislative discretion, which ought to be governed by considerations of convenience [and] expense,’ authorize federal courts to exercise jurisdiction beyond the borders of the judicial district in which they are located,” because Congress consistent with Article III of the Constitution could “create inferior courts without territorial restrictions … and could even create one federal trial court with nationwide jurisdiction.” Fullerton, supra note 8, at 28.


11Outside of bankruptcy, Congress has passed laws specifically permitting nationwide service of process in a number of areas including antitrust. See 15 U.S.C. § 22, federal securities; see id. § 77v(a) and RICO; see 18 U.S.C. § 1965(d). Interestingly, and perhaps (someday) importantly, as discussed herein, nationwide personal jurisdiction and service of process in bankruptcy cases rests on a bankruptcy rule, not a statute.


13See id. at 296-97 (acknowledging split of cases applying a national contacts theory in the absence of a “federal rule or statute authorizing nationwide or worldwide service of process”).


15See id. § 1408.

16See id. § 1409.


21See, e.g., JNA-1 Corp. v. Uni-Marts LLC (In re Uni-Marts LLC), 404 B.R. 767, 775-76 (Bankr. D. Del. 2009). But see Old Elec. Inc. v. RCP Inc., 142 B.R. 189, 192 (Bankr. N.D. Oh. 1992) (“[I]t would seriously distort the text of Bankruptcy Rule 7004(e) to hold that Bankruptcy Rule 7004(d) is either a statute or an order.”); Car Care Ctr. of Crystal Lake Ltd. v. Miller (In re Miller), 336 B.R. 408, 412 (Bankr. E.D. Wis. 2005) (Bankruptcy statutes are enacted by Congress, unlike bankruptcy rules, which are promulgated by the Supreme Court.); Scruggins v. BP Expl. & Oil (In re Brown Transp. Truckload), 161 B.R. 735, 738 (Bankr. N.D. Ga. 1993) (“The Bankruptcy Code is a federal statute, while the [Bankruptcy Rules] are only rules established by the Bankruptcy Rules Committee.”)


23See Fed. R. Bankr. P. 7012 (among other things, applying Rule 12(b) to adversary proceedings).


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