WHICH CASES ARE “SUCH CASES”: INTERPRETING AND APPLYING SECTION 12 OF THE CLAYTON ACT

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This Note examines an issue currently dividing the nation’s circuit courts of appeal. The issue presented is how courts should interpret and apply Section 12 of the Clayton Act, the long-arm and venue statute for private antitrust actions brought against corporate defendants. Section 12’s poor construction has resulted in courts applying section 12 differently to similar sets of facts. This Note thoroughly discusses section 12 as it relates to antitrust law generally and the procedural elements of bringing a private antitrust action in federal court, examines the existing section 12 case law that illustrates the conflict and the arguments on both sides, and proposes a hybrid solution that best satisfies Congress’s intent.

INTRODUCTION

In Daniel v. American Board of Emergency Medicine, the U.S. Circuit Court of Appeals for the Second Circuit dismissed an antitrust suit brought in the Western District of New York fifteen years earlier for lack of personal jurisdiction over the defendants and improper venue. In dismissing the action, the court decided an issue that currently divides the nation’s circuit courts. The issue is how to interpret section 12 of the Clayton Act—the long-arm statute for private antitrust actions brought against corporate defendants. More specifically, the issue is whether the section’s service of process provision is available only to litigants who lay venue pursuant to the section. Section 12 contains a venue clause and a worldwide service of process clause. In Daniel, the Second Circuit read section 12 as an integrated whole—the integrated reading requires that a plaintiff establish venue under the provisions of section 12 in order to take advantage of section 12’s liberal personal jurisdiction clause. Other courts

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1. 428 F.3d 408 (2d Cir. 2005).
2. Id.; see also infra note 180.
4. Id.
5. Daniel, 428 F.3d at 423.
read section 12 broadly and permit plaintiffs to utilize the section’s personal jurisdiction provision while establishing venue through the general provisions of 28 U.S.C. § 1391.\(^6\)

Depending on how a court reads section 12, a litigant either may have the benefit of worldwide service of process, and thus personal jurisdiction over the defendant in any federal district court in the nation, no matter how venue is established (including through section 12 or 28 U.S.C. § 1391—the standard venue provision), or may obtain the benefit of worldwide service only if the litigant establishes venue through section 12.\(^7\) If a plaintiff cannot utilize section 12, he must establish personal jurisdiction under the more restrictive ordinary principles of personal jurisdiction. Indeed, a court’s reading of section 12 has major implications for where a private plaintiff may haul a corporate antitrust defendant into court for antitrust violations.

This Note examines *Daniel* and several other recent cases that illustrate the competing interpretations of section 12, and the impact of the two alternative readings on private antitrust litigation. Most importantly, this Note demonstrates that, properly viewed, section 12 actually involves two separate issues, requiring two separate outcomes. The different general venue provisions with respect to domestic and alien defendants result in the two types of defendants being affected differently by a broad reading of section 12.

Part I discusses the purpose of private antitrust litigation as well as the substantive and procedural elements necessary for a plaintiff to sue a corporate defendant for antitrust violations. Part II discusses the conflict currently dividing the nation’s circuit courts. Thus, Part II focuses on the two competing readings of section 12 by presenting case law and academic work that supports each reading. Part II also reviews the effects of each reading on private antitrust suits against domestic and foreign defendants. Part III proposes a reading of section 12 that works best with the purpose of both the statutory venue requirement and private antitrust litigation itself. The proposed solution notes that the conflict may be resolved by recognizing that disparate treatment is appropriate depending on whether the defendant is a domestic or alien party.

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6. 28 U.S.C. § 1391 (2000); see infra Part II.B.
7. See infra Part I.B.3.a–b for a discussion of the general venue provisions and section 12’s venue provision.
I. BACKGROUND

A. Antitrust Law Generally

1. The Antitrust Laws

Modern antitrust law and policy are rooted in the Sherman Act,\(^8\) enacted in 1890, and the Clayton Act,\(^9\) enacted in 1914. Certain sections of these statutes prohibit conduct deemed by Congress to be anticompetitive. Section 1 of the Sherman Act prohibits agreements that unreasonably\(^10\) restrain “trade or commerce among the several States, or with foreign nations.”\(^11\) Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and combinations or conspiracies to monopolize any industry.\(^12\) Section 2 of the Clayton Act prohibits price discrimination,\(^13\) and section 3 of the Clayton Act proscribes tying and exclusive dealing contracts “where the effect . . . may be to substantially lessen competition or tend to create a monopoly.”\(^14\) Section 7 of the Clayton Act prohibits mergers and acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”\(^15\) Courts, Congress, and commentators all refer to the Sherman and Clayton Acts and certain other statutes simply as the “[a]ntitrust laws.”\(^16\)

2. The Purpose of the Antitrust Laws

Undoubtedly, Congress designed the antitrust laws to further and protect competition. As Justice John Paul Stevens noted in 1978, “The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . [T]he statutory policy precludes inquiry into the question whether competition is good or bad.”\(^17\) Although the U.S. Supreme Court once understood protecting


\(^{10}\) Standard Oil Co. v. United States, 221 U.S. 1, 1 (1911) (observing that all contracts restrain trade and holding that only unreasonable restraints of trade are prohibited by the Sherman Act).


\(^{12}\) Id. § 2.

\(^{13}\) Id. § 13.

\(^{14}\) Id. § 14.

\(^{15}\) Id. § 18.

\(^{16}\) Id. § 12(a). For a list of the statutes and regulations that make up the “antitrust laws,” see Am. Antitrust Inst., Codes: Federal Antitrust Statutes and Regulations, http://www.antitrustinstitute.org/Antitrust_Resources/Antitrust_STATUTES/index.ashx (last visited Sept. 16, 2007).

competition as protecting competitors, the Court now protects competition in order to protect consumer welfare. For example, in 1993, writing on behalf of the Court in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, Justice Anthony Kennedy constructed a test under which the antitrust laws prohibit predatory pricing only if the below-cost pricing party (the defendant) is likely to recoup its losses by way of supra-competitive prices after driving the target (the plaintiff) out of the market. The Court did not want to prohibit unsuccessful predatory pricing because “unsuccessful predation is in general a boon to consumers.” The Court continued,

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured . . . . Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition.

Clearly, under this treatment of competition and the purpose of the antitrust laws, a firm injured by the unsavory business practices of a competitor must establish injury to consumers—as well as itself—in order to bring a private antitrust action.

3. Public and Private Enforcement of the Antitrust Laws

Section 4 of the Sherman Act establishes that “it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain” violations of the antitrust laws. Section 4 of the Clayton Act creates a private right of action for antitrust injuries; it provides that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue.”

The ability of the U.S. government to bring a civil or criminal action for antitrust violations empowers the government to deter and prevent conduct that Congress has determined to be harmful to the economy. The existence of a private right of action also deters and prevents injurious conduct. The purpose of providing a private right of action for those injured by antitrust violations is no different than the purpose of any other tort law: to provide redress for those harmed and to deter injurious conduct. Section 4 of the

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18. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962). In *Brown Shoe*, Chief Justice Earl Warren, referring to section 7 of the Clayton Act, stated, “[W]e cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.” *Id.*


20. *Id.* at 224.

21. *Id.*

22. *Id.* at 224–25.


24. *Id.* § 15(a).
Clayton Act provides that a private plaintiff who has been injured “by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained.” 25 The inclusion of a treble damage multiplier in section 4 further indicates that Congress intended private actions to serve a meaningful deterrent function and creates a significant incentive for private parties to sue antitrust violators.

The Supreme Court noted in Blue Shield of Virginia v. McCready26 that the lack of restrictive language [in section 4 of the Clayton Act] reflects Congress’ ‘expansive remedial purpose’ in enacting [section] 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.27

The broad remedial purpose of section 4 is evidenced by Congress’s decision to grant the district courts the power to “prevent and restrain” any violation of the antitrust laws by way of injunction or prohibition and even by “temporary restraining order or prohibition as shall be deemed just” prior to a final judgment.28 The Court also noted that “[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”29

Although section 4 contains broad language, it does not allow just any person to act as a private U.S. attorney. In Blue Shield, the Court also observed that “[i]t is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.”30 In order to sue, an antitrust plaintiff must establish that (1) he suffered an antitrust injury, (2) his suit will not subject the defendant to duplicative recovery, and (3) he has antitrust standing.31

25. Id. In fact, the court does not inform the jury that the plaintiff is entitled to treble damages. The jury awards damages based on the plaintiff’s injuries and the trial judge multiplies the award by three. See E. Thomas Sullivan & Herbert Hovenkamp, Antitrust Law, Policy and Procedure: Cases, Materials, Problems 70 (5th ed. 2004).
27. Id. at 472 (quoting Pfizer Inc. v. India, 434 U.S. 308, 313–14 (1978)).
30. Id. at 477.
a. Antitrust Injury

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Supreme Court held that “[p]laintiffs must prove antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.” Simply put, antitrust injury is an injury brought on by a decrease in competition. A plaintiff may not sue for an antitrust violation when an increase in competition has caused his injury because the plaintiff has not suffered an antitrust injury.

b. Prohibition on Duplicative Recovery and the Direct Purchaser Requirement

A second requirement to bring suit applies to plaintiffs who allegedly have been injured by paying supra-competitive prices for goods or services. In *Illinois Brick Co. v. Illinois*, the Supreme Court held that only the direct purchaser of anticompetitively priced goods may sue the antitrust violator. An example makes this requirement clear. Assume three automobile manufacturers collude to fix prices above the competitive rate and that dealers purchase the new cars they sell from manufacturers. Assume also that automobile manufacturers set wholesale prices and that automobile dealers set the retail price that consumers pay. Consumers who purchased a new car made by one of the price-fixing manufacturers may not seek damages from the manufacturers for horizontal price-fixing. Only the dealers may seek damages from the price-fixing manufacturers because the dealers are direct purchasers from those manufacturers.

In *Illinois Brick*, the Court gave two primary reasons for imposing the direct purchaser requirement on antitrust plaintiffs: (1) allowing offensive use of the pass-on argument will lead to duplicative liability for antitrust defendants, and (2) allowing plaintiffs to sue for passed-on overcharges would create exceedingly complex litigation “in the real economic world.”

33. Id. at 489.
35. Id. This holding prevents plaintiffs from suing manufacturers and arguing that some of the increased cost charged to the dealer was passed on to them; this is known as offensive pass-on. Defendants also are barred from utilizing the pass-on theory as a defense to suit by a dealer who purchased supra-competitively priced goods. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 482 (1968) (holding that a direct purchaser could recover in damages all of the increased cost resulting from price-fixing, whether or not the defendant could prove that any portion of that cost had been passed on to the next party in the vertical distribution chain).
36. *Ill. Brick*, 431 U.S. at 730. Using the automobile manufacturer cartel example, a consumer could not sue a manufacturer for price-fixing and argue that the dealer passed on some of the increased cost to him at the retail level.
where true costs are very difficult to determine. Not all private antitrust litigation involves a party seeking damages for goods purchased above cost, so the direct purchaser requirement does not always apply. However, the rationale behind the requirement always applies: any time it appears that the maintenance of suit will lead to duplicative or speculative recovery, courts will be wary of allowing suit to proceed. The antitrust standing requirement also furthers this goal.

c. Antitrust Standing

Antitrust standing is the third requirement; however, there is overlap with the antitrust injury requirement. Antitrust standing protects defendants from claimants whose injury was tangentially caused by antitrust violations. To determine if a party has antitrust standing, a court must engage in an analysis similar to a proximate cause analysis in tort law. The Supreme Court attempted to provide guidance and instructed courts to look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant’s conduct unlawful and in providing a private remedy under [section] 4.

In Cargill Inc. v. Monfort of Colorado, Inc., the Supreme Court noted that a “showing of antitrust injury is necessary, but not always sufficient, to establish standing . . . because a party may have suffered antitrust injury but may not be a proper plaintiff . . . for other reasons.” Lower courts have found that those “other reasons” are factors that make the plaintiff an inefficient enforcer of the antitrust laws. Thus, the antitrust standing analysis also requires a court to determine whether the plaintiff is a proper one.

37. Id. at 731–32 (quoting Hanover Shoe, 392 U.S. at 493).
39. It is helpful to conceptualize the three requirements as a Venn diagram in which the portion in the middle where all three circles overlap represents those parties who may sue an antitrust violator.
41. Id. at 478.
42. 479 U.S. 104 (1986).
43. Id. at 110 n.5.
44. Balaklaw v. Lovell, 14 F.3d 793, 797 n.9 (2d Cir. 1994) (citing Todorov v. D.C.H. Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991)).
45. The factors relevant to determining whether the plaintiff is a proper plaintiff were first discussed by the U.S. Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 540–45 (1983), three years before Cargill. However, because the Associated General factors on their own caused much confusion in the lower courts, any discussion beyond that of “antitrust injury” was viewed as dicta. See Todorov, 921 F.2d at 1451 n.20. The Court in Cargill adopted that dictum as the

For a plaintiff to sue in federal court, he must establish proper subject matter jurisdiction, personal jurisdiction over the defendant, and venue. Title 28 contains a number of general provisions that specify how a plaintiff may satisfy the three procedural elements. In addition, certain substantive federal laws contain their own venue and personal jurisdiction provisions. Thus, section 12 of the Clayton Act contains its own venue and personal jurisdiction provisions that may apply in all antitrust suits brought by a private plaintiff against a corporate defendant.

A portion of section 12 is the Clayton Act’s long-arm statute; its primary purpose is to “broaden[] the authority of courts over absent defendants who are otherwise not subject to the territorial power of the state” in which suit is brought. Section 12 of the Clayton Act also contains a venue provision. Section 12, entitled “District in which to sue corporation,” states,

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The portion of text before the semicolon is the venue provision; the portion of text after the semicolon is the personal jurisdiction provision. At issue in this Note is how courts should interpret section 12—specifically, whether the former provision must be satisfied to take advantage of the latter, or more simply—which cases are “such cases.”
1. Subject Matter Jurisdiction

   a. Subject Matter Jurisdiction Generally

   Under Article III of the Constitution, federal courts are courts of limited jurisdiction. Within their constitutional powers, federal courts may only adjudicate cases that Congress has given them the authority to adjudicate. The Supreme Court has noted that subject matter jurisdiction is both a constitutional and statutory requirement that “functions as a restriction on federal power.” The two principal forms of jurisdiction given to the courts by Congress are diversity jurisdiction and federal question jurisdiction. The statute creating federal question jurisdiction grants the district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” A private action in which the plaintiff alleges a violation of the federal antitrust laws obviously falls within federal question jurisdiction because the suit arises under the laws of the United States.

   b. Subject Matter Jurisdiction in Cases Involving Extraterritorial Application of the Federal Antitrust Laws

   A district court can only hear a case in which a private plaintiff alleges that a defendant’s conduct abroad violated U.S. antitrust law if it has subject matter jurisdiction. To have subject matter jurisdiction over the case, the antitrust laws must reach the defendant’s extraterritorial conduct.

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49. See U.S. Const. art. III, §§ 1–2.
52. 28 U.S.C. § 1332 (granting original jurisdiction to the federal district courts of civil actions between citizens of different states or between a citizen of a state and a foreign party where the amount in controversy exceeds $75,000).
53. Id. § 1331.
54. Id.
55. For purposes of this Note, the extraterritoriality analysis is characterized as a question of subject matter jurisdiction because the majority opinion in Hartford Fire Insurance Ins. Co. v. California, 509 U.S. 764 (1993), written by Justice David Souter, characterized the analysis as one of subject matter jurisdiction. John A. Trenor, Comment, Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire, 62 U. Chi. L. Rev. 1583, 1597 (1995). Justice Souter framed the analysis “as one of whether to decline subject matter jurisdiction.” Id.

However, Justice Antonin Scalia, dissenting with three other justices, disagreed with Justice Souter: “[T]he extraterritorial reach of the Sherman Act [] has nothing to do with the jurisdiction of the courts. It is a question of substantive law . . . .” Hartford Fire, 509 U.S. at 813. This analysis is one of legislative jurisdiction, See id.; Trenor, supra, at 1598. The legislative jurisdiction analysis determines first whether the court has subject matter jurisdiction, which it does when a plaintiff has made a nonfrivolous claim under the Sherman Act. Hartford Fire, 509 U.S. at 812. Next, the analysis considers “whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.” Id. at 813;
Since 1945, the federal courts have applied U.S. antitrust law to conduct occurring outside the United States. The courts abandoned the strict territorial application of federal antitrust law following Judge Learned Hand’s opinion in United States v. Aluminum Co. of America (Alcoa). One of the many issues raised by the government in Alcoa was whether Aluminum Limited (Limited), a Canadian corporation, had unlawfully conspired with Alcoa, an American corporation, to form a cartel with other foreign producers of aluminum. Although it was clear that Limited and several European producers had formed a cartel, the evidence indicated that Alcoa was not a member of the cartel. The cartel fixed the output of each member and required any party that produced more than its quota to pay a royalty to the other cartel members. All the cartel members agreed that exports to the United States counted toward the production quotas. For this Note, the pertinent aspect of Alcoa was the court’s determination that Limited, a foreign corporation, violated section 1 of the Sherman Act by

see also Trenor, supra, at 1598. The second question is answered by performing an international conflict of laws comity analysis. This requires the court to accept that the Sherman Act covers the conduct in question and then determine whether the Sherman Act should apply based on whether it conflicts with the law of the nation where the conduct occurred. See Hartford Fire, 509 U.S. at 817; David P. Currie et al., Conflict of Laws: Cases—Comments—Questions 766 (6th ed. 2001); Trenor, supra, at 1599. Professor David Currie believes that Justice Scalia got it right, noting, “Justice Souter is not alone in confusing the difference between subject matter jurisdiction and choice of law. Many judges and international lawyers make the same mistake, using the term ‘subject matter jurisdiction’ in international cases to refer to judicial decisions limiting the scope of the claim on comity grounds.” Currie et al., supra, at 766. Even if Justice Souter “got it wrong,” he was writing for the majority of the Supreme Court in an opinion that remains good law. However, a practitioner should address both methods of analysis, especially because Chief Justice William Rehnquist and Justices Byron White and Harry Blackmun, who joined Justice Souter to make up the majority, are no longer on the Court (only Justices Souter and John Paul Stevens remain from the majority). Justice Sandra Day O’Connor is the only dissenting justice no longer on the Court; Justices Anthony Kennedy and Clarence Thomas remain with Justice Scalia from the dissent. See Hartford Fire, 508 U.S. at 766; Trenor, supra, at 1599 n.83.

56. Before United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945), the U.S. antitrust laws were only applied to conduct occurring within the country. See Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 359 (1909) (holding that conduct occurring outside the United States did not violate the Sherman Act).

57. Alcoa, 148 F.2d 416. The government lost at trial and appealed directly to the Supreme Court. The Court was unable to meet the statutory quorum of six Justices because four justices recused themselves. In response, Congress passed a law which provided that the court of last resort in cases where the Supreme Court cannot muster a quorum shall be the appropriate court of appeals, with the three most senior judges sitting on panel. Alcoa has traditionally carried the precedential weight of a Supreme Court decision because the Second Circuit was sitting as the court of last resort. See Sullivan & Hovenkamp, supra note 25, at 607; Trenor supra note 55, at 1590 n.37.

58. Alcoa, 148 F.2d at 422, 439–45.

59. Id. at 442 (concluding that Alcoa was not a member of the cartel referred to as the “Alliance”).

60. Id. at 443. The members formed the cartel by forming a corporation in Switzerland. Presumably, the corporation was legal in Switzerland, whereas an agreement of that sort would undoubtedly be illegal and unenforceable in the United States. See id. at 442.

61. Id. at 442.
forming a cartel with French, German, Swiss, and British corporations that acted outside the U.S. borders, but which affected the U.S. market. 62

The Second Circuit noted that the cartel agreement “would clearly have been unlawful, had [it] been made within the United States.” 63 Judge Hand framed the analysis as “whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it[,] . . . whether Congress intended to impose the liability, and whether [the U.S.] Constitution permitted it to do so.” 64 Judge Hand analogized the situation to one between two states, where under settled conflict of laws doctrine a state may apply its own laws to impose liability on an out-of-state party for conduct occurring outside the state that caused proscribed consequences in the state. 65 Judge Hand then articulated what has come to be known as “an intended effects test,” 66 stating, “[W]e shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless . . . performance [of the agreement] is shown actually to have had some effect upon [exports to the United States]. Where both conditions are satisfied, the situation certainly falls within [federal law].” 67 Accordingly, where a foreign defendant, by his foreign conduct, intended to affect exports to the United States and did actually affect them, he may be held accountable if his foreign conduct violated U.S. antitrust law. The court went on to find that Limited’s agreement to restrict exports to the United States violated section 1 of the Sherman Act. 68

Almost fifty years after  Alcoa , in  Hartford Fire Insurance Co. v. California , 69 the Supreme Court modified  Alcoa’s “intended effects test” and raised the bar to an “intended substantial effects test.” 70 Most significantly, the Court unequivocally endorsed the application of U.S. antitrust law to conduct occurring outside the United States. In  Hartford Fire , the Court found that there was subject matter jurisdiction in a suit against foreign parties based on the plaintiff’s allegation that the alien defendants conspired to affect the U.S. insurance market, and that their conspiracy produced a substantial effect on the U.S. market. 71 In the face of the defendant’s claim that its conduct was legal where performed, the Court addressed the possibility of a “true conflict” between U.S. law and foreign law. However, it found that a “true conflict” was not present because the defendant could have complied with the laws of both

62. Id. at 443.

63. Id. at 444.

64. Id. at 443.

65. Id. (“[A]ny state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends . . . .” (citations omitted)).


67. Alcoa, 148 F.2d at 444 (citations omitted).

68. Id. at 445.


70. Id. at 796.

71. Id. at 798.
Accordingly, the Court did not extensively address the matter. Thus, the analysis for determining whether a court may apply the federal antitrust laws extraterritorially has two steps. First, the court must determine whether it has subject matter jurisdiction by ascertaining whether the foreign conduct was intended to “produce and did in fact produce some substantial effect in the United States.” Second, the court must ensure that there is not a “true conflict” between the laws of the United States and the laws of the place of the conduct. If there is a “true conflict,” the court must apply the doctrine of international comity to determine whether the court should refrain from exercising subject matter jurisdiction. The court must dismiss the suit if comity dictates that U.S. law may not be applied.

2. Personal Jurisdiction in Federal Question Cases

In order to adjudicate a claim against a defendant, due process requires that the court have personal jurisdiction. Personal jurisdiction gives the court the power to issue a binding personal judgment over the defendant. Courts obtain personal jurisdiction by validly serving process on a party. Federal Rule of Civil Procedure 4 grants federal courts the power to serve process on corporate defendants “who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located” or “when authorized by a statute of the United States.”

Process is valid if it falls within the statutory authorization and if the assertion of personal jurisdiction does not violate the defendant’s constitutional rights. Therefore, each defendant has two sources of protection, the statute that authorizes service and the applicable due process clause. In federal question cases, the Fifth Amendment’s Due Process Clause, not that of the Fourteenth Amendment, governs personal jurisdiction. In cases where section 12 applies, the service of process

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72. Id. at 798, 799 (“No conflict exists . . . ‘where a person subject to regulation by two states can comply with the laws of both.’” (quoting Restatement (Third) of Foreign Relations Law § 403 cmt. e (1987))).
73. Id. at 799 (“We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.”).
74. Id. at 796.
75. Id. at 798.
76. See Trenor, supra note 55, at 1594–96. For an example of a comity analysis as the second step of the inquiry, coming after a finding of subject matter jurisdiction based on the “effects test,” see Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294–98 (3d Cir. 1979).
77. See, e.g., Butcher’s Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 538 (9th Cir. 1986).
79. Id. 4(k)(1)(D).
80. See Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97 (1987) (discussing the Fifth Amendment Due Process Clause throughout the opinion as the relevant clause); see
provision provides the necessary statutory authority for service pursuant to Federal Rule 4(k)(1)(D). When section 12 does not apply, the long-arm statute of the state where the district court sits applies pursuant to Federal Rule 4(k)(1)(A). As will become apparent later, a state long-arm statute is often more restrictive than section 12 as to when process may be served. At issue in this Note is under what circumstances section 12 of the Clayton Act authorizes service of process and thus personal jurisdiction over a corporate defendant, and under what circumstances must the plaintiff resort to the ordinary provisions of Rule 4(k)(1)(A) to establish personal jurisdiction.

a. Fifth Amendment Due Process of Law

Although the Supreme Court has not decided the issue, circuit courts of appeals, when presented with section 12 issues, have repeatedly held that the Fifth Amendment’s Due Process Clause requires that the defendant must have minimum contacts with the nation as a whole. For example, the U.S. Court of Appeals for the Third Circuit, in In re Automotive Refinishing Paint Antitrust Litigation, held that “personal jurisdiction in federal antitrust litigation is assessed on the basis of a defendant’s aggregate contacts with the United States as a whole.” The U.S. Court of Appeals for the Ninth Circuit, in Go-Video, Inc. v. Akai Electric Co., observed that where section 12 confers personal jurisdiction, the court must ensure that the maintenance of suit does not “offend[] traditional notions of fair play and substantial justice.” The court explained that Fifth Amendment Due Process compliance was measured by a national contacts analysis. The U.S. District Court for the Northern District of Texas applied the law of the U.S. Court of Appeals for the Fifth Circuit in Management Insights, Inc. v. CIC Enterprises, Inc. The court noted that where a federal statute provides nationwide service of process, the Due Process Clause of the Fifth Amendment provides the necessary constitutional protection, and “the appropriate modus for ascertaining personal jurisdiction in a case that

also 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1068.1 (3rd ed. 2002) (“It is now clear that the Due Process Clause of the Fifth, rather than the Fourteenth, Amendment applies to the assertion of personal jurisdiction in the federal question context.”).

81. See Omni Capital Int’l, 484 U.S. at 108; see also Wright & Miller, supra note 80.
82. 358 F.3d 288 (3d Cir. 2004).
83. Id. at 298. In In re Automotive Paint, the U.S. Court of Appeals for the Third Circuit read section 12 broadly. See infra notes 251–71 and accompanying text. Therefore, its holding applied to all federal antitrust litigation. A court that reads section 12 as an integrated whole would apply this holding only to cases where section 12’s venue clause was satisfied, thus allowing a plaintiff to invoke section 12’s worldwide service of process clause. Otherwise the state long-arm statute would limit personal jurisdiction.
84. 885 F.2d 1406 (9th Cir. 1989).
85. Id. at 1415.
86. Id.
implicates this type of statute becomes a simple recitation of the question whether the defendant had minimum contacts with the sovereignty of the United States.” 88 It is thus apparent that the Due Process requirement in federal question jurisdiction presents a boundary that is likely less restrictive than the statute providing authorization for service.

b. Statutory Authorization

i. State Long-Arm Authorization of Service

Although private antitrust actions raise federal questions, without the assistance of section 12, the plaintiff must serve process pursuant to Rule 4(k)(1)(A) which requires compliance with the long-arm statute of the state where the district court sits. 89 The state long-arm statute guides its courts in determining when a plaintiff may validly serve out-of-state parties and subject them to personal jurisdiction in the state’s courts. The provisions of the long-arm statute, in the federal question context, may allow the exercise of personal jurisdiction to the extent permitted by the Fifth Amendment’s Due Process Clause. Some states simply have chosen to extend their long-arm statute as far as due process allows, 90 while other states have enumerated long-arm statutes that articulate with specificity what situations will allow the court to exercise personal jurisdiction over an out-of-state party. 91 Although the Fifth Amendment provides the outer due process boundary, when states have enumerated long-arm statutes, the inquiry is often similar to a Fourteenth Amendment minimum contacts analysis as enumerated long-arm statutes require contacts with the forum. For

88. Id. at 523 (citing Bellaire Gen. Hosp. v. Blue Cross Blue Shield, 97 F.3d 822, 825–26 (5th Cir. 1996)).
90. California, for example, has an unenumerated long-arm statute. See Cal. Civ. Proc. Code § 410.10 (West 2004) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).
91. New York, for example, has an enumerated long-arm statute. See N.Y. C.P.L.R. § 302 (Consol. 2006) (“As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or 4. owns, uses or possesses any real property situated within the state.”).
example, in *Daniel*, the U.S. District Court for the Western District of New York tested personal jurisdiction for corporate defendants to whom section 12 did not apply by engaging in a detailed minimum contacts analysis for each defendant pursuant to the provisions of the state long-arm statute.  

Although the Supreme Court has held that the Fifth Amendment contains the appropriate due process clause in federal question cases, some courts still apply Fourteenth Amendment principles in conjunction with the long-arm statute.  For example, the U.S. Court of Appeals for the D.C. Circuit, in *GTE New Media Services Inc. v. BellSouth Corp.*, concluded that section 12 did not apply to the corporate antitrust defendants and discussed establishing personal jurisdiction over the defendants by looking to the district’s long-arm statute.  

Although the long-arm would have permitted suit in the district, the court concluded due process would not allow suit because the defendants lacked the requisite minimum contacts with the forum.  

ii. Section 12 Authorization of Service

Section 12’s second provision undoubtedly provides for worldwide service of process.  If a court permits a plaintiff to utilize section 12, Federal Rule 4(k)(1)(D) gives him the power to serve process on a corporate antitrust defendant wherever the defendant may be found.  Additionally, the Third Circuit, in *In re Automotive Paint*, held that “personal jurisdiction under Section 12 of the Clayton Act is as broad as the limits of due process under the Fifth Amendment.”  

Where section 12 authorizes service, the Fifth Amendment’s liberal national contacts analysis is not just the outer boundary, it is the only boundary on the personal jurisdiction inquiry.  Thus, when the plaintiff can utilize section 12’s worldwide service of process provision, the defendant can only escape personal jurisdiction by establishing that his aggregate contacts with the nation are inadequate.  This is not a plausible argument for a domestic
defendant, but a foreign defendant might be able to successfully argue that its contacts with the United States are inadequate.

3. Venue

   a. Venue Generally

   The third procedural element that a plaintiff must satisfy in order to sue in federal court is venue. The Supreme Court has noted, “[T]he purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial.” Title 28, § 1391(b) provides where a plaintiff may properly lay venue in a federal question case. Unless otherwise provided for by federal law, § 1391 provides that venue is proper only in the following three locations:

   (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

There are two more general venue provisions that are relevant to the section 12 issue: (1) 28 U.S.C. § 1391(d), which provides that “[a]n alien may be sued in any district,” and (2) 28 U.S.C. § 1391(c), which provides in part that a corporate defendant “shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”

Therefore, a corporate defendant subject to personal jurisdiction as a whole; because both analyses employ an “effects test” there likely will be some overlap. See supra Part I.B.2.a.

99. See Mgmt. Insights, Inc. v. CIC Enters., Inc., 194 F. Supp. 2d 520, 523 (N.D. Tex. 2001) (“[T]he appropriate modus for ascertaining personal jurisdiction ... becomes a simple recitation of the question whether the defendant had minimum contacts with the sovereignty of the United States. For domestic defendants—that is, defendants residing within the four corners of the nation—the question is answered before it is even asked.”).

100. See Access Telecom, Inc. v. MCI Telecomms. Corp., 197 F.3d 694, 718 (5th Cir. 1999) (following Go-Video’s national contacts test for personal jurisdiction under the Clayton Act, but holding that, “while there may be some additional evidence of [the foreign defendant] doing business with the U.S., there is no evidence qualitatively different on the subject of doing business in the U.S. for what we deem to be a relevant time period. ... Thus, Clayton Act personal jurisdiction over the antitrust claims is also unavailable”); see also In re New Motor Vehicles Canadian Exp. Antitrust Litig., 307 F. Supp. 2d 145, 151–58 (D. Me. 2004), cert. denied, DaimlerChrysler Canada, Inc. v. Jaynes, 544 U.S. 904 (2005) (discussing thoroughly multiple parties’ nationwide contacts as part of nationwide minimum contacts analysis).


103. Id.

104. Id. § 1391(d).

105. Id. § 1391(c).
jurisdiction in the district cannot contest venue because the defendant resides in the district and venue is proper under § 1391(b)(1) and (c). In addition, a foreign defendant has no venue rights at all because he is amenable to suit in any district pursuant to § 1391(d).

As previously discussed in this section, the general venue provisions make it easy for a plaintiff to establish proper venue when suing a corporate defendant, especially an alien corporate defendant. As will be shown later in this Note, section 12 of the Clayton Act has the potential to obliterate the venue analysis entirely. Ordinarily, district courts have three main tools to protect the defendant’s venue right to a fair and convenient forum: (1) the common law doctrine of forum non conveniens, (2) the federal venue transfer statute, 28 U.S.C. § 1404, and (3) the federal dismissal statute, 28 U.S.C. § 1406. These latter two tools apply equally to private antitrust actions, no matter how venue is established.

Congress gave the district courts the power to transfer the case to a preferable federal district when it enacted 28 U.S.C. §§ 1404 and 1406. Section 1404 allows a district court hearing a case filed without proper venue to dismiss the case or transfer it to a district court “in which it could have been brought.” Section 1404(a) gives the district court the authority to transfer the case “[f]or the convenience of parties and witnesses, in the interest of justice . . . to any other district court or division where [suit] might have been brought.” Section 1404(a) operates similarly to the forum non conveniens doctrine except it applies in situations where the court has the authority to transfer. However, the standard for a § 1404(a) transfer is considerably lower than the standard for a forum non conveniens dismissal. The Supreme Court compared the two doctrines in Norwood v. Kirkpatrick:

[Congress] intended to do more than just codify the existing law on forum non conveniens . . . . Congress, in writing § 1404 (a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404 (a) for transfer . . . . As a consequence, we believe that Congress, by the term “for the convenience of parties and witnesses, in the interest of justice,” intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed.

106. If there are multiple defendants, all defendants must be subject to personal jurisdiction in the state pursuant to § 1391(b)(1).
107. See infra Parts I.B.3, II.B.
111. 28 U.S.C. § 1406(a).
or that the plaintiff’s choice of forum is not to be considered, but only that
the discretion to be exercised is broader.113

Section 1404(a) gives the district court broad discretion to transfer.114 The
discretion afforded to the district court in conjunction with the fact-
intensive nature of the § 1404(a) inquiry makes it impractical to quantify
what “the convenience of the parties and witnesses” and “the interest of
justice” actually mean in practice.115 As a general matter, district courts
typically consider the following factors: convenience of the parties and
witnesses, the plaintiff’s forum choice, where the claim arose, and the
relative ease of access to evidence.116 District courts measure the relative
convenience of the parties as well. The burden is on the moving party to
establish that another more convenient forum exists where maintenance of
suit will not inconvenience the nonmoving party.117 District courts
typically consider the following factors to determine if a transfer is “in the
interests of justice”: the local interest in the matter and the comparative
congestion of the courts where the plaintiff filed the action compared to
where transfer is sought.118

Although the federal courts have the tools to prevent suit in an unfair
forum, the courts do not easily grant a § 1404(a) transfer motion. For
example, when an Australian plaintiff sued a Washington defendant for
antitrust violations based on a contract negotiated in Hawaii in L.C. O’Neil
Trucks Pty., Ltd. v. Pacific Car & Foundry Co.,119 the U.S. District Court
for the District of Hawaii denied a motion to transfer to federal court in
Washington.120 The Hawaii court reasoned that the defendant had “carried
on more than minimal business activities in the District” and was not
persuaded by the defendant’s argument that it would “incur great expense
and undue hardship in transporting witnesses and documents to Hawaii in
order to properly defend [the] action.”121 The court also placed particular
emphasis on the fact that venue was proper under section 12 of the Clayton
Act and that the purpose of the section was to make it easier for private
plaintiffs to sue for antitrust violations.122 It thus seems likely that when a
plaintiff lays venue in accordance with section 12, the court will not easily
disturb the plaintiff’s choice.

114. 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice &
Procedure § 3847 (3d ed. 2007).
115. Id. at n.13; see also Stowell R.R. Kelner, Note, “Adrift on an Uncharted Sea”: A
116. See 15 Wright, Miller & Cooper, supra note 114.
117. Id. § 3849.
118. Id. § 3847.
120. Id. at 843. See generally Questions as to Convenience and Justice of Transfer Under
15, § 31[a]–[b] (2006) (listing and discussing antitrust actions where § 1404(a) motions have
been granted and denied).
122. Id. at 843.
b. Venue in Private Antitrust Actions Under Section 12

i. Interaction Between Specific and Traditional Venue Statutes

In the past, it was unclear how the general venue statutes discussed above would interact with the many specific venue statutes attached to individual substantive laws, such as section 12 of the Clayton Act. However, in *Pure Oil Co. v. Suarez,*\(^{123}\) writing in the context of the Jones Act, the Supreme Court held that in the absence of contrary provisions in the law itself, a statute’s specific venue provision is supplementary and does not displace the general venue provisions.\(^{124}\) Section 12 of the Clayton Act does not have any contrary restrictions and “it is now clear beyond any doubt that the general venue statutes apply to antitrust cases.”\(^{125}\)

In *Brunette Machine Works, Ltd. v. Kockum Industries, Inc.,*\(^{126}\) the Supreme Court has also held that § 1391(d) is not “a venue restriction at all, but rather a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.”\(^{127}\) In *Brunette,* the Court held that venue over an alien defendant being sued for patent violations was proper under § 1391(d) and was not limited by either the specific venue provision that governs patent infringement law or the other venue provisions of § 1391.\(^{128}\)

ii. Venue Under Section 12 of the Clayton Act in Private Antitrust Litigation

The text of section 12 of the Clayton Act provides for proper venue in three situations: (1) in any judicial district where the defendant corporation is an inhabitant, (2) in any judicial district where it may be found, or (3) in any judicial district where it transacts business.\(^{129}\) However, these three situations boil down to a single test, the “transacts business” test.

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124. Id. at 204–05.
125. See 14D Wright, Miller & Cooper, supra note 114, § 3818. It is critical to recognize that this is not the same as holding that the general statutes may broaden section 12’s venue provision. This is what the controversy in this Note is about, whether the general statutes broaden section 12’s venue provision or apply only as an alternative source of venue. If a court reads the general and the specific provisions together, a plaintiff could always invoke section 12’s service of process clause. If the general venue provisions do not broaden section 12’s venue provision, a plaintiff may only invoke section 12’s service of process provision if venue is satisfied through section 12.
127. Id. at 714. Although at first glance this statement might seem to end the inquiry, this holding does not definitively settle the section 12 issue as to alien defendants. There is no question that § 1391(d) applies in antitrust suits against corporate alien defendants; the question is, when venue is satisfied according to § 1391(d), as opposed to section 12, whether a plaintiff may establish personal jurisdiction under section 12, or whether he must establish personal jurisdiction by the traditional means.
128. Id.
A corporation is an “inhabitant” of the state of its incorporation,\textsuperscript{130} “may be found” in a district where it is doing business,\textsuperscript{131} and can “do business” in a district besides that of its incorporation.\textsuperscript{132} The Supreme Court has held that the transacts business language in section 12 presents a lower bar than “may be found,” and stated that to hold otherwise would “defeat the plain purpose of th[e] section.”\textsuperscript{133} Under this interpretation, “may be found” provides no additional basis for venue because it requires greater contacts than transacting business, which section 12 authorizes as an acceptable basis for venue. Transacting business looks at the same contacts, but sets a lower bar; therefore, the higher bar is largely irrelevant.

In \textit{Daniel}, the Second Circuit summarized the transacts business test for section 12, referring to the Supreme Court’s definition of transacting business in \textit{United States v. Scophony Corp.:}\textsuperscript{134}

\textit{[T]he determination whether a defendant transact[s] business in a district depend[s] on a realistic assessment of the nature of the defendant’s business and of whether its contacts with the venue district [can] fairly be said to evidence the “practical, everyday business or commercial concept of doing business or carrying on business of any substantial character.”}\textsuperscript{135}

The transacts business test is a fact-specific inquiry. It is best understood through comparison of fact patterns in which courts concluded that a corporate defendant transacted business for section 12 purposes with fact patterns in which courts concluded that a corporate defendant did not transact business for section 12 purposes. In \textit{Daniel}, the Second Circuit provided many such examples.

A manufacturer transacts business in a district by doing the following in that district: promoting its goods, offering product demonstrations, utilizing salesmen who solicit orders, and shipping goods there.\textsuperscript{136} A corporation that accredits institutions transacts business in a district if it conducts local inspections in the district as part of the accreditation procedure.\textsuperscript{137} A professional organization that enforces its standards by direct and continual


\textsuperscript{131} See Mgmt. Insights, Inc. v. CIC Enters., Inc., 194 F. Supp. 2d 520, 532 (N.D. Tex. 2001). Note that “found” for venue purposes is different than “found” for service of process. The latter provides for worldwide service of process while the former establishes venue wherever a corporation is “doing business.” \textit{See supra} Part I.B.2.b.ii.

\textsuperscript{132} Furthermore, wherever a corporation is incorporated, it will be subject to general personal jurisdiction and section 12 will not be necessary to establish specific personal jurisdiction.

\textsuperscript{133} Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 374 (1927).

\textsuperscript{134} 333 U.S. 795, 807 (1948).


\textsuperscript{136} \textit{Id.} (citing \textit{Eastman Kodak}, 273 U.S. at 373–74).

\textsuperscript{137} \textit{Id.} (citing Levin v. Joint Comm’n on Accreditation of Hosps., 354 F.2d 515, 517–18 (D.C. Cir. 1966)).
supervision of its members in the district transacts business in the district.\textsuperscript{138}

By contrast, an association does not transact business in a district if some of its members reside in the district and the association advertises and transmits professional materials in the district,\textsuperscript{139} but "there [are] no offices, no officers, no agents, no property, no purchases, no seminars or workshops, and no sales save of pamphlets, journals, and other educational and public relations materials generating very little revenue" in the district.\textsuperscript{140} A professional organization does not transact business in a district by advertising and conducting programs in the district for members who reside in the district.\textsuperscript{141}

iii. Distinctions—or Lack Thereof—Between General Venue and Section 12 Venue

In 1914, Congress enacted section 12 to expand the bounds of venue for private antitrust litigation.\textsuperscript{142} However, commentators today largely accept that the general venue provisions have expanded outward to about the same point as section 12.\textsuperscript{143} Whether section 12’s venue provision is equal to, more restrictive than, or more liberal than § 1391(b) does not affect the section 12 issue to the degree one might expect. Section 12 and § 1391(b)

\textsuperscript{138} Id. (citing Myers v. Am. Dental Ass’n, 695 F.2d 716, 730 (3d Cir. 1983)).
\textsuperscript{139} Id. (citing Bartholomew v. Va. Chiropractors Ass’n, 612 F.2d 812, 816 (4th Cir. 1979), abrogated on other grounds by Bartholomew v. Va. Chiropractors Ass’n, 446 U.S. 938 (1980)).
\textsuperscript{140} Bartholomew, 612 F.2d at 816.
\textsuperscript{141} Daniel, 428 F.3d at 429 (citing Golf City, Inc. v. Wilson Sporting Goods, Inc., 555 F.2d 426, 436–38 (5th Cir. 1977)).
\textsuperscript{142} Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 372 (1927).
\textsuperscript{143} See 14D Wright, Miller & Cooper, supra note 114, § 3818 (“[T]he very broad reading of ‘transacts business’ made it rarely if ever necessary to supplement Section 12 by resort to the ‘claim arose’ provision of Section 1391(b).”); see also Daniel J. Capra, Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue, 9 Fordham Int’l L.J. 401, 476 (1986) (“In sum, as to corporate defendants, section 1391(b) provides no forum not already provided by Section 12 of the Clayton Act.”); Jordan G. Lee, Note, Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit in Any District?, 56 Fla. L. Rev. 673, 695 (2004) (mentioning § 1391 as broader than section 12 as a result of amendments to the general provisions). One possible situation where section 12 venue would be easier to satisfy than § 1391(b) and in turn make bringing suit easier for a private plaintiff would be where a corporate defendant meets section 12’s “transacts business” test in a district where the claim did not arise. Suppose Widget Corporation, a Delaware corporation, has its headquarters in California, and has a regional office in New York. Now imagine that Widget has undertaken acts in California that violated the antitrust laws and caused injury across the country. A private plaintiff could sue Widget in New York because maintenance of the regional office would likely satisfy the “transacts business” test for section 12 venue, and therefore could establish personal jurisdiction in the district by utilizing section 12’s worldwide service provision. See supra Part I.B.3.b.ii. Without section 12, a private plaintiff could not sue Widget in New York because the company’s contacts in New York are not so great to expose it to general jurisdiction in the forum. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).
provide that venue is proper in a limited number of locations for each case brought against a domestic defendant. Section 1391(d) provides that venue is proper in any district for a case brought against an alien defendant. The issue is illusory to the extent that when § 1391(b) is satisfied, section 12 venue is likely satisfied as well and the plaintiff may invoke section 12’s service of process provision. However, the question remains whether courts may read section 12 in conjunction with § 1391—the so-called broad reading—to eviscerate the venue inquiry and allow any corporate antitrust defendant to be sued in any district in the same manner as an alien defendant may typically be sued. The issue also remains whether a private plaintiff must satisfy section 12’s venue provision to be able to utilize the worldwide service of process provision to serve an alien defendant, or if the plaintiff may always use the service of process provision because venue is always proper though § 1391(d).

II. SECTION 12 OF THE CLAYTON ACT: THE INTEGRATED READING VERSUS THE BROAD READING

The section 12 issue currently dividing the nation’s circuit courts rests on how a trial court interprets the section when a private party sues a corporate defendant for antitrust violations. There are two possible readings of section 12. One reading, which this Note refers to as the “integrated reading” of section 12, requires that venue first be satisfied pursuant to section 12’s venue provision in order to utilize the liberal worldwide service of process provision of section 12.144 Under the integrated reading, if venue is satisfied under section 12’s venue provision, the plaintiff need only establish that the defendant has minimum aggregate contacts with the nation as required by the Fifth Amendment to obtain personal jurisdiction. Under the integrated reading, a plaintiff that cannot establish venue according to section 12’s venue provision cannot utilize section 12 to serve process on the defendant. The plaintiff would have to lay venue in a proper district according to the general venue provision, § 1391, and establish personal jurisdiction over the defendant through the state long-arm statute pursuant to Federal Rule 4(k)(1)(A) and within the bounds of the Fifth Amendment’s Due Process Clause. Invoking the state long-arm statute will likely require the court to assess whether the defendant has sufficient minimum contacts with the forum state to provide personal jurisdiction over the defendant in the forum.

The other possible reading, which this Note refers to as the “broad reading” of section 12, allows the plaintiff to utilize the liberal worldwide service of process provision and then establish venue through either § 1391 or section 12. Under this reading, personal jurisdiction is established when

144. See, e.g., Daniel, 428 F.3d at 428 (“[B]ecause plaintiffs cannot establish venue in the Western District of New York under Section 12, they cannot avail themselves of that statute’s worldwide service of process provision to establish personal jurisdiction in that district.”).
the defendant has sufficient minimum contacts with the nation as a whole. Once personal jurisdiction is proven, venue may then be established through § 1391(b) and (c)\textsuperscript{145} for domestic defendants or through § 1391(d)\textsuperscript{146} for alien defendants. Under this reading, the result is that venue is proper in any district in the country both for domestic and foreign corporate defendants, the former because personal jurisdiction establishes venue and the latter because of their exemption from venue.

Invariably, the litigants in the cases discussed below fought over whether the plaintiff could utilize the worldwide service of process provision of section 12 to establish personal jurisdiction. Plaintiffs prefer simply to prove that the corporate defendant has minimum contacts with the nation as a whole to establish personal jurisdiction in the court of plaintiff’s choosing rather than to prove that the defendant’s conduct satisfies the long-arm statute of the forum state to establish personal jurisdiction. Plaintiffs especially prefer the broad reading when suing domestic defendants because it relieves them of having to prove proper venue. This part of the Note further explains the conflict by discussing and analyzing cases where the section 12 issue arises.

A. Integrated or Narrow Reading of Section 12

1. Case Law and Rationale

In 1961, in 	extit{Goldlawr, Inc. v. Heiman},\textsuperscript{147} the Second Circuit noted in dicta that “the extraterritorial service privilege is given only when the [venue] requirements [of section 12] are satisfied.”\textsuperscript{148} The court did not indicate that it recognized the possibility of a different reading of section 12. While both the Second Circuit and the D.C. Circuit point to this case in holding that section 12 applies as an integrated whole, it is weak precedent because the interpretation of section 12 in \textit{Goldlawr} was not necessary to the court’s holding, and the court did not explain why section 12 should be read as an integrated whole.

Those cases in which the reading of section 12 was dispositive and where the court acknowledged that there are two possible readings of section 12 are more instructive. In \textit{GTE New Media Services Inc. v. BellSouth}...
Corps. decided by the D.C. Circuit in 2000, the issues presented were “whether the District Court [could properly] assert personal jurisdiction over the defendants and whether venue [wa]s proper in the [district] when the defendants’ sole contact with th[e] forum [wa]s the operation of Internet websites . . . accessible to persons in the District.” The plaintiff alleged a violation of sections 1 and 2 of the Sherman Act, claiming that the defendants colluded to monopolize the online business directories market. The defendants, multiple regional operating companies, had allegedly met and conspired in other states and had no contacts with the District of Columbia besides the operation of websites accessible in the district. The plaintiff argued that the operation of the websites was enough to support personal jurisdiction under the district’s long-arm statute and argued, in the alternative, that section 12 provided an independent basis for personal jurisdiction over the defendants.

The D.C. Circuit rejected the plaintiff’s argument that the defendants’ operation of websites accessible in the forum supplied the requisite minimum contacts with the forum. It then turned to the plaintiff’s section 12 argument. The circuit court noted that the plaintiff did not establish that the defendants were inhabitants of the district, could be found in the district, or transacted business in the district as required by section 12’s venue provision. The plaintiff argued that it was not necessary to satisfy section 12’s first clause in order to take advantage of the second clause, which both parties agreed confers nationwide jurisdiction. The court recognized the desire to view section 12’s venue provision expansively, but commented that this desire does not justify disregarding entirely the venue clause. The court continued, “[I]t seems quite unreasonable to presume that Congress would intentionally craft a two-pronged provision with a superfluous first clause, ostensibly link the two provisions with the ‘in such cases’ language, but nonetheless fail to indicate clearly anywhere that it intended the first clause to be disposable.”

The court went on to hold that “[a] party seeking to take advantage of section 12’s liberalized service provisions must follow the dictates of both of its clauses. To read the statute otherwise would be to ignore its plain meaning.” Because the plaintiff had not proven that the defendants met any of the criteria for venue under section 12, the court held that the

149. 199 F.3d 1343 (D.C. Cir. 2000).
150. Id. at 1345.
151. Id.
152. Id. at 1346.
153. Id. at 1345, 1350–51.
154. Id. at 1349.
155. Id. at 1350.
156. Id. at 1351.
157. Id. at 1350.
158. Id. at 1351.
159. Id.
160. Id.
plaintiff could not establish personal jurisdiction over the defendants under section 12.161

In the following year, in Management Insights, Inc. v. CIC Enterprises, Inc.,162 the U.S. District Court for the Northern District of Texas sua sponte raised the issue of whether section 12 allowed the assertion of personal jurisdiction over an Indiana defendant in Texas by a Texas plaintiff.163 Both parties to the litigation were competitors in the market for providing tax services to Fortune 1000 companies.164 At issue in the litigation was the plaintiff’s allegation that defendant placed a phone call to one of the plaintiff’s customers in Tennessee and informed the customer that the plaintiff was discontinuing a service, presumably one that the defendant told the customer it could provide.165 If true, the plaintiff’s allegation amounted to a Sherman Act violation.166 The defendant moved to dismiss for lack of personal jurisdiction, arguing that it had no contacts with Texas, and that venue was improper in the Northern District of Texas.167 The court first held there were insufficient contacts to support personal jurisdiction over the defendant based on the traditional forum contacts analysis.168

The court next considered whether section 12 of the Clayton Act allowed the assertion of personal jurisdiction over the defendant, at least as to the alleged antitrust law violations.169 The court agreed with the D.C. Circuit’s reading of section 12, and found that an integrated reading was more reasonable in light of the statute’s structure and wording, explaining that “the alternate reading leads to nonsensical results.”170 The court was specifically concerned with what would happen if it combined section 12’s worldwide service of process provision with § 1391(c) of the general venue provision rather than reading section 12 as an integrated whole. The court noted that combining § 1391(c) and a broad reading of section 12 “completely eviscerates any semblance of a venue inquiry in antitrust cases involving corporate defendants—a result this Court finds Congress could not have intended.”171 The court’s incredulity continued:

[All]ow[ing] a national contacts personal jurisdiction analysis if venue is proper under section 12 or § 1391, coupled with § 1391(c)’s provision that venue is proper for corporate defendants as long as personal jurisdiction exists in a particular district, requires a court’s inquiry into

161. Id. The circuit court remanded the case for further jurisdictional discovery to give the plaintiff the opportunity to supplement its jurisdictional allegations. Id. at 1351–52.
163. Id. at 521, 530.
164. Id. at 521.
165. Id. at 522.
166. Id. at 521.
167. Id. at 522.
168. Id. at 527–30.
169. Id. at 530.
170. Id. at 531.
171. Id. at 531–32.
venue and [personal] jurisdiction in antitrust cases to become indisputably circular and monolithic. . . . If the defendant is a domestic corporation, the [broad reading], in conjunction with § 1391(c), allows a plaintiff to sue a defendant in any district, even if that district has absolutely no relation to that defendant’s business or to the incident that prompted the suit.172

The court thus concluded that it could not permit a nationwide contacts analysis under section 12 unless the plaintiff had established proper venue under section 12’s venue provision.173 The court found that plaintiff did not establish that defendant satisfied section 12’s venue provision in the Northern District of Texas and granted defendant’s motion to dismiss for lack of personal jurisdiction.174

Against this background, in Daniel,175 the Second Circuit endorsed the integrated reading of section 12.176 The plaintiff-class of licensed physicians sued two defendants177 incorporated in Michigan and nine hospitals, none of which were New York corporations or had their principal place of business in New York.178 The plaintiffs alleged that the defendants “colluded to restrain trade in connection with the practice of emergency medicine . . . and to monopolize or attempt to monopolize the market for . . . certified and—eligible [emergency] doctors.”179 The district court held that the Clayton Act afforded personal jurisdiction over the defendant-appellees, but dismissed the plaintiff’s claim for lack of standing.180 The plaintiffs appealed from the lower court’s dismissal for

172. Id. at 532.
173. Id.
174. Id. at 532–33. Professor Herbert Hovenkamp has also recognized that a combination of a national contacts analysis with the general venue statute could produce unfair results for some defendants, especially alien defendants. For example, alien defendants could be incorporated in Europe, do business only in New York, and be sued in California where a plaintiff could obtain both venue and personal jurisdiction. See Herbert Hovenkamp, Personal Jurisdiction and Venue in Private Antitrust Actions in the Federal Courts: A Policy Analysis, 67 Iowa L. Rev. 485, 509 (1982). The possibility of such unfair results led Hovenkamp to advocate that “[a] better approach is to interpret section 12 the way it is written. Worldwide service is proper only when the action is brought in the district where the defendant resides, is found, or transacts business.” Id. Hovenkamp believes that “the plaintiff who steps outside of section 12 to establish venue must also lose the benefit of section 12 for obtaining service of process. The plaintiff must then rely on the long-arm statute of the forum state.” Id. Professors Charles Wright, Arthur Miller, and Edward Cooper agree with Professor Hovenkamp. They also believe section 12 should be interpreted “the way it is written.” See 14D Wright, Miller & Cooper, supra note 114, § 3818. Wright, Miller, and Cooper support the integrated reading because the broad reading allows a court to combine § 1391(c) and (b) to establish venue in conjunction with personal jurisdiction under section 12, a result which they believe to be “circular.” Id.
175. 428 F.3d 408 (2d Cir. 2005).
176. Id. at 423.
177. One of the corporate defendants, the American Board of Emergency Medicine, did not contest personal jurisdiction at the district court level and did not appeal a finding of personal jurisdiction over it. Id. at 421.
178. Id. at 415–17.
179. Id. at 414.
180. The plaintiffs lacked standing when the case reached the circuit court. Despite the plaintiffs’ lack of standing, the district court had personal jurisdiction over the defendants.
lack of antitrust standing. On appeal, the defendants argued alternatively that they were not subject to personal jurisdiction and venue in the Western District of New York. The Second Circuit acknowledged the circuit split regarding the interpretation of section 12 of the Clayton Act and elected to join the D.C. Circuit in holding that “the plain language of Section 12 indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied.”

The Second Circuit relied on the Supreme Court’s decision in Robinson v. Shell Oil Co., in which the Supreme Court stated, “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” The Second Circuit took this to mean that “[i]f the meaning is plain, we inquire no further.” Looking to the text of section 12, the court then focused on the common meaning of the word “such,” which Congress placed after the semicolon in section 12. The court found that “such” means “having a quality already or just specified; . . . of the sort or degree previously indicated or implied; or previously characterized or described.” Applying this common meaning to the text, the court found it obvious that,

This occurred because the defendants moved to dismiss for lack of personal jurisdiction and improper venue in the Western District of New York. The magistrate judge recommended that the district court deny the motion based on a broad reading of section 12 (combining § 1391(c) and (b) to establish venue and utilizing section 12 to establish personal jurisdiction). The district court adopted the magistrate judge’s report and recommendation and denied the defendant’s motion to dismiss. See Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127 (W.D.N.Y. 1997). In 2000, the plaintiffs filed a second amended complaint. In 2003, the magistrate judge, on a motion to dismiss by the defendants, recommended that the second amended complaint be dismissed, inter alia, for lack of antitrust standing. The district court again adopted the magistrate judge’s report and recommendation and dismissed the thirteen-year-old case. See Daniel v. Am. Bd. of Emergency Med., 269 F. Supp. 2d 159 (W.D.N.Y. 2003). The plaintiffs appealed the dismissal to the Second Circuit and the defendants argued that dismissal was proper “not only for lack of antitrust standing but also for lack of personal jurisdiction and venue in the Western District of New York.” Daniel, 428 F.3d at 414. The court of appeals chose to interpret section 12 of the Clayton Act because the district court had based personal jurisdiction for all corporate defendants on section 12 while basing venue on the general venue provisions for some defendants and section 12 for other defendants. Id. at 421–35. Notably, the court concluded that venue was improper in the Western District of New York and that the district court lacked personal jurisdiction over the defendants after thirteen years of litigation in that district. Id. at 435. The plaintiffs initiated suit in 1990; the case was dismissed in 2003. See Docket, Daniel v. Am. Bd. of Emergency Med., 269 F. Supp. 2d 159 (W.D.N.Y. 2003) (1:90-CV-01086). That litigation can ensue for thirteen years at the district court level in a forum that lacks personal jurisdiction over the defendants is a good reason for Congress or the Supreme Court to settle the conflict, if only to prevent the waste of scarce judicial resources.

182. Id. at 423.
184. Daniel, 428 F.3d at 423 (quoting Robinson, 519 U.S. at 341).
185. Id.
186. Id. at 424 (internal quotation marks omitted).
The “quality” of the cases specified in the provision of Section 12 preceding the semicolon is not simply that they are antitrust cases . . . it is that they are antitrust cases against corporations brought in the particular venues approved by Section 12. . . . It is “in such cases,” . . . that Section 12 makes worldwide service of process available.\textsuperscript{187}

The court next pointed out that its construction of section 12 comported with the Supreme Court’s 1927 opinion in Eastman Kodak Co. of New York v. Southern Photo Materials Co.\textsuperscript{188}  In Kodak, the Supreme Court noted that section 12 expanded venue by allowing suit in a district where the defendant transacts business, even when the defendant does not reside there, or can be found there.\textsuperscript{189}  The Court, after discussing where venue may be laid under section 12, then linked its discussion of venue to service of process, stating, “\textit{[I]n which case the process may be issued to and served in a district [where] the corporation . . . is ‘found.’}”\textsuperscript{190}  The Daniel court noted that the Supreme Court’s use of the phrase “in which case” to link the discussion of venue and service of process suggested that the Court understood the service of process provision to be available only when venue was satisfied under the statute.\textsuperscript{191}

The Daniel court found that the inquiry could stop there because section 12’s meaning was ascertainable from its plain language. Nevertheless, the court considered the position of those circuit courts that read section 12 broadly.\textsuperscript{192}  Daniel acknowledged that the main purpose of section 12 was the “expansion of the bounds of \textit{venue},” but that the legislative history on section 12 was sparse.\textsuperscript{193}  The court specifically referred to United States v. National City Lines, Inc., where the Supreme Court remarked that “[i]n adopting section 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice.”\textsuperscript{194}  Absent evidence of Congress’s purpose in enacting a venue and service of process provision in a single sentence, the court concluded there is no reason to find that Congress desired to divorce the two “provisions [and] combine the latter with an expanded general venue statute enacted decades later.”\textsuperscript{195}  Essentially, the court in Daniel observed that Congress adopted section 12 to expand venue for antitrust actions in light of restrictive general venue provisions, but today, § 1391 has caught up. Thus, the Daniel court found

\begin{enumerate}
\item[187] \textit{Id.}
\item[188] \textit{Id.} (citing Eastman Kodak Co. of N.Y. v. S. Photo Materials Co., 273 U.S. 359, 372–73 (1927)).
\item[189] \textit{Eastman Kodak}, 273 U.S. at 372–76.
\item[190] Daniel, 428 F.3d at 424 (citing Eastman Kodak, 273 U.S. at 372–73).
\item[191] \textit{Id.} The \textit{Kodak} language is not dispositive of the section 12 issue today because section 12 expanded the bounds of venue when it was enacted; the issue presented in this Note did not exist until the ordinary venue provisions were liberalized. See infra note 290 and accompanying text.
\item[192] \textit{Id.} at 425.
\item[193] \textit{Id.} (quoting Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1410 (9th Cir. 1989)).
\item[195] Daniel, 428 F.3d at 425.
\end{enumerate}
that the elimination of section 12’s liberalizing effect does not justify creatively reading section 12 with § 1391(b) and (c). To do so in order to further liberalize section 12’s antitrust venue beyond Congress’s original intent would eviscerate the venue inquiry entirely.

The court next compared the Clayton Act’s expanded venue provision and service of process provision to similar provisions in the Securities Exchange Act of 1934 (’34 Act) and the Racketeer Influenced and Corrupt Organizations Act (RICO). The Second Circuit recognized that it “must proceed cautiously in drawing . . . analogies” between different statutes’ special venue provisions because, in Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co., the Supreme Court stated that “analysis of special venue provisions must be specific to the statute.” As compared to courts that read section 12 broadly, the Second Circuit further recognized that all three provisions contain different statutory text, and found that such a comparison is relatively useless.

Although the Second Circuit found a comparison of section 12 and section 78aa of the ’34 Act to be unhelpful, Daniel found support for

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196. Id. at 426. The district court relied on such comparisons in reaching the conclusion that section 12 is properly read broadly. Id.
198. See infra notes 265–69 and accompanying text.
199. Daniel, 428 F.3d at 426.

Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Id.

201. Specifically, the court noted that the venue and service of process provision of the ’34 Act was intended “to extend personal jurisdiction to the full reach permitted by the due process clause” and that it was doubtful that a situation would arise where venue would be improper under the provision. Daniel, 428 F.3d at 427 (quoting Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1339 (2d Cir. 1972)). However, as applied, section 12 of the Clayton Act extends personal jurisdiction to the full reach permitted by due process. It is unclear how Congress’s intent to extend personal jurisdiction as far as due process allows indicates Congress’s intent that venue ought to be bootstrapped to personal jurisdiction. Furthermore, the Second Circuit’s statement that the text and structure of the ’34 Act “differ[s] in important respects from the Clayton Act” is inaccurate. Id. at 426. The relevant provision of the ’34 Act states that suit may be brought in any district where the violation occurred “or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.” 15 U.S.C. § 78aa (emphasis added to indicate similarity to section 12 of the Clayton Act). This language is very similar regarding venue and nearly identical regarding service of process to the language of section 12. Delivering the opinion of the court for the Second Circuit, Judge Henry Friendly noted in 1972 that § 78aa is “[a] rather inaptly worded provision[,] . . . [that]
its conclusion that section 12 should be read as an integrated whole by comparing section 12 with the venue and personal jurisdiction provisions of RICO. The Clayton Act served as a model for the venue and personal jurisdiction provisions of RICO.\textsuperscript{202} There, Congress elected to separate the venue and service of process provisions into two separate lettered subsections.\textsuperscript{203} Title 18, § 1965(a) provides where the action may be brought (venue); § 1965(d) provides for worldwide service of process “in any action or proceeding under this chapter.”\textsuperscript{204} In contrast to section 12, the latter RICO section does not contain a limiting “in such cases” clause, making it clear that Congress intended § 1965(d) to apply to all cases brought under RICO, in which venue is established under § 1965(a).\textsuperscript{205} The Daniel court noted that section 12 served as a model for RICO’s § 1965 and concluded that Congress’s decision to separate venue and service of process into separate lettered sections indicated its intent to differentiate RICO’s long-arm statute from the Clayton Act’s long-arm statute.\textsuperscript{206} The court found the language and structural differences between the Clayton Act and RICO to reinforce the conclusion that “Congress was expressly rendering independent under RICO concepts that it had plainly linked under Clayton Act Section 12.”\textsuperscript{207}

2. Impact on Private Antitrust Litigation

An integrated reading of section 12 requires an antitrust plaintiff to lay venue in a district where the defendant transacts business\textsuperscript{208} in order to take advantage of the worldwide service of process provision. In contrast with the broad reading of section 12, which permits suit in any district in the country so long as the defendant (either domestic or foreign) has sufficient minimum contacts with the nation, an integrated reading’s main impact on private antitrust litigation is that it prevents the maintenance of suit under section 12 in districts where the defendant has insufficient contacts. Professor Herbert Hovenkamp noted, “[W]hen an antitrust action is brought in a proper venue under section 12 of the Clayton Act, then the defendant is likely to have the requisite minimum contacts with the state to satisfy the requirements of International Shoe.”\textsuperscript{209}

\begin{itemize}
\item appear[\text{s}] to have been modeled on [section] 12 of the Clayton Act.” \textit{Leasco Data Processing}, 468 F.2d at 1340 n.10.
\item \textsuperscript{202} \textit{Daniel}, 428 F.3d at 427 (citing 18 U.S.C. § 1965(a), (d) (2000)).
\item \textsuperscript{203} Id.
\item \textsuperscript{204} 18 U.S.C. § 1965.
\item \textsuperscript{205} 18 U.S.C. § 1965(a), (d); see \textit{Daniel}, 428 F.3d at 427.
\item \textsuperscript{206} \textit{Daniel}, 428 F.3d at 427.
\item \textsuperscript{207} Id.
\item \textsuperscript{208} \textit{See supra} Part I.B.3.b.i.
\item \textsuperscript{209} Hovenkamp, \textit{supra} note 174, at 508 (citing \textit{Int’l Shoe v. Washington}, 326 U.S. 310 (1945)). Hovenkamp refers to a district court decision where the court concluded, it is clear that once it has been determined that a defendant has transacted business in the particular district involved within the meaning of 15 U.S.C. § 22 and is therefore subject to venue under the antitrust laws, his activities qualifying as
\end{itemize}
Therefore, an integrated reading of section 12 ensures that a private plaintiff cannot force a corporate antitrust defendant to defend in a district in which it has no contacts. This seems to negate any advantage that a plaintiff could gain from section 12’s worldwide service of process clause. If the defendant’s contacts are good enough for section 12 venue and are therefore likely good enough for personal jurisdiction through an *International Shoe* minimum contacts analysis, it remains unclear whether there is anything actually left of section 12 besides the venue provision. This begs the question because it is unclear how a situation might arise where section 12 venue is satisfied, but § 1391(b) is not. Thus, although a common criticism of the broad reading of section 12 is that it eliminates section 12’s venue provision, it seems that an integrated reading of section 12 might, at most, add little to the modern general venue provisions and ordinary personal jurisdiction analysis today. Consequently, the issue is whether this is an acceptable application of section 12.

**B. Broad Reading of Section 12**

The broad reading of section 12 of the Clayton Act allows a plaintiff to utilize section 12’s worldwide service of process provision to serve process on a defendant corporation no matter how venue is established. This can result in a situation where venue is proper in any district in the country, even if the defendant has no contacts with the district where suit is brought. This occurs when courts allow a plaintiff to first establish personal jurisdiction under section 12 and then to establish proper venue through § 1391(b) and (c), for domestic defendants, or through § 1391(d), for alien defendants.

1. **Case Law and Rationale**

   **a. Personal Jurisdiction Under Section 12 and Venue Under § 1391(d) for Alien Defendants**

   In 1982, the U.S. District Court for the Southern District of New York heard *General Electric Co. v. Bucyrus-Erie Co.*, a case brought against a foreign corporation for violations of the antitrust laws. The plaintiff alleged that a British corporation restrained trade in the United States by transacting business under [section 12] likewise fully satisfy the Constitutional due process test of “minimum contacts,” as announced in [*International Shoe*](#). Recognize that *International Shoe* was twenty-six years removed when Congress enacted section 12 in 1914. Therefore, although today it seems likely that when section 12 venue is satisfied that personal jurisdiction is also established by way of the defendant’s minimum contacts with the forum state, in 1914 contacts were not a substitute for presence under *Pennoyer v. Neff*, 95 U.S. 714 (1877), and section 12 made serving valid process substantially easier.  

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2. Id. at 1038.
actions taken abroad. The foreign defendant moved to dismiss for lack of personal jurisdiction, improper venue, and improper service of process. There were two issues presented: (1) whether § 1391(d) supplements section 12, and if so, (2) whether reliance on § 1391(d) to establish venue renders section 12’s worldwide service of process provision unavailable. It was necessary for the court to decide whether the plaintiff could utilize section 12’s service of process provision without establishing venue under section 12 because it was unclear whether the alien defendant fell within section 12’s venue provision.

The court distinguished Goldlawr, a Second Circuit case that read section 12 as an integrated whole, on the grounds that it “did not discuss the applicability of section 1391(d) or any other general venue provision to the question of service and personal jurisdiction under section 12.” The court read Goldlawr to require venue to be proper based on either section 12 or § 1391 in order for plaintiffs to be able to take advantage of section 12’s worldwide service of process clause. In Bucyrus-Erie, the court applied § 1391(d) to the alien defendant and then permitted section 12 to establish personal jurisdiction.

The Bucyrus-Erie court did not ignore the canons of statutory interpretation, but found that the “usual rules of syntax” supported a broad reading of section 12. Referring to the phrase “in such cases” in the service of process provision of section 12, the court defined “such” as meaning “aforementioned.” The court went on to explain that “when ‘such’ precedes a noun it is assumed to refer to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but not to any other part of the preceding clause or sentence.” The noun following “such” in section 12 is “cases.” The antecedent noun that “such” refers to is therefore “any suit . . . arising under the antitrust laws against a corporation” from section 12’s venue provision.

212. Id. at 1043. The court did not discuss whether the United States’ antitrust laws applied to the defendant’s conduct, presumably because the defendant did not raise the issue on the motion to dismiss. The defendant exported millions of dollars worth of machines to the United States, executed contracts within the United States, and held U.S. patents. The court determined that these contacts were sufficient with the nation as a whole to establish personal jurisdiction within Fifth Amendment due process limits. See id. at 1044. See supra Part I.B.1.b for a discussion of the extraterritorial application of federal antitrust law.


214. Id. For reasons discussed in Part I.B.3.b.i, the court concluded that § 1391(d) was supplemental to the venue provision in section 12. See id. at 1038–43.

215. Id. at 1039.

216. See supra note 148 and accompanying text.


218. Id. at 1042.

219. Id.

220. Id.

221. Id. at 1042 n.7.

222. Id.


224. Id.
concluded that “in such cases” refers only to “‘any suit . . . under the antitrust laws against a corporation;’ and not to anything else in section 12’s first clause.”\textsuperscript{225}

The court recognized the problem created by its holding, specifically that “a plaintiff could get jurisdiction over a foreign corporation in ‘any district’ . . . even if the corporation had never had contacts with this country.”\textsuperscript{226} The court resolved this problem by holding that section 12 permits personal jurisdiction to stretch only as far as the Due Process Clause of the Fifth Amendment allows, that is, to a minimum contacts analysis with the United States as a whole.\textsuperscript{227} In \textit{Bucyrus-Erie}, the defendant’s contacts with the United States consisted of regular exportation of millions of dollars worth of machines and spare parts manufactured abroad to the United States, executing contracts within the United States, adopting a U.S. corporate seal, holding U.S. patents that it had licensed to U.S. corporations, and purchasing electrical equipment and diesel engines through U.S. purchasing agents.\textsuperscript{228} The court concluded that the defendant’s contacts with the United States “evince[d] a desire by [the defendant] to avail itself of the ‘privileges and benefits’ of United States law such that ‘it has clear notice that it is subject to suit there.’”\textsuperscript{229} The court held that personal jurisdiction and venue were proper in the Southern District of New York without mentioning whether the defendant had any contacts with the forum.\textsuperscript{230}

Seven years after \textit{Bucyrus-Erie}, the Ninth Circuit heard \textit{Go-Video, Inc. v. Akai Electric Co.},\textsuperscript{231} the case that stands for the broad reading of section 12.\textsuperscript{232} \textit{Go-Video}, a Delaware corporation with its principal place of business in Arizona, brought suit in the District of Arizona against a Japanese electronics trade association made up of multiple Japanese manufacturing companies for alleged violations of section 1 of the Sherman Act.\textsuperscript{233} The plaintiff alleged that the defendants refused to deal with \textit{Go-Video}, which prevented it from manufacturing its patented “dual deck” videocassette recorder.\textsuperscript{234} Plaintiff claimed venue was proper in Arizona under § 1391(d) and served process on the Japanese defendants pursuant to section 12.\textsuperscript{235} The district court found that personal jurisdiction and venue were proper in the District of Arizona based on a combination of the two
statutes and the defendant’s aggregate contacts with the nation. The defendants appealed to the Ninth Circuit.

The defendants argued that section 12 ought to be read as an integrated whole, while the plaintiff argued that “such cases” referred to all antitrust cases against a corporation, not only those in which venue was laid according to the venue provision of section 12. The court observed that the answer was not clear from the plain language of the statute, but concluded that the purpose of private antitrust enforcement supported the adoption of the broad reading of section 12.

The court in Go-Video first found that a broad reading, as compared to an integrated reading, of section 12 was appropriate because “it is more closely in keeping with the manner in which courts have traditionally defined the relationship between one statute’s specific venue provision and the general federal venue statutes.” The court focused on the settled rule of law that specific venue provisions supplement general venue provisions and thus held that venue may properly be satisfied under either provision.

In addition, the court concluded that the history and purpose of the antitrust laws support a broad reading of section 12. The court noted that there is little legislative history illuminating how Congress intended the two provisions of section 12 to interact. Looking to the legislative history, the court observed that the venue provision was introduced in the House with the purpose of allowing antitrust suit against a corporate defendant wherever it could be found; the Senate added the service provision without debate or objection, and specifically without indication that it was intended to “be subject[] to the section’s venue provision.”

The Go-Video court focused on its understanding that section 12 had been adopted to “expan[d] the bounds of venue” and therefore was “reluctant to adopt a construction of section 12 which would, by limiting the availability of the valued tool of worldwide service of process, recast its venue provision as restrictive, rather than a broadening, provision and might prevent plaintiffs from pursuing legitimate [antitrust] claims.”

The court’s determination of the purpose of section 12 guided its statutory construction as well. The court applied the canon reddendo singula singulis, which applies when unclear “antecedents and consequents are [interpreted] by reference to the context and purpose of the statute as a

236. Id. at 1408.
237. Id.
238. Id.
239. Id.
240. Id.
241. Id. at 1408–10; see also supra Part I.B.3.b.i. Note that even courts that adopt an integrated reading of section 12 agree that this is correct; however, to rely on this agreement in order to settle the conflict confuses the issue.
242. Go-Video, 885 F.2d at 1408.
243. Id. at 1410.
244. Id.
245. Id. at 1410–11.
whole.” The court concluded that the broad reading “is clearly the one more consonant with the purpose of the Clayton Act and better comports with a section designed to expand the reach of the antitrust laws and make it easier for plaintiffs to sue for antitrust violations.”

Having determined that venue was proper over the Japanese defendants under § 1391(d), the court upheld personal jurisdiction based on the trade association’s contacts with the United States as a whole pursuant to section 12’s worldwide service of process provision. The defendants argued that it was unfair to require a foreign defendant to litigate in any district in the country based on a national contacts analysis. The court responded that a motion to transfer pursuant to the federal venue transfer statute, 28 U.S.C. § 1404(a), could handle any issue of unfairness since an unfair forum is not necessarily a jurisdictionally defective forum. The defendants had not moved for a transfer, so the court did not consider whether the facts warranted a change of venue.

In 2004, the Third Circuit faced the section 12 issue in a suit brought against an alien corporation, and it too held that service of process under section 12 does not depend on venue being established under section 12. In *In re Automotive Refinishing Paint Antitrust Litigation*, the U.S. Judicial Panel on Multi-district Litigation consolidated sixty-three actions filed in five states for pretrial purposes in the Eastern District of Pennsylvania. The class action complaint alleged that over the course of seven years, multiple foreign and domestic defendants conspired to fix prices of automotive refinish paint in the United States. The district court found personal jurisdiction over the alien defendants pursuant to

246. *Id.* at 1412.
247. *Id.* at 1413 (citing United States v. Scophony Corp., 333 U.S. 795, 806–08 (1948)); *see also* *Lee*, supra note 143, at 689. Jordan Lee argues that because the purpose of the antitrust laws is to protect competition throughout the nation, public policy supports “broad antitrust enforcement.” *Id.* Lee points out that the conduct prohibited by the antitrust laws can result in “large-scale economic impact” making “broad venue and service powers useful in enforcing the [antitrust] laws.” *Id.* Lee’s argument applies to both alien and domestic defendants.
248. *Go-Video*, 885 F.2d at 1414–16.
249. *Id.* at 1416–17. Professor Capra agrees that fear of unfairness to alien defendants is not a good reason to read section 12 as an integrated whole. *See Capra, supra* note 143, at 409–11. Capra argues that “[a]ny concern about protecting alien defendants from overreaching and substantial inconvenience is answered by the protections afforded by the due process clause, and more importantly by the transfer of venue provision.” *Id.* at 409. Capra further argues that allowing the section 12 service of process provision to be used with § 1391(d) simply makes things easier by avoiding the difficulties and uncertainties associated with the “transacts business” venue test in section 12. *Id.* But see *supra* note 174 (discussing Hovenkamp’s argument that fear of unfairness to defendants, especially alien defendants, supports an integrated reading of section 12).
250. *Go-Video*, 885 F.2d at 1416–17.
252. *Id.*
253. *Id.* at 290.
254. *Id.* at 291, 290 n.1.
section 12 based on the defendants’ aggregate contacts with the nation.\textsuperscript{255} The district court also found that section 12’s service of process provision operated independently from its venue provision.\textsuperscript{256} Two of the German corporate defendants appealed the finding of personal jurisdiction in the district to the Third Circuit.\textsuperscript{257}

The Third Circuit acknowledged that there was a split among the circuits, specifically between the D.C. Circuit (\textit{GTE New Media}) and the Ninth Circuit (\textit{Go-Video}).\textsuperscript{258} The court relied on the \textit{Go-Video} and \textit{Bucyrus-Erie} decisions and elected to endorse the \textit{Go-Video} holding that section 12’s “service of process provision on foreign corporations is independent of, and does not require satisfaction of, the specific venue provision under Section 12.”\textsuperscript{259} Additionally, \textit{In re Automotive Paint} compared section 12 of the Clayton Act to section 27 of the ’34 Act to support its conclusion.\textsuperscript{260}

The \textit{Automotive Paint} court found the language of section 12 to be neither clear nor unambiguous and rejected the “plain meaning” treatment adopted in \textit{GTE New Media}.\textsuperscript{261} The court next distinguished \textit{GTE New Media} and \textit{Goldlawr} on the ground that those cases were brought against out-of-state domestic corporate defendants, contrasted with \textit{In re Automotive Paint}, where foreign defendants raised the section 12 issue.\textsuperscript{262} The court noted that “[t]he distinction is crucial” because section 12 venue was easier to satisfy than the general venue provisions for domestic defendants, but more difficult to satisfy than the alien venue provision and that the purpose of section 12 was to make it easier for plaintiffs to establish venue.\textsuperscript{263} The court followed \textit{Go-Video} and elected to read section 12 as a broadening provision, if only when applied to alien defendants.\textsuperscript{264}

\begin{itemize}
\item \textsuperscript{255} \textit{Id.} at 291–92.
\item \textsuperscript{256} \textit{Id.; see In re Auto. Refinishing Paint Antitrust Litig., MDL No. 1426, 2002 WL 31261330, at *6–10 (E.D. Pa. July 31, 2002).}
\item \textsuperscript{257} \textit{In re Auto. Paint}, 358 F.3d at 290.
\item \textsuperscript{258} \textit{Id.} at 294.
\item \textsuperscript{259} \textit{Id.} at 296–97.
\item \textsuperscript{260} \textit{Id.} at 297 n.12, 297. \textit{But cf.} Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 426–27 (2d Cir. 2005) (explaining why a comparison to section 27 of the ’34 Act “offer[ed] little help” in interpreting section 12 of the Clayton Act); see also \textit{supra} notes 194–201 and accompanying text.
\item \textsuperscript{261} \textit{In re Auto. Paint}, 358 F.3d at 296 n.10. It is reasonable to conclude that there is not a singular plain meaning of the statute given that courts and commentators that have come out on both sides of the issue have resorted to utilizing statutory interpretation and the rules of grammar to determine how the “in such cases” clause affects the reading of section 12. \textit{Compare} Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1412–13 (9th Cir. 1989), Gen. Elec. Co. v. Bucyrus-Erie Co., 550 F. Supp. 1037, 1042 n.7 (S.D.N.Y. 1982), and Capra, \textit{supra} note 143, at 409 (arguing that a broad reading of section 12 is “a more reasonable construction in terms of a fair reading of the statute”), \textit{with Daniel}, 428 F.3d at 423–24, 14D Wright, Miller & Cooper, \textit{supra} note 114, \S\ 3818 (generally agreeing with Hovenkamp that an integrated reading was “the way it is written”), and Hovenkamp, \textit{supra} note 174, at 509 (advocating an integrated reading because that is “the way it is written”).
\item \textsuperscript{262} \textit{In re Auto. Paint}, 358 F.3d at 296 n.10.
\item \textsuperscript{263} \textit{Id.} (citing Bucyrus-Erie, 550 F. Supp. at 1041 n.5). However, the court failed to recognize that the general venue provisions were amended in 1988, after \textit{Bucyrus-Erie} was decided, and did not explain exactly how section 12 venue was easier to establish than §
\end{itemize}
Unlike the Second Circuit in Daniel, the Automotive Paint court found support for its holding in section 27 of the '34 Act. The court noted that “[t]he two sections are remarkably similar in their provisions for venue and service of process” and found persuasive Judge Henry Friendly’s construction of section 27 in Leasco Data Processing Equipment Corp. v. Maxwell. The court stated that Judge Friendly wrote that the “in such cases” clause spoke expressly to service of process and was distinct from the venue provision in the section.

The court went on to hold, as all others have, that the Fifth Amendment Due Process Clause is the only constitutional limit on the exercise of personal jurisdiction under section 12 and that the nation as a whole is the measure for a minimum contacts analysis. The court thus held that venue was satisfied under § 1391(d) and that section 12 of the Clayton Act granted the court personal jurisdiction over the alien defendants.

b. Go-Video Goes Domestic: Proper Venue Under § 1391(b) and (c) for Domestic Corporate Antitrust Defendants

The cases already discussed in Part II do not conflict. The cases advocating an integrated reading have all dealt with domestic defendants, while the cases advocating a broad reading in Part II.B.1.a have dealt with foreign defendants; the two lines of cases are distinguishable on those grounds. The following cases truly conflict with the cases advocating an integrated reading in Part II.A, as they involve applying a broad reading of section 12 to domestic antitrust defendants. Private plaintiffs are hauling these domestic corporations into court in a district where they lack purposeful affiliating contacts with the justification that they have sufficient minimum contacts with the nation as a whole.

1391(b). The court did not have to explain this because In re Automotive Paint dealt with foreign defendants and venue under § 1391(d). See In re Auto. Paint, 358 F.3d at 288. Following the Third Circuit in In re Automotive Paint, in 2005 the U.S. District Court for the Eastern District of Pennsylvania, in Cumberland Truck Equipment Co. v. Detroit Diesel Corp., expanded upon In re Automotive Paint’s note that “[t]he distinction is crucial” between alien and domestic corporate defendants. 401 F. Supp. 2d 415, 421 (E.D. Pa. 2005). The district court explicitly held that the broad reading only applies to alien defendants, id. at 420–21, while the integrated reading applies to domestic defendants, id. at 423–24. The district court noted that “[r]equiring Plaintiffs to establish venue . . . exclusively under Section 12 preserves the Third Circuit’s alien-domestic distinction while reflecting a coherent interpretation of antitrust precedent.” Id. at 424.

265. See supra notes 196–207 and accompanying text.
267. Id. at 297.
268. Id. at 297 n.12 (citing Leasco Data Processing Equip. Corp. v. Maxwell, 968 F. 2d 1326, 1340 n.10 (2d Cir. 1972)).
269. Id.
270. Id. at 298–99.
271. Id. at 296–97.
272. See, e.g., supra text accompanying notes 218, 262.
In *Icon Industrial Controls Corp. v. Cimetrix, Inc.*, a Louisiana corporation with its principal place of business in Louisiana brought an antitrust suit in the Western District of Louisiana against multiple nonresident domestic corporate defendants. Icon developed and sold operating systems that controlled robotics and machine tools. Icon alleged that the defendants, against whom it competed, conspired to prevent it from developing and selling a new operating system by disseminating false information about the new system while it was under development. Icon claimed it had lost time responding to the falsehoods and had lost necessary collaborators as well. The defendants submitted sworn statements that they did not transact business or own property in Louisiana and that they had no substantial contacts with the forum. Icon did not contest this claim. The defendants moved to dismiss for lack of personal jurisdiction and for improper venue, with the court observing that “[i]t is not seriously contended that any of the defendants . . . have significant contacts with Louisiana” and that “few, if any, of the events giving rise to the dispute occurred in [Louisiana].”

In resolving the motion to dismiss, the court first noted that when a federal statute grants worldwide service of process, the relevant measure for a minimum contacts analysis is the nation as a whole. Presented with the issue of how to interpret section 12, the court relied on *Go-Video*, despite the defendants’ effort to distinguish the case because it involved alien defendants and venue through § 1391(d) rather than § 1391(b). The *Icon* court found that the issue in both cases was identical, and concluded that “[l]ogically, the [Go-Video] court’s conclusion that the worldwide service provision is available in all antitrust cases is not dependent on whether the defendant is an alien.” The court found nothing in *Go-Video* to indicate that § 1391(d) ought to be the only general venue provision that could supplement section 12.

Recognizing that reasonable arguments existed to support both interpretations of section 12, the court concluded that an integrated reading “makes little sense.” Instead, the court elected to follow *Go-Video* and concluded that a broad reading of section 12 fits best with the overall policy
and purpose of the Clayton Act.\textsuperscript{286} Having concluded that section 12 established personal jurisdiction over the non-Louisiana defendants, the court then found that venue was proper in the district pursuant to a combined reading of § 1391(b)(1) and (c).\textsuperscript{287} The court concluded that the defendants were residents in the district because they were subject to personal jurisdiction there pursuant to § 1391(c) and that venue was proper under § 1391(b)(1) because all defendants “reside” in the state.\textsuperscript{288} The defendants argued that finding venue under a combined reading of § 1391(b)(1) and (c) “renders unnecessary the special venue provisions contained in Section 12” and “that Congress presumably intended the venue provisions contained in Section 12 to have meaning.”\textsuperscript{289} In response, the Louisiana court stated that the special venue provisions had meaning when Congress enacted section 12 in 1914 and did not have a problem concluding that the 1988 amendment to § 1391(c) made the venue provision of section 12 meaningless.\textsuperscript{290}

The \textit{Icon} court dismissed the defendants’ argument that the court’s reading of section 12 was fundamentally unfair by responding that any issue of unfairness “is a policy issue best settled in the legislative arena.”\textsuperscript{291} Instead, it saw § 1404(a) and the forum non conveniens doctrine as preventing antitrust litigation from being brought in a district with no connection to the parties or controversy.\textsuperscript{292} The court then went on to find that the defendants did not meet their high burden of showing that there was a more convenient forum and denied their motion to transfer.\textsuperscript{293} Thus, the holding forced multiple non-Louisiana defendants with no significant

\textsuperscript{286} See id.; see also supra note 247 and accompanying text.
\textsuperscript{287} \textit{Icon Indus. Controls}, 921 F. Supp. at 382–83.
\textsuperscript{288} Id. at 382.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 382–83; see also Lee supra note 143, at 695 (pointing out that section 12’s venue provision had meaning when enacted in 1914 because its venue provision was broader than the general venue provision at the time, and also arguing that Congress’s decision not to modify section 12 when it enacted the general venue provisions currently in force is indicative of congressional intent that the general venue provision “implicitly expanded section 12 to this extensive reach”). While Lee’s argument makes sense, it omits the fact that courts are not simply allowing a plaintiff to establish venue under either the general provision or the section 12 venue provision, but rather that courts are allowing section 12 personal jurisdiction to completely eviscerate the venue inquiry. Doing so makes venue under section 12 more extensive than any general venue provision. Professor Rachel Janutis argues that § 1391(c) corporate residence should be viewed as lying residence where a corporation “is subject to personal jurisdiction independent of nationwide service of process.” Rachel M. Janutis, \textit{Pulling Venue Up by Its Own Bootstraps: The Relationship Among Nationwide Service of Process, Personal Jurisdiction, and § 1391(c)}, 78 St. John’s L. Rev. 37, 79 (2004). It seems more reasonable that any congressional intent that can be gleaned from Congress’s decision to leave section 12 as it was when the general venue provisions were amended is an intent in accord with Janutis’s argument.
\textsuperscript{291} \textit{Icon Indus. Controls}, 921 F. Supp. at 383.
\textsuperscript{292} Id. The court was likely referring to § 1404(a) as the federal forum non conveniens statute because the traditional forum non conveniens doctrine does not apply to federal antitrust litigation. See supra note 108.
\textsuperscript{293} \textit{Icon Indus. Controls}, 921 F. Supp. at 383–85.
contacts with the forum to litigate a claim for antitrust violations in a Louisiana court that arose due to few, if any, events occurring in Louisiana because the plaintiff claimed injury and filed suit in Louisiana.

In 2004, the Ninth Circuit extended its Go-Video reasoning in *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, a case involving only domestic parties. Two domestic corporations, one incorporated in California and the other incorporated in Virginia with its principal place of business in California, sued a Virginia corporation and a Virginia law firm in district court in California in response to an allegedly meritless antitrust suit filed against them in Virginia. In their California suit, the plaintiffs alleged that the defendants pursued the Virginia litigation to achieve goals that violated the antitrust laws. The Virginia corporate defendant moved to dismiss or transfer for lack of proper venue. The trial court granted the motion and transferred the case to the Eastern District of Virginia. The Virginia law firm, for its part, only moved to dismiss for lack of personal jurisdiction. With respect to the law firm, the district court granted the motion and dismissed the case. The plaintiffs appealed the dismissal so that the lack of personal jurisdiction over the defendant law firm was the only issue presented on appeal.

The court essentially restated its Go-Video rationale in holding that section 12 establishes personal jurisdiction over a defendant without requiring satisfaction of section 12’s venue provision. The court stated that Go-Video stood for the proposition “that the special venue provision of Section 12 is supplemented by the general venue provisions of § 1391 for federal antitrust plaintiffs” and went on to hold “that under Section 12 of the Clayton Act, the existence of personal jurisdiction over an antitrust defendant does not depend upon there being proper venue in that court.” The court notably did not discuss why the outcome should be the same when a domestic defendant is sued, as in *Action Embroidery*, as compared to when a foreign defendant is sued, as in Go-Video.

The court did not reach the question of whether venue was proper in California. It simply concluded that personal jurisdiction existed over the Virginia law firm in California under section 12 because section 12 grants personal jurisdiction over any corporate antitrust defendant so long as the

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294. 368 F.3d 1174 (9th Cir. 2004).
295. Id.
296. Id. at 1176.
297. Id.
298. Id.
299. Id.
300. Id. at 1176–77.
301. Id. at 1177.
302. Id. at 1176–77.
303. Id. at 1177–81.
304. Id. at 1177.
305. Id. at 1179–80.
defendant has minimum contacts with the nation as a whole. The court continued, finding that the defendant, “a Virginia professional corporation operating in the United States, . . . clearly had such minimum contacts.”

Despite this holding, the circuit court noted on remand that the district court could, in its discretion, transfer the case for improper or inconvenient venue under the proper federal statutes. Presumably, venue was proper because the district court held that it had personal jurisdiction over the defendant, that § 1391(e) equates residence to personal jurisdiction, and that § 1391(b)(1) provides that venue is proper where the defendant resides.

In 2006, a Kentucky district court found another way to combine section 12 and § 1391. In Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing, Inc., the U.S. District Court for the Eastern District of Kentucky utilized section 12 in conjunction with § 1391(b)(2) to find personal jurisdiction and venue properly established. Kentucky Speedway alleged that NASCAR and the International Speedway Association (ISC) “monopolized and attempted to monopolize” the national stock car racing market in violation of sections 1 and 2 of the Sherman Act. ISC owns racetracks; the plaintiff alleged that NASCAR conspired with ISC to make sure that most NASCAR races are held at ISC tracks, which resulted in injury to plaintiff’s business because it was unable to host NASCAR races.

The court found venue proper under § 1391(b)(2) because of the alleged injury to a Kentucky business from the alleged antitrust violations. The court concluded that the fact that the plaintiff was “damaged in the operation of its business which is headquartered in Kentucky,” made the district a proper one under § 1391(b)(2) because a “substantial part of the events . . . giving rise to claim occurred” in the district. The court went on to analyze the defendant’s contacts with Kentucky and concluded that additional discovery was necessary to establish personal jurisdiction through the Kentucky long-arm statute. The court, however, concluded that this additional jurisdictional discovery was avoidable because section 12 conferred personal jurisdiction over the defendant pursuant to a broad Go-Video reading of the statute.

306. Id. at 1180 (citing Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1416 (9th Cir. 1989)).
307. Id.
308. Id. at 1181.
309. See supra text accompanying notes 285–89.
311. Id.
312. Id. at 593.
313. Id. at 594.
314. Id. at 597–98.
315. Id. at 597.
316. Id. at 598 (quoting 28 U.S.C. § 1391(b)(2) (2000)).
317. Id. at 598.
318. Id. at 600–01.
Supplementing section 12 venue with § 1391(b)(2) is more likely to protect a defendant from litigating in a forum that lacks ties to the underlying case than is the Icon reading where the court combined section 12 for personal jurisdiction with § 1391(b)(1) and (c) for venue.\textsuperscript{319} Under Icon, venue is proper in any district in the country so long as the corporate antitrust defendant has sufficient contacts with the nation as a whole.\textsuperscript{320} Under Kentucky Speedway, venue was proper under § 1391(b)(2) and personal jurisdiction was established through section 12.\textsuperscript{321} Even where a court does use § 1391(b)(1) and (c) to find venue, the district chosen is typically the district where the plaintiff suffered the injury; if it were not, the court would almost surely transfer the case pursuant to the federal venue transfer statute. Therefore, supplementing section 12 venue with § 1391(b)(2)—as opposed to § 1391(b)(1) and (c)—has little if any impact on the ultimate forum of the litigation. This is also the case because a liberal reading of section 12’s “transacts business”\textsuperscript{322} would likely encompass any situation where § 1391(b)(2)’s “claim arose”\textsuperscript{323} requirement is satisfied.\textsuperscript{324} It is not certain that the converse is true: it is possible that a corporate defendant could transact business in a district which would subject it to suit in the district for a claim that did not arise there.\textsuperscript{325}

2. Impact on Private Antitrust Litigation

Thus, under a broad reading of section 12, a corporate antitrust defendant, domestic or foreign, is subject to suit in any district in the United States; venue and personal jurisdiction are satisfied so long as the defendant has the requisite aggregate contacts with the nation as a whole. This outcome has the effect of making it as easy as it is constitutionally permissible for private plaintiffs to sue corporate antitrust defendants. The only mechanism available to protect a defendant’s right to litigate in a fair and convenient forum is the federal venue transfer statute. Whether this mechanism is sufficient depends on whether the plaintiff’s right to easily establish venue and personal jurisdiction when suing a corporate antitrust defendant is greater than the defendant’s right to litigate in a convenient forum. The broad reading of section 12 effectively dispenses with the statutory venue requirement to further section 12’s purpose of making it easier for a private plaintiff to sue a corporate defendant for antitrust violations.

\textsuperscript{319} See supra notes 282–90 and accompanying text.
\textsuperscript{320} See supra notes 282–90 and accompanying text.
\textsuperscript{321} See supra notes 314–18 and accompanying text.
\textsuperscript{324} See supra Part I.B.3.b.iii.
\textsuperscript{325} See supra note 143.
III. A HYBRID SOLUTION

Congress could have saved the courts the trouble of resolving the section 12 issue by writing the section slightly differently. If Congress intended that courts apply section 12 broadly, it could have written “in any and all cases brought under the antitrust laws” instead of “in such cases.” If Congress intended that section 12 be applied as an integrated whole, it could have written “in all cases where venue is established under this section,” instead of “in such cases.” Congress can amend section 12 to eliminate the controversy, but without congressional action, the courts must settle the issue. Therefore, the question remains as to which reading the courts should adopt.

In order to resolve the conflict, it is important to recognize the distinction between personal jurisdiction and venue, two of the procedural elements that a plaintiff must establish in order to bring an action in federal court. Personal jurisdiction is necessary for the court to issue a binding personal judgment over the defendant. Due process of law requires that the court have personal jurisdiction over the defendant to issue such a judgment. Therefore, personal jurisdiction is a constitutional requirement. Venue, on the other hand, is purely a statutory creation, enacted by Congress to protect the defendant from having to litigate in an unfair or inconvenient district over and above those due process protections afforded by personal jurisdiction. In cases arising under federal law, Congress has set specific situations where venue is proper when a plaintiff sues a domestic defendant, but has determined that a plaintiff may sue an alien defendant in any judicial district in the United States. Therefore, although venue is technically required when an alien defendant is sued, in reality there is no venue inquiry that limits the plaintiff’s choice because venue is proper in any district in the United States. Instead, an alien defendant may utilize the venue transfer statute and other venue escape mechanisms in the same manner as a domestic defendant if the plaintiff brought suit in an unfair or inconvenient district.

If Congress wanted to do so, it could eliminate the venue inquiry entirely and leave the Constitution’s Due Process clauses and the state long-arm statutes as the only protection of domestic and alien defendants’ rights. When the case presents a federal question or when process is served pursuant to a federal statute, such as section 12 of the Clayton Act, the Fifth

327. See supra Part I.B.2.
328. See supra Part I.B.2.
331. See id. § 1391(d).
332. Id.
333. See supra Part I.B.3.a.
334. State legislatures can eliminate the long-arm inquiry by enacting an unenumerated long-arm which leaves due process as the only protection. See supra note 90.
Amendment Due Process Clause protects the defendant’s due process rights, regardless of whether the defendant is a domestic or alien corporation.\(^{335}\) Although the Supreme Court has declined to answer the question, it appears settled that a national minimum contacts inquiry is appropriate when the Fifth Amendment Due Process Clause is implicated.\(^{336}\)

If anything is clear from the circuit split regarding how to interpret section 12 of the Clayton Act, it is that there are reasonable arguments supporting each interpretation and valid criticisms of both approaches. The “plain meaning” hermeneutic is especially unhelpful because courts have utilized it to support both the integrated and broad readings of section 12.\(^{337}\) Essentially, the broad reading fits best with Congress’s broad remedial purpose of the private antitrust right of action, but the integrated reading fits best with Congress’s desire to protect defendants from inconvenient litigation as evidenced by the structure of the general venue provisions. Absent congressional action, a hybrid solution is the best way to resolve the section 12 issue. The solution proposed in this Note attempts to resolve the issue while staying true to both the purpose of venue limitations and the purpose of the private antitrust right of action.

Courts can achieve the greatest solution to the section 12 issue by considering both Daniel and Go-Video good law as to the class of defendants sued in each action.\(^{338}\) The two cases are distinguishable on the ground that Daniel’s holding applies to domestic defendants and Go-Video’s holding applies to alien defendants. Properly viewed, the issue presents two distinct questions: (1) how should courts apply section 12 when a plaintiff sues a domestic defendant, and (2) how should courts apply section 12 when a plaintiff sues an alien defendant.\(^{339}\)

Congress has not provided specific guidance to the courts as to how to apply section 12. However, Congress has indicated that domestic defendants have greater rights to a fair and convenient trial location as compared to alien defendants by enacting more restrictive venue requirements for domestic defendants\(^{340}\) than for alien defendants.\(^{341}\)

\(^{335}\) See supra Part I.B.2.a.

\(^{336}\) See supra Part I.B.2.a.

\(^{337}\) See supra note 261 and accompanying text.

\(^{338}\) Daniel and Go-Video are referenced because they stand for the integrated reading and the broad reading, respectively. However, the Third Circuit in In re Automotive Paint best understood the issue, holding that the broad reading applied only to antitrust suits brought against alien defendants. See In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 296 n.10 (3d Cir. 2004) (noting that “the distinction is crucial” between suits brought against alien corporations and merely out-of-state corporations); see also supra notes 262–63 and accompanying text.

\(^{339}\) The Third Circuit adopted this approach in In re Automotive Paint, applying the broad reading to alien defendants and pointing out the distinction between the two types of defendants. A district court within the Third Circuit followed suit and applied the integrated reading to domestic defendants in Cumberland Truck Equipment Co. See supra notes 262–63 and accompanying text.

Although the legislative history surrounding section 12 is sparse, it is clear that at the time of its drafting, it was easier for private plaintiffs suing a domestic corporate antitrust defendant to satisfy section 12’s venue provision than it was to satisfy the general venue provision. It is also clear that section 12’s service of process provision made it easier to serve a corporate defendant validly. Congress’s purpose in enacting section 12 was to make it easier for a plaintiff to sue a corporate defendant for an antitrust violation. It is unclear today, however, whether section 12’s venue provision is more liberal than § 1391(b) or if § 1391(b) is more liberal than section 12. However, § 1391(d) is more clearly liberal than section 12’s venue provision as § 1391(d) allows for suit against an alien in any district.

A. Domestic Defendants

Regardless of whether section 12’s venue provision will provide for proper venue in a more liberal, restrictive, or the same manner as § 1391(b), an integrated reading is preferable to a broad reading of section 12, which is tantamount to no venue inquiry at all. Congress has never legislatively equated the venue inquiry to a nationwide contacts personal jurisdiction inquiry when a domestic party is sued, and the courts should not bootstrap venue to personal jurisdiction in this manner. Neither section 12 of the Clayton Act nor the general venue provisions provide that “a corporate antitrust defendant may be sued in any district.” Courts that combine section 12 with § 1391(c) and (b) and plaintiffs that argue for such a combination read the two provisions as though Congress had passed such a provision. As noted in Management Insights, a broad reading where § 1391(c) and (b) are taken in conjunction with section 12’s service of process provision “completely eviscerates any semblance of a venue inquiry

341. See id. § 1391(d).
343. See id. at 372–74 (“[W]e think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is ‘found,’ but also in any district in which it ‘transacts business’ . . . . To construe the words ‘or transacts business’ as adding nothing of substance . . . would . . . defeat the plain purpose of th[e] section.”).  
344. Id.
345. See supra Part I.B.3.b.iii.
347. See supra notes 180, 286 and accompanying text (advocating such an approach). But see supra notes 171–72 and accompanying text (criticizing such an approach).
348. Professor Janutis argues that “[n]ational venue without regard for a defendant’s contacts seems contrary to the general principle that venue should make sure that a defendant is not forced to litigate in an inconvenient forum.” Janutis, supra note 290, at 47. Janutis continues, “1391(c) should be read to mean that a corporation resides in a district only if the corporation would be subject to personal jurisdiction under International Shoe’s minimum contacts standard.” Id. at 47–48.
in antitrust cases involving corporate defendants.” Furthermore, section 12 does not explicitly grant venue in a more liberal manner than the general venue provisions—it provides that venue is proper in certain specific situations. The fact that the general provisions may have expanded to the point of section 12 venue, or even past section 12 venue, does not mean that courts should expand the bounds of section 12 venue even further. As the Supreme Court has eloquently noted, “In adopting [section] 12 Congress was not willing to give plaintiffs free rein to haul defendants hither and yon at their caprice.” The courts should leave it to Congress to further expand section 12’s venue provision.

Congress has determined that domestic defendants have a statutory right to litigate in a fair and convenient forum. This right is protected by the venue requirements of section 12 and the general venue provisions. Courts should not pick the provisions apart, put them together, and deny domestic defendants this right. The broad remedial purpose of antitrust law should not yield to Congress’s clear intent that domestic defendants may be sued only in certain districts because Congress has never evinced intent that domestic parties may be sued in any district. Therefore, when a domestic corporate defendant is sued for violating the antitrust laws, section 12 should be read as an integrated whole, so that the section’s latter service of process provision may be utilized only if venue was laid pursuant to the section’s former venue provision.

B. Alien Defendants

Alternatively, Congress has passed a venue provision that reads, “An alien may be sued in any district.” It is unlikely that Congress is more concerned with corporate alien-antitrust defendants than all other alien defendants. Discussing § 1391(d), the Supreme Court noted that the section is “a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” Moreover, Congress has evidenced its intent to protect all defendants’ right to avoid litigating in an unfair or inconvenient forum by allowing for the venue transfer and other venue escape mechanisms to apply equally to all defendants. Venue law treats alien defendants differently in that their sole right is a limited one that is addressed at the

352. See supra Part I.B.3.a.
354. Brunette Mach. Works, Ltd. v. Kockum Indus., Inc., 406 U.S. 706, 714 (1972). Again, this statement does not end the section 12 inquiry. An alien defendant may be sued in any district. The question is, if the plaintiff uses § 1391(d) to lay venue, may the plaintiff utilize section 12’s service of process provision or must he serve process pursuant to the state long-arm statute and the more restrictive minimum contacts with the state analysis?
court’s discretion. Therefore, the argument advanced by Professors Herbert Hovenkamp, Charles Wright, Arthur Miller, and Edward Cooper that section 12 should be read as an integrated whole as a matter of fairness, especially fairness to alien defendants, seems to ignore the fact that, as Professor Capra argues, any element of fairness can be handled by a motion to transfer. Professor Daniel J. Capra also notes that under section 12, alien defendants are no worse off than § 1391(d) makes them in non-antitrust civil actions. District courts should use § 1404(a) more aggressively than they typically do when an alien defendant gets hauled into court through section 12 and § 1391(d) because § 1391(d) presupposes that personal jurisdiction in the forum is based on minimum contacts with the forum state. When plaintiffs utilize section 12, personal jurisdiction serves no greater check on the defendant’s contacts with the forum than § 1391(d).

In passing § 1391(d), Congress has sent a clear signal that any interest in fairness to alien defendants is not so great that a plaintiff’s choice of district should be limited when suing an alien defendant. Courts should not limit Congress’s clear intent that private antitrust actions serve a broad remedial purpose by an integrated reading of section 12 when applied to alien defendants. Effectively, this hybrid solution preserves venue protections for corporate domestic defendants while placing corporate alien defendants in no worse a position than they would be subject to under § 1391(d).

CONCLUSION

It would be ideal if Congress amended section 12 and settled the issue. However, until Congress does so, the courts must figure out how to interpret section 12. If Congress wants section 12 to make it easier to sue a corporate defendant for an antitrust violation than for other causes of action, Congress should amend section 12 by further liberalizing the venue provision (so that it is more liberal than § 1391) or simply allow plaintiffs

356. See supra note 174.
357. See supra note 249 and accompanying text. Of course, the argument that § 1404(a) can handle any element of unfairness can be made with respect to suits against domestic corporations, but the crucial difference is that Congress has specifically limited the districts where a plaintiff may lay venue when suing a domestic corporation; Congress has not limited the districts where a plaintiff may lay venue when suing an alien defendant.
358. See supra note 249 and accompanying text.
359. It is possible for an alien defendant to get hauled into a district court with proper venue by way of § 1391(d) and personal jurisdiction by way of Federal Rule of Civil Procedure 4(k)(2) which allows for personal jurisdiction over alien defendants who are not subject to courts of general jurisdiction of any state based upon its contacts with the nation as a whole. Congress put Rule 4(k)(2) in place to provide federal district courts with jurisdiction over alien defendants who lack sufficient minimum contacts with any specific state. None of the section 12 issue cases discussed mentioned Rule 4(k)(2) as an alternative source of personal jurisdiction, but if a corporate alien antitrust defendant lacked sufficient contacts with any particular state, Rule 4(k)(2) and § 1391(d) could be utilized together to receive the same result as a broad reading of section 12. If such a situation arose, the district courts should also use § 1404(a) more aggressively than they typically do.
to sue corporate antitrust defendants (domestic and alien, or just alien) in any district. Otherwise, Congress should clearly indicate in the statute that plaintiffs may only utilize the service of process provision when they lay venue through section 12 or that § 1391(c) may not be used to supplement section 12’s venue provision. Eliminating § 1391(c) as a supplement to section 12 would coincide with the solution adopted in this Note because it would extend greater protection to domestic defendants than to alien defendants.

The solution proposed in this Note is relatively simple, but there is no reason why a simple solution cannot be the best solution. The section 12 issue is ultimately not very complicated, but a court’s reading of section 12 does have the ability to greatly affect a defendant’s right to litigate in a fair and convenient forum. Even if the circuit court eventually holds that suit may not proceed in the district, as in Daniel, the corporate defendant may be forced to litigate personal jurisdiction and venue for many years before such a decision is rendered. Such a result does not truly further the purpose of statutory venue, as it may be equally inconvenient to litigate procedural matters even if the matter is eventually settled in favor of the defendant. Any ambiguity concerning how courts should apply section 12 cuts against the section’s purpose of making it easier for private plaintiffs to sue corporate antitrust violators. Ease of suing is not furthered if a plaintiff is unsure about where he can actually sue under section 12. Therefore, if only to eliminate a possibly extensive amount of pretrial litigation and truly make it easier for plaintiffs to sue, it is imperative that the conflict presented in this Note be resolved definitively either by the courts or by Congress.

360. See supra note 180.