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Vouching: In or Out?

NOTES

VOUCHING: IN OR OUT?

Vouching in is a common-law procedural device[1] that allows a defendant to bind[2] other potential parties to the outcome of an action upon notice[3]

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1. *See* Olin's Rent-A-Car Sys. v. Royal Continental Hotels, 187 So.2d 349, 351-52 (Fla. 1966) (roots of vouching in lie deep within common law). The court in *Olin's Rent-A-Car Sys. v. Royal Continental Hotels* described vouching in as a procedure that originated in personal property law, and which courts later adapted to real property. *Id.* at 351. The *Olin's* court explained that vouching in was a product of early Celtic and Teutonic law. *Id.* at 352 (quoting DIGBY, HISTORY OF THE LAW OF REAL PROPERTY (5th ed. 1875)). In its earliest historical settings, vouching in was primarily a means for avoiding charges of theft. *See* E. JENKS, A SHORT HISTORY OF ENGLISH LAW 12 (5th ed. 1938). For further historical background of vouching in, see Note, *Development of the Common Law Rule Making a Judgment Conclusive Against Warrantors and Indemnitors*, 34 VA. L. REV. 321 (1948) (analysis of history and development of vouching in beginning with reign of King Hlothaere of Kent in 685 A.D.).

2. *See* SCAC Transport (USA), Inc. v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (vouched in party bound by results of all litigated issues regardless of whether vouched in party appeared and defended original suit); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (plaintiff's notice to defendant of pending action binds defendant to ultimate judgment). In *Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd.*, the court based part of its decision to bind the vouchee to the original judgment on § 107 of the 1973 Tentative Draft of the *Restatement (Second) of Judgments*. 119 Ariz. at ____, 579 P.2d at 50; *see* RESTATEMENT (SECOND) OF JUDGMENTS § 107 (Tent. Draft 1973). According to the *Restatement*, if the indemnitee gives the indemnitor reasonable notice of the pending action and requests the indemnitor to defend the action, both the indemnitee and indemnitor are bound by the judgment to the extent of the liability of the indemnity. *See* 119 Ariz. at ____, 579 P.2d at 50; RESTATEMENT (SECOND) OF JUDGMENTS § 107 (Tent. Draft 1973). The *Restatement* explains that since the indemnitor has the ultimate liability, the indemnitee should be able to shift the burden of trial and the indemnitor should respond to the indemnitee's request for assistance. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 107 comment c (Tent. Draft 1973). The *Litton Systems* court described § 107 of the *Restatement* as a summary of the common-law procedural device of vouching in. *See* 119 Ariz. at ____, 579 P.2d at 51; *see also* Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, ____, 509 P.2d 86, 90 (1973) (voucher's proffer of notice of pending litigation to vouchee binds voucher and vouchee to factual determinations of original judgment in subsequent litigation). *See generally* 1 B. J. MOORE, J. LUCAS, T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405[9] (2d ed. 1983) (judgment against voucher binds vouchee to all issues determined in original suit). Professor Moore explains that the factual determinations necessary for the judgment of the original suit bind the vouchee even if the vouchee refuses to participate in the defense of the original action. *Id.* at 248.

3. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (indemnity court should inquire whether vouchee received notice of original suit); Morris v. Federated Mut. Ins. Co., 497 F.2d 538, 543 (5th Cir. 1974) (court refused to bind vouchee to voucher's settlement because of absence of notice to vouchee); Glick v. White Motor Co., 458 F.2d 1287, 1292 (3d Cir. 1972) (vouching in is common-law device by which voucher notifies vouchee of pending suit); Travelers Indem. Co. v. Evans Pipe Co., 432 F.2d 211, 212 (6th Cir. 1970) (vouchee who receives notice of pending suit and demand to defend bound by judgment of pending action); Aetna Casualty & Sur. Co. v. Hase, 390 F.2d 151, 152 (8th Cir. 1968) (vouchee may claim defense of lack of notice in indemnity action); Schoneweather v. L.F. Richardson, Inc., 122 F. Supp. 692, 693 (W.D. Mo. 1954) (vouching in must contain formal

and opportunity to defend.[4] Vouching in occurs when a defendant-voucher[5] informs a potentially liable party, or vouchee,[6] that notice of the original suit[7] constitutes a formal tender of control of the defense.[8] If the vouchee refuses the opportunity to defend and the court in the original suit adjudges the voucher liable, the voucher will look to the vouchee for indemnity.[9] Controversy surrounding vouching in, however, arises over the fact that a judgment in the original action may bind[10] a vouchee whether or

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notice of pendency of original cause of action); Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, ____, 509 P.2d 86, 90 (1973) (notice to vouchee of pending original suit is essential element of vouching in).

4. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (voucher satisfies vouching in requirements by requesting vouchee to appear and defend original suit); Travelers Indem. Co. v. Evans Pipe Co., 432 F.2d 211, 212 (6th Cir. 1970) (vouching in requires demand to defend original action); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (notice of vouching in must contain unequivocal demand to undertake defense); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, 380 N.E.2d 571, 579 (1978) (voucher must request vouchee to take up defense of original suit); Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, ____, 509 P.2d 86, 90 (1973) (vouching in includes formal tender of right to defend original action).

5. *See* BLACK'S LAW DICTIONARY 1414 (5th ed. 1979). A voucher is a defendant in the original litigation who notifies a potential party of the pending litigation and tenders the defense of the original pending litigation to the potential party. *Id.*

6. *Id.* A vouchee is the potential party to whom the voucher has sent notice and tendered defense of the original pending litigation. *Id.*

7. *See* Squillante, *Commercial Code Review, A Summary of Leading Decisions and Articles*, 78 COM. L.J. 320, 380, 415, 444 (1973) (vouching in usually involves original suit between defendant-voucher and subsequent indemnity suit between original defendant-voucher and subsequent defendant-vouchee); *see also* 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.02 (2d ed. 1983) (two suits are necessary where voucher is found liable and vouchee refuses to indemnify). The double litigation element of vouching in has also been discussed in the context of third-party practice, or impleader. *Id.* at 14-16 (discussing FED. R. CIV. PROC. 14); *see also infra* notes 115-19 and accompanying text (comparing impleader with vouching in).

8. *See* Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (voucher must offer to surrender control of action to vouchee); Moyses v. Spartan Asphalt Paving Co., 383 Mich. 314, 332-33, 174 N.W.2d 797, 805 (1970) (voucher must tender opportunity to control defense to vouchee); U.S. Wire & Cable Co. v. Ascher Corp., 34 N.J. 121, ____, 167 A.2d 633, 637 (1961) (voucher should tender defense of action to vouchee immediately after institution of suit).

9. *See* Hessler v. Hillwood Mfg. Co., 302 F.2d 61, 62 (6th Cir. 1962) (judgment against voucher in original action entitled voucher to indemnity from vouchee in subsequent suit); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 50 (1978) (vouchee-manufacturer must indemnify voucher-distributor on judgment based on strict liability in tort when vouchee had notice of action and refused to defend); *see also supra* note 2 (discussing rationale underlying vouchee's duty to indemnify).

10. *See supra* note 2 (discussing binding effect of vouching in); *cf.* Mitsui & Company, Inc. v. S.S. Attica, No. 79 Civ. 3191-CSH (S.D.N.Y. September 20, 1983) (available on LEXIS, Genfed library, Dist file) (good faith settlement of original suit raises rebuttable presumption of liability in subsequent indemnity action). *But see* SCAC Transport (USA), Inc. v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (court refused to bind vouchee to arbitration findings). In *SCAC Transport (USA), Inc. v. S.S. Danaos*, the United States District Court for the Southern District of New York refused to allow the findings of an arbitration board to bind the vouchee in the voucher's suit for indemnity. *Id.* at 331. The *Danaos* court based its

not the court in the original action possessed jurisdiction[11] over the vouchee. This "extra-jurisdictional"[12] quality of vouching in potentially conflicts with modern notions of due process[13] and personal jurisdic-

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decision in part on the fact that the vouchee had not consented to an arbitration forum and, therefore, had not been afforded a full and fair opportunity to contest liability. *Id.* at 329.

11. *See* Pennoyer v. Neff, 95 U.S. 714, 729 (1877). The United States Supreme Court in *Pennoyer v. Neff* laid the framework for modern jurisdictional analysis. *Id.* According to the Court in *Pennoyer*, the territorial limits of a state restricted the authority of every tribunal within the state. *Id.* The Supreme Court explained that any attempt to exceed those territorial limits was an illegitimate assumption of power. *Id.* The Supreme Court later relaxed these strict territorial limitations, however, in *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). In *International Shoe*, the Supreme Court abandoned *Pennoyer*'s requirement that a defendant must be present or own property in a state to be subject to the jurisdiction of the state. *Id.* After *International Shoe*, a defendant came under the jurisdiction of a state's courts by manifesting his "presence" there through certain "minimum contacts." *Id.* at 316-17. The *International Shoe* Court defined the phrase "minimum contacts" as the criteria by which to determine whether the defendant's activities bring him within the state's personal jurisdiction. *Id.* The Court's inquiry focused on whether a defendant's contacts were sufficient to make it reasonable to require the defendant to defend a suit in a foreign court. *Id.* at 317. The most recent Supreme Court cases discussing the imposition of a state court's jurisdictional powers over a foreign defendant continue to use the minimum contacts analysis. *See* Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1478-79 (1984) (state's assertion of personal jurisdiction over nonresident defendant predicated on minimum contacts between defendant and state). Vouching in, however, imposes the power of a state on a non-forum defendant without a jurisdictional or minimum contacts analysis. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (vouchee bound by foreign state judgment even though foreign state court lacked jurisdiction over vouchee).

12. *See* Note, *Does Voucher to Warranty Belong in the U.C.C.?*, 18 STAN. L. REV. 666, 671-76 (1966) (coining term "extra-jurisdictionality" to refer to vouching in). More recent Supreme Court decisions on personal jurisdiction appear to conflict with the lack of territorial limitations on the power of state courts. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 294 (1980) (citing Kulko v. California Superior Court, 436 U.S. 84, 91 (1978) (limiting powers of state courts); Hanson v. Denckla, 357 U.S. 235, 250-51 (1958) (emphasizing territorial limitations on power of respective states)). The Supreme Court in *World-Wide Volkswagen Corp. v. Woodson* emphasized that restrictions on the personal jurisdiction of state courts are a result of territorial limitations on the power of the states. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 251 (1958) (evolving flexibility of state boundaries does not signal end to restrictions on personal jurisdiction)). The *World-Wide Volkswagen* Court reasserted the element of state sovereignty that originally appeared in *Pennoyer v. Neff*. *See* 444 U.S. 286, 293-94 (1980). The *World-Wide Volkswagen* Court held that the focus of a personal jurisdiction analysis must be on the due process clause as an "instrument of interstate federalism" which may "act to divest the State of its power to render a valid judgment." *See id.* at 294. The language of *World-Wide Volkswagen* is crucial to an analysis of vouching in, since vouching in asserts the power of a state's judgments while ignoring state territorial and jurisdictional boundaries. *See, e.g.*, Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (foreign state judgment bound vouchee despite fact that vouchee was not within personal jurisdiction of foreign state court).

13. *See* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that no state shall ". . . deprive any person of life, liberty, or property, without due process of law." *Id.* The elements of notice and opportunity to be heard which constitute traditional notions of due process are similar to the notice and opportunity requirements of vouching in. *See* Harper v. District Court of Oklahoma County, 484 P.2d 891, 895 (1971) (due process consists of notice

tion.[14] The concept of due process minimally requires notice and an opportunity to be heard before a tribunal having jurisdiction over the action and full power to grant relief.[15] In apparent contravention of contemporary notions of personal jurisdiction and due process,[16] vouching in may bind the vouchee to a judgment even if the court lacks personal jurisdiction over the vouchee.[17] Recent personal jurisdiction cases,[18] therefore, warrant particular scrutiny in resolving the apparent conflict between vouching in and modern notions of due process and personal jurisdiction.

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and opportunity to be heard before tribunal having jurisdiction and power to grant relief); Pryor v. Western Paving Co., 74 Okl. 308, ____, 184 P. 88, 89 (1919) (due process requires notice and opportunity to appear and defend before tribunal of competent jurisdiction). The disparity between the concepts of vouching in and due process occurs because vouching in requires only notice and opportunity to be heard, while due process requires the tribunal hearing the action to have personal jurisdiction over the parties as well. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (vouchee bound by judgment of original suit although not subject to personal jurisdiction of court hearing original action).

14. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (emphasizing importance of state boundaries for purposes of personal jurisdiction analysis). The *World-Wide Volkswagen* Court explained that the due process clause will not allow a state to make a binding judgment against a defendant with whom the state has no contacts or relations. *Id.* at 294; *see infra* note 16 (discussing nature of jurisdictional contacts). The due process clause limits the power of state courts to render valid personal judgments against foreign defendants. *Id.* at 291. According to the Court in *World-Wide Volkswagen*, due process requires that a defendant receive adequate notice of the action and be subject to the personal jurisdiction of the court. *Id.*

15. *See supra* note 13 (describing elements of due process).

16. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). The Supreme Court in *World-Wide Volkswagen* reaffirmed the rule that a state court may exercise personal jurisdiction over nonresident defendants only if sufficient minimum contacts exist between the defendant and the forum state. *Id.* at 291. The *World-Wide Volkswagen* Court explained that the concept of minimum contacts performs two functions. *Id.* First, the concept protects defendants against the burdens of litigating in distant or inconvenient forums. *Id.* at 292. Second, the minimum contacts analysis ensures that the states, through their courts, do not reach beyond the limits imposed on them by their status as coequal sovereigns in a federal system. *Id.* Vouching in, however, is used specifically to extend the power of state court judgments over nonresident vouchees. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (original judgment of liability bound vouchee who was not within personal jurisdiction of court hearing original action); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, ____, 308 N.E.2d 571, 579 (1978) (personal service of process not necessary to bind vouchee); Moyses v. Spartan Asphalt Paving Co., 383 Mich. 314, 332, 174 N.W.2d 797, 805 (1970) (process of vouching in is valid method for binding third parties outside the jurisdictional reach of state courts).

17. *See supra* note 16 (discussing binding effect of vouching in despite lack of jurisdiction).

18. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (minimum contacts is standard for determining whether exercise of jurisdiction complies with due process). In *Shaffer v. Heitner*, the United States Supreme Court declared that if a direct assertion of personal jurisdiction over a defendant violated due process, then an indirect assertion of that jurisdiction was equally impermissible. *Id.* at 209. Vouching in appears inconsistent with the Court's declaration in *Shaffer* because vouching in is used to bind the vouchee when jurisdiction is absent. *See, e.g.*, Moyses v. Spartan Asphalt Paving Co., 383 Mich. 314, 332, 174 N.W.2d 797, 805 (1970) (vouching in binds third parties who are outside jurisdictional reach of state courts).

The United States Supreme Court originally defined the modern parameters of personal jurisdiction and due process in the landmark case of *Pennoyer v. Neff*.[19] In *Pennoyer*, the Supreme Court pronounced that every state possessed exclusive jurisdiction and sovereignty over persons and property within its territory.[20] The converse of the Court's proposition was equally clear: no state could exercise direct jurisdiction or authority over persons or property outside the state's boundaries.[21] The *Pennoyer* Court further described due process as a course of legal proceedings consistent with the rules and principles of jurisprudence for the protection and enforcement of private rights.[22] To give legal proceedings validity, the reviewing tribunal, therefore, must be competent to pass upon the subject matter of the suit and have personal jurisdiction over the defendant.[23]

The Supreme Court later expanded the rigid state jurisdictional boundaries drawn by *Pennoyer* in *International Shoe Co. v. Washington*.[24] In *International Shoe*, the Court held that a person need not be present or own property in a state to come under the jurisdiction of the state's courts.[25] A

In the vouching in process, the vouchee's obligation to indemnify the voucher travels with the person of the voucher. This phenomenon is quite similar to the concept of transient jurisdiction discussed by the United States Supreme Court in *Harris v. Balk*. *See* 198 U.S. 215, 222 (1905) (debt follows debtor to other states). In *Harris v. Balk*, the Court characterized a debt as travelling with the debtor and not remaining with the creditor-owner. *Id.* The property of the creditor-owner, therefore, travelled with the debtor and came under the jurisdiction and power of any forum into which the debtor ventured. *Id.* Several decades later, the United States Supreme Court in *Shaffer v. Heitner* severely criticized this notion of transient jurisdiction predicated on movable obligations or property. *See* 433 U.S. 186, 212 (1977) (fiction that assertion of jurisdiction over property is anything but assertion of jurisdiction over owner of property is without substantial modern justification). Although the Supreme Court has not explicitly discarded the concept of transient jurisdiction, the Court has harshly questioned its validity. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980) (court disparages mechanical rule that creditor's amenability to suit travels with debtor).

19. 95 U.S. 714 (1877).

20. *See id.* at 722. The Supreme Court in *Pennoyer* explained that one of the principals underlying state jurisdiction over persons and property is the concept of exclusive state sovereignty. *Id.*

21. *See id.* at 720. According to the Court in *Pennoyer*, the territorial limits of a state restrict the authority of every tribunal located within the state. *Id.* Any exercise of authority beyond the territorial limits of the state was an improper assumption of power. *Id.* The Court described the limitations on individual state power as protections to ensure the equal dignity and authority of the states as independent sovereigns. *Id.* at 722.

22. *See id.* at 733 (due process requires system of procedures and doctrines for protection of individual rights).

23. *See id.* The Court in *Pennoyer* explained that defendants may challenge the validity of judgments and resist their enforcement on the ground that the court hearing the action lacked jurisdiction over the parties. *Id.* A court's determination of the rights and obligations of parties over whom the court lacks jurisdiction is inconsistent with due process of law. *Id.*

24. 326 U.S. 310 (1945).

25. *See id.* at 316. The United States Supreme Court in *International Shoe Co. v. Washington* explained that prior to the holding in *International Shoe*, the jurisdiction of courts was grounded on the courts' power over the defendant's person. *Id.* The defendant's presence

defendant could come within the jurisdiction of a state's courts by manifesting his "presence" within the state through certain "minimum contacts."[26] The Court in *International Shoe*, however, refused to construct a mechanical or quantitative scheme to define minimum contacts.[27] Instead, the Court focused on the nature and quality of the defendant's activities[28] within the state to ascertain whether maintenance of the suit offended "traditional notions of fair play and substantial justice."[29]

Following the decision in *International Shoe*, the Supreme Court continued to expand the parameters of state court jurisdiction. In *McGee v. International Life Insurance Co.*,[30] the Court noted that *Pennoyer* had depicted the due process clause of the Fourteenth Amendment as a restriction on the power of state courts to enter binding judgments against persons not served with process within state boundaries.[31] The Court in *McGee*, however, pointed to a distinct historical trend toward expanding the scope of state court jurisdiction in decisions subsequent to *Pennoyer*.[32] For example, the Supreme Court further clarified when the defendant's activities or "contacts" would subject him to the jurisdiction of state courts in *Hanson v. Denckla*.[33] According to the Court in *Hanson*, the essential inquiry in each jurisdictional

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within the territorial jurisdiction of the court, therefore, was a prerequisite to rendering a valid judgment binding the defendant. *Id.*

26. *Id.* In *International Shoe*, the Supreme Court stated that even if a defendant was not personally within the territory of a state forum, the state nonetheless could subject the defendant to a valid judgment. *Id.* The Court held that due process requires only that the defendant have certain "minimum contacts" with the forum such that maintenance of a suit did not offend "traditional notions of fair play and substantial justice." *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

27. *See id.* at 319. The criteria by which the *International Shoe* Court measured the activities that justified subjection of a corporation or individual to suit were not mechanical or quantitative. *Id.* Rather, the Court's inquiry centered upon whether the contacts were sufficient in the context of a federal system of government to make it reasonable to require a corporation or individual to defend in a foreign forum. *Id.* at 317.

28. *See id.* at 319. The Court in *International Shoe* indicated that due process depends upon the quality and nature of a defendant's activities within the forum. *Id.* The due process clause does not allow a state to make binding judgments against defendants with whom the state has no contacts, ties, or relations. *Id.*

29. *See id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (court examined whether process of serving notice was "fair").

30. 355 U.S. 220 (1957).

31. *See id.* at 222. In *McGee v. International Life Ins. Co.*, the United States Supreme Court stated that since *Pennoyer v. Neff*, the Supreme Court had held that the due process clause limits the powers of state courts to enter binding judgments against foreign defendants. *Id.*

32. *See id.* Examining the development of personal jurisdiction, the *McGee* Court discerned a clear trend toward expanding the scope of state court jurisdiction over foreign corporations and other nonresidents. *Id.* The *McGee* Court attributed the expansive trend in part to a transformation in the national economy. *Id.* The Court noted that modern commercial transactions often touch two or more states and involve parties separated by the full continent. *Id.* at 223.

33. 357 U.S. 235 (1958).

analysis was whether there was some act by which the defendant had purposefully availed himself of the privilege of conducting activities within the forum state.[34]

The most recent Supreme Court decisions on personal jurisdiction, however, have reemphasized the importance of territorial limitations on the power of state courts, a theme originally discussed by the Court in the *Pennoyer* decision.[35] The Supreme Court in *World-Wide Volkswagen v. Woodson*,[36] for example, emphasized that the trend of expanding state court powers did not signal the end of restrictions on personal jurisdiction.[37] The *World-Wide Volkswagen* Court stated explicitly that the territorial restrictions on personal jurisdiction were more than simply a shield against inconvenient or distant litigation.[38] Rather, restrictions on the personal jurisdiction of state courts are a consequence of territorial limitations on state sovereignty.[39] The *World-Wide Volkswagen* Court, thereby, reasserted the principle that a state may not exercise power over a defendant unless the defendant has sufficient minimum contacts with the state.[40] The due process clause thus limits the power of the state courts to render valid personal judgments against nonresident defendants.[41] According to the Supreme Court in *World-Wide Volkswagen*, due process requires that the defendant receive adequate notice of the pending action[42] and possess sufficient minimum

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34. *See id.* at 253. The United States Supreme Court in *Hanson v. Denckla* declared that for a state court to assert its jurisdictional power over a nonresident defendant, it was essential that the defendant had availed himself of the privileges of the forum state, thereby invoking the benefits and protections of the state's laws. *Id.*

35. *See supra* notes 12 and 16 (discussing territorial restrictions on state court jurisdiction).

36. 444 U.S. 286 (1980).

37. *See id.* at 294 (quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)) (relaxation of state jurisdictional boundaries does not herald demise of all restrictions on personal jurisdiction). The *World-Wide Volkswagen* Court declared that the Supreme Court never had accepted the proposition that state lines are irrelevant for jurisdictional purposes. 444 U.S. at 293.

38. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980) (quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)) (restrictions on personal jurisdiction are more than merely shield against inconvenient litigation).

39. *See id.* (quoting Hanson v. Denckla, 357 U.S. 235, 250-51 (1958)) (territorial limitations on states create restrictions on assertion of personal jurisdiction by state courts).

40. *See id.* at 291 (state court cannot exercise personal jurisdiction over nonresident unless minimum contacts exist between defendant and forum state). A state cannot enter a judgment attempting to bind a person over whom it has no jurisdiction. *Id.* Due process requires that the court possess personal jurisdiction over the defendant and that the defendant receive adequate notice of the suit. *Id.*

41. *See id.* (citing Kulko v. California Superior Court, 436 U.S. 84, 91 (1978)) (due process clause operates as limitation on state court jurisdiction to enter judgments affecting rights or interests of nonresident defendants).

42. *See id.* (citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950)) (due process demands that notice of action precede any adjudication involving deprivation of life, liberty, or property).

contacts with the forum state to render him subject to the personal jurisdiction of the court hearing the action.[43] A judgment rendered in violation of due process is void and is not entitled to full faith and credit.[44]

Vouching in, however, binds the vouchee even if the court hearing the original action lacks personal jurisdiction over the vouchee.[45] Although the original court cannot assert jurisdiction over an absent vouchee, the judgment of the original action binds the vouchee in a second suit for indemnity.[46] Vouching in, therefore, appears to conflict with the Supreme Court's definitions of due process and personal jurisdiction since vouching is used specifically to bind nonappearing vouchees who are not within the jurisdiction of the court hearing the original suit.[47] Although the full faith and credit

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43. *See id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)) (state may not make binding judgment against defendant in absence of personal jurisdiction).

44. *See id.* (citing Pennoyer v. Neff, 95 U.S. 714, 732-33 (1878) (judgment by court lacking personal jurisdiction over defendant is void)); *see also* U.S. CONST. art. IV, § 1 (stating that ". . . Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state.") The Supreme Court in *Pennoyer* explained that if a court has no jurisdiction over the person of the defendant, then the court has no authority to adjudicate the personal rights and obligations of the defendant. Pennoyer v. Neff, 95 U.S. at 732. A judgment rendered by a state tribunal that lacks jurisdiction over the party is not entitled to any credit or respect in the rendering state, or in any other state. *Id.* In vouching in, however, a court lacking jurisdiction over the vouchee adjudicates the vouchee's rights and obligations. *See* Moyses v. Spartan Asphalt Paving Co., 383 Mich. 314, 332, 174 N.W.2d 797, 805 (1970) (vouching in allows court to bind vouchee who is outside jurisdictional reach of court); *see also infra* notes 104-24 and accompanying text (discussing vouching in's extra-jurisdictional presumption of preclusive power). This indirect assertion of power by a court over a defendant not within the personal jurisdiction of the court appears to conflict with modern notions of due process and personal jurisdiction. *See supra* note 18 (discussing declaration of *Shaffer v. Heitner* that if direct assertion of personal jurisdiction violates due process then indirect assertion of jurisdiction is also invalid). *But see infra* notes 125-51 and accompanying text (reconciling extra-jurisdictionality of vouching in with modern notions of personal jurisdiction by emphasizing fairness aspect of due process analysis).

45. *See* SCAC Transport (USA), Inc. v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (vouching in is valid procedure for binding parties over whom personal jurisdiction cannot be obtained). The doctrine of vouching in does not violate due process, however, since the court adjudicating the vouchee's obligation to indemnify the voucher does not actually assert personal jurisdiction over the vouchee. *Id.* Rather, the court adjudges the voucher's liability, and the vouchee is bound by this determination in the subsequent suit for indemnity, regardless of whether the vouchee appeared and defended in the original action. *Id.* Vouching in, therefore, does not appear inconsistent with due process or personal jurisdiction, since the court exercises its power only over the "property" of the vouchee, i.e., the vouchee's obligation to indemnify, rather than over the person of the vouchee. However, an assertion of jurisdiction over property is simply an assertion of jurisdiction over the owner of the property. *See* Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (discarding fiction that assertion of jurisdiction over property is anything but assertion of jurisdiction over owner of property).

46. *See, e.g.*, SCAC Transport (USA), Inc. v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (judgment of original action binds vouchee in second suit for indemnity despite lack of personal jurisdiction over vouchee); Moyses v. Spartan Asphalt Paving Co., 383 Mich. 314, 332, 174 N.W.2d 797, 805 (1970) (vouching in allows court to bind vouchee who is outside jurisdictional reach of court).

47. *See supra* note 16 (discussing binding effect of vouching in despite lack of personal

clause of the United States Constitution requires that each state recognize and give credit to the lawful judgments of sister states,[48] a prerequisite to lawful judgments is jurisdiction over the parties to the judgment in question.[49] In vouching in, this prerequisite is absent.

The conflict between vouching in and personal jurisdiction derives in part from the fact that vouching in developed in English common law, in which jurisdiction was not an issue.[50] The earliest American decisions discussing vouching in involved no jurisdictional complications, and the American courts simply applied the broad language of vouching in appearing in English decisions.[51] In *Carpenter v. Pier*,[52] the first American case to discuss the jurisdictional implications of vouching in, the court avoided the jurisdictional problem of binding a defendant over whom the court had no jurisdiction by basing its decision on an alternative ground.[53] In *Boyd v.*

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jurisdiction over vouchee); *see also supra* notes 13 & 14 (defining elements of due process as notice to the parties to the action, opportunity to the parties to appear and defend the action, and jurisdiction of the court over the parties to the action).

48. *See* U.S. CONST. art. IV, § 1 (stating that ". . . Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state"); *see also supra* note 44 (discussing full faith and credit clause).

49. *See* Pennoyer v. Neff, 95 U.S. 715, 733 (1877) (validity of court's judgment rests on proper exercise of jurisdiction over parties).

50. *See, e.g.*, Duffield v. Scott, 3 Term R. 374, 100 Eng. Rep. 628, 630 (K.B. 1789). In sweeping and unqualified language, the English court in *Duffield v. Scott* declared that a claimant's demand upon an indemnitee was equivalent to a judgment against the indemnitor if the indemnitor had notice of the demand and refused to defend the claim. *Id.* The judgment of the first action estopped the indemnitor from maintaining that the indemnitee-defendant in the first action had no duty to pay the judgment. *Id.; see Does Voucher to Warranty Belong in the U.C.C.?, supra* note 12, at 673 (asserting that extra-jurisdictional quality of vouching in developed accidentally). English courts were not concerned with the jurisdictional problems which now confront American courts and, therefore, used broad language to state that all vouchees were bound by any subsequent indemnity actions. *See Does Voucher to Warranty Belong in the U.C.C.?, supra* note 12, at 672. The English courts' neglect of jurisdictional concerns derives from the English system's concept of a single sovereignty residing in the person of the king. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 182 (1903). England's government was characterized by a centralized unitary system whereas America was a federal system composed of independent sovereignties. W. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 140 (1964). The characterization of vouching in by the English cases, therefore, is inconsistent with the American system of federalism comprised of states acting as independent sovereigns.

51. *See, e.g.*, Davis v. Wilbourne, 19 S.C.L. (1 Hill) 27, 28 (1833). The court in *Davis v. Wilbourne* stated that notice of vouching in makes the vouchee privy to the record of the case and binds the vouchee to the record to the extent that his rights have been tried and adjudged. *Id.*

52. 30 Vt. 81 (1858).

53. *See id.* In *Carpenter v. Pier*, the defendant, a resident of Vermont, sold and warranted a note to the plaintiff, a resident of New York. *Id.* The plaintiff subsequently brought suit in New York against the maker of the note and the suit resulted in a judgment against the plaintiff. *Id.* The plaintiff-voucher sent notice of the original suit to the defendant-vouchee and requested that the vouchee attend the hearing. *Id.* The vouchee refused to appear and defend the suit. *Id.* The court in *Carpenter* first addressed whether the judgment of a New York state court should

Whitfield,[54] the next American case directly addressing the conflict between vouching in and personal jurisdiction, the *Boyd* court simply ignored the vouchee's argument that, since the state court lacked jurisdiction over the vouchee, it also lacked the power to bind a foreign vouchee to the state court's judgment.[55]

Many American courts have failed to address the personal jurisdictional aspects of due process or have concluded flatly that vouching in does not violate due process. For example, the United States Supreme Court in *Louisville & Nashville Railroad Co. v. Schmidt*[56] bound the Louisville & Nashville Railroad Company to the judgment of an earlier suit in which the railroad company was not a party. The *Louisville & Nashville* Court held that the requirements of due process were satisfied when the vouchee received proper notice and had adequate opportunity to appear and defend.[57] The Court in *Louisville & Nashville* intimated, however, that the extent of the vouchee's involvement in the original suit might be an element of the due process analysis.[58] In *State Bank of New Prague v. American Surety Co.*,[59] however, the Supreme Court of Minnesota asserted that the extent of the vouchee's involvement in the original action is not always an element in determining whether vouching in violates jurisdictional aspects of due process.[60] Citing the United States Supreme Court decision in *Louisville & Nashville*, the *New Prague* court explained that the due process requirements were satisfied because the vouchee had had notice and an opportunity to defend, and not because the vouchee had participated in the defense.[61] After

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be received in Vermont as conclusive upon a Vermont vouchee. *Id.* at 85. The *Carpenter* court pointed out that the conclusive effect of a judgment rests upon the authority of the court to act within its jurisdiction. *Id.* at 86. The *Carpenter* court did not decide whether mere notice to appear and defend in another state would give the foreign court jurisdiction to bind the vouchee. *Id.* Rather, the *Carpenter* court held that on the facts of the case, the vouchee had been sufficiently involved in the original suit to manifest privity and connection with the suit and the foreign court. *Id.* at 88. The liability of the vouchee, therefore, was determined by the original judgment of the foreign court. *Id.*

54. 19 Ark. 447 (1858).

55. *See id.* at 467 (suit involving warranty of title to slaves). In *Boyd v. Whitfield*, the plaintiff was a Virginia resident who claimed title to slaves in Arkansas. *Id.* at 463. The plaintiff argued that to require warrantors to defend title in distant states by forcing warrantors of personal property to follow the property to the domicile of the vendee would place a grievous burden on vendors. *Id.* at 451. The *Boyd* court, however, did not mention this argument in its decision. The *Boyd* court instead based its judgment upon the broad language of other vouching cases which held that notice to the warrantor-vouchee binds the warrantor-vouchee to the extent that the vouchee's rights have been adjudged. *Id.* at 467-68 (citing Davis v. Wilbourne, 19 S.C.L. (1 Hill) 27, 28 (1833)); *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980) (seller's amenability to suit does not travel with his chattel).

56. 177 U.S. 230 (1899).

57. *See id.* at 236 (notice and opportunity to appear and defend satisfy due process).

58. *See id.* at 238-39.

59. 288 N.W. 7 (Minn. 1939).

60. *Id.* at 10.

61. *See id.* at 11. In *State Bank of New Prague v. American Surety Co.*, the vouchee

reviewing *Louisville & Nashville* and the history of vouching in, the *New Prague* court flatly concluded that vouching in did not violate due process because vouching in had been the law of the land for nearly five centuries.[62] The *New Prague* court's analysis of the due process implications of vouching in, therefore, may have been simply an application of the principle of stare decisis[63] rather than a reasoned judicial analysis.[64]

Only two other cases have considered the issue of whether vouching in violates due process. Paraphrasing the language of the courts in *Louisville & Nashville* and *New Prague*, the Minnesota Supreme Court in *Liberty Mutual Insurance Co. v. J.R. Clark Co.*[65] stated that the requirements of due process of law are satisfied when the voucher has transmitted notice of the suit to the vouchee and has afforded the vouchee an opportunity to appear by tendering defense of the suit.[66] Similarly, the Arizona Court of Appeals in *Litton Systems, Inc. v. Shaw's Sales & Service, Ltd.*[67] disposed of any due process problems in one sentence, stating that binding the vouchee to the judgment of the original suit does not violate due process if the vouchee received proper notice of the original action.[68] A more thorough analysis of the elements of vouching in, personal jurisdiction, and due process is warranted, however, if vouching in is to retain its validity and viability in modern litigation.

To ascertain whether modern litigators may still employ vouching in as

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neither appeared nor participated in the defense of the original suit. *Id.* at 9. The vouchee in *New Prague*, therefore, claimed to be a "stranger" to the original litigation since the original suit failed to name him as a party in interest. *Id.* at 10. The *New Prague* court disposed of the vouchee's argument, however, by stating that once notice had been given and the defense had been tendered, the vouchee was no longer a stranger to the action. *Id.* The *New Prague* court reasoned that since the vouchee had the right to appear and defend the suit and the opportunity to employ the same tactics and procedures as if the vouchee had been the party of record, the vouchee could not assert immunity from the binding effects of the original judgment. *Id.* Emphasizing the Supreme Court's language in *Louisville & Nashville*, the *New Prague* court declared that the vouchee's receipt of notice and an adequate opportunity to defend satisfied all the requirements of due process. *Id.* at 11 (citing Louisville & Nashville Rd. Co. v. Schmidt, 177 U.S. 230 (1900)).

62. *See* 288 N.W. at 11. The *New Prague* court reviewed the history of vouching in discussed by Blackstone and Pollock and Maitland. *Id.* The *New Prague* court explained that vouchees are not vouched in as parties of record. *Id.* Unfortunately, the *New Prague* court did not develop the rationale underlying vouching in. Rather, the *New Prague* court stated merely that the practice of vouching in had become so well established that neither the courts nor legal commentators felt a need to assign reasons for the development of vouching in. *Id.*

63. *See* Marathon Oil Co. v. Briceland, 31 Ill. Dec. 128, 75 Ill. App. 3d 189, 394 N.E.2d 44, 46 (1979) (stare decisis is policy of courts to stand by precedents and not to disturb settled points of law).

64. *See supra* note 61 (discussing *New Prague* court's superficial explanation of vouching in).

65. 239 Minn. 511, 59 N.W.2d 899 (1953).

66. *Id.* at ____, 59 N.W.2d at 904.

67. 119 Ariz. 10, 579 P.2d 48 (1978).

68. *Id.* at ____, 579 P.2d at 52 (citing Liberty Mut. Ins. Co. v. J.R. Clark Co., 239 Minn. 511, ____, 59 N.W. 2d, 899, 904 1953)).

a procedural device, it is important to analyze the elements and mechanics of the vouching in process. Vouching in consists of a tendered defense in which the voucher notifies the vouchee of the pendency of the original suit against the voucher.[69] Moreover, the voucher must advise the vouchee that the notice constitutes a formal tender of control of defense of the action and that if the court in the pending suit adjudges the voucher liable, the voucher will look to the vouchee for indemnity.[70] Finally, the voucher must inform the vouchee that the vouchee will be bound by the factual determinations underlying the original judgment.[71] In short, vouching in is notice to the vouchee to stand by and defend or prepare to be bound by the outcome of the original action.[72]

The United States Supreme Court outlined the parameters of notice necessary to comply with due process in the landmark case of *Mullane v. Central Hanover Trust Co.*[73] The Court first stated that a fundamental requirement of due process in any proceeding is that notice must be reasonably calculated to apprise interested parties of the pendency of the action and to afford the parties an opportunity to present objections.[74] The Court in *Mullane* also explained that notice must reasonably convey necessary information about the litigation to interested parties[75] and must afford a reasonable time for interested parties to appear.[76] After *Mullane*, the due process test for the validity of notice of vouching in is, therefore, whether the notice is reasonably calculated to apprise the vouchee of the pendency

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69. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (indemnity court should inquire whether vouchee received notice of original suit); Glick v. White Motor Co., 458 F.2d 1287, 1292 n.8 (3d Cir. 1972) (vouching in is common-law device by which voucher notifies vouchee of pending suit); Schoneweather v. L.F. Richardson, Inc., 122 F. Supp. 692, 693 (W.D. Mo. 1954) (vouching in must contain formal notice of pendency of original cause of auction); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (notice of vouching in must contain full and fair information concerning pending suit).

70. *See* Travelers Indem. Co. v. Evans Pipe Co., 432 F.2d 211, 212 (6th Cir. 1970) (vouching in requires voucher to demand vouchee to defend original action); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (notice of vouching in must contain unequivocal demand to undertake defense); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, ____, 380 N.E.2d 571, 579 (1978) (voucher must request vouchee to take up defense of original suit; *see also supra* notes 2 & 9 (discussing vouchee's duty to indemnify).

71. *See supra* note 2 (discussing binding effect of vouching in).

72. *See* City of Waco v. U.S. Fidelity & Guaranty Co., 76 F.2d 470, 471 (5th Cir. 1935) (describing vouching in as notice warning vouchee to defend action).

73. 339 U.S. 306 (1950).

74. *See id.* at 314 (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (under concept of due process, service of process must be reasonably calculated to give actual notice and an opportunity to be heard).

75. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 315 (1950) (object of notice must be to inform absentee of action).

76. *See id.* at 314 (citing Roller v. Holly, 176 U.S. 398, 409 (1900) (notice must allow sufficient time to enable party to prepare defense)).

of the original action and to afford the vouchee an opportunity to present objections.

Courts evaluating the sufficiency of notice of vouching in have held that notice may be either oral or written[77] and can consist of various forms such as letters or telegrams.[78] A series of letters and communications viewed as a whole also can demonstrate sufficient notice of vouching in.[79] The wary voucher, however, may prefer the precaution of certified mail[80] to convey notice of vouching in. The use of certified mail also will help the voucher avoid the admonition of the Supreme Court in *Mullane* that notice which is a mere gesture does not comport with due process.[81]

Although courts have not required a uniform type of notice[82] so long as the notice that the vouchee receives is adequate,[83] the substantive content of the notice is essential to meet due process requirements. In evaluating the

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77. *See* Bouleris v. Cherry-Burrell Corp., 45 Misc. 2d 318, 319, 256 N.Y.S.2d 537, 538 (Sup. Ct. 1964) (vouching in is informal procedure in which notice may be written or oral). *But cf.* 4 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-607.66 (3d ed. 1983) (vouching in under U.C.C. § 2-607(5)(a) is formal procedure that requires notice of vouching to be in writing).

78. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1126 (5th Cir. 1977) (voucher informed vouchee of accident and resulting litigation by telegram). In addition to sending a telegram, the voucher's attorney in *Wisconsin Barge Line* sent a letter to the vouchee concerning the pending litigation. *Id.*

79. *See* Hase v. Aetna Casualty & Sur. Co., 266 F. Supp. 952, 956 (E.D. Mo. 1967) (series of letters and meetings between voucher and vouchee was sufficient to satisfy notice requirements), *aff'd*, 390 F.2d 151 (8th Cir. 1968).

80. *See* Morris v. Federated Mut. Ins. Co., 497 F.2d 538, 543 (5th Cir. 1974) (court recommends precaution of registered or certified mail despite informal nature of vouching in device). In *Morris v. Federated Mut. Ins. Co.*, the United States Court of Appeals for the Fifth Circuit emphasized that the absence of acknowledged receipt of vouching in notice places a heavy burden of proof on the voucher who later attempts to enforce liability in a subsequent indemnity action against the vouchee. *Id.*

81. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950). The United States Supreme Court in *Mullane* specified that the form of notice selected must be such that one who truly desired to inform an absent party might choose that form. *Id.* A chosen form or method of notice has constitutional validity only if it is reasonably certain to inform those affected by the pending action. *Id.*

82. *See* American Mut. Liab. Ins. Co. v. Matthews, 87 F. Supp. 854, 858 (E.D.N.Y. 1949) (rights of parties should not turn upon form of notice unless notice fails to sufficiently apprise vouchee of his interests), *rev'd, on other grounds*, 182 F.2d 322 (2d Cir. 1950). In *American Mut. Liab. Ins. Co. v. Matthews*, a longshoreman injured by a faulty guyline sued the shipowner for his injuries. *Id.* at 859. The shipowner sent a written notice of vouching in to the stevedore, calling for indemnity. *Id.* at 858. The shipowner requested the stevedore to indemnify the shipowner for any judgments, costs, or expenses in connection with the suit pending against the shipowner. *Id.* The stevedore argued that the form of the owner's notice constituted a suit against the stevedore as a joint tortfeasor rather than an indemnity action and, therefore, was ineffectual as a proper notice of vouching in. *Id.* The *Matthews* court disagreed, however, stating that a vouching in notice was insufficient only if the language of the notice caused the vouchee to ignore the notice. *Id.*

83. *See supra* notes 5-9 and accompanying text (discussing elements constituting proper notice of vouching in).

content of notice, however, courts do not examine the content in a vacuum, but place the notice within the context of information known to the vouchee.[84] For example courts may consider the vouchee's familiarity with court procedures and with the vouching in device in general.[85] In *West Indian Co. v. S.S. Empress of Canada*,[86] the form of notice which the voucher employed contained all of the components necessary for a proper notice of vouching in.[87] The tendered notice gave a clear explanation of the pending suit and contained an explicit demand to the vouchee to undertake the defense of the impending action.[88] Moreover, the notice contained an offer from the voucher to surrender control of the original suit, and warned that the judgment in the original action could conclusively bind the vouchee.[89] In short, all essential elements of vouching in were present in the notice.

In addition to the requirement that notice be clear and reasonably calculated to inform interested parties,[90] the Court in *Mullane* specified that

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84. *See* American Mut. Liab. Ins. Co. v. Matthews, 87 F. Supp. 854, 858-59 (E.D.N.Y. 1949). The *Matthews* court pointed to several factors that supported the voucher's claim that the vouchee had received adequate notice. *Id.* Of particular importance to the *Matthews* court was the fact that the voucher had attached a copy of the original complaint to the vouching in notice. *Id.* at 859. The *Matthews* court stated that the language of the complaint combined with the language of the vouching in notice effectively disposed of the stevedore's contention that he had not been placed on notice that the issue of the stevedore's negligence would be litigated. *Id.* Attaching a copy of the original complaint to any written notice of vouching in has many advantages to the voucher. For example, confronting the vouchee with a court document adds seriousness to what otherwise could be taken as an idle threat. Moreover, attaching a copy of the complaint complies with *Mullane*'s requirement that the vouching in notice be reasonably calculated to inform the vouchee of the pending action. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). A voucher truly desirous of informing the vouchee of the original action, therefore, should attach a copy of the original complaint to the notice of vouching in. *Id.; see also supra* note 81 (discussing *Mullane* definition of proper notice).

85. *See* American Mut. Liab. Ins. Co. v. Matthews, 87 F. Supp. 854, 860 (E.D.N.Y. 1949) (noting that state courts were thoroughly familiar with vouching in process). The *Matthews* court found support in other vouching in cases decided in that jurisdiction. *Id.* The court also noted that the local rules of civil procedure discussed the vouching in device. *Id.* at 860-61.

86. 277 F. Supp. 1 (S.D.N.Y. 1967).

87. *See supra* notes 69 & 70 (discussing elements of vouching in).

88. *See id.* at 2. In *West Indian Co. v. S.S. Empress of Canada*, the S.S. Empress of Canada collided with two cranes owned and operated by the plaintiff. *Id.* The collision occurred when the S.S. Empress of Canada was leaving the plaintiff's dock in St. Thomas, Virgin Islands. *Id.* The plaintiff initiated an admiralty action based on negligence against the S.S. Empress of Canada and the owner of the ship, the Canadian Pacific Railroad Company. *Id.* The Canadian Pacific Railroad Company attempted to vouch in the pilot of the ship and the Department of Commerce of the Virgin Islands. *Id.* The notice in *West Indian* stated that the plaintiff had instituted the action against the defendant-vouchers. *Id.* The notice further stated that the voucher would look to the vouchees for indemnity and that the vouchees had 20 days in which to appear and defend the action. *Id.* Finally, the notice said that if the vouchees refused to appear and defend, then the vouchees would be bound by the voucher's defense and disposition of the original action. *Id.*

89. *Id.; see supra* notes 69 & 70 (discussing elements of vouching in).

90. *See* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1949) (citing Milliken v. Meyer, 311 U.S. 457, 463 (1940)) (form of notice must be reasonably calculated to give actual notice and an opportunity to be heard).

notice which complies with due process must allow a party to choose whether to appear or default.[91] The requirement that notice of vouching in be timely affords the vouchee the choice of accepting or refusing the tendered defense.[92] In evaluating the timeliness of vouching in notice, some courts have considered the location of the parties,[93] the complexity of the litigation,[94] and the vouchee's ability to participate in settlement proceedings.[95] The voucher should notify the vouchee soon after the institution of litigation in order to permit complete control of the pretrial proceedings by the vouchee.[96] When several communications compose the vouching in notice, courts have measured timeliness from the point at which the vouchee receives notice rather than when the voucher initiates correspondence.[97] Many courts, however,

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91. *See id.* (defendant's right to appear has little value unless defendant is informed of his interests and is capable of determining whether to acquiesce to or contest pending action).

92. *See* Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (original judgment binds vouchee if vouchee receives timely notice of original action and refuses defense); U.S. Wire & Cable Co. v. Ascher Corp., 34 N.J. 121, ____, 167 A.2d 633, 636 (1961) (indemnitor must have timely notice of original suit or judgment will not bind him).

93. *See* Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, 693, 509 P.2d 86, 90 (1973). The vouchee in *Dixon v. Fiat-Roosevelt Motors, Inc.* was a California-based manufacturer who would have had to conduct a defense to the action in Washington state. *Id.* at 693, 509 P.2d at 90. The Supreme Court of Washington held that the location of the parties complicated the litigation and necessitated an early notice of tender of defense. *Id.* The court held, therefore, that tenders of defense on September 25 and October 24, 1969, for a trial set for November 10, 1969, were untimely. *Id.*

94. *See id.* The court in *Dixon v. Fiat-Roosevelt Motors, Inc.* noted that the complexity of the litigation would require the vouchee to conduct investigative tests and assemble expert testimony in preparation for trial. *Id.*

95. *See* United New York Sandy Hook Pilots Ass'n v. Rodermond Indus., 394 F.2d 65, 73 (3d Cir. 1968). In *United New York Sandy Hook Pilots Ass'n v. Rodermond Indus.*, the plaintiff commenced the original litigation on September 16, 1953, and the defendant-voucher did not tender defense of the suit until April 3, 1959. *Id.* In *Sandy Hook*, the United States Court of Appeals for the Third Circuit stated that the voucher could not seriously contend that the vouchee could have had complete control of all relevant pretrial proceedings. *Id.* Of particular concern to the Third Circuit in *Sandy Hook* was the fact that the vouchee had been denied the opportunity to effect a favorable settlement. *Id.* The Third Circuit emphasized that it was insufficient to say that the voucher had afforded the vouchee an opportunity to settle at a later date. *Id.* The Third Circuit in *Sandy Hook* also stated that early notice is necessary not only for adequate trial preparation, but also for the vouchee to assert control over the direction of the defense. *Id.* The Third Circuit emphasized that the voucher must tender the defense early enough in the litigation to enable the vouchee to decide what avenues the defense will take. *Id.* For example, the vouchee must have time to decide what legal theories to use and when. *Id.* Consequently, the *Sandy Hook* court held that the fact that the voucher had briefed the vouchee on the voucher's pretrial activities and had left the vouchee to act out the voucher's trial script constituted insufficient notice. *Id.*

96. *See* Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 52 (1978) (voucher must give notice immediately after institution of suit to permit complete control of pretrial proceedings by vouchee); U.S. Wire & Cable Co. v. Ascher Corp., 34 N.J. 121, ____, 167 A.2d 633, 637 (1961) (voucher must give notice soon after institution of suit to afford vouchee complete control of pretrial proceedings).

97. *See* U.S. Wire & Cable Co. v. Ascher Corp., 34 N.J. 121, ____, 167 A.2d 633, 636

have not adopted a clearly defined time period within which a vouching in notice must fall to be timely.[98] If a potential vouchee has been involved in pretrial investigations and proceedings, a tender of defense as little as one week before trial may be sufficiently timely to bind the vouchee.[99]

After receiving a tender of defense, the vouchee must decide whether or not to accept the defense. Courts have suggested that the vouchee should accept a tendered defense when the facts at the time of tender demonstrate that liability eventually would fall on the vouchee, thereby placing the vouchee under a duty to defend.[100] Although the rule that a vouchee should accept a tendered defense when he is likely to be held ultimately liable

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(1961). In *U.S. Wire & Cable Co. v. Ascher Corp.*, plaintiff commenced the original suit against the defendant-voucher on February 28, 1958. *Id.* at ____, 167 A.2d at 635. By letter of March 11, 1958, the voucher advised the vouchee that in the event of the voucher's liability in the original litigation, the voucher would hold the vouchee responsible for indemnity. *Id.* The voucher stated that this letter was to give the vouchee "timely notice" of the suit, and requested an indication of what role the vouchee would play in the defense. *Id.* By a second letter of October 3, 1958, the voucher reiterated that the vouchee should take responsibility for the defense and assume any liability adjudged. *Id.* at ____, 167 A.2d at 635-36. The vouchee failed to accede to this demand, and the voucher proceeded to trial on October 20, 1958. *Id.* at ____, 167 A.2d at 636. In the voucher's subsequent indemnity suit against the vouchee, the court refused to hold the vouchee to the determinations of the earlier proceeding. *Id.* at ____, 167 A.2d at 637. The court noted that the letter of March 11, 1958, contained no demand to assume the defense of the earlier action, and although the letter of October 2, 1958, at least impliedly offered to surrender control of the defense, this letter came only seventeen days before trial. *Id.* By the time the vouchee received the second letter, the voucher's counsel had accomplished all of the preliminary preparation. *Id.* The *Ascher* court held, therefore, that the notice of vouching in was untimely. *Id.*

98. *See* West Indian Co. v. S.S. Empress of Canada, 277 F. Supp. 1, 2 (S.D.N.Y. 1967) (vouching in notice fifteen months after institution of original suit was timely); Ford Motor Co. v. Bendix Corp., 83 Mich. App. 108, 111, 268 N.W.2d 305, 307 (1978) (vouching in tender five days before trial was timely); Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 50 (1978) (tender of notice one week before trial was timely). *But see* United New York Sandy Hook Pilots Ass'n v. Rodermond Indus., 394 F.2d 65, 73 (3d Cir. 1968) (tender six years after institution of original suit was untimely); Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, ____, 509 P.2d 86, 90 (1973) (tender of defense eighteen days before trial was untimely); U.S. Wire & Cable Co. v. Ascher Corp., 34 N.J. 121, ____, 167 A.2d 633, 637 (1961) (tender of control of suit seventeen days before trial was untimely).

99. *See* Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd., 119 Ariz. 10, ____, 579 P.2d 48, 50 (1978). In *Litton Systems, Inc. v. Shaw's Sales & Serv., Ltd.*, the voucher Litton first tendered defense of the original action to the vouchee Shaw some five months prior to trial and the vouchee refused the tender. *Id.* at ____, 579 P.2d at 49. The vouchee's local counsel, however, requested and received copies of all depositions, interrogatories and photographs in the possession of vouchee's counsel. *Id.* at ____, 579 P.2d at 50. Local counsel also represented the vouchee at the pretrial conference. *Id.* One week before the trial the voucher again tendered defense of the action, and again the vouchee refused. *Id.* Although the *Litton* court did not state explicitly that tender only one week before trial would have been timely, the court implied that because of the vouchee's involvement in the pretrial proceedings, the one week time period would have been sufficient. *Id.; see also* Ford Motor Co. v. Bendix Corp., 83 Mich. App. 108, 111, 268 N.W.2d 305, 307 (1978) (tender of defense five days before trial was timely where vouchee had notice of action and had participated in discovery).

100. *See* Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727,

appears clear and concise, practical applications have proven problematic. One court has characterized the potential vouchee's choice as calling for an uncanny ability to foresee at the pretrial stage the eventual outcome of the original suit.[101] The resulting trend is that the vouchee will be most likely to reject the tendered defense when numerous contributors to the original liability exist.[102] Likewise, courts will be most likely to uphold the vouchee's rejection of the defense and afford no preclusive effect to the original judgment when the cause of the original liability is unclear.[103]

In spite of numerous objections by vouchees, courts generally have granted preclusive effect to judgments rendered after the vouchee has rejected a tendered defense.[104] Courts, therefore, need to analyze the rationale underlying a procedure that allows the determinations of one suit to bind the

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734 (3d Cir. 1971) (vouchee must defend when facts of case indicate that liability will fall upon vouchee); Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, 694, 509 P.2d 86, 90 (1973) (citing Glick v. White Motor Co., 458 F.2d 1287, 1292 (3d Cir. 1972) (facts at time of voucher's tender of defense must demonstrate that liability will fall upon vouchee)).

101. *See* Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727, 734 (3d Cir. 1971). In *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co.*, the United States Court of Appeals for the Third Circuit described the vouchee's duty to indemnify as inconsistent and erratic. *Id.* The *Humble Oil* court was critical of a strict application of the rule requiring the acceptance of the tender of defense because the vouchee's choice in actual fact situations often is not clear cut. *Id.*

102. *See* Transit Casualty Co. v. United States, 239 F. Supp. 436, 438 (S.D. Tex. 1965) (vouchee rejected tender because multiple factors contributed to liability).

103. *See id.* In *Transit Casualty Co. v. United States*, a United States Marshal seized a ship and transported it to Bishop Marine Service which docked the ship. *Id.* at 436. All of the docks in the area, including Bishop's, previously has been severely damaged by a hurricane. *Id.* at 437. As a result, the shipyards lacked water, lights, and firefighting equipment. *Id.* The ship burned while in Bishop's custody, and the shipowner's insurer, Transit Casualty Company, sued the United States. *Id.* The United States attempted to vouch in Bishop. *Id.* Bishop refused to accept the defense and the district court refused to enforce the United States' settlement with the owner against Bishop. *Id.* at 438. The *Transit* court noted that the United States had failed to show that any of Bishop's actions proximately caused the damage to the ship. *Id.* Because so many factors could have caused the damage to the ship the court refused to hold the vouchee liable. *Id.* at 438-39. *But see* Ford Motor Co. v. W.F. Holt & Sons, 335 F. Supp. 775, 778 (M.D. Tenn.), *modified*, 453 F.2d 116 (6th Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972). In *Ford Motor Co. v. W.F. Holt & Sons*, Ford Motor Company sued its general contractor, W.F. Holt & Sons, for indemnity sums that Ford had paid for the personal injury of a subcontractor's employee. *Id.* at 777. Ford had attempted to vouch in W.F. Holt & Sons, but the general contractor refused to take over the defense. *Id.* The voucher Ford settled the personal injury claim and the court subsequently enforced Ford's settlement against the vouchee W.F. Holt & Sons. *Id.* at 777-78. Nevertheless, the United States District Court for the Middle District of Tennessee asserted that a jury might have found that the injured employee was guilty of proximate negligence which caused the accident. *Id.* at 778. A jury also could have found that the subcontractor was guilty of contributory negligence which caused the accident. *Id.* In addition, the *Ford* court noted that a jury might have determined that the voucher was guilty of negligence which contributed to the accident, or that the voucher was guilty of proximate negligence which alone caused the accident. *Id.* The *Ford* case demonstrates, therefore, that no matter how dispersed the original liability appears, a court may still bind the vouchee to the judgment of the original suit.

104. *See* Ford Motor Co. v. W.F. Holt & Sons, 335 F. Supp. 775, 778 (M.D. Tenn.) (court

vouchee, when the vouchee was neither a party to the original action nor within the personal jurisdiction of the court hearing the original action. The basis for the doctrine that permits original determinations to bind the vouchee is that the vouchee is no longer a disinterested party to the suit once he

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stated vouchee could not complain of voucher's actions in view of indemnity contract between voucher and vouchee), *modified*, 453 F.2d 116 (6th Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972); Carole Stupell, Ltd. v. Blenko Glass Co., 137 F. Supp. 335, 337-38 (W.D. Va. 1955) (court unimpressed with vouchee's criticism of voucher in light of fact that vouchee left voucher sole responsibility for defense of action). In an indemnity claim, the trial court generally examines a number of questions concerning the original claim including whether the voucher sent notice of the incident, notice of the claim, and notice of the filing of the lawsuit to the vouchee. *See* Wisconsin Barge Line, Inc. v. Barge Chem 300, 546 F.2d 1125, 1129 (5th Cir. 1977) (setting out parameters of indemnity court's inquiry into voucher/vouchee relationship). The trial court should also examine whether the voucher has tendered control of the claim and defense of the action to the vouchee. *Id.* Finally, the court must address whether fraud or collusion existed in the original action and examine the circumstances surrounding the payment of any settlement in the first action. *Id.*

The charge of collusive settlement or fraudulent tactics between the original plaintiff and defendant-voucher is popular among vouchees, but the claim is not always a successful defense in an indemnity action. *See* Stewart & Foulke, Inc. v. Robertshaw Controls, Co., 397 F.2d 971, 973 (5th Cir. 1968) (vouchee's claim of collusion rejected even though original parties reached settlement of original claim and continued to trial two weeks later); *see also* Dixon v. Fiat-Roosevelt Motors, Inc., 8 Wash. App. 689, 694, 509 P.2d 86, 90-91 (1973) (claim of ineffectual defense based upon conflict of interest between vouchee and voucher). For example, in a products liability context in *Dixon v. Fiat-Roosevelt Motors, Inc.*, the retailer-voucher attempted to demonstrate that an alleged defect occurred during manufacturing. *Id.* at 694, 509 P.2d at 91. Conversely, the manufacturer-vouchee in *Dixon* endeavored to show that the defect occurred subsequent to manufacturing. *Id.* The conflict of interest between the manufacturer and retailer was so clear that the *Dixon* court held that the vouching in device was inapplicable. *Id.*

In at least one case, the court upheld the vouchee's claim of collusion. *See* Grummons v. Zollinger, 240 F. Supp. 63, 66-67 (N.D. Ind. 1964). The actions of the parties in *Grummons v. Zollinger* demonstrate an example of collusion in the worst degree. *Id.* The plaintiff and defendant in the original suit had effected a settlement before the action went to trial and judgment was entered. *Id.* at 68. Attorneys for the plaintiff and defendant-voucher exchanged correspondence in which they agreed to make a deal to settle the case in order to proceed against the vouchee. *Id.* The attorneys for the plaintiff and defendant-voucher arranged to have their expert testify to bolster the action against the vouchee. *Id.* The goal of the original parties was to fashion a strong indemnity suit against the vouchee. *Id.* The court in the indemnity action refused to bind the vouchee to the results of the earlier actions between the plaintiff and defendant-voucher. *Id.* at 76.

At least one commentator has indicated that the vouchee's defenses are limited to denial of notice and opportunity to defend, denial of the alleged warranty or duty to reimburse the voucher, and denial that the original claim is within the coverage of the vouchee's obligation. *See* 1 B. J. MOORE, J. LUCAS, T. CURRIER, MOORE'S FEDERAL PRACTICE § 0.405[9] (2d ed. 1983). In the products liability context, the United States District Court for the Eastern District of Missouri in *City of Clayton v. Grumman Emergency Products, Inc.* stated that to establish a right of indemnity the voucher must prove that he bought the defective item from the vouchee-manufacturer and that the same warranties the voucher-retailer made to his customer were made to the retailer by the manufacturer. 576 F. Supp. 1122, 1128 (E.D. Mo. 1983). The retailer must also prove that the defect on which the manufacturer's breach of warranty liability was established constituted a breach by the manufacturer of the same warranty as made to the retailer, and that the retailer gave notice of the consumer's lawsuit against him to the

receives notice of the suit and opportunity to defend.[105] Upon receiving notice, the vouchee has the right to appear and defend the action and may employ any defense strategies or tactics to controvert the claim.[106] The presumption that the vouchee has a duty to appear or be bound by the outcome of the original suit is based on the premise that the court hearing the original action has the power to bind the nonappearing vouchee to its determinations.[107] The presumption that a court which lacks personal jurisdiction nevertheless can have preclusive power over a vouchee is the novelty of the vouching in device. Whether or not vouching in is to remain a valid procedure in modern litigation depends upon whether modern notions of due process and personal jurisdiction can be reconciled with this extra-jurisdictional presumption of preclusive power.

The presumption that a court can have preclusive power over a vouchee derives in part from the relationship between the voucher and the vouchee.[108] The voucher/vouchee relationship may arise though contract[109] or by operation of law.[110] The vouchee's relationship with the voucher renders the vouchee primarily liable for any acts of negligence by the voucher.[111] The court may bind the vouchee regardless of whether the vouchee appeared and defended in the original action.[112] To bind the vouchee to the determinations of the earlier litigation, however, a court must find that the basis for the

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manufacturer. *Id.* The court in *City of Clayton* implied, therefore, that the vouchee could avoid indemnity by demonstrating the absence of any one of these factors. *Id.*

105. *See* Grummons v. Zollinger, 240 F. Supp. 63, 75 (N.D. Ind. 1964) (quoting Hartford Accident & Indem. Co. v. First Nat'l Bank & Trust Co., 281 N.Y. 162, 22 N.E.2d 324, 326 (1939)) (vouchee who receives notice is not stranger to suit); Olin's Rent-A-Car Sys., Inc. v. Royal Continental Hotels, Inc. 187 So.2d 349, 351 (Fla. 1966) (quoting Littleton v. Richardson, 34 N.H. 179, 187 (1856)) (vouchee's notice of right to appear and defend brings him within original action).

106. *See supra* note 8 (discussing vouchee's right to control defense of original suit).

107. *See supra* notes 2, 10 & 11 (discussing binding effect of vouching in).

108. *See supra* note 2 (discussing relationship between indemnitor and indemnitee).

109. *See* Ford Motor Co. v. W.F. Holt & Sons, Inc., 355 F. Supp. 775, 778 (M.D. Tenn.) (contract of indemnity between voucher and vouchee bound vouchee to voucher's good faith settlement of original claim), *modified*, 453 F.2d 116 (6th Cir. 1971), *cert. denied*, 405 U.S. 1067 (1972).

110. *See* Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., 444 F.2d 727, 734 (3d Cir. 1971) (shipowner attempts to vouch in stevedore in suit by injured longshoreman). In *Humble Oil*, the United States District Court for the Eastern District of Pennsylvania noted that no contractual agreement existed between the parties regarding the defense of possible suits by injured longshoremen. *Id.* Nevertheless, the district court found that the voucher-stevedore's duty to defend arose because it was readily apparent that claims of negligence and unseaworthiness were matters within the stevedore's responsibility. *Id.* The Third Circuit ultimately found that the stevedore's duty was not as clear cut as the district court had described it. *Id.* The Third Circuit, however, had no quarrel with the lower court's enunciation of the general rule that the vouchee had a duty to defend. *Id.*

111. *See* SCAC Transport (USA), Inc. v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (vouchee is ultimately responsible for any negligence arising out of voucher/vouchee relationship).

112. *See id.; see also supra* note 2 (discussing binding effect of vouching in).

vouchee's liability to the voucher is the same as the defendant-voucher's basis of liability to the plaintiff in the original action.[113]

A comparison of the concept of vouching in with other examples of judicial power and preclusion is helpful in reconciling vouching in's extra-jurisdictional presumption of preclusive power with modern notions of due process and personal jurisdiction. Vouching in supplied the common-law roots for the modern device of impleader.[114] The modern impleader procedure is a device that also brings third parties into an action and binds them to the judgments of the court.[115] Unlike vouching in, however, personal jurisdiction over the impleaded third-party defendant is a prerequisite to the use of impleader.[116] Impleader also has a procedural advantage over vouching in because impleader requires only one action for a complete adjudication of the rights and obligations of all interested parties while vouching in requires two separate adjudications.[117] Furthermore, in a vouching in procedure the voucher must surrender complete control of the suit to the vouchee,[118] whereas impleader allows the original defendant to continue to direct his own defense independent of the tactics employed by the impleaded third-party defendant.[119]

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113. *See* Travelers Indem. Co. v. Evans Pipe Co., 432 F.2d 211, 213 (6th Cir. 1970) (golf course pipe supplier's liability to contractor for breach of warranty was identical to contractor's liability to country club); Hessler v. Hillwood Mfg. Co., 302 F.2d 61, 62 (6th Cir. 1962) (liability for manufacturer's breach of warranty of fitness and merchantability to retailer was same as retailer's liability for breach of warranty to customer).

114. *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.02 (1984) (roots of impleader stem from common-law procedure of vouching to warranty). Professor Moore notes that impleader or third-party practice was meant to supplement and not to supplant vouching in. *Id.; see also* West Indian Co. v. S.S. Empress of Canada, 277 F. Supp. 1, 3 (S.D.N.Y. 1967) (impleader has not abolished vouching in); Uniroyal, Inc. v. Chambers Gasket & Mfg. Co., 177 Ind. App. 508, ____, 380 N.E.2d 571, 581 (1978) (impleader supplements vouching in but does not replace it).

115. *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 14.02 (1984) (general purpose of impleader is to avoid multiplicity and reduplication in litigation by joining all appropriate parties in one action). Professor Moore explains that impleader is a procedure whereby a party to a suit may bring in additional parties to afford a full and complete adjudication. *Id.; see also* Stiber v. United States, 60 F.R.D. 668, 670 (E.D. Pa. 1973) (purpose of impleader is to allow parties to resolve conflicting claims in one judicial proceeding).

116. *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.28[1] (1984) (impleader requires jurisdiction over third-party defendant); *cf.* SCAC Transport (USA) Inc., v. S.S. Danaos, 578 F. Supp. 327, 330 (S.D.N.Y. 1984) (vouching in is valid alternative to impleader when lack of personal jurisdiction forecloses use of impleader).

117. *See* 1 B J. MOORE, J. LUCAS, T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 14.02 (1984) (two suits are necessary in vouching in when voucher found liable and vouchee refuses indemnity); *see also* 3 J. MOORE, J. LUCAS, T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 14.02 (1984) (purpose of impleader is to avoid multiple actions and reduplication of evidence).

118. *See supra* notes 8, 94 & 95 and accompanying text (discussing vouchee's control of defense of original suit).

119. *See* 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.02 (1984) (defendant retains control of his defense under impleader).

In addition to vouching in, a second example of extra-jurisdictional power is the "bulge rule"[120] of rule 4(f)[121] of the Federal Rules of Civil Procedure. Rule 4(f) authorizes service of process outside the territorial limits of a state up to a distance of 100 miles from the district court in which the action was brought.[122] Rule 4(f) permits service to run beyond the geographical and territorial limits of the state to bring in additional parties to secure more complete relief in a pending action.[123] The purpose of rule 4(f) is to extend the boundaries of state courts in order to adjudicate all the rights and obligations involved in a controversy.[124]

The United States Supreme Court in *Insurance Corporation of Ireland v. Compagnie Des Bauxites*[125] provided another exercise of judicial power which helps to reconcile the apparent discrepancies between vouching in and modern notions of due process and personal jurisdiction. In *Ireland*, respondent Compagnie des Bauxites sued petitioner Ireland and several other foreign insurance companies in the United States District Court for the Western District of Pennsylvania for an alleged breach of an insurance contract.[126] Ireland raised the defense of lack of personal jurisdiction.[127] Compagnie des Bauxites attempted to use discovery in order to establish jurisdictional facts.[128] After repeated failures by Ireland to comply with the district court's orders for production of the requested information, the court imposed personal jurisdiction on Ireland as a sanction.[129] On appeal to the Supreme Court, Ireland argued that imposing jurisdiction as a discovery sanction was an impermissible creation of judicial power.[130] The Supreme Court disagreed,

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120. *See* SCM Corp. v. Xerox Corp., 76 F.R.D. 214, 215 (D. Conn. 1977). The bulge rule of rule 4(f) of the Federal Rules of Civil Procedure permits service of process ". . . at all places outside the state . . . but within the United States that are not more than 100 miles from the place in which the action is commenced. . . ." *Id.* (quoting FED. R. CIV. P. 4(f)).

121. *See* FED. R. CIV. P. 4(f).

122. *See* Deloro Smelting & Refining Co. v. Engelhard Minerals & Chem. Corp., 313 F. Supp. 470, 474 (D.N.J. 1970) (rule 4(f) authorizes service of process to any place in United States within 100 mile radius "as the crow flies" from place where action was commenced).

123. *See* 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 4.42[2] (1984) (goal of rule 4(f) is to guarantee presence of parties necessary for full and just adjudication).

124. *See id.* (purpose of bulge rule is to extend state boundaries in order to determine an entire controversy).

125. 456 U.S. 694 (1982).

126. *Id.* at 698.

127. *Id.*

128. *Id.* In *Insurance Corp. of Ireland v. Compagnie des Bauxites*, Compagnie des Bauxites requested copies of numerous insurance policies in an effort to establish Ireland's jurisdictional contacts. *Id.* Ireland objected to the discovery requests as burdensome. *Id.*

129. *Id.* at 698-99. The district court in *Ireland* ordered Ireland to respond to the discovery requests of Compagnie des Bauxites. *Id.* at 698. The district court ordered Ireland to produce the requested documents in July of 1978, on November 8, 1978, and on December 31, 1978. *Id.* at 698-99. On April 19, 1979, the district court, after noting that Ireland still had not complied with the discovery order, imposed personal jurisdiction on Ireland. *Id.* at 699.

130. *Id.* at 701. In *Ireland*, petitioner Ireland argued that the imposition of jurisdiction was merely judicial fiat. *Id.* Petitioner argued that imposing jurisdiction as a discovery sanction created judicial power where the power did not actually exist. *Id.*

however, explaining that Ireland had confused and merged the concepts of personal jurisdiction and subject matter jurisdiction.[131] The Court stated that the power of a court to exercise subject matter jurisdiction derives from article III of the Constitution.[132] The Constitution's characterization of subject matter jurisdiction functions as a restriction on federal power and defines the parameters of the federal sovereign.[133] Actions by the parties to a suit therefore cannot confer subject matter jurisdiction upon a court, since article III directly limits actions within federal court jurisdiction.[134] Personal jurisdiction, in contrast, is a function not of article III, but of the due process clause.[135] The Supreme Court stated that personal jurisdiction restricts judicial power as a matter of individual liberty and not as a matter of sovereignty.[136]

The Supreme Court's characterization of due process and personal jurisdiction as matters of individual liberty conflicts with the Court's description of due process as an instrument of interstate federalism in *World-Wide Volkswagen*.[137] In a footnote to the *Ireland* decision, the Court addressed this conflict, stating that *World-Wide Volkswagen*'s restrictions on state sovereign power ultimately must be viewed as a function of the individual liberty interest that the due process clause preserves.[138] The *Ireland* Court explained that the requirement that courts must have personal jurisdiction over parties in adjudications arose solely from the due process clause.[139] The due process clause itself makes no mention of the concepts of federalism or state sovereignty.[140] Furthermore, as the *Ireland* Court noted, it is possible for defendants to waive the personal jurisdiction requirements, while individuals cannot by their actions create subject matter jurisdiction.[141] The Court emphasized that the elements of federalism and state sovereignty, therefore, are distinct and separate from the concepts of personal jurisdiction and due process.[142] The Supreme Court thus held that the imposition of personal jurisdiction against Ireland did not violate due process.[143]

Under traditional jurisdictional principles, the due process analysis focused on whether sufficient minimum contacts existed between the parties

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131. *Id.*
132. *Id.* at 701-02.
133. *Id.* at 702.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See supra* note 12 (discussing due process clause as instrument of interstate federalism).
138. *See* Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 702 n.10 (1982).
139. *Id.*
140. *Id.*
141. *Id.* at 701-02.
142. *Id.*
143. *Id.* at 709.

and the forum state to justify the state's exercise of personal jurisdiction.[144] Vouching in, however, eliminates any analysis of contacts between the vouchee and the forum, and focuses instead on the relationship between the voucher and the vouchee.[145] Vouching in, therefore, emphasizes the fairness element of due process[146] rather than the jurisdictional element of due process.[147] Before *Ireland*, personal jurisdiction cases had linked minimum contacts and notions of fairness as jointly defining state sovereign limits on assertions of personal jurisdiction over unconsenting defendants.[148] By emphasizing the element of fairness in due process, vouching in serves the valuable function of reconciling theoretical consistency with practical fairness. By focusing on the relationship between the voucher and the vouchee rather than on the vouchee's contacts with the forum, vouching in allows the courts to place liability on the party ultimately responsible. The *Ireland* Court's apparent disregard of minimum contacts as a limitation on the sovereign power of states appears to smooth the inconsistencies between vouching in and traditional notions of due process and personal jurisdiction. In *Ireland*, the Court affirmed the imposition of personal jurisdiction over an unconsenting defendant in the absence of a showing of minimum contacts.[149] Similarly, vouching in binds the unconsenting vouchee to the judgment of the original action despite the absence of personal jurisdiction over the vouchee in the original action.[150] Vouching in, therefore, which appears to be out after *World-Wide Volkswagen*'s emphasis on federalism[151] is now in as a result of *Ireland*'s emphasis on fairness.

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144. *See supra* notes 11 & 12 and accompanying text (discussing development of minimum contacts analysis).

145. *See supra* notes 108-13 and accompanying text (discussing voucher/vouchee relationship).

146. *See supra* text accompanying note 29 (discussing "fairness" of maintenance of suit).

147. *See supra* notes 13-15 and accompanying text (discussing personal jurisdiction as element of due process).

148. *See supra* notes 11 & 12 and accompanying text (discussing development of minimum contacts analysis); *see also* Insurance Corp. of Ireland v. Compagnie Des Bauxites, 456 U.S. 694, 714 (1982) (Powell, J., concurring). In *Ireland*, Justice Powell criticized the majority's decision for what he saw as an abandonment of the minimum contacts analysis. *Id.* Justice Powell viewed the *Ireland* Court's imposition of personal jurisdiction as redefining the personal jurisdiction inquiry from an analysis of minimum contacts to a focus on abstract notions of fairness. *Id.*

149. *See id.* at 713.

150. *See supra* notes 9 & 10 (discussing binding effect of vouching in).

151. *See supra* notes 14, 16 & 18 (discussing federalism and inadmissibility of indirect assertions of jurisdiction).