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## Substituted Service and the Hague Service Convention

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## SUBSTITUTED SERVICE AND THE HAGUE SERVICE CONVENTION

WILLIAM S. DODGE\*

### ABSTRACT

*State law plays a surprisingly large role in transnational litigation, and how it defines the applicability of the Hague Service Convention is an important example. In Volkswagenwerk Aktiengesellschaft v. Schlunk, the U.S. Supreme Court held that the Convention does not apply when, under state law, service of process is made within the United States. In Schlunk, Illinois law permitted substituted service on the U.S. subsidiary of a foreign parent company, so the Convention did not apply. This Article looks at substituted service under state law today and when it permits avoidance of the Hague Convention. The Article focuses on two kinds of*

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*substituted service that many states permit: (1) substituted service on affiliated companies; and (2) substituted service on state officials.*

*The Article argues that states should liberalize their rules for substituted service on affiliated companies by focusing on whether service on the affiliate provides adequate notice to the defendant rather than on whether there are grounds to pierce the corporate veil, as many states currently do. The Article further argues that when substituted service is made on a state official, the Due Process Clauses require that a copy of the service be sent abroad, making the Hague Convention applicable.*

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## INTRODUCTION

First year courses in Civil Procedure typically focus on the Federal Rules of Civil Procedure and related federal doctrines and statutes. But state law plays an important role in civil litigation, including transnational litigation, even in federal courts. Under the *Erie* doctrine, for example, state law governs the conflict of laws and the enforcement of foreign judgments.<sup>1</sup> The Federal Rules expressly incorporate state rules on personal jurisdiction.<sup>2</sup> The same is true for service of process, including service on defendants located abroad. Although Federal Rule 4(f) governs service in a foreign country,<sup>3</sup> Federal Rule 4(e)(1) alternatively permits service within the United States by “following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made.”<sup>4</sup> As this Article discusses, state statutes on substituted service often permit service within the state even when the defendant is located abroad.<sup>5</sup>

When a foreign defendant is located in a country that has joined the Hague Service Convention, an additional set of rules and procedures come into play.<sup>6</sup> This treaty interacts with state law in two

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1. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that federal courts exercising diversity jurisdiction must apply state conflicts rules); *DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 378 (5th Cir. 2015) (holding that state law governs the enforcement of foreign-country judgments); see also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 reporters’ note 1 (AM. L. INST. 2018) (discussing law governing enforcement of foreign-country judgments).

2. See FED. R. CIV. P. 4(k)(1)(A) (establishing personal jurisdiction over a defendant “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located”).

3. Rule 4(f) applies to service on individuals, but Rule 4(h)(2) extends most of its provisions to corporations.

4. Although Rule 4(e)(1) applies to service on individuals, Rule 4(h)(1)(A) extends its provisions to corporations.

5. See *infra* Parts III-IV.

6. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention]. In addition to the United States, seventy-eight countries are currently parties to the Hague Service Convention, including Brazil, Canada, China, France, Germany, India, Ireland, Italy, Japan, South Korea, Mexico, Switzerland, and the United Kingdom, which is to say, most of the United States’ largest trading partners. See *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HCCH (June 17, 2021), <https://www.hcch.org>.

important ways. On the one hand, as the U.S. Supreme Court held in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the Convention “pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”<sup>7</sup> But on the other hand, state law defines the applicability of the Convention. By its terms, the Convention applies only “where there is occasion to transmit a judicial or extrajudicial document for service abroad.”<sup>8</sup> The Supreme Court held that this question turns on “the internal law of the forum state.”<sup>9</sup> In *Schlunk*, Illinois law provided that a foreign parent company could be served by substituted service on its U.S. subsidiary.<sup>10</sup> Because service on the foreign company’s agent was completed within the United States, there was no occasion to transmit documents for service abroad, and the Convention did not apply.<sup>11</sup>

This Article contributes to the growing literature on the role of state law in transnational litigation<sup>12</sup> by examining substituted service under state law today and when it allows parties to avoid the Hague Service Convention.<sup>13</sup> The Article focuses on two kinds of substituted service. The first is the kind found in *Schlunk*, service on an affiliated U.S. company as an involuntary agent of the foreign

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net/en/instruments/conventions/status-table/?cid=17 [https://perma.cc/9DPD-EZ4G] [hereinafter *Status Table*]. For an overview of the Convention, see GEORGE A. BERMANN, WILLIAM S. DODGE & DONALD EARL CHILDRESS III, *TRANSNATIONAL LITIGATION IN A NUTSHELL* 297-303 (2d ed. 2021).

7. 486 U.S. 694, 699 (1988).

8. Hague Service Convention, *supra* note 6, art. 1.

9. *Schlunk*, 486 U.S. at 700.

10. *Id.* at 706.

11. *Id.* at 707-08.

12. See, e.g., Kevin D. Benish, Note, *Pennoyer’s Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, 90 N.Y.U. L. REV. 1609 (2015); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631 (2017); William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389 (2020); Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013).

13. It is also possible for the parties to the contract to avoid the Hague Convention by appointing an agent for service of process in the United States or by waiving formal service of process under state law, as the California Supreme Court recently held. See *Rockefeller Tech. Invs. (Asia) VII v. Changzhou SinoType Tech. Co.*, 460 P.3d 764, 776 (Cal. 2020), *cert. denied*, 141 S. Ct. 374 (2020). For an excellent discussion of these issues, see John F. Coyle, Robin J. Effron & Maggie Gardner, *Contracting Around the Hague Service Convention*, 53 U.C. DAVIS L. REV. ONLINE 53 (2019).

defendant.<sup>14</sup> Most states that have considered the question allow the use of affiliated companies as involuntary agents for service only when there are grounds for piercing the corporate veil.<sup>15</sup> But courts in important states like California, Illinois, and Massachusetts have followed more liberal approaches that focus on whether the defendant is likely to receive notice.<sup>16</sup>

The second kind of substituted service involves service on a state official—typically, the secretary of state—as an agent of the foreign corporation.<sup>17</sup> Statutes authorizing such service usually require either the state official or the plaintiff to send a copy of the process to the defendant, and many courts have held that such a requirement to transmit documents abroad makes the Hague Service Convention applicable.<sup>18</sup> Some courts, however, have interpreted such statutes to provide that service is complete when the state official is served, making the Convention inapplicable.<sup>19</sup> These decisions are problematic both because they replicate the practice of *notification au parquet* that the Convention aimed to eliminate<sup>20</sup> and because they raise questions of constitutionally adequate notice.<sup>21</sup>

Part I begins with an overview of the Hague Service Convention, its interpretation in *Schlunk*, and the rules that govern service of process in state and federal courts. Part II reviews the due process requirements of adequate notice articulated in *Mullane v. Central Hanover Bank & Trust Co.*<sup>22</sup> and considers their implications for substituted service. Part III reviews state laws permitting substituted service on affiliated companies as involuntary agents. It argues that veil piercing is too restrictive a test for determining whether an affiliated company should be deemed an agent for

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14. In corporate law, companies may be affiliated in a number of different ways. Most of the cases considered below involved service on a subsidiary as an involuntary agent of a parent company. This Article uses the term “affiliated companies” rather than “subsidiary” because it is possible that service on a company other than a subsidiary might provide constitutionally adequate notice. By the same token, it is also possible that service on a subsidiary might be constitutionally inadequate.

15. See *infra* notes 83-88 and accompanying text.

16. See *infra* notes 91-108 and accompanying text.

17. See *infra* Part IV.

18. See *infra* notes 123, 129, 134, 139, 141-60 and accompanying text.

19. See *infra* notes 161-84 and accompanying text.

20. See *infra* notes 195-202 and accompanying text.

21. See *infra* notes 203-07 and accompanying text.

22. 339 U.S. 306, 313-15 (1950).

service of process and that courts should focus instead on whether service on the U.S. affiliate will provide constitutionally adequate notice to the foreign defendant. Part IV turns to state laws permitting substituted service on state officials. It argues that the Due Process Clauses require either the state official or the plaintiff to transmit a copy of the process to the foreign defendant even when state law does not, making the Convention applicable in all such cases. Part V briefly concludes.

### I. THE HAGUE SERVICE CONVENTION

The Hague Service Convention aims “to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time” and to “simplify[] and expedit[e] the procedure.”<sup>23</sup> To accomplish these aims, the Convention requires each state-party to designate a Central Authority to receive requests for service.<sup>24</sup> Upon receiving a request, the Central Authority serves the document in accordance with the receiving state’s own law<sup>25</sup> and sends a certificate of service to the applicant.<sup>26</sup> The Convention permits service by other means, including diplomatic and consular agents and postal channels, so long as the receiving state has not objected to these.<sup>27</sup> And service may be made through any other method that is permitted under the law of the receiving state for documents coming from abroad.<sup>28</sup>

The Convention’s fundamental concern that the addressee receive actual notice is reflected in two provisions on default judgments. Article 15 provides that a court shall not enter a default judgment unless (1) the document was served by a method the receiving country uses for domestic actions, (2) the document was actually delivered to the defendant by another method provided in the Convention, or (3) the document was transmitted by a method

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23. Hague Service Convention, *supra* note 6, pmbl.

24. *Id.* art. 2.

25. *Id.* art. 5. The applicant may request a particular method so long as it is consistent with the receiving state’s law. *Id.*

26. *Id.* art. 6.

27. *Id.* arts. 8, 10. For the reservations and declarations of each state, see generally *Status Table*, *supra* note 6.

28. Hague Service Convention, *supra* note 6, art. 19.

provided in the Convention and at least six months have elapsed.<sup>29</sup> Article 16 provides relief from a default judgment if the defendant did not have knowledge of the document served and has a prima facie defense on the merits.<sup>30</sup> But of course these provisions guarding against default judgments without notice apply only if the Convention itself applies.<sup>31</sup>

The Hague Convention applies “in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”<sup>32</sup> In *Schlunk*, the Supreme Court held that this question “must be determined by reference to the law of the forum state.”<sup>33</sup> Illinois permitted substituted service on a foreign corporation, allowing a plaintiff to use the defendant’s domestic subsidiary as an “involuntary agent” for service.<sup>34</sup> Under the Due Process Clause, service must provide “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>35</sup> But the Court concluded that “[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.”<sup>36</sup>

The defendant in *Schlunk* argued that if forum law determined the applicability of the Convention, “countries could circumvent the Convention by defining methods of service of process that do not require transmission of documents abroad.”<sup>37</sup> In particular, such an

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29. *Id.* art. 15.

30. *Id.* art. 16.

31. See HCCH, PRACTICAL HANDBOOK ON THE OPERATION OF THE SERVICE CONVENTION ¶ 10 (4th ed. 2016) [hereinafter PRACTICAL HANDBOOK] (“[I]t goes without saying that the protection offered by Articles 15 and 16 only operates when the Convention is applicable, which is only the case when a document must be transmitted for service abroad.”).

32. Hague Service Convention, *supra* note 6, art. 1. The Convention does not apply when the address of the person to be served is not known. *Id.*

33. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 701 (1988).

34. *Id.* at 696; see also *id.* at 697 (describing Illinois decisions). For more on Illinois law, see *infra* notes 91-95 and accompanying text. Other countries have similarly interpreted the applicability of the Convention to turn on forum law, and the Permanent Bureau of the Hague Conference agrees with this interpretation. See PRACTICAL HANDBOOK, *supra* note 31, ¶¶ 30-47.

35. *Schlunk*, 486 U.S. at 705 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

36. *Id.* at 707. For discussion of what due process requires, see *infra* Part II.

37. *Schlunk*, 486 U.S. at 703.

interpretation would allow *notification au parquet*, a method of service used in some civil-law countries under which service is made by depositing documents with a government official.<sup>38</sup> The Court had no doubt that the Convention’s drafters wanted to eliminate *notification au parquet*.<sup>39</sup> But the question of substituted service on government officials was not before the Court, and there was no similar indication in the drafting history that the Convention was intended to eliminate substituted service on subsidiaries.<sup>40</sup> Finally, the Court expressed doubt “that this country, or any other country, will draft its internal laws deliberately so as to circumvent the Convention in cases in which it would be appropriate to transmit judicial documents for service abroad.”<sup>41</sup>

The Federal Rules on service abroad are designed to work in tandem with the Hague Service Convention. Federal Rule of Civil Procedure 4(h)(2) governs the service of corporations outside the United States and permits all of the means available for serving individuals abroad under Rule 4(f) except personal service.<sup>42</sup> Rule 4(f)(1) authorizes service by “internationally agreed means” and refers specifically to the Hague Convention.<sup>43</sup> Rule 4(f)(2) applies if there is no treaty or the treaty permits other means of service and is limited to means of service prescribed by foreign law, directed by a foreign authority, or at least not prohibited by foreign law.<sup>44</sup> And Rule 4(f)(3) allows courts to order other means of service, but only if they are “not prohibited by international agreement.”<sup>45</sup> Several states have adopted rules modeled on Federal Rule 4(f) for service of process abroad.<sup>46</sup>

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38. *Id.* (listing France, the Netherlands, Greece, Belgium, and Italy as countries permitting *notification au parquet*). For discussion of similar statutes in the United States, see *infra* Part IV.A.

39. *Schlunk*, 486 U.S. at 703.

40. *Id.* at 704.

41. *Id.* at 705.

42. FED. R. CIV. P. 4(h)(2).

43. FED. R. CIV. P. 4(f)(1).

44. FED. R. CIV. P. 4(f)(2).

45. FED. R. CIV. P. 4(f)(3).

46. *See, e.g.*, ALA. R. CIV. P. 4.4; ALASKA R. CIV. P. 4(d)(13) (limited to service on individuals); ARIZ. R. CIV. P. 4.2(i)-(k); NEV. R. CIV. P. 4.3(b)(1)-(3); N.D. R. CIV. P. 4(f); R.I. R. CIV. P. 4(g) (limited to service on individuals); S.D. CODIFIED LAWS § 15-6-4(d)(9) (2021); TENN. R. CIV. P. 4A; UTAH R. CIV. P. 4(d)(4); WYO. R. CIV. P. 4(f), (h)(3).

But substituted service on an affiliated company or a government official does not occur abroad—it occurs in the United States, which is why it may potentially avoid the Hague Service Convention.<sup>47</sup> In federal courts, Federal Rule 4(h)(1) governs the service of corporations within the United States, and it authorizes service in accordance with state law, as for individuals under Rule 4(e)(1).<sup>48</sup> As Parts III and IV discuss, many states permit substituted service on affiliated companies in the United States, substituted service on government officials, or both.<sup>49</sup> Thus, state rules on substituted service apply to actions brought in federal court as well as to those brought in state court.

But in the United States, service of process has a constitutional dimension as well. Under the Due Process Clauses, as *Schlunk* noted, “substituted service [must] provide[] ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’”<sup>50</sup> *Schlunk* conditioned its holding that the Hague Convention did not apply in that case on the fact that service was “valid and complete under both state law *and the Due Process Clause*.”<sup>51</sup> So, before turning to what state law permits, it is worth considering what due process requires.

## II. NOTICE UNDER THE DUE PROCESS CLAUSES

The seminal case on notice under the Due Process Clauses is *Mullane v. Central Hanover Bank & Trust Co.*<sup>52</sup> In that case, a trustee had given notice regarding a judicial settlement of accounts to a trust’s beneficiaries by publication in a local newspaper, as

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47. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707-08 (1988).

48. FED. R. CIV. P. 4(h)(1)(A). Rule 4(h)(1)(B) additionally permits service on an officer, managing or general agent, or “any other agent authorized by appointment or by law to receive service of process.” FED. R. CIV. P. 4(h)(1)(B). As discussed below, many states make affiliated companies or government officials involuntary agents for service. In this respect, subsection (1)(B) simply duplicates subsection (1)(A).

49. See *infra* Parts III-IV.

50. *Schlunk*, 486 U.S. at 705 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)).

51. *Id.* at 707 (emphasis added).

52. 339 U.S. 306.

permitted by New York's banking law.<sup>53</sup> The Supreme Court held that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>54</sup> But the Court cautioned that the constitutional determination must be made "with due regard for the practicalities and peculiarities of the case."<sup>55</sup> In *Mullane* itself, the Court distinguished between beneficiaries with known addresses and those without.<sup>56</sup> For those without known addresses, the Court found notice by publication constitutionally sufficient because there were no better choices.<sup>57</sup> But for those with known addresses, the Court held that necessity could not justify notice by publication because the mail furnished a reasonable alternative.<sup>58</sup>

How might *Mullane's* notice requirement apply to substituted service? The Supreme Court in *Schlunk* seemed to think that service on an affiliated company could be constitutionally sufficient.<sup>59</sup> The Illinois Court of Appeals had concluded that "the relationship between [Volkswagenwerk Aktiengesellschaft (VWAG)] and [Volkswagen of America (VWoA)] is so close that it is certain that VWAG 'was fully apprised of the pendency of the action' by delivery of the summons to VWoA."<sup>60</sup> The parent company in *Schlunk* did not dispute that it had received constitutionally adequate notice.<sup>61</sup> And the Supreme Court, after stating that the

53. *Id.* at 309.

54. *Id.* at 314.

55. *Id.*

56. *Id.* at 317-18.

57. *Id.* ("However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.")

58. *Id.* at 318 ("Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.")

59. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707-08 (1988).

60. Schlunk v. Volkswagenwerk Aktiengesellschaft, 503 N.E.2d 1045, 1053 (Ill. App. Ct. 1986) (quoting Maunder v. DeHavilland Aircraft of Canada, 466 N.E.2d 217, 233 (Ill. App. Ct. 1984)).

61. The parent company argued only that "[a]bsent a presumption that service will be transmitted to the defendant abroad, substituted service on a domestic 'involuntary agent' would violate the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner at 22, Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (No. 86-1052), 1987 WL 881152, at \*22.

Convention would be inapplicable only if service were “valid and complete under both state law and the Due Process Clause,”<sup>62</sup> held that “the Hague Service Convention does not apply.”<sup>63</sup> In sum, for service on affiliated companies, the constitutional question is whether the relationship between the defendant and its affiliate served as an involuntary agent is sufficiently close that substituted service is reasonably calculated to provide notice to the defendant.<sup>64</sup>

Substituted service on state officials is different. State officials have no preexisting relationships with foreign defendants that would make them likely to send the defendants copies of the service unless required to do so.<sup>65</sup> The Hague Convention applies only when the address of the person to be served is known.<sup>66</sup> In such cases, the Hague Convention’s procedures become available alternatives.<sup>67</sup> Just as service by publication was considered constitutionally insufficient in *Mullane* when service by mail was an option,<sup>68</sup> substituted service on a state official with no obligation to send the service to the defendant is constitutionally insufficient when using the Convention is an option.<sup>69</sup> In sum, substituted service on a state official would seem to satisfy due process only if the plaintiff or the state official is required to send a copy of the service to the defendant abroad. That constitutional obligation makes the Hague Convention applicable.

There is, however, a possible wrinkle in this analysis. Foreign corporations are often required by state law to register to do business in the state and to appoint and maintain an agent for service of process.<sup>70</sup> When a foreign corporation fails to appoint or maintain an agent for service, one might argue that the foreign corporation is to blame for its failure to receive notice. The Supreme

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62. *Schlunk*, 486 U.S. at 707.

63. *Id.* at 708.

64. *See id.* at 707-08.

65. *See Quinn v. Keinicke*, 700 A.2d 147, 154 (Del. Super. Ct. 1996) (“It is obvious that merely serving the Secretary of State, without the necessary mailing to the nonresident defendant, will not apprise the defendant of the pendency of the action.”).

66. Hague Service Convention, *supra* note 6, art. 1 (“This Convention shall not apply where the address of the person to be served with the document is not known.”).

67. *See id.*

68. *See supra* note 58 and accompanying text.

69. *See Quinn*, 700 A.2d at 154.

70. *See infra* note 116 and accompanying text.

Court embraced such an argument in *Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court*, a pre-*Mullane* case, upholding the constitutionality of substituted service on a state official who did not give notice to the defendant, a foreign corporation that had registered to do business in the state of Washington and then withdrawn.<sup>71</sup> The Court reasoned:

By appointing a new agent when [its registered agent] ceased to be a resident of the State the appellant could have assured itself of notice of any action. The statute informed the company that if it elected not to appoint a successor ... the Secretary of State would by law become its agent for the purpose of service. The burden lay upon the appellant to make such arrangement for notice as was thought desirable. There is no denial of due process in the omission to require the corporation's agent to give it such notice.<sup>72</sup>

As described in Part IV, some states today—Maryland, New Mexico, and New York—distinguish between registered foreign corporations that are required to appoint an agent for service and unregistered foreign corporations that are not, providing that sending a copy of the process to the defendant is not required to complete service in the case of registered corporations.<sup>73</sup>

But it is doubtful that *Bond & Goodwin & Tucker* remains good law and that the distinction that these states draw between registered and unregistered corporations is constitutional. First, the Supreme Court has repeatedly rejected the argument, on which that decision rests, that no due process violation occurs if the defendant could have protected itself by making other arrangements for notice.<sup>74</sup> Second, the case was decided before *Mullane*, which held

71. 289 U.S. 361, 366 (1933).

72. *Id.* at 365.

73. See *infra* notes 169-78, 185-91 and accompanying text. In fact, the New Mexico Supreme Court relied on *Bond & Goodwin & Tucker* to hold that service on a corporation authorized to do business was effective despite the Secretary of State's failure to send the defendant a copy of the process. *Silva v. Crombie & Co.*, 44 P.2d 719, 720-21 (N.M. 1935). The Maryland Court of Special Appeals in turn relied on *Silva* to hold that due process did not require the state official to send a copy of the process to a foreign corporation required to maintain an agent in order for service to be effective. *Rhema, LLC v. Foresite, LLC*, No. 1274, 2015 WL 6951145, at \*7-9 (Md. Ct. Spec. App. Nov. 10, 2015).

74. *Jones v. Flowers*, 547 U.S. 220, 232 (2006) (“The Commissioner does not argue that

the constitutional adequacy of notice must be determined by considering the available alternatives.<sup>75</sup> The fact that a foreign corporation has failed to maintain a required agent in the state does not make service through the Hague Convention any more difficult or any less of an alternative. And, as noted above, when the defendant's address is known and the Convention's procedures are available, service on a state official not obligated to transmit that service to the defendant becomes as unreasonable as service by publication was in *Mullane*.<sup>76</sup>

### III. SUBSTITUTED SERVICE ON AFFILIATED COMPANIES

In *Schlunk*, Illinois courts held that the plaintiff could effectuate service on a foreign corporation by serving its domestic subsidiary even though the foreign corporation had not appointed the subsidiary as its agent for service.<sup>77</sup> As summarized in Table 1 below, courts in twenty-four states have considered whether an affiliated company may be used as an involuntary agent for service of process.<sup>78</sup> In three states, courts have rejected the possibility. In twenty-one states, courts permit substituted service on affiliated companies, but they have adopted different standards. Courts in eighteen states use some version of a veil-piercing test. But courts in three states—California, Illinois, and Massachusetts—have followed a more liberal approach focusing on whether substituted service on an affiliated company is likely to provide notice to the defendant.<sup>79</sup> This Part argues that the more liberal approach is the better one.

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Jones' failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree."); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) (noting that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation").

75. See *supra* notes 55-58 and accompanying text.

76. See *supra* notes 65-69 and accompanying text.

77. *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 503 N.E.2d 1045, 1054 (Ill. App. Ct. 1986).

78. The table includes decisions by federal courts because the federal courts were applying state law. However, when the classification relied solely on federal court decisions, that fact is noted with an "FC."

79. See *infra* notes 91-108 and accompanying text.

Table 1. Substituted Service on Affiliates

	Permitted (Veil Piercing)	Permitted (Notice)	Rejected	Not Addressed
Alabama	X			
Alaska				X
Arizona				X
Arkansas				X
California		X		
Colorado				X
Connecticut				X
Delaware	X			
Florida	X			
Georgia			X	
Hawaii				X
Idaho				X
Illinois		X		
Indiana	X			
Iowa				X
Kansas	X			
Kentucky				X
Louisiana				X
Maine				X
Maryland	FC			
Massachusetts		X		
Michigan			FC	
Minnesota	X			
Mississippi	X			
Missouri				X
Montana				X
Nebraska	FC			
Nevada				X
New Hampshire				X
New Jersey			X	
New Mexico	X			
New York	X			
North Carolina				X

North Dakota				X
Ohio				X
Oklahoma	FC			
Oregon				X
Pennsylvania	X			
Rhode Island				X
South Carolina				X
South Dakota				X
Tennessee				X
Texas	X			
Utah				X
Vermont				X
Virginia	FC			
Washington	X			
West Virginia	X			
Wisconsin	X			
Wyoming				X

The twenty-four states in which courts have considered whether an affiliated company may be used as an involuntary agent for service of process may be divided into three groups. In the first group are three states where courts have rejected the possibility: state courts in Georgia<sup>80</sup> and New Jersey,<sup>81</sup> and federal courts in Michigan.<sup>82</sup>

In the second group are eighteen states in which courts have accepted the possibility of substituted service on affiliated companies but have limited such service to cases in which there are grounds for piercing the corporate veil. This group includes state courts in Alabama, Delaware, Florida, Indiana, Kansas, Minnesota, Mississippi,

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80. *Rovema Verpackungsmaschinen v. Deloach*, 500 S.E.2d 647, 649 (Ga. Ct. App. 1998) (“Neither Georgia’s general service of process statute (OCGA § 9-11-4) nor the corporate service statute (OCGA § 14-2-504) authorizes service on an agent of a domestic subsidiary as constituting proper service on the foreign parent corporation.”).

81. *Gapanovich v. Komori Corp.*, 605 A.2d 1120, 1123 (N.J. Super. Ct. App. Div. 1992) (“In New Jersey, such service is not effective.”).

82. *Lafarge Corp. v. Altech Env’t USA*, 220 F. Supp. 2d 823, 832 (E.D. Mich. 2002) (“No provision within [Michigan] Rule 105 allows service on a parent corporation to be achieved by delivery of process to its subsidiary.”); *see also Mich. Motor Techs. LLC v. Volkswagen Aktiengesellschaft*, No. 19-10485, 2020 WL 3893038, at \*8-9 (E.D. Mich. July 10, 2020) (quoting *Lafarge*, 220 F. Supp. 2d at 832).

New Mexico, New York, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin as well as federal courts in Maryland, Nebraska, Oklahoma, and Virginia.<sup>83</sup> The standards for piercing the corporate veil vary from state to state.<sup>84</sup> To decide whether an affiliated company may be used as an involuntary agent for service of process, some of these states ask whether the parent company exercises such control that its subsidiary “operates merely as a department of the parent corporation”<sup>85</sup> or that the subsidiary’s activities “were in fact the activities of the parent.”<sup>86</sup> Others consider whether the subsidiary is the “alter ego” of the parent<sup>87</sup> or whether other reasons exist to pierce the corporate veil.<sup>88</sup>

Some of the courts that have followed a veil-piercing approach have relied on the U.S. Supreme Court’s decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, which held that “use of a subsidiary does not necessarily subject the parent corporation to the

83. See *infra* notes 85-88 and accompanying text.

84. See generally STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL 101-1007 (2020-21 ed.) (discussing all fifty states’ laws for piercing the corporate veil). Procedural differences among the states, such as pleading standards, threshold presumptions, and burdens of proof, may also make a difference in the successfulness of veil piercing. See Sam F. Halabi, *Veil-Piercing’s Procedure*, 67 RUTGERS U. L. REV. 1001 (2015). Empirical studies have also found substantial variation in veil piercing from state to state. See Peter B. Oh, *Veil-Piercing*, 89 TEX. L. REV. 81, 115-16 tbl.6 (2010); Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1051 tbl.6 (1991).

85. *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d 880, 884 (Ala. 1983) (quoting *Pro. Invs. Life Ins. Co. v. Roussel*, 445 F. Supp. 687, 698 (D. Kan. 1978)); *accord Racusin v. Monteco, Inc.*, No. 01-95-00271-CV, 1996 WL 443730, at \*4 (Tex. Ct. App. Aug. 8, 1996); *Stoehr v. Am. Honda Motor Co.*, 429 F. Supp. 763, 766 (D. Neb. 1977); *Farha v. Signal Cos.*, 532 P.2d 1330, 1338 (Kan. 1975); *Taca Int’l Airlines, S.A. v. Rolls-Royce of Eng., Ltd.*, 204 N.E.2d 329, 331 (N.Y. 1965).

86. *Aquila Steel Corp. v. Fontana*, 585 So. 2d 426, 427 (Fla. Dist. Ct. App. 1991) (quoting *Volkswagenwerk Atkiengelselischaf v. McCurdy*, 340 So. 2d 544, 546 (Fla. Dist. Ct. App. 1976)); *accord Norfolk S. Ry. Co. v. Maynard*, 437 S.E.2d 277, 283 (W. Va. 1993); *Gen. Fin. Corp. v. Skinner*, 426 N.E.2d 77, 84 (Ind. Ct. App. 1981); *Brooks v. Int’l Brotherhood of Boilermakers*, 114 N.W.2d 647, 654 (Minn. 1962).

87. *Tanfield Eng’g Sys., Inc. v. Thornton*, 97 So. 3d 694, 699 (Miss. 2012); *Cruttenden v. Mantura*, 640 P.2d 932, 934-35 (N.M. 1982); *Rothchild Int’l Corp. v. Liggett Grp., Inc.*, No. 6239, 1981 WL 7624, at \*4 (Del. Ch. July 14, 1981); *Del. Valley Surgical Supply Co. v. Geriatric & Med. Ctrs., Inc.*, 299 A.2d 237, 239 (Pa. 1973).

88. *Conservatorship of Prom v. Sumitomo Rubber Indus., Ltd.*, 592 N.W.2d 657, 665 (Wis. Ct. App. 1999); *State v. Nw. Magnesite Co.*, 182 P.2d 643, 664 (Wash. 1947); see also *Sanyal v. Toyota Motor Corp.*, No. 14-cv-906, 2014 WL 4925842, at \*2 (E.D. Va. Sept. 30, 2014); *Corraro v. Moody Int’l*, No. 11-CV-0455, 2012 WL 3061476, at \*3 (N.D. Okla. July 26, 2012); *Haley Paint Co. v. E.I. Dupont De Nemours & Co.*, 775 F. Supp. 2d 790, 795 (D. Md. 2011).

jurisdiction.”<sup>89</sup> This is ironic. *Cannon* was careful to distinguish veil piercing in the context of personal jurisdiction from questions of service and substantive liability.<sup>90</sup> But the eighteen veil-piercing states seem to assume that the test for piercing the corporate veil should be the same no matter whether the question is substantive liability, jurisdiction, or service of process.

Courts in three states have followed a more liberal approach to substituted service on affiliated companies. One of these states is Illinois, whose courts held in *Schlunk* that a domestic subsidiary could be used to serve a foreign corporation, thereby avoiding the Hague Service Convention.<sup>91</sup> In concluding that Volkswagen of America (VWoA) could be treated as an agent for serving its parent Volkswagen AG (VWAG), the Illinois Court of Appeals relied on a number of factors, including that the subsidiary was wholly owned by the parent, that it existed to promote sales of the parent’s products, that the parent extensively controlled the subsidiary’s activities, and that the parent dominated the subsidiary’s board of directors.<sup>92</sup> The court concluded that “the relationship between VWAG and VWoA is so close that it is certain that VWAG ‘was fully apprised of the pendency of the action’ by delivery of the summons to VWoA.”<sup>93</sup>

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89. 267 U.S. 333, 336 (1925); see, e.g., *Norfolk S. Ry. Co.*, 437 S.E.2d at 283 (citing *Cannon*, 267 U.S. at 336); *Ex parte Volkswagenwerk Aktiengesellschaft*, 443 So. 2d at 884 (same); *Stoehr*, 429 F. Supp. at 766 (same); *Nw. Magnesite Co.*, 182 P.2d at 664 (same). On the influence of *Cannon* today, see John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445 (2004).

90. *Cannon* noted that “[t]he objection to the maintenance of the suit is not procedural—as where it is sought to defeat a suit against a foreign corporation on the ground that process has been served upon one not authorized to act as its agent.” 267 U.S. at 335. Rather, “[t]he question is simply whether the corporate separation carefully maintained must be ignored in determining the existence of jurisdiction.” *Id.* at 336. The Court also distinguished cases involving substantive liability on the ground that there was “no attempt to hold the defendant liable for an act or omission of its subsidiary or to enforce as against the latter a liability of the defendant.” *Id.* at 337.

91. *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 503 N.E.2d 1045, 1053-54 (Ill. App. Ct. 1986), *aff’d*, 486 U.S. 694 (1988); see *supra* note 60 and accompanying text.

92. *Schlunk*, 503 N.E.2d at 1053. Subsequent decisions have multiplied the number of factors. See, e.g., *Chung v. Tarom, S.A.*, 990 F. Supp. 581, 584 (N.D. Ill. 1998) (listing thirteen factors); *Wissmiller v. Lincoln Trail Motosports, Inc.*, 552 N.E.2d 295, 298 (Ill. App. Ct. 1990) (listing seven factors).

93. *Schlunk*, 503 N.E.2d at 1053 (quoting *Maunder v. DeHavilland Aircraft of Can.*, 466 N.E.2d 217, 233 (Ill. 1984)).

The Illinois court in *Schlunk* distinguished its approach from veil-piercing states that “have looked to whether a subsidiary is an alter-ego or mere department of its parent.”<sup>94</sup> And a subsequent decision confirmed that, for service under Illinois law, “it is not necessary that a parent’s control of a subsidiary be so pervasive as to make the two corporations essentially one, or to make the subsidiary an alter ego or a mere department of the parent.”<sup>95</sup>

Courts in Massachusetts have also asked whether service on the subsidiary will provide notice to the parent. The Massachusetts Rules of Civil Procedure authorize service within the Commonwealth upon a foreign corporation by delivering the summons and complaint “to a managing or general agent.”<sup>96</sup> In *Heffernan v. Robeco Investment Management, Inc.*, the Superior Court read this provision to require “a sufficiently close relationship between a United States entity and a foreign entity such that service upon the United States agent is sufficient to provide notice to the foreign defendant.”<sup>97</sup> After noting that “[a] mere parent-subsidiary relationship is not sufficient,” the court listed factors to consider, including:

whether the resident entity performs all the functions for the foreign entity that the foreign entity would if it were doing business in the state by its own officials, the extent of common ownership and common officers, and generally the extent to which the foreign entity operates in the forum through the resident entity.<sup>98</sup>

Because there was “a close relationship,” the court found that service on the parent by service on the subsidiary was proper and that the Hague Service Convention did not apply.<sup>99</sup>

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94. *Id.* at 1054.

95. *Wissmiller*, 552 N.E.2d at 298.

96. MASS. R. CIV. P. 4(d)(2).

97. No. 07-2116-BLS2, 2007 WL 3244422, at \*10 (Mass. Sup. Ct. Oct. 25, 2007) (quoting *Sankaran v. Club Mediterranee, S.A.*, No. 97 Civ. 8318, 1998 WL 433780, at \*5 (S.D.N.Y. July 31, 1998)).

98. *Id.* The court noted that “[t]he factual determination that is necessary for this purpose is closely related to the factual determination that governs personal jurisdiction.” *Id.*

99. *Id.* In *Sionyx, LLC v. Hamamatsu Photonics K.K.*, the district court applied the test articulated in *Heffernan*, concluding that there was not a sufficiently close relationship and that service under the Hague Convention was required. No. 15-13488, 2016 WL 4007558, at \*5-7 (D. Mass. July 26, 2016). The court rejected the argument that only actual notice was

In California, service on a foreign corporation may be made by delivery of process to “its general manager in this state.”<sup>100</sup> In *Cosper v. Smith & Wesson Arms Co.*, the California Supreme Court interpreted a predecessor provision of the California Corporations Code to provide that a nonexclusive sales agent qualified as a “general manager in this State” for service of process.<sup>101</sup> The court noted that “every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made,’ and by service on such an agent, ‘the requirement of the statute is answered.”<sup>102</sup> The court concluded that the sales representative “would have ample regular contact with Smith & Wesson and would be of ‘sufficient character and rank to make it reasonably certain’ that Smith & Wesson would be apprised of the service of process.”<sup>103</sup> More recently, in *Yamaha Motor Co. v. Superior Court*, the California Court of Appeal applied *Cosper* to hold that a foreign corporation’s U.S. subsidiary and exclusive distributor was its “general manager” for service of process, noting that it was “doubly reasonably certain Yamaha-America will apprise Yamaha-Japan of any service in California.”<sup>104</sup> Because California law permitted substituted service on a domestic subsidiary, the court concluded that the Hague Service Convention did not apply.<sup>105</sup>

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required, reasoning that “if actual notice were sufficient, every domestic subsidiary would be a managing or general agent of its foreign parent.” *Id.* at \*7.

100. CAL. CORP. CODE § 2110 (West 2021).

101. 346 P.2d 409, 413-14 (Cal. 1959).

102. *Id.* at 413 (quoting *Eclipse Fuel Eng’g Co. v. Superior Ct.*, 307 P.2d 739, 745 (Cal. Ct. App. 1957)).

103. *Id.* at 413-14 (quoting *Eclipse Fuel*, 307 P.2d at 745).

104. 94 Cal. Rptr. 3d 494, 501 (Ct. App. 2009). The Court of Appeal questioned whether *Cosper* was correctly decided: “The phrase ‘general manager in this state’ implies a real presence in the state of a person who has some real control over the corporation being served.” *Id.* at 502. But the court concluded that it was bound by *stare decisis* to follow *Cosper*. *Id.*

105. *Id.* at 498-99; see also *Sweikhart v. Akebono Brake Indus. Co.*, B305065, 2021 WL 193311, at \*3 (Cal. Ct. App. Jan. 20, 2021) (holding that substituted service on a domestic subsidiary was proper under California law and that the Hague Service Convention did not apply). Federal courts have repeatedly applied *Yamaha* to hold that substituted service on an affiliated company was proper under California law and that the Hague Service Convention did not apply. See, e.g., *Xun v. Daimler AG*, No. 19-CV-02405, 2020 WL 6784526, at \*1-2 (C.D. Cal. Sept. 3, 2020).

California’s test for substituted service is more liberal than Illinois’s or Massachusetts’s. California’s test can be satisfied by a nonexclusive agent, whereas Illinois and Massachusetts look for indications of common ownership and control. But all three states focus on the same question—whether service on the affiliated company is reasonably certain to provide notice to the defendant. Illinois requires a relationship “so close that it is certain that [the defendant] ‘was fully apprised of the pendency of the action.’”<sup>106</sup> Massachusetts requires “a sufficiently close relationship between a United States entity and a foreign entity such that service upon the United States agent is sufficient to provide notice to the foreign defendant.”<sup>107</sup> And California holds that “every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.”<sup>108</sup> Given the purposes of service of process, this is the right question.

The test for whether an affiliated company is an agent for service of process need not be the same as the tests for whether an affiliated company is an agent for jurisdiction or for substantive liability. In *Daimler AG v. Bauman*, the Supreme Court noted that “[a]gencies ... come in many sizes and shapes: ‘One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.’”<sup>109</sup> In the context of personal jurisdiction, *Daimler* even suggested that the agency test might be different for specific jurisdiction than for general jurisdiction.<sup>110</sup> And some courts apply a “less stringent” veil-piercing test for personal jurisdiction than for substantive liability.<sup>111</sup>

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106. *Schlunk v. Volkswagenwerk Aktiengesellschaft*, 503 N.E.2d 1045, 1053 (Ill. App. Ct. 1986) (quoting *Maunder v. DeHavilland Aircraft of Can.*, 466 N.E.2d 217, 233 (Ill. App. Ct. 1984)).

107. *Heffernan v. Robeco Inv. Mgmt., Inc.*, No. 07-2116-BLS2, 2007 WL 3244422, at \*10 (Mass. Super. Ct. Oct. 25, 2007) (quoting *Sankaran v. Club Mediterranee, S.A.*, No. 97 Civ. 8318, 1998 WL 433780, at \*5 (S.D.N.Y. July 31, 1998)).

108. *Cosper*, 346 P.2d at 413 (quoting *Eclipse Fuel*, 307 P.2d at 745).

109. 571 U.S. 117, 135 (2014) (quoting 2A C. J. S., Agency § 43 (2013)).

110. *Id.* at 135 n.13.

111. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 546 (5th Cir. 2014) (quoting *Stuart v. Spademan*, 772 F.2d 1185, 1198 n.2 (5th Cir. 1985)); see also BERMANN ET AL., *supra* note 6, at 58-62 (discussing jurisdictional veil piercing).

Whether an affiliated company should be deemed an involuntary agent for service of process should not turn on factors relating to substantive liability or personal jurisdiction but rather on factors relating to service. As discussed above in Part II, the key question with respect to service is whether notice is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>112</sup> That is the approach that California, Illinois, and Massachusetts have taken.<sup>113</sup>

Allowing substituted service on affiliated companies does not undermine the Hague Service Convention. As noted above, the Convention aims to ensure that documents to be served are “brought to the notice of the addressee in sufficient time.”<sup>114</sup> When this requires the transmission of documents abroad, the Convention provides a “simpl[e] and expedit[ed]” procedure.<sup>115</sup> But when service on an affiliated company within the forum state will provide notice to the defendant, it is not necessary to require compliance with the Convention’s procedures in order to accomplish the Convention’s goals.

#### IV. SUBSTITUTED SERVICE ON STATE OFFICIALS

State laws permitting substituted service on state officials are more widespread than state laws permitting substituted service on affiliated companies. They are also more problematic. Many of these statutes expressly require that the state official or the plaintiff send a copy of the service to the defendant, and courts typically interpret such requirements as making the Hague Service Convention applicable. But some courts have held that service is complete when the state official is served. Moreover, some statutes do not expressly require transmittal to the defendant. Such statutes represent an American version of the system of *notification au parquet* that the

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112. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)).

113. It may well be that service on a nonexclusive sales agent, as in *Cosper*, would not meet this standard. But service on a wholly owned subsidiary of a foreign company, as in *Yamaha*, *Schlunk*, and *Heffernan*, typically would.

114. Hague Service Convention, *supra* note 6, pmbl.

115. *Id.*

Hague Convention's drafters wanted to abolish. They also raise serious problems under the Due Process Clauses of the U.S. Constitution. Before considering those problems, however, it is necessary to survey the statutory landscape.

### *A. The Statutory Landscape*

Every state permits substituted service on state officials in at least some circumstances. As summarized in Table 2 below, forty states permit substituted service on foreign corporations that are registered or authorized to do business in the state (the terminology varies), typically when the corporation withdraws from the state, has its registration revoked, or when the appointed agent cannot be found and served. Seventeen states permit substituted service on unregistered foreign corporations doing business in the state. And twenty states have provisions in their long-arm statutes or rules of procedure that permit substituted service on unregistered corporations, registered corporations, or both.

Finally, every state permits substituted service on nonresident motorists and/or specific businesses ranging from agents for college athletes to snowmobile operators. Typically, the provisions for registered and unregistered corporations, as well as the long-arm statutes, include an express requirement that the state official send a copy of the service to the defendant. The provisions dealing with nonresident motorists and specific business are less consistent.

Table 2. Substituted Service on State Officials

	Registered Corporations	Unregistered Corporations	Long-Arm Statutes	Motorists or Particular Businesses
Alabama		X		X
Alaska	X			X
Arizona	X			X
Arkansas	X		X	X
California	X			X
Colorado				X
Connecticut	X			X
Delaware	X	X		X
Florida	X	X	X	X
Georgia	X		X	X
Hawaii	X			X
Idaho				X
Illinois	X	X		X
Indiana	X			X
Iowa	X		X	X
Kansas	X		X	X
Kentucky	X		X	X
Louisiana	X		X	X
Maine	X			X
Maryland			X	X
Massachusetts	X	X		X
Michigan			X	X
Minnesota	X	X		X
Mississippi	X			X
Missouri	X			X
Montana	X		X	X
Nebraska				X
Nevada			X	X
New Hampshire	X		X	X
New Jersey	X		X	X
New Mexico	X		X	X

New York	X	X		X
North Carolina	X			X
North Dakota	X	X		X
Ohio	X	X		X
Oklahoma	X	X	X	X
Oregon	X	X		X
Pennsylvania				X
Rhode Island	X	X		X
South Carolina	X		X	X
South Dakota	X			X
Tennessee	X	X		X
Texas	X	X	X	X
Utah				X
Vermont	X	X	X	X
Virginia	X	X	X	X
Washington	X			X
West Virginia	X	X	X	X
Wisconsin				X
Wyoming	X			X

Registered foreign corporations are often covered by statutes permitting substituted service on state officials. All fifty states require foreign corporations doing business in the state to register with the secretary of state or some other state official.<sup>116</sup> When such corporations register, they must appoint an agent for service of process.<sup>117</sup> Many states permit substituted service on the secretary of state or another state official when a foreign corporation's registration is withdrawn or revoked.<sup>118</sup> Some states additionally

116. See Benish, *supra* note 12, at 1647-61 (listing registration statutes in all fifty states).

117. See *id.* at 1625 & n.103, 1647-61 (noting all fifty states require appointment of an agent for service of process).

118. ALASKA STAT. § 10.06.765 (2021) (revocation); *id.* § 10.06.780(4) (withdrawal); ARIZ. REV. STAT. ANN. § 10-1520(G) (2021) (withdrawal); *id.* § 10-1531(D) (revocation); ARK. CODE ANN. § 4-27-1520(c) (2021) (withdrawal); *id.* § 4-27-1531(d) (revocation); CAL. CORP. CODE § 2114(b) (West 2021) (surrender); CONN. GEN. STAT. § 33-932(c) (2021) (withdrawal); *id.* § 33-936(d) (revocation); DEL. CODE ANN. tit. 8, § 381(c) (2021) (withdrawal); FLA. STAT. § 607.1520(2) (2021) (withdrawal); GA. CODE ANN. § 14-2-1520(c) (2021) (withdrawal); *id.* § 14-

provide for substituted service on state officials if the registered foreign corporation fails to appoint an agent or if that agent cannot be found or served.<sup>119</sup> The widely adopted ABA Model Business Corporation Act (MBCA) seems to be responsible for these provisions in many states, particularly the provisions dealing with withdrawal and revocation.<sup>120</sup> But some states have adopted the

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2-1531(d) (revocation); HAW. REV. STAT. § 414-451(b)(3) (2021) (withdrawal); 805 ILL. COMP. STAT. 5/13.45(a)(3) (2021) (withdrawal); *id.* 5/5.25(b)(5) (revocation and withdrawal); IND. CODE § 23-0.5-5-11(e) (2021) (revocation); IOWA CODE § 490.1520(3) (2021) (withdrawal); *id.* § 490.1531(4) (revocation); KY. REV. STAT. ANN. § 14A.9-060(4) (West 2021) (withdrawal); *id.* § 14A.9-080 (revocation); LA. STAT. ANN. § 12:312(A)(4) (2021) (withdrawal); ME. REV. STAT. ANN. tit. 13-C, § 1521(2)(C) (West 2021) (withdrawal); *id.* § 1532(4) (revocation); MASS. GEN. LAWS ch. 156D, § 15.20(c) (2021) (withdrawal); MINN. STAT. § 5.25(4)(a) (2021) (withdrawal and revocation); MISS. CODE ANN. § 79-4-15.20(c) (2021) (withdrawal); *id.* § 79-4-15.31(d) (revocation); MO. REV. STAT. § 351.596(3) (2021) (withdrawal); MONT. CODE ANN. § 35-14-504(3) (2021) (withdrawal and termination); N.H. REV. STAT. ANN. § 293-A:15.20(c) (2021) (withdrawal); N.J. STAT. ANN. § 14A:13-8(2)(c) (West 2021) (withdrawal); *id.* 14A:13-10(4) (revocation); N.M. STAT. ANN. § 53-17-15(A)(4) (2021) (withdrawal); N.Y. BUS. CORP. LAW § 1303 (McKinney 2021) (annulment); *id.* § 1310 (surrender); N.C. GEN. STAT. § 55D-33(b) (2021) (withdrawal); *id.* § 55-15-20(c) (revocation); N.D. CENT. CODE § 10-19.1-140(1)(d) (2021) (withdrawal); OHIO REV. CODE ANN. § 1703.19 (LexisNexis 2021) (cancellation); OKLA. STAT. ANN. tit. 18, § 1135(C) (West 2021) (withdrawal); OR. REV. STAT. § 60.731(2)(b) & (d) (2021) (revocation and withdrawal); 7 R.I. GEN. LAWS § 7-1.2-1410(b) (2021) (revocation); *id.* 7-1.2-1412(a)(4) (withdrawal); S.C. CODE ANN. § 33-15-200 (2021) (withdrawal); *id.* § 33-15-310(e) (revocation); S.D. CODIFIED LAWS § 47-1A-1531.1 (2021) (revocation); TENN. CODE ANN. § 48-15-104(b) (2021) (withdrawal and revocation); TEX. BUS. ORGS. CODE ANN. § 5.251(2)(A) (West 2021) (revocation); *id.* § 9.011(b)(5)(B) (withdrawal); VT. STAT. ANN. tit. 11A, § 15.20 (2021) (withdrawal); *id.* § 15.30(d) (revocation); VA. CODE ANN. § 13.1-767(A)(4) (2021) (withdrawal); *id.* § 13.1-769(E) (revocation); WASH. REV. CODE §§ 23.95.530(3) & 23.95.450(4) (2021) (withdrawal); W. VA. CODE § 31D-15-1520(c) (2021) (withdrawal) & § 31D-15-1531(d) (revocation); WYO. STAT. ANN. § 17-16-1520(c) (2021) (withdrawal); *id.* § 17-16-1531(d) (revocation).

119. ALASKA STAT. § 10.06.175(b) (2021); ARIZ. REV. STAT. ANN. § 10-1510(B) (2021); CAL. CORP. CODE § 2111(a) (West 2021); DEL. CODE ANN. tit. 8, § 376(b) (2021); 805 ILL. COMP. STAT. 5/5.25(b)(1)-(2) (2021); KAN. STAT. ANN. § 17-7931(g) (2021); LA. STAT. ANN. § 12:1-504(B) (2021); MASS. GEN. LAWS ch. 156D, § 15.10(b) (2021); MINN. STAT. § 5.25(4)(a) (2021); MO. REV. STAT. § 351.380 (2021); MONT. CODE ANN. § 35-14-504(2) (2021); N.Y. BUS. CORP. LAW § 304(a) (McKinney 2021); N.C. GEN. STAT. § 55D-33(b) (2021); N.D. CENT. CODE § 10-01.1-13(3)(c)-(d) (2021); OHIO REV. CODE ANN. § 1703.19 (LexisNexis 2021); OR. REV. STAT. § 60.731(2)(a) (2021); 7 R.I. GEN. LAWS § 7-1.2-1410(b) (2021); TENN. CODE ANN. § 48-15-104(b) (2021); TEX. BUS. ORGS. CODE ANN. § 5.251(1) (West 2021); VA. CODE ANN. § 13.1-766(B) (2021); WASH. REV. CODE § 23.95.450(4) (2021); W. VA. CODE § 31D-15-1510(d) (2021).

120. According to the ABA, thirty-four states have enacted a version of the MBCA. See Corp. Laws Comm., *MBCA Enactment Map*, AM. BAR ASS'N, [https://www.americanbar.org/groups/business\\_law/committees/corplaws/](https://www.americanbar.org/groups/business_law/committees/corplaws/) [https://perma.cc/V3FF-V7EY]. The 2010 MBCA and earlier versions provided for substituted service on the secretary of state in cases of withdrawal and revocation. MODEL BUS. CORP. ACT §§ 15.20(c), 15.31(d) (2010) (AM. BAR

MBCA without providing for substituted service,<sup>121</sup> whereas others have provided for substituted service without adopting the MBCA.<sup>122</sup> The state statutes permitting substituted service on registered corporations are summarized in Table 3.

Table 3. Substituted Service on Registered Corporations

	Withdrawal	Revocation	Agent Cannot Be Served	Obligation to Send
Alaska	X	X	X	X
Arizona	X	X	X	X
Arkansas	X	X		X
California	X	X	X	X
Connecticut	X	X		X
Delaware	X		X	X
Florida	X			X
Georgia	X	X		X
Hawaii	X			X
Illinois		X	X	X
Indiana		X		X
Iowa	X	X		X
Kansas			X	X
Kentucky	X	X		X
Louisiana	X		X	
Maine	X	X		X
Massachusetts	X		X	X
Minnesota	X	X		X
Mississippi	X	X	X	X
Missouri	X		X	X
Montana	X	X	X	X

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ASS'N). But these earlier versions did not provide for substituted service when the foreign corporation's agent could not be served. The 2016 MBCA now provides for substituted service on the secretary of state when the foreign corporation's agent cannot be served, in addition to cases of withdrawal and termination. MODEL BUS. CORP. ACT § 5.04(c) (2016) (AM. BAR ASS'N). The 2016 MBCA has not yet been widely adopted. *See* Corp. Laws Comm., *supra*.

121. *See, e.g.*, COLO. REV. STAT. § 7-90-807(1)(b) (2021) (providing for service by mail on withdrawn foreign entity).

122. *See, e.g.*, CAL. CORP. CODE § 2114(b) (West 2021).

New Hampshire	X			X
New Jersey	X	X		X
New Mexico	X			
New York	X	X	X	X
North Carolina	X	X	X	X
North Dakota	X		X	X
Ohio		X	X	X
Oklahoma	X			X
Oregon	X	X	X	X
Rhode Island	X	X	X	X
South Carolina	X	X		X
South Dakota		X		X
Tennessee	X	X	X	X
Texas	X	X	X	X
Vermont	X	X		X
Virginia	X	X	X	X
Washington	X		X	
West Virginia	X	X	X	X
Wyoming	X	X		X

As shown in the far-right column of Table 3, most of the states that permit substituted service on state officials for registered corporations expressly require that either the plaintiff or the state official send a copy of the service to the defendant.<sup>123</sup> Only three

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123. ALASKA STAT. ANN. § 10.06.175(b) (2021) (plaintiff must send); ARIZ. REV. STAT. ANN. §§ 10-1510(B), 10-1520(G), 10-1531(D) (2021) (commission must send); ARK. CODE ANN. §§ 4-27-1520(c), 4-27-1531(d) (2021) (secretary of state must send); CAL. CORP. CODE § 2114(b) (West 2021) (“shall be sent”); CONN. GEN. STAT. § 33-929(b) (2021) (secretary of state must send); DEL. CODE ANN. tit. 8, §§ 376(b), 381(d) (2021) (secretary of state must send); FLA. STAT. § 48.161(1) (2021) (plaintiff must send); *id.* § 607.1520(2) (secretary must send); GA. CODE ANN. §§ 14-2-1520(c), 14-2-1531(d) (2021) (plaintiff must send); HAW. REV. STAT. § 414-451 (2021) (director must send); 805 ILL. COMP. STAT. 5/5.25(c)(2) (2021) (plaintiff must send); IND. CODE § 23-0.5-5-11(e) (2021) (secretary of state must send); IOWA CODE §§ 490.1520(3), 490.1531(4) (2021) (secretary of state must send); KAN. STAT. ANN. § 17-7931(g) (2021) (stating that secretary of state must send pursuant to KAN. STAT. ANN. § 60-304(f)); KY. REV. STAT. ANN. §§ 14A.9-060(4), 14A.9-080 (West 2021) (secretary of state must send); ME. REV. STAT. ANN. tit. 13-C, §§ 1521(3), 1532(4) (West 2021) (secretary of state must send); MASS. GEN. LAWS ch. 156D, §§ 15.10(d), 15.20(c) (2021) (secretary of state must send); MINN. STAT. § 5.25(4)(a) (2021) (secretary of state must send); MISS. CODE ANN. §§ 79-4-15.20(c), 79-4-15.31(d) (2021) (secretary of state must send); MO. REV. STAT. §§ 351.380, 351.596(3) (2021)

states do not. Louisiana's corporations code contains no express requirement to send a copy of the service to the defendant, although Louisiana's code of civil procedure does impose such a requirement.<sup>124</sup> Washington's corporations code also contains no express requirement, but it allows substituted service on the secretary of state for registered corporations only after service by mail has failed,<sup>125</sup> and service by mail would implicate the Hague Convention before substituted service is even permitted. Finally, New Mexico's corporations code requires that a withdrawing corporation provide an address to which the secretary of state may send a copy of the process but imposes no express obligation on the secretary to send the copy.<sup>126</sup> As discussed below, courts have interpreted even those provisions of New Mexico law that do expressly require the secretary of state to send a copy of the service to the defendant not to require compliance with the Hague Convention.<sup>127</sup> For New Mexico, the problem lies not in the text of its statutes but rather in their interpretation.

In addition to the provisions for registered foreign corporations, seventeen states permit substituted service on state officials for foreign corporations that do business in the state without registering.<sup>128</sup> Fourteen of these states expressly require the plaintiff or the

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(secretary of state must send); MONT. CODE ANN. § 35-14-504(2)-(3) (2021) (secretary of state must send); N.H. REV. STAT. ANN. § 293-A:15.20(c) (2021) (secretary of state must send); N.J. STAT. ANN. §§ 14A:13-8(2)(d), 14A:13-10(4) (West 2021) (secretary of state must send); N.Y. BUS. CORP. LAW § 306(b) (McKinney 2021) (secretary of state must send); N.C. GEN. STAT. §§ 55-15-20(c), 55D-33(b) (2021) (secretary of state must send); N.D. CENT. CODE § 10-01.1-13(6) (2021) (secretary of state must send); OHIO REV. CODE ANN. § 1703.19 (LexisNexis 2021) (secretary of state must send); OKLA. STAT. ANN. tit. 18, § 1135(C) (2021) (secretary of state must send); OR. REV. STAT. §§ 60.121(3), 60.731(3) (2021) (plaintiff must send); 7 R.I. GEN. LAWS § 7-1.2-1410(b) (2021) (secretary of state must send); S.C. CODE ANN. §§ 33-15-200, 33-15-310(e) (2021) (secretary of state must send); S.D. CODIFIED LAWS § 47-1A-1531.1 (2021) (secretary of state must send); TENN. CODE ANN. § 48-15-105(a) (2021) (secretary of state must send); TEX. BUS. ORGS. CODE ANN. § 5.253 (West 2021) (secretary of state must send); VT. STAT. ANN. tit. 11A, §§ 15.20(c), 15.30(d) (2021) (secretary of state must send); VA. CODE ANN. § 12.1-19.1 (2021) (clerk of state corporation commission must send); W. VA. CODE §§ 31D-15-1510(d), 1520(c), 1531(d) (2021) (secretary of state must send); WYO. STAT. ANN. §§ 17-16-1520(c), 1531(d) (2021) (secretary of state must send).

124. LA. CODE CIV. PROC. ANN. art. 1262 (2021).

125. WASH. REV. CODE § 23.95.450(4) (2021).

126. N.M. STAT. ANN. § 53-17-15(A)(5) (2021).

127. See *infra* notes 169-78 and accompanying text.

128. ALA. CODE § 10A-1-7.22 (2021); ALASKA STAT. § 10.06.765 (2021); CAL. CORP. CODE § 2111(a) (West 2021) (only if ordered by the court); FLA. STAT. § 607.1502(8) (2021); 805 ILL.

state official to send a copy of the service to the defendant.<sup>129</sup> Vermont does not, but it seems likely that Vermont's rules of procedure governing substituted service on the secretary of state would impose such an obligation.<sup>130</sup> In Rhode Island, the plaintiff must give the defendant only such notice of the substituted service as the court orders.<sup>131</sup> And Alabama's provision is simply silent.<sup>132</sup>

The provisions for registered and unregistered corporations discussed above are typically found in state corporations codes. But one can find more provisions on substituted service in state procedural rules. As summarized in Table 4, twenty states have long-arm statutes or rules of civil procedure authorizing substituted service on state officials for registered foreign corporations, unregistered foreign corporations, or both.<sup>133</sup>

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COMP. STAT. 5/5.30 (2021); MASS. GEN. LAWS ch. 156D, § 15.10(b) (2021); MINN. STAT. § 5.25(4)(b) (2021); N.Y. BUS. CORP. LAW § 307(a) (McKinney 2021); N.D. CENT. CODE § 10-01.1-13(3)(a) (2021); OHIO REV. CODE ANN. § 1703.191 (LexisNexis 2021); OKLA. STAT. tit. 18, § 1136(A) (2021); OR. REV. STAT. §§ 60.731(2)(c), (e) (2021); 7 R.I. GEN. LAWS § 7-1.2-1410(c) (2021); TENN. CODE ANN. § 48-15-104(b) (2021); TEX. BUS. ORGS. CODE ANN. § 5.251(2)(B) (West 2021); VT. STAT. ANN. tit. 11, § 1626 (2021); VA. CODE ANN. § 13.1-758(F) (2021); W. VA. CODE § 31D-15-1510(e) (2021).

129. ALASKA STAT. § 10.06.175(b) (2021) (plaintiff must send); CAL. CORP. CODE § 2111(b) (West 2021) (secretary of state must send); FLA. STAT. § 48.161(1) (2021) (plaintiff must send); 805 ILL. COMP. STAT. 5/5.25(c)(2) (2021) (plaintiff must send); IND. CODE § 34-33-3-1(b) (2021) (secretary of state must send pursuant to IND. R. CIV. P. 4.10(2)); MASS. GEN. LAWS ch. 156D, § 15.10(d) (2021) (secretary of state must send); MINN. STAT. § 5.25(6) (2021) (secretary of state must send); N.Y. BUS. CORP. LAW § 307 (McKinney 2021) (plaintiff must send); N.D. CENT. CODE § 10-01.1-13(6) (2021) (secretary of state must send); OHIO REV. CODE ANN. § 1703.191 (LexisNexis 2021) (secretary of state must send); OKLA. STAT. tit. 18, § 1136(A) (West 2021) (secretary of state must send); OR. REV. STAT. §§ 60.121(3), 60.731(3) (2021) (plaintiff must send); TENN. CODE ANN. § 48-15-105(a) (2021) (secretary of state must send); TEX. BUS. ORGS. CODE ANN. § 5.253 (West 2021) (secretary of state must send); VA. CODE ANN. § 12.1-19.1 (2021) (clerk of state corporation commission must send); W. VA. CODE § 31D-15-1510(e) (2021) (secretary of state must send).

130. VT. STAT. ANN. tit. 12, § 856 (2021).

131. 7 R.I. GEN. LAWS § 7-1.2-1410(c) (2021).

132. ALA. CODE § 10A-1-7.22 (2021). Alabama is also the only state to permit substituted service on unregistered foreign corporations but not service on registered foreign corporations. See *supra* Table 2; *supra* note 128 and accompanying text.

133. ARK. CODE ANN. § 16-58-120(b)(1) (2021); FLA. STAT. § 48.181(1) (2021); GA. CODE ANN. § 9-11-4(e)(1)(A) (2021) (for registered foreign corporations only); IOWA CODE § 617.3(2) (2021); KAN. STAT. ANN. § 60-304(f) (2021); KY. REV. STAT. ANN. § 454.210(3)(a)(3) (West 2021); LA. CODE CIV. PROC. ANN. art. 1262 (2021); MD. R. CIV. P. 2-124(o) (for foreign corporations required to have a registered agent); MICH. CT. R. 2.105(D)(4) (for foreign corporations who fail to appoint a resident agent); MONT. CODE ANN. § 25-20-4(j) (2021) (by order of the clerk of the court); NEV. REV. STAT. § 14.030(1) (2021); N.H. REV. STAT. ANN. § 510:4(II) (2021); N.J.

Table 4. Long-Arm Statutes and Procedural Rules

	<b>Registered Corporations</b>	<b>Unregistered Corporations</b>	<b>Obligation to Send</b>
Arkansas	X	X	X
Florida	X	X	X
Georgia	X		X
Iowa	X	X	X
Kansas	X		X
Kentucky	X	X	X
Louisiana	X	X	X
Maryland	X		
Michigan	X	X	X
Montana	X	X	X
Nevada			X
New Hampshire	X	X	X
New Jersey	X	X	X
New Mexico	X	X	X
Oklahoma	X	X	X
South Carolina		X	X
Texas	X	X	X
Vermont	X	X	X
Virginia	X	X	X
West Virginia	X	X	X

As shown in the far-right column, in nineteen of these states, the statutes or rules expressly require the plaintiff or the state official to send a copy of the service to the defendant.<sup>134</sup> Maryland is the

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STAT. ANN. § 2A:15-30.1(b) (West 2021); N.M. STAT. ANN. § 38-1-5 (2021) (foreign corporations authorized to transact business); *id.* § 38-1-6 (foreign corporations not authorized to transact business); OKLA. STAT. tit. 12, § 2004(c)(4) (2021) (after attempting service in person or by mail); S.C. CODE ANN. § 15-9-245(a) (2021) (foreign corporations not authorized to do business); TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (West 2021); VT. STAT. ANN. tit. 12, § 855 (2021); VA. CODE ANN. § 8.01-329(A) (2021); W. VA. CODE § 56-3-33(a) (2021).

134. ARK. CODE ANN. § 16-58-120(b)(4) (2021) (secretary of state must send); FLA. STAT. § 48.161(1) (2021) (secretary of state must send); GA. CODE ANN. § 9-11-4(e)(1)(A) (2021) (secretary of state must send); IOWA CODE § 617.3(3) (2021) (plaintiff must send); KAN. STAT. ANN. § 60-304(f) (2021) (secretary of state must send); KY. REV. STAT. ANN. § 454.210(3)(c) (West 2021) (secretary of state must send); LA. CODE CIV. PROC. ANN. art. 1262 (2021) (secretary of state must send); MICH. CT. R. 2.105(D)(4) (plaintiff must send); MONT. CODE

only state that does not,<sup>135</sup> and Maryland courts have interpreted the absence of such an express requirement to mean that service is complete when the state official is served, even if notice is never sent to the defendant.<sup>136</sup>

Finally, there are substituted service statutes for nonresident motorists and for specific kinds of businesses. In 1927, the U.S. Supreme Court upheld the constitutionality of substituted service for nonresident motorists in *Hess v. Pawloski*,<sup>137</sup> and it held the following year that such statutes must “make a reasonable provision” for communicating notice of the suit to the defendant.<sup>138</sup> Today, most states that permit substituted service for nonresident motorists expressly require that the plaintiff or the state official send a copy of the process to the defendant.<sup>139</sup> Nonresident motorist

ANN. § 25-20-4(j) (2021) (secretary of state must send); NEV. REV. STAT. § 14.030(4) (2021) (plaintiff must send); N.H. REV. STAT. ANN. § 510:4(II) (2021) (plaintiff must send); N.J. STAT. ANN. § 2A:15-30.1(c) (West 2021) (secretary of state must send); N.M. STAT. ANN. §§ 38-1-5 (2021) (secretary of state must send); OKLA. STAT. tit. 12, § 2004(C)(4)(d) (2021) (secretary of state must send); S.C. CODE ANN. § 15-9-245(b) (2021) (secretary of state must send); TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(b) (West 2021) (secretary of state must send); VT. STAT. ANN. tit. 12, § 856 (2021) (secretary of state or plaintiff must send); VA. CODE ANN. § 8.01-329(C)(2) (2021) (secretary of the commonwealth must send); W. VA. CODE § 56-3-33(c) (2021) (secretary of state must send).

135. MD. R. CIV. P. 2-124(o).

136. *Rhema, LLC v. Foresite, LLC*, No. 1274, 2015 WL 6951145, at \*7-9 (Md. Ct. Spec. App. Nov. 10, 2015) (holding in a domestic case that service on State Department of Assessment and Taxation under Rule 2-124(o) was sufficient without notice being sent to the defendant). For discussion of this decision’s implications for the applicability of the Hague Convention, see *infra* notes 185-86 and accompanying text.

137. 274 U.S. 352, 356-57 (1927).

138. *Wuchter v. Pizzutti*, 276 U.S. 13, 19 (1928).

139. ARK. CODE ANN. § 16-58-121(b) (2021) (plaintiff must send); CONN. GEN. STAT. § 52-63(b)-(c) (2021) (plaintiff must send); FLA. STAT. §§ 48.171, 48.161(1) (2021) (plaintiff must send); GA. CODE ANN. § 40-12-1, 40-12-2 (2021) (plaintiff must send); IDAHO CODE § 49-2421 (2021) (plaintiff must send); 625 ILL. COMP. STAT. 5/10-301(b) (2021) (plaintiff must send); KAN. STAT. ANN. § 8-401(b) (2021) (no obligation to send); KY. REV. STAT. ANN. § 188.020 (West 2021) (no obligation to send); LA. STAT. ANN. §§ 13:3474, 13:3475(A) (2021) (plaintiff must send); ME. REV. STAT. ANN. tit. 29-A, § 108(2) (West 2021) (plaintiff must send); MICH. COMP. LAWS § 257.403(a) (2021) (plaintiff must send); MISS. CODE ANN. § 13-3-63 (2021) (secretary of state must send); MO. REV. STAT. § 506.210(2) (2021) (no obligation to send); MONT. CODE ANN. § 25-3-602 (2021) (no obligation to send); N.J. STAT. ANN. § 39:7-2(b) (West 2021) (no obligation to send); N.M. STAT. ANN. § 66-5-103 (2021) (no obligation to send); N.Y. VEH. & TRAF. LAW § 253(2) (McKinney 2021) (plaintiff must send); N.C. GEN. STAT. § 1-105(2) (2021) (commissioner of motor vehicles or plaintiff must send); N.D. CENT. CODE § 39-01-11 (2021) (no obligation to send); OHIO REV. CODE ANN. § 2703.20 (2021) (plaintiff must send); 31 R.I. GEN. LAWS § 31-7-7(b) (2021) (plaintiff must send); S.C. CODE ANN. § 15-9-370 (2021) (plaintiff

statutes have figured in a number of cases against foreign-country defendants, and courts have held that any requirement that a copy of the process be sent to the defendant abroad makes the Hague Convention applicable.<sup>140</sup>

Every state has at least one statute permitting substituted service on specific kinds of businesses, but these statutes vary as to whether they require a copy of the process to be sent to the defendant. For example, twenty states have adopted the Uniform Securities Act, which provides for substituted service on state officials in civil actions but says that service is not effective unless the plaintiff sends a copy to the defendant.<sup>141</sup> By contrast, the Uniform Athlete Agents Act (UAAA) provides for substituted service on state officials without any obligation to forward a copy to the defendant.<sup>142</sup> Thirty-three states have adopted the UAAA with this provision intact,<sup>143</sup> but an additional five states have altered or omitted the

or director of department of motor vehicles must send); S.D. CODIFIED LAWS § 15-7-6 (2021) (no obligation to send); TENN. CODE ANN. § 20-2-203(b) (2021) (secretary of state must send); TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.062, 17.063(b) (West 2021) (chairman of Texas Transportation Commission must send); UTAH CODE ANN. § 41-12a-505(2) (LexisNexis 2021) (plaintiff must send); VT. STAT. ANN. tit. 12, §§ 891-92 (2021) (plaintiff must send); VA. CODE ANN. § 8.01-308 (2021) (no obligation to send); WASH. REV. CODE § 46.64.040 (2021) (plaintiff must send); W. VA. CODE § 56-3-31(d) (2021) (secretary of state must send); WIS. STAT. § 345.09(2) (2021) (secretary of transportation must send); WYO. STAT. ANN. § 1-6-301(a) (2021) (plaintiff must send).

140. *Howard v. Krull*, 438 F. Supp. 3d 711, 717 (E.D. La. 2020); *Larson v. Yoon*, 351 P.3d 167, 171 (Wash. Ct. App. 2015); *Heredia v. Transport S.A.S., Inc.*, 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000); *Quinn v. Keinicke*, 700 A.2d 147, 154 (Del. Super. Ct. 1996); *Curcuruto v. Cheshire*, 864 F. Supp. 1410, 1411 (S.D. Ga. 1994).

141. UNIF. SEC. ACT § 611 (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2002); *see* ALASKA STAT. § 45.56.650(3) (2021); GA. CODE ANN. § 10-5-80(c) (2021); HAW. REV. STAT. ANN. § 485A-610(c) (LexisNexis 2021); IDAHO CODE § 30-14-611(c) (2021); IND. CODE § 23-19-6-11(c) (2021); IOWA CODE § 502.611(3) (2021); KAN. STAT. ANN. § 17-12a611(c) (2021); ME. REV. STAT. ANN. tit. 32, § 16611(3) (West 2021); MICH. COMP. LAWS ANN. § 451.2611(3) (2021); MINN. STAT. § 80A.88(c) (2021); MISS. CODE ANN. § 75-71-611(c) (2021); MO. ANN. STAT. § 409.6-611(c) (West 2021); N.H. REV. STAT. ANN. § 421-B:6-611(c) (2021); N.M. STAT. ANN. § 58-13C-611(c) (2021); OKLA. STAT. ANN. tit. 71, § 1-611(c) (2021); S.C. CODE ANN. § 35-1-611(c) (2021); S.D. CODIFIED LAWS § 47-31B-611(c) (2021); VT. STAT. ANN. tit. 9, § 5611(c) (2021); WIS. STAT. ANN. § 551.611 (2021); WYO. STAT. ANN. § 17-4-611(c) (2021).

142. UNIF. ATHLETE AGENTS ACT § 3(a) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2000); *see also* REVISED UNIF. ATHLETE AGENTS ACT § 3(b) (NAT'L CONF. COMM'RS ON UNIF. STATE L. 2015).

143. ALA. CODE § 8-26B-3(b) (2021); ARK. CODE ANN. § 17-16-103 (2021); FLA. STAT. § 468.453(5) (2021); GA. CODE ANN. § 43-4A-3 (2021); HAW. REV. STAT. § 481Z-3(b) (2021); IND. CODE § 25-5.2-2-1(a) (2021); IOWA CODE § 9A.103(2) (2021); KY. REV. STAT. ANN. § 164.6905(1) (West 2021); MD. BUS. REG. CODE ANN. § 4-402(a) (2021); MINN. STAT. § 81A.24(1) (2021);

provision.<sup>144</sup> Many states permit substituted service on state officials for out-of-state insurance companies with an obligation to send a copy of the process to the defendant.<sup>145</sup> The same is true for

MISS. CODE ANN. § 73-42-5(2) (2021); MO. ANN. STAT. § 436.221(2) (West 2021); NEB. REV. STAT. § 48-2603(1) (2021); NEV. REV. STAT. § 398A.125(2) (2021); N.H. REV. STAT. ANN. § 332-J:2 (2021); N.M. STAT. ANN. § 61-14F-3(A); N.Y. GEN. BUS. LAW § 899-b(1) (McKinney 2021); N.C. GEN. STAT. § 78C-87(a) (2021); N.D. CENT. CODE § 9-15.2-02(2) (2021); OKLA. STAT. ANN. tit. 70, § 820.3(B) (2021); OR. REV. STAT. § 702.062(1) (2021); 5 PA. CONSOL. STAT. § 3104 (2021); 5 R.I. GEN. LAWS ANN. § 5-74.1-3(a) (West 2021); S.C. CODE ANN. § 59-102-30(B) (2021); S.D. CODIFIED LAWS § 59-10-3(a) (2021); TENN. CODE ANN. § 49-7-2103(b)(3) (2021); TEX. OCC. CODE ANN. § 2051.402(c) (West 2021); UTAH CODE ANN. § 58-87-103(2) (LexisNexis 2021); VA. CODE ANN. § 54.1-527(C) (2021); WASH. REV. CODE ANN. § 19.225.020 (2021); W. VA. CODE ANN. § 30-39-3(a) (2021); WIS. STAT. § 440.9905 (2021); WYO. STAT. ANN. § 33-44-103 (2021).

144. Kansas adopted the substituted service provision but added an obligation to forward. KAN. STAT. ANN. § 44-1518(a) (2021). Colorado and Louisiana adopted the act but added different provisions on service. COLO. REV. STAT. § 23-16-203 (2021); LA. STAT. ANN. § 4:422(B)(1)(f) (2021). And Delaware and Idaho initially adopted the provision but later repealed it, Delaware in 2012 and Idaho in 2020. 78 Del. Laws c. 376, § 2 (2012); 2020 Idaho Sess. Laws 281, 283. An additional two states—Connecticut and Illinois—have repealed the entire act. 2017 Conn. Acts 150 (Reg. Sess.); Act of Sept. 27, 2017, 2017 Ill. Laws 100-0534.

145. *See, e.g.*, ALA. CODE § 27-11-5 (2021) (secretary of state must send); ARIZ. REV. STAT. ANN. § 20-401.03(c) (2021) (secretary of state must send); CONN. GEN. STAT. § 38a-25 to -27 (2021) (insurance commissioner must send); FLA. STAT. § 626.909(4) (2021); HAW. REV. STAT. § 431:2-205 (2021) (insurance commissioner must send); IDAHO CODE § 41-1206, 41-1207 (2021) (director must send); 215 ILL. COMP. STAT. 5/121-6, 5/121-7 (2021) (secretary of state must send); IND. CODE § 27-4-5-4(b)-(c) (2021) (secretary of state must send); IOWA CODE § 507A.6 (2021) (secretary of state must send); KAN. STAT. ANN. § 40-2002(a) (2021) (insurance commissioner must send); KY. REV. STAT. ANN. §§ 304.11-040(2), 304.3-203(5) (West 2021); LA. STAT. ANN. § 22:1907 (2021) (secretary of state must send); MD. CODE ANN., INS. § 4-206(b) (West 2021) (insurance commissioner must send); *id.* § 4-207(b) (West 2021) (secretary of state must send); MASS. GEN. LAWS ANN. ch. 175B, § 2 (West 2021) (insurance commissioner must send); MO. REV. STAT. § 375.788(3) (2021) (secretary of state must send); MONT. CODE ANN. §§ 33-1-612, 33-1-613(1) (2021) (insurance commissioner must send); N.H. REV. STAT. ANN. § 406-A:5(II) (2021) (insurance commissioner must send); *id.* § 406-B:5(III) (2021) (secretary of state must send); N.J. STAT. ANN. § 17B:33-3 (West 2021) (commissioner of banking and insurance must send); N.M. STAT. ANN. § 38-1-8(B) (2021) (secretary of state must send); N.C. GEN. STAT. § 58-16-35(b) (2021) (plaintiff must send); N.D. CENT. CODE §§ 26.1-02-10, 26.1-02-11 (2021) (secretary of state must send); OKLA. STAT. tit. 36, § 6103.9, tit. 12, § 2004(C)(4)(d) (2021) (secretary of state must send); OR. REV. STAT. § 731.324(3) (2021) (secretary of state must send); 27 R.I. GEN. LAWS § 27-16-1.4 (2021) (secretary of state must send); S.C. CODE ANN. § 38-25-510(c) (2021) (secretary of state must send); TENN. CODE ANN. §§ 56-2-503, 56-2-504 (2021) (insurance commissioner must send); TEX. INS. CODE ANN. § 804.107(e) (West 2021) (no default judgment unless copy is mailed); UTAH CODE ANN. §§ 31A-2-309, -310 (LexisNexis 2021) (insurance commissioner must send); VT. STAT. ANN. tit. 8, § 3370(b) (2021) (secretary of state must send); VA. CODE ANN. § 38.2-801 (2021) (clerk of the state corporation commission must send); W. VA. CODE § 33-4-13(b) (2021) (plaintiff must send); WIS. STAT. ANN. §§ 601.715(4), 601.73(2) (2021) (secretary of state must send).

charitable organizations and paid solicitors.<sup>146</sup> And one finds substituted service statutes, sometimes with an obligation to send and sometimes not, for an eclectic range of other businesses, including beer makers,<sup>147</sup> carnivals,<sup>148</sup> nurseries,<sup>149</sup> poultry hatchers,<sup>150</sup> snowmobile operators,<sup>151</sup> and textbook sellers.<sup>152</sup>

### *B. Implications for the Hague Service Convention*

One might expect that an express statutory obligation to send a copy of the process to the defendant would lead to the conclusion that substituted service under such a statute presents an “occasion to transmit a judicial or extrajudicial document for service abroad,” requiring compliance with the Hague Service Convention.<sup>153</sup> In a leading case, *Darden v. DaimlerChrysler North America Holding Corp.*, for example, the court noted that to serve an unauthorized foreign corporation under section 307 of New York’s Business Corporation Law, “a party must serve both the New York Department of State and the foreign corporation at its foreign offices.”<sup>154</sup> The court reasoned that because such service “requires the transmittal of a judicial document abroad, the Hague Convention ... applies and preempts contrary state law.”<sup>155</sup> Courts have reached

146. ALA. CODE § 13A-9-71(k) (2021) (requires notice to be sent); ALASKA STAT. § 45.68.080 (2021) (requires notice to be sent); 225 ILL. COMP. STAT. 460/5 (2021) (plaintiff must send); IND. CODE § 23-7-8-8(f) (2021) (stating that secretary of state must send pursuant to IND. R. CIV. P. 4.10(2)); N.Y. EXEC. LAW §§ 172-c(2), 173-c(2) (McKinney 2021) (attorney general or plaintiff must send); 10 PA. STATE AND CONS. STAT. ANN. § 162.16(g)(4) (West 2021) (secretary of state must send); S.C. CODE ANN. § 33-56-130 (2021) (secretary of state must send); TENN. CODE ANN. § 48-101-516(b) (2021) (plaintiff or secretary of state must send); W. VA. CODE § 29-19-14 (2021) (secretary of state must send); WIS. STAT. § 202.17(5) (2021) (department of financial institutions must send); WYO. STAT. ANN. §§ 26-12-202(a), 26-3-122(c) (2021) (insurance commissioner must send).

147. TEX. ALCO. BEV. CODE ANN. § 61.07 (West 2021) (no obligation to send).

148. GA. CODE ANN. § 43-1-15(a)(1) (2021) (plaintiff must send); MISS. CODE ANN. § 75-75-1 (2021) (no obligation to send); N.D. CENT. CODE § 53-05-04 (2021) (no obligation to send).

149. COLO. REV. STAT. § 35-26-110 (2021) (secretary must send).

150. MISS. CODE ANN. § 69-7-201 (2021) (no obligation to send).

151. N.Y. PARKS REC. & HIST. PRESERV. LAW § 25.27 (McKinney 2021) (plaintiff must send).

152. MISS. CODE ANN. § 37-43-29 (2021) (no obligation to send); MO. REV. STAT. § 170.121 (2021) (no obligation to send).

153. Hague Service Convention, *supra* note 6, art. 1.

154. 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002).

155. *Id.* (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1988)). As discussed below, the text of section 306 providing for substituted service on an authorized

similar conclusions interpreting statutes from other states that require a copy of the process to be sent to a foreign corporation, including Florida,<sup>156</sup> Kentucky,<sup>157</sup> Minnesota,<sup>158</sup> and Texas.<sup>159</sup> As noted above, courts have also held that nonresident motorist statutes with an obligation to send a copy of the process to the defendant “require transmission of documents for service abroad and accordingly implicate the Hague Convention.”<sup>160</sup>

On the other hand, courts in Kansas, New Mexico, Rhode Island, and South Carolina have said that substituted service on a state official does not require compliance with the Hague Convention even when statutory language requires a copy of the process to be sent to the defendant. And decisions in Maryland and New York suggest that courts there would reach similar conclusions. The dominant rationale for this position is that service under these statutes is complete when the state official is served, although other arguments appear in some of the cases.

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corporation is different and might lead to a different result. *See infra* notes 187-91 and accompanying text.

156. *Vega Glen v. Club Méditerranée S.A.*, 359 F. Supp. 2d 1352, 1356 (S.D. Fla. 2005) (interpreting FLA. STAT. §§ 48.161, 48.181 (2021), the state long-arm provisions); *McClenon v. Nissan Motor Corp. in U.S.A.*, 726 F. Supp. 822, 824-25 (N.D. Fla. 1989) (same).

157. *Phoenix Process Equip. Co. v. Capital Equip. & Trading Corp.*, No. 3:16-CV-00024, 2017 WL 157834, at \*7 (W.D. Ky. Jan. 13, 2017) (interpreting KY. REV. STAT. ANN. § 454.210 (2021), the state long-arm provision); *Norrenbrock Co. v. Ternium Mexico, S.A. De C.V.*, No. 13-CV-00767, 2014 WL 556733, at \*2 (W.D. Ky. Feb. 12, 2014) (same); *Collins v. Westfreight Sys., Inc.*, No. 08-227-KKC, 2009 WL 1036381, at \*2 (E.D. Ky. Apr. 17, 2009) (same).

158. *Froland v. Yamaha Motor Co.*, 296 F. Supp. 2d 1004, 1008 (D. Minn. 2003) (interpreting MINN. STAT. § 5.25 (4), (6) (2021), which provides for substituted service on authorized foreign corporations and other foreign corporations doing business in the state); *see also IDS Prop. Cas. Ins. Co. v. Gree USA, Inc.*, No. CV 18-1313, 2018 WL 6605896, at \*3 (D. Minn. Dec. 17, 2018) (citing *Froland*, 296 F. Supp. 2d at 1007) (same).

159. *Traxcell Techs., LLC v. Nokia Sols. & Networks US LLC*, No. 18-cv-00412, 2019 WL 8137134, at \*3 (E.D. Tex. Oct. 22, 2019) (interpreting TEX. CIV. PRAC. & REM. CODE ANN. § 17.045 (West 2021), the state long-arm provision); *Macrosolve, Inc. v. Antenna Software, Inc.*, No. 11-CV-287, 2012 WL 12903085, at \*2 (E.D. Tex. Mar. 16, 2012) (same); *see also Wuxi Taihu Tractor Co. v. York Grp., Inc.*, No. 01-13-00016-CV, 2014 WL 6792019, at \*5 (Tex. Ct. App. Dec. 2, 2014) (reaching same result without analysis).

160. *Howard v. Krull*, 438 F. Supp. 3d 711, 717 (E.D. La. 2020) (interpreting LA. STAT. ANN. §§ 13:3474, 13:3475 (2021)); *accord Larson v. Yoon*, 351 P.3d 167, 171 (Wash. Ct. App. 2015) (interpreting WASH. REV. CODE § 46.64.040 (2021)); *Heredia v. Transp. S.A.S., Inc.*, 101 F. Supp. 2d 158, 161 (S.D.N.Y. 2000) (interpreting N.Y. VEH. & TRAF. LAW § 253 (McKinney 2021)); *Quinn v. Keinicke*, 700 A.2d 147, 154 (Del. Super. Ct. 1996) (interpreting DEL. CODE ANN. tit. 10, § 3112, which has since been repealed); *Curcuruto v. Cheshire*, 864 F. Supp. 1410, 1411 (S.D. Ga. 1994) (interpreting GA. CODE ANN. §§ 40-12-1, 40-12-2 (2021)).

The first such decision appears to have been *Melia v. Les Grands Chais de France*, interpreting a provision of Rhode Island’s corporations code.<sup>161</sup> Although the Rhode Island Supreme Court had previously held that service on a foreign corporation must always be made through the Hague Convention,<sup>162</sup> *Melia* held that this Rhode Island decision did not survive *Schlunk*.<sup>163</sup> Having wiped the slate clean, the *Melia* court reasoned that “[a]lthough the statute requires the secretary of state to forward notice to the defendant corporation, other states with similar statutes have interpreted the statutes to mean that service is complete when the secretary is served.”<sup>164</sup> The court also seemed to draw a distinction between statutes requiring the plaintiff to give notice to the defendant and statutes requiring the state official to do so, suggesting that compliance with the Hague Convention was necessary only when the statutory obligation fell on the plaintiff.<sup>165</sup>

The next case was *Brand v. Mazda Motor of America, Inc.*, involving a Kansas long-arm provision for service on registered and unregistered corporations.<sup>166</sup> Although *Brand* did not formally decide the question because the plaintiff had not shown that the

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161. 135 F.R.D. 28, 30-32 (D.R.I. 1991) (interpreting R.I. GEN. LAWS 7-1.1-108, now codified as 7 R.I. GEN. LAWS § 7-1.2-1410 (2021)). Although the court cited an earlier case involving South Carolina’s long-arm statute for the proposition that service is complete when the state official is served, *see id.* at 32 (citing *Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 642 (D.S.C. 1989)), the cited case did not in fact reach the question, finding insufficient evidence that the secretary of state had been properly served in the first place; *see Hammond*, 128 F.R.D. at 643. For discussion of a more recent decision interpreting the same South Carolina statute and reaching the same result as *Melia*, *see infra* notes 179-84 and accompanying text.

162. *Cipolla v. Picard Porsche Audi, Inc.*, 496 A.2d 130, 132 (R.I. 1985).

163. *Melia*, 135 F.R.D. at 30.

164. *Id.* at 32 (citing *Hammond*, 128 F.R.D. at 642). In fact, Rhode Island’s statutory requirement to forward notice applied only to corporations authorized to do business in the state. *See* 7 R.I. GEN. LAWS § 7-1.2-1410(b) (2021). For corporations carrying on business without authorization, such as the defendant in *Melia*, subsection (c) has no similar requirement and requires the plaintiff to provide only such notice to the defendant as the court orders. *See id.* § 7-1.2-1410(c).

165. *Melia*, 135 F.R.D. at 32 (“Thus, because the statute does not require that *plaintiff* mail notice directly to the defendant *in addition* to the service on the secretary of state, service may be completed without the transmission of documents abroad and the Hague Convention does not apply.”). This distinction finds no support in the Hague Convention, the applicability of which turns on whether “there is occasion to transmit a judicial or extrajudicial document for service abroad,” and not on who does the transmitting. Hague Service Convention, *supra* note 6, art. 1.

166. 920 F. Supp. 1169 (D. Kan. 1996) (interpreting KAN. STAT. ANN. § 60-304(f) (2021)).

defendant was doing business in Kansas, the court stated in dictum that it would have found “the Hague Convention [to be] inapplicable as service is complete when the secretary of state is served.”<sup>167</sup> The court offered no reason for rejecting the defendant’s argument that “the Hague Convention still applies as [the statute] still requires the transmittal of documents abroad.”<sup>168</sup>

In *Solis v. Gilles*, a court in New Mexico adopted a similar interpretation of that state’s long-arm provision for foreign corporations authorized to do business when their designated agent cannot be found.<sup>169</sup> The New Mexico statute provided that “[w]ithin two days after service upon the secretary of state, the secretary shall notify the corporation of service of process by certified or registered mail directed to the corporation at its registered office and enclose a copy of the process or other paper served,”<sup>170</sup> but the court made no mention of this provision. Instead, the court simply concluded that “[b]ecause service of process on [the defendant] was accomplished when the Secretary of State was served, the Hague Convention does not apply.”<sup>171</sup>

*Solis’s* holding finds support in earlier New Mexico cases that the court did not cite—cases that distinguish between registered and unregistered foreign corporations. In a 1935 decision, *Silva v. Crombie & Co.*, the New Mexico Supreme Court interpreted the predecessor of the statute at issue in *Solis* to provide that substituted service was still effective if the secretary of state failed to send the process to the defendant.<sup>172</sup> The court found decisive language in the statute making substituted service “effective to all intents and purposes as if made upon the president or head officers of the corporation.”<sup>173</sup> And the court added that “[i]f the Legislature had

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167. *Id.* at 1172 n.7 (citing *Melia*, 135 F.R.D. at 32; *Hammond*, 128 F.R.D. at 642).

168. *Id.* at 1172; *see also* KAN. STAT. ANN. § 60-304(f) (2021) (requiring the secretary of state to “promptly forward a copy” of the process to the defendant).

169. No. 10-CV-952, 2011 WL 13284657 (D.N.M. July 5, 2011) (interpreting N.M. STAT. ANN. § 38-1-5 (2021)).

170. N.M. STAT. ANN. § 38-1-5(B) (1993).

171. *Solis*, 2011 WL 13284657, at \*9 (citing *Brand v. Mazda Motor of Am., Inc.*, 920 F. Supp. 1169, 1172 n.7 (D. Kan. 1996); *Melia v. Les Grands Chais de Fr.*, 135 F.R.D. 28, 32-35 (D.R.I. 1991); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706-07 (1988)).

172. 44 P.2d 719, 719-20 (N.M. 1935) (interpreting N.M. COMP. STAT. 1929, § 32-150, now codified as N.M. STAT. ANN. § 38-1-5 (2021)).

173. *Id.* at 720. *Cf.* N.M. STAT. ANN. § 38-1-5(A) (2021) (“[T]he [substituted] service shall be as effective to all intents and purposes as if made upon an officer, director or the registered

desired to make the service effective only when the secretary of state had notified such corporation, it could have so stated in plain language” and that “[t]he neglect of the secretary of state is not chargeable to the [plaintiff].”<sup>174</sup> By contrast, the New Mexico Court of Appeals held in *Abarca v. Henry L. Hanson, Inc.* that substituted service under the long-arm provision for a foreign corporation not authorized to do business in the state was not effective unless the defendant received notice from the secretary of state.<sup>175</sup> The critical difference for the court was that authorized foreign corporations have a statutory obligation to appoint an agent for service of process, and “if the corporation failed to comply with the terms of the statute in this regard, it could not complain that the service provided for in lieu of the appointment of an agent was insufficient to give it notice.”<sup>176</sup> Unauthorized corporations, which have no such obligation, could not similarly be blamed for failing to maintain an agent and were still entitled to notice.<sup>177</sup> Although neither *Silva* nor *Abarca* involved the applicability of the Hague Convention, they suggest a possible distinction between registered corporations that are required to appoint agents—as in *Solis*—and non-registered foreign corporations that are not.<sup>178</sup>

Most recently, in *Peake v. Suzuki Motor Corp.*, the court interpreted South Carolina’s long-arm statute providing for service on foreign corporations not authorized to do business in the state as not requiring compliance with the Hague Convention.<sup>179</sup> In language that is typical of the statutes that this Part has been discussing, the statute provided in part:

Service of the process is made by delivering to and leaving with the Secretary of State, or with any person designated by him to receive such service, duplicate copies of the process, notice, or demand. The Secretary of State immediately shall cause one of

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agent of the corporation.”).

174. *Silva*, 44 P.2d at 720.

175. 738 P.2d 519, 519-20 (N.M. Ct. App. 1987) (interpreting N.M. STAT. ANN. § 38-1-6 (2021)).

176. *Id.* at 520.

177. *Id.*

178. For discussion of a similar distinction in New York law, see *infra* notes 187-91 and accompanying text.

179. No. 19-cv-00382, 2019 WL 5691632, at \*5-8 (D.S.C. Nov. 4, 2019).

the copies to be forwarded by certified mail, addressed to the corporation either at its registered office in the jurisdiction of its incorporation, its principal place of business in the jurisdiction, or at the last address of the foreign business or nonprofit corporation known to the plaintiff, in that order.<sup>180</sup>

First, the court reasoned that the “plain language” of the first sentence of the quoted provision established that service was complete when delivered to the secretary of state.<sup>181</sup> Second, the court found support for this interpretation in another subsection of the long-arm statute providing that the defendant’s refusal to accept delivery of a copy sent by the secretary of state would not affect the validity of the service.<sup>182</sup> Third, the court relied on the South Carolina Supreme Court’s interpretation of the statute, in a case involving the effective date of service, “that ‘once a summons and complaint are delivered to the secretary of state, *service is complete*, regardless of whether the corporation actually receives notice of the suit.’”<sup>183</sup> Finally, the court construed the secretary of state’s obligation to forward a copy of the process not as “a requirement to effectuate service” but rather as a means “to provide additional notice.”<sup>184</sup>

Although the decisions from Kansas, New Mexico, Rhode Island, and South Carolina just discussed are the only ones interpreting statutes providing for substituted service on state officials to avoid the Hague Service Convention, Maryland and New York are also worth discussing. Maryland and New York have not held specifically that the Hague Convention does not apply to substituted service on registered corporations, but their decisions in other contexts raise the possibility that they might do so in the future.

Maryland courts have held in interstate cases that substituted service on the State Department of Assessment and Taxation under Maryland Rule of Civil Procedure 2-124(o), which applies to foreign corporations required to maintain a resident agent, is effective even if the defendant did not receive a copy of the process.<sup>185</sup> The court

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180. S.C. CODE ANN. § 15-9-245(b) (2021).

181. *Peake*, 2019 WL 5691632, at \*7.

182. *Id.* (quoting S.C. CODE ANN. § 15-9-245(c) (2021)).

183. *Id.* (quoting *Holman v. Warwick Furnace Co.*, 456 S.E.2d 894, 896 (S.C. 1995)).

184. *Id.* at \*8.

185. *Rhema, LLC v. Foresite, LLC*, No. 1274, 2015 WL 6951145, at \*8 (Md. Ct. Spec. App.

quoted an earlier Maryland case, which in turn quoted the New Mexico Supreme Court in *Silva*.<sup>186</sup> If Maryland Rule 2-124(o), like New Mexico's long-arm statute for authorized foreign corporations, does not require the sending of process to the defendant to be effective, it is difficult to see how Maryland's rule would implicate the Hague Convention.

In New York, as noted above, courts have held that service on an unauthorized corporation under section 307 of New York's Business Corporation Law requires the transmittal of a judicial document for service abroad and therefore also requires compliance with the Hague Convention.<sup>187</sup> But service on a corporation authorized to do business in New York is governed by a different provision—section 306—with different language. Although section 306 provides that “[t]he secretary of state shall promptly send one of such copies [of process] by certified mail, return receipt requested, to such corporation,” it also states that “[s]ervice of process on such corporation shall be complete when the secretary of state is so served.”<sup>188</sup> In *Flick v. Stewart-Warner Corp.*, the New York Court of Appeals distinguished section 306 from section 307, holding that whereas service under section 307 was not effective unless the plaintiff sent a copy of the process to the defendant, “service [under section 306] on the Secretary of State as the foreign corporation’s designated agent is the equivalent of actual service on the foreign corporation.”<sup>189</sup> Although *Flick* was an interstate case, New York’s Appellate Division has similarly distinguished between section 306 and section 307, suggesting in dictum that service under section 306 would not require compliance with the Hague Convention, whereas service under section 307 would.<sup>190</sup>

In sum, although many courts have held that a statutory obligation to send a copy of the process to the defendant implicates

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Nov. 10, 2015).

186. *Id.* (quoting *Barrie-Peter Pan Schs., Inc. v. Cudmore*, 276 A.2d 74, 77 (Md. 1971)).

187. *See Darden v. DaimlerChrysler N. Am. Holding Corp.*, 191 F. Supp. 2d 382, 387 (S.D.N.Y. 2002); *supra* notes 154-55 and accompanying text.

188. N.Y. BUS. CORP. LAW § 306(b)(1) (McKinney 2021).

189. 555 N.E.2d 907, 910 (N.Y. 1990). The court contrasted section 306(b)'s provision that service is effective when the secretary of state is served with section 307(c)'s provision that service is not effective until ten days after the plaintiff files papers with the clerk of the court showing that a copy of the process has been sent to the defendant. *Id.*

190. *Vazquez v. Sund Emba AB*, 548 N.Y.S.2d 728, 731 n.4 (App. Div. 1989).

the Hague Convention, some courts have decided the other way. Courts in Maryland, New Mexico, and New York distinguish between registered and unregistered corporations, suggesting that compliance with the Hague Convention is required for unregistered corporations but not for registered ones.<sup>191</sup> Courts interpreting the laws in Kansas, Rhode Island, and South Carolina have said more broadly that compliance with the Hague Convention is not required for either registered or unregistered corporations.<sup>192</sup> Moreover, some of the arguments found in the cases discussed above would apply to statutes in the numerous other states where courts have not yet addressed the question. Many substituted service statutes have provisions stating that service is effective when the state official is served, which New York courts have found significant.<sup>193</sup> And even in the absence of such a provision on effectiveness, it would often be possible to argue that sending a copy of the process to the defendant is not part of the service itself but rather a means “to provide additional notice.”<sup>194</sup>

The possibility that statutes permitting substituted service on state officials might be interpreted not to require compliance with the Hague Convention is problematic both because it runs against the desire of the Convention’s drafters to eliminate the practice of *notification au parquet* and because it raises due process concerns. The next Section considers these objections.

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191. See *Rhema*, 2015 WL 6951145, at \*8 (interpreting MD. R. CIV. P. 2-124(o) for foreign corporations required to maintain a resident agent); *Solis v. Gilles*, 10-CV-952, 2011 WL 13284657, at \*9 (D.N.M. July 5, 2011) (interpreting N.M. STAT. ANN. § 38-1-5 (2021) for corporations to do business in the state); *Flick*, 555 N.E.2d at 910 (distinguishing section 306 for serving registered corporations from section 307 for serving unregistered corporations).

192. *Peake v. Suzuki Motor Corp.*, No. 19-cv-00382, 2019 WL 5691632, at \*7-8 (D.S.C. Nov. 4, 2019) (interpreting S.C. CODE ANN. § 15-9-245 (2021) for unregistered corporations); *Brand v. Mazda Motor of Am., Inc.*, 920 F. Supp. 1169, 1172 n.7 (D. Kan. 1996) (interpreting KAN. STAT. ANN. § 60-304(f) (2021) for registered and unregistered corporations); *Melia v. Les Grands Chais de Fr.*, 135 F.R.D. 28, 32 (D.R.I. 1991) (interpreting R.I. GEN. LAWS 7-1.1-108, now codified as 7 R.I. GEN. LAWS § 7-1.2-1410 (2021), for registered and unregistered corporations).

193. See *Flick*, 555 N.E.2d at 910; *Vazquez*, 548 N.Y.S.2d at 731 n.4.

194. *Peake*, 2019 WL 5691632, at \*8.

### C. Notice Concerns

One of the aims of the Hague Convention was to eliminate *notification au parquet*.<sup>195</sup> This method of service, used in some civil-law countries, permits effective service by depositing documents with a government official or posting them on the notice board of the court seized.<sup>196</sup> According to *Schlunk*, when the Convention was drafted, France, the Netherlands, Greece, Belgium, and Italy permitted some version of *notification au parquet*.<sup>197</sup> The fact that states in the United States similarly permitted substituted service on state officials—an American version of *notification au parquet*—seems to have largely escaped attention, both at the time of the Convention’s drafting and when *Schlunk* was decided.<sup>198</sup>

Despite the intentions of its drafters, however, the Hague Convention did not succeed in abolishing *notification au parquet* in either its European or its U.S. manifestations. The principle that forum law determines whether there is occasion to transmit documents for service abroad, adopted in *Schlunk* and now endorsed by the Permanent Bureau of the Hague Conference,<sup>199</sup> necessarily leaves open the possibility that a country might define substituted service on a state official to be complete without any obligation to give notice to the defendant. The Permanent Bureau has acknowledged this fact. Commenting on the Convention’s provisions on default judgments,<sup>200</sup> the Permanent Bureau wrote: “[T]he Convention ... does not do away with *notification au parquet* ... , but aims to protect a defendant from the potentially detrimental effects of

195. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 703 (1988) (“There is no question but that the Conference wanted to eliminate *notification au parquet*.”); PRACTICAL HANDBOOK, *supra* note 31, ¶ 2 (noting that one of the “main criticisms of the existing system” was “the survival of *notification au parquet* and its detrimental consequences for defendants”).

196. See PRACTICAL HANDBOOK, *supra* note 31, ¶ 8 (describing *notification au parquet*).

197. *Schlunk*, 486 U.S. at 703. France abolished *notification au parquet* in 2005. PRACTICAL HANDBOOK, *supra* note 31, ¶ 10.

198. *But cf. Schlunk*, 486 U.S. at 716 (Brennan, J., concurring) (quoting statement by Philip W. Amram in S. Exec. Rep. No. 6, 90th Cong., 1st Sess., 15 (1967), that the Convention may require “a minor change in the practice of some of our States in long-arm and automobile accident cases” where “service on the appropriate official need be accompanied only by a minimum effort to notify the defendant”).

199. See *supra* note 34 and accompanying text.

200. Hague Service Convention, *supra* note 6, arts. 15-16; see also *supra* notes 29-31 and accompanying text (discussing these provisions).

such a system.”<sup>201</sup> Although the Supreme Court in *Schlunk* technically left open the question “whether the Convention applies to *notification au parquet*,”<sup>202</sup> one must conclude that the answer to that question is no.

But even if substituted service on a state official without notice to the defendant does not violate the Hague Convention, it may still violate the Due Process Clauses of the U.S. Constitution. Part II argued that when substituted service is made on a state official, due process requires that either the plaintiff or the state official send a copy to the defendant. *Mullane* held that a “fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”<sup>203</sup> The Convention applies only when a defendant’s address is known,<sup>204</sup> and under those circumstances, the alternatives provided by the Convention become constitutionally required as alternatives that are far better calculated to provide notice to the defendant than mere service on a state official.<sup>205</sup> Under *Mullane*, it makes no difference whether the defendant is a registered corporation required to appoint an agent for service or not. The fact that a foreign corporation has registered does not make service under the Convention any less of an alternative,<sup>206</sup> and the Supreme Court has held that “a party’s ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.”<sup>207</sup>

The implications of this argument are simple but important. *Schlunk* held that “[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our

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201. PRACTICAL HANDBOOK, *supra* note 31, ¶ 9. However, as noted above, the Permanent Bureau acknowledges that Articles 15 and 16 only apply if the Convention does. *See id.* ¶ 10; *see also supra* note 31 and accompanying text.

202. *Schlunk*, 486 U.S. at 704.

203. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950); *see also Schlunk*, 486 U.S. at 705 (quoting *Mullane*, 339 U.S. at 314).

204. Hague Service Convention, *supra* note 6, art. 1 (“This Convention shall not apply where the address of the person to be served with the document is not known.”).

205. *See supra* notes 65-69 and accompanying text.

206. *See supra* text following note 75.

207. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983); *accord Jones v. Flowers*, 547 U.S. 220, 232 (2006) (“The Commissioner does not argue that Jones’ failure to comply with a statutory obligation to keep his address updated forfeits his right to constitutionally sufficient notice, and we agree.”).

inquiry ends and the Convention has no further implications.”<sup>208</sup> But if the Due Process Clause requires the transmission of documents abroad, then service is not complete until this is done. It does not matter whether the state statute contains an express obligation on the plaintiff or the state official to send a copy of the process to the defendant, whether the statute provides that service is effective when the state official is served, nor whether the foreign corporation is registered or unregistered. When substituted service is made on a state official, due process requires that a copy of the process be sent to the defendant, and that requirement alone makes the Hague Service Convention applicable.

### CONCLUSION

In the United States, the applicability of the Hague Service Convention depends on state law. But state law is subject to the requirements of the Due Process Clause of the Fourteenth Amendment, which requires notice reasonably calculated to inform the defendant of the action. This due process requirement has different implications for substituted service on affiliated companies and for substituted service on state officials.

*Schlunk* held that substituted service on an affiliated company could be used to serve a foreign defendant within the United States, making the Hague Convention inapplicable. There was no question of notice being constitutionally insufficient in *Schlunk* because Illinois permits such service only when the relationship between the companies is so close that notice to the defendant is certain. California and Massachusetts have adopted similar approaches. Because these approaches focus on the purposes of service, they make more sense than the veil-piercing approaches in other states that turn on factors unrelated to notice.

Substituted service on state officials has very different constitutional implications. Without an obligation on the plaintiff or the state official to send a copy of the process to the defendant, it seems highly unlikely that the defendant would learn of the action in sufficient time to allow it to defend. Many state statutes expressly require a copy to be sent. But the Constitution imposes such an

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208. *Schlunk*, 486 U.S. at 707.

obligation even when state law does not. The constitutional obligation to send a copy of the process to the defendant in turn requires compliance with the Hague Service Convention.

Service of process is just one area in which state law impacts transnational litigation. And by virtue of Federal Rule 4(e)(1), state law on service is applicable in federal courts, too. States have considerable freedom to provide for substituted service within their borders, thereby avoiding the Hague Service Convention. They cannot devise an American version of *notification au parquet*, but they can and should provide for substituted service on affiliated companies that is reasonably calculated to provide notice to the foreign defendant.