Forthwith Service, Rule 4(m) and the Maritime Waiver of Sovereign Immunity

James David Phipps
I. INTRODUCTION

The Suits in Admiralty Act\(^1\) (SAA) conditionally allows plaintiffs to sue the United States in admiralty. One condition to this allowance is that plaintiffs “forthwith” serve their admiralty complaints on the United States.\(^2\) At first glance,

\* This Comment was prepared in the wake of an internship with the government office responsible for representing the United States in all admiralty actions—the Admiralty & Aviation Litigation Section, Torts Branch, Department of Justice, Washington, D.C. It does not pretend, however, to represent the views, official or otherwise, of that office.

1 46 U.S.C. app. §§ 741-52 (1988) (amending ch. 95, 41 Stat. 525 (1920)) (waiving sovereign immunity in admiralty actions, thus placing the United States under the same admiralty law liabilities as any private shipowner, with two exceptions: one, United States vessels could be neither seized nor arrested; two, actions against the United States only would be allowed to proceed in personam); see 46 U.S.C. app. §§ 781-90 (1988) (amending the Public Vessels Act, ch. 428, 43 Stat. 1112 (1925)) (providing a remedy against the United States personally for actions arising from the operation of public vessels; and, in § 782, adopting the conditions and procedural mechanisms of the SAA); see also 1 MARTIN J. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 8:1-2 (4th ed. 1990); 2 MARTIN J. NORRIS, THE LAW OF SEAMEN § 28:1 (4th ed. 1985) (discussing the background and scope of the SAA).

2 46 U.S.C. app. § 742 (commanding the admiralty plaintiff to “forthwith serve a copy of his [or her] libel on the United States . . . .”); Libby v. United States, 840 F.2d 818, 820 (11th Cir. 1988) (holding that “the conditions contained in § 742 [of the SAA], including the forthwith service requirement, are necessary terms of the government’s consent to be sued”); Watts v. Pinkney, 762 F.2d 406, 408 (9th Cir. 1985); Amelia v. United States, 732 F.2d 711, 712 (9th Cir. 1984); Kenyon v. United States, 676 F.2d 1229, 1231 (9th Cir. 1981) (declaring that the “congressional command of § 742 [regarding forthwith service] is a condition precedent to the congressional waiver of . . . sovereign immunity”); City of New York v. McAllister Bros., Inc., 278 F.2d 708, 710 (2d Cir. 1960), cert. dismissed, 371 U.S. 907 (affirming that even “technical requirements for service of process upon the government, when it has waived sovereign immunity, must be strictly complied with”). Contra Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., 772 F.2d 62, 63-66 (3d Cir. 1985) (holding that § 742’s forthwith service requirement has been superseded by the 120 day service limit of Rule 4(m) of the Federal Rules of Civil Procedure); see Gregory J. Ressa, Note, Rule 4(j) of the Federal Rules of Civil Procedure and the Forthwith Service Requirement of the Suits in Admiralty Act, FORDHAM L. REV. 1195 (1986) (arguing that § 742’s
the way this condition works is simple: "No forthwith service, no admiralty action." Closer scrutiny, however, reveals the forthwith service condition to be all but simple.

To begin with, there is the problem of determining when service is sufficiently forthwith, since the SAA does not define forthwith. From a plain language standpoint, forthwith means immediately, now, straightaway, without delay, promptly, and with all reasonable dispatch. Thus, the admiralty plaintiff might safely assume that service on the day of or just after filing would be sufficiently forthwith. But what about service after 2, 15, 30, 45, 60, or 120 days? As it turns out, the courts are relatively clear about the smaller and the larger time periods—2, 15, 60 and 120 days. The smaller time periods generally count as forthwith, the larger ones generally do not.

forthwith service requirement is no longer a condition on a plaintiff's right to sue the United States in admiralty because that requirement is superseded by the service limit of Rule 4(m)).

Caveat: The United States typically raises the 'failure to serve forthwith' defense in the form of a Rule 12(b)(1), FED. R. CIV. P., lack of jurisdiction motion and does so, if at all, as its response to the admiralty plaintiff's complaint. E.g., infra, at note 7 (most of the cases in this list involved a United States' 12(b)(1) motion made in lieu of an answer to the original complaint).


5 Smaller time periods found to be forthwith: Libby, 840 F.2d at 821 (24 days); Phillips v. U.S. Army Corps of Engineers, 629 F. Supp. 967, 971 (S. D. Miss. 1986) (52 days, because the United States received constructive notice ten days after initial filing); Gajewski v. United States, 540 F. Supp. 381, 384-385 (C.D.N.Y 1982) (18 days).

Larger time periods found not to be forthwith: Watts, 752 F.2d at 408 (33 months); Amella, 732 F.2d at 713 (63 days); Kenyon, 676 F.2d at 1231 (60 days); Barrie v. United States, 615 F.2d 829, 830 (9th Cir. 1980) (64 days); Owens v. United States, 541 F.2d 1386, 1387 (9th Cir. 1976) (58 days), cert. denied, 430 U.S. 945 (1977); Battaglia v. United States, 303 F.2d 683, 685-86 (2d Cir.) (approximately 135 days), cert. dismissed, 371 U.S. 907 (1962); McAllister Brothers, 278 F.2d at 710 (over 60 days); O'Halloran v. United States, 817 F. Supp. 829, 831-33 (N.D. Cal. 1993) (77 days); Hall v. Maritime Administration, 1993 WL 139507, at *2 (E.D. La. April 27, 1993) (126 days); Landry v. United States, 815 F. Supp. 1000, 1003 (E.D. Tex. 1993) (110 days), aff'd, 1994 U.S. App. LEXIS 7656 (5th Cir. March 29, 1994); Erdman v. Hudson Waterways Corp., 713 F. Supp. 706, 709 (S.D.N.Y. 1989) (80 days); Pezzola v. United States, 618 F. Supp. 544, 544-48
But what about the middle, thirty to fifty day range? Research turned up no cases in this range. Thus, if the admiralty plaintiff serves her admiralty complaint on the United States during this range, she has little, if any, assurance that she has complied with the SAA’s forthwith service condition.

In 1983, Rule 4(m) was added to the Federal Rules of Civil Procedure. This new federal civil rule specified an expandable 120 day service period in admiralty cases involving the United States. At the time this new rule was propounded, some admiralty plaintiffs may have assumed that the new rule’s expandable 120 day service period superseded the SAA’s somewhat wooden forthwith service condition—along with that condition’s middle range ambiguities. But such an assumption would have been not only overly optimistic, but also premature. Of the circuits which concern themselves regularly with admiralty questions, the Second, Ninth, and Eleventh Circuits did not allow the new uniform service period to supersede the SAA’s forthwith service condition. Only the Third Circuit has

6 FED. R. CIV. P. 4(m). This rule was previously located at FED. R. CIV. P. 4(j). The rule is found at its current location as a result of 1993 amendments to the federal procedural rules. The reader will note that, while materials cited in this Comment refer internally to the rule at its previous location, this Comment refers to the rule at its new location and infers that materials cited intend reference to the rule at its present location.

7 This service period can be expanded either by the plaintiff’s motion under Rule 6(b), FED. R. CIV. P., or by failing to serve within Rule 4(m)’s 120 day service period and then showing “good cause” for such failure. 128 CONG. REC. H9851-52 (daily ed. Dec. 15, 1982), reprinted in JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE, FEDERAL CIVIL RULES, pt. 1, § 4.2[3] (1993). The 1993 amendment to Rule 4(m) allows the court to extend the service period without a showing of good cause. FED. R. CIV. P. 4(m) advisory committee’s notes, reprinted in JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE, FEDERAL CIVIL RULES, pt. 1, § 4.1[2] (1994). This new provision of Rule 4(m) will come to bear on this Comment’s analysis at a later stage.

8 Libby, 840 F.2d at 820; Watts, 752 F.2d at 408; Amella, 732 F.2d at 712; Kenyon, 676 F.2d at 1231; McAllister Bros., 278 F.2d at 710.
allowed such a result. The Fifth Circuit has, rather remarkably, remained mostly silent on this issue.

Which of the circuits, if any, is right about the effect of Rule 4(m) on the SAA’s forthwith service condition? For the benefit of the admiralty plaintiff, this Comment attempts to answer this question. To do so, this Comment analyzes two key cases on point, Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc., a Third Circuit case holding that Rule 4(m) supersedes the SAA’s forthwith service condition, and Libby v.

9 Jones & Laughlin Steel, 772 F.2d at 63-6. But cf. Libby, 840 F.2d at 820-21 (holding that, while Rule 4(m)’s 120 day service period does not supersed the forthwith service condition, it may nevertheless act as a “benchmark” in determining what qualifies as forthwith); see NORRIS, THE LAW OF MARITIME PERSONAL INJURIES § 8:4 (4th ed. 1990) (misconstruing Libby as holding that Rule 4(m) supersedes the forthwith service condition; a discussion making this misconstrual more obvious follows below).

10 The Fifth Circuit has not, however, been altogether silent. In one unpublished case, the Fifth Circuit appeared to hold that forthwith service was still a condition which had to be met in order for the court to have jurisdiction over the sovereign. Kieu v. United States, 1993 A.M.C. 1789, 1790-92 (5th Cir. 1992) (quoting Amella, 732 F.2d at 730) (holding that plaintiff never properly served the United States and, impliedly, that plaintiff did not serve forthwith as required by § 742 of the SAA; stating that “[f]ailure to comply with the forthwith service demand of §742 [sic] is a jurisdictional defect which denies a court subject matter jurisdiction in the controversy”). Two further points are noteworthy here. First, the Fifth Circuit chose not to publish Kieu, because it regarded forthwith service “as a well-settled principle of law.” 5TH CIR. R. 47.5.1. Second, if this interpretation of Kieu is correct, then the Fifth Circuit, while not addressing the Rule 4(m) question directly, has set a precedent regarding whether or not the forthwith service condition has been superseded by another of the Federal Rules of Civil Procedure (Rule 15(c)). Under local Fifth Circuit rules, unpublished cases do have precedential value. 5TH CIR. R. 47.5.3.

Since Kieu, two Fifth Circuit district courts’ decisions have held that the forthwith service condition remains unaffected by the presence of Rule 4(m), while two others have held the opposite, i.e., that the forthwith service condition has been superseded. See Hall v. United States, No. CIV.A. 92-3020, 1993 WL 139507, at *2 (E.D. La. Apr. 27, 1993); Landry, 815 F. Supp. at 1002-3 (both holding that the forthwith service conditions still applies). But see Holmberg v. OMI Ship Management, Inc., No. CIV.A. 92-3749, 1993 WL 165774, at *1-2 (E.D. La. May 6, 1993); Estain v. United States, No. CIV.A. 92-479, 1992 WL 125348, at *1-2 (E.D. La. June 2, 1992) (both holding that the forthwith service condition has been superseded).

United States,12 an Eleventh Circuit case holding the contrary. This Comment then discusses how these two cases, taken together, suggest a new argument for undoing the SAA’s forthwith service condition. Finally, this Comment concludes that, at least until such time as Rule 4(m) unambiguously carries the day, admiralty plaintiffs would do well to serve their admiralty complaints on the United States “forthwith”, that is, on the same day they file them or very soon thereafter.13

II. THE THIRD CIRCUIT ARGUMENT AGAINST FORTHWITH SERVICE

In Jones & Laughlin Steel, the Third Circuit decided that the Rule 4(m)’s service period superseded the SAA’s forthwith service condition to the maritime waiver of sovereign immunity.14

A. Facts of the Case

The U.S. Army Corps of Engineers (Engineers)—ultimately the United States, appellee—operates the Maxwell Lock and Dam, located on the Monongahela River in Fayette County, Pennsylvania.15 Downstream from this dam, appellant Jones & Laughlin Steel, Inc. (J&L) operates a preparation plant which relies on the Monongahela’s water level for transportation purposes.16 In January of 1982, an empty barge belonging to appellee Mon River Towing Company, Inc. (Mon River), “broke free, floated down river, and lodged in an open gate at the dam.”17 In order to dislodge this empty barge from the open gate at the dam, the Engineers found it necessary to low-

---

12 846 F.2d 818 (11th Cir. 1988).
13 The difficulties involved in serving this way are minimal. Instructions on how to serve the United States are easy to come by. See 46 U.S.C. § 742 (1988); FED R. CIV. P. 4(i) (both giving detailed instructions on how to serve the United States).
Caveat: The United States has not been served for the purposes of the forthwith service condition until both the local United States Attorney and the U.S. Attorney General have been properly served. Amella, 732 F.2d at 712; Battaglia v. United States, 303 F.2d 683, 685-86 (2d. Cir 1962); Rodriguez v. Tisch, 688 F. Supp. 1530, 1531 (S.D. Fla. 1988).
14 772 F.2d at 63-66.
15 Id. at 63.
16 Id.
17 Id.
er the Monongahela's water level.\textsuperscript{18} This action on the part of the Engineers caused the downstream J&L plant to suffer an economic loss.\textsuperscript{19}

In January of 1984, prior to the running of the SAA's two-year statute of limitations,\textsuperscript{20} and after realizing the unlikelihood of recovery \textit{vis a vis} administrative channels, J&L filed an admiralty complaint against the United States and Mon River in the United States District Court for the Western District of Pennsylvania.\textsuperscript{21} The day after filing this complaint, J&L served its summons and complaint on the Engineers at their offices in Pittsburgh, Pennsylvania.\textsuperscript{22} Two months later, an Assistant United States Attorney sent J&L a letter informing J&L that, in order for its suit to proceed, it would need to comply with the instructions of the federal procedural rules respecting both timely service\textsuperscript{23} and the method for effecting service on the United States.\textsuperscript{24} Days later and before the end of the 120 day service period, J&L served the United States as directed by the Assistant United States Attorney's letter.\textsuperscript{25}

The United States then had a sudden change of heart and took the position that it should be dismissed from the action, based on the following two-step argument: step one, the sole basis for jurisdiction in the suit against the United States was the SAA; step two, by failing properly to serve the United States until two months after filing its complaint, J&L failed to serve the United States forthwith as jurisdictionally required by § 742 of the SAA.\textsuperscript{26} This change of position raised for the

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} 46 U.S.C. § 745 (1988).
  \item \textsuperscript{21} \textit{Jones & Laughlin Steel}, 772 F.2d at 63.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} See \textit{FED. R. CIV. P.} 4(m) (formerly 4(j)).
  \item \textsuperscript{24} Id.; see \textit{FED. R. CIV. P.} 4(i) (formerly 4(d)(4)).
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. at 63-64. This particular paragraph (the paragraph in which the Third Circuit notes this quick change in the United States' position) seems to be the key paragraph in \textit{Jones & Laughlin Steel}. In this paragraph, the Third Circuit reveals its disgust for the United States' quick change in position regarding the applicability of Rule 4(m); that is, for the United States' willingness, first to lead J&L down the primrose path of believing that the Federal Rules were controlling with respect to service issues, then suddenly to switch service laws on J&L when it was too late for J&L to do anything about it, when their claim would be time-barred if dismissed. For, by this time in the action the SAA's two year statute limitations had run, so that if J&L was dismissed for service reasons, it would have, for intents and purposes, been dismissed with prejudice.
\end{itemize}
first time, in the district as well as in the Third Circuit, the issue of whether or not Rule 4(m) supersedes the forthwith service condition of § 742 of the SAA. Looking to the Second and Ninth Circuits for guidance,\textsuperscript{27} the district court then adopted the United States' position and dismissed the United States from the action.\textsuperscript{28} When J&L appealed the Third Circuit reversed, holding that Rule 4(m) supersedes the forthwith service condition of the SAA.\textsuperscript{29}

\textbf{B. Reasoning of the Court}

Reduced to propositional form, the Third Circuit's argument in favor of Rule 4(m) works as follows:

1. Under the Rules Enabling Act,\textsuperscript{30} Rule 4(m) supersedes any inconsistent federal procedural laws;\textsuperscript{31}

2. The SAA's forthwith service condition is a federal procedural (and merely procedural) law;\textsuperscript{32}

\textsuperscript{27} See Kenyon, 676 F.2d at 1231; McAllister Bros., 278 F.2d at 710.

\textsuperscript{28} Jones \& Laughlin Steel, 772 F.2d at 64.

\textsuperscript{29} Id. at 66.


\textsuperscript{31} Jones \& Laughlin Steel, 772 F.2d at 66; see Rules Enabling Act, 28 U.S.C. § 2072 (1988) (declaring that "all laws in conflict with such rules [as are enabled by this act, e.g., Rule 4(m)] shall be of no further force or effect after such rules have taken effect").

\textsuperscript{32} Id. at 65-66 (quoting 46 U.S.C. § 743 (1988), which declares that admiralty actions against the United States permitted under the SAA "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties," and, thus, implying that the SAA did not intend to give the United States a special procedural, hypertechnical defense otherwise not available "in like cases between private parties"). The Third Circuit here relied on the twin arguments of Judges Friendly and Boochever who disagreed with the case law in their own respective circuits, the Second and the Ninth, regarding whether or not the SAA's forthwith service condition was indeed a condition. See \textit{Battaglia}, 303 F.2d at 686-87 (Friendly, J., concurring) (expressing the opinion that once the United States, in the first two sentences of 46 U.S.C. § 742 (1988), grants its general maritime waiver of sovereign immunity, maritime actions against the United States, at least with respect to procedural questions, proceed as if brought against a private admiralty defendant); Kenyon, 676 F.2d at 1231-32 (Boochever, J., concurring) (arguing along similar lines as Judge Friendly in \textit{Battaglia} and indicating that the SAA's forthwith service language was in fact intended only as a technical, procedural apparatus for dealing with suits in admiralty brought against the United States under the SAA and that, after the adoption of the uniform Federal Rules of Civil Procedure in 1966,
3. The SAA's forthwith service condition is inconsistent with Rule 4(m);\(^{33}\) (1 & 2)

4. Hence, Rule 4(m) supersedes the SAA's forthwith service condition.\(^{34}\) (1 & 3)

Using principles of formal logic, it will be possible to analyze quickly the Third Circuit's argument. Of course, as is apparent, the Third Circuit's argument is deductively valid, meaning that if all of its premises are true, then its conclusion must also be true. But a deductively valid argument is not necessarily a sound or true argument. In order to deny the conclusion of a valid argument, it must be shown that at least one of the argument's premises is false. Assuming for the moment then that the conclusion of the Third Circuit's argument is false, it will be of some value to determine which of the argument's premises is most likely to be false.

Given the statutory foundation of premise number one and the conclusory nature of premise number three, the obvious candidate for falsehood is premise number two—the premise in which the Third Circuit opines the SAA's forthwith service condition to be merely procedural. It is with this premise that the Eleventh Circuit expressly disagrees with the Third Circuit. For further commentary on the Third Circuit's argument then, it will be useful to examine the Eleventh Circuit's argument.

III. THE ELEVENTH CIRCUIT ARGUMENT IN FAVOR OF FORTHWITH SERVICE

In Libby v. United States,\(^{35}\) the Eleventh Circuit expressly disagreed with the Third Circuit's decision in Jones & Laughlin Steel, and decided that Rule 4(m)'s service period did not and could not supersede the SAA's forthwith service condition to maritime waiver of sovereign immunity.\(^{36}\)

---

\(^{33}\) See Jones & Laughlin Steel, 772 F.2d at 63-66. Although the court never directly states this premise of this argument, the premise may be implied from the facts as an enthymeme of the court's argument.

\(^{34}\) Id.

\(^{35}\) 840 F.2d 818 (11th Cir. 1988).

\(^{36}\) Id. at 820-21.
A. Facts of the Case

In March of 1984, Michael Libby (Libby) was injured while working aboard a vessel belonging to the United States.\textsuperscript{37} In March of 1986, one day before the running of the SAA's two year statute of limitations,\textsuperscript{38} Libby filed an admiralty action against the United States in the United States District Court for the Middle District of Florida.\textsuperscript{39} Twenty-four days later, Libby completed service on the United States.\textsuperscript{40} In response to this twenty-four day "delay" in service, the United States moved to be dismissed on the grounds that Libby had failed to serve forthwith as required by § 742 of the SAA.\textsuperscript{41}

The Middle District, apparently not impressed with the United States' Draconian interpretation of forthwith service, denied the United States' motion and held instead that the expandable 120 day service period established by Rule 4(m) superseded the SAA's forthwith service condition.\textsuperscript{42} On appeal, the Eleventh Circuit disagreed with the reasoning of the lower court, holding that Rule 4(m)'s service period did not and could not supersede the SAA's "jurisdictional" forthwith service condition.\textsuperscript{43} The Eleventh Circuit, however, went on to affirm the district court's result, holding, inter alia, that service twenty-four days after filing was sufficiently forthwith.\textsuperscript{44}

B. Reasoning of the Court

Reduced to propositional form, the Eleventh Circuit's argument in favor of forthwith service looks like this:

5. Under the Rules Enabling Act, Rule 4(m) may not abridge, enlarge or modify any substantive or jurisdictional right.\textsuperscript{45}

\textsuperscript{37} Id. at 819.
\textsuperscript{39} Libby, 840 F.2d at 819.
\textsuperscript{40} Id.
\textsuperscript{41} Id. As in note 28, supra, this part of the case seems to be the turning point for the United States. Perhaps if the United States had refrained from employing the forthwith service defense after being served only 24 days after filing, the Eleventh Circuit would never have announced its "benchmark" theory for determining what service amounts to forthwith service. As is explained later, it is this benchmark theory which may ultimately undo the United States' forthwith service defense altogether.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 820-21.
\textsuperscript{44} Id. at 821-22.
\textsuperscript{45} Id. at 820; see Rules Enabling Act, 28 U.S.C. § 2072(b) (1988) (stating
6. In addition to whatever procedural functions it performs, the SAA's forthwith service condition involves at least these three substantive and jurisdictional rights:46

(a) The sovereign's absolute substantive right to condition its waivers of sovereign immunity;47
(b) The admiralty plaintiff's conditional substantive right to sue the sovereign;48 and
(c) The federal judiciary's conditional jurisdiction over the sovereign.49

7. Allowing Rule 4(m) to supersede the SAA's forthwith service condition results in:

(a) an abridgement of the sovereign's absolute substantive right to condition its waivers of sovereign immunity (i.e., the sovereign could be sued despite the fact that one of the conditions to its maritime waiver—forthwith service—has not been met);50
(b) an enlargement of the admiralty plaintiff's conditional substantive right to sue the sovereign (i.e., the admiralty plaintiff would be allowed to sue the sovereign without complying with all of the sovereign's conditions—conditions which include forthwith service);51 and
(c) a modification of the federal judiciary's conditional jurisdiction over the sovereign (i.e., the federal judiciary

that the Federal "[R]ules shall not abridge, enlarge or modify any substantive right"); see also Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941); United States v. Sherwood, 312 U.S. 584, 589-90 (both stating that, when the Rules Enabling Act prohibits the Federal Rules from abridging, enlarging or modifying substantive rights, it also intends to prohibit the Federal Rules from abridging, enlarging or modifying the jurisdiction of the federal courts); see Fed. R. Civ. P. 82 (recognizing Sibbach and Sherwood principle that Federal Rules of Civil Procedure are not to extend the jurisdiction of the federal courts).

46 As the Third Circuit did in Jones & Laughlin Steel, the Eleventh Circuit in Libby took an interest in the location of the SAA's forthwith service language within the Act. The Eleventh Circuit found that, because the forthwith service language was in the SAA section that actually announced and defined the maritime waiver of sovereign immunity, § 742, rather than in the SAA's procedural matters section, § 743, it was only correct to interpret the forthwith service language as being part of the waiver and, therefore, jurisdictional. 840 F.2d at 820.
47 Libby, 840 F.2d at 820.
48 Id.
49 Id. at 820-21 (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)).
50 Id.
51 Id.
would be allowed to hail the sovereign into court without enforcing all of the conditions of the sovereign's maritime waiver of immunity). 52

8. Hence, Rule 4(m) may not supersede the SAA's forthwith service condition to the maritime waiver of sovereign immunity. 53

The Eleventh Circuit's argument is deductively valid. It is in premise number six—the premise in which a substantive and jurisdictional role is suggested for the SAA's forthwith service condition—that the Eleventh Circuit parts ways with the Third Circuit.

Not surprisingly, this point of departure happens at the most vulnerable part of the argument. For, if there is a doubtful premise in the Eleventh Circuit's argument it is premise six. This is true for reasons similar to those described above regarding the doubtfulness of premise two. Premise five is well founded in the plain language of the Rules Enabling Act. Premise seven is a conclusion based on premises five and six. Premise six involves the Eleventh Circuit's interpretation of the SAA, an interpretation directly at odds with that of the Third Circuit.

The Third Circuit, as expressed in premise two, believes that the SAA's forthwith service condition is merely procedural and, therefore, that Rule 4(m) supersedes that condition by virtue of the Rules Enabling Act. The Eleventh Circuit, as expressed in premise six, believes that, in addition to any procedural function it may serve, the SAA's forthwith service condition has substantive as well as jurisdictional content and, hence, that the Rules Enabling Act prevents Rule 4(m) from changing that condition in any way. Apparently, the Third and Eleventh Circuits are stalemated. They would be, except for the fact that after giving the appearance of favoring the SAA's forthwith service condition, the Eleventh Circuit went on cleverly to undermine the forthwith service condition by suggesting a new theory for determining when service is forthwith.

52 Id.
53 Id. at 821.
C. The Eleventh Circuit's Argument Against Forthwith Service

To its conclusion upholding the SAA's forthwith service condition, the Eleventh Circuit added this proviso: that, while Rule 4(m) did not and could not supersede the SAA's forthwith service condition, it might well serve as a "benchmark" for determining when service is forthwith.\(^5^4\) In effect, the Eleventh Circuit offered this new premise:

9. Nothing prevents the court from using Rule 4(m)'s service period as a "benchmark" for determining what constitutes forthwith service in a contemporary litigation setting.

This new "benchmark" premise appears to be what the admiralty plaintiff has been waiting for: a readily comprehensible, straightforward statement of what the SAA's forthwith service condition actually requires. What this new premise means, at least on its face and as applied in Libby, is that, if the admiralty plaintiff serves the United States within the time allowed by Rule 4(m), then the admiralty plaintiff probably serves forthwith.\(^5^5\) When combined with premises one through eight above, this premise means that, whether or not the SAA's forthwith service condition is merely procedural or has substantive, jurisdictional content, Rule 4(m) applies, either directly or as an afterthought. This would be true whether it supersedes the SAA's obsolete forthwith service condition (as in the Third Circuit) or because it serves as a benchmark in the determina-

\(^5^4\) 840 F.2d at 821.

\(^5^5\) As noted earlier, Rule 4(m)'s 120 day service period is expandable. It would be pure speculation and beyond the scope of this Comment to guess what the Eleventh Circuit might do in the situation where the admiralty plaintiff serves the United States after the 120 days but within an allowable expanded period, say a period of 150 days with a showing of good cause. One could argue that the Eleventh Circuit's preference in this matter would be as follows: keep things simple and uniform; if it is good enough for Rule 4(m), it ought to be good enough for forthwith service. There is no good reason for setting up jurisdictional traps in which to snare unwitting admiralty plaintiffs. However, the most recently amended version of the 120 day rule suggests that this reasoning may be overly generous. The amended rule allows the court to expand the service period on its own motion and without any showing of good cause. Based on the reasoning above, this would mean, at least from the Government's perspective, that a federal court would have the power, as a matter of discretion, to expand its jurisdiction over the United States in admiralty actions, a result prohibited by the Rules Enabling Act and the federal procedural rules themselves. 28 U.S.C. § 2072 (1988); Fed R. Civ. P. 82.
tion of when the SAA’s forthwith service condition has been satisfied (as in the Eleventh Circuit).

The admiralty plaintiff, however, is not yet in a position to be at ease in assuming that mere compliance with Rule 4(m)’s service limit will render service on the United States forthwith as required by the SAA. The Eleventh Circuit merely said that Rule 4(m)’s uniform service period might properly serve as a benchmark in determining when service is forthwith. It did not say that Rule 4(m)’s service limit would serve as a benchmark. Nor did it say that Rule 4(m)’s service limit would serve as the benchmark. In short, the Eleventh Circuit left open the possibility that other benchmarks might still exist, including those established in earlier, albeit inadequate jurisprudence—jurisprudence which failed to offer the admiralty plaintiff assurances in the middle or thirty to fifty days range.

IV. CONCLUSION

In Jones & Laughlin Steel, the Third Circuit takes one of the possible approaches to solving the forthwith service problem. The Third Circuit declared the SAA’s forthwith service condition merely procedural and, by that means, allowed Rule 4(m)’s service limit to supersede the SAA’s forthwith service condition as required by the Rules Enabling Act. In order to follow the Third Circuit’s approach, a court would have to overlook significant jurisprudence holding the forthwith service condition to be more than merely procedural.

In Libby, the Eleventh Circuit takes the benchmark approach to solving the forthwith service problem, preventing Rule 4(m)’s service limit from undermining the SAA’s forthwith service condition, but nonetheless allowing Rule 4(m) to operate as a criterion in the determination of when an admiralty plaintiff’s service on the United States satisfies the condition. The benchmark approach, of course, avoids the problems involved in overlooking significant jurisprudence on point. For circuits such as the Second and the Ninth, which hold the forthwith service condition to be at least partly jurisdictional, the Eleventh Circuit’s benchmark approach offers a possibility for changing course on the forthwith service issue without overturning circuit precedent. To make the benchmark approach work as desired, and to make the service standard for plaintiffs suing the United States in admiralty completely unambiguous, however, the service limit of Rule 4(m) must be recognized as the only criterion for determining when service
qualifies as service forthwith. Such a holding, however, could be undesirable, if the result thereof was tantamount to granting the federal courts discretionary power to enlarge their admiralty jurisdiction over the United States—especially in cases where no showing of good cause for tardy service is provided, as unamended Rule 4(m) strictly required. If this were the result, then it would have to be said that Rule 4(m) did what the Rules Enabling Act and Rule 82 forbade: namely, that Rule 4(m) modified the substantive rights of both the sovereign and admiralty plaintiffs and enlarged the admiralty jurisdiction of the federal courts over the sovereign.

A parting word to the wise: At least until such a time as Rule 4(m) unambiguously carries the day, admiralty plaintiffs would be well-advised to serve their admiralty complaints on the United States “forthwith”—on the day of filing or very soon thereafter.

James David Phipps