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## Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue

Daniel J. Capra\*

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# Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue

Daniel J. Capra

## **Abstract**

Finding an appropriate U.S. forum for an international antitrust case is unnecessarily complicated. Congress, with its intent to effectuate broad enforcement of the antitrust laws, has provided statutory authority, which allows suit in any judicial district so long as the antitrust defendant has minimum contacts with the United States. Thus far the courts have generally ignored the solution provided by Congress in favor of the long-arm statutes of the state legislature. This state of affairs must be corrected in order to prohibit a jurisdictional windfall to alien defendants that was not intended by Congress.

# SELECTING AN APPROPRIATE FEDERAL COURT IN AN INTERNATIONAL ANTITRUST CASE: PERSONAL JURISDICTION AND VENUE

*Daniel J. Capra\**

## INTRODUCTION

Plaintiffs who seek to bring international antitrust claims in the United States courts face several important limitations once it has been established that the United States antitrust laws can be properly applied.<sup>1</sup> In order to adjudicate the case in his or her choice of forum, the plaintiff must clear jurisdictional, procedural, venue, and convenience obstacles.

The plaintiff must first show that the court has personal jurisdiction over the defendant. Personal jurisdiction refers to the power of the court to adjudicate the particular defendant's rights and obligations.<sup>2</sup> This power must come from the legislature,<sup>3</sup> and the legislative grant is subject to constitutional limitations which seek to prevent the defendant from being sued in a jurisdiction in which he has no meaningful contacts.<sup>4</sup>

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\* Associate Professor of Law, Fordham University School of Law; J.D. 1977, University of California, Berkeley; A.B. 1974, Rockhurst College. My thanks to Robin Ann Roth for her assistance on this article. The article was made possible by a research grant from Fordham Law School. For further discussion of this topic, see 1 B. HAWK, *UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE* (3d ed. 1986).

1. On this issue of application of antitrust laws see, e.g., *United States v. Aluminum Co. of Am. (ALCOA)*, 148 F.2d 416, 444 (2d Cir. 1945) (extraterritorial application of United States antitrust law based on intended and actual effects on United States commerce); *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 549 F.2d 597, 614 (9th Cir. 1976) (decision to apply United States antitrust law based on effects and "jurisdictional rule of reason" which takes into account the extent of the effect on United States commerce and principles of international comity). After remand, the Ninth Circuit held that its "jurisdictional rule of reason" required dismissal for lack of subject matter jurisdiction. 749 F.2d 1378 (9th Cir. 1984); see also Davidow, *Extraterritorial Antitrust and the Doctrine of Comity*, 15 J. WORLD TRADE L. 500 (1981); Kintner & Griffin, *Jurisdiction over Foreign Commerce under the Sherman Antitrust Act*, 18 B.C. INDUS. & COM. L. REV. 199 (1977).

2. See Capra, Book Review, *Conceptual Limitations on Long-Arm Jurisdiction*, 52 FORDHAM L. REV. 1034, 1042 (1984).

3. See *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 287 (3d Cir.), cert. denied, 454 U.S. 1085 (1981).

4. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The plaintiff must establish a basis upon which the court can justify the assertion of personal jurisdiction over a defendant.

The plaintiff must then show that the defendant has been properly served with process, i.e., that notice of the action and a copy of the complaint have been served on the defendant. Authorization for service of process comes from the legislature as well,<sup>5</sup> subject to constitutional limitations which guarantee that defendant receives reasonable notice under the circumstances, as well as a reasonable opportunity to appear to defend his interests.<sup>6</sup>

It must also be shown that venue is proper.<sup>7</sup> Venue is purely a statutory question.<sup>8</sup> The venue statutes seek to place an action in a convenient United States forum.<sup>9</sup>

Finally, the forum chosen by plaintiff must not seriously inconvenience the parties or witnesses, or be contrary to the interests of justice, even though the requirements of personal jurisdiction and venue have been met.<sup>10</sup> Venue statutes are not perfect guarantors of a convenient forum.<sup>11</sup> Consequently, Congress has provided for transfer of venue, under certain conditions, throughout the federal system.<sup>12</sup>

Unfortunately, in international antitrust cases, the above limitations are not as easily distinguishable as should be expected. One major problem is that while jurisdiction may be constitutionally obtainable over non-resident defendants, the legislature must effectuate this possibility by authorizing extra-

5. See, e.g., FED. R. CIV. P. 4; Clayton Antitrust Act, § 12, 15 U.S.C. § 22 (1975).

6. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

7. See *infra* notes 287-374 and accompanying text.

8. See 28 U.S.C. § 1391 (1982); 15 U.S.C. § 22 (1975); Ehrenzweig, *From State Jurisdiction to Interstate Venue*, 50 OREGON L. REV. 103 (1971).

9. See *LeRoy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984) (venue requirements are not analogous to personal jurisdiction requirements since venue is concerned with inconvenience while jurisdiction is concerned with whether defendant has a meaningful relationship with the relevant forum).

10. See *infra* notes 375-90 and accompanying text.

11. For instance, an alien can be sued in any district under 28 U.S.C. § 1391(d) (1982). It cannot be maintained that each judicial district is an equally convenient place to hear an antitrust case.

12. See 28 U.S.C. §§ 1404, 1406, 1631 (1982). If the case cannot be conveniently tried anywhere in the United States, the common law doctrine of *forum non conveniens* would arguably be relevant. However, the application of this doctrine to antitrust cases has been generally rejected. See *infra* notes 391-408 and accompanying text.

territorial service of process. To the extent that the legislature has not acted, concepts of jurisdiction and service of process become entangled: jurisdiction is limited only because service of process is limited in such a case by Rule 4 of the Federal Rules of Civil Procedure (Rule 4).<sup>13</sup> Second, the special antitrust statute respecting appropriate federal forums—section 12 of the Clayton Act<sup>14</sup>—speaks to jurisdiction, venue, *and* service of process. Courts often try to construe section 12 as a whole, which is significantly different from the sum of its parts.

In light of the existing confusion surrounding the construction of section 12, Rule 4, and the constitutional limitations on personal jurisdiction, it is time to suggest a simple solution to the problem of forum allocation in international antitrust actions. The solution is particularly simple with respect to alien corporate defendants, and follows a logical progression.

First, section 12 of the Clayton Act should be read to authorize worldwide service of process, thus extending extraterritorial authority over alien defendants to the limits of the due process clause.<sup>15</sup> The proper manner of service, as opposed to the jurisdictional reach of service, is properly governed by Rule 4.

Second, the only limitation on the legislative grant of worldwide jurisdiction under section 12 is the due process clause of the fifth amendment.<sup>16</sup> The fifth amendment merely requires that the defendant have minimum contacts with the

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13. FED. R. CIV. P. 4; *see* *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 418-19 (9th Cir. 1977).

14. Section 12 of the Clayton Act, 15 U.S.C. § 22 (1973), provides:

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

15. Courts have disputed this proposition on two grounds: 1) section 12 provides nationwide, but not worldwide service of process; and 2) the venue requirements of section 12 must be satisfied before the plaintiff can resort to the service provisions of section 12. *See infra* notes 35-51 and accompanying text.

16. This proposition is accepted by most courts. *See* *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334-35 (2d Cir. 1972); *supra* notes 200-14 and accompanying text. However, some courts either ignore or reject the proposition that section 12 provides the necessary statutory authority for asserting extraterritorial jurisdiction to the limits of fifth amendment due process. *See, e.g.,* *Max*

United States, not with any particular state.<sup>17</sup> Consequently, if the alien corporation purposefully avails itself of the benefits and protections of the laws of any part of the United States, it can be sued in any United States forum.

Third, venue as to aliens is proper in any federal district court.<sup>18</sup> Finally, given the broad choice of fora presented by the above scenario, alien corporations would undoubtedly claim that they could be subject to extreme burdens of distant litigation in outrageously chosen fora.<sup>19</sup> However, these concerns do not present problems of jurisdiction or constitutional due process. Rather, these are simply questions of venue.<sup>20</sup> If defendant can show that the plaintiff's choice of forum is substantially inconvenient, the court can transfer to a more convenient federal district court.<sup>21</sup>

Unfortunately, few courts have taken the simple route outlined above.<sup>22</sup> Most cases take the antitrust plaintiff through a procedural thicket of "transacting business" under section 12 of the Clayton Act, and, of all things, *state* long-arm statutes and fourteenth amendment constitutional limitations on state courts.<sup>23</sup> What follows is a discussion of the procedural hur-

*Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 106 S. Ct. 383 (1985); *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414, 418-20 (E.D. Pa. 1979).

17. See *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Cryomedics Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975).

18. 28 U.S.C. § 1391(d) (1982). Many courts do not reach the point of invoking section 1391(d), because they hold that the statutory service provisions of section 12 of the Clayton Act cannot be invoked without first satisfying statutory venue requirements.

19. See Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. REV. 1 (1984) (discussing suit in Alaska even though defendant's contacts are with Florida).

20. See, e.g., *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251, 256-57 (5th Cir. 1981).

21. See 28 U.S.C. § 1404 (1982); see, e.g., *United States v. Nat'l City Lines, Inc.*, II, 337 U.S. 78 (1949).

22. The important case of *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982), follows the four step approach to forum allocation discussed in the text. While an alien corporate defendant can be easily dealt with, the problems are more complex as to alien individuals because section 12 service does not apply to them, and as to United States citizens, because 28 U.S.C. § 1391(d) does not apply to them. See *infra* notes 34 and 289 and accompanying text (discussion of the more difficult problems of forum allocation).

23. See *Defames*, 654 F.2d at 284.

[W]e believe that Hitachi's amenability to suit . . . must be judged by fourteenth amendment standards. We recognize that this creates an anomalous situation because it results in a federal court in a nondiversity case being

dles to choosing a forum in an international antitrust case. With respect to the paradigmatic corporate alien defendant, a much simpler and more logical solution is possible and has been used by some courts.

## I. PERSONAL JURISDICTION

### A. Statutory Authority

#### 1. Rule 4 and the Long-Arm Statutes

It is well settled that a court cannot act to adjudicate the rights and obligations of a defendant unless it has been given the authority to do so by the legislature.<sup>24</sup> Rule 4(e) of the Federal Rules of Civil Procedure generally provides that in the absence of a special federal statute, the statutory power to reach defendants who must be served outside a particular state shall extend only to those defendants who could be reached under the statutes passed by the *state* legislature of the state in which the federal court sits.<sup>25</sup> These state statutes are referred

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limited by the due process restrictions imposed on the states by the fourteenth amendment as opposed to those imposed on the federal government by the fifth amendment.

*Id.*; see also Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 132-40 (1983).

24. See *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977). "Not only must the requirements of due process be met before a court can properly assert in personam jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature." *Id.* at 416.

25. FED. R. CIV. P. 4(e) provides:

*Summons: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

See *Burstein v. State Bar of Cal.*, 693 F.2d 511, 514 (5th Cir. 1982). Rule 4(f) limits process under Rule 4 (with certain exceptions not pertinent hereto) to the state in which the district court sits. FED. R. CIV. P. 4.

to as long-arm statutes.<sup>26</sup> Long-arm statutes differ in both terminology and construction. Some reach the full extent of due process either explicitly or by judicial construction.<sup>27</sup> Other long-arm statutes exclude certain activities or conduct which could constitutionally be reached under the fourteenth amendment due process clause.<sup>28</sup> Many list enumerated acts which must have occurred in the state in order for jurisdiction to be statutorily authorized.<sup>29</sup> Accordingly, if service of process must be made outside the state, and no special federal statute for service can be found, reference must be made to the various long-arm provisions to determine the extent of statutory power the court—even a federal court in an antitrust case—will have.<sup>30</sup> This may result in inconsistent and incomplete enforcement of the antitrust laws; the federal antitrust case will be controlled by state limitations on their own process.<sup>31</sup>

A plaintiff in an international antitrust action can avoid resort to state long-arm statutes in at least two ways. First, if a defendant can be served *within* the state in which the district court sits—either personally if an individual defendant, or upon a proper agent if a business entity—then Rule 4(d) provides a wholly federal means of service, and Rule 4(f) specifically provides a statutory basis of personal jurisdiction upon such in-state service.<sup>32</sup> The only further limitation on such ser-

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26. See generally R. CASAD, JURISDICTION IN CIVIL ACTIONS ¶¶ 4.01-4.03 (1983).

27. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 1973); 42 PA. CONS. STAT. ANN. § 5322 (Purdon 1981); 2A R.I. GEN. LAWS, § 9-5-33 (1969); see also Note, *Personal Jurisdiction Over Alien Corporations in Antitrust Actions: Toward a More Uniform Approach*, 54 ST. JOHN'S L. REV. 330, 333-37 (1980).

28. See, e.g., N.Y. CIV. PRAC. LAW & RULES § 302 (McKinney Supp. 1986); Banco Ambrosiano S.p.A. v. Artoc Bank & Trust Ltd., 62 N.Y.2d 65, 71-73, 464 N.E.2d 432, 434-36, 476 N.Y.S.2d 64, 66-68 (1984) (*quasi in rem* jurisdiction fills the gap between long-arm statute and due process limitations). The anomaly of federal incorporation of state statutory jurisdiction is especially pronounced when the federal court in a federal question case cannot enforce federal law because of a limited long-arm statute which was passed to effectuate state policy. See Lilly, *supra* note 23, at 136.

29. See, e.g., 32 MICH. COMP. LAWS ANN. § 600.705 (West 1981); 29 MO. ANN. STAT. § 506.500 (Vernon Supp. 1982).

30. For a detailed analysis of state long-arm statutes, see R. CASAD, *supra* note 26, at ¶¶ 4.01-4.09.

31. Compare I.S. Joseph Co. v. Mannesmann Pipe & Steel Co., 408 F. Supp. 1023 (D. Minn. 1976) (state long-arm statute does not reach defendant's antitrust activity) with Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659 (D.N.H. 1977) (same activity by related defendant can be reached under New Hampshire long-arm).

32. In other words, when service is made by wholly federal means within the



vice will be the due process clause of the fifth amendment.<sup>33</sup>

## 2. Section 12 of the Clayton Act

The second and more important possibility for avoiding the vagaries and limitations of the state long-arm statutes is to invoke the statutory grant of jurisdiction contained in section 12 of the Clayton Act. When service of process is authorized under section 12, it is clear that the limitations contained in Rule 4(e) are not applicable. Rule 4 merely governs the manner of service, and not the extent of jurisdiction, where section 12 is applicable.<sup>34</sup> However, the scope of the statutory grant of personal jurisdiction under section 12 is subject to several qualifications and to some dispute.

Section 12 of the Clayton Act provides for venue, personal jurisdiction, and service of process as follows:

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

The first limitation on section 12 as a jurisdictional authorization to serve process outside the state in which the district court sits is that the process provision, as well as the venue

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state, Rule 4 itself provides a statutory basis for personal jurisdiction, and plaintiff need not resort to the provisions of Rule 4 which incorporate the jurisdictional limitations of the state long-arm statute. *FED. R. CIV. P. 4*; see *Lone Star Package Car Co. v. Baltimore & O.R. Co.*, 212 F.2d 147 (5th Cir. 1954) (federal court not bound by limitations on state courts where in-state service is made under Rule 4(d)); Note, *supra* note 27, at 350 n.87; see also *Delta Steamships Lines, Inc. v. Albano*, 768 F.2d 728 (5th Cir. 1985) (mailed in-state service under Federal Rule 4(c)(2)(C)(ii) establishes federal statutory basis of jurisdiction).

33. See *infra* notes 200-14 and accompanying text. If service is made within the state, it can be made pursuant to state service of process provisions, and yet state limitations on personal jurisdiction (as distinct from manner of service) will not be relevant. This is because Rule 4 provides a statutory *basis* for jurisdiction upon in-state service, but allows plaintiff to adopt a manner of service authorized by state law. See *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398, 403 (5th Cir. 1981) (in-state service made pursuant to Louisiana service provision, but state limitations on jurisdictional power of Louisiana state courts irrelevant in federal action), *cert. denied*, 456 U.S. 928 (1982).

34. *FED. R. CIV. P. 4(e)*; see *supra* note 25; see also *Burstein v. State Bar of Cal.*, 693 F.2d 511, 514 (5th Cir. 1982); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251, 256-57 (5th Cir. 1981).

provision, is by its terms only applicable to *corporate* defendants. Thus, a plaintiff suing an individual defendant in an anti-trust action has only two possibilities for statutory authorization of personal jurisdiction: pursuant to in-state service under Rule 4, or pursuant to such limited and varied extraterritorial service as is authorized by the relevant state long-arm statute.

A second possible qualification on section 12 as a grant of extraterritorial jurisdiction is in dispute among the courts. Section 12 speaks both to venue *and* jurisdiction. Some courts have held that section 12 must be read as a whole; these courts state that the use of the extraterritorial service provision of section 12 is predicated upon satisfying the standards of venue under section 12.<sup>35</sup> These courts apparently reason that the term "process in such cases" contained in the second clause of section 12 refers to cases in which the venue clause applies, i.e., those which "may be brought not only in the judicial district whereof [defendant] is an inhabitant, but also in any district wherein it may be found or transacts business."<sup>36</sup> In some cases, however, a plaintiff may wish to use the extraterritorial service provisions of section 12, but will not be able to satisfy the section 12 venue requirements.<sup>37</sup> However, such a plaintiff may be able to satisfy another statutory basis of venue. This is particularly true when the suit is against a corporate alien defendant as to whom venue is proper in any judicial district under section 1391(d) of title 28 of the United States Code (section 1391(d)).<sup>38</sup> As to such cases, the courts limiting sec-

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35. See, e.g., *Athlete's Foot of Del., Inc. v. Ralph Libonati Co., Inc.*, 445 F. Supp. 35, 45 (D. Del. 1977); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975) (dictum), *cert. denied*, 434 U.S. 923 (1977); *Friends of Animals, Inc. v. American Veterinary Medical Ass'n*, 310 F. Supp. 620 (S.D.N.Y. 1970). In *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir. 1981), the Sixth Circuit refused to decide whether the section 12 service provisions could be used without satisfying the section 12 venue provisions.

36. See, e.g., *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 n.7 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962).

37. See, e.g., *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982).

38. The venue provisions of section 12 of the Clayton Act are supplemented by the general venue provisions applicable to all federal actions. See *Brunette Machine Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972); *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966); *Ballard v. Blue Shield of S. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976); *infra* notes 288-305 and accompanying text.

tion 12 extraterritorial service to cases in which section 12 venue requirements are satisfied have effectively obliterated the broad, alternative venue provision of section 1391(d).<sup>39</sup>

Other courts have taken the opposing view and have held that a plaintiff can resort to the extraterritorial provisions of section 12 without first satisfying the section 12 venue requirements. These courts reason that the term "process in such cases" refers to the *cases* described in the first clause of section 12, i.e., "any suit, or proceeding under the antitrust laws against a corporation," and not to the judicial districts where venue would be proper.<sup>40</sup> Not only is this a more reasonable construction in terms of a fair reading of the statute, but it is also a construction which does not deprive section 1391(d) of all practical value. Moreover, allowing plaintiffs to use the extraterritorial service provisions of section 12 together with the alien venue provisions of section 1391(d) is a simple, streamlined approach: it avoids the difficulties and uncertainties of establishing state long-arm jurisdiction on the one hand,<sup>41</sup> and the difficulties and uncertainties of establishing a "transacting business" basis of venue on the other.<sup>42</sup> Any concern about protecting alien defendants from overreaching and substantial inconvenience is answered by the protections afforded by the due process clause,<sup>43</sup> and more importantly by the transfer of venue provisions.<sup>44</sup> It would thus seem unnecessary to limit the plain meaning of section 12 in order to provide any further

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39. This result is contrary to the rationale of the Supreme Court in *Brunette Machine Works, Ltd. v. Kockum Indus.*, 406 U.S. 706 (1972), where the Court states that 28 U.S.C. § 1391(d) derives from a tradition going "back to the beginning of the republic . . . [that] suits against aliens were left unrestricted, and could be tried in any district, subject *only* to the requirements of service of process." 406 U.S. at 708 (emphasis added).

40. See, e.g., *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982); *Scriptomatic, Inc. v. Agfa-Gevaert, Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,594 (S.D.N.Y. 1973). The court in *Bucyrus-Erie* distinguished the Second Circuit's contrary ruling in *Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962), as a case against a United States defendant where venue could not have been obtained under the general venue statutes, especially not 28 U.S.C. § 1391(d) (1982). See *Bucyrus-Erie*, 550 F. Supp. at 1040-43. Accordingly, *Goldlawr* is properly characterized as dictum as to the use of the section 12 service of process provision where venue can in fact be obtained under 28 U.S.C. § 1391(d).

41. See *supra* notes 24-33 and accompanying text.

42. See *infra* notes 300-63 and accompanying text.

43. See *infra* notes 204-14 and accompanying text.

44. See *infra* notes 375-408 and accompanying text.

statutory protection to an alien defendant.<sup>45</sup>

In sum, the better view is that the extraterritorial service provision of section 12 is independent from the venue provisions. If a contrary view is taken, a plaintiff who cannot satisfy the venue provisions of section 12 must rely upon the extraterritorial service provisions of the relevant state long-arm statute for a statutory grant of jurisdiction, or else must be able to effectuate service inside the state under Rule 4(d).<sup>46</sup> With respect to United States defendants, this dilemma will not often arise, since as to such defendants there is generally no more liberal a basis for venue than that provided by section 12—transacting business. Thus it will rarely if ever occur that a plaintiff would satisfy general venue statutes, but not section 12 venue requirements, and would thus wish to use section 12 solely as a service statute. As to alien defendants, however, this situation could often arise, since section 1391(d) is far more liberal as to venue than section 12.<sup>47</sup>

A third qualification on section 12 as an extraterritorial service statute is also in dispute. Some courts have held that, whether or not the venue provision is satisfied, section 12 authorizes only *nationwide* service of process, not *worldwide* service of process.<sup>48</sup> This view of section 12 is based on a statutory

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45. In *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), Judge Friendly analyzed section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, *id.* at 1340, which is a venue and service of process provision modeled on 15 U.S.C. § 22. *Leasco*, 468 F.2d at 1340 n.10. Judge Friendly stated that the process clause of the Securities Exchange Act, 15 U.S.C. § 78aa (1981) "speaks expressly only to service of process." *Leasco*, 468 F.2d at 1340 (emphasis added).

46. See Hovenkamp, *Personal Jurisdiction and Venue in Private Antitrust Actions in Federal Courts: A Policy Analysis*, 67 *IOWA L. REV.* 485, 509 (1982).

47. See, e.g., *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982); Hovenkamp, *supra* note 46, at 509; *infra* notes 288-95 and accompanying text.

48. See *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 378 (D. Md. 1975) (service of process under section 12 "may be made in any district where a corporation is found or is an inhabitant") (emphasis added), *cert. denied*, 434 U.S. 923 (1977); *In re Electric & Musical Indus., Ltd., Middlesex Eng.*, 155 F. Supp. 892, 894 (S.D.N.Y. 1957) (process under section 12 runs only to judicial districts in which defendant is found); *In re Siemens & Halske, A.G.*, 155 F. Supp. 897 (S.D.N.Y. 1957). All these cases are arguably dictum as to section 12 and worldwide service. In none of these cases was worldwide service actually attempted. In fact, in each of these cases, service was actually upheld as granting a statutory basis of jurisdiction. The foreign defendants were held to be found within the United States on the basis of their control over American subsidiaries. Service on the subsidiaries—outside the forum state but within the United States—was held to be proper section 12 service upon the foreign parent. See *infra* notes 335-57 and accompanying text.

construction that the clause "process may be served wherever it [the corporation] may be found" refers back to the "any district" language of the provision on venue.

A far more straightforward construction of the process provision is that "wherever it may be found" means exactly what it says. If Congress had wanted to limit service to the judicial districts, it could have used the term "in which" to so qualify the process clause.<sup>49</sup> Moreover, a construction limiting section 12 service to the United States would in some cases mean that section 12 would provide venue but not jurisdiction. This is because a foreign corporation may very well be "transacting business" in a judicial district for venue purposes, but will not be "found" there for jurisdictional process purposes.<sup>50</sup> It is nonsensical to assume that the Congress intended section 12 to provide for venue in cases where jurisdiction would not exist as a statutory matter. Accordingly, the better view adopted by most courts is that section 12 authorizes worldwide service wherever a corporate defendant may be "found"—most commonly corporate headquarters but also including any place where the corporation's officers or agents are engaged in activity tantamount to the "doing business" test.<sup>51</sup>

If the court takes a limited view of the extent of process provided by section 12 then only those corporate defendants "found" within the United States are subject to the statutory

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49. This argument was made by Judge Friendly in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), construing the process provision of the Securities Exchange Act, 15 U.S.C. § 78aa (1982), which was modeled on section 12 of the Clayton Act, 15 U.S.C. § 22 (1973). The court in *Leasco* held that § 27 was a statutory grant of jurisdiction which authorized worldwide service of process.

50. The term "found," which is also used as a basis of venue, requires substantially more contacts in the judicial district than does the term "transacts business." See *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 370-71 (1927); *infra* notes 296-300 and accompanying text. However, section 12 does not authorize service of process wherever defendant transacts business. See Note, *supra* note 27.

51. See, e.g., *Smokey's of Tulsa, Inc. v. American Honda Motor Co., Inc.*, 453 F. Supp. 1265, 1267 (E.D. Okla. 1978); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 402 F. Supp. 262, 329 (E.D. Pa. 1975); *Hoffman Motors Corp. v. Alfa Romeo, SpA*, 244 F. Supp. 70, 77-81 (S.D.N.Y. 1965). In addition, most courts have construed the analogous provisions of the securities laws to provide for worldwide service. *Leasco*, 468 F.2d at 1340-41; *Paulson Inv. Co. v. Norway Secs., Inc.*, 603 F. Supp. 615, 617 (D.Or. 1984); *Bucyrus-Erie*, 550 F. Supp. at 1038-39.

For a further discussion of where a corporation may be "found," see *infra* notes 296-300 and accompanying text.

grant of jurisdiction provided by that section. Defendants not found in the United States will have to be reached, if at all, through the relevant long-arm statute.

The fourth limitation on section 12 as a grant of jurisdiction arises when plaintiff brings non-federal claims together with an antitrust claim under the doctrine of pendent jurisdiction. Pendent jurisdiction is a doctrine originally applied to subject matter jurisdiction. Claims having no independent federal basis of subject matter jurisdiction can nonetheless be heard by a federal court if such non-federal claims arise out of a common nucleus of operative fact with federal claims such that one would ordinarily expect the claims to be decided in one proceeding.<sup>52</sup> Thus, the doctrine of pendent subject matter jurisdiction is based on convenience and proceeds from the proposition that since the federal claims will be heard in federal court anyway, it effectuates judicial economy to hear all related claims in a single proceeding.

Pendent subject matter jurisdiction is permissible under article III of the Constitution because related non-federal claims are part of the federal "case."<sup>53</sup> The court must also find that pendent jurisdiction has been at least implicitly authorized by Congress.<sup>54</sup> If the non-federal claim is related enough to be a part of the constitutional case, and if no new parties are brought in as a result, it is ordinarily presumed that Congress has implicitly authorized pendent subject matter jurisdiction in order to effectuate convenience.<sup>55</sup> In particular, in antitrust actions a plaintiff routinely appends related state law claims, e.g., tortious interference, breach of contract, unfair trade practices in violation of state law, to the federal antitrust claims.<sup>56</sup> All of these claims, if related to the antitrust

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52. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

53. *Id.* at 725.

54. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976).

55. Capra, *Pendent Parties, Pendent Claims: A Solution to the Gordian Knot*, Nat'l L.J., Oct. 4, 1982, at 22, col. 1.

56. See, e.g., *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484 (D. Mass. 1985) (breach of contract, misrepresentation, tortious interference, deceptive trade practices in violation of state law); see also *Federated Dep't Stores Inc. v. Moitie*, 452 U.S. 394 (1981), in which Justice Blackmun, concurring, argues that plaintiff's state antitrust claim is precluded by plaintiff's earlier federal antitrust action because plaintiff should have brought the state claim in federal court originally under the doctrine of pendent jurisdiction.

claim, can be heard in federal court under the doctrine of pendent jurisdiction.<sup>57</sup>

An analogous problem can arise in the resolution of the personal jurisdiction issue, especially when the extraterritorial service provisions of section 12 are used. If section 12 service only applies to the federal antitrust claim, then extraterritorial service as to the pendent state claim would be determined by the relevant state long-arm statute. However, many long-arm statutes are more limited than the section 12 service provisions.<sup>58</sup> Many require contacts within the state, which are not necessarily required under section 12,<sup>59</sup> and all long-arm provisions are limited by fourteenth amendment due process standards, which may be more stringent than the fifth amendment due process standards applicable to service under section 12.<sup>60</sup> In sum, there will be cases in which section 12 statutory jurisdiction will exist as to the federal claim, but in which there is no independent statutory grant of personal jurisdiction as to the pendent state claim. In such a case, the question arises as to whether the court can exercise pendent personal jurisdiction over the state claim.

Case law is divided on the propriety of taking pendent personal jurisdiction over a related state claim. Most cases have arisen under the world-wide service provisions of the Securities Exchange Act, and courts recently have consistently exercised pendent personal jurisdiction thereunder.<sup>61</sup> Pendent personal jurisdiction was also exercised over an antitrust claim under the worldwide service provisions of the District of Columbia Foreign Patentee Statute.<sup>62</sup> However, when service is made pursuant to section 12 of the Clayton Act, it has generally been presumed without discussion that personal jurisdic-

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57. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966).

58. *See Banco Ambrosiano S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

59. This is particularly true if section 12 service provisions can be used without regard to the section 12 venue requirements. *See supra* notes 31-42 and accompanying text.

60. *See infra* notes 210-14 and accompanying text.

61. *See, e.g.*, *GRM v. Equine Inv. & Management Group*, 596 F. Supp. 307, 317-18 (S.D. Tex. 1984); *Ninth Fed. Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 493 F. Supp. 981 (S.D.N.Y. 1980); *Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 196-97 (E.D. Pa. 1974).

62. *Oetiker v. Jurid Werke, GmbH*, 556 F.2d 1 (D.C. Cir. 1977).

tion as to non-federal claims must be established under the relevant long-arm statute.<sup>63</sup>

It is submitted that the doctrine of pendent personal jurisdiction should be applied to antitrust cases. Since the defendant will already be in federal court, it suffers no greater inconvenience by defending a claim which by definition is a related claim. The resulting convenience of trying the entire "case" at one time will result in more efficient application of the antitrust laws, thus comporting with the intent of Congress in passing the broad provisions of section 12.<sup>64</sup> Moreover, while pendent personal jurisdiction, like all assertions of personal jurisdiction, must be statutorily authorized,<sup>65</sup> section 12 *can* be read, in light of its broad intent, to implicitly authorize pendent personal jurisdiction over non-federal claims.

The process provision of section 12 authorizes service for "cases" under the antitrust laws. There is no reason to construe the term "case" any differently under section 12 than under article III of the Constitution.<sup>66</sup> "Case" is appropriately defined as all claims arising from a common nucleus of operative fact. This includes related state claims even though no independent service provision is available. In light of the above arguments, at least one court has exercised pendent personal jurisdiction over a non-federal claim in an antitrust action.<sup>67</sup>

### 3. In-State Service on Affiliated Corporations

An exercise of personal jurisdiction by a federal court is statutorily authorized by Rule 4 when service can be made within the state. However, if service is to be made outside the state, jurisdiction is authorized only by way of a state long-arm

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63. See, e.g., *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484, 1491-92 (D. Mass. 1985); *Sportmart, Inc. & Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254, 1256 n.5 (N.D. Ill. 1982); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977); *Hoffman Motors Corp. v. Alfa Romeo*, 244 F. Supp. 70, 77-79 (S.D.N.Y. 1965) (section 12 does not apply to related claim under Auto Dealers Act; state long-arm provisions must be used).

64. *United States v. Scophony Corp.*, 333 U.S. 795, 804 (1948).

65. See generally *Aldinger v. Howard*, 427 U.S. 1 (1976) (statutory requirements for pendent subject matter jurisdiction).

66. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

67. *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565, 576 (N.D. Ill. 1975). See generally R. CASAD, *supra* note 26, at ¶ 5.03[7]; Comment, *Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 *FORDHAM L. REV.* 127 (1982).



statute or a special federal statute such as section 12 of the Clayton Act. Rule 4(d)(3) authorizes in-state service upon a foreign corporation "[b]y delivering a copy of the summons and of the complaint to an officer, a managing or general agent." Rule 4(d)(1) further provides for in-state [or] personal service of an individual defendant.<sup>68</sup> Finally, Rule 4(c)(2)(C)(ii) allows such in-state service to be made by mail. Of course, if such an agent of an alien corporation happens to be in the state, or if an individual defendant happens to be in the state and is personally served, the federal statutory basis of jurisdiction has been satisfied.<sup>69</sup> A remaining question is whether plaintiff can serve an in-state agent employed not by the alien corporation, but rather by a corporate affiliate of such corporation or individual. Can the "corporate veil" of the in-state corporation be "pierced" so that service on the in-state corporation is deemed a statutorily authorized assertion of jurisdiction over the non-resident?<sup>70</sup>

The basic rule with respect to the exercise of statutory jurisdiction over a non-resident because of the in-state location of an affiliate is that the non-resident must control the affiliate to such an extent that the affiliate is an "alter ego" or "mere department" of the non-resident.<sup>71</sup> In antitrust cases, the

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68. FED. R. CIV. P. 4(d)(1) provides:

(d) *Summons and Complaint: Person to be Served.* The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

69. See, e.g., *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398 (5th Cir. 1981), cert. denied, 456 U.S. 928 (1982); *Delta Steamships Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir. 1985) (mailed service under Rule 4(c)(2)(C)(ii) is a statutory grant of jurisdiction for service within the state). Of course, the exercise of statutory jurisdiction must comport with due process. See *infra* notes 81-219 and accompanying text.

70. This question will arise whenever the section 12 service provision may not authorize extraterritorial service, e.g., as to individual defendants, pendent claims, questions as to service outside the United States, etc.

71. *Levin v. Garfinkle*, 514 F. Supp. 1160, 1164 (E.D. Pa. 1981); *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981). See generally R. CASAD, *supra* note 26, at ¶ 3.02[2][6] (description of standards for service upon an agent); *S & S Indus., Inc. v. Nakamura Precision Indus. Co., Ltd.*, 93 F.R.D. 564 (D. Minn. 1982) (service of process on a wholly owned subsidiary was sufficient

question of corporate affiliate relationships usually arises in the context of whether the non-resident is "transacting business" in the judicial district through the corporate affiliate for purposes of the venue requirements of section 12. If conduct of an affiliate can be so attributed for purposes of transacting business, then the court will ordinarily find a statutory basis of jurisdiction under section 12 as well.<sup>72</sup> Accordingly, the standards for attributing in-state affiliate activity to a non-resident in antitrust actions will be considered more fully in terms of the "transacting business" ground of section 12 venue.

#### 4. Quasi in Rem Jurisdiction

The doctrine of quasi in rem jurisdiction was developed to allow plaintiffs to attach a defendant's property located in the forum as a way of forcing the defendant to defend there. It was justified as an assertion of jurisdiction over defendant's *property*, not over the defendant.<sup>73</sup> The situations in which quasi in rem jurisdiction can be constitutionally asserted has been drastically curtailed by *Shaffer v. Heitner*.<sup>74</sup> However, as a matter of statutory jurisdiction, subject, of course, to constitutional limitations, assertion of quasi in rem jurisdiction over defendant's property is regulated by Rule 4(e) of the Federal Rules. Rule 4(e) provides that quasi in rem attachment of property is limited to property found in the state in which the district court sits; statutory authority for such jurisdiction must be found under state law. This reference to state law is not, however, as problematic as is the application of the various

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service of process on Japanese corporation when subsidiary was merely a "marketing arm").

72. *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.*, 499 F. Supp. 829, 837 (D. Ore. 1980); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977). Whether an in-state affiliate is an agent for service under Rule 4 could be considered distinct from whether it is an alter ego or whether it is transacting business for the non-resident, but that distinction has not been made in the cases. See R. CASAD, *supra* note 26, at ¶ 4.03[5]. Also, it seems logically possible that a non-resident defendant may transact business through a subsidiary and yet may not be "found" in that district for purposes of the service provisions of section 12. This would present a problem in courts which hold service of process under section 12 to be limited to the United States; it would mean that venue would exist under section 12, but not statutory jurisdiction. See *supra* note 14 and accompanying text.

73. *Harris v. Balk*, 198 U.S. 215, 217 (1905).

74. *Shaffer v. Heitner*, 433 U.S. 186 (1977); see *infra* notes 176-87 and accompanying text.

long-arm statutes. States routinely and consistently provide a statutory basis for quasi in rem jurisdiction over property located within the state.<sup>75</sup> However, while statutory jurisdiction consistently extends to property located in the state, the manner in which such jurisdiction is asserted varies from state to state.<sup>76</sup> Because Rule 4(e) incorporates such standards, reference must be made to the procedural requirements of the state in which the federal court sits.

The Sherman Act<sup>77</sup> and the Wilson Tariff Act<sup>78</sup> both provide for statutory jurisdiction on a quasi in rem basis over property owned by foreign corporations.<sup>79</sup> These provisions have not been invoked since 1931.<sup>80</sup>

### B. Constitutional Limitations: Minimum Contacts

The exercise of personal jurisdiction may violate the Constitution even if it is statutorily authorized.<sup>81</sup> The Supreme Court has consistently stated that the due process clause imposes limits on a court's exercise of statutorily authorized jurisdiction.<sup>82</sup> All of the Supreme Court's personal jurisdiction decisions have dealt with the fourteenth amendment due process clause. The Court has not stated whether due process considerations are different when it is the fifth amendment due process clause that controls the federal court.<sup>83</sup> Nonetheless,

75. See, e.g., N.Y. CIV. PRAC. LAW & RULES § 6201 (McKinney Supp. 1986); N.J. STAT. ANN. § 2A:26-2 (West Supp. 1986).

76. See R. CASAD, *supra* note 26, at ¶ 3.05.

77. 15 U.S.C. §§ 1-7 (1982).

78. 15 U.S.C. §§ 8-9 (1982).

79. Section 6 of the Sherman Act, 15 U.S.C. § 6 (1976), provides:

Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this act, and being in the course of transportation from one State to another or to a foreign country, shall be forfeited to the United States and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

80. See generally W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 108-11 (2d ed. 1978).

81. See *Shaffer v. Heitner*, 433 U.S. 186 (1977); Capra, *supra* note 2, at 1034-40.

82. *Hanson v. Denckla*, 357 U.S. 235, 245 (1958); see Capra, *supra* note 2, at 1040-42.

83. A federal court is not subject to the fourteenth amendment by its terms and is subject instead to restrictions imposed by the due process clause of the fifth amendment. See *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251,

the Court's fourteenth amendment cases are at least relevant, and at times controlling authority in limiting the assertion of personal jurisdiction by the federal courts—even in federal question cases.

Due process requires an adequate basis or predicate for the exercise of personal jurisdiction, as well as adequate notice to defendant of the action. Under the famous case of *Pennoyer v. Neff*,<sup>84</sup> the Supreme Court held that the presence of the defendant or his property in the state was the only basis upon which jurisdiction could constitutionally be asserted. The Court in *Pennoyer* stressed that due process guaranteed that one state could not, by exercising extraterritorial jurisdiction over persons not present within the forum, intrude upon the "sovereign" rights of its sister states.<sup>85</sup> With respect to corporations, which are not physically present anywhere, the Court later promulgated a doctrine of "doing business," a concept which signified such substantial in-state activity that the corporation could be deemed "present" within the forum.<sup>86</sup>

The modern era of easy communication and transportation, with burgeoning interstate and international commerce made it obvious that the presence theory was too limiting. Thus, in *Milliken v. Meyer*<sup>87</sup> the Court held that it was constitutionally permissible to exercise jurisdiction extraterritorially over a domiciliary who was temporarily absent from the state. Subsequently, in the landmark case of *International Shoe Co. v. Washington*,<sup>88</sup> the Court stated that the defendant's presence within the forum was no longer necessary. Where the defendant is not present, jurisdiction can be asserted consistently with the due process clause so long as the defendant has certain "minimum contacts" with the forum such that asserting jurisdiction comports with "traditional notions of fair play and sub-

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256 (5th Cir. 1981); Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 SO. CAL. L. REV. 913, 937 (1985).

84. 95 U.S. 714 (1877).

85. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956) (sovereignty limitations stated in *Pennoyer* improperly borrowed from international law); Capra, *supra* note 2, at 1035.

86. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). See generally Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

87. 311 U.S. 457 (1940).

88. 326 U.S. 310 (1945).

stantial justice.”<sup>89</sup>

This minimum contacts test promulgated by *International Shoe* is obviously vague and uncertain. Many questions have been raised concerning the application of the minimum contacts test, some of which have not been answered after forty years of litigation. In the following discussion of these minimum contacts questions, it must be remembered that any minimum contacts case is obviously fact-specific. No case is absolute authority as to any other.<sup>90</sup>

### 1. What Kind of “Contact” Will Count Toward the “Minimum”?

The Supreme Court has held that not every relationship between the defendant and the forum is relevant to the minimum contacts inquiry.<sup>91</sup> For instance, the “mere” fact that the defendant has caused injury in a state is not sufficient to establish minimum contacts there. Thus, in *World-Wide Volkswagen v. Woodson*,<sup>92</sup> the presence of an automobile in the forum was not attributable to the retailer of the automobile as a “contact” since the consumer had driven the automobile into the forum. Similarly, “merely” contracting with a party who happens to be from another state does not mean that defendant has a constitutionally cognizable contact with that state.<sup>93</sup> Likewise, the “mere” acceptance of a directorship of a corporation is not a countable contact with the state of incorporation, at least where the state has not notified that director that acceptance of the directorship is tantamount to submission to jurisdiction.<sup>94</sup>

What is lacking in all the above cases, and what is required in *all* minimum contacts cases, is “some act by which the defendant purposefully avails itself of the privilege of conducting

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89. *Id.* at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This minimum contacts test applies to both corporate and individual defendants. See *Shaffer v. Heitner*, 433 U.S. 186, 204 n.19 (1977).

90. *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 92 (1978). “We recognize that this determination is one in which few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable.” *Id.* (citing *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

91. See generally Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

92. 444 U.S. 286 (1980).

93. *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174, 2184 (1985).

94. *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977).

activities within the forum state, thus invoking the benefits and protections of its laws.”<sup>95</sup> The purposeful availment test basically requires a voluntary, controllable submission to the authority of the forum. As the Supreme Court has stated, if the contact is derived from the “unilateral activity” of a third party, it is not purposeful or controllable as to the defendant, hence cannot count toward the minimum necessary for due process.<sup>96</sup>

The reason for the purposeful availment test of minimum contacts is that it “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>97</sup> The fallacy of any theory based on “predictability” and “expectation”, however, is that it is inherently tautological and content-neutral. Predictability is the result of clearly established law but this “predictability” alone is no basis for deciding which of many clear laws should be established. Likewise, “expectation” depends on what the law is. If the Court had held in *World-Wide Volkswagen* that the “mere” presence of the car *was* a countable contact, the retailer would know exactly what to expect in the next case. In short, the minimum contacts test has been encrusted with a strict purposeful availment/expectation test which limits the expansiveness promised by the analytically vacant *International Shoe* case, and leads to results which are not explainable in terms of fairness.<sup>98</sup>

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95. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

96. This was the case in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), where the presence of the exploding automobile was considered the unilateral activity of the consumer who drove the car into the forum. See also *Kulko v. Superior Court of Cal.*, 436 U.S. 84 (1978) (presence of children in forum was not controllable by divorced parent); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (checks drawn on Texas bank not controllable by payee).

97. *Burger King*, — U.S. at —, 105 S. Ct. at 2182 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

98. See *Shaffer v. Heitner*, 433 U.S. 186 (1977) (director shareholders of Delaware corporation, receiving benefits under Delaware law, are not subject to jurisdiction in Delaware for corporate mismanagement); *Hanson v. Denckla*, 357 U.S. 235 (1958) (most convenient forum for all parties cannot assert jurisdiction because no purposeful availment by stakeholder trustee); *Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769 (1st Cir. 1985) (major multinational corporation which sells millions of dollars of products in state through a controlled network of distribution is not subject to jurisdiction).

## 2. What Type of Contacts are Considered Purposeful and Controllable Enough to Count Toward the Minimum?

While the minimum contacts test is fact-specific, some generalizations can be drawn about the type of activity which is likely to be purposeful.

Efforts to market a product in the state—whether directly by in-state sales or indirectly through a distribution network or “stream of commerce”—will ordinarily be deemed purposeful availment.<sup>99</sup> Thus, the retailer in *World-Wide Volkswagen* did not have minimum contacts with the forum when it had made no effort to market its cars there. However, the court indicated that the case would have been different if such an effort had been made.<sup>100</sup> Purchasing goods in the forum has sometimes

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99. *Stabilisierungsfonds Fur Wein v. Kaiser Stultz Wine Distributors Pty, Ltd.*, 647 F.2d 200 (D.C. Cir. 1981) (Australian trademark defendants subject to jurisdiction where it ships goods to an intermediary with the expectation that the intermediary will distribute the goods in a region that includes the forum); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980) (importer subject to jurisdiction in Texas where lighters are distributed through chain of distribution).

100. The Court cited favorably the famous case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 436, 176 N.E.2d 761 (1961), in which jurisdiction was upheld over a component part manufacturer with respect to a product that had found its way into Illinois through a stream of commerce. See *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081 (7th Cir. 1984) (where manufacturer, importer and distributor promote stream of commerce in effort to sell products in the forum, jurisdiction can be asserted there); *Rockwell Int'l v. Costruzioni Aeronautiche Giovanni Augusta, SpA*, 553 F. Supp. 328 (E.D. Pa. 1982) (defendant parts replacement manufacturer subject to jurisdiction in Pennsylvania where it decided to exploit the international market and developed its parts knowing that they would be components of helicopters marketed throughout the United States. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), can be distinguished in that defendant herein decided to serve, directly or indirectly, the largest possible market for its product.) There are, however, some contrary decisions in the lower courts about the viability of stream of commerce amenability after *World-Wide Volkswagen*. See *Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769 (1st Cir. 1985) (in personam jurisdiction lacking over a Japanese corporation where vehicles manufactured for Japanese corporation were sold in Massachusetts by authorized dealers who purchased them from Japanese corporation's wholly-owned California subsidiary); *Humble v. Toyota Motor Co., Ltd.*, 727 F.2d 709 (8th Cir. 1984) (component part manufacturer does not engage in purposeful activity in state where automobile is distributed and sold in the stream of commerce). The courts which refuse to find purposeful activity through participation in stream of commerce are unreasonably allowing corporate defendants to benefit from the exploitation of an in-state market, without allowing the state to impose a fair burden of litigation in return. Such a windfall to defendants in the stream of commerce is unwarranted even after *World-Wide Volkswagen*. The Supreme Court has recently decided to clarify the distinction, if any, between unilat-

been found to be sufficiently purposeful, at least where the defendant is not a simple mail order purchaser.<sup>101</sup> Physical presence in the forum is not required in order for such a purchase to be a countable contact.<sup>102</sup>

After *Calder v. Jones*,<sup>103</sup> a defendant will be found to be purposefully availing himself of the forum when he has intentionally created a harmful effect in the forum, even if the defendant never entered the forum physically, or through an agent. The *Calder* "effects" test is obviously pertinent to whether a defendant who causes antitrust injury in the forum has engaged in purposeful activity there. Like the libel in *Calder*, an antitrust violation is a tort-based, intentional creation of an effect on the plaintiff. Like the plaintiff in *Calder*, plaintiffs in an antitrust action will allege that purposeful contact with the forum is

eral consumer activity and efforts to market through the stream of commerce. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 39 Cal. 3d 35, 216 Cal. Rptr. 385 (1985) (jurisdiction exercised over component parts manufacturer that made no direct sales into California, but sold substantial number of its parts incorporated into finished product sold in California through stream of commerce), *cert. granted*, 106 S. Ct. 1258 (1986).

101. *See, e.g.*, *General Time Corp. v. Eye Encounter, Inc.*, 50 N.C. App. 467, 274 S.E.2d 391 (1981); *Kemper v. Rohrich*, 508 F. Supp. 444 (D. Kan. 1980); *Pedi Bares, Inc. v. P & C Food Mkt., Inc.*, 567 F.2d 933 (10th Cir. 1977). For an example of concern over the supposed jurisdictional plight of mail order purchasers, see *Geneva Indus. v. Copeland Constr. Corp.*, 312 F. Supp. 186, 188 (N.D. Ill. 1970). *See R. CASAD, supra* note 26, at ¶ 8.01[2][b].

102. *See Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985); *Pedi Bares, Inc. v. P & C Food Mkt., Inc.*, 567 F.2d 933 (10th Cir. 1977). However, a finding of purposefulness based on an agreement to purchase in-state goods or services is not inevitable. *See Lakeside Bridge & Steel Co. v. Mountainstate Constr. Co.*, 445 U.S. 907 (1980) (White, J., dissenting from denial of certiorari) and the cases cited therein.

103. *Calder v. Jones*, 465 U.S. 783 (1984). *Calder* was a libel case in which an author and an editor libeled a California plaintiff in a newspaper article that was written in Florida and published in a nationally distributed magazine. The Court found minimum contacts existed because the individual defendants had purposefully created harmful effects in the plaintiff's state. *Id.* at 790. The Court found the purposeful nature of the in-state effects to be enhanced by the fact that plaintiff resided in California. In other words, plaintiff was a target for defendant's acts under the facts of the case, since the article described plaintiff's activity in California, and defendant knew plaintiff resided there. *Id.* at 789-90. Under these circumstances, defendants would not be heard to argue that they were surprised that their activity would have an effect in California. *See also Wallace v. Herron*, 778 F.2d 291 (7th Cir. 1985) (*Calder v. Jones*, 465 U.S. 783 (1984), did not mean that intentional effects were created in forum merely because plaintiff resides there; where gravamen of activity is in California, no purposeful activity could be found in plaintiff's forum state of Illinois).



clear since the plaintiff, located in the forum, was a "target" of the defendant's activity.<sup>104</sup> As in *Calder*, the court will properly hold that a defendant need not physically enter the forum to be subject to jurisdiction for intentional creation of effects there.

In sum, *Calder* is strong authority for the assertion of jurisdiction over antitrust defendants in any forum to which the effects of their conduct may be targeted. Given the pervasive nature of an antitrust injury, the constitutionally permissible fora for an antitrust injury may indeed be broad even under the fourteenth amendment.<sup>105</sup> The target/effects test had, in fact, been applied to antitrust actions before it was specifically authorized by *Calder*.<sup>106</sup> It can be anticipated that it will be more broadly applied after the *Calder* imprimatur.

It could be argued that the target theory is an inappropriate test since it confuses jurisdictional issues with the merits of a case. For instance, in an antitrust action, the jurisdictional target theory is based on intentionally creating a harmful effect upon plaintiff which is basically what must be proven at trial. However, tests for personal jurisdiction are often merit-based.<sup>107</sup> Courts have solved this problem by requiring only

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104. See *Centronics Data Computer Corp. v. Mannesman, A.G.*, 432 F. Supp. 659, 668 (D.N.H. 1977) (antitrust violations subject defendants to jurisdiction because defendant's activity was "directly aimed at the plaintiff in New Hampshire . . . [and defendant] cannot avoid the consequences of its deliberate tortious acts by hiding behind jurisdictional technicalities. The traditional notions of justice and fair play should not be used to extend a cloak of immunity over deliberate torts merely because the defendant is an alien corporation. To do so would be to deny justice and fair play to the plaintiff.").

105. See *Hovenkamp*, *supra* note 46, at 492; *Black v. Acme Mkts.*, 564 F.2d 681 (5th Cir. 1977).

106. See *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977). In *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981), the court in a pre-*Calder* case rejected the "target" theory because it was merit-based. Yet, the court failed to recognize that a *prima facie* test is often used as to merit-based jurisdictional questions. For further applications of personal jurisdiction based on targeted effect of antitrust injury within the forum, after *prima facie* showing of such effects, see *Black v. Acme Mkts., Inc.*, 564 F.2d 681, 685 (5th Cir. 1977); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088 (5th Cir. 1977); *Cherokee Laboratories, Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97, 103 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); *Iranian Shipping Lines, S.A. v. Moriates*, 377 F. Supp. 644 (S.D.N.Y. 1974); *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842 (D. Or. 1972).

107. For instance, long-arm statutes establish statutory jurisdiction for "tortious acts." See ILL. STAT. ANN., ch. 110, § 2-209(2) (1983). Whether the act is "tortious"

prima facie proof of the merit-based question at the jurisdictional level.<sup>108</sup> The Supreme Court in *Calder* presumed that the same prima facie standards would apply to the "intentional creation of effects" test.<sup>109</sup> Accordingly, the "targeted effects" test of purposeful availment is properly applied to defendants causing antitrust injury within the forum.

When a co-conspirator has committed acts within the forum state in furtherance of a conspiracy, those acts have been attributed to non-resident co-conspirators as their own purposeful and countable contacts.<sup>110</sup> Such an attribution of purposefulness is obviously important in antitrust actions in which one of the co-conspirators is acting in the forum in furtherance of the conspiracy. Under the co-conspiracy theory, the in-state contacts are counted against all co-conspirators.<sup>111</sup>

The co-conspirator theory of minimum contacts does not apply merely because a member of the conspiracy resides in the forum or engages in activity there.<sup>112</sup> Rather, the in-state activity must be an overt act in furtherance of the conspiracy, and the product of a common tortious intent among the conspirators in order to be attributed as purposeful availment to all the conspirators.<sup>113</sup>

As with the "effects" test, the co-conspirator theory is sub-

is a merits question. See generally Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986).

108. See *Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); R. CASAD, *supra* note 26, at ¶ 4.03[1].

109. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

110. *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (7th Cir. 1983) (acts of resident defendant in furtherance of the conspiracy are attributable to all co-conspirators for purposes of jurisdiction); *United States Dental Inst. v. American Ass'n of Orthodontists*, 396 F. Supp. 565 (N.D. Ill. 1975) (non-resident defendants committed a significant overt act in furtherance of a conspiracy which permitted Illinois court to acquire jurisdiction). See Brilmayer & Paisley, *supra* note 107, at 19-21.

111. See *Cofinco Inc. v. Angola Coffee Co., A.C.*, 1975-2 Trade Cas. (CCH) ¶ 60,456 (S.D.N.Y. 1975) (New York acts of importer defendants in furtherance of conspiracy bind Angolan exporters and selling agents for jurisdictional purposes); *Cherokee Laboratories, Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97, 103 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); see also R. CASAD, *supra* note 26, at ¶ 4.03[1]. See generally Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 FORDHAM L. REV. 234 (1983).

112. See *Weinstein v. Morris Corp.*, 1977-2 Trade Cas. (CCH) ¶ 61,750 (E.D. Mich. 1977); Althouse, *supra* note 111, at 242.

113. See *American Land Program v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449 (9th Cir. 1983) (non-resident defendant must be shown to have conspired with in-state actors to cause harm to plaintiff).

ject to the criticism that it is merits-based.<sup>114</sup> However, as with any merits-based basis of jurisdiction, conspiracy need only be proven by a *prima facie* standard at the jurisdictional level.<sup>115</sup>

The co-conspirator theory of minimum contacts must be distinguished from the co-conspirator theory of "transacting business" for purposes of venue under section 12 of the Clayton Act. Courts have generally rejected the argument that a non-resident can be transacting business in the judicial district through the residence of the co-conspirator.<sup>116</sup> However, this rejection, whether right or wrong, does not bear upon whether a non-resident's membership in a conspiracy should allow *jurisdiction* based upon the in-state activity of a co-conspirator.<sup>117</sup> Some courts have improperly confused jurisdiction and venue when a co-conspiracy theory has been argued.<sup>118</sup>

It is possible to find purposeful, countable contacts by combining the co-conspiracy theory with the "effects" test of *Calder*. If a co-conspirator commits an overt act *outside* the forum in furtherance of the conspiracy, by which act the co-conspirator intentionally creates a harmful effect *within* the forum, then all of the non-resident co-conspirators can be held to have committed a purposeful act within the forum.<sup>119</sup>

Purposeful activity can be found by the presence of a cor-

114. See *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981); Althouse, *supra* note 111, at 247-51.

115. R. CASAD, *supra* note 26, at ¶ 4.03[2]; *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387 (7th Cir. 1983); *Thomas v. Kadish*, 748 F.2d 276 (9th Cir. 1984) (conclusory allegations of conspiracy insufficient to establish jurisdiction), *cert. denied*, 105 S. Ct. 3531 (1985), *El Cid, Ltd. v. New Jersey Zinc Co.*, 1978-2 Trade Cas. (CCH) ¶ 62,257 (S.D.N.Y. 1977) (*prima facie* standard applied to jurisdictional question; "whether the plaintiff will be able to sustain its burden of proof by a preponderance of the evidence at trial is an entirely different question which is not now before us"). Of course with a complicated and merits-based issue such as antitrust conspiracy, jurisdictional discovery, as well as the ultimate jurisdictional decisionmaking may become quite involved. See Althouse, *supra* note 111, at 256-59 (proposing a method of proof for early decisionmaking in accord with standards for preliminary injunctions).

116. See *supra* note 112 and accompanying text.

117. See R. CASAD, *supra* note 26, at ¶ 4.03[1] n.263.

118. See, e.g., *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981).

119. *Maricopa County v. American Petrofina, Inc.*, 322 F. Supp. 467 (N.D. Cal. 1971) (economic injury to persons in the state resulting from overt acts in furtherance of a price-fixing conspiracy outside the state was sufficient to subject defendant conspirators to jurisdiction for claims arising from the conspiracy).

porate affiliate within the forum.<sup>120</sup> The most common problem is where a non-resident parent is argued to be purposefully availing itself of the benefits and protections of the laws of the forum through the activities of a local subsidiary. However, purposeful activity by a non-resident cannot be found merely because there is jurisdiction over a corporate affiliate.<sup>121</sup> Very generally, purposeful activity by the non-resident will be found only by "piercing the corporate veil" of the local defendant.<sup>122</sup> Attribution of purposefulness is typically based on a finding of "alter ego", "mere department" or "marketing arm".<sup>123</sup> Common ownership, common directorship, and even sole ownership, without more, is not enough to attribute purposefulness to the non-resident based upon the acts of an in-state affiliate.<sup>124</sup> The courts focus upon actual control by the non-resident over decisions that one would expect the local corporation to decide for itself as a matter of normal corporate practice.<sup>125</sup> A lack of formal separateness or undercapitalization of the local corporation is clearly helpful in piercing the

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120. *Williams v. Canon Inc.*, 1977-2 Trade Cas. (CCH) ¶ 61,749 (C.D. Cal. 1977).

121. *Id.*

122. *See* *Flynt Distrib. Co. Inc. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984) (non-signatory subject to jurisdiction on basis of contracts signed by signatory corporation in the state; all such corporations are alter-ego of sole shareholder); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983) (parent must be one and the same corporation as the subsidiary); *Sportmart, Inc. and Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982) (in order to support the exercise of jurisdiction and venue over a foreign corporation, the relationship between the foreign and local corporation must be such that one is merely the alter ego of the other).

123. *See* *R. CASAD*, *supra* note 26, at ¶ 3.01[2][6][ix]; *MCI Communications Corp. v. American Tel. & Tel. Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,652 (D.D.C. 1983); *see also* *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977) (oil company which used subsidiary as its marketing arm, which controlled subsidiary's decisions through the use of its own officers in subsidiary positions and by the execution and implementation of major marketing study of subsidiary's potential was subject to jurisdiction in Maryland).

124. *See, e.g.*, *Ryder Truck Rental v. Acton Foodservices Corp.*, 554 F. Supp. 277 (C.D. Cal. 1983) (sole ownership of subsidiary by parent is not enough to subject parent to suit); 2 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 4.25[6].

125. *See* *Dunlop Tire & Rubber Corp. v. Pepsico, Inc.*, 591 F. Supp. 88 (N.D. Ill. 1984). However, the fact that the subsidiary must seek permission for major capital expenditures is not sufficient to pierce the corporate veil, since such permission is ordinarily required from shareholders for major expenditures. *King v. Johnson Wax Assoc., Inc.*, 565 F. Supp. 711 (D.C. Md. 1983) (in the absence of accompanying evidence of control over ordinary business operations, defendant's approval of certain capital expenditures is not sufficient to attribute subsidiary's activity to defendant).

corporate veil,<sup>126</sup> but is not absolutely necessary to a finding that a non-resident exercised actual and substantial control over the activity of a local corporation.<sup>127</sup>

As with the effects test and the co-conspirator theory, the alter ego or mere department theory is merit-based in that the plaintiff is usually seeking to hold the parent substantively liable for the subsidiary's acts, as well as amenable to jurisdiction on the basis of such acts. Just as with the other merit-based jurisdictional concepts, the problem is solved by requiring plaintiff to show *prima facie* evidence at the jurisdictional level, and a preponderance at trial.<sup>128</sup>

The question of whether it is proper to attribute contacts to a corporate affiliate for *jurisdictional* purposes is distinct from the question of whether a non-resident is "transacting business" through a corporate affiliate for purposes of venue under section 12 of the Clayton Act.<sup>129</sup> Courts have often confused minimum contacts analysis with venue questions under section 12.<sup>130</sup> While the result may properly be the same as to both jurisdiction and section 12 venue where an alter ego relationship is found, it is appropriate to analyze the questions separately: jurisdiction deals with the power of the court to hear a case, whereas venue deals with trial convenience.<sup>131</sup>

126. See *Ryder Truck Rental v. Acton Foodservices Corp.*, 554 F. Supp. 277 (C.D. Cal. 1983) (no alter ego where plaintiff failed to show *prima facie* proof that corporate formalities were not maintained, or that the subsidiary was undercapitalized); *Williams v. Canon, Inc.*, 432 F. Supp. 376 (C.D. Cal. 1977) (no lack of formal separateness of parent and subsidiary and no showing that subsidiary was undercapitalized).

127. *Dunlop Tire & Rubber Corp. v. Pepsico, Inc.*, 591 F. Supp. 88 (N.D. Ill. 1984) (finding of "sham" not required; jurisdiction found through controlling finances); *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978) (rejecting the strict *Canon* formal separation test as not constitutionally required, in favor of a test focusing on actual control in attributing purposefulness).

128. See *Dunlop Tire & Rubber Corp. v. Pepsico, Inc.*, 591 F. Supp. 88 (N.D. Ill. 1984); *Brilmayer & Paisley*, *supra* note 107, at 8-15.

129. See *infra* notes 300-63 and accompanying text.

130. See *Dunlop Tire & Rubber Corp. v. Pepsico, Inc.*, 591 F. Supp. 88 (N.D. Ill. 1984) (analysis of section 12 venue provision to determine personal jurisdiction through subsidiary's activity within the forum); *Ryder Truck Rental v. Acton Foodservices Corp.*, 554 F. Supp. 277 (C.D. Cal. 1983) (jurisdictional decision based on incorrect reliance on section 12 cases). For decisions where the court separated the due process requirements of personal jurisdiction from the statutory venue requirements, see *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Williams v. Canon, Inc.*, 432 F. Supp. 376 (C.D. Cal. 1977).

131. See *Hovenkamp*, *supra* note 46, at 507, 517-18.

Purposeful contact between the defendant and the forum can be found where the non-resident has expressly or impliedly authorized an agent to act on its behalf in the forum.<sup>132</sup> A non-resident can be found to be engaging in purposeful activity through the agency of a totally independent corporation.<sup>133</sup> In fact, the stream of commerce theory and the co-conspirator theory are merely particularized applications of a general doctrine that the in-state activity of an agent who is authorized either implicitly or explicitly to act on behalf of a non-resident can be attributed to that non-resident for purposes of jurisdiction. The general test is whether, if the in-state actor did not engage in such activity, the non-resident defendant would have to engage in such activity on its own behalf.<sup>134</sup>

Of course, if a non-resident can be held to engage in purposeful activity in the state through the acts of a totally independent corporation, it follows that an affiliated corporation can be an agent for purposes of jurisdiction as well. Thus, the alter ego theory is not the only way to attribute the in-state contacts of an affiliate to a non-resident; if the in-state affiliate is acting on behalf of the non-resident, and is engaging in activity that the non-resident would otherwise have to do, then the affiliate corporation should be deemed an agent for jurisdictional purposes even if it is not an alter ego.<sup>135</sup> The alter-ego theory should be reserved for situations where all activity

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132. See *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516 (11th Cir. 1985) (personal jurisdiction found in contract case on basis of agency contacts where negotiations were done by an independent party acting to benefit defendant to whom defendant later paid a commission).

133. *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

134. See *id.*; *Behagen v. Amateur Basketball Ass'n of the United States*, 744 F.2d 731 (1984), *cert. denied*, 105 S. Ct. 1878 (1985); *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322 (E.D.N.Y. 1981). It should be noted that as a statutory matter, when it is necessary to resort to a long-arm statute, the typical "enumerated act" statute covers activity conducted through an agent. See N.Y. CIV. PRAC. LAW & RULES § 302 (McKinney Supp. 1986); R. CASAD, *supra* note 26, at ¶ 4.03[1].

135. See, e.g., *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied*, 389 U.S. 923 (1967); *Stabilisierungsfonas Fur Wein v. Kaiser Stuhl Wine Distrib. Pty. Ltd.*, 647 F.2d 200 (D.C. Cir. 1981); *Puerto Rico Maritime Shipping Auth. v. Almogy*, 510 F. Supp. 873 (S.D.N.Y. 1981); *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.* 508 F. Supp. 1322 (E.D.N.Y. 1981); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

is done by and purportedly on behalf of the in-state affiliate itself, but where the plaintiff alleges such control over the in-state affiliate by the non-resident that the corporate veil should be pierced. The agency theory is applicable where the non-resident is admittedly doing business through an affiliate, and the only question is whether such business relationship establishes an agency—even if arm's length. Unfortunately, the distinction between the agency and alter ego theories of purposeful contacts has often not been recognized by the courts.<sup>136</sup> This misunderstanding has carried over to section 12 of the Clayton Act.

As with other theories of imputing purposeful contacts, plaintiffs invoking the agency theory of jurisdiction are often seeking to prove agency for substantive liability. The problem of a merit-based jurisdictional determination is solved by requiring no more than *prima facie* proof of agency to overcome a jurisdictional objection.<sup>137</sup>

Attendance at an alleged conspiratorial meeting in the forum will ordinarily be held to be purposeful activity without regard to whether defendant or a co-conspirator committed an overt act there.<sup>138</sup> Extensive contractual negotiations, by phone or mail or in person, entering into long-term contracts with a resident of the forum (e.g., a franchise relationship), or in general, performing or agreeing to perform contractual obligations with significant contemplated consequences in the forum, will be found to be purposeful activity in the forum, resulting in a finding of countable contacts therein.<sup>139</sup>

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136. For cases which have observed the distinction, see *Puerto Rico Maritime Shipping Auth. v. Almogy*, 510 F. Supp. 873 (S.D.N.Y. 1981); *Northern Natural Gas Co. v. Superior Court*, 64 Cal. App. 3d 983, 134 Cal. Rptr. 850 (1976). For an egregious case which has failed to recognize the agency theory, see *Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769 (1st Cir. 1985). Many courts fail to recognize that a defendant could be transacting business through an agent/affiliate, even though there is no alter ego relationship. See, e.g., *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064, 1066 (9th Cir. 1974); *Sportmart, Inc. and Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982); *Amateur-Wholesale Elecs. v. R.L. Drake Co.*, 515 F. Supp. 580 (S.D. Fla. 1981); *Williams v. Canon, Inc.*, 432 F. Supp. 376 (C.D. Cal. 1977).

137. See *R. CASAD*, *supra* note 26, at ¶ 403[1][a]; *Brilmayer & Paisley*, *supra* note 107, at 16-19.

138. *El Cid, Ltd. v. New Jersey Zinc Co.*, 444 F. Supp. 845 (S.D.N.Y. 1977); *Ohio-Sealy Mattress Mfg. Co. v. Kaplan*, 429 F. Supp. 139 (N.D. Ill. 1977).

139. See *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174 (1985) (long term franchise relationship gives rise to significant contemplated consequences

Finally, if defendant maintains an office or place of business in the forum, this will clearly be found to be purposeful availment.<sup>140</sup> Indicia of a place of business include bank accounts, telephone listings, directors' meetings and business correspondence.<sup>141</sup>

### 3. How Many Contacts Constitute the Minimum Contacts?

The next question that arises in applying the minimum contacts test is: presuming we have countable contacts, how many are sufficient to equal the minimum? The Supreme Court has stated that the minimum level of acceptable contacts will vary depending on the nature of the cause of action brought by the plaintiff. If the cause of action is related to or arises out of the countable forum contacts, then even one indication of purposeful activity will be sufficient to comport with due process.<sup>142</sup> Thus, in an antitrust action, if the cause of action is based upon harm within the forum caused by defendant, and such harm can be attributed to defendant as a matter of purposeful activity, (e.g., by the theories of agency, effects, co-conspirator, etc.) assertion of jurisdiction will ordinarily be proper as a matter of due process.<sup>143</sup>

On the other hand, if plaintiff's cause of action does not relate to or arise from defendant's purposeful activity, then the Supreme Court has required that defendant engage in substantial and continuous purposeful activity within the forum, tantamount to a finding of permanence within the forum.<sup>144</sup> If

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in the forum); *D.J. Invest., Inc. v. Metzeler Motorcycle Tire Agent Gregg, Inc.*, 754 F.2d 542 (5th Cir. 1985); *Mid-America, Inc. v. Shamaingar*, 714 F.2d 61 (8th Cir. 1983); *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970) (extensive telephone negotiations during auction constitute purposeful activity).

140. *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

141. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

142. See *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174 (1985) (long term franchise gives rise to contemplated consequences in the forum); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957) (single contract of reinsurance is sufficient for minimum contacts with the state).

143. See, e.g., *Myers v. American Dental Ass'n*, 695 F.2d 716 (3d Cir. 1982).

144. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (extensive in-state purchases and training programs insufficient to establish a showing of substantial and permanent contact with the forum); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); see *Lee v. Walworth Valve Co.*, 482 F.2d 297 (4th Cir. 1973). "The sufficiency of contacts threshold is elevated when the cause does



a finding of permanence is warranted then defendant can be held amenable to suit within the forum on *any* cause of action consistent with due process requirements. Jurisdiction based upon a finding of substantial and continuous activity is called *general* jurisdiction; whereas jurisdiction based on the cause of action having a nexus to isolated (but purposeful) forum activity is referred to as *specific* jurisdiction.<sup>145</sup>

General jurisdiction is basically the same basis of jurisdiction as was found under the old "corporate presence" and "doing business" tests before *International Shoe*.<sup>146</sup> More recently in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>147</sup> the Supreme Court indicated that with respect to general jurisdiction, the crucial question was whether defendant was engaging in such substantial and continuous activity as to warrant a finding of *permanence* within the forum; consequently, not all purposeful activity would necessarily be relevant to a finding of permanence. More specifically, the Court held that defendant's substantial in-state *purchases* of helicopters and pilot training collateral to such purchases, would not warrant a finding of permanence within the forum.<sup>148</sup> The Court indicated that the case would have been different if defendant maintained an office within the forum,<sup>149</sup> or had made substantial and continuous in-state *sales* without a resident office.<sup>150</sup> A finding of permanence supporting general jurisdiction could have then been

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not arise in the forum state or derive from the foreign corporation's transactions in the state." *Id.*; see Weinberg, *supra* note 83, at 914.

145. Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).

146. For instance, the contacts in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917), which were found by the court to warrant a finding of "presence," would today result in a holding that defendant was engaged in such substantial and continuous activity in the forum that general jurisdiction was "fair." See, e.g., *Lee v. Walworth Valve Co.*, 482 F.2d 297 (4th Cir. 1973) (general jurisdiction found where defendant sent sales personnel into forum 75 to 85 days annually, resulting in in-state sales of \$100,000 annually).

147. 466 U.S. 408, 416-18 (1984).

148. The Court relied on *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923), which preceded *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), for this proposition. For a criticism of such reliance, see *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 (1984) (Brennan, J., dissenting). See also *Henry R. Jahn & Son v. Superior Court of San Mateo County*, 49 Cal. 2d 855, 859, 323 P.2d 437, 440 (1958) (finding *Rosenberg* obsolete).

149. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

150. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

made.<sup>151</sup> Thus, with respect to general jurisdiction, contacts must not only be counted in terms of purposefulness, they must also be weighed to determine whether the purposeful contact creates an inference of permanence.

Specific jurisdiction is, on the other hand, based on *isolated* contacts and any purposeful activity can support jurisdiction for a related cause of action. Thus, if the cause of action in *Hall* had been found to arise out of or to have been related to the in-state purchases, jurisdiction would undoubtedly have been upheld on the basis of the purposeful activity in buying the helicopters.<sup>152</sup> It thus becomes important for a plaintiff to trigger the category of specific jurisdiction; it avoids the problem of having to find many contacts of a certain variety.

Specific jurisdiction is obviously based on some nexus between the plaintiff's cause of action and the defendant's in-state activity. However, the required degree of such nexus has not yet been decided by the Supreme Court.<sup>153</sup> In the absence of Supreme Court guidance, some courts and commentators have used a very strict test for specific jurisdiction: that the contact with the forum must be "substantively relevant" to the cause of action in the sense that it is the gravamen of the dispute out of which plaintiff's claim for relief "arises".<sup>154</sup> Other courts, recognizing that general and specific jurisdiction are mere labels, have properly taken a more liberal view of the nexus requirements. It has been noted that, in an action arising from out-of-state activity, the defendant ordinarily is not more significantly burdened or unprepared to defend the action in the forum than it would be if the action arose out of purposeful in-state activity.<sup>155</sup> These courts hold that so long as the cause of action is generally related to the in-state activ-

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151. *Hall*, 466 U.S. at 414-16.

152. *Id.* at 419-28 (Brennan, J., dissenting).

153. *Id.* at 415-16 n.10.

154. See *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984); *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983) (plaintiff injured at Opry Land in Tennessee; fact that she was solicited in Arkansas to come to Tennessee is insufficient to invoke specific jurisdiction since the negligence in Tennessee did not "arise out of" solicitation in Arkansas); *Oregon ex rel La Manufacture Française des Pneumatiques Michelin v. Wells*, 294 Or. 296, 657 P.2d 207 (1982); *Brilmayer*, *supra* note 91.

155. See *Jones v. North American Aerodynamics, Inc.*, 594 F. Supp. 657 (D. Me. 1985) (recognizing these points but following the First Circuit's inappropriately strict nexus requirement in *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984));

ity—in the sense either that the cause of action lies in the wake of the in-state activity or is one that defendant could generally expect to defend in the forum—there is a sufficient nexus to assert specific jurisdiction.<sup>156</sup>

It should be noted that if plaintiff must resort to state statutes for a basis of jurisdiction, most states have a statutory scheme which is correlative to the constitutional categories of specific and general jurisdiction. Thus, most states provide statutory jurisdiction over any cause of action where defendant engages in substantial and continuous activity within the state<sup>157</sup> as well as for certain enumerated acts where the cause of action arises from or is related to such acts.<sup>158</sup> However, the required degree of nexus between contact and cause of action may, as a statutory matter, differ among the states.<sup>159</sup> Furthermore, a few states do not provide a statutory basis for general jurisdiction. In such states, the nexus requirement must be satisfied or jurisdiction will be unobtainable.<sup>160</sup>

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*Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419-28 (1984) (Brennan, J., dissenting).

156. See *Southwire Co. v. Trans-World Metals & Co., Ltd.*, 735 F.2d 440, 445 (11th Cir. 1984) (cause of action was "sufficiently 'connected with'" prior negotiation between the parties to support specific jurisdiction; cause of action was at end of chain of events started by an earlier transaction in the state); *Gates Lear Jet Corp. v. Jensen*, 743 F.2d 1325 (9th Cir. 1984) (cause of action for abuse of process and harassment in Philippines was sufficiently related to termination of a contract between plaintiff and defendant in Arizona; "but for" termination of contract, defendant would not have engaged in allegedly tortious activity in Philippines).

157. See *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); N.Y. CIV. PRAC. LAW & RULES § 301 (McKinney Supp. 1986). Section 301 authorizes general jurisdiction over defendants who are present or do business in the forum.

158. See *supra* notes 27-28 and accompanying text; *R. CASAD, supra* note 26, at A-32-102.

159. Compare *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067, 1068-69 (8th Cir. 1983) (Arkansas long-arm statute requires strict nexus), with *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55 (2d Cir. 1985) (under N.Y. CIV. PRAC. LAW & RULES § 302, breach of contract need not occur in New York where defendants transacted business in New York by negotiating the contract there); see *Southwire Co. v. Trans-World Metals & Co., Ltd.*, 735 F.2d 440 (11th Cir. 1984) (Georgia long-arm liberally construed as to nexus).

160. *Smith v. De Walt Products Corp.*, 743 F.2d 277 (5th Cir. 1984) (Mississippi long-arm does not provide for general jurisdiction).

#### 4. Are Any Other Considerations Beyond Defendant's Contacts Relevant To A Finding Of Minimum Contacts?

Arguably, factors other than those found in the single-inquiry defendant's contacts test should be relevant to whether the assertion of jurisdiction is fair for purposes of due process. Plaintiff could argue that even if defendant's contacts do not exist, or are insufficient to meet a "minimum", jurisdiction would nonetheless be fair if plaintiff has an overriding convenience interest in bringing the suit in a chosen forum.<sup>161</sup> Other arguably relevant factors could include the forum's overriding interest in hearing the case in terms of convenience of trial, adjudication of conduct, and protection of in-state residents,<sup>162</sup> and that defendant suffers no substantial inconvenience by defending in the forum.<sup>163</sup> The defendant could, on the other hand, argue that *even if* the defendant's contacts exist the case should not be heard in the forum if the forum has no legitimate interest in hearing the case,<sup>164</sup> if the plaintiff has not chosen a particularly convenient forum to try the case,<sup>165</sup> or if the defendant would suffer substantial inconvenience by defending in the forum.<sup>166</sup>

The Supreme Court has often referred to the above factors—the plaintiff's interest, forum interest, trial convenience, and burdens on the defendants—as relevant to whether it is "reasonable" to assert jurisdiction under the due process clause.<sup>167</sup> These reasonableness factors have not, however,

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161. It may occur that if plaintiff is forced to bring the suit in a distant forum, the suit would not be brought at all. See *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950). This is particularly true in an international antitrust case if the alternative forum lies abroad, in which case the plaintiff will be deprived of a remedy under United States antitrust law. See Hovenkamp, *supra* note 46, at 485.

162. See *Hanson v. Denckla*, 357 U.S. 235, 256 (1958) (Black, J., dissenting).

163. See *id.*; Nordenberg, *State Courts, Personal Jurisdiction and the Evolutionary Process*, 54 NOTRE DAME LAW. 587, 618-30 (1979).

164. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

165. *Id.*

166. *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174 (1985).

167. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

Implicit in this emphasis on reasonableness is the understanding that the burden on defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute. . . ; the plaintiff's interest in obtaining convenient and effective relief. . . , at least when that interest is not

ever affected the result of any Supreme Court case. This is because the Court has consistently held that the defendant's contacts are a threshold inquiry; it is only *after* sufficient purposeful contacts are found that reasonableness factors would ever be relevant.<sup>168</sup> For plaintiffs, therefore, the reasonableness factors are totally useless since if the countable contacts are insufficient, it does not matter how inconvenient it would be for plaintiff to sue elsewhere, or whether the forum is interested in hearing the case, or that defendant would not be inconvenienced by defending in the forum. There is no reasonableness substitute for a lack of defendant's contacts.<sup>169</sup>

From defendant's point of view it could appear that reasonableness factors would prevent jurisdiction even though the defendant had purposeful contacts with the forum, but this is not so. This is because if the defendant's contacts do exist, sufficient forum interest in the case will exist almost by definition.<sup>170</sup> This is especially true after *Keeton v. Hustler Magazine, Inc.*,<sup>171</sup> in which the Court found a constitutionally sufficient state interest in hearing the case on a threshold so low that it is hard to conceive of a case where defendant's contacts with the forum will not give rise to such an interest.<sup>172</sup> Moreover, *Keeton* held that the fact that the plaintiff may have been forum

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adequately protected by the plaintiff's power to choose the forum. . . ; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental social policies.

*Id.* at 292 (citations omitted); see *Burger King*, — U.S. at —, 105 S. Ct. at 2174.

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' . . . Thus courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'

*Id.* at —, 105 S. Ct. at 2184 (citations omitted).

168. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court of Cal.*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

169. *Weinberg*, *supra* note 83, at 918.

170. See *Lilly*, *supra* note 23, at 107.

171. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

172. See *id.* (New Hampshire has sufficient interest in regulating libel claims arising outside the state as a cooperative effort with sister states, even though every other state would have prohibited the claim as untimely).

shopping was a question of choice-of-law, not jurisdiction.<sup>173</sup>

Finally, with respect to overwhelming burdens of distant litigation on the defendant, the Supreme Court in *Burger King Corp. v. Rudzewicz* held that if sufficient purposeful contacts exist, the existence of burdens of distant litigation is generally a question of venue, which deals specifically with trial convenience.<sup>174</sup> In that case, the Court found it reasonable to require an individual defendant to defend in a state 1500 miles away when sued by a nationwide corporation. Thus, after *Burger King* and *Keeton*, it is difficult to envision any case in which the defendant can put the reasonableness factors to any use.<sup>175</sup> In practical effect, the sole inquiry for due process is whether the defendant has engaged in sufficient purposeful activity in the forum to trigger either specific or general jurisdiction, depending on the cause of action brought.

##### 5. Is Presence Within The Forum Still A Constitutionally Sufficient Basis of Jurisdiction?

A fair reading of *International Shoe* indicates that the Supreme Court did not replace the traditional presence basis of jurisdiction of *Pennoyer*; rather, the Court intended that the minimum contacts test would *supplement* the presence doctrine, thus expanding upon *Pennoyer*.<sup>176</sup> Nonetheless, in two situations it is arguable that satisfaction of the traditional presence standards will not satisfy the minimum contacts test. The question after *International Shoe* is whether the assertion of ju-

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173. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

174. *Burger King Corp. v. Rudzewicz*, — U.S. —, —, 105 S. Ct. 2174, 2185 (1985).

175. Some courts, particularly the Ninth Circuit, are more prone to dismissing jurisdiction on reasonableness grounds than appears warranted by Supreme Court authority. See, e.g., *Paccar Int'l, Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058 (9th Cir. 1985) (fraudulent demand for payment of California letter of credit is a countable contact; but jurisdiction is not reasonable because, among other things, the Bank of Kuwait would bear a heavy burden of defending in California, and jurisdiction would interfere with the sovereignty of Kuwait); see also *Lilly*, *supra* note 23, at 107.

176. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the Forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

*Id.* at 316 (citations omitted).

jurisdiction would in such cases be unconstitutional because "unfair." These two situations are: 1) assertion of quasi in rem jurisdiction over property present in the forum, but where the cause of action has no relationship to such property;<sup>177</sup> and 2) assertion of jurisdiction over an individual defendant who is served with process while present within the forum, but where the cause of action has no relationship to such presence—a basis of jurisdiction known as "transient jurisdiction."<sup>178</sup>

As to quasi in rem jurisdiction, the Supreme Court has held that all assertions of jurisdiction over property are equivalent to assertions of jurisdiction over the property owner. Accordingly, as with personal jurisdiction, assertions of quasi in rem jurisdiction must satisfy the minimum contacts test.<sup>179</sup> This means that while property ownership is a purposeful contact, if such contact is isolated, plaintiff's cause of action must be sufficiently related to the property to support specific jurisdiction.<sup>180</sup> Of course, ownership of property is usually not "mere" ownership; it is often indicative of other contacts which would give rise to general jurisdiction.<sup>181</sup>

While generally requiring quasi in rem jurisdiction to comport with minimum contacts, the Court in *Shaffer v. Heitner* left open two situations in which the presence of property would be itself sufficient for jurisdiction. Courts after *Shaffer* have asserted jurisdiction in both situations. First, if there is no other forum available in the United States, quasi in rem jurisdiction over property located within the forum can be supported under the doctrine of jurisdiction by necessity.<sup>182</sup> This

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177. See *Harris v. Balk*, 198 U.S. 215 (1905).

178. See Ehrenzweig, *supra* note 86.

179. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

180. See, e.g., *Spungin v. Chinetti Int'l Motors*, 515 F. Supp. 31 (E.D.N.Y. 1981) (presence of automobile sufficient under *Shaffer* where cause of action dealt with title to automobile); *Banco Ambrosiano S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

181. See *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439 (1965) (maintaining office shows permanent and continuous activity). It should be noted that even as limited by minimum contacts, the quasi in rem basis of jurisdiction can be valuable to plaintiffs who must resort to state statutory jurisdiction where the relevant long-arm statute is not as extensive as due process would allow. In such a case, the state ordinarily provides a statutory basis for quasi in rem jurisdiction that would only be limited by due process. See *Banco Ambrosiano S.p.A. v. Artoc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984).

182. See *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977); *Louring v. Kuwait Boulder Shipping Co.*, 455 F. Supp. 630 (D. Conn. 1977).

doctrine may be especially important as to foreign antitrust defendants whose only countable contact with the United States is the presence of a bank account.<sup>183</sup> Second, quasi in rem jurisdiction can be used as an attachment device upon property merely present in the forum to secure recovery of a judgment sought in another forum in which minimum contacts do exist.<sup>184</sup>

With respect to transient jurisdiction, while its premises have been questioned after *Shaffer*,<sup>185</sup> the courts which have squarely considered the question have held that the ancient doctrine of transient jurisdiction remains an appropriate basis of jurisdiction until it is specifically overruled.<sup>186</sup> Thus, a minimum contacts analysis is unnecessary if an individual defendant is served within the forum. However, a minimum contacts analysis *will* be necessary if the service seeks to bind any one other than the individual defendant (e.g., a partnership, corporation or unincorporated association). There is no such thing as transient jurisdiction over a defendant not physically present in the forum.<sup>187</sup>

## 6. Is Due Process Still Based on Sovereign Limitations Between the States?

The original rationale for placing due process limitations on state court jurisdiction was that the due process clause assured that the forum state would not impinge upon the sovereign rights of defendant's state by an inappropriate extraterritorial assertion of forum state authority.<sup>188</sup> While *International Shoe* altered the *test* for due process, the Supreme Court retained the notion that the *function* of due process was to impose limitations on the forum state in order to protect the sovereign

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183. See *Feder v. Turkish Airlines*, 441 F. Supp. 1273 (S.D.N.Y. 1977).

184. *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044 (N.D. Cal. 1977).

185. *Nehemiah v. Athletics Congress*, 765 F.2d 42 (3d Cir. 1985).

186. *Opert v. Schmid*, 535 F. Supp. 591 (S.D.N.Y. 1982); *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980). These courts correctly conclude that anything that *Shaffer* may have implied about transient jurisdiction is clearly dictum.

187. *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189 (1915) (no transient jurisdiction over corporation by serving agent physically present in the state); *Nehemiah v. Athletics Congress*, 765 F.2d 42 (3d Cir. 1985) (minimum contacts test must be applied to unincorporated association).

188. See *Pennoyer v. Neff*, 95 U.S. 714 (1878).



interests of sister states.<sup>189</sup> This doctrine of sovereignty and interstate relations was removed from the interests of the actual litigants in any case. For instance, even if the defendant would suffer no burden of distant litigation from defending in the forum—thus making it difficult to see how he would be “deprived” of “life, liberty or property” by an assertion of jurisdiction—the defendant could nonetheless assert that minimum contacts (and thus due process) had not been satisfied.<sup>190</sup> The defendant was allowed this windfall in order to protect the supposed sovereign interest of his state in trying the case unless the defendant had minimum contacts with some other state.<sup>191</sup>

However, in *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinée*,<sup>192</sup> the Supreme Court apparently recognized that the due process clause has nothing to do with interstate sovereignty limitations.<sup>193</sup> By its terms the due process clause regulates only the relationship between the state and the individual.<sup>194</sup> The Court in *Bauxites* concluded that the due process clause only regulates state court jurisdiction to the extent that it protects the “individual liberty interest” of the defendant.<sup>195</sup>

189. See Capra, *supra* note 2, at 1038.

190. *World-Wide Volkswagen*, 444 U.S. at 286.

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

*Id.* at 294. See generally Redish, *Due Process, Federalism and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. REV. 1112 (1981).

191. See Capra, *supra* note 2, at 1040-41. Some courts, in response to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), have held that the sovereignty of a foreign defendant's nation is protected by the due process clause. See *Olsen v. Mexico*, 729 F.2d 641 (9th Cir. 1984); *Donahue v. Far Eastern Air Transp. Corp.*, 652 F.2d 1032 (D.C. Cir. 1981). This is clearly incorrect since even *World-Wide Volkswagen*, the most sovereignty-oriented of all Supreme Court opinions, refers to the due process clause as an instrument of “interstate federalism.” 440 U.S. at 294.

192. 456 U.S. 694 (1982).

193. *Id.* at 702-03 n.10.

194. “No person shall . . . be deprived of life, liberty, or property without due process of law. . . .” U.S. CONST. amend. V. “No State shall . . . deprive any person of life, liberty or property without due process of law. . . .” U.S. CONST. amend. XIV, § 1, cl. 2; see Redish, *supra* note 190, at 1113.

195. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702-03 n.10 (1982).

In *Burger King Corp. v. Rudzewicz*<sup>196</sup> the Court has reaffirmed its apparent rejection in *Bauxites* of sovereignty limitations on a state's exercise of personal jurisdiction. It would appear then that if the defendant is not personally deprived of liberty or property by an assertion of jurisdiction—because not meaningfully inconvenienced—such defendant should not be heard to complain about a lack of minimum contacts. Unfortunately, even this modest advance from *Pennoyer* is weakened by *Burger King*, which implied that the minimum contacts test was always required because the due process clause requires predictable results—presumably even if the defendant is not meaningfully inconvenienced by an “unpredictable” result.<sup>197</sup> Because predictability is not normally considered an independently protected interest under due process,<sup>198</sup> it is apparent that the court is merely using predictability as a surrogate for the sovereignty limitations held to be part of due process by *Pennoyer* and *World-Wide Volkswagen*.<sup>199</sup> In sum, sovereignty limitations are not truly eradicated from fourteenth amendment due process jurisdiction cases; in all cases, sovereignty or its surrogate, predictability, requires a finding of minimum contacts even if

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196. *Burger King Corp. v. Rudzewicz*, — U.S. at —, 105 S. Ct. at 2182 n.13 (1985).

197. *See id.* —, 105 S. Ct. at 2174.

By requiring that individuals have ‘fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign,’ . . . the Due Process Clause ‘gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.’

*Id.* at —, 105 S. Ct. at 2182 (citation omitted). It should be noted that anything in *Burger King* regarding due process requirements where defendant is not meaningfully inconvenienced is dictum, since defendant in *Burger King* was inconvenienced by a suit in Florida. Thus, an individual due process deprivation was clearly implicated in *Burger King*.

198. It is generally held that a state can act as unpredictably and even arbitrarily as it wishes so long as it does not deprive an individual of a constitutionally cognizable interest in life, liberty or property. *See, e.g.,* *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Leis v. Flynt*, 439 U.S. 438 (1979); *Paul v. Davis*, 424 U.S. 693 (1976). *See generally* Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others under the Burger Court*, 59 N.Y.U. L. REV. 482 (1984).

199. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). “But insofar as the state’s ‘interest’ in adjudicating the dispute is part of the fourteenth amendment due process equation, as a surrogate for some of the factors already mentioned, we think the interest [herein] is sufficient.” *Id.* at 776 (citations omitted); *see Capra, supra* note 2, at 1048-49.

the defendant is not meaningfully inconvenienced by distant litigation.

7. Does the Due Process Analysis Differ When the Exercise of Jurisdiction is by a Federal Court in a Federal Question Case?

The Supreme Court has discussed constitutional limitations on personal jurisdiction solely in terms of the due process clause of the fourteenth amendment. However, the due process clause of the fourteenth amendment, by its terms, is not applicable to the federal government, and hence not directly applicable to a federal court. Thus, to the extent it is subject to due process limitations, a federal court in a federal question case can only be directly limited by the due process clause of the fifth amendment.<sup>200</sup>

In recent years, it has been consistently held that the limitations imposed by the fifth amendment due process clause on a federal court are different from the limits imposed by the fourteenth amendment.<sup>201</sup> The courts have held as a constitutional matter that "the judicial jurisdiction over the person of the defendant does not relate to the geographical power of the particular court which is hearing the controversy, but to the power of the unit of government of which the court is a part."<sup>202</sup> In other words, state boundaries have no special significance for fifth amendment due process. The relevant forum in a federal question case in federal court is the United States as a whole, and not the state in which the particular fed-

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200. This is a unanimous holding of the courts. See *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Driver v. Helms*, 577 F.2d 147 (1st Cir. 1978); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985).

A federal court in a diversity case is likewise not directly limited by the fourteenth amendment. However, under the *Erie* doctrine, it has generally been held that a federal court in diversity can have no greater power as to personal jurisdiction than the parallel state court. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Forum-shopping would result from a contrary rule. See, e.g., *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963); *R. CASAD*, *supra* note 26, at ¶ 5.01.

201. See Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470 (1981).

202. *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381, 390 (S.D. Ohio 1967); see also *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *Green*, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1966).

eral court sits.<sup>203</sup>

If the defendant is a United States domiciliary or citizen, it follows that the minimum contacts test is inapposite because there is no application of extraterritorial authority at all. The relevant "territory" is the United States as a whole.<sup>204</sup> Thus, the due process clause is implicated in an international antitrust case in federal court only when jurisdiction is asserted across a sovereign border. It is only at that point that the minimum contacts inquiry is even relevant.<sup>205</sup> It follows that the federal court is not affected by the federalism limitations (or its surrogate of "predictability") inherent in the fourteenth amendment due process clause.<sup>206</sup> This means that there is no constitutional violation if jurisdiction is asserted in California federal court over an antitrust defendant located in Florida—even if the defendant has *no* contacts with California or any other western state.<sup>207</sup> Minimum contacts with any particular

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203. *Matter of Marc Rich & Co. A.G.*, 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S. Ct. 3555 (1983); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985).

204. *Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974); *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985).

205. *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981). One court has stated that the validity of the "single sovereign" analysis of due process has been eroded by the Supreme Court's analysis in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 456 U.S. 694 (1982), which held that sovereignty limitations were not part of the fourteenth amendment due process clause. *See GRM v. Equine Inv. & Management Group*, 596 F. Supp. 307 (S.D. Tex. 1984); *Bamford v. Hobbs*, 569 F. Supp. 160 (S.D. Tex. 1983). This reliance on *Bauxites*, which leads the court to a general fairness balancing analysis, to determine whether fifth amendment due process is satisfied, is misplaced. *Bauxites* merely held that sovereignty limitations were no longer applicable to a state's *extraterritorial* assertion of personal jurisdiction. It said nothing about a state's *intraterritorial* assertion of sovereign authority. In fact, if anything, *Bauxites* eradicates sovereignty-based restrictions on the power of the forum. It can hardly be read to *impose* additional limitations upon the forum state or country. If *Bamford* is correct, then a resident of Buffalo would have a *constitutional* objection to suit in New York City in the absence of "minimum contacts" with the city. The due process clause has never applied to intraterritorial assertions of jurisdiction. *See Buckley v. New York Post Corp.*, 373 F.2d 175 (2d Cir. 1967); *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 736 (E.D. Tenn. 1962) ("[O]ne fundamental principle of the Anglo-American law of jurisdiction is that a sovereignty has personal jurisdiction over any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts.").

206. *See supra* notes 188-99 and accompanying text.

207. Such a ruling is particularly warranted in antitrust cases, given the perva-

state are irrelevant to fifth amendment due process. Of course, the defendant may suffer substantial inconvenience in defending such a suit. However, this is not a constitutional problem with respect to intraterritorial jurisdiction: "the defendant must look primarily to federal venue requirements for protection from onerous litigation."<sup>208</sup>

With respect to alien antitrust defendants (as well as to other federal question defendants) not serveable in the United States,<sup>209</sup> the formal act of invoking jurisdiction—service of process—would entail an extraterritorial assertion of personal jurisdiction. The test for whether this comports with due process is whether the defendant has minimum contacts with the forum. However, for fifth amendment purposes, state lines are irrelevant. The relevant constitutional forum with which to evaluate minimum contacts is the United States, not the particular state in which the federal court sits. If the alien has minimum contacts within the United States—national contacts—fifth amendment due process would not be violated, regardless of the state in which the case is brought.<sup>210</sup> Thus for instance, if an alien antitrust defendant makes sales of its products to New York (or has sufficient purposeful activity throughout the United States as a whole), such defendant could be subject to jurisdiction in any federal court without violating fifth amendment due process.<sup>211</sup> The same *International Shoe* test of pur-

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sive nature of the antitrust injury. See Hovenkamp, *supra* note 46, at 485. It is also important in antitrust cases for all defendants to be subject to jurisdiction in the same court. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (no contribution among antitrust defendants). This would not always be possible if each defendant had to have minimum contacts with a particular state. Hovenkamp, *supra* note 46, at 491-93.

208. *Hogue v. Milodon Eng'g, Inc.*, 736 F.2d 989, 991 (4th Cir. 1984) (citations omitted); *accord Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947 (1st Cir. 1984); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Mariash v. Morrill*, 496 F.2d 1138 (2d Cir. 1974).

209. Aliens could be subject to service in the United States if they appoint (expressly or impliedly), an agent for service, or if they have an alter ego affiliate. See *supra* notes 68-72 and accompanying text. In such a case, the minimum contacts test would be as irrelevant as with United States defendants.

210. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 106 S. Ct. 383 (1985); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985).

211. See, e.g., *Leasco v. Data Processing Equip. Corp.*, 468 F.2d 1326 (2d Cir. 1972); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982); *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975).

poseful activity, and the same categories of general and specific jurisdiction apply to such a defendant; the only difference is that the relevant contacts forum is the United States.<sup>212</sup> Furthermore, the sovereignty and federalism limitations which still apply at least to some extent to the minimum contacts test under the fourteenth amendment would not be applicable to the fifth amendment national contacts test.<sup>213</sup> If the defendant is not personally inconvenienced by distant litigation, minimum contacts should not even be required since there is no independent sovereignty interest protected by the fifth amendment due process clause.<sup>214</sup>

Of course, certain alien defendants will undoubtedly suffer burdens of distant litigation when subject to the national contacts test.<sup>215</sup> However, any concern for defendant's inconvenience is answered in several ways. If defendant has minimum contacts with one or more states in the United States and thus has to defend "abroad," any problem of incremental inconvenience of being sued in one state instead of another does not rise to a constitutional level.<sup>216</sup> If the defendant has minimum contacts with the United States but not with any particular state, having to defend in the United States at all would be

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212. *See, e.g.*, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229 (6th Cir.) (court accepts national contacts test, but defendant has no minimum contacts with the United States in this case; defendant made only isolated purchases within the United States, and such purchases were not related to the cause of action), *cert. denied*, 454 U.S. 893 (1981).

213. *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265, 1272 (6th Cir. 1984). "When a federal court is hearing and deciding a federal question case there are no problems of 'co-equal sovereigns'. That is a fourteenth amendment concern which is not present in actions founded on federal substantive law. Thus. . . we will be concerned only with whether the district court's assertion of jurisdiction unfairly burdened [defendant] with the requirement of litigating in an inconvenient forum." *Id.* at 1271.

214. *Id.*; *see supra* notes 188-99; Capra, *supra*, note 2, at 1041-42; Redish, *supra* note 190, at 1133-44. It should also be noted that the national contacts approach does not violate international law under which the sovereignty of constituent states of a country is irrelevant to the country's exercise of extraterritorial jurisdiction. Lilly, *supra* note 23, at 127 n.155.

215. *See Fullerton, supra* note 19, at 1-10.

216. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 416 (9th Cir. 1977) ("it might very well be neither unfair nor unreasonable as a matter of due process to aggregate the nonforum contacts of an alien with his forum contacts or to require an alien to litigate in one state both those causes of action which originate in that forum state and those arising elsewhere in the United States") (citations omitted); *Engineering Equip. Co. v. S.S. Selena*, 446 F. Supp. 706 (S.D.N.Y. 1978); Lilly, *supra* note 23, at 215.

an inconvenience. However, this inconvenience is fairly imposed because in such a case an aggregate contacts test is absolutely necessary to "avoid the risk that American plaintiffs could not gain jurisdiction over alien defendants with scattered contacts."<sup>217</sup> It is especially necessary in antitrust cases given the pervasive and scattered nature of antitrust injury. Finally, and most importantly, any question of inconvenience incurred in defending in one state instead of another is, according to the Supreme Court's recent decision in *Burger King*, largely a question of venue and not due process.<sup>218</sup> If this is so as between sovereign states as it was in *Burger King*, it is clearly so as to courts within a single sovereign, such as federal courts in federal question cases.<sup>219</sup>

In sum, with a federal court in a federal question case there is no *constitutional* violation in asserting personal jurisdic-

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217. Lilly, *supra* note 23, at 117; Note, *supra* note 201, at 474-75. *George v. Omni Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986) (en banc) (Wisdom, J., dissenting) (if contacts not aggregated under national contacts' approach, these alien defendants could not be sued anywhere in the United States; such a result is "unjust, inconvenient, and expensive" and would immunize defendants from liability). *But see* Hovenkamp, *supra* note 46, at 501-05 (hypothesizing that such a "scattered contacts" problem would rarely, if ever occur). Professor Fullerton, who opposes the doctrine of national contacts, nonetheless agrees that the doctrine must be applied to aliens to avoid the risk of a "scattered contacts" problem. Fullerton, *supra* note 19, at 44 n.194.

218. *See Burger King Corp. v. Rudzewicz*, — U.S. —, —, 105 S. Ct. 2174, 2182 (1985). Cases which have rejected the national or aggregate contacts approach because it would impose unconstitutional burdens on either an alien or a United States defendant did not have the benefit of the Supreme Court's re-evaluation in *Burger King* of defendant's inconvenience as being largely a venue question. *See, e.g., Medeco Security Locks, Inc. v. Fichet Bauche*, 568 F. Supp. 405 (D. Va. 1983) (court rejects national contacts doctrine because it would be unfair to subject alien defendant to jurisdiction in Virginia on the basis of defendant's substantial business in New York).

Leaving inconvenienced defendants to the comfort of the venue statutes is not a complete remedy since the defendant loses its right to default and attack the judgment at a later date. A venue objection (as well as a motion to transfer venue or to dismiss for forum non conveniens) must be made in the rendering court, or it is waived, whereas a jurisdictional objection can be preserved by defaulting in the rendering court. *See* Fullerton, *supra* note 19, at 36-37. Also, venue transfer decisions, and forum non conveniens decisions are far more discretionary than a ruling on lack of jurisdiction or violation of due process. *Id.* However, the Supreme Court obviously considered these differences between venue and jurisdiction in *Burger King*, and nonetheless decided that inconvenience suffered by a defendant is largely solved, if at all, through venue.

219. *See, e.g., Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972).

tion in any federal district court over all defendants who are citizens or domiciliaries of the United States. It is also consistent with due process in such a case to assert jurisdiction in any federal court over an alien who has countable minimum contacts with the United States. In both situations, defendants must look to venue requirements to solve any problem of inconvenience.

However, while the national contacts approach is constitutionally *possible*, personal jurisdiction must be implemented by a statute as an original matter.<sup>220</sup> A statutory authorization of jurisdiction is made by the legislature when it authorizes the formal act of service of process.<sup>221</sup> Thus, if Congress authorizes service of process over a defendant in a federal question case as a formal jurisdictional act, then the only constitutional limitations are those imposed by the fifth amendment and the national contacts test. Congress must specify the jurisdictional extent of service of process as a formal exercise of federal authority over the defendant.

Unfortunately, the main provision for service of process in a federal action, Rule 4 of the Federal Rules,<sup>222</sup> generally limits the jurisdictional effectiveness of service to the state in which the federal court sits. All the provisions made by Rule 4 for the appropriate *manner* of service (including mailed service under Rule 4(c)) are thus only effective if service is made within the state's territorial limits.<sup>223</sup> Accordingly, *if* service is

220. See *supra* notes 2-3 and accompanying text.

221. See R. CASAD, *supra* note 26, at ¶ 3.01.

222. The Federal Rules are indirectly authorized by Congress under the Rules Enabling Act, 28 U.S.C. § 2072. They are promulgated by the Supreme Court, and Congress has the power to change or reject the Supreme Court's provisions.

223. FED. R. CIV. P. 4(f) provides:

(f) *Territorial Limits of Effective Service.* All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or crossclaim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.



made within the state under Rule 4 (e.g., personal service on an individual defendant or an authorized corporate agent who happens to be within the state), then federal statutory jurisdiction exists and the only constitutional limitation on the exercise of jurisdiction is the national contacts test of the fifth amendment.<sup>224</sup> Jurisdiction could be constitutionally asserted in such a case even if the state court could not exercise jurisdiction under its own statutes or under the fourteenth amendment.<sup>225</sup> On the other hand, if service can only be made outside the state, the question of statutory jurisdiction and due process becomes more complicated.

Rule 4(e) provides for two possible methods of service, and thus a statutory exercise of jurisdiction, beyond the borders of the state in which the federal district court sits. The first possibility is where such service is authorized by a special statute of the United States. It is generally agreed by the courts that if Congress has passed a special service of process statute that extends beyond the borders of the state, and if defendant is within the territorial reach of such statute, then the statutory jurisdiction problem is solved and the only constitutional question is whether national contacts are satisfied.<sup>226</sup> With respect to antitrust actions, as previously discussed,<sup>227</sup> section 12 of the Clayton Act provides for service beyond the borders of the state in which the federal court sits. The situations to which the section 12 service provisions can apply is a question of some doubt.<sup>228</sup> It is clear, however, that if service is

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224. See *supra* notes 68-72 and accompanying text; see also *William B. May Co. v. Hyatt*, 98 F.R.D. 569 (S.D.N.Y. 1983) (Rule 4(c) service by mail provisions are not applicable beyond the state line, and cannot be used to invoke personal jurisdiction beyond such boundaries); see also *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.) (Hague Convention does not provide a jurisdictional basis for extraterritorial service), *cert. denied*, 454 U.S. 1085 (1981).

225. See *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398 (5th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

226. *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir.), *cert. denied*, 106 S. Ct. 383 (1985); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *F.T.C. v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); R. CASAD, *supra* note 26, at ¶ 4.06[5].

227. See *supra* notes 35-51 and accompanying text; see also *Soltex Polymer Corp. v. Fortex Indus., Inc.*, 590 F. Supp. 1453 (E.D.N.Y. 1984) (Congress authorizes nationwide service of process in civil RICO actions).

228. See *supra* notes 35-51 and accompanying text.

authorized by section 12, the only constitutional limitations on personal jurisdiction are those provided by the national contacts test of the fifth amendment.<sup>229</sup>

The second possibility for out-of-state service provided by Rule 4(e) is where a statute of the state in which the district court sits provides for service "upon a party not an inhabitant of or found within the state." Rule 4(e) thus incorporates the long-arm statute of the state in which the district court sits. There are two problems with this incorporation: 1) some long-arm statutes are not as extensive as even the fourteenth amendment would allow;<sup>230</sup> and 2) even if the statute extended to the bounds of "due process,"<sup>231</sup> the relevant due process clause as to state authority is the due process clause of the fourteenth amendment. The question then is whether the federal court can use the state statutory authority incorporated into Rule 4(e) as a springboard to asserting jurisdiction over any defendant with national contacts, or whether the court—even in a federal question case—is limited strictly to the extra-territorial authority that the correlative state court would have.

Under the terms of Rule 4(e), the extent to which the federal court is statutorily authorized to assert jurisdiction, even in federal question cases, is limited by the extent of extraterritorial process authorized by the state long-arm statute.<sup>232</sup> As a

229. *Black v. Acme Mkts., Inc.*, 564 F.2d 681 (5th Cir. 1977); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982). Several cases which reject the national contacts approach in antitrust cases do so on the assumption that there is no federal statutory basis of jurisdiction. These courts do not mention section 12, and have obviously overlooked the statutory authority clearly provided by Congress. See, e.g., *Superior Coal Co. v. Ruhrkohle, A.G.*, 83 F.R.D. 414 (E.D. Pa. 1979).

230. N.Y. CIV. PROC. LAW & RULES § 302 (McKinney Supp. 1986); see *Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 464 N.E.2d 432, 476 N.Y.S.2d 64 (1984); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, *cert. denied*, 382 U.S. 905 (1965). However, many state long-arm statutes are either written to be or construed to be coextensive with due process. See generally R. CASAD, *supra* note 26, at ¶ 4.01; *supra* note 25 and accompanying text.

231. See, e.g., CALIF. CIV. PROC. CODE § 410.10 (West 1973).

232. See Note, *supra* note 201. In the absence of a special federal statute the only time the long-arm statutory limitations would be irrelevant is when service is made inside the state under FED. R. CIV. P. 4(c), (d). *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398 (5th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

Of course, use of a limited long-arm statute means that the territorial authority of a federal court in an antitrust action (if section 12 is inapplicable) is controlled by a state legislature without federal policy in mind. This is anomalous, but it is a consequence of Rule 4(e), and any cries of federal "policy" are presumably answered by

result, an intriguing and pervasive question is, presuming that the state long-arm provides statutory authority, what is the relevant constitutional control in federal court on the statutory assertion of jurisdiction? Is it the fourteenth amendment which requires minimum contacts with the *state* in which the district court sits, replete with sovereignty limitations? Or is it the fifth amendment, which requires only minimum contacts with the United States, which is automatically satisfied as to resident and domiciliaries of the United States; and which imposes no limits resulting from federalism?

A few courts have argued that since the fourteenth amendment is not by its terms applicable to a federal court, *only* the fifth amendment is applicable. Thus, these courts hold that when a state provides statutory authority under its long-arm statute, Rule 4(e) is merely borrowing that statute to provide a federal basis for personal jurisdiction; the constitutionality of such jurisdiction must thus be evaluated under the fifth amendment national contacts standard.<sup>233</sup> This result is somewhat anomalous in that the federal court, using the state statute, could reach defendants that the state legislature itself could not constitutionally reach; the long-arm statute is being used in a manner that the body which made it could not authorize. Yet the result is clearly a favorable one in terms of effectuating federal interests especially with respect to enforcement of the antitrust laws.

The vast majority of courts, however, have held that when a long-arm statute is borrowed under Rule 4(e) for a statutory basis of jurisdiction, the federal court is subject to *all* the jurisdictional limitations to which the state court is subject.<sup>234</sup> This

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Congressional inaction in amending Rule 4 to provide for extraterritorial service. See Note, *supra* note 201.

233. *Handley v. Indiana & Mich. Elec. Co.*, 732 F.2d 1265 (6th Cir. 1984); *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973); *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1972).

234. See, e.g., *George v. Omni Int'l, Ltd.*, 795 F.2d 415 (5th Cir. 1986) (en banc); *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 383 (1986); *Johnson Creative Arts, Inc. v. Wool Masters*, 743 F.2d 947 (1st Cir. 1984); *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Stabilisierungsfonds Fur Wein v. Kaiser Stuttl Wine Distributors Pty., Ltd.*, 647 F.2d 200 (D.C. Cir. 1981) (federal court in trademark action subject to District of Colum-

is because Rule 4(e) incorporates the state long-arm statute with the proviso that service can only be made "under the circumstances and in the manner" prescribed in the long-arm statute. The language "under the circumstances" is construed to mean *all* the circumstances to which the state legislature (and thus the state court) is subject, and that includes the limitations of the fourteenth amendment.<sup>235</sup>

It is important to note that these courts do not contend that the fourteenth amendment applies to the federal court as a constitutional matter. Rather, these are statutory decisions. As a statutory matter, Rule 4(e) requires reference to all limitations to which a state court is subject, including the fourteenth amendment. Rule 4(e) is thus construed, in the absence of a special federal statute, to make the federal and state courts jurisdictionally coextensive; and since the state court would be prohibited from reaching a defendant on the basis of national contacts, Rule 4(e) correspondingly prohibits the federal court from doing so.<sup>236</sup> Under this reasoning, the federal court which resorts to a long-arm statute can only assert jurisdiction as a statutory matter if the defendant has minimum contacts with the state in which the federal court sits.<sup>237</sup> This result is just as anomalous as the minority viewpoint because under the majority view, a constitutional provision which by its terms does not apply nonetheless effectively limits a federal court's jurisdiction.

In sum, the national contacts test, an important tool in the enforcement of the antitrust laws, is available (other than in

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bia long-arm statute); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977); *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*, 289 F. Supp. 381 (S.D. Ohio 1967).

235. *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982); *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

236. In *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); Judge Gibbons, dissenting, argued that a state court itself is not bound by the fourteenth amendment in a federal question case, but is subject only to the fifth amendment due process clause. Thus, even though FED. R. CIV. P. 4(e) incorporates all the "circumstances" to which the state court is subject, in federal question cases, those "circumstances" would be the limitations of the fifth amendment, not the fourteenth amendment. This analysis is quite cogent, and solves the dilemma of a federal court being indirectly subject to the fourteenth amendment; it has not yet, however, been adopted by a majority of any court. See Weinberg, *supra* note 83, at 936-38.

237. See Lilly, *supra* note 23; Note, *supra* note 27.

the relatively limited cases of in-state service)<sup>238</sup> only when a federal statute authorizes extraterritorial service of process. In antitrust cases, it is thus of the utmost importance to determine when section 12 of the Clayton Act provides for out-of-state service over the defendant.<sup>239</sup> It is also important for the courts to construe the service provisions of section 12 to apply in the optimum number of cases. Otherwise an antitrust plaintiff is left to the vagaries of state law and indirectly to a constitutional provision grounded in sovereignty limitations which should be inapplicable to the federal court.

## II. SERVICE OF PROCESS

Service of process is both a formal jurisdictional act and a means for notifying the defendant of the action. Even if the defendant is otherwise subject to personal jurisdiction, plaintiff must satisfy the notice aspects of service of process. Both constitutional and statutory requirements must thus be met as to the manner of service.

The defendant has a constitutional procedural due process right defined in the landmark case of *Mullane v. Central Hanover Bank & Trust Co.* as "notice reasonably calculated, under all the circumstances, to apprise [defendants] of the pendency of the action and afford them an opportunity to be heard."<sup>240</sup> The *Mullane* test of reasonableness allows a flexible balancing approach which takes account of the expenses of notifying defendants. Under *Mullane*, actual personal in-hand service is not constitutionally required if other substituted service is as likely to reach defendants; the test is whether a person who *desired* to notify defendant would use such a method of service.<sup>241</sup> In essence, the statutory requirements of manner of service under Federal Rule 4 are written with *Mullane* in mind.<sup>242</sup>

Besides satisfying procedural due process, plaintiff must satisfy the statutory requirements as to manner of service

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238. See *supra* notes 68-72.

239. See *supra* notes 35-51.

240. 339 U.S. 306, 314 (1950).

241. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (upholding mailed service); see also *Milliken v. Meyer*, 311 U.S. 457 (1940); R. CASAD, *supra* note 26, at ¶ 2.03[2][b].

242. See generally 2 J. MOORE, *supra* note 124, ch. 4.

under Federal Rule 4.<sup>243</sup> *Actual* notice is both unnecessary and insufficient to satisfy the constitutional and statutory requirements as to manner of service.<sup>244</sup>

Analysis of the statutory requirements as to manner of service begins with Rule 4 of the Federal Rules of Civil Procedure. In an international antitrust action, Federal Rule 4 governs manner of service even where the formal act of asserting statutory jurisdiction is provided by section 12 of the Clayton Act. Section 12 does not provide any requirements as to manner of service. In such a situation, Rule 4(e) provides that if there is no federal statute "prescribing the manner of service," service is to be made in a manner prescribed by Rule 4.<sup>245</sup>

Rule 4 provides for, among other things, personal service upon a corporation or partnership by delivery of a copy of the summons and complaint to an officer thereof, or to "any other agent authorized by appointment or by law to receive service of process."<sup>246</sup> Appointment of such an "agent" could be required by law in order for the corporation or partnership to be authorized to do business in a certain state.<sup>247</sup> More importantly, courts have deemed corporate affiliates of a non-resident defendant to be appropriate agents for service where defendant exercises effective control over the affiliate.<sup>248</sup> It will

243. Failure to properly serve process results in dismissal for lack of jurisdiction because any resulting judgment would be void. *Armco, Inc. v. Penrod-Stauffer Bldg. Systems, Inc.*, 733 F.2d 1087 (4th Cir. 1984).

244. *Id.* (statutory requirements); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (constitutional requirements); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Daley v. ALIA*, 105 F.R.D. 87, 89 (E.D.N.Y. 1985) (actual notice insufficient where extraterritorial service unauthorized by Fed. R. Civ. P. 4); FED. R. CIV. P. 4(d)(1).

245. See *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982).

246. FED. R. CIV. P. 4.

247. See, e.g., N.Y. BUS. CORP. LAW. § 304 (McKinney Supp. 1986).

248. See *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985) (West German parent corporation's control over wholly-owned American subsidiary sufficient basis for finding that parent transacted business in Florida and that subsidiary acted as parent's agent; service on subsidiary is deemed service on parent); *Industria Siciliana Asfalti v. Exxon Research and Eng'g.*, 1977-1 Trade Cas. (CCH) ¶ 61,256 (S.D.N.Y. 1977) (jurisdiction over foreign subsidiary found upon activities of a United States parent on grounds that parent was acting on behalf of subsidiary, though less of a control than would be required to find a common law agency); *Sunrise Toyota, Ltd. v. Toyota Motor Co.*, 1972 Trade Cas. (CCH) ¶ 74,092 (S.D.N.Y. 1972); *United States v. Watchmakers of Switzerland Information Center, Inc.*, 133 F. Supp. 40, 44-45 (S.D.N.Y. 1955); *United States v. U.S. Alkali Export Ass'n*, 1946-47 Trade Cas. (CCH) ¶ 57,508 (S.D.N.Y. 1946).

be particularly important to establish such an agency within the state in which the federal court sits if there is no federal statute (e.g., section 12 of the Clayton Act) which establishes extraterritorial jurisdiction in a particular case.<sup>249</sup> Federal Rule 4 will control intra-state service, thus triggering the fifth amendment national contacts test, rather than the stricter fourteenth amendment test which is applicable when a state long-arm statute is used for extraterritorial service.<sup>250</sup> In other words, with an intra-state agent or affiliate of an out-of-state defendant, the issues of jurisdiction and service are intertwined.<sup>251</sup>

Besides personal service, Federal Rule 4 now provides for service by mail on an appropriate deliverer. The requirements of proper mailed service under Rule 4(c)(2)(C)(ii) are specific and detailed, and must be strictly followed.<sup>252</sup> The summons and complaint must be served by first class mail with an acknowledgment form conforming to form 18-A of the Federal Rules.<sup>253</sup> The acknowledgement of service must be returned within 20 days of mailing. If there is no return within that time, the *only* valid manner of service then becomes personal service on defendant or an agent: plaintiff cannot reattempt service by mail, nor can plaintiff use a substitute service provided by state law, as would otherwise be allowed under Rule 4(c)(2)(C)(i).<sup>254</sup> Plaintiff does, however, receive some comfort from Rule 4(c)(2)(D) which provides that defendant shall pay for the costs of personal service unless it can show good cause for not returning the receipt within 20 days of mailing.

If service is outside the state in which the federal court sits, the mailing provisions of Rule 4(c) do not apply unless a

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249. See *supra* notes 35-51 and accompanying text.

250. See *supra* notes 200-39 and accompanying text.

251. While this is true as a federal statutory matter due to the limits of the Federal Rules of Civil Procedure, it may not always be true in terms of countable contacts for the minimum contacts test of due process. Contacts of an agent can be attributed to a defendant even though the agent is completely separate as a corporate matter. Yet such an agent for minimum contacts purposes will generally not be an agent for purposes of service under Rule 4. See *R. CASAD, supra* note 26, at ¶¶ 4.03[s], 5.01[2]; *supra* notes 120-37 and accompanying text.

252. *Delta Steamships Lines, Inc. v. Albano*, 768 F.2d 728 (5th Cir. 1985).

253. The acknowledgment serves as proof of service. See *Delta Steamships Lines v. Albano*, 768 F.2d 728 (5th Cir. 1985).

254. *Armco, Inc. v. Penrod-Stauffer Building Systems, Inc.*, 733 F.2d 1087 (4th Cir. 1984).

federal statute authorizes such extraterritorial service to be made, at which point Rule 4(c) would govern as to manner of service.<sup>255</sup> If a federal statute is not applicable, Rule 4(e) relies on the state long-arm statute for statutory jurisdiction.<sup>256</sup> If plaintiff resorts to state law for statutory jurisdiction, the appropriate manner of all service effected within the United States is governed *solely* by the service of process provisions of the state in which the district court sits.<sup>257</sup> In contrast, if statutory jurisdiction is provided by a federal statute, Rules 4(c) and (e) state that plaintiff has the option to follow *either* Rule 4 or the forum state's process provisions to satisfy the requirement of a proper manner of service.<sup>258</sup> In either case, reference must be made to the particular service of process provision of the state in which the district court sits. Service provisions vary among the states.<sup>259</sup>

When service must be made outside the United States in order to obtain personal jurisdiction, the requirements as to manner of service are somewhat more complicated. Again, without a special federal statute authorizing service, the provisions on manner of service in Rule 4(c)(2)(C)(ii) and Rule 4(d) are inapplicable.<sup>260</sup> However, where statutory jurisdiction exists—either by the long-arm statute, in which state rules on service apply, or by a federal statute like section 12 of the Clayton

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255. See *Daley v. ALIA*, 105 F.R.D. 87, 89 (E.D.N.Y. 1985); *William B. May Co. v. Hyatt*, 98 F.R.D. 569 (S.D.N.Y. 1983). In fact, none of the rules as to manner of service provided by FED. R. CIV. P. 4(c) or 4(d) apply extraterritorially in the absence of a federal statutory grant of personal jurisdiction. *Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983).

256. See *supra* notes 222-37 and accompanying text.

257. FED. R. CIV. P. 4(e), 4(c)(2)(C)(i); *Davis v. Musler*, 713 F.2d (2d Cir. 1983); *Rosa v. Cantrell*, 705 F.2d 1208 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983).

258. FED. R. CIV. P. 4(c)(2)(C)(i); see *Delta Steamships Lines, Inc. v. Albano*, 768 F.2d 728 (5th Cir. 1985). Where section 12 of the Clayton Act authorizes statutory jurisdiction, and state service provisions are borrowed under FED. R. CIV. P. 4(c)(2)(C)(i), the constitutional limitations on extraterritorial jurisdiction are those provided by the national contacts test of the fifth amendment. This is because a federal statutory grant of jurisdiction exists, and FED. R. CIV. P. 4(e) borrows state procedures only as to the manner of service—not as to the manner *and circumstances* of service, which are borrowed where a federal jurisdiction statute is not applicable. See *Burstein v. State Bar of Cal.*, 693 F.2d 511 (5th Cir. 1982); *Terry v. Raymond Int'l, Inc.*, 658 F.2d 398 (5th Cir. 1981), *cert. denied*, 456 U.S. 928 (1982).

259. Compare N.Y. CIV. PRAC. LAW & RULES § 308 (McKinney Supp. 1986) with CAL. CODE CIV. PROC. § 410.10 (West Supp. 1982).

260. See *supra* note 255 and accompanying text.



Act,<sup>261</sup> in which the service provisions of both Rule 4(c)-(d) and the forum state are applicable—Rule 4(i) of the Federal Rules provides additional options to a plaintiff seeking a proper manner of service.<sup>262</sup>

Rule 4(i) allows service, in addition to previously discussed means, by any of five different means. First, service may be effected in the manner provided by the country where service is made. This would include manners of substituted service not acceptable under either Rule 4(c)-(d) or the forum state service provisions.<sup>263</sup> Service may also be made through letters rogatory. Such service proceeds through diplomatic channels and is often quite time consuming.<sup>264</sup>

Personal service on defendant or, if a corporation, upon an officer, a managing agent, or a general agent is authorized by Rule 4(i). Service by mail, requiring a signed receipt, is authorized by Rule 4(i). Such service must be mailed by the clerk of the court. Finally, Rule 4(i) also provides for service pursuant to court order, in any manner or circumstances not already authorized by Rule 4(c) or (d) (if applicable) or by the state service provisions, so long as the service is reasonable and adequate under the circumstances in attempting to notify the defendant.<sup>265</sup>

Courts have generally required plaintiff to exhaust or demonstrate the futility of the other methods allowed by Rule 4(i) before resorting to court-ordered service.<sup>266</sup> However, if such methods are shown wanting, the courts have shown a willingness to authorize novel and flexible methods of serving de-

261. It should be remembered that some courts have held that section 12 does not authorize service outside the United States. See *supra* notes 48-51 and accompanying text.

262. FED. R. CIV. P. 4(i), by its terms, governs only manner of service. Thus, for FED. R. CIV. P. 4(i) provisions to apply, a statutory grant of worldwide service must be found under a federal statute or the long-arm statute of the forum state. See *R. CASAD*, *supra* note 26, at ¶ 4.06[4].

263. *United States v. Danenza*, 528 F.2d 390 (2d Cir. 1975). The option of complying with the service provisions of the state in which the service is made is not available for service within the United States. FED. R. CIV. P. 4(c), 4(d); see also *Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983).

264. A description of the letters rogatory process can be found in *R. CASAD*, *supra* note 26, at ¶ 4.06[1].

265. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken v. Meyer*, 311 U.S. 457 (1940).

266. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 508 F. Supp. 49 (S.D.N.Y. 1980).

fendant.<sup>267</sup>

In addition to Rule 4(i), further methods of service may be authorized by international treaties to which the United States is a signatory, such as the Convention on Service Abroad of Judicial and Extrajudicial Documents (Hague Convention or Convention).<sup>268</sup> The Hague Convention deals solely with manner of service and is not a grant of personal jurisdiction over the defendant.<sup>269</sup> While the Hague Convention is a self-executing law authorizing an appropriate manner of service in a signatory country,<sup>270</sup> Rule 4(i) does not specifically provide that service under the Hague Convention is valid. The advisory committee has, however, proposed an amendment to Rule 4(i) which would specifically authorize service pursuant to applicable treaties or conventions in addition to the methods authorized by Rule 4(i).<sup>271</sup> The contrary proposition is also true: Rule 4 provisions for service (including Rule 4(i)) are ordinarily *additional* methods by which a defendant can be served in a country that is party to the Hague Convention unless otherwise indicated; the Hague Convention does not ordinarily pre-empt the service provisions of Rule 4.<sup>272</sup>

The Hague Convention provides that certain methods of

267. See, e.g., *International Controls Corp. v. Vesco*, 593 F.2d 166, 175-82 (2d Cir.) (service pursuant to court order held valid where plaintiff's attorney threw process onto the grounds of defendant's residence and fled pursuing bodyguards and also mailed process), *cert. denied*, 442 U.S. 941 (1979); *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 508 F. Supp. 49 (S.D.N.Y. 1980) (service by telex).

268. Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *entered into force for the United States*, Feb. 10, 1969, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163 [hereinafter cited as the *Hague Convention*]. The text of the *Hague Convention* is reproduced in full at 28 U.S.C.A., following FED. R. Civ. P. 4(i) (West Supp. 1986). The parties to the *Hague Convention* are: Barbados, Belgium, Botswana, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Seychelles, Sweden, Turkey, United Kingdom, United States, and West Germany.

269. See *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.) (Hague Convention is not a "wholly federal means" of service triggering the national contacts test), *cert. denied*, 454 U.S. 1085 (1981).

270. See *Voorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983).

271. See Preliminary Draft, published by Committee on Rules of Practice and of the Judicial Conference, Administrative Office of the U.S. Courts, Washington, D.C.

272. *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *International Control Corp. v. Vesco*, 593 F.2d 166 (2d Cir. 1979); *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

service be made through the "central authority" of the receiving country.<sup>273</sup> First, service may be in the manner of the country where made.<sup>274</sup> Second, service may be made by any method requested by the applicant pursuant to a request form filed with the central authority of the receiving state. The form of service requested must not violate local law, as determined by the central authority.<sup>275</sup>

In addition to the service methods provided through the central authority, article 10 of the Convention provides for personal service by competent officials of the rendering state, and also that service can be made directly by ordinary mail. This mailing provision is, on its face, compatible with the mailing provisions of Rule 4(i)(1)(D) and Rule 4(c). However, article 10 mailed service is allowed only if the "state of destination does not object." Several countries, most notably West Germany, have objected to mailed service.<sup>276</sup> Moreover, various signatory countries have objected to, or imposed conditions upon, certain other methods of service otherwise allowed by the Convention or by Rule 4. For instance, West Germany, as well as other nations, has ratified the Treaty subject to the condition that process be translated.<sup>277</sup> Japan objected to the personal service provisions of article 10.<sup>278</sup> Such reservations ostensibly limit the possible methods of service that can be made pursuant to the Convention within the objecting country. A more difficult question is whether such reservations would prohibit service otherwise permissible under Rule 4. Is the Convention merely supplementary to Rule 4, or does it pre-empt

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273. *Hague Convention*, *supra* note 268, at art. 2. A list of central authorities may be obtained from the Justice Department or United States Marshals.

274. *Hague Convention*, *supra* note 268, at art. 5(a). Ordinarily, translation of documents is required. See 28 U.S.C.A. (West Supp. 1986), following FED. R. CIV. P. 4(i) (ratifications following the treaty) (Germany, Luxembourg, Sweden). Even without regard to the *Hague Convention*, translation may be required to satisfy the rudimentary concepts of notice. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).

275. *Hague Convention*, *supra* note 268, at art. 5(b). The request must be submitted pursuant to a request form, which may be found following the text of the Convention at 28 U.S.C.A. (West Supp. 1986), following FED. R. CIV. P. 4(i).

276. *Harris v. Browning-Ferris Chemical Services, Inc.*, 100 F.R.D. 775 (M.D. La. 1984); *Low v. Bayerische Motoren Werke, A.G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (1st Dep't 1982).

277. See 28 U.S.C.A., following FED. R. CIV. P. 4(i) (West Supp. 1986) (ratifications of Treaty); FED. R. CIV. P. 4(i).

278. *Kadota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68 (Ct. App. 1980).

Rule 4, at least insofar as it *prohibits* service otherwise permissible under Rule 4 or the incorporated state service provisions?

The courts that have considered the question have thus far uniformly held that use of Rule 4 methods of service, including, by absorption, the forum state service provisions, is invalid where such use is otherwise prohibited by the Hague Convention.<sup>279</sup> Since service of process is void in such cases, no judgment can properly be rendered. Thus, a violation of the Hague Convention concomitantly results in a judgment that is void abroad as well as within the United States.<sup>280</sup> The cases finding Hague Convention prohibitions pre-emptive of Rule 4 are generally based on the rationale that the Hague Convention was adopted after Rule 4, that a self-executing treaty like the Hague Convention is of equal dignity with an Act of Congress, and that "where the two conflict, the latter in time prevails."<sup>281</sup> This rationale may cut the other way in light of the recent adoption of the mailed service provisions of Rule 4(c), and in light of the proposed amendment to Rule 4(i) which states that the Convention is an *alternative* to, and not pre-emptive of, the other Rule 4 service provisions. Application of the last in time rule to the new Rule 4 provisions could very well mean the mailed service provisions of Rule 4(c), as well as all provisions of Rule 4(i), supersede any prior-in-time Convention prohibition.<sup>282</sup>

Even presuming, however, that Rule 4 provisions would be respected by *United States* courts as controlling service provisions—thus resulting in a judgment enforceable in the United States—if service is invalid under the law of the defendant's country or pursuant to a Hague Convention prohibition, plaintiff will not be able to enforce the judgment in such country. For instance, Switzerland will refuse to enforce a judgment as to which service was made in Switzerland by mail; in fact Swit-

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279. See *Voorhees v. Fischer & Krecke*, 697 F.2d 574 (4th Cir. 1983) (plaintiff allowed to re-serve defendant in accordance with the Convention; the court refused to dismiss the complaints because the statute of limitations had run); *Harris v. Browning-Ferris Chemical Servs., Inc.*, 100 F.R.D. 775 (M.D. La. 1984); *Kadota v. Hosogai*, 125 Ariz. 131, 608 P.2d 68 (Ct. App. 1980); *Low v. Bayerische Motoren Werke A.G.*, 88 A.D.2d 504, 449 N.Y.S.2d 733 (1st Dep't 1982).

280. *Voorhees*, 697 F.2d at 576.

281. *Id.* at 575-76.

282. See generally Note, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LAW. 637, 640-42 (1980).

zerland refuses to recognize any manner of service other than letters rogatory.<sup>283</sup> The intra-territorial prohibitions of foreign states (other than those reserved in the Hague Convention) ordinarily do not prohibit the rendering and enforcement of a judgment in the United States.<sup>284</sup> Such prohibitions will obviously preclude enforcement of the judgment in the country which objects to the manner of service. Care must accordingly be taken, and local counsel should be consulted at the time of service, if the judgment must ultimately be enforced outside the United States.

All the complicated problems of service abroad can be bypassed if service can be effectuated upon an agent of the foreign defendant in the United States. This includes the secretary of state of the forum state if the defendant is authorized to do business within the forum.<sup>285</sup> More importantly, it includes affiliated corporations actually controlled by the foreign defendant.<sup>286</sup>

### III. *VENUE*

Venue and jurisdiction are distinct requirements which must be analyzed separately. Jurisdiction concerns the power of the court to assert authority over the defendant and to subject it to the burdens of distant litigation; venue is concerned with a forum location which will guarantee trial convenience.<sup>287</sup> Nonetheless, in antitrust actions—especially where

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283. *Id.*

284. *Id.* But see *FTC v. Compagnie de Saint Gobain-Pont-à-Mousson*, 636 F.2d 1300, 1313-14 (D.C. Cir. 1980) (in dictum, the court states that in the United States, FED. R. CIV. P. 4(i) provisions may violate international law, thus resulting in unenforceability).

285. See, e.g., N.Y. BUS. CORP. LAW § 307 (McKinney Supp. 1986); FED. R. CIV. P. 4(d)(3).

286. See *supra* notes 120-31; *Lamb v. Volkswagenwerk A.G.*, 104 F.R.D. 95 (S.D. Fla. 1985) (control exercised by West German parent corporation over wholly owned American subsidiary sufficient basis for finding agency for service of process; objection of West Germany to mailed service under article 10 of Hague Convention inapplicable when service was accomplished upon alter ego within United States); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985) (service on local agent of foreign defendant; limitations of Hague Convention inapplicable when service accomplished within United States).

287. *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *Myers v. American Dental Ass'n*, 695 F.2d 716, 724 n.7 (3d Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484, 1488 (D. Mass.

statutory jurisdiction is sought under section 12 of the Clayton Act—the issues of venue and jurisdiction tend to intertwine.

In antitrust actions, special antitrust venue provisions as well as the general venue provisions of 28 U.S.C. § 1391 (section 1391) are applicable.<sup>288</sup> In international antitrust cases where alien defendants are concerned, the venue question is as easy as an original matter: 28 U.S.C. § 1391(d) (section 1391(d)) provides that an alien may be sued in any district.<sup>289</sup> The question thus arises: Why, in an international antitrust case, does the plaintiff ordinarily seek to show that the defendant transacts business in the judicial district so as to satisfy the much more complicated venue provision of section 12 of the Clayton Act?<sup>290</sup> The answer lies in the fact that many courts have conditioned the use of the section 12 statutory grant of worldwide personal jurisdiction<sup>291</sup> upon satisfaction of the section 12 venue requirements.<sup>292</sup> In these courts, the use of the simpler venue provision of section 1391(d) is costly in that plaintiff must find statutory jurisdiction under the forum state long-arm statute which in turn is limited by the fourteenth amendment due process clause through Federal Rule 4(e). On the other hand, if plaintiff pays the cost of proving venue under the more difficult transacting business test of section 12, the federal statutory grant automatically gives personal jurisdiction over the alien,<sup>293</sup> and the only constitutional limitation

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1985) ("because venue is primarily a matter of convenience of litigants and witnesses . . . it should be distinguished from personal jurisdiction").

288. See *Brunette Machine Works v. Kockum Indus.*, 406 U.S. 706 (1972); *King v. Johnson Wax Assoc.*, 565 F. Supp. 711 (D. Md. 1983) (§ 1391(b)); *Bamford v. Hobbs*, 569 F. Supp. 160, 169-70 (S.D. Tex. 1983); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982); *Centronics Data Computer Corp. v. Manesmann, A.G.*, 432 F. Supp. 659, 661 (D.N.H. 1977); *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

289. See *Brunette Machine Works v. Kockum Indus.*, 406 U.S. 706 (1972); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,824 (D.D.C. 1984) (venue in any district proper as to Canadian corporate defendant); *General Elec. Co. v. Bucyrus-Erie Co.*, 550 F. Supp. 1037 (S.D.N.Y. 1982).

290. See, e.g., *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484 (D. Mass. 1985).

291. Some courts construe section 12 to provide nationwide, not worldwide, service of process. See *supra* notes 48-51 and accompanying text.

292. *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484 (D. Mass. 1985). For the better view, that the section 12 service provision is independent from the venue provision, see *supra* notes 35-47 and accompanying text.

293. See *supra* notes 35-47 and accompanying text.

is the fifth amendment national contacts test.<sup>294</sup> Also, if defendant is *not* an alien (which can obviously be the case even in an international antitrust case) the transacts business test of section 12 will ordinarily be the most liberal venue provision open to plaintiff.<sup>295</sup> Accordingly, the venue provisions of section 12 are of prime consideration in an antitrust case.

Section 12 applies only to *corporate* defendants; it provides for venue in any judicial district where such defendant is an "inhabitant, is found, or transacts business." If defendant is not a corporation, venue must be found either under the more restrictive provisions of section 4 of the Clayton Act, or under the general venue provisions.

A corporate defendant is an "inhabitant" of the state or country where it is incorporated.<sup>296</sup> Thus, an alien corporation by definition is not an "inhabitant" of any judicial district. A corporate defendant is "found" wherever it would be considered to be "present" or "doing business" under the traditional jurisdictional tests applicable after *Pennoyer v. Neff*.<sup>297</sup> This requires a showing of substantial and continuous activity within the district tantamount to a finding of permanence.<sup>298</sup> Most courts have held that an alien corporation cannot be "found" in a district where it does business through subsidiaries or other distributors; a corporation must ordinarily have its own agents and officers present in the district.<sup>299</sup>

In 1914 Congress added the phrase "transacts business"

294. See *supra* notes 200-39 and accompanying text.

295. Hovenkamp, *supra* note 46, at 514-15.

296. *Aro Mfg. Co. v. Automobile Body Research Corp.*, 352 F.2d 400 (1st Cir. 1965), *cert. denied*, 383 U.S. 947 (1966).

297. 95 U.S. 714 (1878); see *People's Tobacco Co. v. American Tobacco Co.*, 246 U.S. 79, 84 (1918); *supra* notes 84-86 and accompanying text.

298. See *Johnson Creative Arts v. Wool Masters*, 743 F.2d 947, 952-54 (1st Cir. 1984) (same test applied to "doing business" under 28 U.S.C. § 1391(c)); *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949 (9th Cir. 1968) (office, employee, or agent within the district, carrying on continuous activity); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 291 F. Supp. 252, 257 (E.D. Pa. 1968) (corporation is found in district if license would be required as condition precedent to conducting such activity).

299. *Stern Fish Co. v. Century Seafoods, Inc.*, 254 F. Supp. 151, 153 (E.D. Pa. 1966). This strict requirement for venue does not necessarily apply to the statutory grant of jurisdiction provided by section 12. At least where the defendant exercises substantial control over a local affiliate, service of process on the affiliate is considered a proper statutory exercise of jurisdiction over the defendant. See *supra* notes 120-31.

to section 12 as an additional location in which venue would be proper as to corporate defendants in antitrust cases. The intent of Congress was to broaden plaintiff's venue options since the term "found" often resulted in plaintiff's inability to sue conveniently, or even to sue at all in the United States.<sup>300</sup> Thus, the Supreme Court has instructed that the phrase "transacts business" should be given a liberal construction based on "practical business conceptions" instead of "the previous hair-splitting legal technicalities encrusted upon the 'found' - 'present' - 'carrying-on-business' sequence" of section 12.<sup>301</sup> A broad construction makes sense since any other construction raises unreasonable obstacles to the enforcement of United States antitrust laws.

The general test for transacting business, according to the Supreme Court, is whether the defendant carries on business of a substantial character within the district as evaluated by practical everyday business concepts.<sup>302</sup> Given the broad construction encouraged by the Supreme Court in *Scophony* it is fair to say, however, that the response of the lower courts has often been disappointing. Cases can be found which construe the term "transacts business" very strictly, ignoring the obvious impact that the defendant has within the district and the obvious benefits it derives therefrom.<sup>303</sup> In fact, there are many cases which construe the transacts business requirement more strictly than the personal jurisdiction due process requirements, especially in cases where the cause of action is related to defendant's contacts with the forum.<sup>304</sup> Yet for every

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300. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 374 (1927).

301. *United States v. Scophony Corp.*, 333 U.S. 795, 808 (1948).

302. *Id.* at 807.

303. *See, e.g.*, *O.S.C. v. Toshiba, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (contacts of wholly owned importer and distributor selling products solely on behalf of defendant are not attributable to defendant); *Sportmart, Inc. & Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982) (foreign defendant does not transact business through wholly owned United States subsidiary which is the exclusive domestic distributor of defendant's products, with substantial sales within the district); *Williams v. Canon, Inc.*, 432 F. Supp. 376 (C.D. Cal. 1977) (parent company does not transact business within forum through wholly owned subsidiary even though there are interlocking directorates, common officers, transfer of personnel, and basic decisions on marketing procedures made by parent).

304. *See supra* notes 152-56 and accompanying text; *see also* *Buckeye Assocs., Ltd. v. Fila Sports, Inc.*, 616 F. Supp. 1484 (D. Mass. 1985); *Sportmart, Inc. & Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982); *Cascade Steel Rolling*



case which unreasonably construes "transacts business" strictly, there is a case which has taken *Scophony* to heart and adopted a broad view under which venue is at least as easy to find as countable, minimum contacts with the forum state.<sup>305</sup>

It is safe to conclude from the foregoing that it is somewhat unpredictable whether a defendant will be found to transact business under section 12. It will depend, of course, on the particular facts of each case,<sup>306</sup> and on whether the court takes a properly broad or an unreasonably narrow view of what constitutes transacting business. Nonetheless, a few generalities can be drawn to help evaluate a given set of facts. First, it is well accepted that the activities which constitute transacting business need not be related to the cause of action under section 12.<sup>307</sup> It is also well accepted that the court is not to view

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Mills, Inc. v. C. Itoh & Co., 499 F. Supp. 829 (D. Or. 1980) (stream of commerce contacts ignored for transacting business under section 12, although the same contacts would be purposeful and countable for minimum contacts purposes); *Athlete's Foot of Del., Inc. v. Ralph Libonati Co., Inc.*, 445 F. Supp. 35 (D. Del. 1977) (agreement with franchisee does not constitute transacting business, even though it is clearly purposeful availment under *Burger King Corp. v. Rudzewicz*, — U.S. —, 105 S. Ct. 2174 (1985)).

305. See *Myers v. American Dental Ass'n*, 695 F.2d 716, 726-27 (3d Cir. 1982) (isolated entry into district to promulgate local standards found to constitute transacting business; venue requirements should not be more strictly construed than personal jurisdiction requirements); *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985) (purchasing activity by agents in district constitutes transacting business); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 442 F. Supp. 1201 (S.D.N.Y. 1978) (transacting business found through an agency, even though an independent entity, in accord with agency theory of purposeful availment); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co. Ltd.*, 402 F. Supp. 262 (E.D. Pa. 1975).

306. See *Myers*, 695 F.2d at 726-28 ("transacts business" analysis requires a case by case approach).

307. *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985). Since transacting business requires less pervasive contacts than the substantial contacts required for general jurisdiction (such contacts are synonymous with the "found-presence" test of venue), it is at least theoretically possible that venue would be permissible under section 12, but personal jurisdiction would not exist. This could occur when defendant transacts business, the cause of action is unrelated to such business, and the contacts do not rise to the level required for general jurisdiction. The reason this problem will not often, if ever, arise is because if defendant is found to transact business under section 12, that will trigger worldwide statutory jurisdiction. But see *supra* notes 48-51 and accompanying text. As to United States corporations, jurisdiction would be automatic. As to aliens, defendant's contacts throughout the United States would be aggregated. Since it is already assumed that defendant transacts business in a single judicial district, it will be the rare case where there are not enough contacts elsewhere which, when added to those in the forum district, will not then be sufficient to support general jurisdiction.

the defendant's intra-district business in comparison with the defendant's total business.<sup>308</sup> A view to the contrary would suggest that a defendant who spread its business equally throughout the United States would not be transacting business anywhere.

The volume of business is to be evaluated from the point of view of the average businessman, not from the perspective of a major corporation.<sup>309</sup> Thus, even a few thousand dollars' worth of continuous business a year may be sufficient "transacting" for a court which takes a broad view of section 12.<sup>310</sup> Furthermore, transacting can be found through either purchasing activity or sales activity within the district, or both.<sup>311</sup>

Other intra-district forms of business which are relevant to "transacting" include maintenance of local offices or employees,<sup>312</sup> visits to the district by officers, employees or sales representatives,<sup>313</sup> patent licensing activities,<sup>314</sup> negotiation or

308. *Black v. Acme Mkts., Inc.*, 564 F.2d 681 (5th Cir. 1977); *Dunham's*, 614 F. Supp. at 624; *In re Chicken Antitrust Litig.*, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975).

309. *Black v. Acme Mkts., Inc.*, 564 F.2d 681 (5th Cir. 1977); *Dunham's*, 614 F. Supp. at 624; *In re Chicken Antitrust Litig.*, 407 F. Supp. 1285, 1291 (N.D. Ga. 1975).

310. *Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985); *ABC Great Sales, Inc. v. Globe Ticket Co.*, 310 F. Supp. 739 (N.D. Ill. 1970) (\$14,500 in sales found sufficient). *But see King v. Johnson Wax Assoc., Inc.*, 565 F. Supp. 711 (D. Md. 1983) (\$2,000 per year would not be considered substantial enough to be transacting business from point of view of average businessman).

311. *See Dunham's, Inc. v. National Buying Syndicate of Texas*, 614 F. Supp. 616 (E.D. Mich. 1985); *Black v. Acme Mkts.*, 564 F.2d 681 (5th Cir. 1977). Purchasing activity will not count significantly toward a finding of general jurisdiction for minimum contacts purposes, though it is significant for specific jurisdiction. *See supra* notes 101, 142-56 and accompanying text. Thus, where the cause of action is unrelated to the contacts, purchasing activity may lead to a finding of venue without jurisdiction. Again this anomaly is more theoretical than real, given the fact that a finding of transacting business triggers nationwide or worldwide jurisdiction and a national contacts test of due process. *See supra* note 307.

It must be emphasized that the relevant geographical area for determining transaction of business is the judicial district. In states with more than one judicial district, the fourteenth amendment requirement of minimum contacts with the state—wherever applicable—will result in a broader analysis for jurisdiction than for venue.

312. *See, e.g., Professional Adjusting Sys. of Am., Inc. v. General Adjustment Bureau, Inc.*, 352 F. Supp. 648 (E.D. Pa. 1972); *Gray Line, Inc. v. Gray Line Sightseeing Companies Associated, Inc.*, 246 F. Supp. 495 (N.D. Cal. 1965) (local office maintained for sales purposes); *Friedman v. United States Trunk Co.*, 204 F. Supp. 366 (S.D.N.Y. 1962), *aff'd*, 367 F.2d 583 (2d Cir. 1966).

313. *See, e.g., School Dist. v. Harper & Row Publishers, Inc.*, 267 F. Supp. 1006 (E.D. Pa. 1967) (court found venue relying in large part on good will visits to custom-

consummation of contracts,<sup>315</sup> and delivery of products.<sup>316</sup> Advertising which reaches the district may be relevant to the venue determination, but it will ordinarily not be sufficient in itself to be transacting business.<sup>317</sup>

A finding of transacting business is much more likely if the business is conducted on a relatively continuous and systematic basis.<sup>318</sup> On the other hand, even a single transaction (such as a significant negotiation, contracting, or sale in the district) has been held sufficient for "transacting" by courts which have given section 12 a liberal construction.<sup>319</sup> A requirement of substantial continuity for transacting business will prohibit venue under section 12 in cases where jurisdiction would exist on the basis of isolated contacts and a related cause of action.<sup>320</sup> While venue and jurisdiction are distinct concepts, it makes little sense to construe section 12 more strictly than the already strict limitations imposed by the Supreme Court's jurisdictional requirement of purposeful

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ers and advertising and mail order catalogues used in the district); *Rhode Island Fittings Co. v. Grinnell Corp.*, 215 F. Supp. 198 (D.R.I. 1963) (sales representative sent to Rhode Island seven times a year and sales volume of \$108,000 annually in Rhode Island led court to find venue).

314. *United States v. Scophony Corp.*, 333 U.S. 795 (1948).

315. See, e.g., *United States v. Diebold, Inc.*, 1978-1 Trade Cas. ¶ 61,827 (D. Del. 1977); *Hoffman Motors Corp. v. Alfa Romeo, S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

316. Compare, e.g., *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974) (no venue where delivery made in Japan from Japanese parent to United States subsidiary and which in turn were imported into the district) with *Sunbury Wire Rope Mfg. Co. v. United States Steel Corp.*, 129 F. Supp. 425 (E.D. Pa. 1955) (venue found where delivery into district even though title passed in a different state).

317. See *King v. Johnson Wax Assocs., Inc.*, 565 F. Supp. 711, 717 (D. Md. 1983); *Athlete's Foot of Del., Inc. v. Ralph Libonati Co., Inc.*, 445 F. Supp. 35 (D. Del. 1977).

318. See *B. J. Semel Assocs. v. United Fireworks Mfg. Co.*, 355 F.2d 827, 832 (D.C. Cir. 1966); *King v. Johnson Wax Assocs., Inc.*, 565 F. Supp. 711, 716 (D. Md. 1983) ("[A] corporation's contacts with a district must be somewhat regular and continuous; meager, sporadic dealings within the district are not sufficient."); *Amateur-Wholesale Elecs. v. R.L. Drake Co.*, 515 F. Supp. 580, 585 (S.D. Fla. 1981) ("The business transacted must be of a substantial character, and it must have some degree of continuity;" use of two trade shows to display products in district in last two years "is not sufficient to constitute the requisite degree of continuous local contact").

319. See *Myers v. American Dental Ass'n*, 695 F.2d 716 (3d Cir. 1982); *Hoffman Motors Corp. v. Alfa Romeo S.p.A.*, 244 F. Supp. 70 (S.D.N.Y. 1965).

320. See, e.g., *El Cid, Ltd. v. New Jersey Zinc Co.*, 444 F. Supp. 845 (S.D.N.Y. 1977) (court finds jurisdiction under state long-arm statute on the basis of meetings conducted in New York; court states that more is required for venue under section 12).

availment. Such an unreasoned limitation on section 12 is contrary to the broad construction mandated by *Scophony*.

There is disagreement among the courts as to whether the "transacts business" test is determined as of the time the cause of action arose, or rather as of the time the complaint is filed. The question can be of obvious import where defendant has ceased transacting business in the judicial district after the antitrust injury. Courts which hold the date of filing as the relevant date have reasoned that the statutory phrase "transacts business" is written in the present tense, not in the past.<sup>321</sup> Courts which hold the accrual date the relevant point for ascertaining venue have done so to prevent corporations from committing antitrust violations and then fleeing the district.<sup>322</sup> In light of these competing considerations, some courts have taken the compromise position that the date of accrual is the relevant date if the plaintiff's claim is related to business transacted in the district; otherwise the date of filing is the relevant date.<sup>323</sup>

Where there is a claim of a conspiracy to violate the antitrust laws with venue obtainable over one co-conspirator, plaintiffs have asserted a co-conspirator theory of venue. The argument is that since each co-conspirator is an agent for another, venue over one co-conspirator should constitute venue over all. The proposition that the presence of a co-conspirator within the district automatically means that venue is proper as to all conspirators, has been uniformly rejected.<sup>324</sup> However, what if a co-conspirator carries out an antitrust conspiracy by transacting business within the district? Should venue exist under section 12 as to all co-conspirators? Some courts have accepted this "modified" conspiracy theory of venue under

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321. *Amateur-Wholesale Elecs., v. R.L. Drake Co.*, 515 F. Supp. 580 (S.D. Fla. 1981); *C.C.P. Corp. v. Wynn Oil Co.*, 354 F. Supp. 1275 (N.D. Ill. 1973). This reasoning is faulty by its terms because if applied strictly it would make the relevant date that on which the venue determination is made, rather than the date on which the suit was filed.

322. *Snyder v. Eastern Auto Distribs.*, 357 F.2d 552, 556 (4th Cir.), *cert. denied*, 384 U.S. 987 (1966); *Nelson v. Victory Elec. Works*, 210 F. Supp. 954 (D. Md. 1962).

323. *See King v. Johnson Wax Assocs., Inc.*, 565 F. Supp. 711 (D. Md. 1983).

324. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953) (*dictum*); *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 495 (9th Cir. 1979) (co-conspirator theory of venue rejected by court which promulgated it); *see supra* notes 110-18 and accompanying text (similar view of the co-conspirator theory of jurisdiction).

section 12.<sup>325</sup> However, a majority of courts have rejected the conspiracy theory of venue entirely, thus requiring that venue be shown as to each co-conspirator separately through direct acts that constitute "transacting business."<sup>326</sup> These courts reason that the co-conspirator theory is faulty because it is merit-based; it assumes what must be proven in the case.<sup>327</sup> This argument ignores the fact that many preliminary inquiries with respect to an appropriate forum are merit-based. Most importantly, many jurisdictional bases are merit-based, such as the conspiracy theory of jurisdiction. Any problem with a merit-based determination is solved by requiring prima facie proof at the preliminary level.<sup>328</sup> In this way, the preliminary issue does not assume what must be proved; thus the courts that reject the conspiracy theory of venue in its entirety ignore a more reasoned solution to the problem they pose.

The conspiracy theory of venue—at least where a co-conspirator transacts business in the district pursuant to the conspiracy—is essential to the proper enforcement of the antitrust laws. If each co-conspirator must be shown to directly transact business in the district, it is possible that venue may not be obtainable in any one district over all defendants.<sup>329</sup> The burdens on plaintiff, as well as on those defendants who are transacting business in the district of plaintiff's choice, are obvious when such a "venue gap" occurs.<sup>330</sup> It is more efficient for a plaintiff to have a claim heard against all related defendants in one proceeding; a judicial construction of section 12 must take that efficiency into account. This is especially so since Con-

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325. *Securities Inv. Protector Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985); *Weinstein v. Norman M. Morris Corp.*, 432 F. Supp. 337 (E.D. Mich. 1977) (overt acts in furtherance of conspiracy must rise to level of transacting business; allegations of district activity insufficient); *Pacific Tobacco Corp. v. American Tobacco Co.*, 338 F. Supp. 842, 844 (D. Or. 1972).

326. *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981); *Caribe Trailer Sys., Inc. v. Puerto Rico Maritime Shipping Auth.*, 475 F. Supp. 711 (D.D.C. 1979); *San Antonio Tel. Co. v. American Tel. & Tel. Co.*, 364 F. Supp. 1157, 1159 (W.D. Tex. 1973), *aff'd*, 499 F.2d 349 (5th Cir. 1974).

327. *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981); see Byrnes, *Bringing the Co-Conspiratory Theory of Venue Up-to-Date and into Proper Perspective*, 11 ANTITRUST BULL. 889 (1966); Note, *supra* note 27, at 340 n.44.

328. See *supra* notes 110-18 and accompanying text; Hovenkamp, *supra* note 46, at 521.

329. See Hovenkamp, *supra* note 46, at 515-20.

330. *Id.*; see *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (no contribution among antitrust defendants).

gress has shown its intent to close venue gaps in the interest of judicial economy.<sup>331</sup> Finally, rejection of a co-conspiracy theory of venue means that in many cases venue requirements will be harder to satisfy than jurisdictional requirements. This is contrary to the broad construction of section 12 mandated by *Scophony*.

Another theory of transacting business offered by plaintiffs is the "target theory." This theory is parallel to the "effects" test of jurisdiction.<sup>332</sup> The argument is that a defendant can be held to transact business in a district as long as that defendant targeted plaintiff's antitrust injury to occur in that district. This theory of venue is different from the conspiracy theory; it is based not on overt acts of a co-conspirator in the district, but rather on targeted effects created by the *defendant* in the district whether or not the defendant physically entered the district. However, as with the conspiracy theory of venue, most courts have rejected the target theory of section 12 venue as merit-based.<sup>333</sup> Other courts have solved this supposedly insurmountable problem by requiring prima facie proof of targeted effects for venue purposes.<sup>334</sup> Acceptance of the target theory is necessary to combat the pervasive nature of antitrust injury; it also avoids the anomaly of maintaining stricter standards of venue than of jurisdiction.

The most controversial and fact-based issue of venue under section 12 is whether a defendant can be deemed to be transacting business through a subsidiary or corporate affiliate which admittedly transacts business within the forum. The leading case in this area is *United States v. Scophony Corp.*<sup>335</sup>

Scophony Corporation was a British corporation which manufactured and sold television apparatus and also owned and licensed patents on television reception and transmission.

331. See Hovenkamp, *supra* note 46, at 521; Comment, *Federal Venue: Locating the Place Where the Claim Arose*, 54 TEX. L. REV. 392, 399-401 (1976).

332. See *supra* notes 103-09 and accompanying text.

333. See, e.g., *Sportmart, Inc. & Olympic Distribs., Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982); *Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co.*, 499 F. Supp. 829 (D. Or. 1980).

334. See, e.g., *Centronics Data Computer Corp. v. Mannesman, A.G.*, 432 F. Supp. 659 (D.N.H. 1977) (target theory applied; prima facie proof of conspiracy shown).

335. 333 U.S. 795 (1948).

After the outbreak of war in 1939, Scophony opened an office in New York and commenced activities preliminary to the establishment of an American manufacturing and sales business. Negotiations, carried on by a director of Scophony (Levey), were entered into with Paramount and General Precision, both United States corporations. Agreements were reached which provided for the establishment of a new corporation (American Scophony), with control shared among all three corporations.<sup>336</sup> Levey became president and a director of American Scophony. The agreements provided, among other things, that Scophony was to transfer all its interests in patents in the Western Hemisphere to American Scophony. American Scophony, in turn, was to grant exclusive licenses for this territory to Paramount and General Precision. Scophony agreed further not to market any products involving its inventions in the Western Hemisphere, and Paramount and General Precision agreed not to export to the east.<sup>337</sup> In a government civil action the Court held that Scophony was transacting business within the district for purposes of section 12, stating that Scophony's operations in New York were a continuous course of business before and throughout the period in question. The Court emphasized that Scophony's failure to enter the United States simply as manufacturer and seller of television equipment led it to turn to complicated licensing and other patent arrangements which were carried out not merely through corporate forms and arrangements but by contracts binding the participating companies to the common enterprise, as well as the special medium of executing it, American Scophony. The Court stated:

These were not mere licensing arrangements, nor did they make Scophony nothing more than a shareholder for investment purposes . . . . The contracts created controls in Scophony, and in the American interests as well, which taken in conjunction with the stock controls called for continuing exercise of supervision over and intervention in

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336. Scophony was entitled to elect three directors, president, vice presidents and treasurer; the two American partners were entitled to elect two directors, secretary, and assistant secretary.

337. The plan fell through because General Precision and Paramount did not want to exploit the patents licensed through American Scophony and would not allow the agreements to be modified. The resignation of certain directors reduced the number required for a quorum and American Scophony could not function.

American Scophony's affairs.<sup>338</sup>

According to the *Scophony* Court the crucial issue of control is to be determined by investigating "the actual unity and continuity of the whole course of conduct" and not by "atomizing it into minute parts or events."<sup>339</sup>

The Court in *Scophony* found that the foreign corporation sufficiently controlled the subsidiary for section 12 purposes, even though the *formal* identity of the two corporations was maintained. In focussing on the question of actual control, the Court specifically rejected the test for venue applied in *Cannon Manufacturing Co. v. Cudahy Packing Co.*,<sup>340</sup> a non-antitrust case. *Cannon* held that the acts of an affiliate could not be attributed to the defendant for venue purposes as long as the corporations retained a separate formal identity. Under *Cannon*, each contact between the corporation must be evaluated in an atomizing approach; a formal separation is maintained if any such contact is insufficient to show absolute control.<sup>341</sup>

Despite *Scophony*, some courts have incorrectly denied venue over a foreign affiliate by relying on *Cannon*.<sup>342</sup> Such a "pulverizing" approach<sup>343</sup> creates venue immunity for anti-trust defendants which insulate themselves through wholly owned and controlled but formally separate subsidiaries.<sup>344</sup> Most courts have appropriately rejected *Cannon* in favor of the *Scophony* test of actual control.<sup>345</sup> However, even taking the *Scophony* approach, courts differ in determining when sufficient control will be found. As with other aspects of section 12 analysis, the issue of control is fact-based, and depends on whether the court engages in a broad or limited construction of section 12.

338. *Scophony*, 333 U.S. at 814.

339. *Id.* at 817.

340. 267 U.S. 333 (1925).

341. *Id.* at 336-37.

342. *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Massey-Ferguson, Ltd. v. Intermountain Ford Tractor Sales Co., Ltd.*, 210 F. Supp. 930, 932 (D. Utah 1962), *aff'd*, 325 F.2d 713 (10th Cir. 1963), *cert. denied*, 377 U.S. 931 (1964).

343. *See Scophony*, 333 U.S. at 817.

344. *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 842-43 (S.D. Fla. 1975).

345. *See, e.g.*, *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980); *Grappone Inc. v. Subaru of Am., Inc.*, 403 F. Supp. 123 (D.N.H. 1975); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 402 F. Supp. 262 (E.D. Pa. 1975); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977).



The leading case representing a broad view of the *Scophony* test is *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*<sup>346</sup> Plaintiffs sought to establish section 12 venue over Japanese electronics manufacturers based solely on the activities of their United States marketing subsidiaries' transaction of business in the district. The court found that the foreign parents had "relationships of sufficient intimacy" with their subsidiaries, in light of their established manufacturing/trading/sales pattern, to be considered to be transacting business through them.<sup>347</sup> The *Zenith* court, evaluating prior cases, listed the following factors as pertinent in determining whether "sufficient intimacy" exists:

1. performance by the subsidiary or affiliate of business in the district (for example, sales and servicings) that in a less elaborate corporate scheme the absent corporation would perform directly by its own branch offices or agents;
2. partnership, in world-wide business competition, between the absent corporation and the corporation that is present in the district;
3. capacity of the absent corporation to influence decisions of the subsidiary or affiliate that might have anti-trust consequences; controlling stock ownership and interlocking directorates are indices of such a capacity;
4. the part that the subsidiary or affiliated corporation plays in the over-all business activity of the absent corporation;
5. existence of an integrated sales system involving manufacturing, trading and sales corporations;
6. status of the subsidiary or affiliate as a marketing arm of the absent corporation;<sup>348</sup>
7. use by the subsidiary or affiliate of a trademark owned by the parent;
8. transfer of personnel back and forth between the absent corporation and its subsidiary or affiliate or substantial overlap in personnel;<sup>349</sup>
9. presentation of a common marketing image by the re-

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346. 402 F. Supp. 262 (E.D. Pa. 1975).

347. *Id.* at 328.

348. See *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977).

349. See *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984). However, mere common directorship is not enough for a finding of control.

lated corporations, especially when those corporations hold themselves out to the public as a single entity that is conveniently departmentalized either nationally or worldwide;<sup>350</sup> and

10. granting of an exclusive distributorship by the absent corporation to its subsidiary or affiliate.

Financial control has also been deemed important by most courts, including loan guarantees and a pervasive requirement of financial approval.<sup>351</sup> In addition, undercapitalization of the local affiliate will be relevant—some stricter courts say that this is a critical requirement.<sup>352</sup>

Representative of the stricter view of the *Scophony* test is *Williams v. Canon, Inc.*<sup>353</sup> where the court held that both management and day-to-day control of the local affiliate was required to satisfy section 12.<sup>354</sup> The *Williams* court found that the following facts failed to demonstrate both control and management of Canon U.S.A. by Canon, Inc., the parent: 1) use of the parent's trademarks by the subsidiary, 2) visits in the district by Canon's chairman and a director, who were both directors of Canon U.S.A., to business meetings where there was no suggestion that they represented the parent at the meetings, 3) receipt by plaintiff of promotional materials directly from Canon upon the instructions of Canon U.S.A., 4) service training in the district by Canon factory personnel,

*Neumann v. Vidal*, 1982-2 Trade Cas. (CCH) ¶ 64,933 (D.D.C. 1981); *Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980).

350. This finding is often made as a result of defendant's officers description of the subsidiary at a deposition. See, e.g., *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 374-76 (D. Md. 1975), *cert. denied*, 434 U.S. 923 (1977); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,652, at 69,342-43 (D.D.C. 1983).

351. *Cascade Steel*, 499 F. Supp. at 838-40; *Call Carl*, 391 F. Supp. at 371; *Dunlop Tire & Rubber Corp. v. Pepsico, Inc.*, 591 F. Supp. 88, 90 (N.D. Ill. 1984). Venue is not proper, however, if financial approval is required only for major capital expenditures, since major shareholders ordinarily must give such approval. *King v. Johnson Wax Assocs., Inc.*, 565 F. Supp. 711, 718 (D. Md. 1983).

352. See *Ryder Truck Rental, Inc. v. Acton Foodservices Corp.*, 554 F. Supp. 277, 279 (C.D. Cal. 1983).

353. 432 F. Supp. 376 (C.D. Cal. 1977).

354. *Id.* at 380. "The parent controls the subsidiary when it dictates general policies, but it *manages* the subsidiary when it controls the internal affairs of the subsidiary and determines how the company will be operated on a day-to-day basis." *Id.* (emphasis added). *Contra Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co., Inc.*, 499 F. Supp. 829 (D. Or. 1980) (actual control required, but it need not be day-to-day control; must be more than capacity to control).

and 5) the making of "basic policy decisions" in Japan (such as the pricing structure for Canon calculators and the opening of branch offices).

It is submitted that the court which decided *Zenith* would have decided that venue was proper under section 12 with the facts presented in *Williams*. Basically a court following *Williams* will take a more traditional alter ego approach to determine section 12 venue, rather than a functional approach looking for sufficient intimacy through actual control.<sup>355</sup> It is obvious that the *Zenith* approach is preferable in terms of the reality of corporate activity, in terms of the rationale of the venue requirement, which is to provide trial convenience,<sup>356</sup> and is in accord with *Scophony*, which mandates a liberal reading of section 12 to guarantee broad enforcement of the antitrust laws.

A defendant could logically be found to be transacting business for venue purposes indirectly through an agent's activity in the district. Attributing an agent's activity on *behalf of* defendant presents a different analysis from whether a local affiliate's transacting business should be attributed to the non-resident affiliate. An agency attribution should exist whenever any local actor acts to the benefit of the non-resident whether such an agent is an affiliate or a completely independent entity; whereas, if defendant controls an affiliate, that affiliate's activity should count against defendant for all purposes, whether or not the affiliate is specifically engaging in activity on defendant's behalf.<sup>357</sup>

A few courts have seen the possibility of an agency theory of section 12 venue, and have attributed the "agent's" activity to defendant whenever the "agent" is conducting activity on behalf of the defendant that the defendant would otherwise

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355. For cases following the stricter view of *Williams*, see *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175 (9th Cir.), *cert. denied*, 449 U.S. 1062 (1980); *Ryder Truck Rental, Inc. v. Acton Foodservices, Corp.*, 554 F. Supp. 277, 279 (C.D. Cal. 1983); *Sportmart, Inc. & Olympic Distributions, Inc. v. Frisch*, 537 F. Supp. 1254 (N.D. Ill. 1982); *Caribe*, 475 F. Supp. at 717.

356. Trial will ordinarily be convenient in the district in which the defendant has an intimate relationship with a local affiliate. A tighter nexus such as management and day to day control is not required to prevent inconvenient litigation. Moreover, the policy of the venue statutes to provide judicial economy is effectuated by a finding of venue over both the local affiliate and the non-resident corporation.

357. A parallel distinction between corporate affiliate relationships and agency relationships exists in the law of personal jurisdiction. See *supra* notes 129-37 and accompanying text.

have to conduct.<sup>358</sup> Other courts, perhaps confused by the control requirements of the *Scophony* rule as to automatic attribution of the conduct of corporate affiliates, reject the idea that the defendant transacts business in a district whenever it derives benefit from the acts of one acting on its behalf.<sup>359</sup> At best, such courts find an "agency" relationship as to non-affiliates only when the defendant exercises such control over the independent actor as to satisfy the *Scophony* test for corporate affiliates.<sup>360</sup> Imposition of control limitations on the agency theory is unwarranted. It confuses the corporate affiliate with the independent agent. It is contrary to the common sense, average businessperson's standard which the courts are required to apply to section 12.<sup>361</sup> More importantly, under such a view defendants will not be subject to section 12 venue even though they are purposefully, albeit indirectly, deriving substantial benefit from the district. Again this view makes venue harder to obtain than jurisdiction;<sup>362</sup> such a result is inconceivable under the broad view of section 12 mandated by *Scophony*.<sup>363</sup>

If venue is found under section 12 over an antitrust claim, venue will also exist as to all other claims which are related to the antitrust claim—even if they are not specifically covered by section 12. One court has referred to "pendent venue" in hearing related claims not specifically covered by section 12.<sup>364</sup> The same policies of judicial economy and trial convenience

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358. See, e.g., *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 442 F. Supp. 1201, 1205 n.10 (S.D.N.Y. 1978) (independent booking agency transacts business on behalf of non-resident shipper; a court is not required "to ignore the activities of agents when venue is at issue under [section 12]. Indeed, such an interpretation would vitiate the very purpose of [section 12])."

359. See, e.g., *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974); *Athlete's Foot of Del., Inc. v. Ralph Libonati Co., Inc.*, 445 F. Supp. 35 (D. Del. 1977).

360. See, e.g., *Amateur-Wholesale Elecs. v. R.L. Drake Co.*, 515 F. Supp. 580 (S.D. Fla. 1981) (independent local retailers not sufficiently controlled by defendants to be deemed agents for purposes of section 12, even though such retailers sell substantial and consistent volume of defendant's products; court cites inapposite cases on corporate affiliates).

361. *Scophony*, 333 U.S. at 808.

362. For a discussion of the agency theory of jurisdiction, see *supra* notes 132-41 and accompanying text.

363. See, e.g., *Dunham's*, 614 F. Supp. at 624; *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 442 F. Supp. 1201 (S.D.N.Y. 1978) (section 12 is to be construed more broadly than parallel principles of personal jurisdiction).

364. *Zenith*, 402 F. Supp. at 328 n.38 (antidumping act claims not specifically covered by section 12, but related to section 12 claims properly brought within the

exist here as are found under the doctrines of pendent subject matter jurisdiction and pendent personal jurisdiction.<sup>365</sup>

The provisions of section 12, both in terms of allowing venue and in terms of *not* allowing venue, can be overridden by a fairly negotiated forum selection clause.<sup>366</sup> Forum selection clauses will be enforced unless substantial injustice would result, or unless the clause is invalid because of fraud or overreaching.<sup>367</sup>

If the defendant is not an alien, and section 12 does not apply, the proper districts for venue are extremely limited.<sup>368</sup> If defendant is not a corporation, plaintiff can resort to section 4 of the Clayton Act, which provides for venue where defendant is an "inhabitant" or is "found."<sup>369</sup> These terms are extremely limited and basically require plaintiff to sue the defendant at its home.

Section 1391(b) of Title 28 appears to allow a forum venue *not* necessarily allowed under the section 12 requirement of transacting business: an action may be brought in the district where the claim arose.<sup>370</sup>

In fact, however, the Supreme Court has construed the term "where the claim arose" in such a strict fashion that it is inconceivable that a claim could "arise" in a district where defendant was not also transacting business under section 12.

district). *See also* Beattie v. United States, 756 F.2d 91 (D.C. Cir. 1984) (pendent venue can be exercised over claim arising out of common factual transaction).

365. *See supra* notes 50-66 and accompanying text; 1 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 0.142[3] (2d ed. 1984); C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 10, at 32 (4th ed. 1983) ("If procedural convenience is enough to avoid the constitutional limitations on the jurisdiction of the federal court, it should suffice also to dispose with the purely statutory requirements as to venue.")

366. *See* Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718 (2d Cir. 1982) (dismissal even if section 12 satisfied); *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972) (case can be heard even though jurisdiction and venue would not otherwise exist).

367. *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972).

368. If defendant is an alien, 28 U.S.C. § 1391(d) (1982) provides that venue is proper in any judicial district. For an alien defendant there is no need to go to further sources of venue beyond section 1391(d) after failing under section 12, because only section 12 provides a jurisdictional basis, to which some courts maintain that section 12 venue is the key to the vault of statutory jurisdiction. *See supra* notes 288-95 and accompanying text.

369. *See supra* notes 288-95.

370. *See* Bamford v. Hobbs, 569 F. Supp. 160 (S.D. Tex. 1983); *Centronics Data Computer Corp. v. Mannesmann, A.G.*, 432 F. Supp. 659 (D.N.H. 1977).

For plaintiffs suing non-corporate defendants who are not subject to section 12, section 1391(b) will provide a forum choice somewhat broader than that provided by section 4 of the Clayton Act.<sup>371</sup>

The major teaching of *Leroy v. Great Western United Corp.*,<sup>372</sup> is that the claim does not arise in the district under section 1391(b) merely because the plaintiff is located there, or even because the injury was suffered in such district. Rather, section 1391(b) was drafted with the convenience of the *defendant*, the availability of witnesses, and the accessibility of evidence in mind. In *Leroy*, that convenience was found where most of the disputed acts occurred (Idaho), not where the effects of such acts were felt by the plaintiff (Texas). The district where the disputed acts of the defendant occurred is also of necessity a district where the defendant transacted business under section 12.<sup>373</sup> The court in *Leroy* expressly rejected the idea that in an action where the injuries were pervasive, the defendant should be answerable under section 1391(b) throughout the United States.<sup>374</sup> In sum, as to corporate defendants, section 1391(b) provides no forum not already provided by section 12 of the Clayton Act.

#### IV. FORUM NON CONVENIENS AND TRANSFER OF VENUE

##### A. *Forum Non Conveniens*

Forum non conveniens is a common law doctrine which allows a court in its discretion to dismiss a suit even though the forum chosen by plaintiff satisfies the requirements of jurisdiction and venue. The doctrine recognizes that satisfaction of jurisdiction and venue requirements does not necessarily prevent a suit in an extremely inconvenient forum in terms of presentation of witnesses, proof, and the interest of the fo-

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371. See Hovenkamp, *supra* note 46, at 517.

372. 443 U.S. 173 (1979).

373. See Hovenkamp, *supra* note 46, at 517 ("[A]n antitrust claim will not arise someplace unless the defendant is also transacting business within [section 12].").

374. *Leroy v. Great Western United Corp.*, 443 U.S. 157, 185 (1979). The Court in *Leroy* basically followed the "weight of the contacts" approach to section 1391(b) which had been applied by many courts in antitrust cases. See generally Hovenkamp, *supra* note 46, at 510-16; *Athlete's Foot of Del., Inc. v. Ralph Libonati Co., Inc.*, 445 F. Supp. 35 (D. Del. 1977); Comment, *supra* note 331.

rum.<sup>375</sup> Under the doctrine of forum non conveniens, the plaintiff's choice of forum is entitled to deference. However, if the defendant can show that the chosen forum is extremely inconvenient, and that another forum is much more convenient, the court can in its discretion dismiss the case; forum non conveniens dismissals are conditioned upon the availability of some alternative forum.<sup>376</sup>

If the alternative forum presented by the defendant is within the United States, forum non conveniens is not the appropriate remedy. The harshness of dismissal under forum non conveniens has been alleviated by the transfer of venue provisions of Title 28.<sup>377</sup> Forum non conveniens is thus precluded unless the alternative forum is another country.<sup>378</sup>

Even presuming that the only alternative forum is a foreign country, there is substantial current authority that the forum non conveniens doctrine is not applicable to antitrust actions. The Fifth Circuit so held in *Industrial Investment Development Corp. v. Mitsui & Co.*,<sup>379</sup> relying on the Supreme Court's holding in *United States v. National City Lines, Inc., I.*<sup>380</sup> The rationale of both cases was that forum non conveniens would unreasonably hamper enforcement of the antitrust laws.<sup>381</sup> In re-

375. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

376. *Id.* (all witnesses and proof are located in another forum and forum state has no interest in hearing the case, both public and private factors allow dismissal within the court's discretion under the common law doctrine of forum non conveniens); *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983) (district court *must* compare convenience of plaintiff's forum with an alternative forum). Dismissal is often conditioned on defendant's waiving the defense of the statute of limitations in the other forum (if that is possible); a court will not dismiss on forum non conveniens if plaintiff is left without any remedy. *See, e.g.,* *Constructora Spilimerg, C.A. v. Mitsubishi Aircraft Co.*, 700 F.2d 225 (5th Cir. 1983) (conditional dismissal; defendant must show that alternative forum can provide relief); *In re Air Crash Disaster Near Bombay, India*, on January 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982) (*Bombay Plane Crash*) (Indian law does not allow waiver of statute of limitations defense; dismissal therefore cannot be granted).

377. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

378. *Cowan v. Ford Motor Co.*, 713 F.2d 100 (5th Cir. 1983).

379. 671 F.2d 876, 890 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983).

380. *United States v. Nat'l City Lines, Inc., I.*, 334 U.S. 573, 596-97 (1948).

381. Plaintiff in *Indus. Inv. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 890 n.18 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983), as well as some commentators, have argued that the Supreme Court reversed itself on the availability of forum non conveniens in antitrust actions in *United States v. National City Lines, Inc., II*, 337 U.S. 78 (1949). *See Note, Forum Non Conveniens and the Extraterritorial Ap-*

sponse to these decisions, recent legislation has been proposed which specifically states that forum non conveniens would be available in an antitrust action.<sup>382</sup>

It has been argued that forum non conveniens, if and when available in an antitrust action, should be used to limit the unreasonable extraterritorial application of the United States antitrust laws.<sup>383</sup> This argument confuses the role of forum non conveniens and the role of choice of law. In effect the argument puts the cart before the horse. A court making a forum non conveniens ruling *does* decide which country's law is likely to be applied to the action. This is relevant to the forum non conveniens motion since it is preferable in terms of judicial convenience for the court which hears the case to apply its own law.<sup>384</sup> However, the decision of which law to apply must already be made by the time the court decides whether to dismiss or not.<sup>385</sup> A court would only confuse its analysis if it were to dismiss on forum non conveniens grounds because application of United States law would be unreasonable. The applicable law is, at any rate, only one factor among many factors relevant to the forum non conveniens inquiry.<sup>386</sup>

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*plication of United States Antitrust Law*, 94 YALE L.J. 1693, 1712 n.128 (1985). This argument is incorrect. The court in *National City Lines II* held only that the venue transfer provisions of Title 28 were available in antitrust actions. A transfer within the federal system will not at all hamper enforcement of the antitrust laws. Thus, *National City Lines II* has no effect on *National City Lines I* as to the unavailability of forum non conveniens in antitrust actions. See also *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 749 F.2d 1378 (9th Cir. 1984) (assuming without deciding that forum non conveniens is inapplicable in antitrust actions); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

382. S. 397, 99th Cong., 1st Sess., 131 Cong. Rec. S1160 (1985) (a bill to amend the Sherman Act and the Clayton Act to modify the application of such acts to international commerce).

383. See Note, *supra* note 381; see also *Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 749 F.2d 1378 (9th Cir. 1984); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

384. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Signalas v. Lido Maritime, Inc.*, 776 F.2d 1512 (11th Cir. 1985).

385. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *In re McLelland Engineers, Inc.*, 742 F.2d 837, 838 (5th Cir. 1984). "The first step in any forum non conveniens analysis is a determination of which substantive law governs the case." *Id.*; *American Rice, Inc. v. Arkansas Rice Growers Cooperative Ass'n*, 701 F.2d 408 (5th Cir. 1983).

386. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 345 (8th Cir. 1983). "The fact that a federal court may be required to apply foreign law is not dispositive on the forum non conveniens issue." *Id.*



Finally, even if forum non conveniens is applicable to anti-trust actions, a court must be particularly concerned whether an antitrust plaintiff could obtain *any* relief in a foreign forum. The Supreme Court in *Piper Aircraft Co. v. Reyno*<sup>387</sup> held that forum non conveniens dismissal would not be precluded merely because the more convenient forum would apply a substantive law *less* favorable to plaintiff. The Court did not, however, change the standard forum non conveniens doctrine that an alternative forum must exist as a practical matter.<sup>388</sup> Thus, if plaintiff would not receive *any* relief under foreign law in a foreign forum, then even *Piper* would prevent dismissal.<sup>389</sup> The lack of *any* relief will occur whenever the foreign forum does not recognize United States concepts of antitrust injury.<sup>390</sup>

### B. Venue Transfer

Congress has passed three statutes which provide for venue transfer within the federal court system. All the statutes seek to provide transfer to a convenient forum. Section 1404 of title 28, the most important of these provisions, allows transfer to another district where the case might have been brought, if such transfer is for the convenience of the parties and in the interests of justice.<sup>391</sup> Section 1404 applies when venue and personal jurisdiction are both proper in the transferor court.<sup>392</sup> Section 1406 of that title is to the same effect, except that it applies when venue and personal jurisdiction are improper in the transferor court.<sup>393</sup> Section 1631 is a recent

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387. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

388. *Irish Nat'l Ins. Co. v. Aerlingus Teoranta*, 739 F.2d 90 (2d Cir. 1984); *Bombay Plane Crash*, 531 F. Supp. 1175 (W.D. Wash. 1982).

389. See *supra* note 376 and accompanying text.

390. See *Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 891 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983). This is another reason why forum non conveniens cannot be used to control extraterritorial application of United States antitrust law: forum non conveniens is by definition inapplicable if the foreign law would provide no relief to plaintiff.

Note, however, that if the forum law provides some relief with no substantial obstacles to obtaining it, dismissal could be granted even if the relief is much less than a United States court would provide. *Ahmed v. Boeing Co.*, 720 F.2d 224 (1st Cir. 1984) ("blood money" settlement under Saudi Arabian law provides some recovery).

391. 28 U.S.C. § 1404 (1982).

392. *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

393. *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962).

provision to the same effect, except that it applies when venue is proper in the transferor forum and jurisdiction is not.<sup>394</sup> Under the solution proposed herein as to alien defendants—venue available in any district, worldwide statutory jurisdiction under section 12 of the Clayton Act, limited constitutionally by the national contacts test—most transfer cases would arise under section 1404. Less expansive interpretations of jurisdiction and venue may require resort to the other transfer sections. If a court *does* combine section 12 jurisdiction with alien venue, the venue transfer provisions take on enormous importance to the alien defendant: transfer of venue is the defendant's only protection from substantially inconvenient litigation.<sup>395</sup>

All three statutes limit the judicial district to which transfer can be made. The transferee forum must be one in which both jurisdiction and venue would have existed at the time the action was brought.<sup>396</sup> The defendant cannot, at the time of transfer, waive any objection to venue or jurisdiction that it *could* have waived if the case had originally been brought in the transferee court.<sup>397</sup> Thus before transfer the transferor court must engage in a hypothetical analysis of whether jurisdiction and venue existed in the *transferee* court on the day when the suit was actually brought elsewhere.<sup>398</sup>

Under section 1404, the transferor court must determine that the transfer to the alternate forum comports with the convenience of the parties and the interests of justice. While these considerations parallel the doctrine of forum non conveniens, it is clear that section 1404 did not merely codify forum non

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394. *McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983). *But see* *Nose v. Rementer*, 610 F. Supp. 191, 192 (D. Del. 1985) (section 1631 refers only to subject matter jurisdiction; where personal jurisdiction in transferor court is lacking, transfer can be made under section 1404).

395. *See supra* notes 18-21 and accompanying text.

396. *Hoffman v. Blaski*, 363 U.S. 335 (1960); *R. CASAD, supra* note 26, at ¶ 5.06 n.154.

397. *Hoffman v. Blaski*, 363 U.S. 335, 349 (1960) (Frankfurter, J., dissenting).

398. *See, e.g., Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984). The *Hoffman* requirement is automatically satisfied if alien venue is combined with section 12 statutory jurisdiction and national contacts. By definition, such a case "might have been brought" in any judicial district. The *Hoffman* analysis is more difficult if the court resorts to "transacting business" for venue or the state long-arm statutes for jurisdiction.

conveniens.<sup>399</sup> Generally speaking, venue transfer will be easier to obtain than a similar motion to dismiss for forum non conveniens. The "gap" of convenience between plaintiff's choice of forum and the alternative forum need not be as great as in a forum non conveniens situation.<sup>400</sup> As with forum non conveniens, the court compares the relative ease of trying the case in the two districts in terms of production of witnesses and proof, as well as the relative interests of the two courts in trying the case.<sup>401</sup> A decision to transfer on convenience or justice grounds is within the discretion of the district court.<sup>402</sup>

As with forum non conveniens, plaintiff's choice of forum is entitled to respect on a motion to transfer venue under section 1404.<sup>403</sup> Courts in antitrust cases have held that plaintiff's choice of forum is entitled to "particular respect."<sup>404</sup> Thus defendant may have to prove a greater convenience gap in an antitrust case than in any other case. This greater burden is unwarranted in cases where alien venue is combined with section 12 jurisdiction and national contacts. In such a case, defendant's only protection from substantial inconvenience are the provisions on transfer of venue. Moreover, if plaintiff is not suing in its home district, the venue privilege is especially unworthy of "particular respect;" otherwise forum-shopping would be encouraged.<sup>405</sup>

399. *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

400. *Van Dusen v. Barrack*, 376 U.S. 612 (1964); *King v. Johnson Wax Assocs. Inc.*, 565 F. Supp. 711 (D. Md. 1983).

401. *R. CASAD*, *supra* note 26, at ¶ 5.06.

402. *Los Angeles Memorial Coliseum Comm'n v. N.F.L.*, 726 F.2d 1381, 1399 (9th Cir. 1984) (trial court did not abuse its discretion in refusing to grant transfer in the interests of justice); *In re Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983) (trial court abused discretion in transferring for its own convenience); *King v. Johnson Wax Assocs.*, 565 F. Supp. 711, 719 (D. Md. 1983). Ordinarily, a ruling under section 1404 is not immediately appealable, unless the court misconstrues whether a claim might have been brought in the transferee forum. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). In extraordinary circumstances, mandamus may be available. *In re Scott*, 709 F.2d 717 (D.C. Cir. 1983) (mandamus allowed where no tolerable basis for transfer existed). In the ordinary case, a claim of error under section 1404 is relatively useless, because it is made *after* the litigation has been completed.

403. *Scott*, 709 F.2d at 720; *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955).

404. *See Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 442 F. Supp. 1202, 1207 (S.D.N.Y. 1978); *see also Ford Motor Co. v. Ryan*, 182 F.2d 329 (2d Cir.), *cert. denied*, 340 U.S. 851 (1950).

405. *King v. Johnson Wax Assocs.*, 565 F. Supp. 711, 721 (D. Md. 1983); *Piper*, 454 U.S. at 255-56. Two good and conflicting examples of convenience balancing in antitrust cases are *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth.*, 442 F.

In contrast to section 1404, transfer under sections 1406 and 1631 does not require comparison of the relative convenience of transferor and transferee districts. This is because the case by definition cannot be heard in the transferor forum. The only question, presuming that a forum with proper venue and jurisdiction exists, is whether the court should transfer or dismiss the case.<sup>406</sup> Generally speaking, transfer will be granted unless plaintiff was in bad faith in bringing the case in the transferor court.<sup>407</sup> Transfer is especially mandated if the statute of limitations will have run if the case is dismissed.<sup>408</sup>

### *CONCLUSION*

Finding an appropriate United States forum for an international antitrust case is unnecessarily complicated. Congress, with its intent to effectuate broad enforcement of the antitrust laws, has provided statutory authority which allows suit in any judicial district so long as the antitrust defendant has minimum contacts with the United States. Thus far the courts have generally ignored the solution provided by Congress in favor of the long-arm statutes of the state legislature. This state of affairs must be corrected in order to prohibit a jurisdictional windfall to alien defendants that was not intended by Congress.

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Supp. 1201 (S.D.N.Y. 1978) (transfer denied) and *King v. Johnson Wax Assocs.*, 565 F. Supp. 711 (D. Md. 1983) (transfer granted).

406. Motions for transfer in these situations are, of course, ordinarily made by plaintiffs. See *Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962).

407. See *Manley v. Engram*, 735 F.2d 1463 (11th Cir. 1985); *R. CASAD*, *supra* note 26, at ¶ 5.06[3].

408. *Sinclair v. Kleindienst*, 711 F.2d 291 (D.C. Cir. 1983).