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Jurisdiction Over Alien Corporations Based on the Activities of Their Subsidiaries in the Forum: Whither the Doctrine of Corporate Separateness?

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Jurisdiction Over Alien Corporations Based on the Activities of Their Subsidiaries in the Forum: Whither the Doctrine of Corporate Separateness?

Juliet Sarkessian

Abstract

This Note argues that without the finding of an agency or alter-ego relationship between a parent and its subsidiary, the acts of a subsidiary cannot, under the doctrine of corporate separateness, be attributed to a parent. Unless the acts of a subsidiary can be attributed to the parent, the existence of the parent-subsidiary relationship alone cannot supply the minimum contacts needed to confer jurisdiction on a court over an alien parent. Part I of this Note will discuss the corporation as a legal entity and the doctrine of corporate separateness. After an examination of the pertinent United States Supreme Court cases on the jurisdiction, an analysis of recent lower court cases on parent and subsidiary corporations will follow in Part II. Part III will compare the statutory and case law of the United Kingdom. Finally, Part IV will analyze whether the current movement in the United States towards expanded jurisdiction is desirable in an international context.

JURISDICTION OVER ALIEN CORPORATIONS BASED ON THE ACTIVITIES OF THEIR SUBSIDIARIES IN THE FORUM: WHITHER THE DOCTRINE OF CORPORATE SEPARATENESS?

INTRODUCTION

There are various bases for United States federal court jurisdiction to adjudicate over foreign corporations.¹ The asser-

1. Foreign corporations are corporations organized under the local law of a state other than the forum state. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 42 comment a (1971) [hereinafter cited as RESTATEMENT OF CONFLICTS]. For the purposes of this Note, a "foreign" defendant is either a citizen of, or if a corporation, is incorporated in, or if an unincorporated association, has its principal place of business in, one of the states in the United States, but not the forum state. An "alien" defendant is a citizen of, or if a corporation, is incorporated in, or if an unincorporated association, has its principal place of business in, a nation other than the forum nation.

A state has the power to exercise jurisdiction over a foreign corporation if the relationship of the corporation to the state is such as to make the exercise of such jurisdiction reasonable. *Id.* § 42(1). The RESTATEMENT OF CONFLICTS, lists the following as sufficient to support an exercise of jurisdiction over a foreign corporation:

1) A state has power to exercise jurisdiction over a corporation that has consented to the exercise of such jurisdiction. *Id.* § 43; *cf. In re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1278, *modified on other grounds*, 541 F. Supp. 62 (D. Md. 1981) (consent statutes must incorporate the due process "minimum contacts" requirement).

2) A state has power to exercise jurisdiction over a corporation that has appointed an agent to accept service of process in actions brought against the corporation in the state. RESTATEMENT OF CONFLICTS, *supra*, § 44; *see*, *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917).

3) A state has power to exercise jurisdiction over a corporation that has entered an appearance as a defendant in the action. RESTATEMENT OF CONFLICTS, *supra*, § 45; *see, e.g.*, *Yale v. National Indem. Co.*, 602 F.2d 642, 645 (4th Cir. 1979).

4) A state has power to exercise jurisdiction over a corporation that has brought an action in the state in that action, and, to the extent local law so provides, in any action that the defendant may bring against it by way of counterclaim or cross-action. RESTATEMENT OF CONFLICTS, *supra*, § 46; *see Adam v. Saenger*, 303 U.S. 59, *reh'g denied*, 303 U.S. 666 (1938).

5) A state has power to exercise jurisdiction over a corporation that does business in the state, with respect to causes of action arising from the business done in the state. RESTATEMENT OF CONFLICTS, *supra*, § 47(1); *see, e.g.*, *Washington v. Norton Mfg., Inc.*, 588 F.2d 441, 446-47 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979). With respect to causes of action that do not arise from the business done in the state, a state has power to exercise jurisdiction when this business is so continuous and substantial that the state's exercise of such jurisdiction is reasonable. RESTATEMENT OF CONFLICTS, *supra*, § 47(2); *see, e.g.*, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, *reh'g denied*, 343 U.S. 917 (1952); *Bramam v. Mary Hitchcock Memorial Hosp.*, 631 F.2d 6 (2d Cir. 1980). The RESTATEMENT OF CONFLICTS, defines doing business as doing a series of similar acts for the purpose of realizing pecuniary profit, or other-

tion of jurisdiction over a defendant will be valid under the due process clause of the fourteenth amendment of the United States Constitution² if the defendant has "certain minimum

wise accomplishing an objective, or doing a single act for such purpose with the intention of initiating a series of such acts. RESTATEMENT OF CONFLICTS, *supra*, § 47 comment a.

6) A state has power to exercise jurisdiction when a corporation has done business in the state but has ceased to do business there at the time when the action is brought, when the action arises from the business done in the state. *Id.* § 48; *see* *Washington v. Superior Court*, 289 U.S. 361 (1933).

7) A state has power to exercise jurisdiction when a corporation has done, or has caused to be done, an act in the state, when the cause of action arising from the act is in tort. RESTATEMENT OF CONFLICTS, *supra*, § 49(1); *see, e.g.*, *Elkhart Engineering Corp. v. Dornier Werke*, 343 F.2d 861 (5th Cir. 1965). With respect to any cause of action not in tort arising from the act, a state may exercise jurisdiction unless the nature of the act and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable. RESTATEMENT OF CONFLICTS, *supra*, § 49(2); *see, e.g.*, *Sun First Nat'l Bank of Orlando v. Miller*, 77 F.R.D. 430, 434 (S.D.N.Y. 1978).

8) A state has power to exercise jurisdiction when a corporation has caused effects in the state by an act done outside of the state, when the cause of action arises from these effects, unless the nature of these effects and the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable. RESTATEMENT OF CONFLICTS, *supra*, § 50; *see, e.g.*, *Mississippi Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1112 (5th Cir. 1982).

9) A state has power to exercise jurisdiction over a corporation that has owned, used or possessed an immovable thing in the state, when the cause of action arises from the thing while it was owned, used or possessed by the corporation. RESTATEMENT OF CONFLICTS, *supra*, § 51(1); *see, e.g.*, *Leo v. Child*, 304 F. Supp. 593, 595 (D. Mass. 1969).

10) A state has power to exercise jurisdiction over a corporation that has owned, used or possessed a chattel in the state, when the cause of action arises from the chattel while it was in the state and was so owned, used or possessed, unless the nature of the chattel and the corporation's relationship to the state make the exercise of such jurisdiction unreasonable. RESTATEMENT OF CONFLICTS, *supra*, § 51(2); *see, e.g.*, *Canterbury v. Monroe Lange Hardwood Imports*, 48 N.C. App. 90, 92-93, 268 S.E.2d 868, 870-71 (1980).

11) A state has power to exercise jurisdiction over a corporation in other situations when the corporation has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction. RESTATEMENT OF CONFLICTS, *supra*, § 52. As an example of such a relationship, the RESTATEMENT OF CONFLICTS addresses jurisdiction over a parent corporation in connection with the activities of its subsidiary. *Id.* § 52 comment b. The RESTATEMENT OF CONFLICTS, states that jurisdiction over a subsidiary corporation does not, in and of itself, give a state jurisdiction over the parent, even though the parent owns all the stock of the subsidiary. *Id.*

For a discussion of the Supreme Court's interpretation of a "reasonable" exercise of jurisdiction, *see infra* notes 38-105 and accompanying text.

Although the RESTATEMENT OF CONFLICTS, addresses jurisdiction over "foreign" corporations, the jurisdictional standards it sets forth are equally applicable to alien corporations, which are afforded the same due process as domestic corporations. *See infra* note 4.

2. The due process clause of the fourteenth amendment of the United States

contacts with [the forum,] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"³ The requirement of minimum contacts is especially important in the case of an alien defendant,⁴ because it is generally more difficult and inconvenient to defend a suit in a foreign nation than a foreign state.⁵

Various United States courts disagree over whether the incorporation or business activities of a wholly-owned subsidiary corporation in a forum constitutes sufficient minimum contacts to give a court jurisdiction over an alien parent corporation.⁶

Constitution states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

3. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, *reh'g denied*, 312 U.S. 712 (1940)).

4. The fifth and fourteenth amendments to the United States Constitution protect alien persons from the deprivation of life, liberty or property without due process of the law. U.S. CONST. amend. V, XIV, § 1; *see Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Galvan v. Press*, 347 U.S. 522, 530 (1954). For purposes of the fourteenth amendment, corporations are considered to be "persons." *See Metropolitan Life Ins. Co. v. Ward*, 105 S. Ct. 1676 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, *reh'g denied*, 438 U.S. 907 (1978).

There is some disagreement as to how much due process aliens should be afforded under the United States Constitution. *See Note, Jurisdiction Over Alien Corporations After Shaffer v. Heitner*, 10 *LOY. U. CHI. L.J.* 739, 753-55 n.91-96 and accompanying text (1979). Nevertheless, there seems little doubt that, at least with respect to jurisdictional issues, the due process clause applies even to aliens that are not present within the United States. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 446 U.S. 408 (1985), in which the United States Supreme Court held that the contacts of a Colombian corporation with the forum state, Texas, were insufficient, under the due process clause, to permit the courts of that state to assert jurisdiction over it in an action unrelated to the corporation's activities in Texas. *Id.* at 418-19. For a discussion of *Helicopteros*, *see infra* note 83.

5. *See, e.g., Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271-72 (9th Cir. 1981) (court considered that the Mexican defendant and its witnesses would have a great distance to travel, and that the defendant would need to translate testimony and documents if it was forced to defend a suit in Alaska, the forum state.)

6. *Compare Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir.), *modified on other grounds*, No. 82-2231, 82-2236, slip op. (5th Cir. Nov. 3, 1983) and *Samuels v. B.M.W. of N. Am. Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983) (presence of subsidiary is not enough to give court jurisdiction over parent corporation) with *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188 (N.D. Ill. 1982), *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wis. 1983), and *Weight v. Kawasaki Motors Corp., U.S.A.*, 604 F. Supp. 968 (E.D. Va. 1985) (presence of a subsidiary that is incorporated or doing business in the forum is enough to give the courts of that state jurisdiction over the parent).

For the purposes of this Note, a "parent corporation" is a corporation that owns 100% of the shares of another corporation, the "subsidiary corporation." This Note will not address jurisdiction in connection with subsidiaries that are less than wholly-owned by another corporation.

Under the traditional rule of corporate separateness,⁷ United States federal courts do not have jurisdiction over a parent corporation merely because its subsidiary is incorporated or doing business in the forum state.⁸ This is true even though the parent owns 100% of the stock of the subsidiary.⁹

A court will have jurisdiction over a parent corporation when its subsidiary is acting as an agent¹⁰ of the parent corporation or when the parent corporation controls and dominates the subsidiary to such an extent that the subsidiary's independent corporate status is a fiction.¹¹ In the latter situation, which is frequently referred to as the "alter-ego" theory,¹² a court will "pierce the corporate veil" to find that the two corporations are really one.¹³ Under either the alter-ego theory or the agency doctrine, the acts of a subsidiary corporation may be attributed to its parent, thereby giving the parent sufficient

7. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-36 (1925). For a discussion of the doctrine of corporate separateness, see *infra* notes 26-35 and accompanying text.

8. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); RESTATEMENT OF CONFLICTS, *supra* note 1, § 52 comment b.

9. See *Cannon Mfg. Co. v. Cudahy Co.*, 267 U.S. 333 (1925); RESTATEMENT OF CONFLICTS, *supra* note 1, § 52 comment b.

10. Agency is a "fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958). The one for whom the action is to be taken is the principal and the one who is to act is the agent. *Id.* The manifestation of consent does not have to be written or oral, but can arise from conduct of the principal, which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account. *Id.* § 26.

A subsidiary may act as an agent for its parent, thereby making the parent a principal that will be bound by, and benefit from, the acts of its agent. P. BLUMBERG, *THE LAW OF CORPORATE GROUPS* 21 (1983). Courts examine many factors to determine whether a subsidiary is an agent, including whether the subsidiary can bind the parent contractually, confirm sales or set prices and terms of sales. See *Baird v. Day & Zimmerman, Inc.*, 390 F. Supp. 883 (S.D.N.Y. 1974), *aff'd*, 510 F.2d 968 (2d Cir. 1975).

11. 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, *MOORE'S FEDERAL PRACTICE* § 4.25[6] (2d ed. 1985) [hereinafter cited as 2 J. MOORE]; C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1069 (1969); RESTATEMENT OF CONFLICTS, *supra* note 1, § 52 comment b. For a discussion of when a court may disregard the corporate separateness of a parent and subsidiary, see *infra* notes 33-37 and accompanying text.

12. See P. BLUMBERG, *supra* note 10, at 9; *Hargrave*, 710 F.2d at 1161.

13. P. BLUMBERG, *supra* note 10, at 9; see *infra* notes 34-37 and accompanying text.

“contacts” with the forum for due process purposes.¹⁴

While some courts follow the traditional rule, others have held that a parent corporation can be doing business within a state based on the activities of its subsidiary even absent a finding of an agency or alter-ego relationship.¹⁵ The case law varies from state to state, and two courts may reach opposite conclusions on the issue of jurisdiction given the same set of facts.¹⁶

This Note argues that without the finding of an agency or alter-ego relationship between a parent and its subsidiary, the acts of a subsidiary cannot, under the doctrine of corporate separateness,¹⁷ be attributed to a parent. Unless the acts of a subsidiary can be attributed to the parent, the existence of the parent-subsidiary relationship alone cannot supply the minimum contacts needed to confer jurisdiction on a court over an alien parent.¹⁸ Part I of this Note will discuss the corporation as a legal entity and the doctrine of corporate separateness.¹⁹ After an examination of the pertinent United States Supreme Court cases on jurisdiction,²⁰ an analysis of recent lower court cases on parent and subsidiary corporations will follow in Part II.²¹ Part III will compare the statutory and case law of the

14. See *Coca-Cola Co. v. Procter & Gamble Co.*, 595 F. Supp. 304, 308 (N.D. Ga. 1983); *Top Form Mills v. Sociedad Nationale Indus.*, 428 F. Supp. 1237, 1246 n.10 and accompanying text (S.D.N.Y. 1977); *Captain Int'l Indus. v. Westbury, Chicago, Inc.*, 416 F. Supp. 721, 722-23 (N.D. Ill. 1975).

15. See, e.g., *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wis. 1983); *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188 (N.D. Ill. 1982). Some courts have not addressed the issue of agency or alter-ego in their decisions but find jurisdiction over an alien parent corporation on other grounds, such as the “stream of commerce” theory or “purposeful availment.” See, e.g., *Kawasaki*, 604 F. Supp. at 970-71. For a discussion of the stream of commerce doctrine see *infra* notes 73-74 and accompanying text. For a discussion of the purposeful availment doctrine see *infra* notes 75-76 and accompanying text.

16. Compare *Allen v. Toshiba Corp.*, 599 F. Supp. 381 (D. N.M. 1984) (court did not have jurisdiction over alien parent, Toshiba, whose subsidiary transacted business in the forum state) with *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983) (court did have jurisdiction over alien parent, Toshiba, whose subsidiary transacted business in the forum state). For a discussion of *Allen* and *Copiers*, see *infra* notes 174-86 and accompanying text.

17. For a discussion of the doctrine of corporate separateness, see *infra* notes 27-37, and accompanying text.

18. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

19. See *infra* notes 27-37 and accompanying text.

20. See *infra* notes 38-105 and accompanying text.

21. See *infra* notes 106-205 and accompanying text.

United States with that of the United Kingdom,²² and will discuss the United States-United Kingdom Convention on the Reciprocal Recognition & Enforcement of Judgments in Civil Matters (United States-United Kingdom Convention).²³ Finally, Part IV will analyze whether the current movement in the United States towards expanded jurisdiction is desirable in an international context.²⁴ This Note will conclude that United States courts should not exercise jurisdiction over alien corporations based on their subsidiaries' contacts with the forum state unless the court determines that there is an agency or alter-ego relationship between them.²⁵

I. THE DOCTRINE OF CORPORATE SEPARATENESS

A corporation is an artificial person or legal entity created by or under the authority of the laws of a state or nation.²⁶ Under the entity theory²⁷ a corporation is an entity with rights and liabilities separate from those of its shareholders.²⁸ Under this view, a subsidiary corporation is also a legal entity, separate from its shareholders, notwithstanding that its principal shareholder is another corporation.²⁹ The entity theory of cor-

22. See *infra* notes 206-29 and accompanying text.

23. Initialed at London, October 26, 1976, United States-United Kingdom, 16 I.L.M. 71 (1977) [hereinafter cited as U.S.-U.K. Convention]; see *infra* notes 230-54 and accompanying text. This Convention has not been ratified. See *infra* note 230. For an early draft of the Convention, see Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 TEX. INT'L L.J. 421, 452 (1976).

24. See *infra* notes 255-98 and accompanying text.

25. See *infra* notes 299-311 and accompanying text.

26. H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 78 (3d ed. 1983).

27. In the United States, there are various theories regarding the status of a corporation. *Id.* The traditional concept, which is known as the entity theory, is that a corporation is a fictitious, artificial, legal person or juristic entity created by the state. *Id.* The "fiat" or "concession" theory emphasizes the creation of the corporation by grant from the sovereign. *Id.* The "realist theory" or "inherence theory" views the corporation as a group whose group activities require separate legal recognition, and that share many of the attributes of a natural person. *Id.* The "enterprise theory" stresses the underlying commercial enterprise. It considers a corporation to be an aggregate of persons rather than an entity. *Id.* The "symbol theory" regards the corporation as the symbol of the aggregate of group jural relations of the persons composing the enterprise. *Id.* The "contract theory" views a corporation as the result of contracts among the members, between the members and the corporation, and between the members of the corporation and the state. *Id.*

28. *Id.*

29. *Engel v. Teleprompter Corp.*, 703 F.2d 127, 131 (5th Cir. 1983); see *Tennes-*

porate separateness provides the traditional basis for the concept of limited liability of a corporation.³⁰ Incorporation for the purpose of avoiding unlimited liability is generally accepted under United States law.³¹

The separate identities of a parent and its subsidiary should not be disregarded, even if the subsidiary is wholly owned, except in unusual circumstances.³² A court may disregard corporate separateness, and treat a parent and subsidiary as one, if the parent exerts so much control over the subsidiary that the latter does not have an independent corporate existence.³³ Piercing the corporate veil is one method for a court to find that it has jurisdiction over a parent corporation.³⁴ A

see *Valley Authority v. Exxon Nuclear Co.*, 753 F.2d 493, 497 (6th Cir. 1985); *Matter of Chrome Plate Inc.*, 614 F.2d 990, 996 (5th Cir.), *cert. denied*, *Chrome Plate, Inc. v. United States*, 449 U.S. 842 (1980); *In re Midwestern Co.*, 49 B.R. 98, 101 (Bankr. W.D. Mo. 1985); P. BLUMBERG, *supra* note 10, at 5.

30. P. BLUMBERG, *supra* note 10, at 1-2; H. HENN & J. ALEXANDER, *supra* note 26, § 146. In essence, incorporation allows legal entities to limit their liability for actions or practices of the corporation. See P. BLUMBERG, *supra* note 10, at 1-2; H. HENN & J. ALEXANDER, *supra* note 26, § 146.

31. H. HENN & J. ALEXANDER, *supra* note 26, § 146; see *Berger v. Columbia Broadcasting System*, 453 F.2d 991, 994 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972) (one of the principle purposes for legal sanctioning of a separate corporate personality is to afford shareholders an opportunity to limit their personal liability); Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 *YALE L.J.* 193, 194 (1929).

32. See *Parker v. Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1399 (E.D. Pa. 1985) (to disregard corporate form under Pennsylvania law the corporate entity must be so controlled as to have no "mind" of its own, and there must be a showing that the corporate entity is being used to defeat public convenience, justify wrong, protect fraud or defend crime); *Securities Indus. Ass'n v. Federal Home Loan Bank Bd.*, 588 F. Supp. 749, 754-55 (D. D.C. 1984); *Andrew Martin Marine Corp. v. Stork-Werkspoor Dielsel B.V.*, 480 F. Supp. 1270, 1275 (E.D. La. 1979), *cert. denied*, 456 U.S. 989 (1981) (because corporations are legal entities entitled to presumption of separateness, their legal identities should not be lightly disregarded); *Boise Cascade Corp. v. Wheeler*, 419 F. Supp. 98, 102 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 554 (2d Cir. 1977) (dual personalities of parent and subsidiary are not lightly disregarded) (citing *Berger v. Columbia Broadcasting System*, 453 F.2d at 994).

33. 2 J. MOORE, *supra* note 11, § 4.25[6]; *RESTATEMENT OF CONFLICTS*, *supra* note 1, § 52 comment b.

34. 2 J. MOORE, *supra* note 11, § 4.25[6]. To determine whether to pierce the corporate veil, courts examine various criteria, including:

1) whether the two corporations have intermingled their business transactions, tax returns, financial statements, bank accounts, and corporate records. See *Scott v. Megó Int'l, Inc.*, 519 F. Supp. 1118, 1126 (D. Minn. 1981);

2) whether the two corporations have failed to observe the formalities of corporate separateness by holding joint meetings or sharing the same officers and directors. See *id.*; *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1331-32, 1341

court may use this technique either for jurisdictional purposes or to determine ultimate liability.³⁵

Some courts are more likely to disregard the corporate separateness of the parent and subsidiary corporations when applying the criteria for piercing the corporate veil.³⁶ Other

(E.D.N.Y. 1981) (the sharing of a key officer by both the parent and the subsidiary was one factor the court considered in finding jurisdiction over an alien parent corporation). The sharing of some of the same officers and directors does not, however, necessarily lead to a piercing of the corporate veil. See *Hargrave*, 710 F.2d at 1162 (citing *Miles v. American Tel. & Tel. Co.*, 703 F.2d 193, 195 (5th Cir. 1983)); *Harris v. Deere & Co.*, 223 F.2d 161, 162 (4th Cir. 1955); *Douglas & Shanks*, *supra* note 31, at 196;

3) whether the subsidiary corporation is inadequately financed as a separate entity, because of either initial inadequate financing or because the parent has drained the subsidiary's earnings to keep the subsidiary financially dependent. See *Hargrave*, 710 F.2d at 1162; *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 389 (D. N.M. 1984);

4) whether the respective enterprises hold themselves out to the public as one entity. See *Hargrave*, 710 F.2d at 1162; *Bulova Watch*, 508 F. Supp. at 1340 (parent and subsidiary held themselves out as one corporation in advertisements);

5) whether the two corporations keep their daily business separate. *Douglas & Shanks*, *supra* note 31, at 197; see *Hargrave*, 710 F.2d at 1160; see also H. HENN & J. ALEXANDER, *supra* note 26, § 148 (discussing intermingling of business transactions, failure to observe corporate formalities, inadequate financing and holding corporations out to the public as one entity); 2 J. MOORE, *supra* note 11, § 4.25[6] (discussing intermingling of business transactions, failure to observe corporate formalities, holding corporations out to the public as one entity, keeping daily business separate and whether the subsidiary pays cash for products sold or services rendered to it by the parent).

In *Scott v. Mego Int'l Inc.*, 519 F. Supp. 1118 (D. Minn. 1981), the court found that the defendant and its subsidiary shared common directors and officers; issued consolidated summaries of operation, financial statements, income statements and statements of shareholders' equity; filed consolidated federal income tax returns; that the parent held out to the public that it had substantial control over the subsidiary, and that there was in fact evidence of such control. *Id.* at 1126. After an analysis of these factors, the court held that it had jurisdiction over the non-resident defendant. *Id.*

Courts have also used the doctrine of agency to exercise jurisdiction over a parent corporation based on the activities of its subsidiary. See *supra* note 10 and accompanying text.

35. Compare *Coca-Cola Co. v. Procter & Gamble Co.*, 595 F. Supp. 304, 307-08 (N.D. Ga. 1983) (court found that subsidiary was a mere division of parent and therefore could exercise jurisdiction over parent) and *Scott*, 519 F. Supp. at 1126 (nature of parent-subsidiary relationship permitted court to exercise jurisdiction over parent) with *Tennessee Valley Authority v. Exxon Nuclear Co.*, 753 F.2d 493, 497 (6th Cir. 1985) (piercing the corporate veil is generally done to impose liability on a parent corporation) and *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 695 (5th Cir. 1985) (court found subsidiary was alter-ego of parent and therefore parent was liable for the subsidiary's fraudulent actions), *cert. denied*, 106 S. Ct. 1194 (1986).

36. See, e.g., *Willis v. American Permac, Inc.*, 541 F. Supp. 118, 121-22 (D. Mass.

courts will pierce the corporate veil only when there is "virtually total disregard" by the parent of the corporate form of the subsidiary.³⁷ The opinion of a court, as to the degree of con-

1982). The court, in *Willis*, disregarded the corporate separateness of the parent and subsidiary, finding the parent was the sole shareholder of the subsidiary, the corporations had significant intermingling of officers and directors, and that the parent had, on two occasions, appointed officers of the subsidiary without the approval of the subsidiary's board of directors. *Id.* at 119, 122. Although the court found that the parent undertook responsibility for the liabilities of the subsidiary by agreement, it did not set forth the facts that lead to this conclusion. *Id.* The court held that it had jurisdiction over the parent corporation based on the activities of its subsidiary. *Id.* at 121-22.

Another case in which the court disregarded the corporate separateness of the parent and its subsidiary to exercise jurisdiction over the former was *Katz Agency, Inc. v. Evening News Ass'n*, 514 F. Supp. 423 (S.D.N.Y. 1981), *aff'd*, 705 F.2d 20 (2d Cir. 1983). In *Katz*, the court found that the subsidiary was a mere department of the parent, and therefore, the parent was doing business in New York through its subsidiary. *Id.* at 429. In support of its exercise of jurisdiction, the court noted that the parent corporation's vice president had referred to an agency as the employee of the parent, in a correspondence to that agency, whereas the agency was the sales representative of the subsidiary. *Id.* at 428-29. In addition, the court determined that the agency appeared to be unaware of the existence of the subsidiary. *See id.* These facts tend to imply that the parent and subsidiary were holding themselves out to the public as one corporation, which is one factor that courts use to determine whether to pierce the corporate veil. *See supra* note 35. The court did not examine other factors relevant to piercing the corporate veil, but determined that these facts alone were sufficient to support the court's exercise of jurisdiction over the parent. *Katz*, 514 F. Supp. at 429.

37. *See Hargrave*, 710 F.2d at 1163 (quoting *Edwards Co. v. Monogram Indus., Inc.*, 700 F.2d 994, 1004 (5th Cir. 1983)). In *Hargrave*, the court stated that the mere domination of a subsidiary by a parent is not a sufficient basis for the court to pierce the corporate veil. *Id.* "Of course the parent may dominate the subsidiary. A subsidiary by its nature is ultimately subservient in any case The parent can dictate the direction, the form and the style of the subsidiary. It can hire and fire, create and dissolve. And the subsidiary will still insulate the parent from liabilities incurred by the subsidiary." *Id.* (quoting *Edwards Co.*, 700 F.2d at 1002).

In *Beary v. Norton-Simon, Inc.*, 479 F. Supp. 812 (W.D. Pa. 1979), the parent owned 100% of the stock of the subsidiary, three of the six members of the board of directors of the subsidiary held positions as officers of the parent, 50% of the earnings of the subsidiary were distributed to the parent, the parent had made loans to the subsidiary and engaged in cash transactions with the subsidiary on a daily basis. *Id.* at 814. Nevertheless, the court held that it did not have jurisdiction over the parent under the alter-ego doctrine because the plaintiff had not alleged the perpetration of fraud, illegality or injustice by means of the parent-subsidary relationship and the parent and the subsidiary operated as separate corporate entities. *Id.* at 814-15. The court also held that it did not have jurisdiction over the parent under the agency doctrine even though the subsidiary was subject to some degree of control by the parent, which directed some marketing, auditing and advertising functions of its subsidiaries. *Id.* at 815. The court stressed that there was no evidence of an intercorporate relationship of the parent and subsidiary with regard to the specific facts which gave rise to the plaintiff's claim. *Id.* Therefore, the court held that the evi-

trol a parent corporation can legitimately exercise over a subsidiary, may affect its decision whether to pierce the corporate veil, and, based on the activities of the subsidiary, to take jurisdiction over a parent corporation.

II. THE BOUNDARIES OF DUE PROCESS

A. *United States Supreme Court Cases*

The first major United States Supreme Court case to address jurisdiction over a parent corporation, based on the activities of its subsidiary in the forum state, was *Cannon Manufacturing Co. v. Cudahy Packing Co.*³⁸ The Court, in *Cannon*, indicated that it would accept a large degree of control by a parent over a subsidiary, without subjecting the parent to the jurisdiction of a foreign court.³⁹

Cannon involved a North Carolina corporation that sued a Maine corporation for breach of contract in a North Carolina court.⁴⁰ To determine whether the North Carolina court had jurisdiction over the Maine corporation, Cudahy Packing Company, the United States Supreme Court examined whether the defendant had been doing business in the state.⁴¹ To determine whether the defendant had been doing business in the state, the Court examined the relationship between the defendant and its subsidiary.⁴²

Cudahy Packing Company itself did no business in North Carolina, but its subsidiary, Cudahy Packing Company of Alabama, had an office in North Carolina and was employed to market the parent's products there.⁴³ The Court expressly found that the subsidiary was not acting as an agent for the defendant.⁴⁴ In addition, the Court found that the parent and the subsidiary were two separate entities, even though the par-

dence of the parent's control of the subsidiary was insufficient to establish an agency relationship between the parent and the subsidiary. *Id.*

38. 267 U.S. 333 (1925).

39. *See id.* at 335-37.

40. *Id.* at 334.

41. *Id.* at 335.

42. *Id.*

43. *Id.* The subsidiary bought goods from the defendant and then sold them to dealers. *Id.* The parent corporation packed the goods in Iowa and shipped them directly to dealers. *Id.* The subsidiary then collected the purchase price. *Id.*

44. *Id.*

ent owned the entire capital stock of the subsidiary and exerted commercial and financial control over the subsidiary in the same manner as it controlled the branches of its business that were not separately incorporated.⁴⁵ The Court stressed that although “[t]he corporate separation . . . [was] perhaps merely formal, [it] was real. It was not pure fiction.”⁴⁶ Therefore, for the purposes of determining jurisdiction, the Court held that it could not find that the business of the subsidiary in North Carolina became the business of the defendant parent corporation.⁴⁷

Twenty years after *Cannon*, the United States Supreme Court set forth the modern standard for in personam jurisdiction in *International Shoe Co. v. Washington*.⁴⁸ In *International Shoe*, the Court stated that to subject a defendant to a judgment in personam when he is not present within the forum, the only requirement under the due process clause is that he have “certain minimum contacts with [the forum,] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’ ”⁴⁹ The relationship between the defendant and the forum also has to be “reasonable . . . to require the corporation to defend the particular suit which is brought there.”⁵⁰

Soon after *International Shoe*, the Supreme Court readdressed the subject of jurisdiction over a parent corporation based on the activities of its subsidiary, but in the context of United States antitrust law. In *United States v. Scophony Corp.*,⁵¹ the Court held that personal jurisdiction over a United Kingdom corporation was established in New York through the presence of its subsidiary, which was doing business in the state.⁵² Jurisdiction was based on the parent’s continuing supervision over the subsidiary and its intervention in the subsid-

45. *Id.* The court noted that the two corporations kept separate books and recorded all transactions between them as though they were two independent corporations. *Id.*

46. *Id.* at 337 (Brandeis, J.).

47. *Id.* at 338.

48. 326 U.S. 310 (1945).

49. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, *reh’g denied*, 312 U.S. 712 (1940)).

50. *Id.* at 317.

51. 333 U.S. 795 (1948).

52. *Id.* at 818.

itary's affairs.⁵³

The issue in *Scophony*, unlike *Cannon*, was whether the defendant had "transacted business" in New York, or could be "found" in the state⁵⁴ within the meaning of section 12 of the Clayton Act.⁵⁵ This difference is an important one because the test for jurisdiction under the Clayton Act has been viewed to be broader than the test which is used in other contexts.⁵⁶

53. *Id.* at 814. American Scophony was created by the contractual agreements Scophony executed with the other defendant corporations. *Id.* at 798. The Court found that these contracts established a pattern for a regular and continuing program of patent exploitation that required Scophony's constant supervision and intervention in the affairs of its subsidiary, American Scophony. *Id.* at 814. The president of American Scophony was also a director of Scophony. *Id.* at 815. The Court found that the president received and carried out instructions from Scophony regarding American Scophony's affairs. *Id.* The Court stated that it could almost be said that, while in New York, "he was the [parent] company." *Id.* at 816.

54. *Id.* at 796.

55. Clayton Act, 15 U.S.C. § 22 (1982). Section 12 of the Clayton Act states that "[a]ny 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." *Id.* In *Scophony*, the United States Government charged that Scophony Limited, its subsidiary, Scophony Corporation of America, three other United States corporations and three individuals had monopolized, attempted to monopolize, and conspired to restrain and monopolize interstate and foreign commerce in patents and inventions useful in television and allied industries. *United States v. Scophony Corp.*, 333 U.S. at 796-97.

56. See *Flank Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357, 364-65 (D. Colo. 1967); *Akzona Inc. v. E.I. du Pont de Nemours & Co.*, 607 F. Supp. 227, 239 (D. Del. 1984); *Call Carl, Inc. v. BP Oil Corp.*, 391 F. Supp. 367, 372-73 (D. Md. 1975); *Waldron v. British Petroleum Co.*, 149 F. Supp. 830, 834-35 (S.D.N.Y. 1957). The court, in *Flank Oil*, stated that the underlying policy reasons in antitrust actions require a more "penetrating" analysis of business activity within a state than might be necessary in other situations. *Flank Oil*, 277 F. Supp. at 364.

The court in *Akzona* stated that the Supreme Court in *Scophony* distinguished its decision from *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), on the grounds that *Scophony* arose under United States antitrust laws, and that a more lenient standard for jurisdiction was necessary to effectuate the policies of antitrust statutes. *Akzona*, 607 F. Supp. at 239 (citing *Scophony*, 333 U.S. at 817). While the Court in *Scophony* did not actually make this distinction, the implication is apparent. The Court, in *Scophony*, stated that it did not have a factual situation similar to those presented in the "manufacturing and selling cases," *Scophony*, 333 U.S. at 816, whereas earlier in its decision, the Court had referred to *Cannon* as an example of a "manufacturing and selling compan[y]." *Id.* at 813 n.23 and accompanying text. "[T]hose decisions [involving manufacturing and selling activities] may be left untouched for the facts and situations in which they have arisen and to which they have been applied." *Id.* at 817. The Court then discussed why an expansion of jurisdiction in the area of antitrust was important to the implementation of the policies behind the antitrust laws. *Id.* Therefore, it would appear that the Supreme Court was

Nevertheless, some commentators view *Scophony* as overruling *Cannon* by implication.⁵⁷ However, there is no language in the

implying that *Scophony* was distinguishable from *Cannon* because *Scophony* arose in the context of an antitrust litigation.

57. See P. BLUMBERG, *supra* note 10, at 47; Rosic, *In Personam Jurisdiction Over Foreign Parent Corporations*, 6 *ASILS INT'L L.J.* 19, 28 (1982). Professor Blumberg failed to cite any case that espoused the position that *Scophony* overrules *Cannon* in areas other than antitrust. Furthermore, certain courts are divided over whether *Scophony* overruled *Cannon* in antitrust litigation. Some courts, in light of *Scophony*, have refused to apply *Cannon* in an antitrust context. See, e.g., *Zenith Radio Corp. v. Matsushita Electronics Ind.*, 402 F. Supp. 262, 319 (E.D. Pa. 1975); *Call Carl*, 391 F. Supp. at 372-73; *Flank Oil*, 277 F. Supp. at 364-65. Other courts have adopted the *Cannon* rationale in antitrust cases. See, e.g., *San Antonio Tel. Co. v. American Tel. & Tel. Co.*, 499 F.2d 349, 352 (5th Cir. 1974); *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064, 1067-68 (9th Cir. 1974) (per curiam); *Indian Coffee Corp. v. Procter & Gamble Co.*, 482 F. Supp. 1098, 1104 (W.D. Pa. 1980), *modified on other grounds*, 752 F.2d 891 (3rd Cir. 1985); *Wireline, Inc. v. Byron Jackson Tools, Inc.*, 239 F. Supp. 955, 960-61 (D. Mont. 1964), *aff'd*, 344 F.2d 331 (9th Cir. 1965); *Goldlawr, Inc. v. Shubert*, 169 F. Supp. 677, 684 (E.D. Pa. 1958), *aff'd*, 276 F.2d 614 (3d Cir. 1960); *Fisher Baking Co. v. Continental Baking Corp.*, 238 F. Supp. 322, 327-28 (D. Utah 1956).

Kramer Motors, Inc. v. British Leyland Ltd., 628 F.2d 1175 (9th Cir.), *cert. denied*, 449 U.S. 1062 (1980), was an action in which plaintiff automobile dealer alleged a conspiracy between three United Kingdom corporations to drive the plaintiff out of business. *Id.* at 1176. The court, in *Kramer Motors*, did not discuss either *Cannon* or *Scophony*. However, the *Kramer Motors* court did follow *Cannon*'s traditional approach to jurisdiction over alien parent corporations. *Id.* at 1177-78. In *Kramer Motors*, the court examined the presence of three United Kingdom corporations that had a subsidiary in the United States. One of the United Kingdom corporations was the parent of the United States corporation. The other United Kingdom defendants were affiliated holding companies. *Id.* at 1176 n.2 and accompanying text. The court found that the parent and subsidiary had shared certain directors and officers. *Id.* at 1177. In addition, the court found that executives of the parent corporation worked closely with executives of the subsidiary on the pricing of vehicles for the United States market. *Id.* The court, however, stated that these facts were insufficient to make the subsidiary the alter-ego or agent of the parents. *Id.* Although the parent corporation did approve the subsidiary's marketing scheme that eventually caused the plaintiff to lose its supply of automobiles, the court did not view this action as "the kind of deliberate forum protection-invoking act which the law requires" to assert personal jurisdiction over an alien corporation. *Id.* at 1178. Significantly, one of the defendants in *Kramer Motors* was a company that was 95% owned by the government of the United Kingdom. *Id.* at 1176 n.2. The possibility that the acts of that company may have constituted foreign acts of state concerned the court and may have influenced its decision not to exercise jurisdiction over the defendants. See *id.* at 1178.

For a comparison of jurisdiction over alien corporations under the United States Internal Revenue Code (IRC), 26 U.S.C. §§ 1 et. seq., with jurisdiction over such corporations under the United States antitrust laws, see *United States v. Toyota Motor Corp.*, 561 F. Supp. 354 (C.D. Cal. 1983). The action in *Toyota* was to enforce two summonses of the Internal Revenue Service, one of which was issued to a Japanese corporation, and the other to its wholly-owned subsidiary, which was incorporated in the forum state of California. *Id.* at 355. The United States Government claimed jurisdiction under section 7604(a) of the IRC, which provides that the Internal Reve-

Scophony opinion that indicates that *Cannon* is no longer good law.⁵⁸

Some courts and commentators have argued that *Cannon* is no longer good law after the United States Supreme Court's decision in *International Shoe*.⁵⁹ Under this view, the derivation

nue Service may bring a petition to enforce a summons in the "district court for the district in which [the person summoned] resides or is found." I.R.C. § 7604(a) (1985). In interpreting this section of the IRC, the court determined that the Japanese corporation did not reside in the state but could be "found" there through the presence of its subsidiary, and therefore the court had jurisdiction. *Toyota*, 561 F. Supp. at 357-58. The court did look at certain factors pertinent to the alter-ego theory but stated that it could find jurisdiction over a parent corporation under the IRC regardless of whether its subsidiary acted as the parent's agent or was its alter-ego. *Id.* at 358-59. This is because section 482 of the IRC may be invoked whenever two business organizations are owned or controlled directly or indirectly by the same interests. *Id.* at 359. The court could find no case law interpreting "found" in the context of the IRC, but it argued that because the term had been given a broad interpretation under the copyright venue provisions of 28 U.S.C. § 1400(a), it should also be given a broad interpretation under the IRC. *Id.* at 357. The court rejected the parent corporation's argument that the court should adopt the more restrictive interpretation of the word "found" that certain courts have given it in cases arising under section 12 of the Clayton Act, 15 U.S.C. § 22, and mentioned *Kramer Motors*, and *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974) (per curiam), by way of example. *Id.* at 358. The court distinguished the antitrust cases by finding that the antitrust laws were intended to provide remedy for business-related injuries, which is not the intent of the IRC. *Id.* at 358. Under the antitrust laws, if it is the domestic subsidiary of an alien corporation that has engaged in the complained of activities, the court argued that there may be no reason to subject the parent to suit unless it had contributed directly to the conduct by employing the subsidiary as an "alter-ego" or "agent." *Id.* However, in *Kramer Motors*, the plaintiff alleged a conspiracy between the parent and the subsidiary to put the plaintiff out of business. *Kramer Motors*, 628 F.2d at 1176. Therefore, in that instance, the parent was allegedly directly involved in the complained of activity, yet the court still did not take jurisdiction. The *Toyota* court also ignored that in *Scophony*, the Supreme Court stressed that the intent of the antitrust laws is to encourage an expansion of jurisdiction over non-domiciliaries, rather than discourage it, as the *Toyota* court's analysis of the antitrust cases seemed to suggest. See *Scophony*, 333 U.S. at 817. Therefore, the distinction made by the *Toyota* court between the tax and the antitrust cases may be of limited value.

58. The Court in *Scophony* only mentioned the *Cannon* decision once, in a footnote, as an example of a case involving jurisdiction over manufacturing and selling companies. *Scophony*, 333 U.S. at 813 n.23. The cite to *Cannon* is an innocuous one, and it would be difficult to draw an inference from it at all, favorable or unfavorable, except to note that the court was certainly aware of the decision.

59. See P. BLUMBERG, *supra* note 10, at 46; *Brunswick*, 575 F. Supp. at 1419 (discussed *infra* notes 165-73 and accompanying text); *Coca-Cola Co. v. Procter & Gamble Co.*, 595 F. Supp. 304, 307-08 (N.D. Ga. 1983); *Roorda v. Volkswagenwerk, A.G.*, 481 F. Supp. 868, 879 (D. S.C. 1979); *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, 495-508 (D. Kan. 1978) (extensive discussion of the *Cannon* doctrine in relation to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945),

of economic benefits from the operation of a subsidiary in a distant forum constitutes sufficient contacts with that forum to meet the minimum contacts test of *International Shoe*.⁶⁰ However, if the mere presence of a subsidiary doing business in the state were enough to confer jurisdiction over an alien parent, it would have been unnecessary for the United States Supreme Court to inquire, as it did, into the details of the relationship between the parent and the subsidiary in *Scophony*.⁶¹

Cannon was the last United States Supreme Court case to address the issue of jurisdiction over a parent corporation based on the activities of its subsidiary within the forum.⁶² The next pertinent Supreme Court case to generally address jurisdiction over foreign corporations was *World Wide Volkswagen Corp. v. Woodson*.⁶³ In *Volkswagen*, the Court reversed⁶⁴ the judgment of the Supreme Court of Oklahoma,⁶⁵ predicated on

and *Shaffer v. Heitner*, 433 U.S. 186 (1977), as well as an examination of recent case law relying on *Cannon*).

60. P. BLUMBERG, *supra* note 10, at 46; *see also Roorda*, 481 F. Supp. at 881 (defendant corporation should not complain about the burdens of defending in a distant forum when it derives benefits from that forum through its relationship with its subsidiary).

61. *Scophony*, 333 U.S. at 797-802, 810-16. A problem with Professor Blumberg's theory is his mistaken impression that *Scophony*, which was decided in 1948, came before *International Shoe*, when in fact *International Shoe* was decided three years earlier, in 1945. *See* P. BLUMBERG, *supra* note 10, at 47.

62. 267 U.S. 333 (1925). *Scophony* was decided after *Cannon*, but *Scophony* appears to be limited to antitrust cases. *See supra* notes 55-58 and accompanying text.

63. 444 U.S. 286 (1980). In *Volkswagen*, the Court addressed the issue of whether an Oklahoma court could constitutionally exercise in personam jurisdiction, in a products liability action, over a nonresident automobile retailer and its wholesale distributor when the defendants' only connection with the state was that an automobile sold in New York to residents of that state became involved in an accident in Oklahoma. *World-Wide Volkswagen v. Woodson*, 444 U.S. at 287.

The defendants that challenged the Oklahoma court's jurisdiction were two New York corporations, Seaway Volkswagen, Inc. (Seaway), and World-Wide Volkswagen Corporation (World-Wide). *Id.* at 288-89. Seaway was a retail dealer and World-Wide was the regional distributor for retail dealers in New York, New Jersey and Connecticut. The other defendants were Audi NSU Auto Union Aktiengesellschaft (Audi), the manufacturer of the allegedly defective automobile, and Volkswagen of America, Inc. (Volkswagen), the importer of the automobile to the United States. *Id.* at 288. Audi, an alien corporation, did not challenge the court's jurisdiction over it. *See id.* at 288. Volkswagen had entered a special appearance in the district court but did not seek review in the Supreme Court of Oklahoma, and was not a petitioner in the case before the United States Supreme Court. *Id.* at 288 n.3.

64. *Id.* at 299.

65. 585 P.2d 351 (Okla. 1978). Here, the Oklahoma court denied defendant's

a provision of the Oklahoma long arm statute,⁶⁶ that provides for jurisdiction when a person causes a tortious injury in that state.⁶⁷ The decision by the Court made it clear that the minimum contacts test of *International Shoe* is applicable to assertions of jurisdiction based on state long arm statutes.⁶⁸

The Court stressed that the burden on the defendant of litigating in a distant and inconvenient forum was the primary concern in evaluating the reasonableness of the court's exercise of jurisdiction.⁶⁹ Other factors, such as the forum state's interest in adjudicating the dispute,⁷⁰ and the plaintiff's interest in obtaining convenient and effective relief,⁷¹ would also be considered in appropriate cases.⁷²

In *Volkswagen*, the Court stated that a court does not exceed its power under the due process clause if it asserts per-

writ of prohibition to restrain the district court judge from exercising in personam jurisdiction over them. *Id.* at 355.

66. Long arm statutes are jurisdictional statutes that predicate jurisdiction over non-residents upon a variety of contacts with the forum, including the transaction of business in the state, the commission of any one of a series of enumerated acts within the state, such as the commission of a tort, ownership of property, or entry into a contract, or, in some cases, the commission of a particular act outside the forum that has consequences within. See J. FRIEDENTHAL, M. KANE, A. MILLER, CIVIL PROCEDURE 139-40 (1985).

67. OKLA. STAT. ANN., tit. 12, § 1701.03(a)(4), *repealed and superseded by* OKLA. STAT. ANN., tit. 12, § 2004 (West 1980 and Supp. 1985). Prior to repeal, this subsection of the statute provided that a court may exercise jurisdiction over a person who, directly or through an agent, causes tortious injury in the state "if he regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in th[e] state."

68. See *Volkswagen*, 444 U.S. at 291.

69. *Id.* at 292.

70. *Id.* at 292 (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957)). The Court, in *McGee*, held that the defendant's solicitation of business from the plaintiff's decedent, the mailing of an insurance contract to him, and the acceptance of premiums the decedent sent to the defendant while the decedent was living in the forum state were sufficient contacts with the forum for the court to exercise personal jurisdiction over the defendant. *McGee*, 355 U.S. at 223.

71. *Volkswagen*, 444 U.S. at 292 (citing *Kulko v. Superior Court of California*, 436 U.S. 84, 92, *reh'g denied*, 438 U.S. 908 (1978)). In *Kulko*, the Court held that the California court's exercise of in personam jurisdiction over a nonresident, non-domiciliary parent of minor children domiciled in that state, in an action for child support, violated the due process clause. *Kulko*, 436 U.S. at 86, 101.

72. *Volkswagen*, 444 U.S. at 292. Other factors the Court mentioned in *Volkswagen* were the interstate judicial system's interest in obtaining the most effective resolution of controversies and the several states' shared interest in furthering fundamental social policies. *Id.*; see *Kulko*, 436 U.S. at 93, 98.

sonal jurisdiction over a corporation that delivers its products into the "stream of commerce" and expects that they will be purchased by consumers in that state.⁷³ A number of courts have relied on the stream of commerce test to assert jurisdiction over an alien corporation.⁷⁴

In addition, the Court in *Volkswagen* reaffirmed a "purposeful availment" test, whereby a corporation that "purposefully avails itself of the privilege of conducting activities within the forum State" . . . has clear notice that it [will be] subject to suit there."⁷⁵ This "test" has also been used by many courts to justify their assertion of jurisdiction over alien corporations.⁷⁶

In *Shaffer v. Heitner*,⁷⁷ the United States Supreme Court addressed the issue of whether a court could exercise jurisdiction over a defendant by sequestering his property located in the forum state.⁷⁸ The Court held that, by itself, the presence of property that is unrelated to the plaintiff's cause of action was insufficient to support the court's assertion of jurisdiction.⁷⁹

73. *Volkswagen*, 444 U.S. at 297-98. The "stream of commerce" theory has been defined as "a means of sustaining jurisdiction in products liability cases in which the product ha[s] traveled through an extensive chain of distribution before reaching the ultimate consumer." *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981).

74. *See, e.g., Kawasaki*, 604 F. Supp. at 970 (personal injury tort); *Copiers*, 576 F. Supp. at 320 (D. Md. 1983) (business tort); *cf. Graco*, 558 F. Supp. at 193 (business tort) (court did not use the term "stream of commerce" but stated that the products of the alien parent were sold in the state on a regular basis and used this fact to support its assertion of jurisdiction). The stream of commerce test has been most frequently relied on in tort actions.

75. *Volkswagen*, 444 U.S. at 297 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, *reh'g denied*, 358 U.S. 858 (1958)). In *Hanson*, a Florida court attempted to exercise personal jurisdiction over a Delaware trustee. While the testatrix of the trust died a resident of Florida, she created a trust while domiciled in Pennsylvania. *Hanson*, 357 U.S. at 238-39. Although there was correspondence between the Delaware trustee and the testatrix while she was in Florida, and the trust was connected with the forum state, the court held that Florida did not acquire jurisdiction over the defendant trustee. *Id.* at 254. The Court asserted that in order to satisfy the minimum contacts test, there must be "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Id.* at 253.

76. *See, e.g., Graco*, 558 F. Supp. at 193; *Copiers*, 576 F. Supp. at 320; *Toyota*, 561 F. Supp. at 359.

77. 433 U.S. 186 (1977).

78. *Id.* at 189.

79. *Id.* at 209. It could be argued that a subsidiary is the "property" of the parent corporation and therefore under *Shaffer* the existence of a subsidiary in the forum

In *Shaffer*, the Court stated that the foundation of in personam jurisdiction is the "relationship among the defendant, the forum and the litigation."⁸⁰ The importance of this relationship was reaffirmed in *Helicopteros Nacionales de Columbia, S.A. v. Hall*⁸¹ in reference to "specific jurisdiction."⁸² In *Helicopteros* the Court indicated, however, that when a court wished to exercise "general jurisdiction"⁸³ over a defendant, the contacts between the defendant and the forum had to be "continuous and systematic."⁸⁴

In 1985, the United States Supreme Court decided two

state would be insufficient, in and of itself, to confer jurisdiction on a court. *See id.* This argument is weak, however, because courts do not base jurisdiction on the mere existence of a subsidiary within the forum state, but rather that the subsidiary is doing business there. *See, e.g., Brunswick*, 575 F. Supp. at 1421-22; *Kawasaki*, 604 F. Supp. at 970-71; *Graco*, 558 F. Supp. at 192.

80. *Shaffer*, 433 U.S. at 204.

81. 466 U.S. 408, 414 (1984). In *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984), the representative of four United States citizens, who died when a helicopter owned by the defendant, a Columbia corporation, crashed in Peru, brought wrongful death actions against the defendant in a Texas court. *Helicopteros*, 466 U.S. at 410. The issue before the Supreme Court was whether the contacts between the Columbia corporation and Texas were sufficient to permit a Texas state court to exercise jurisdiction over the defendant in a cause of action that did not arise out of, and was not related to, the corporation's activities in that state. *Id.* at 409. The defendant's contacts with Texas were limited, consisting of one trip by the defendant's chief executive officer to the state, the defendant's acceptance of checks drawn on a Texas bank, and the defendant's purchase of helicopters and equipment from a Texas manufacturer and related training trips. *Id.* at 410-11. The Court held that these contacts were insufficient to satisfy the requirements of the due process clause when the state was attempting to assert "general jurisdiction" over the defendant. *Id.* at 415-16. Therefore, the Texas court could not constitutionally exercise in personam jurisdiction over the defendant. *Id.* at 418-19. For a discussion of general jurisdiction, see *infra* notes 83-84 and accompanying text.

82. When a controversy arises out of, or is related to a defendant's contacts with the state, the court's exercise of jurisdiction over the defendant is "specific jurisdiction." *Burger King Corp. v. Rudzewicz*, ___ U.S. ___, 105 S. Ct. 2174, 2182 n.15 and accompanying text (1985).

83. When a court exercises personal jurisdiction over a defendant in a suit not arising out of nor related to the defendant's contacts with the forum, the court's exercise of jurisdiction over the defendant is "general jurisdiction." *Helicopteros*, 466 U.S. at 414 n.9.

84. *Id.* at 414-15 (referring to *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438, *reh'g denied*, 343 U.S. 917 (1952)). In *Perkins*, the Court found that the alien corporate defendant had maintained a continuous and systematic, although limited, part of its general business in Ohio through its president. *Perkins*, 342 U.S. at 438. Under these circumstances, the Court held that jurisdiction over the corporation was "reasonable and just." *Id.* at 445.

cases in relation to jurisdiction over foreign persons.⁸⁵ In *Burger King Corp. v. Rudzewicz*,⁸⁶ the Supreme Court addressed the issue of whether, in a franchise dispute, the exercise of long arm jurisdiction by a Florida court over a Michigan franchisee offended due process.⁸⁷ The Court upheld the constitutionality of this exercise of jurisdiction for two reasons. First, the defendant had established a substantial, continuing relationship with the plaintiff franchisor's Florida headquarters.⁸⁸ Second, the franchise agreement provided that the franchise was established in Florida, and was governed by the law of that state.⁸⁹

In *Burger King*, the Supreme Court reiterated the minimum contacts test of *International Shoe* as the constitutional "touchstone" of personal jurisdiction.⁹⁰ Furthermore, the Court held that when a defendant deliberately engages in significant activities within the state,⁹¹ he manifestly avails himself of the privilege of conducting business there.⁹² Because a defendant's activities are shielded by the "benefits and protections" of the forum's law,⁹³ it is presumably not unreasonable to subject him to the burdens of litigating in that forum.⁹⁴

It could be argued, following the reasoning in *Burger King*, that when an alien corporation owns a subsidiary that is incorporated or doing business in a state, an alien parent is deliber-

85. See *Burger King Corp. v. Rudzewicz*, ___ U.S. ___, 105 S. Ct. 2174 (1985); *Phillips Petroleum Co. v. Shutts*, ___ U.S. ___, 105 S. Ct. 2965 (1985). In the context of these two cases, a "foreign" person is a citizen of one of the states of the United States other than the forum state. See *supra* note 1.

86. ___ U.S. ___, 105 S. Ct. 2174 (1985).

87. *Id.* at 2177-78.

88. *Id.* at 2186-87, 2190.

89. *Id.* at 2178, 2187. There were very few contacts between the defendant and the forum in this case other than a brief training course the defendant attended there. *Id.* at 2186.

90. *Id.* at 2183.

91. *Id.* at 2184 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984)). *Keeton* involved a libel suit brought in New Hampshire against the defendant magazine publisher, an Ohio corporation. *Keeton*, 465 U.S. at 772. The defendant's only contact with New Hampshire was the monthly sales of 10-15,000 copies of its magazine. *Id.* at 772. The court held that the defendant's regular circulation of magazines in the forum state was sufficient to support the exercise of jurisdiction by its courts in a libel action based on the contents of the magazine. *Id.* at 773-74, 781.

92. *Burger King*, ___ U.S. at ___, 105 S. Ct. at 2184.

93. *Id.* (referring to its decision in *Hanson v. Denckla*, 357 U.S. at 253). For a discussion of *Hanson*, see *supra* note 75.

94. *Burger King*, ___ U.S. at ___, 105 S. Ct. at 2184.

ately engaging in significant activities there.⁹⁵ Therefore, a court of that state should have jurisdiction over the alien parent. This argument is flawed because it neglects that a subsidiary corporation is a separate entity from its parent.⁹⁶ The Supreme Court, in *Burger King*, stressed that it is the acts of the defendant *himself* that are crucial in determining whether the defendant has a substantial connection with the forum state.⁹⁷ The acts of a subsidiary cannot, under traditional United States corporate law, be attributed to a parent corporation unless it can be shown that the two corporations should be treated as one under the alter-ego or agency doctrines.⁹⁸

The second 1985 United States Supreme Court case addressing the issue of jurisdiction over foreign persons was *Phillips Petroleum Co. v. Shutts*.⁹⁹ In *Phillips*, a class action to recover interest on certain royalty payments,¹⁰⁰ the Supreme Court considered whether the due process clause prevented a Kansas court from adjudicating the claims of members of a plaintiff class that did not possess minimum contacts with the state.¹⁰¹ The Court held that absent class action plaintiffs are entitled to protection from the exercise of jurisdiction by courts in states with which they do not have sufficient contacts.¹⁰² However, as long as a state affords a class action plaintiff minimal due process protection, it is not necessary for each plaintiff to possess the minimum contacts with the state that would be necessary to support jurisdiction over a defendant.¹⁰³ Accordingly, the Court stressed that litigation places a heavier burden on out-of-state defendants than those assumed by absent class action

95. *See id.*

96. *See supra* note 29 and accompanying text.

97. *Burger King*, ___ U.S. at ___, 105 S. Ct. at 2184 (emphasis in the original). This is not to suggest that the Court was referring to parent-subsidiary relations. The Court appears to indicate, by this statement, that unilateral activity of another party or third person will not constitute a "contact" of the defendant with the forum state. *Id.* at 2183.

98. *See supra* notes 10-14, 32-34 and accompanying text.

99. ___ U.S. ___, 105 S. Ct. 2965 (1985).

100. *Id.* at 2968.

101. *Id.*

102. *Id.* at 2975.

103. *Id.* The Supreme Court, in *Phillips*, held that minimal due process requires that the plaintiffs be given notice plus an opportunity to be heard and to participate in the litigation as well as an opportunity to remove themselves from the class. *Id.* In addition the named plaintiff must at all times adequately represent the interests of the absent class members. *Id.*

plaintiffs.¹⁰⁴ Therefore, the Court determined that the due process clause requires courts to afford greater protection to an out-of-state defendant than to absent class action plaintiffs.¹⁰⁵

B. Lower Court Decisions That Apply the Jurisdictional Standards Set Forth in United States Supreme Court Precedent

When deciding whether to assert jurisdiction over alien corporations that have United States subsidiaries, lower federal courts have inconsistently interpreted the jurisdictional standards established by the Supreme Court.¹⁰⁶ The problem of obtaining jurisdiction over alien corporations arises in many different contexts, including torts involving personal injury,¹⁰⁷

104. *Id.* at 2973. The out-of-state defendant must hire counsel and travel to the forum to defend himself from the plaintiff's claims or suffer a default judgment. *Id.* Such a defendant might be forced to participate in lengthy and costly discovery and might be forced to respond in money damages or comply with some other form of remedy if he loses the suit. *Id.*

105. *Id.* The Court, in *Phillips*, also addressed the standing of the defendant to assert the claim that the Kansas court did not possess jurisdiction over certain class members as well as the applicable choice of law. *Id.* at 2971-72 (standing), *id.* at 2977-81 (choice of law). The Court held that the defendant did have standing to assert this claim because the defendant had a personal interest in having the plaintiff class bound by res judicata. *Id.* at 2972. As to the issue of the applicable choice of law, the Court held that the Supreme Court of Kansas erred in ruling that Kansas law was applicable to all the transactions that it sought to adjudicate. *Id.* at 2981. The Court determined that for a Kansas court to apply its law to the claims of each member of the plaintiff class, that state must have a "significant aggregation of contacts" to each claim. *Id.* at 2980. These contacts had to create sufficient state interest to ensure that the choice of Kansas law was not arbitrary or unfair. *Id.* (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, *reh'g denied*, 450 U.S. 971 (1981)). The Court found that Kansas did not have a sufficient interest in the claims that were unrelated to that state, and concluded that the application of Kansas law to every claim was arbitrary and unfair, thereby exceeding constitutional limits. *Id.*

106. A federal court in a diversity action must apply the law of the state in which it sits to determine questions of personal jurisdiction. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 711 (1982) (Powell, J., concurring); *Arrowsmith v. United Press Int'l.*, 320 F.2d 219 (2d Cir. 1963). *See generally*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In cases in which federal court jurisdiction is based on a federal question, except in cases involving a United States statute that provides for service of a summons, service may be made under the circumstances and in the manner prescribed by the statute or rules, if there are any, of the state in which the court sits. FED. R. Civ. P. 4(e).

107. *See, e.g.*, *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir. 1983); *Weight v. Kawasaki Motor Corp.*, 604 F. Supp. 968 (E.D. Va. 1985); *Samuels v. B.M.W. of N. Am., Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983).

torts involving business injuries,¹⁰⁸ patent infringement suits,¹⁰⁹ antitrust,¹¹⁰ and cases under the Internal Revenue Code.¹¹¹ The following discussion will first address actions involving personal injury, and then actions involving business related injuries.¹¹²

108. See, e.g., *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D.N.Y. 1981).

109. See, e.g., *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wis. 1983); *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188 (N.D. Ill. 1982).

110. See, e.g., *United States v. Scophony Corp.*, 333 U.S. 795 (1948); *O.S.C. Corp. v. Toshiba Am., Inc.*, 491 F.2d 1064 (9th Cir. 1974) (per curiam); *Akzona Inc. v. E.I. du Pont de Nemours & Co.*, 607 F. Supp. 227 (D. Del. 1984); see *supra* notes 51-57 and accompanying text.

111. See, e.g., *United States v. Toyota Motors Corp.*, 561 F. Supp. 354 (C.D. Cal. 1983) (discussed *supra* note 57).

112. There is no simple way to divide lower court decisions because the jurisdictional standards of each state are slightly different. Courts usually assert jurisdiction over alien corporations by way of state long arm statutes, which vary from state to state. See, e.g., *Brunswick*, 575 F. Supp. at 1421; *Kawasaki*, 604 F. Supp. at 968; *Copiers*, 576 F. Supp. at 321; see also *Hargrave*, 710 F.2d at 1158 (third party plaintiff asserted that court had jurisdiction over United Kingdom corporation under state long arm statute); *Samuels*, 554 F. Supp. at 1192 (plaintiff asserted that court had jurisdiction over West German corporation under state long arm statute). For a definition of long arm statutes, see *supra* note 66.

Whether a court exercises jurisdiction over a non-resident defendant by way of a state long arm statute, or by other means, the exercise of jurisdiction must comply with the requirements of the due process clause in order to be valid. See *Volkswagen*, 444 U.S. at 291 (citing *Kulko v. California Superior Court*, 436 U.S. at 91). For a discussion of *Kulko*, see *supra* note 71. For examples of a court's ability to exercise jurisdiction over an alien corporation without reliance on a long arm statute, see, e.g., *Graco*, 558 F. Supp. at 192; *Bulova Watch*, 508 F. Supp. at 1344-45 (doing business doctrine).

A state may have a greater interest in adjudicating actions involving personal injuries to their citizens than those involving business related injuries. *Copiers*, 576 F. Supp. at 321. In a typical personal injury case the plaintiff is an individual who may have limited financial resources, and therefore would find it difficult to go out of state to bring suit. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). "When claims [are] small or moderate, individual claimants frequently [cannot] afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof." *Id.* While the action in *McGee* was to recover a judgment against an insurance company on a life insurance policy, the rationale is equally applicable to personal injury suits. See *Volkswagen*, 444 U.S. at 302-03 (Brennan, J., dissenting). Justice Brennan stated:

As in *McGee*, a resident forced to travel to a distant State to prosecute an action against someone who has injured him could, for lack of funds, be entirely unable to bring the cause of action. The plaintiff's residence in the State makes the State one of a very few convenient forums for a personal injury case.

Id. In contrast, the typical plaintiff in an action for business related damages is a

In a recent case, *Weight v. Kawasaki Motors Corp., U.S.A.*,¹¹³ the United States District Court for the Eastern District of Virginia held that it had personal jurisdiction over an alien corporation¹¹⁴ under the state's long arm statute.¹¹⁵ In *Kawasaki*, a Virginia resident brought a products liability suit against a Japanese corporation and its ninety-six percent owned United States subsidiary for personal injuries arising out of an allegedly defective motorcycle.¹¹⁶ While there were no direct contacts between the defendant parent corporation and the forum,¹¹⁷ the court found that the parent corporation had indirect contacts with the state through its subsidiary, which sold Kawasaki motorcycles to nineteen retail dealers in Virginia.¹¹⁸ The court held these contacts sufficient for the parent corporation to reasonably expect to be haled into a Virginia court.¹¹⁹

The holding in *Kawasaki* was not based on the existence of an agency relationship between the two corporations nor did the court attempt to pierce the corporate veil.¹²⁰ Instead, the court cited dicta from *Volkswagen* to support its exercise of jurisdiction.¹²¹ The court stated that the parent corporation

corporation that has more financial resources at its disposal than would an individual plaintiff.

113. 604 F. Supp. 968 (E.D. Va. 1985).

114. *Id.* at 971.

115. VA. CODE § 8.01-328.1 (1984). The court does not indicate which subsection of the long arm statute it used to find jurisdiction over the defendant. The court did discuss the defendant's business activities in some detail, however, and the opinion seemed to imply that jurisdiction arose under subsection A(1) of the long arm statute, which addresses the transaction of business within the Virginia Commonwealth. See *Kawasaki*, 604 F. Supp. at 970-71. There is also the possibility of jurisdiction under subsection 3 of the statute, which states that a court may exercise jurisdiction over a person who causes tortious injury by an act or omission in the Commonwealth, or subsection 4, which states that a court may exercise jurisdiction over a person who causes tortious injury in the Commonwealth by an act or omission from without. VA. CODE § 8.01-328.1(A)(3), (4) (1984).

116. *Kawasaki*, 604 F. Supp. at 969-70.

117. See *id.* at 969. Examples of direct contacts between a parent corporation and the forum would be the registration or licensing of the corporation to do business in the state, or the parent's establishment of an office there. See *id.*

118. *Id.* at 970. It appears that the subsidiary was not incorporated in Virginia.

119. *Id.* at 971.

120. The court did mention, however, that one person served on the board of directors of both corporations. *Id.* at 970.

121. *Id.* at 970. The *Kawasaki* court quoted *Volkswagen* for the proposition:

If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other

knew and intended that many of its motorcycles would be purchased by consumers in Virginia, and these sales could lead to consequences in that state.¹²² The court also stressed that the parent corporation received substantial economic benefit from the sale of its motorcycles by its subsidiary.¹²³ Even though the parent did not send the product directly into Virginia; the court found that the parent could reasonably foresee that marketing by its subsidiary would cause the product to reach Virginia.¹²⁴ The court concluded that jurisdiction over the parent was reasonable.¹²⁵

Not all courts have followed the reasoning of the *Kawasaki* court regarding jurisdiction over alien parent corporations. Texas has a long arm statute¹²⁶ similar to Virginia's statute, which provides for jurisdiction over nonresidents doing business in the state.¹²⁷ The Texas statute defines doing business as including the commission of a tort within the state.¹²⁸ The United States Circuit Court of Appeals for the Fifth Circuit applied the Texas statute in *Hargrave v. Fibreboard Corp.*,¹²⁹ in an action alleging injury from exposure to asbestos insulation, and held that it did not have jurisdiction over the publicly-owned United Kingdom corporation.¹³⁰

States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owners or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. (citing *Volkswagen*, 444 U.S. at 297). The court also cited the Supreme Court's holding in *Volkswagen*. *Id.* at 971.

122. *Id.* at 970.

123. *Id.*

124. *Id.* at 970-71.

125. *Id.* at 971.

126. TEX. REV. CIV. STAT. ANN. art. 2031(b) (Vernon 1964 & Supp. 1982-1983) (current version at TEX. CIV. PRACTICE & REMEDIES CODE ANN. §§ 17.041-45 (Vernon 1985)).

127. *Id.* § 3 (current version at § 17.044).

128. *Id.* § 4 (current version at § 17.042(2)).

129. 710 F.2d 1154 (5th Cir.), *modified on other grounds*, No. 82-2231, 82-2236, slip op. (5th Cir. Nov. 3, 1983).

130. *Id.* at 1161. The United Kingdom corporation, Turner & Newall, Ltd. (T&N), was a third-party defendant in *Hargrave*. The third-party plaintiff, Nicolet, Inc. (Nicolet), asserted that the court had personal jurisdiction over T&N as a result of the torts of Keasby & Mattism Co. (K&M), a Pennsylvania corporation which operated as a wholly-owned subsidiary of T&N from 1936-62. *Id.* at 1156-57. K&M,

In *Hargrave*, the court stated that it was willing to assume that the subsidiary's activity in Texas would be subject to the reach of the Texas long arm statute.¹³¹ However, the court still required the third party plaintiff to demonstrate that the subsidiary's activities could properly be imputed to its parent.¹³² Relying on *Cannon Manufacturing Co. v. Cudahy Packing Co.*,¹³³ the court stated that as long as a parent and its subsidiary maintain distinct corporate entities, the presence of one in a state may not be attributed to the other.¹³⁴ Before viewing the two corporations as one for jurisdictional purposes, courts in the Fifth Circuit have required plaintiffs to prove that the parent corporation had control over the internal business operations and affairs of the subsidiary.¹³⁵ The court in *Hargrave* did not find such control by the parent.¹³⁶

A distinction between *Kawasaki* and *Hargrave* is that the latter case did not involve a parent corporation using a subsidiary to deliver its products into the stream of commerce. Nevertheless, the court in *Hargrave* could have argued, as did the court in *Kawasaki*,¹³⁷ that the parent corporation had derived eco-

which was dissolved in 1967, had sold some of its asbestos manufacturing facilities to Nicolet in 1962. *Id.* at 1156. After being made a defendant to this suit, Nicolet brought a third-party complaint against T&N seeking a declaratory judgment that T&N was liable for any and all injuries arising from the plaintiff's exposure to asbestos products manufactured by K&M. *Id.* at 1156.

131. *Id.* at 1159.

132. *Id.*

133. 267 U.S. 333 (1925); see *supra* notes 38-47 and accompanying text.

134. *Hargrave*, 710 F.2d at 1160.

135. *Id.*; see, e.g., *Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Products Promotions, Inc. v. Cousteau*, 495 F.2d 483, 493 (5th Cir. 1974). The court, in *Hargrave*, explained that "[t]he Lone Star of Texas may shine brightly throughout the world, but its long arm is not judicially all encompassing." *Hargrave*, 710 F.2d at 1161.

136. *Hargrave*, 710 F.2d at 1161. Some factors that influenced the court's decision that the parent did not control the subsidiary were that the companies shared no common officers, never had more than one common director, and the two companies "scrupulously observed" corporate formalities. *Id.* at 1160. While the parent, T&N, had complete authority over the general policy decisions of its subsidiary, K&M, including selection of product lines, hiring and firing of the officers of K&M, and approval of sizable capital investments, the day-to-day business and operational decisions were made by K&M officers. *Id.*

137. Compare *Hargrave*, 710 F.2d at 1160, with *Kawasaki*, 604 F. Supp. at 970. The subsidiary in *Hargrave* manufactured products in the United States from raw materials supplied by the parent, rather than acting as a distributor for the parent's foreign made products, as the subsidiary did in *Kawasaki*. *Hargrave*, 710 F.2d at 1160; *Kawasaki*, 604 F. Supp. at 970. The court, in *Hargrave*, did not, however, discuss this

conomic benefits from the forum state's market and had received protection from that state's laws.¹³⁸ Instead, the *Hargrave* court asserted that there was nothing improper about the parent profiting from the business of its subsidiary unless it could be shown that the benefits the parent derived from the subsidiary were a result of a misuse of the corporate form.¹³⁹

In *Samuels v. B.M.W. of North America, Inc.*,¹⁴⁰ the United States District Court for the Eastern District of Texas addressed a factual situation almost identical to the one in *Kawasaki*. The plaintiff, in *Samuels*, brought an action against a West German auto manufacturer, Bayerische Motoren Werke, A.G. (Bayerische), and its wholly-owned United States marketing subsidiary, B.M.W. of North America (BMW).¹⁴¹ The plaintiff sued for personal injuries that he claimed were caused by an automobile produced by defendant corporation.¹⁴² The court held that it did not have jurisdiction over the alien parent corporation under the Texas long arm statute,¹⁴³ even though a tort had allegedly been committed within the state.¹⁴⁴ The only contacts between the parent corporation and the forum were through the subsidiary, BMW.¹⁴⁵ The court concluded that, absent some other contact, under the *Cannon* doctrine it did not have jurisdiction over the West German corporation.¹⁴⁶

In *Samuels*, the court was willing to assume that if a tort had been committed it was committed by both the parent and the subsidiary,¹⁴⁷ but the court refused to take jurisdiction over

factor in its decision to dismiss the complaint against the alien parent. Therefore it would be difficult to argue that *Hargrave* can be distinguished from *Kawasaki* on this basis alone.

138. See *Kawasaki*, 604 F. Supp. at 970.

139. *Hargrave*, 710 F.2d at 1162. Furthermore, the court stated that the parent had done nothing more "nefarious" than to demonstrate a parent corporation's proper interest and involvement. *Id.*

140. 554 F. Supp. 1191 (E.D. Tex. 1983).

141. *Id.* at 1192.

142. *Id.* The personal injuries included the death of a passenger. *Id.*

143. See *supra* notes 126-28 and accompanying text.

144. *Samuels*, 554 F. Supp. at 1195.

145. *Id.* at 1193.

146. *Id.* While the court did not address the possibility of an agency or alter-ego relationship between Bayerische and BMW, it did find that BMW was "autonomous." *Id.* at 1194.

147. *Id.* at 1193.

the parent.¹⁴⁸ The rationale was based in part on the court's finding that jurisdiction over the parent was not necessary to satisfy the forum state's interest in having the dispute adjudicated in Texas.¹⁴⁹ Here, the forum state's interests were satisfied because BMW, the distributor and warrantor of the automobile, had not challenged the court's exercise of jurisdiction.¹⁵⁰ In addition, because BMW appeared to be a profitable and solvent firm, the plaintiff's interest in obtaining convenient and effective relief had also been satisfied.¹⁵¹ Unless the plaintiff could show that the parent, Bayerische, was a necessary party, its presence in the suit would increase the costs to the defendant without benefiting the plaintiff, and would delay a resolution of the suit.¹⁵² The court concluded that asserting jurisdiction over Bayerische would be an unreasonable violation of due process.¹⁵³

*Graco, Inc. v. Kremlin, Inc.*¹⁵⁴ involved a cause of action for patent infringement.¹⁵⁵ Here, the United States District Court for the Northern District of Illinois held that the exercise of personal jurisdiction over a French corporation, SKM,¹⁵⁶ was consistent with due process because the defendant's conduct and connection with the forum state were such that it should reasonably anticipate being haled into court there.¹⁵⁷

The alien corporation's only contact with the state, in

148. *Id.* at 1195. The court relied on *Volkswagen*, stating:

It is not the *presence* of a product in the forum that satisfies the due process requirements of asserting jurisdiction over a foreign defendant. Rather, the *relationship* between the defendant and the forum must be such that it is reasonable . . . to require the corporation to defend the particular suit which is brought there.

Id. at 1193 (emphasis in original) (quoting *Volkswagen*, 444 U.S. at 291).

149. *Id.* at 1194. The court, in *Samuels*, stated that when the reasonableness of requiring a foreign defendant to defend is less than adequate on its face, a court should consider the four factors set out in *Volkswagen*. *Id.* at 1193-94. One of these factors is the forum state's interest in having a dispute adjudicated there. *See supra* notes 70-72 and accompanying text.

150. *Samuels*, 554 F. Supp. at 1194.

151. *Id.*

152. *Id.* As the distributor of Bayerische's autos in the United States, the court found that BMW alone was the natural and logical defendant in this case. *Id.*

153. *Id.*

154. 558 F. Supp. 188 (N.D. Ill. 1982).

155. *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. at 189.

156. SKM appears to be the formal name of the French corporation. *See id.* at 189.

157. *Id.* at 193 (quoting *Volkswagen*, 444 U.S. at 297).

Graco, was through its wholly-owned subsidiary, Kremlin, Inc. (Kremlin), which was incorporated and doing business in Illinois.¹⁵⁸ The court examined the relationship between the parent and its subsidiary, and specifically found that Kremlin had acted as an independent corporate entity, free from dominion by SKM.¹⁵⁹ Therefore, personal jurisdiction over SKM could not be based on its relationship with Kremlin.¹⁶⁰ Nevertheless, the court held that it did have jurisdiction over SKM under the doing business doctrine¹⁶¹ because SKM's products regularly entered the state through its United States subsidiary.¹⁶² The court also noted that by establishing a subsidiary

158. *Id.* at 189-90.

159. *Id.* at 191.

160. *Id.* The court also found that the parent, SKM, had not held Kremlin out as its agent. *Id.*

161. *Id.* at 193. In Illinois the doctrine of doing business is one of general jurisdiction. *Id.* at 192 n.10. Therefore, when a corporation is found to be doing business in the state, it is amenable to service as a resident corporation under ¶ 13.3 of the Civil Practice Act, ILL. REV. STAT., ch. 110 (1977) (current version at ILL. STAT. ANN., ch. 110 ¶ 2-204 (West 1983 & Supp. 1985)). See *Graco*, 558 F. Supp. at 192 n.10. The court, in *Graco*, stated that it was unnecessary to decide whether jurisdiction over the parent could be found under the Illinois long arm statute, ILL. REV. STAT., ch. 110 ¶ 17(1)(b) (1977) (current version at ILL. STAT. ANN., ch. 110 ¶ 2-209(a)(2) (West 1983)), which grants jurisdiction over non-resident defendants who have committed a tortious act within the state, because the court was able to find that jurisdiction existed under the doctrine of doing business. *Graco*, 558 F. Supp. at 192.

162. *Graco*, 558 F. Supp. at 192. The seminal case that stands for the proposition that a court can find jurisdiction over a corporation whose products regularly enter the forum is *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961) (cited favorably by the Supreme Court in *Volkswagen*, 444 U.S. at 298, in support of the "stream of commerce" theory). *Gray* was a products liability case involving a claim for personal injuries, as was *Volkswagen*. In *Gray*, an Illinois resident sued an out-of-state corporation, Titan Valve Mfg. Co. (Titan), and others, for injuries sustained when a water heater allegedly exploded. *Id.* at 434, 176 N.E.2d at 762. Titan moved to dismiss on the grounds that it did not commit a tortious act in the state of Illinois because it did not do business there. *Id.* Titan manufactured a safety valve in Ohio that was incorporated in the hot water heater in Pennsylvania. The heater was then sold to consumers in Illinois. *Id.* at 438, 176 N.E.2d at 764. The Supreme Court of Illinois held that Titan was subject to the jurisdiction of the Illinois courts, stating that "if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products." *Id.* at 442, 176 N.E.2d at 766.

It is questionable, under *Gray*, whether jurisdiction based on the stream of commerce theory is applicable to cases involving business losses, or whether it is limited to personal injury suits. Compare *Allen*, 599 F. Supp. at 389 n.10 (stream of commerce theory is only applicable to tort claims for personal injury) and *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 285 (3d Cir. 1981) (stream of commerce theory

in the state,¹⁶³ SKM intended to market its products there and had derived substantial revenue from sales by Kremlin in Illinois.¹⁶⁴

The United States District Court for the Eastern District of Wisconsin followed similar reasoning in another action alleging patent infringement. In *Brunswick Corp. v. Suzuki Motor Co., Ltd.*,¹⁶⁵ the district court did not investigate whether it was possible to pierce the corporate veil between the Japanese corporate defendants, Hitachi Ltd. (Hitachi) and Mitsubishi Electric Corporation (MELCO), and their subsidiaries.¹⁶⁶ Instead, the court determined that, under *International Shoe Co. v. Washington*¹⁶⁷, it could consider a non-resident's contacts with the forum state through its wholly-owned subsidiaries, without regard to whether the affiliated corporations have maintained a formal separation of corporate identities.¹⁶⁸

was developed as a means of sustaining jurisdiction in products liability cases) with *Copiers*, 576 F. Supp. at 319-20.

In *Copiers*, the court used the stream of commerce theory to help support the exercise of jurisdiction over an alien corporation in an action for business-related injuries. *Id.* The court stated that even though a state's interests are greater with personal injuries, states are certainly concerned about protecting economic interests of local businesses. *Id.* at 321; see also *Toyota*, 561 F. Supp. at 359 (citing the stream of commerce theory to support jurisdiction in an action to enforce an IRS summons on an alien corporation).

163. *Graco*, 558 F. Supp. at 189. One could distinguish the court's findings of jurisdiction over the defendant in *Graco*, from the refusal of the courts in *Hargrave* or *Samuels* to take jurisdiction, because the subsidiary in *Graco* was incorporated in the forum state, whereas this was not the case in either *Hargrave* or *Samuels*. Compare *Graco*, 558 F. Supp. at 189 with *Hargrave*, 710 F.2d at 1156 (subsidiary was a Pennsylvania corporation in Texas forum) and *Samuels*, 554 F. Supp. at 1194 (subsidiary was a Delaware corporation in Texas forum). However, the subsidiary in *Kawasaki* was also not incorporated in the forum, yet the court found jurisdiction over the parent corporation in that case. *Kawasaki*, 604 F. Supp. at 971. In addition, none of these courts mentioned the state of the subsidiary's incorporation as being a relevant factor in their decisions.

164. *Graco*, 558 F. Supp. at 193.

165. 575 F. Supp. 1412 (E.D. Wis. 1983).

166. See generally *Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. 1412 (E.D. Wis. 1983). It appears that none of the defendants' subsidiaries were incorporated in Wisconsin. See *id.* at 1415-16.

167. 326 U.S. 310 (1945) (discussed *supra* notes 48-50, 61-62 and accompanying text).

168. *Brunswick*, 575 F. Supp. at 1419. This holding directly conflicts with the United States Supreme Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). See *supra* notes 38-47 and accompanying text. The *Brunswick* court did discuss the *Cannon* doctrine, but found that in light of *International Shoe* and its progeny, reliance on *Cannon* and the alter-ego principles of corporation law were

The court held that it had jurisdiction over the Japanese parent corporations under the doing business provision of the Wisconsin long arm statute,¹⁶⁹ which gives a court general jurisdiction over a defendant.¹⁷⁰ The court based its holding solely on the business contacts between the subsidiaries and the state,¹⁷¹ even though neither Hitachi's nor MELCO's subsidiaries were related to the subject matter of the patent suit.¹⁷² The court determined that, while the relationship between the defendants' contacts with the state and the cause of action was important, it would not be the controlling criteria.¹⁷³

no longer relevant to the constitutional inquiry into whether an exercise of jurisdiction over a non-resident offends traditional notions of fair play. *Id.* at 1419-20. For further discussion and a critique on this view, see *supra* notes 59-61 and accompanying text.

169. WIS. STAT. ANN. § 801.05(1)(d) (West 1977). This subsection gives the court jurisdiction over a person served where he is engaged in "substantial and not isolated activities within the state." *Id.*

170. WIS. STAT. ANN. § 801.05(1) (revision notes) (West 1977). When jurisdiction rests upon one of the grounds stated in subsection one of the long-arm statute, it is immaterial that the cause of action arose outside of Wisconsin. *Id.*

171. *Brunswick*, 575 F. Supp. at 1421. The parent corporations had no direct contact with Wisconsin at all. *See id.* at 1415. Defendants Hitachi Ltd. (Hitachi) and Mitsubishi Electric Corporation (MELCO) manufactured the motor ignition systems in Japan that were alleged to infringe the plaintiff's patents. *Id.* The two defendant corporations sold these ignition systems, in Japan, to another Japanese corporation, Suzuki Motor, which incorporated them into outboard motors that it manufactured in Japan. *Id.* Some of these motors were sold in Japan to U.S. Suzuki, a subsidiary of Suzuki Motor, which imported the motors into California. *Id.* Eventually some of these motors reached Wisconsin and were sold to the public. *Id.*

172. *See id.* at 1421-23. The defendants argued that they could not reasonably have anticipated being sued in Wisconsin for patent infringement of devices whose sales they did not purposely promote in that state or anywhere in the United States. *Id.* at 1422. The court rejected this argument, stressing the defendant's overall relationship with the forum state through their subsidiaries. *Id.*

173. *Id.* This statement seems to conflict with the Supreme Court's assertion that the "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction." *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)); *see supra* notes 80-81 and accompanying text. However, since the doing business provision of the Wisconsin long arm statute, WIS. STAT. ANN. § 801.05(1)(d) (West 1977), gives a court general jurisdiction over a defendant, a different standard for a court's exercise of personal jurisdiction applies. *See Helicopteros*, 466 U.S. at 414-16 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. at 438, 445). For an assertion of general jurisdiction to be constitutionally valid, the defendant must have "systematic and continuous" contacts with the forum state. *Id.* at 416; *see supra* notes 83-84 and accompanying text.

In *Brunswick*, the parent corporation had no direct contacts with the forum state.

Two cases brought against Toshiba Corporation, *Allen v. Toshiba Corp.*¹⁷⁴ and *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*,¹⁷⁵ demonstrate that courts can arrive at different conclusions under similar facts. Toshiba Corporation (Toshiba) is a Japanese corporation that manufactures, among other things, photocopiers, and does business in the United States through its wholly-owned subsidiary, Toshiba America, Inc. (TAI), a New York corporation.¹⁷⁶ Both suits involved business torts and other business related charges.¹⁷⁷ In both instances, the only contact Toshiba had with the forum state was through its subsidiaries.¹⁷⁸ In *Allen*, the United States District Court for

See Brunswick, 575 F. Supp. at 1415. Therefore, under *Helicopteros*, it could be argued that the court's assertion of jurisdiction in *Brunswick* was constitutionally invalid. *See Helicopteros*, 466 U.S. at 414-16. Although the *Brunswick* court did not address the "continuous and systematic" test, it is likely that the court would have found that the subsidiary's contact with the forum provided the continuous and systematic contacts that were necessary, even though the contacts were those of the subsidiary and not the parent. *See Brunswick*, 575 F. Supp. at 1419. "This Court believes that the constitutional analysis under *International Shoe* permits consideration of a non-resident's contacts with the forum state through its wholly-owned subsidiaries without regard to whether the affiliated corporations have maintained a formal separation of corporate identities." *Id.*

174. 599 F. Supp. 381 (D.N.M. 1984).

175. 576 F. Supp. 312 (D. Md. 1983).

176. *See Copiers*, 576 F. Supp. at 316; *Allen*, 599 F. Supp. at 386-87. Toshiba America, Inc. (TAI), the subsidiary, purchased photocopiers from its parent, Toshiba Corporation (Toshiba), F.O.B. Japan. *Copiers*, 576 F. Supp. at 316; *see Allen*, 599 F. Supp. at 383.

Neither of these suits took place in the state in which TAI was incorporated (New York), nor where its principal office was located (New Jersey), so the state of incorporation is not a factor that separates or explains the difference in these decisions.

177. In *Allen* the charges were, inter alia, breach of warranty and fraudulent misrepresentation. *Allen*, 599 F. Supp. at 383. In *Copiers* the charges were, inter alia, breach of contract, negligence, breach of warranty and fraudulent and negligent misrepresentation. *Copiers*, 576 F. Supp. at 315. Jurisdiction, or the lack of it, was based in each case on transaction of business provisions of the long arm statute of the respective states, rather than on tort provisions of the statutes. *See Copiers*, 576 F. Supp. at 321; *Allen*, 599 F. Supp. at 388. The court, in *Copiers*, based jurisdiction on the section of Maryland's long arm statute referring to the defendant's transaction of business in the state, MD. CTS. & JUD. PROC. CODE ANN. § 6-103(b)(1) (Michie 1984). *Copiers*, 576 F. Supp. at 321. The court, in *Allen*, held that it did not have jurisdiction over the defendant. *Allen*, 599 F. Supp. at 392. In so holding, the court referred to the section of the New Mexico long arm statute which provides a court jurisdiction over a defendant that transacts any business within the state, N.M. STAT. ANN. § 38-1-16(A)(1) (Michie 1978). *Allen*, 599 F. Supp. at 388.

178. *See Allen*, 599 F. Supp. at 386; *Copiers*, 576 F. Supp. at 316. Toshiba, the parent, was not licensed to do business in either New Mexico or Maryland, nor did it own or lease any real property or maintain any bank accounts, offices, employees or

the District of New Mexico held that it did not have jurisdiction over the parent corporation because the plaintiff was unable to establish that TAI was an alter-ego of Toshiba, or that there was an agency relationship between the two corporations.¹⁷⁹ Although the defendant's subsidiary did business with the state, the contacts were not sufficient to sustain jurisdiction over the parent corporation under the *Cannon* doctrine.¹⁸⁰

Under similar facts, the court in *Copiers* reached the opposite conclusion of the *Allen* court.¹⁸¹ In *Copiers*, the court determined that when Toshiba manufactured its copiers for sale in the United States, it performed a "forum-related act."¹⁸² By placing its goods into the stream of commerce, the corporation should have reasonably anticipated being haled into court in any state where its goods were sold and had injured someone.¹⁸³ Furthermore, the court found that Toshiba purposely availed itself of the privileges and immunities of Maryland's laws by selling its goods in the state and receiving substantial revenues from those sales.¹⁸⁴ The court held that its exercise of jurisdiction over Toshiba under the Maryland long arm statute was therefore reasonable and proper.¹⁸⁵ The court did not discuss the existence of an agency relationship between the two corporations or factors relating to the alter-ego theory.¹⁸⁶

places for the regular conduct of business in either state. See *Allen*, 599 F. Supp. at 386; *Copiers*, 576 F. Supp. at 316.

179. See *Allen*, 599 F. Supp. at 390-92.

180. See *id.* at 391. The court also asserted that as a general rule "a foreign corporation is not subject to the jurisdiction of the forum state merely because its subsidiary is present or doing business there." *Allen*, 599 F. Supp. at 389 (quoting *Hargrave*, 710 F.2d at 1159).

181. See *Copiers*, 576 F. Supp. at 320.

182. *Id.* at 319.

183. *Id.* at 320 (citing *Volkswagen*, 444 U.S. at 297). For a comparison of the applicability of the stream of commerce theory in cases involving personal injury, with cases involving business losses, see *supra* note 162.

184. *Id.* at 320.

185. *Id.* at 321. The *Copiers* court held that it had jurisdiction over Toshiba under the subsection of the Maryland long arm statute that gives a court jurisdiction over a person who directly, or by an agent transacts, any business or performs any work in the state. MD. CTS. & JUD. PROC. CODE ANN. § 6-103(b)(1) (Michie 1984). *Copiers*, 576 F. Supp. at 321.

186. See generally *Copiers Calculators Typewriters, Inc. v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983). The court did discuss some factors that tend to negate an inference of an alter-ego relationship between the parent and the subsidiary. For example, the court noted that Toshiba did not conduct business from its subsidiary's facilities, had no common directors, and did not maintain joint bank accounts with it.

The concept of agency and the alter-ego doctrine formed the bases of the traditional New York approach to jurisdiction over alien corporations that have subsidiaries doing business in the state.¹⁸⁷ One variation of this approach was *Bulova Watch Co. Inc. v. K. Hattori & Co., Ltd.*,¹⁸⁸ a case involving allegations of unfair competition.¹⁸⁹ The defendant in *Bulova*, K. Hattori & Co., Ltd. (Hattori) was a Japanese corporation with its principal offices in Tokyo.¹⁹⁰ Its primary connection with the forum state, New York, was through its subsidiaries.¹⁹¹

In *Bulova*, the United States District Court for the Eastern District of New York found two possible predicates for jurisdiction over Hattori: the state's long arm statute, which provides for jurisdiction when a defendant has committed a tortious act in-state, or out-of-state with in-state consequences,¹⁹² and the

Id. at 316-17. The court did, however, mention that TAI used Toshiba's trademark, and implied that Toshiba and TAI held themselves out to the public as one corporation. *Id.* at 320.

187. *See, e.g.*, *Taca Int'l Airlines, S.A. v. Rolls-Royce of England, Ltd.*, 15 N.Y.2d 97, 102, 204 N.E.2d 329, 331, 256 N.Y.S.2d 129, 132 (1965) (alien corporation is considered to be doing business in New York if its affiliated company is in effect a local department separately incorporated); *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 537, 227 N.E.2d 851, 854, 281 N.Y.S.2d 41, 44 (alien corporation does business in New York if the affiliated company acts as an agent for the parent), *cert. denied*, 389 U.S. 923 (1967).

188. 508 F. Supp. 1322 (E.D.N.Y. 1981). For a detailed analysis of this case, see Comment, *Jurisdiction Over a Foreign Corporation on the Basis of its Subsidiary's Activities in New York: Bulova Watch Co. v. K. Hattori & Co.*, 9 BROOKLYN J. INT'L L. 91 (1983).

189. *Bulova*, 508 F. Supp. at 1329. In this action the plaintiff, Bulova Watch Co. charged K. Hattori & Co. (Hattori), and certain individual defendants with unfair competition, disparagement and conspiracy to raid plaintiff's marketing staff in order to appropriate the plaintiff's trade secrets. *Id.* The damages were for business losses rather than personal injury. *See id.*

190. *Id.*

191. *See id.* The defendant, Hattori, owned all of the stock of Seiko Corporation of America (SCA), a New York corporation. SCA owned all of the stock of Seiko Time Corporation, Pulsar Time, Inc. and SPD Precision, Inc., all New York corporations. Hattori contracted in Japan for the manufacture of its watches and sold them under the Seiko, Pulsar and other brand names to its three American sub-subsidiaries. *Id.* at 1329. Hattori may have had ties with New York other than those established by its subsidiaries, but the court did not discuss any, except in relation to one of Hattori's officers, Moriya. *See infra* note 196.

192. N.Y. CIV. PRAC. LAW § 302(a)(2), (3) (McKinney 1972); *see Bulova*, 508 F. Supp. at 1345-47. The court held that it could exercise jurisdiction over Hattori under section (a)(2) of the long arm statute, N.Y. CIV. PRAC. LAW § 302(a)(2) (McKinney 1972), which provides for jurisdiction over a defendant that commits a tortious act in New York. *Bulova*, 508 F. Supp. at 1347. In addition, the court found that it had jurisdiction over the defendant under section (a)(1) of the long arm statute, N.Y.

doing business doctrine.¹⁹³ The court found that while the case presented a factual pattern that did not meet the requirements of either the doing business doctrine or the long arm statute, a combination of the two categories could cover the claims asserted.¹⁹⁴

After taking judicial notice of multinational operations in general and the Japanese hierarchical corporate structure in particular,¹⁹⁵ the court examined the relationships between the parent and its subsidiaries.¹⁹⁶ The court held that when a sub-

CIV. PRAC. LAW § 302(a)(1) (McKinney 1972 and Supp.), which gives New York courts jurisdiction over a defendant that transacts business in the state. *Bulova*, 508 F. Supp. at 1345-47. The plaintiff had also alleged that the court had jurisdiction over Hattori under section (a)(3) of the long arm statute, N.Y. CIV. PRAC. LAW § 302(a)(3) (McKinney 1972). *Bulova*, 508 F. Supp. at 1347. The court did not decide this issue, however, because it had found that jurisdiction over the defendant existed under sections 301 (discussed *infra* note 193 and accompanying text), 302(a)(1) and 302(a)(2) of the New York Civil Practice Law. *Bulova*, 508 F. Supp. at 1347.

193. See *Bulova*, 508 F. Supp. at 1326. The doing business doctrine is embodied in section 301 of the New York Civil Practice Law, which states that "[a] court may exercise such jurisdiction over person, property, or status as might have been exercised heretofore." N.Y. CIV. PRAC. LAW § 301 (McKinney 1972). Section 301 confers personal jurisdiction over unlicensed foreign and alien corporations that are doing business in New York. See *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 200 N.E.2d 427, 251 N.Y.S.2d 433 (1964); *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

194. *Bulova*, 508 F. Supp. at 1327.

195. *Id.* at 1335-40. In its examination of Japanese multinational corporations, the court stressed the inherent control that Japanese parent corporations maintain over their subsidiaries. *Id.* at 1339. For a critique of the *Bulova* court's use of judicial notice, see Comment, *supra* note 188, at 105-08, 112 (discussed *infra* note 199).

196. See *Bulova*, 508 F. Supp. at 1329-33, 1340-41. One of the most important factors the court examined was the role of Moriya, an officer of Hattori, and one of the individual defendants that the plaintiff charged with, among other things, conspiracy to raid the plaintiff's marketing staff. See *id.* at 1329. During the period that the complained-of events occurred, Moriya was president and director of SCA, sole director of Pulsar Time and SPD Precision, director of Seiko Time, an officer of two other of Seiko's United States subsidiaries, and a director of a third. *Id.* at 1329-30. At the same time Moriya held the positions at Hattori of Deputy Manager, Manager of the International Marketing Department and, significantly for the purpose of the *Bulova* litigation, Manager of the Personnel Department. *Id.* at 1331.

Although the defendant asserted that, while in New York, Moriya was acting only on behalf of Hattori's United States subsidiaries and not for Hattori itself, the court was not persuaded by this argument. See *id.* The court found that the actions taken by Moriya in New York were undertaken on behalf of Hattori, to expand the parent corporation's presence in the United States. *Id.* at 1341. While the court did not explicitly state that Moriya was acting as Hattori's agent while in New York, the implication is apparent. See *id.* at 1331. "Common sense . . . dictates . . . that while in the United States Moriya loyally performed substantial services for Hattori." *Id.* Signifi-

subsidiary establishes and expands a parent's market position in the United States, for as long as the activity is being conducted in New York, and with respect to activities furthering the parent's ends, the parent is doing business in New York.¹⁹⁷ This novel approach has yet to be adopted in other jurisdictions,¹⁹⁸

cantly, the court stated that its finding that it had jurisdiction over Hattori under the doing business doctrine, due to the activities of Hattori's subsidiaries, was buttressed by the fact that the cause of action was integrally related to Hattori's doing business within the state. *Id.* at 1344.

Although the court claimed that it was not piercing the corporate veil, *id.* at 1342, the court discussed some factors relevant to that doctrine. In addition to discussing the interchange of officers and directors between Hattori and its subsidiaries, the court pointed out that the corporations had held themselves out as one entity in advertisements. *See id.* at 1329-30 (interchange of officers and directors); *id.* at 1332, 1340 (holding themselves out as one corporation).

197. *Id.* at 1344-45. The court stated that its holding was particularly applicable "as to activities directly related to primary steps taken to ensure a place for its subsidiaries, as where action is taken to raid an established competitor's personnel in penetrating the American market." *Id.* at 1345.

198. The *Bulova* court's decision to exercise jurisdiction over an alien parent corporation in connection with its use of subsidiaries to establish and expand its market position in the United States, has only been followed in one case. *See Androlonis v. United States*, 526 F. Supp. 183 (N.D.N.Y. 1981). Unlike *Bulova*, *Androlonis* involved the control by an individual, Werner Glatt, over a West German and a United States corporation. *Id.* at 189-90. Mr. Glatt owned 100% of the stock of the West German corporation, Glatt GmbH, and 85% of the stock of the United States distributor of the products of Glatt GmbH, Glatt Air Techniques, Inc. (GAT). *Id.* at 185-86. Although GAT was not the subsidiary of Glatt GmbH, the court found that Glatt GmbH controlled GAT through Werner Glatt. *Id.* at 190. The court held that it had jurisdiction over Glatt GmbH. *Id.* at 190. In support of this exercise of jurisdiction, the court pointed to GAT's recent incorporation and dependence on Glatt GmbH. *Id.* at 189 (citing *Bulova*, 508 F. Supp. at 1337-38). In addition, the court mentioned the importance of the United States market to Glatt GmbH's continued growth, as well as the significance of GAT's contribution to Glatt GmbH's earnings. *Id.* at 189-90. The court held that, given these facts, it would be unfair for Glatt GmbH to escape jurisdiction, especially in an action arising out of the activities of GAT that furthered Glatt GmbH's ends. *Id.* at 190 (citing *Bulova*, 508 F. Supp. at 1344-45).

Since *Bulova*, a number of New York cases have reaffirmed the importance of the traditional agency and the alter-ego concepts in determining jurisdiction over alien corporations. *See, e.g., Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984). In *Volkswagenwerk*, the Court of Appeals for the Second Circuit stated that officers of a corporation that owns the stock of another corporation necessarily exercise control over the subsidiary and its board of directors in their capacity as representatives of the controlling stockholder. *Id.* at 120, 121. This factor alone is not enough to subject the parent to jurisdiction in New York. *Id.* Only when the parent shows a disregard for the separate corporate existence of the subsidiary will New York courts be able to assert jurisdiction over the parent. *Id.* at 120. The issues that the court viewed as relevant in deciding when to assert jurisdiction were common ownership, financial dependence of the subsidiary on the parent, the degree to which the parent interferes in the selection and assignment of executive

and one commentator has criticized the decision as advancing a policy that could have a negative impact on international trade.¹⁹⁹

As these cases demonstrate, the case law in the United States addressing jurisdiction over alien parent corporations that have subsidiaries doing business in the United States has been inconsistent. Some courts have followed the *Cannon* doc-

personnel of the subsidiary and fails to observe corporate formalities, and the degree of control the parent exercises over the marketing and operational policies of the subsidiary. *Id.* at 120-22. In *Volkswagenwerk*, the court held that it did have jurisdiction over the defendant, a Delaware corporation that had a subsidiary doing business in New York. *Id.* at 122. One element that the court found important was that the parent had given a no-interest loan to the subsidiary with no stated payment date, along with other extensions of credit. In addition, the parent paid the entire salaries of the officers it shared with the subsidiary, and the subsidiary conducted no formal meetings of its board of directors except for quarterly marketing meetings. *Id.* at 121-22. These factors, taken together, were sufficient to give New York courts jurisdiction over the parent corporation. *Id.* at 122.

In another recent case, *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523 (S.D.N.Y. 1985), the District Court for the Southern District of New York stated that a subsidiary will be considered a "mere department" of its parent for purposes of § 301 of the N.Y. CIV. PRAC. LAW (McKinney 1972) (doing business doctrine), only if the foreign parent's control of the subsidiary is pervasive enough that the corporate separateness is more formal than real. *Mayer*, 601 F. Supp. at 1529 n.5. In *Mayer*, the court determined that the United Kingdom parent corporation did not exercise pervasive control over its United States subsidiary, a New York corporation, and therefore the court could not exercise jurisdiction on that basis. *Id.* Alternatively, the court examined the possibility of exercising jurisdiction over the parent based on the concept of agency. *Id.* Under the agency theory, a parent would be subject to suit in New York under the doing business doctrine if the subsidiary was doing business in New York on the parent's behalf. *Id.* The court stated that corporate affiliation may, in light of the facts of a case, give rise to a valid inference of agency. *Id.* In this instance, however, the court found that the subsidiary's advertising, promotion and servicing were done on its own behalf to further its own corporate purpose. *Id.* In addition, the subsidiary had no power to bind the parent in any way. *Id.* Therefore, the court concluded that the common ownership of the parent and the subsidiary did not give rise to a valid inference of agency. *Id.*

199. See Comment, *supra* note 188, at 112. That Comment especially criticized the *Bulova* court's extensive use of judicial notice to support its finding that Hattori controlled its United States subsidiaries. *Id.* The Comment stated that an inquiry into the development of a corporation entering the United States market may be helpful in setting guidelines for determining the implications of control by a parent corporation over its subsidiary. *Id.* Nevertheless, an analysis of a particular country's economic hierarchy may place an alien corporation that is attempting to utilize the United States market at the disadvantage of being categorized on the basis of its own nation's customs. *Id.* The Comment concluded that the likely result of this type of approach is to discourage alien corporations from entering the United States market. *Id.*

trine,²⁰⁰ while others have not.²⁰¹ Still, other courts have not discussed *Cannon* at all, and instead, they have based their exercise of jurisdiction over parent corporations on the stream of commerce or purposeful availment theories.²⁰² The inconsistency in the case law makes it difficult for potential defendants to structure their conduct with certainty, because they cannot predict which of their actions may render them liable to suit.²⁰³ This result is troubling, especially because the United States Supreme Court has determined that one of the purposes of the due process clause is to enhance the predictability of the United States legal system.²⁰⁴ There is no justifiable reason why, under similar facts, Toshiba Corporation should be subject to the jurisdiction of Maryland courts but not those of New Mexico.²⁰⁵

II. LAW OF THE UNITED KINGDOM AND THE UNITED STATES-UNITED KINGDOM CONVENTION

Unlike United States law on jurisdiction over alien corporations, the law of the United Kingdom in this area has been relatively uniform.²⁰⁶ A company²⁰⁷ that is incorporated in the United Kingdom is subject to the jurisdiction of that nation's courts.²⁰⁸ Companies incorporated outside of the United

200. See, e.g., *Samuels v. B.M.W. of N. Am.*, 554 F. Supp. 1191 (E.D. Tex. 1983) (discussed *supra* notes 140-53 and accompanying text).

201. See, e.g., *Brunswick*, 575 F. Supp. at 1418-21 (discussed *supra* notes 165-73 and accompanying text).

202. See, e.g., *Kawasaki*, 604 F. Supp. at 970-71 (stream of commerce and purposeful availment) (discussed *supra* notes 113-25 and accompanying text); *Copiers*, 576 F. Supp. at 319-20 (stream of commerce and purposeful availment) (discussed *supra* notes 175-78, 181-86 and accompanying text).

203. See *Burger King Corp. v. Rudzewicz*, — U.S. at —, 105 S. Ct. at 2182.

204. See *id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297).

205. Compare *Allen v. Toshiba Corp.*, 599 F. Supp. 381 (D. N.M. 1984) with *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983). For a discussion of *Allen* and *Copiers*, see *supra* notes 174-86 and accompanying text.

206. See Fawcett, *Jurisdiction and Subsidiaries*, 1985 J. Bus. L. 16; Schmitthoff, *The Wholly Owned and the Controlled Subsidiary*, 1978 J. Bus. L. 218, 219-24 [hereinafter cited as Schmitthoff, 1978]; Schmitthoff, *Multinationals in Court*, 1972 J. Bus. L. 103, 105-09 [hereinafter cited as Schmitthoff, 1972]; 1 A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 186-89 (10th ed. 1980). But see *infra* notes 220-21 and accompanying text on the lack of United Kingdom case law in this area.

207. In the United Kingdom the term "company" is used to include corporations. See, e.g., *Companies Act 1985* (Halsbury 1985).

208. See *Companies Act 1985*, § 725(1) (Halsbury 1985). Service of a document

Kingdom that establish a "place of business"²⁰⁹ there are required to register with the registrar of companies²¹⁰ and are subject to service of process.²¹¹ A company will be considered to have a place of business in the United Kingdom if the place of business is fixed and definite,²¹² and it is established there for a sufficient period of time.²¹³ An alien company that has a place of business in the United Kingdom, but does not comply with the registration requirements of company law there,²¹⁴ may be served at its place of business in the United Kingdom.²¹⁵

One commentator in the United Kingdom²¹⁶ has concluded that the requirement that an alien company have a place of business in the United Kingdom to be subject to jurisdiction there signifies that an alien parent with a branch office in the United Kingdom would be subject to jurisdiction,

on a company incorporated in the United Kingdom can be made by leaving it at, or sending it to, the registered office of the company in the United Kingdom. *Id.* The general rules of jurisdiction do not necessarily apply to cases falling within the scope of the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 15 J.O. COMM. EUR. (No. L 299) 32 (1972); 3 COMMON MKT. REP. (CCH) ¶ 6003 (entered into force on Feb. 1, 1973) [hereinafter cited as the Brussels Convention]. *Cf.* Fawcett, *supra* note 206, at 16 n.2 (stating that his article on jurisdiction and subsidiaries will not address those cases falling within the scope of the Brussels Convention). For a discussion of the Brussels Convention see *infra* notes 244-49 and accompanying text.

209. The term "place of business" includes a share transfer or share registration office. Companies Act 1985, § 744 (Halsbury 1985).

210. *Id.* § 691.

211. *Id.* § 695(1); see 1 A. DICEY & J. MORRIS, *supra* note 206, at 186-89 (commenting on alien companies under the 1948 Companies Act). The sections of the 1948 Companies Act addressing alien companies have remained essentially unchanged under the 1985 Companies Act. Compare Companies Act 1948 §§ 406-423 (Halsbury 1968) with Companies Act 1985 §§ 691-703 (Halsbury 1985). A company incorporated outside of the United Kingdom that establishes a place of business in the United Kingdom will sometimes be referred to as an "oversea company" by the Companies Act 1985. See, e.g., Companies Act 1985, §§ 695, 700, 701 (Halsbury 1985); *id.* § 744 (definition of overseas company).

212. *Okura & Co. v. Forsbacka Jernverks A/B* [1914] 1 K.B. 715, 718 (C.A.); *Saccharin Corp. v. Chemische Fabrik A/G*, [1911] 2 K.B. 516, 522 (C.A.); see *The "Theodohos,"* [1977] 2 Lloyd's L.R. 428.

213. *Okura*, [1914] 1 K.B. at 718; *Thames & Mersey Marine Ins. Co. v. Societa di Navigazione a Vapore del Lloyd Austriaco*, [1914] All E.R. 1104, 1106 (ten years is a "substantial time").

214. See Companies Act 1985, §§ 691-693, 696 (registration by oversea companies); *id.* §§ 700-703 (delivery of accounts) (Halsbury 1985).

215. *Id.* § 695(2)(a); see 1 A. DICEY & J. MORRIS, *supra* note 206, at 188.

216. See Schmitthoff, 1978, *supra* note 206; Schmitthoff, 1972, *supra* note 206.

whereas one with a wholly-owned subsidiary would not.²¹⁷ This conclusion is based in part on the law of the United Kingdom, which favors the theory that parent corporations and their subsidiaries, even if wholly-owned, are separate entities.²¹⁸

In the United Kingdom, the theory of corporate separateness was first enunciated in *Salomon v. Salomon & Co.*²¹⁹ In this

217. Schmitthoff, 1978, *supra* note 206, at 223. Professor Fawcett has concluded that whether a parent corporation does business through a branch office, independent commercial agent, or subsidiary, the jurisdictional test is always whether the United Kingdom outlet is acting on behalf of the alien company. Fawcett, *supra* note 206, at 17. It is difficult to evaluate either Professor Schmitthoff's or Professor Fawcett's view as to the jurisdictional tests for alien corporations that have United Kingdom subsidiaries, since there have been so few cases in this area. See Fawcett, *supra* note 206, at 16; Schmitthoff, 1972, *supra* note 206, at 105-09.

One case addressing jurisdiction over an alien parent corporation was *Distillers Co. v. Thompson*, [1971] A.C. 458. *Distillers* involved an United Kingdom parent company that had a subsidiary doing business in Australia. The court, in *Distillers*, found jurisdiction over the United Kingdom parent, but this conclusion was not based on the activities of the subsidiary. Instead, the court found that it had jurisdiction over the parent corporation because the parent had committed an act of negligence in failing to put a warning label on a drug it had manufactured. *Id.* at 469. The warning could have been placed on the drug in England, or the parent company could have communicated to persons in Australia to place the warning on when it arrived there. *Id.* The court concluded that the negligent omission took place in part in Australia, and therefore the court had jurisdiction over the parent corporation. *Id.*

Another case which involved an alien parent with a subsidiary doing business in the United Kingdom was *Deverall v. Grant Advertising Inc.*, [1955] Ch. 111. In this case the plaintiff did not argue that the United States parent was present in the United Kingdom through its subsidiary, but rather that the parent itself had established a place of business in the United Kingdom along with its subsidiary. *Id.* at 111-12. The court held that it did not have jurisdiction over the parent because the parent had not established a place of business in the United Kingdom, and, even assuming that it had done so at one time, such place no longer existed. *Id.* at 115-16, 120.

In *Firestone Tyre and Rubber Co. v. Lewellin*, [1957] 1 W.L.R. 464, a United Kingdom court addressed the issue of whether an alien corporation was present in the United Kingdom through its subsidiary. In that case the court found jurisdiction over a United States parent company whose United Kingdom subsidiary manufactured and sold the parent's tires. *Id.* at 472. The court determined that the subsidiary was a separate legal entity, which sold its own goods, but found that for the purposes of taxation the subsidiary was acting as an agent of its parent. *Id.* at 469. The court's finding of agency was based in part on the parent's right to approve the subsidiary's customers, set the price of the goods, and retain the profit from the subsidiary's sales, less a fixed percentage. *Id.* For a discussion of *Firestone*, see Fawcett, *supra* note 206, at 24.

218. See *Ebbw Vale Urban District Council v. South Wales Traffic Area Licensing Auth.*, [1951] 2 K.B. 366, 370 (citing *Salomon v. Salomon & Co.*, [1897] A.C. 22); Schmitthoff, 1978, *supra* note 206, at 219-20.

219. [1897] A.C. 22.

case, the House of Lords rejected the view that the one incorporator of a wholly-owned company was the principal and the company was his agent.²²⁰ Instead, the court chose to regard the two as separate legal entities.²²¹ The court would disregard the theory of legal separation between a corporation and its incorporators only when fraud or agency could be established, or when the corporation was a "fiction" or "myth."²²²

Since *Salomon*, cases in the United Kingdom have disregarded the corporate form only when the incorporator, whether an individual or corporation, has employed the company as an agent,²²³ or has abused the corporate form.²²⁴ The

220. *Id.* at 31.

221. *Id.* Short of proof of fraud, "it seems . . . impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself." *Id.* at 30 (Halsbury, J.).

222. *See id.* at 33.

223. *See, e.g.,* Re F.G. (Films) Ltd., [1953] All E.R. 615, 616 (United Kingdom company was held to be an agent for an United States company which appeared to have financed the film in question); *Smithe, Stone & Knight v. Birmingham Corp.*, [1939] 4 All E.R. 116, 121 (when the parent controlled the business of the subsidiary, and profits of the subsidiary were treated as profits of the parent, the court found the subsidiary to be carrying on business for the parent); *Commissioners of Inland Revenue v. Sansom*, [1921] 2 K.B. 492, 503 (although a company may be a legal entity under *Salomon*, it may act as an agent for its shareholders, thereby making the shareholders liable for the taxes of the business of the company); *The Gramophone & Typewriter, Ltd. v. Stanley*, [1908] 2 K.B. 89, 96 (a person may cause such an arrangement to be entered between himself and a company as will suffice to make the company his agent for the purpose of carrying on business); *see also* *Camilla Cotton Oil Co. v. Grandex S.A. and Tracom S.A.*, [1976] 2 Lloyd's L.R. 10, 15-16 (comparison of United Kingdom, Swiss and United States law on the doctrine of agency).

Many courts have found that the ability of a United Kingdom company to bind an alien company is the crucial inquiry in determining whether an agency relationship exists between them. In *Thames*, [1914] All E.R. at 1106, the court stated that the question to ask in each case is:

Does the agent, in carrying on the foreign corporation's business, *make* a contract for the foreign corporation, or does the agent, in carrying on his own business, *sell* a contract with the foreign corporation? In the former case the foreign corporation is and in the latter it is not carrying on business at that place.

Id. (emphasis added); *see* *The Lalandia*, [1933] All E.R. 391, 396; *Okura*, [1914] 2 K.B. at 721; *see also* *Saccharin*, [1911] 2 K.B. at 522, 524, 526 (ability of agent to bind the defendant corporation was one factor the court considered in holding that the agent could be served as an officer of the defendant); *Fawcett*, *supra* note 206, at 23 (the most important jurisdictional criterion is the ability of the "outlet" of the alien company to bind the alien company contractually). *But see* *The World Harmony*, [1965] 2 W.L.R. 1275. In *World Harmony*, the court found that it had jurisdiction over a Liberian company due to the activities of its agent in the United Kingdom, even though the agent could not bind the alien company contractually. *Id.* at 1280. The

establishment of a wholly-owned company does not, by itself, constitute an abuse of the corporate form.²²⁵ To argue that the corporate form has been abused, the plaintiff must show something additional, such as demonstrating that the controlled company was a device or a sham.²²⁶ The doctrine of doing business, which is accepted in the United States as a basis for the exercise of jurisdiction,²²⁷ has not been recognized in the United Kingdom.²²⁸ Therefore, courts in the United Kingdom are limited to finding jurisdiction over an alien corporation based on the activities of its subsidiary only when there is an agency relationship or an abuse of the corporate form between the parent and the subsidiary.²²⁹

court based its holding on the fact that the agent actively managed the ship in question for the alien company. *Id.* at 1279-80, 1284.

224. *See, e.g.,* Selangor United Rubber Estates Ltd. v. Cradock, [1968] 1 W.L.R. 1555 (when directors of a company used company money for their own purposes, they would be held personally liable for their illegal transactions); Jones v. Lipman, [1962] 1 W.L.R. 832, 836 (when a United Kingdom company had only nominal capital, was controlled by its principal shareholder, and was created for the purpose of defeating the plaintiff's right to specific performance, the company was declared a sham); *Re F.G. (Films) Ltd.*, [1953] All E.R. at 616 (the court held that a United Kingdom company with almost no capital, no staff, and no premises except its registered office, could not be regarded as the maker of the film in question); Gilford Motor Co. v. Horne, [1933] Ch. 935, 961, 965 (defendant was using his company in breach of a covenant not to compete with his old employer, and the court held that the company was a cloak or sham); *see also* Malyon v. Plummer, [1964] 1 Q.B. 330, 342 (court disregarded the existence of the corporate entity when assessing damages of a wife for the loss of her husband who ran the company and made it profitable).

225. Schmitthoff, 1978, *supra* note 206, at 220; *see Salomon*, [1897] A.C. 22. In *Salomon*, there were seven shareholders but they were all members of one family. *Id.* at 31. The Judge of the first instance, Vaughan Williams, J., appeared to have treated the company as being under the control of Mr. Salomon. *See id.* at 35-36.

226. Jones v. Lipman, [1962] 1 W.L.R. at 836. Abuse of the corporate form is comparable to the United States alter-ego theory because if a United Kingdom court finds that there has been abuse, it will treat the company and its incorporators as one. *See id.* at 836-37.

227. *See, e.g.,* Graco, Inc. v. Kremlin, Inc., 558 F. Supp. at 192-193; Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. at 1333-35, 1344-47.

228. *See* Mathers, *The UK/US Civil Judgments Convention-II*, 127 NEW L.J. 819 (1977).

229. Schmitthoff, 1978, *supra* note 206, at 219-20; *see also* Fawcett, *supra* note 206, at 16-17 (stressing agency relationship between parent and subsidiary as the controlling criterion for jurisdiction under existing law). Some critics in the United Kingdom have taken the view that alien corporations doing business in the United Kingdom through subsidiaries should be treated the same as those doing business in the United Kingdom through a branch office for jurisdictional purposes. *See* Schmitthoff, 1978, *supra* note 206, at 223-24; Schmitthoff, *Salomon in the Shadow*, 1976 J. Bus. L. 305, 312; Schmitthoff, 1972, *supra* note 206, at 109-11; Fawcett, *supra* note 206, at

On October 26, 1976, the United States and the United

25 (stating that, at present, United Kingdom courts will take jurisdiction only when a subsidiary operates as a branch office and can bind the parent contractually). Fawcett has suggested that courts of the United Kingdom should adopt a wider notion of agency to extend jurisdiction over alien multinationals with subsidiaries in the United Kingdom. *Id.* at 23-25. Schmitthoff has suggested that all alien multinationals which carry on substantial business in the United Kingdom should have a registered office there, and that the United Kingdom court in the district where the multinational enterprise has its registered office, should be given jurisdiction over all entities that are a part of the multinational enterprise irrespective of whether they carry on business in the United Kingdom. Schmitthoff, 1972, *supra* note 206, at 110.

Schmitthoff has also suggested that the United Kingdom adopt the view espoused by the European Court of Justice in *Imperial Chem. Indus., Ltd. v. Commission of the European Communities*, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161 (sometimes referred to as the "Dyestuffs Case"). See Schmitthoff, 1978, *supra* note 206, at 223-24. In *Imperial Chemical*, the Court of Justice held that article 85(1) of the Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 3 (1958) (unofficial English translation) [hereinafter cited as EEC Treaty], could be enforced against a company incorporated in a non-Member nation. *Imperial Chemical*, 1972 E. Comm. Ct. J. Rep. at 661-63, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8030-8031. Article 85 of the EEC Treaty addresses agreements that have an anticompetitive effect. EEC Treaty, *supra*, art. 85.

The original member states of the European Economic Community (EEC) were France, Italy, The Federal Republic of Germany, the Netherlands, Belgium, and Luxembourg. EEC Treaty, *supra*, preamble. The United Kingdom, Ireland, and Denmark joined the EEC on January 1, 1973. Treaty of Accession, Jan. 22, 1972, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I). Greece became the tenth member state in 1979. Treaty of Accession of the Hellenic Republic, May 28, 1979, 22 O.J. EUR. COMM. (No. L 291) 9 (1979). Spain and Portugal became Member states of the EEC on January 1, 1986. Treaty of Accession of the Kingdom of Spain and the Portuguese Republic, 28 O.J. EUR. COMM. (No. L 302) 9 (1985).

The Treaty establishing the European Atomic Energy Community, March 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 169 [hereinafter cited as Euratom], was signed on the same date as the EEC Treaty. The two treaties came into force on January 1, 1958 and provided for a Court of Justice for the EEC. EEC Treaty, *supra*, art. 4(1); Euratom, *supra*, art. (3). The Treaty establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189), 261 U.N.T.S. 142, was signed on April 18, 1951 and came into force on July 23, 1952, 1973 Gr. Brit. T.S. No. 2 at 91; 261 U.N.T.S. at 142 n.1.

The Court of Justice administers three bodies of Community law, those of the European Coal and Steel Community, the European Atomic Energy Community, and the EEC. Convention on Certain Institutions Common to the European Communities, Mar. 25, 1957, § II, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II). The jurisdiction of the Court is defined in articles 169-83 of the EEC Treaty. EEC Treaty, *supra*, art. 169-83.

The issue in *Imperial Chemical* was whether increases in the price of dyestuffs that occurred in Italy, The Netherlands, Belgium, Luxembourg, Germany, and France in 1964, 1965 and 1967 had been made by mutual agreement between certain European manufacturers of dyestuffs, in violation of article 85 of the EEC Treaty. *Imperial*

Kingdom initialed a Convention on the Reciprocal Recogni-

Chemical, 1972 E. Comm. Ct. J. Rep. at 622, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8003. The Commission of European Communities (the Commission) had found that these increases stemmed from concerted practices of the defendant that were in violation of article 85 of the EEC Treaty. See 12 J.O. COMM. EUR. (No. L 195) 11 (1969). The Court of Justice affirmed the Commission's decision, denying the defendant's application for the annulment of that decision. *Imperial Chemical*, 1972 E. Comm. Ct. J. Rep. at 648-64, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8024-8032.

In *Imperial Chemical* the Court of Justice addressed the issue of the Commission's jurisdiction over the defendant, a company incorporated in the United Kingdom, which at that time, had not yet joined the EEC. While the Commission argued that its jurisdiction extends to conduct outside the EEC if the conduct produces effects within the Community, the Court did not base its holding of jurisdiction on this theory. Instead, the Court held that by and through its relationship with its subsidiary in the Common Market, the defendant had itself acted in the Common Market, stating:

The fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company. Such may be the case in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

Id. at 662, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8031. The Court then found that the defendant was able to, and did, influence the sale price policy of its subsidiary in the Common Market. *Id.* The Court concluded:

the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition. It was in fact the [defendant] which brought the concerted practice into being within the Common Market. The submission as to lack of jurisdiction raised by the [defendant] must therefore be declared to be unfounded.

Id. at 663, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8031.

The Court's position, in *Imperial Chemical*, on the Commission's jurisdiction over the defendant, has been criticized, most significantly by the Advocate General in *Imperial Chemical*. The Advocate General was not convinced that the Commission had sufficiently demonstrated that the defendant controlled its subsidiary to such an extent that the subsidiary's separate legal personality should be denied. See *id.* at 693, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8055. The Advocate General was therefore unwilling to adopt the Commission's position that the parent company acted within the Common Market through its control of its subsidiary. See *id.*

For other critiques of the Court's decision in *Imperial Chemical*, see Mann, *The Dyestuffs Case in the Court of Justice of the European Communities*, 22 INT'L & COMP. L.Q. 35, 46-50 (1973); Note, *Common Market—Antitrust—Interpretation of Concerted Practices Within the Meaning of Article 85—Extraterritorial Jurisdiction of the European Commission*, 14 HARV. INT'L L.J. 621, 628 (1973). "Since the enterprise theory is premised upon a finding of complete economic control of the subsidiary by the parent, the long-term relationship of [the parent] and its subsidiary should have been indicated more fully." *Id.*

tion and Enforcement of Judgments in Civil Matters.²³⁰ Articles 10 and 11 of the convention list the bases for jurisdiction which would entitle a judgment to reciprocal recognition, as long as the judgment has binding effect within the "territory of origin."²³¹ A few sections of article 10 are pertinent to alien corporations that do business²³² within the territory of origin.

230. U.S.-U.K. Convention, *supra* note 23. This convention does not address the grounds on which the courts of either nation may exercise jurisdiction. The convention only addresses the circumstances under which these judgments will be recognized and enforced in the other nation. *Id.* art. 2(1).

The Draft Convention has not been ratified, and negotiations on it have been suspended for the time being. *See* Von Mehren, *Recognition and Enforcement of Foreign Judgments: Contemporary Practices and the Role of Conventions*, in 1980 PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS 223, 277-78 n.78. The 1976 draft was met with hostility in the United Kingdom, most especially from United Kingdom insurance interests. *Id.* It appeared that these organizations were most concerned about jurisdiction under United States long arm statutes, and the size of United States jury verdicts. *Id.* In an effort to rectify some of the disagreements on the draft, further negotiations were undertaken in September 1978. *Id.* These negotiations lead to an unsigned text of September 1978. *Id.* On May 14, 1980, the British Embassy in Washington delivered a note to the Department of State, advising the United States that the reactions to the draft text from major representative organizations continued to be hostile. *Id.* Therefore, the United Kingdom authorities concluded that there was no prospect of reaching an agreement on a convention in this area at the present time. *Id.* There have been no further negotiations on the U.S.-U.K. Convention since 1978. Telephone interview with P. Fund of the International Law Office of the State Department, March 3, 1986.

231. U.S.-U.K. Convention, *supra* note 23, art. 4(1)(a), (b). Territory of origin is defined as the nation, either the United States or the United Kingdom, for which the court of origin was exercising jurisdiction. *Id.* art. (1)(i), (j). the "court of origin" is defined as the court which gave a judgment for which recognition or enforcement is sought under the convention. *Id.* art. 1(d).

232. Article 10(j) of the U.S.-U.K. Convention has a provision for jurisdiction based on the commission of a tort, resulting in injury to person or property that could extend to alien corporations. *Id.* art. 10(j). Under this section, however, both the act or omission that caused the injury or damage and the actual injury or damage has to have occurred in the nation in which the court of origin exercised jurisdiction. *Id.* So where a United Kingdom corporation committed a negligent act in the United Kingdom, and then shipped products to the United State which caused injury to someone there, jurisdiction of the United States courts would not lie under § 10(j). *See* Mathers, *supra* note 228, at 820. Because it would seem that a company would be most likely to commit a tortious act or omission in the nation in which it has its principle place of business, this provision would not be very useful as a vehicle to reach alien corporations through their subsidiaries or otherwise. *Compare* U.S.-U.K. Convention, *supra* note 23, with Brussels Convention, *supra* note 208, art. 5(3). The Brussels Convention states that a defendant domiciled in the territory of a Contracting State may be sued in another Contracting State in cases of torts or quasi torts, before the court of the place where the injury occurred. Brussels Convention, *supra* note 208, art. 5(3). This section has been interpreted by the European Court of Justice as giving a plaintiff the option of proceeding in the court of the place where

Under that article, a court will have jurisdiction when a corporate defendant has its principal place of business, or was incorporated in the forum state.²³³ Jurisdiction will also be valid if a defendant has a branch or "other establishment" within the territory of origin,²³⁴ or when it conducts business on a continuing basis.²³⁵ In these latter two situations, however, article 10 *specifically excepts* subsidiary corporations, so that a judgment will not be recognized when jurisdiction is based on the presence, or business activities, of a subsidiary of the defendant in the forum.²³⁶

The provisions of article 10 depart, to a certain extent, from United States law.²³⁷ Article 10 eliminates the possibility of treating an independent subsidiary as having acted on behalf of a corporate defendant.²³⁸ However the alter-ego doctrine should be viable, because piercing the corporate veil is similar to a finding that the subsidiary is a mere division or branch of the defendant.²³⁹

Ratification by the United States Senate of conventions on the enforcement of judgments, such as the United States-United Kingdom Convention, would provide a number of benefits to the United States. First, ratification might result in a

the act *or* the injury occurred. *Handelswerkerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1976 E. Comm. Ct. J. Rep. 1735, [1976 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8378; *see Mathers, supra* note 228, at 820.

233. The U.S.-U.K. Convention, *supra* note 23, art. 10(b). In the case of an unincorporated association, the court of the state where the association has its headquarters will have jurisdiction. *Id.*

234. *Id.* art. 10(c).

235. *Id.* art. 10(e).

236. *Id.* art. 10(c), (e).

237. *See Smit, The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443, 461; *see, e.g., Brunswick Corp. v. Suzuki Motor Co.*, 575 F. Supp. at 1421 (interpretation of the doing business provision of the Wisconsin long arm statute by the United States District Court for the Eastern District of Wisconsin). In *Brunswick*, the court interpreted the provision to include the activities of subsidiaries as a basis for jurisdiction over parent corporations. *Id.*; *see supra* notes 165-73 and accompanying text.

238. U.S.-U.K. Convention, *supra* note 23, art. 10(c), (e).

239. *See, e.g., Coca-Cola Co. v. Procter & Gamble Co.*, 595 F. Supp. 304, 308 (N.D. Ga. 1978) (division or department); *Taca Int'l Airlines, S.A. v. Rolls-Royce of Eng., Ltd.*, 15 N.Y.2d 97, 102, 204 N.E.2d 329, 331, 256 N.Y.S.2d 129, 132 (1965) (mere department); *see also* P. BLUMBERG, *supra* note 10, at 85 (discussion of New York courts' use of the "mere department" theory). The presence of a branch office of the defendant is a valid basis for jurisdiction under the U.S.-U.K. Convention. U.S.-U.K. Convention, *supra* note 23, art. 10(c).

more uniform recognition of foreign nation judgments in United States courts.²⁴⁰ In addition, ratification of such conventions may lead to increased recognition of United States judgments abroad.²⁴¹ Most importantly,²⁴² ratification of conventions on the enforcement of judgments, especially with members of the European Economic Community (EEC),²⁴³ would help to eliminate a problem that has arisen in connection with the EEC Convention on Jurisdiction and the Enforcement of Judgments (the Brussels Convention).²⁴⁴ The Brussels Convention discriminates²⁴⁵ against United States domiciliaries²⁴⁶ in its validation of the exercise of so-called "exorbitant"²⁴⁷ jurisdiction over defendants not domiciled in a contracting state.²⁴⁸

240. Smit, *supra* note 237, at 443; see Comment, *The Effect of the Proposed U.S.-U.K. Reciprocal Recognition and Enforcement of Civil Judgments Treaty on Current Recognition Practices in the United States*, 18 COLUM. J. TRANSNAT'L L., 119, 120 (1979).

241. Smit, *supra* note 237, at 444. Professor Smit points out that as between the United States and the United Kingdom this would not be an advantage to the passage of a recognition treaty since both countries have liberal recognition rules. *Id.* at 444 n.9 and accompanying text.

242. *Id.* at 445.

243. For a definition and discussion of the EEC, see *supra* note 229.

244. See *supra* note 208.

245. See Smit, *supra* note 237, at 445; Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 998-1001 (1967).

246. For purposes of the Brussels Convention the domicile of a corporation is where the seat of the company is located. Brussels Convention, *supra* note 208, art. 53.

247. See, e.g., Smit, *supra* note 237, at 445. Some examples of exorbitant jurisdiction would be the civil codes of France and Luxembourg, which allow for a proceeding to be brought in the courts of each respective nation as long as the plaintiff is a citizen of that nation. Code de procedure civile [C. PR. CIV.] art. 14 (Dalloz 1985-86) (France); Code Civil [C. Civ.] art. 14 (Luxembourg). Another example is the Federal Republic of Germany, where jurisdiction vests on the basis of the presence of assets. Zivilprozessordnung [ZPO] art. 23 (code of civil procedure). German courts have interpreted this provision to render judgments in excess of the value of the assets present. See Bartlett, *Full Faith and Credit Comes to the Common Market: Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44, 53 (1975). For a discussion of these, and other forms of exorbitant jurisdiction in the context of the Brussels Convention, see Bartlett, *supra*, at 53; Nadelmann, *supra* note 245, at 998-99 (using the term "improper fora" rather than "exorbitant jurisdiction").

248. Brussels Convention, *supra* note 208, art. 4. Article 4 states that if a defendant is not domiciled in the territory of a Contracting State, the jurisdiction of the courts in each Contracting State shall be governed by the laws of that State, which may include exorbitant bases for jurisdiction. *Id.* art. 4. In addition, Contracting States must recognize judgments based on exorbitant jurisdiction rendered by other

The Brussels Convention does allow for a member state to enter into agreements with third countries to alter the rule permitting the recognition of exorbitant jurisdiction.²⁴⁹ Article 18 of the United States-United Kingdom Convention allows both countries to refuse recognition of judgments based on exorbitant jurisdiction.²⁵⁰ If the United States entered into treaties for the recognition of judgments with members of the EEC, refusal to recognize judgments based on exorbitant jurisdiction could also be incorporated into those agreements.²⁵¹

Finally, even though conventions on the recognition of judgments may not address the actual exercise of jurisdiction,²⁵² the standards they provide for recognition will have a positive influence on United States courts.²⁵³ These standards would, in the case of the United States-United Kingdom Convention, exclude the exercise of jurisdiction over alien corporations based on the activities of their subsidiaries.²⁵⁴

Member States against non-domiciliaries. Smit, *supra* note 237, at 445; see Brussels Convention, *supra* note 208, art. 4, 26, 31. By way of comparison, domiciliaries of Contracting States are to be sued in the courts of the State in which they are domiciled. *Id.* art. 2. The Convention specifies that article 14 of the civil codes of France and Luxembourg, as well as article 23 of the Code of Civil Procedure for the Federal Republic of Germany, and provisions from the codes of other nations that permit judgments based on exorbitant jurisdiction, may not be invoked against a domiciliary of a Contracting State. *Id.* art. 3. Since the United States is not a signatory to the Brussels Convention, the exercise of exorbitant jurisdiction would be permitted over defendants domiciled there. See *id.* art. 4.

249. *Id.* art. 59.

250. See U.S.-U.K. Convention, *supra* note 23, art. 18.

251. See Brussels Convention, *supra* note 208, art. 59.

252. The U.S.-U.K. Convention does not address the actual exercise of jurisdiction. See U.S.-U.K. Convention, *supra* note 23, art. 2(1). However, the Brussels Convention addresses both jurisdiction and the enforcement of judgments. See Brussels Convention, *supra* note 208, arts. 2-24.

253. Mathers, *supra* note 228, at 821.

254. See U.S.-U.K. Convention, *supra* note 23, art. 10(c), (e). If the grounds the Convention sets forth for recognition of judgments were followed by United States courts as guidelines for the exercise of jurisdiction, this would alleviate Professor Smit's fear that the passage of the U.S.-U.K. Convention would result in increased uncertainty in United States law in that the courts would have to construe two sets of rules on adjudicatory authority, rather than one. See Smit, *supra* note 237, at 461-62.

IV. JURISDICTION SHOULD NOT BE EXTENDED TO
FOREIGN CORPORATIONS BASED ON THE
ACTIVITIES OF THEIR SUBSIDIARIES

A. Rationale

There are numerous reasons why certain forms of jurisdiction, such as those based on foreign acts that have effects within the forum, as well as jurisdiction based on the doctrine of doing business, must be judiciously applied, particularly in an international context.²⁵⁵ Because the separate states of the United States are not independently sovereign, allowing them to exercise broad jurisdiction over citizens of other states of the Union is not generally objectionable.²⁵⁶ There is a much greater chance that the laws of two sovereign nations will conflict than the laws of two states.²⁵⁷ When the laws of individual states do conflict, the United States Supreme Court has the authority to resolve internal conflict,²⁵⁸ whereas there is no final arbitrator in disputes between nations. In addition, the burden on an alien defendant to litigate in the United States is potentially greater than that of a domestic corporation to defend itself in a foreign state.²⁵⁹

The jurisdictional tests that are acceptable to United States courts may be viewed as exorbitant in an international context.²⁶⁰ The comity of nations²⁶¹ and the United States' de-

255. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1341 (2d Cir. 1972).

256. Note, *The Outer Limits of In Personam Jurisdiction Over Alien Corporations: The National Contacts Theory*, 16 GEO. WASH. J. INT'L L. & ECON. 637, 656 (1982).

257. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981).

258. U.S. CONST. art. III, § 2, cl. 1; see Note, *supra* note 256, at 656.

259. See *supra* note 5 and accompanying text.

260. Hay & Walker, *The Proposed U.S.-U.K. Recognition of Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753, 759 (1978); see also Note, *supra* note 256, at 656 (international jurisdictional standards arguably must be stricter than domestic ones).

261. The comity of nations dictates "[t]he extent to which the law of one nation, as put in force within its territory . . . shall be allowed to operate within the dominion of another nation . . ." *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). It is neither a matter of absolute obligation nor one of mere courtesy and good will. *Id.* at 163. It is the recognition that one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens and of other persons under the protection of its laws. *Id.* at 163-64.

In *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923) (per Andrews, J.), the New York Court of Appeals defined

sire to maintain favorable relations with other nations²⁶² are policy considerations that should not be overlooked by courts in determining when to exercise jurisdiction over alien corporations.

In addition, enforcing judgments over non-domiciliaries can be difficult.²⁶³ A United States judgment against an alien defendant may be enforced by attaching his assets in the United States.²⁶⁴ However, when the defendant's only asset in the United States is a subsidiary, there are few reasons²⁶⁵ for a plaintiff to sue both the parent and the subsidiary because he may recover the same amount no matter which party he sues.²⁶⁶ When a judgment against an alien parent corporation

comity as "that reciprocal courtesy which one member of the family of nations owes to the others Rules of comity are a portion of the law that [the courts] enforce."

The word "comity" has been used in the following senses in connection with international law:

- 1) the rules of politeness, convenience and goodwill observed by nations in their interactions, without being legally bound by them;
- 2) as an equivalent to private international law;
- 3) (misused) for the "company of nations mutually practicing international comity;"
- 4) (misused) as an equivalent to international law.

1 L. OPPENHEIM, *INTERNATIONAL LAW* 34 n.1 and accompanying text (H. Lauterpacht 8th ed. 1955).

262. Weintraub, *Jurisdiction Over the Foreign Non-Sovereign Defendant*, 19 *SAN DIEGO L. REV.*, 431, 436 (1982).

263. Note, *supra* note 256, at 655. Commentators disagree as to whether the enforceability of judgments against alien defendants is a factor that should be considered when determining how far the jurisdiction of United States courts should extend. *Id.* Some courts believe that the possibility that the judgment may not be enforced is not a sufficient basis to deny jurisdiction where it is otherwise valid. *See Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 236 (9th Cir. 1969); *Engineered Sports Products v. Brunswick Corp.*, 362 F. Supp. 722, 729 (D. Utah 1973).

264. *See* Weintraub, *supra* note 262, at 436.

265. A plaintiff may want to sue both a parent and subsidiary if he is seeking recovery from an undercapitalized subsidiary and is afraid that if judgment is entered only against the subsidiary, that he will not be able to collect. Undercapitalization is, however, one of the factors courts examine under the alter-ego theory, so that jurisdiction over the parent in such a case may be achieved by piercing the corporate veil. *See supra* note 12-13, 33-35 and accompanying text.

266. In a case in which the subsidiaries have no connection with the cause of action, a plaintiff would have to sue the parent corporation to recover. *See, e.g., Brunswick*, 575 F. Supp. 1412. Jurisdiction over a parent corporation based solely on the activities of an autonomous subsidiary, in relation to litigation that is unconnected with the activities of the subsidiary, would seem to be of questionable constitutional validity under *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984). For a discussion of the applicability of these decisions to *Brunswick*, see *supra* note 173 and accompanying text.

is for an amount in excess of the defendant's total assets in the United States, a plaintiff must attempt to get the United States judgment recognized abroad. When jurisdiction has been based on principles that are considered exorbitant by other nations, the likelihood of recognition, enforcement, and recovery is limited.²⁶⁷

The extension of jurisdiction over alien corporations based on the activities of their subsidiaries will probably discourage corporations from establishing subsidiaries in the United States. Alien corporations may ship their goods to the United States through independent distributors rather than risk being subject to the rulings of United States courts through the actions of their subsidiaries.²⁶⁸ Alternatively, an alien corporation might decrease or forego business in the United States. Important policy and commercial considerations are involved in preventing or permitting businesses to limit liability and exposure to governmental regulation.²⁶⁹ To a country engaged in world-wide trade and investment, these considerations are particularly important.²⁷⁰ The choice between extending or limiting jurisdiction may lead to either encouragement or discouragement of investment.²⁷¹ In addition, the expansion of jurisdiction over alien corporations may lead to reciprocal assertions of jurisdiction by other nations.²⁷²

267. Weintraub, *supra* note 262, at 436.

268. See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. at 336. Shipping goods through an independent distributor would not necessarily make an alien corporation immune to suit in the United States. For example the distributor could be found to be the agent of the alien corporation. See, e.g., *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Protos Shipping, Inc.*, 472 F. Supp. 979, 983 (N.D. Ill. 1979) (court held that it had jurisdiction over eight German shipowners because of their commission of tortious acts through their local agent); *Snyder v. Hampton Indus.*, 521 F. Supp. 130, 142-43 (S.D.N.Y. 1981) (court deemed the plaintiffs to be the agents of the non-resident corporate defendant and therefore the court had jurisdiction over the defendant even though the plaintiffs were labeled independent contractors). However, if the alien corporation did not own any property in the United States, there would be no assets of the corporation to satisfy the judgment, forcing a successful plaintiff to get the judgment recognized in a nation where the defendant did have assets.

269. *Frummer v. Hilton Hotel Int'l*, 19 N.Y.2d 533, 540-41, 227 N.E.2d 851, 855, 281 N.Y.S.2d 41, 46-47 (Breitel, J., dissenting), *cert. denied*, 389 U.S. 923 (1967). This proposition is especially true when the enterprises are truly separate corporate entities. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

Commentators have raised strong arguments in support of asserting United States jurisdiction over alien corporations based on the activities of their United States subsidiaries.²⁷³ The most frequently mentioned arguments are the interests of the forum state in reaching alien parent corporations²⁷⁴ and the interest of the plaintiff in litigating in the United States.²⁷⁵

A forum state has an interest in providing its residents with effective forum of redress for injuries caused by non-residents.²⁷⁶ This interest may include protection from economic as well as physical harm.²⁷⁷ However, although a forum state has an interest in protecting its residents, this interest is limited by the due process protections of foreign and alien defendants.²⁷⁸

Similarly, a United States plaintiff has an interest in litigating its claim in the United States.²⁷⁹ When an alien defendant lacks direct contacts with a state in the United States, a plaintiff may face a choice of either bringing an action in a foreign country, or not at all.²⁸⁰ This may place great burdens on a plaintiff.²⁸¹ But although it may be unfair to force a plaintiff to make this choice, the United States Supreme Court has clearly held that the purpose of the minimum contacts test is to “pro-

273. See, e.g., Hay, *The Interrelation of Jurisdiction and Choice-of-Law in United States Conflicts Law*, 28 *INT'L & COMP. L.Q.* 161, 175-76 (1979) [hereinafter cited as Hay, *Interrelation*]; Hay *Judicial Jurisdiction Over Foreign Country Corporate Defendants*, 63 *OR. L. REV.* 431, 453 (1984) [hereinafter cited as Hay, *Judicial Jurisdiction*]; Note, *supra* note 57, at 41-42; Note, *supra* note 4, at 759.

274. See, e.g., Hay, *Judicial Jurisdiction*, *supra* note 273, at 453; Note, *supra* note 57, at 41-42; see also, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. at 321 (in addressing reasonableness of exercising jurisdiction over a non-resident defendant court must consider the interests of the forum state).

275. See, e.g., Hay, *Judicial Jurisdiction*, *supra* note 273, at 453; Note, *supra* note 4, at 759. The right to trial by jury and liberal discovery rules are some examples of procedural benefits of United States law that a plaintiff may desire to have at his disposal. Hay, *Judicial Jurisdiction*, *supra* note 273, at 453.

276. See *supra* note 274.

277. *Copiers*, 576 F. Supp. at 321.

278. See *World-Wide Volkswagen v. Woodson*, 444 U.S. at 291 (citing *Kulko v. Superior Court of California*, 436 U.S. at 91) (the due process clause of the fourteenth amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

279. See *supra* note 275.

280. Note, *supra* note 4, at 759.

281. *Id.*

tect the *defendant* from the burden of litigating in a distant and inconvenient forum."²⁸²

Apparently, no court has directly held that a plaintiff has a constitutionally guaranteed right to litigate in a United States court. Some commentators, however, have argued that a footnote in *Shaffer v. Heitner*²⁸³ supports the conclusion that a United States plaintiff has this right.²⁸⁴ In *Shaffer*, the United States Supreme Court suggested that a defendant's right to be protected from the jurisdiction of those states with which he does not have minimum contacts may have to yield to a plaintiff's absolute right to have a forum.²⁸⁵ Few courts, however, have interpreted "a forum" to mean a United States forum, because the Court did not qualify the term in that manner.²⁸⁶ In addition, the Supreme Court's decision in *Helicopteros Nacionales de Columbia, S.A. v. Hall* negates such an inference.²⁸⁷ In *Helicopteros*, the Supreme Court strongly implied that any forum, even one outside of the United States, might satisfy the plaintiff's right to have his case adjudicated.²⁸⁸

282. *Volkswagen*, 444 U.S. at 292 (emphasis added); see also, *Phillips Petroleum Co. v. Shutts*, — U.S. at —, 105 S. Ct. at 2973 (the purpose of the minimum contacts test is to protect the defendant from the travail of defending in a distant forum unless his contacts make it just to force him to defend there). If the burdens on the plaintiff are too great, he can decide not to sue, or to sue elsewhere. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981). A defendant has no such "luxury." *Id.*

283. 433 U.S. 186, 211 n.37 (1977). The Supreme Court in this footnote stated that "[t]his case does not raise, and we do not therefore consider, the question of whether the presence of a defendant's property in a state is a sufficient basis for jurisdiction when no other forum is available to the plaintiff." *Id.*

284. See Hay, *Judicial Jurisdiction*, *supra* note 273, at 446-47. While Professor Hay believes that there are good policy reasons why a local forum should be available to a United States plaintiff when an alien defendant has some contact with the United States, he admits that these policy reasons alone do not make such an exercise of jurisdiction constitutional. *Id.* at 453; see also, Note, *supra* note 4, at 759. That Note argued that the facts of each case should be considered in deciding whether or not the plaintiff practically has the ability to sue in another country, including the monetary and other resources available to each party. *Id.* at 760.

285. *Shaffer*, 433 U.S. at 211 n.37; see *supra* note 283.

286. The court in *American Land Program, Inc. v. Bonadventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1453 (10th Cir. 1983) appears to have adopted this reasoning in dicta. See Hay, *Judicial Jurisdiction*, *supra* note 273, at 447.

287. 466 U.S. 408, 419 n.13 (1984).

288. *Id.* The plaintiff, in *Helicopteros*, had suggested that, as an alternative to the traditional minimum contacts analysis, the Court should hold that the State of Texas had personal jurisdiction over the defendant *Helicopteros* under the doctrine of "jurisdiction by necessity." *Id.* (citing *Shaffer*, 433 U.S. at 211 n.37). The Court declined

Policies that favor international trade and economic growth in the United States will be best served by curtailing the extension of jurisdiction over alien corporations that have no direct contact with a forum state.²⁸⁹ By exercising jurisdiction over alien corporations based on the activities of their United States subsidiaries, United States courts will most likely discourage the incorporation of subsidiaries and increase the costs of exporting to the United States.²⁹⁰

B. *Recommendations*

United States courts should adopt a uniform approach to asserting jurisdiction over alien corporations whose only contacts with the forum are through United States subsidiaries. The courts should follow the traditional approach of exercising jurisdiction over a foreign or alien parent corporation only when the court finds that the subsidiary is acting as an agent for the parent or that the subsidiary is a mere division of the parent under the alter-ego doctrine.²⁹¹ This approach is preferable because it would encourage alien corporations to incorporate subsidiaries in the United States. In addition, the traditional approach is preferable because it is consistent with the doctrine of corporate separateness²⁹² as endorsed by the Supreme Court in *Cannon Manufacturing Co. v. Cudahy Packing Co.*²⁹³

An alternate approach would be for the United States Congress to enact legislation to clarify the current confusion regarding jurisdiction over alien corporations that have incorporated subsidiaries in the United States.²⁹⁴ Such legislation could specifically state that the incorporation of a subsidiary in

to consider the adoption of this doctrine, however, stating that the plaintiffs had failed to carry their burden of showing that all three defendants could not be sued together in a single forum. *Id.* Significantly, the Court stated that "[i]t is not clear from the record . . . whether suit could have been brought against all three defendants in either *Colombia* or *Peru*." *Id.* (emphasis added).

289. See *Samuels v. B.M.W. of N.A., Inc.*, 554 F. Supp. at 1194.

290. See *id.*, at 1195. This increase will probably be reflected in the price consumers have to pay for foreign goods and the balance of trade.

291. See *supra* notes 10-13, 33-35 and accompanying text.

292. See *supra* notes 26-37 and accompanying text.

293. 267 U.S. 333 (1925). For a discussion of the *Cannon* doctrine, see *supra* notes 38-47 and accompanying text.

294. *Cf. Cannon*, 267 U.S. at 336. The Court, in *Cannon*, stated that "Congress has not provided that a corporation of one State shall be amenable to suit in the

a particular state gives that state, and any other state in which the subsidiary does business, jurisdiction over the parent corporation.²⁹⁵ At least, this procedure would afford potential defendants the predictability that the due process clause was intended to provide.²⁹⁶

Finally, the United States Senate should ratify recognition and enforcement of judgment treaties, such as the United States-United Kingdom Convention. Equally important, the United States Senate should ratify treaties addressing the actual exercise of jurisdiction²⁹⁷ to clarify that jurisdiction over an alien corporation cannot be based solely on the presence or activities of its United States subsidiary corporation.²⁹⁸

CONCLUSION

A subsidiary corporation is a legal entity separate from its shareholders, notwithstanding that its principal shareholder is another corporation.²⁹⁹ The dual personality of a parent and its subsidiary should not be lightly disregarded.³⁰⁰ Under the traditional rule, as adopted by the United States Supreme Court in *Cannon Manufacturing Co. v. Cudahy Packing Co.*,³⁰¹ a court does not have jurisdiction over a parent merely because its subsidiary is incorporated or doing business in the forum state.³⁰² Only when a subsidiary is acting as an agent of its parent, or when the parent so controls and dominates the subsidiary that at the latter's independent corporate status is a fiction,³⁰³ will a court have jurisdiction over the parent based on the actions of its subsidiary.

federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein." *Id.*

295. Such legislation could be enacted at either a federal level or state level. Leaving such legislation to individual states, however, would likely result in continued inconsistencies under United States law.

296. *Burger King Corp. v. Rudzewicz*, — U.S. at —, 105 S. Ct. at 2182 (citing *Volkswagen*, 444 U.S. at 297).

297. An example of such a treaty is the Brussels Convention, *supra* note 208.

298. The treaty approach is preferable to a case law or statutory approach to jurisdiction over alien corporations, since a treaty would guarantee that the stated grounds for jurisdiction are mutually respected and agreed upon on both sides.

299. See *supra* note 29 and accompanying text.

300. See *supra* note 32 and accompanying text.

301. 267 U.S. 333 (1925).

302. See *supra* notes 38-47 and accompanying text.

303. See *supra* notes 7-11, 33-34 and accompanying text.

Although some United States courts follow the traditional rule, others have exercised jurisdiction over alien corporations based on the activities of their subsidiaries absent a finding of an agency or alter-ego relationship.³⁰⁴ The United States case law has been inconsistent on this issue, thereby failing to provide defendants with the predictability of the legal system that the due process clause was intended to afford.³⁰⁵

Like traditional United States law, the law of the United Kingdom favors the theory of legal separation between a corporation and its shareholders.³⁰⁶ United Kingdom courts apply the theory of corporate separateness between a parent and its subsidiary, unless the court finds the existence of an agency relationship or abuse of the corporate form.³⁰⁷ This approach is reflected in the United States-United Kingdom Convention on the Reciprocal Recognition & Enforcement of Judgments in Civil Matters.³⁰⁸ The Convention specifically excludes the recognition of a judgment in which jurisdiction over a parent corporation was based solely on the activities of its subsidiary in the forum.³⁰⁹

United States courts should adopt a uniform approach for exercising jurisdiction over an alien corporation whose only contact with the forum is through its subsidiary. The courts should follow the traditional rule of exercising jurisdiction over an alien parent corporation only when the court finds the existence of an agency or alter-ego relationship between the parent and the subsidiary.³¹⁰ In addition, the United States Senate should ratify recognition and enforcement of judgment treaties, such as the United States-United Kingdom Convention, and clarify the basis for jurisdiction over an alien corporation, which cannot be based solely on the presence or activities

304. See, e.g., *Weight v. Kawasaki Motors Corp., USA*, 604 F. Supp. 968 (E.D. Va. 1985) (discussed *supra* notes 113-25 and accompanying text); *Brunswick Corp. v. Suzuki Motors Co.*, 575 F. Supp. 1412 (E.D. Wis. 1983) (discussed *supra* notes 165-73 and accompanying text); *Graco, Inc. v. Kremlin, Inc.*, 558 F. Supp. 188 (N.D. Ill. 1982) (discussed *supra* note 154-64 and accompanying text).

305. See *Burger King*, — U.S. at —, 105 S. Ct. at 2182.

306. See *supra* notes 218-21 and accompanying text.

307. See *supra* notes 222-26 and accompanying text.

308. U.S.-U.K. Convention, *supra* note 23.

309. See *supra* note 236 and accompanying text.

310. See *supra* note 291 and accompanying text.

of its United States subsidiary.³¹¹

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311. See *supra* notes 297-98 and accompanying text.