# PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS IN THE NINTH CIRCUIT

There are several important obstacles that face plaintiffs who claim against foreign defendants in United States courts. One of the first hurdles is proving that the court has personal jurisdiction over the foreign defendant.[1] This paper examines the treatment of personal jurisdiction over foreign defendants in the Ninth Circuit.

## BACKGROUND

The exercise of personal jurisdiction must satisfy both statutory and constitutional requirements. It is well-established that a court can exercise personal jurisdiction only if statutorily authorized by the legislature.[2] In the federal system, Rule 4(e) of the Federal Rules of Civil Procedure provides that, absent a specific federal statute, a federal court must look to the jurisdictional statute of the state in which it sits.[3]

In addition to satisfying statutory requirements, assertions of personal jurisdiction must comport with the due process clause of the Fourteenth Amendment. The Supreme Court established the modern due process limits on assertions of personal jurisdiction in its 1945 decision in *International Shoe Co. v. State of Washington.*[4] The Court held that the due process claims did not require the defendant's actual presence within the forum. Instead, the defendant need only have certain minimum contacts with the forum so that the suit would not offend ". . . traditional notions of fair play and substantial justice."[5]

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[1]Personal jurisdiction is the power of a court to adjudicate the rights and obligations of a particular defendant. This power comes from the legislature and is always subject to constitutional limitations that work to protect the defendant from suit in a jurisdiction with which he has no meaningful contacts. It is the plaintiff who must establish, to the satisfaction of the court, the basis for the court's assertion of personal jurisdiction over a particular defendant. *See* Capra, *Selecting an Appropriate Federal Court in an International Antitrust Case: Personal Jurisdiction and Venue*, 9 Ford. Int. L. J. 401 (1986).

[2]*See* Wells Fargo & Co. v. Wells Fargo, 556 F.2d 406 (9th Cir. 1977).

[3]All state legislatures have enacted state "long-arm" statutes authorizing the assertion of personal jurisdiction over persons within the state and over persons having had some prior connections with the forum state. Federal courts use the long-arm statute of the state in which they sit. Since the state long-arm statutes vary, the federal courts will, *a priori*, vary in their findings based on those statutes.

[4]326 U.S. 310 (1945). Until this decision, personal jurisdiction required actual presence of the defendant within the territorial jurisdiction of the forum. *Compare* Pennoyer v. Neff, 95 U.S. 714 (1877).

[5]*See International Shoe*, 326 U.S. at 316, citing Milliken v. Meyer, 311 U.S. 457, 463 (1940).

In 1980, the Supreme Court reaffirmed the minimum contacts test in *World-Wide Volkswagen Corp. v. Woodson.*[6] There, the Court found that the fortuitous circumstance that allowed a product to find its way into the forum, without other contacts between the defendant and the forum, was insufficient to find minimum contacts.[7] While foreseeability alone would not be sufficient for a finding of personal jurisdiction, neither is it wholly irrelevant. ". . .[T]he foreseeability that is critical to due process analysis is . . . that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[8] Only by purposely availing oneself of the privilege of conducting business within the forum can the defendant have clear notice of being subject to suit there.[9]

## NINTH CIRCUIT ANALYSIS

The Ninth Circuit has a well-established framework for determining whether personal jurisdiction may be asserted over a foreign defendant. The framework is controlled by two independent considerations: (1) whether there is a state statute or rule which confers personal jurisdiction, and (2) whether that statute or rule accords with the due process clause.[10] The first part of this analysis has generally been straightforward. All of the state long-arm statutes reviewed by the Ninth Circuit have been found to establish jurisdiction to the maximum extent permitted by the due process clause.[11]

The Ninth Circuit next relies on *International Shoe* and its progeny[12] in determining the due process limitations upon the court's power to

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[6]444 U.S. 286 (1980).

[7]*World-Wide Volkswagen,* 444 U.S. at 295.

[8]*World-Wide Volkswagen,* 444 U.S. at 297.

[9]Jurisdiction can be found to be either general or specific. If general jurisdiction is found, the court can adjudicate any action relating to the defendant. If only specific jurisdiction is found, the court can adjudicate only cases arising out of the defendant's forum-related activity. If the defendant's forum activities are "substantial" or "continuous and systematic", a sufficient relationship can be found to exist between the defendant and the forum to support the finding of general personal jurisdiction over the defendant. However, if the defendant's forum-related activities are not pervasive enough to subject him to general jurisdiction, the determination of jurisdiction will be decided by evaluation of the nature and quality of the defendant's forum-related activities in relation to the cause of action. *See also,* Helicopteros Nacionales de Columbia, S.A. v. Hall, 461 U.S. 965 (1984).

[10]Data Disc Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280 (9th Cir. 1977).

[11]*See* Capra, *supra* note 1. Not all state long-arm statutes are found to be "coextensive" with the outer limits of both state and federal constitutional due process limits.

[12]*International Shoe,* 326 U.S. 310. *See also World-Wide Volkswagen,* 444 U.S. 286; Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); Rush v. Savchuk 444 U.S. 320 (1980).

exercise personal jurisdiction. As we have seen, the basic rule is that the defendant must have sufficient contacts with the forum to insure that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice.[13] In *Data Disc v. Systems Tech. Assoc., Inc.*,[14] the Ninth Circuit set out a three-prong test to be used in the determination of limited jurisdiction:[15]

(1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
(2) the claim must be one which arises out of or results from the defendant's forum-related activities; and
(3) exercise of jurisdiction must be reasonable.[16]

The Ninth Circuit has discussed the third prong of the *Data Disc* test, reasonableness, at considerable length.[17] Because there is no mechanical or quantitative test for personal jurisdiction under the *International Shoe*[18] reasonableness standard, the Ninth Circuit has developed a list of non-exclusive factors to be considered in assessing reasonableness. In *Insurance Company of North America v. Marina Salina Cruz*,[19] the court listed the following factors as relevant in determining whether or not to exercise personal jurisdiction:

(1) the extent of the purposeful interjection into the forum state;
(2) the burden on the defendant of defending in the forum;
(3) the extent of conflict with the sovereignty of defendant's state;

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[13]*See International Shoe*, 326 U.S. 310.
[14]557 F.2d 1280.
[15]If a nonresident defendant's activities within a forum are "substantial" or "continuous", that forum may exercise general jurisdiction over the defendant; jurisdiction would exist whether or not the claim arose out of those forum-related activities. However, if the defendant's forum activities are neither "substantial" nor "continuous" enough to create general jurisdiction, the court may then examine the defendant's conduct. If the defendant is found to have purposefully availed himself of the privilege of conducting activities in the forum, and the claim arises out of that activity, the court may exercise limited personal jurisdiction over that defendant.
[16]*See Data Disc*, 557 F.2d 1280.
[17]The Supreme Court has stated that contacts with the forum must be such " . . . as to make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principle place of business is relevant in this connection." *International Shoe*, 326 U.S. at 317.
[18]326 U.S. 310.
[19]649 F.2d 1266 (9th Cir. 1981).

(4) the forum state's interest in adjudicating the dispute;
(5) the most efficient judicial resolution of the controversy;
(6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
(7) the existence of an alternative forum.[20]

Each of these elements will be briefly examined below.

### *Purposeful Interjection*

In *Data Disc*,[21] the court held that it may be unreasonable to assert jurisdiction where an alleged tortious act, committed outside the forum but having an effect within, is the result of negligence rather than caused by purposeful activities. The degree of interjection into the forum affects the fairness of asserting jurisdiction and assessing the overall reasonableness factor.

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[20]"For purposes of determining reasonableness of asserting limited jurisdiction over foreign defendants based on seriousness of potential affront to sovereignty of defendant's country, a foreign nation presents a higher sovereignty barrier than that between two states within United States." *See* Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1326 (9th Cir. 1984). This idea is echoed throughout virtually all Ninth Circuit cases. It is interesting to note, however, that while the Ninth Circuit considers a foreign nation to present a higher sovereignty barrier than that of a sister state, it very rarely prevents the court from exercising jurisdiction over a foreign defendant. One notable exception might be found in *Insurance Co. of North America*, 649 F.2d 1266, in which the court declined to exercise jurisdiction over a Mexican defendant; however, the court claimed that a major obstacle to jurisdiction was that the plaintiffs were not forum residents, even though the injury occurred in the forum. It is only conjecture that the court actually considered the sovereignty issue to be of import, since that was not the court's claim. However, the court did note that since the Mexican ambassador had asserted sovereign immunity, there was reason to doubt the possibility of enforcing a U.S. judgment. *See also* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int. & Comp. L. 1 (1987).

The Ninth Circuit spends a great deal of time analyzing jurisdiction under the Foreign Sovereign Immunity Act of 1976 (FSIA). Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in 28 U.S.C. §§ 1330, 1602-1611). In discussing the affront to sovereignty, the court has held that it " . . . is now effectively subsumed under the Congressional policy expressed in the FSIA. If jurisdiction over a nonresident defendant would be otherwise reasonable, the fact that the defendant is an instrumentality of a foreign state engaged in a commercial activity should be presumed not to affront the state's sovereignty. As the courts have noted time and again, in passing the FSIA Congress codified the restrictive view of sovereign immunity." Wyle v. Bank Melli of Tehran, Iran, 577 F.Supp. 1148, 1157 (N.D. Cal. 1983). Recognizing that the potential affront to the sovereignty of a defendant's state should be considered, the court notes " . . . Congress' decision that jurisdiction does not pose an affront to the sovereignty of the defending nation so serious as to preclude it . . . ." Olsen by Sheldon v. Mexico, 729 F.2d 641, 650 (9th Cir. 1984).

[21]557 F.2d 1280.

### *Burden of Defense*[22]

Due to modern methods of transportation and communication, the burden of defense in a distant forum has been greatly diminished. However, the following factors may be determinative of the burden of defenses: direct transportation service between defendant's state and the forum, distance involved, the necessity of transporting witnesses and evidence to the forum and the burden involved in translating testimony and documents. While it might be true that the plaintiff could incur the same problems in a suit in the defendant's state, the primary concern is for the burden on the defendant.[23] If the burdens are too great on the plaintiff, he can choose not to sue or perhaps to sue elsewhere; the defendant has no such choice and, therefore, his burdens are particularly significant, especially if he has done little to inject himself into the forum.[24]

### *Conflict with Sovereignty of Defendant's State*

Due process limitations on personal jurisdiction are largely derived from our constitutional federalism and the resulting sovereignty of states.[25] Purposeful interjection requires that a defendant remove himself from the exclusive protection of his own state by engaging in activities involving the sovereignty of a different state. Hence, reasonableness depends, in part, upon the seriousness of any potential affront to the sovereignty of the defendant's state. While not minimizing the sovereignty of sister states within the U.S., the Ninth Circuit has concluded that ". . . foreign nations present a higher sovereignty barrier than that between two states within our union. This is only a recognition of what is obvious."[26]

### *Interest of Forum State*

Forums have an interest in the protection of their residents from the negligence of foreigners,[27] assuring the commercial stability of the forum,[28] regulating defective products sent into the forum,[29] providing

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[22]*See* Born, *supra* note 20.
[23]*World-Wide Volkswagen*, 444 U.S. 286.
[24]*Insurance Co. of North America*, 649 F.2d 1266.
[25]*See World-Wide Volkswagen*, 444 U.S. 286.
[26]*Insurance Co. of North America*, 649 F.2d at 1292.
[27]*Insurance Co. of North America*, 649 F.2d 1266.
[28]Taubler v. Giraud, 655 F.2d 991 (9th Cir. 1981).
[29]Hedrick v. Daiko Shoji Co., Ltd., 715 F.2d 1355 (9th Cir. 1983)

a forum for remedy, deterring wrongful conduct, assuring compensation, protecting the state's economic resources from unnecessary expenditures and protecting the welfare of its minors.[30] Courts have been reluctant, however, to assert jurisdiction when the plaintiff is not a resident of the forum, although the alleged injury took place there.[31]

### *Most Efficient Resolution*

The most efficient forum for resolution will usually be that where most of the witnesses, documents, and physical evidence, on which the case will turn, are located. The court will also consider whether or not a foreign judgment can be enforced in the forum. The threat of sovereign immunity being raised can be considered to be a factor against the efficiency of a forum's resolution.[32]

### *Convenient and Effective Relief for Plaintiff*

Weight must be given to whether the plaintiff has the power to select a different forum. An individual plaintiff is often less able to seek practical relief in foreign courts than are large corporations. Individual claimants " . . . would be at a severe disadvantage if they were forced to follow the . . . company to a distant State in order to hold it legally accountable. . . . [S]mall or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum thus in effect making the company judgmentproof."[33]

### *Existence of an Alternative Forum*

The plaintiff has the burden of proving the unavailability of an alternative forum. Factors in such proof include: absence of foreign law giving a cause of action, travel and other expenses for the plaintiff and witnesses, and other general aspects of conducting a suit in a forum foreign to the plaintiff.[34]

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[30]Olsen by Sheldon v. Government of Mexico, 729 F.2d 641.

[31]*See Insurance Co. of North America*, 649 F.2d 1266.

[32]*See Insurance Co. of North America*, 649 F.2d 1266, and *Olsen by Sheldon*, 729 F.2d 641.

[33]McGee v. International Life Ins. Co. 355 U.S. 220 (1957), *quoted in* Raffaele v. Compagnie Generale Maritime, 707 F.2d 395 (9th Cir. 1983).

[34]*See Insurance Co. of North America*, 649 F.2d 1266, and *Raffaele*, 707 F.2d 395.

## APPLICATION OF THE NINTH CIRCUIT RULES

The standard applied by the Ninth Circuit in determining whether personal jurisdiction exists appears to be consistent in both the district courts and the Court of Appeals. However, application of this standard is not necessarily consistent, especially if different areas of the law are examined. It appears that personal jurisdiction is most likely to be found when the case involves the Internal Revenue Service, torts, or contract actions. Jurisdiction is least likely to be found in cases involving antitrust litigation. Finally, the Court of Appeals tends to be more likely to grant jurisdiction than do the district courts. Application of the *Data Disc*[35] test and the *Insurance Co. of North America*[36] reasonableness test by courts in the Ninth Circuit will be considered below.

### *Internal Revenue Service Action*

When dealing with actions involving the Internal Revenue Service, the Ninth Circuit appears to take a liberal attitude towards the exercise of jurisdiction. While this result is not fully explained, it is apparently based on the presence of federal statutes.

*U.S. v. Toyota Motor Corporation*[37] involved an action to enforce two Internal Revenue Service summons, one issued to a Japanese parent corporation (Toyota Japan) and the other to its wholly-owned American subsidiary (Toyota USA). Pursuant to § 482 of the Internal Revenue Code[38], certain records in the possession of Toyota Japan were requested. Since Toyota Japan knew and intended that its automobiles would be purchased in the U.S. and derived "substantial economic benefits" from sales by its subsidiary, personal jurisdiction was found over the parent company.

Citing an expansive reading of "found" in the statutory scheme authorizing Internal Revenue summons power, the court stated that "[n]othing in the language . . . precludes issuance of a summons against a foreign parent corporation possessing information relevant to the taxation of its subsidiary . . . . [I]t follows that the jurisdictional power conferred . . . should be construed to extend at least as far as the . . . summons power . . . ."[39]

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[35]557 F.2d 1280.
[36]649 F.2d 1266.
[37]561 F.Supp. 354 (C.D.Cal. 1983).
[38]26 U.S.C. §482, *quoted in* U.S. v. Toyota, 561 F.Supp. at 355.
[39]U.S. v. Toyota, 561 F.Supp. at 358.

The court was careful to distinguish between cases involving the nation's tax laws and those involving antitrust matters, expressly finding that policy considerations make the exercise of jurisdiction less restrictive in the former.[40] Although an earlier California case[41] chose not to consider a "stream of commerce" theory, the *Toyota* court did not find that decision binding.[42] It noted that subsequent Ninth Circuit decisions[43] did expressly embrace this theory. The court held that ". . . due process is satisfied so long as Toyota Japan knew and intended that its vehicles would be sold here, and it actively promoted those sales."[44]

### *Torts*

There have been a number of cases in the Ninth Circuit involving personal jurisdiction over foreign defendants in tort actions. The Court of Appeals appears to be more likely to grant jurisdiction than the district courts are, and has often reversed district court decisions declining to exercise jurisdiction.[45] When faced with a products liability case, the court has used a "stream of commerce" theory to support its exercise of personal jurisdiction.[46]

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[40]"[T]here is no basis for concluding that the word 'found' must be given the same restrictive meaning in the context of the nation's tax laws. The antitrust laws are designed to provide a remedy for injuries resulting from business or commercial practices. If the complained of practices are conducted by the domestic subsidiary of a foreign corporation, there very well may be no reason to subject the parent to suit unless it has contributed directly to that conduct by employing the subsidiary as an 'alter ego' or 'agent'. Enforcement of the tax laws, by contrast do not turn upon issues such as whether the parent exercised day-to-day management or control over its subsidiary. Instead, section 482 of the Internal Revenue Code may be invoked whenever two business organizations are 'owned or controlled directly or indirectly by the same interests,' regardless of whether one is considered an 'agent' or 'alter ego' of the other. Given the significantly different policy considerations underlying the tax code and the antitrust laws, the restrictive jurisdictional rules announced [in decisions in other areas of the law] . . . have little persuasive value in this case." *Toyota*, 561 F.Supp. at 358-359.

[41]Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175 (9th Cir. 1979).

[42]*See* Asahi Metal Industry Co., Ltd. v. Superior Court of California, 107 S. Ct. 1026 (1987).

[43]*See* Taubler, 655 F.2d 991, and Plant Food Coop v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155 (9th Cir. 1980).

[44]Toyota, 561 F.Supp. at 359

[45]*See Olsen by Sheldon*, 729 F.2d 641; *Raffaele*, 707 F.2d 395; and *Hedrick*, 715 F.2d 1355.

[46]*See Hedrick*, 715 F.2d 1355, and *Asahi*, 107 S. Ct. 1026.

In *Olsen by Sheldon v. Government of Mexico*,[47] the court first found subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA).[48] Regarding the issue of personal jurisdiction, the court held that by intentionally entering U.S. airspace, Mexico had ". . . purposefully availed itself of the benefits of operating its aircraft over California. In addition, the claims . . . arise from the plane's flight and crash in California."[49] Consequently, the court reversed the district court and found jurisdiction over Mexico.

Although it is true that the Mexican plane did intentionally enter U.S. territory, interpreting this as a "purposeful availment" is problematic. The plane's unplanned and momentary entry was made only because of bad weather and the need to make an instrument landing, impossible at its original destination, a Mexican airport.

In two cases in which a product entering the forum caused injury to longshoremen,[50] the Court of Appeals reversed the district court's findings and elected to exercise jurisdiction. Distinguishing the cases from *World Wide Volkswagen*,[51] the court noted that both defendants had purposely availed themselves of the benefits and protections of forum law by placing their products in the "stream of commerce" that they knew would be serving the forum. In *Hedrick v. Daiko Shoji Co.*,[52] the court specifically noted the fact that it was a products liability case and found that "[a] manufacturer or supplier of a defective product who knew or should have known that a product would enter the stream of foreign commerce can be subjected, consistently with due process, to a forum state's long-arm jurisdiction and be sued in the forum where the injury occurred."[53]

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[47]*Olsen by Sheldon*, 729 F.2d 641 (wrongful death action by children whose parents were killed while being transferred to the United States pursuant to a Prisoner Exchange Treaty between the United States and Mexico. Due to adverse weather conditions, instead of landing in Mexico, the plane intentionally entered U.S. airspace where it crashed, killing all on board. The crash was within the territorial boundaries of the U.S.).

[48]Foreign Sovereign Immunities Act, *supra* note 20.

[49]*Olsen by Sheldon*, 729 F.2d 641, 649.

[50]*See Raffaele*, 707 F.2d 395 (longshoreman injured when crates he was unloading fell on him) and *Hedrick*, 715 F.2d 1355 (longshoreman injured when defective wire-rope splice gave way).

[51]*See World-Wide Volkswagen*, 444 U.S. 286.

[52]*See Hedrick*, 715 F.2d 1355.

[53]*See Hedrick*, 715 F.2d at 1359. Sousa v. Ocean Sunflower Shipping Co., Ltd., 608 F. Supp. 1309 (N.D. Cal. 1984), had a fact pattern nearly identical to the two cases discussed above. Here again, the district court declined to exercise personal jurisdiction over the defendant.

It seems clear that the Court of Appeals in the Ninth Circuit is much more likely to exercise personal jurisdiction over foreign defendants than are the Circuit's district courts. In fact, the Court of Appeals has noted that "[t]he line of cases treating the delivery of products into the 'stream of commerce' resulting in torts in the United States exemplifies a broader application of jurisdiction because of the strong state interest in protecting its citizens against harmful products."[54]

A plurality of the Supreme Court, in a recent product liability case involving a foreign defendant,[55] reasoned that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct [is necessary] . . . . [A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State."[56] Although this might appear to cast doubt on Ninth Circuit opinions, the effect is not at all clear. The language appeared in the opinion of a plurality and there are strong suggestions that a majority of the Court reject the plurality's rationale.[57] Furthermore, since the plaintiff was not a forum resident, the Court held that the forum's interest in hearing the case was significantly diminished. Finally, in agreement with the Ninth Circuit, the Court found that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[58]

### *Contracts*

There have been a number of contract cases involving personal jurisdiction over a foreign defendant in the Ninth Circuit. It appears

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[54]Pacific Atlantic Trading Co. v. M/V Main Express, 758 F.2d 1325, 1336 (9th Cir. 1985).

[55]*Asahi*, 107 S. Ct. 1026 (tire valves manufactured in Japan, sold to tire manufacturer in Taiwan, who sold tires throughout the United States, including the forum state).

[56]*Asahi*, 107 S. Ct. at 1033.

[57]"As long as a defendant . . . is aware that the final product is being marketed in the forum State . . . . Jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and [no showing of additional conduct is required]. . . . [D]efendant's regular and extensive sales to a manufacturer it knew was making regular sales of the final product in California were [sufficient] to establish minimum contacts with California." *Asahi*, 107 S. Ct. at 1035-1038. (Brennan, J.; White, J.; Marshall, J.; and Blackmun, J., disagreeing with the plurality's interpretation of the stream-of-commerce theory).

[58]*Asahi*, 107 S. Ct. at 1035, quoting United States v. First National City Bank, 379 U.S. 378, 404 (1965). *See also* Born, *supra* note 20.

that in contract cases, as well as in tort actions, the Court of Appeals is more likely to assert jurisdiction than are the district courts.[59] In at least two cases the appellate court has overruled district court findings of no jurisdiction. Moreover, the court seems to be consistent in its findings. Cases in which the defendant had little or no contact with the forum are likely to be dismissed for lack of jurisdiction.[60] On the other hand, when the defendant has significant forum contacts, the court appears to exercise personal jurisdiction over the defendants.[61]

In both *Taubler v. Giraud*[62] and *Gates Learjet Corp. v. Jensen*,[63] the Court of Appeals found personal jurisdiction over the defendants, overruling district court decisions. While general jurisdiction was found lacking in both cases, the court reasoned that the defendants had ". . . engaged in purposeful activity in [the forum and that] the claims arise out of that activity . . . ."[64] The *Taubler* court found no fortuitous arrival of the product in the forum since the defendants knew that it was being shipped there, thus distinguishing the case from *World-Wide Volkswagen*.[65]

The focus of the *Taubler* court was on the defendant's intent and knowledge, as well as the foreseeable location of the injury. While no one fact in the case was considered to be controlling, the collective view of the nature of the defendant's business plus the injury to a forum resident allowed the court to exercise jurisdiction over the defendants. Considering all of the factors in both cases, the court concluded that both defendants had reasonable notice of possible suit in the forum.

In *Haisten v. Grass Valley Medical Reimbursement*[66] the Court of Appeals affirmed the district court's finding of personal jurisdiction over the defendant. The court found this case to be unique because it was faced with "a defendant who has made a tremendous effort to construct a transaction in such a way as to avoid the appearance of contacts with [the forum] . . . and thus the reach of the . . . [forum]

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[59] *See Taubler*, 655 F.2d 911, and *Gates Learjet*, 743 F.2d 1325.

[60] *See* Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240 (9th Cir. 1984); Thos. P. Gonzalez Corp. v. Consejo Nacional, 614 F.2d 1247 (9th Cir. 1980); and Fields v. Sedgwick Associated Risks, Ltd., 796 F.2d 299 (9th Cir. 1986).

[61] *See Taubler*, 655 F.2d 991; *Gates Learjet*, 743 F.2d 1325; and Haisten v. Grass Valley Medical Reimbursement, 784 F.2d 1392 (9th Cir. 1986).

[62] 655 F.2d 991 (French winemaker, with extensive contacts with forum, breached contract with forum resident).

[63] 743 F.2d 1325 (Philippine corporation breached contract with forum resident).

[64] *Taubler*, 655 F.2d at 994.

[65] 444 U.S. 286.

[66] 784 F.2d 1392 (defendant formed fund and conducted all business in Caymen Islands for express purpose of insuring California doctors and refused to honor malpractice claim against California physician).

courts. Nonetheless, its only purpose was to provide insurance for . . . [forum] doctors treating . . . [forum] patients and to avoid requirements imposed by . . . [forum] law."[67]

The *Haisten* court held that recent Supreme Court cases suggested that the reasonableness prong of the *Data Disc* test should be modified to allow a finding of reasonableness upon a lesser showing of minimum contacts if the defendant purposely directed its activities at the forum.[68] The court found that the defendant need not physically act within the forum in order to satisfy the due process requirements. The court refused to restrict the exercise of jurisdiction with no physical contacts between the forum and the defendant to the area of products liability.[69]

In *Congoleum Corp. v. DLW Aktiengesellschaft*[70], *Thos. P. Gonzalez Corp. v. Consejo Nacional*,[71] and *Fields v. Sedgwick Associated Risk, Ltd.*[72], the Ninth Circuit declined to exercise jurisdiction over the defendants in contract cases. In all three cases, the contract was entered into elsewhere, performed elsewhere, and the claim did not arise from any of the defendants' forum-related activity, if any even existed. Finding the economic reality to be that the defendants had not availed themselves of the privilege of conducting business in the forum, there was no personal jurisdiction over the defendants. The factual situations of these three cases very clearly support the court's decisions and distinguished them from *Taubler*,[73] *Gates Learjet*,[74] and *Haisten*.[75]

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[67]*Haisten*, 784 F.2d at 1396.

[68]"In particular, within the rubric of 'purposeful availment' the Court has allowed the exercise of jurisdiction over a defendant whose only 'contact' with the forum state is the 'purposeful direction' of a foreign act having effect in the forum state . . . . Moreover, jurisdiction may be exercised with a lesser showing of minimum contact than would otherwise be required if considerations of reasonableness dictate . . . . Finally, there is a presumption of reasonableness upon a showing that the defendant purposefully directed his activities at forum residents which the defendant bears the burden of overcoming by presenting a compelling case that jurisdiction would be unreasonable." *Haisten*, 784 F.2d at 1397.

[69]The "purposeful availment" requirement is to protect against suit resulting from random, fortuitous or attenuated contacts, not from commercial activities that are purposely directed toward the residents of the forum. *See World-Wide Volkswagen*, 444 U.S. 286.

[70]729 F.2d 1240 (action brought against West German corporation for breach of licensing agreement with respect to sales in France).

[71]614 F.2d 1247 (action for breach of contract against autonomous institution of the Republic of Costa Rica with all related activity occurring in Costa Rica).

[72]796 F.2d 299 (action for breach of insurance contract against British corporation involving British contract, British site of events, and plaintiff having dual U.S. and British citizenship).

[73]655 F.2d 991.

[74]743 F.2d 1325.

[75]784 F.2d 1392.

*Antitrust*

Fewer antitrust cases appear to have reached the Ninth Circuit than has occurred in the tort and contract field. Furthermore, there appears to be less uniformity in the decisions in this area than in cases involving torts and contracts. However, both district and appellate courts seem to be unanimous in finding that control by a parent corporation over a subsidiary is an overriding factor that must be found in order to exercise personal jurisdiction over the foreign parent corporation. "[T]he mere fact that a wholly-owned subsidiary did business within the [forum] . . . and had some common officers with the parent was insufficient . . . in the absence of a showing that the foreign corporation in fact controlled and managed the subsidiary . . . ."[76]

Both *O.S.C. v. Toshiba*[77] and *Williams v. Canon*[78] were antitrust cases with nearly identical fact patterns. In both, the court declined to "pierce the corporate veil" and exercise jurisdiction over the parent corporation. The *Toshiba* court stressed the fact that the sale and delivery of the product did not take place in the forum so the parent company could not be found ". . . to be within the practical everyday business or commercial concept of doing or carrying on business of a substantial character."[79]

The *Canon* court listed seven factors that the plaintiff alleged as showing minimum contacts of the parent company with the forum. While noting that the plaintiff attempted to aggregate all of those facts, the court found them to be either immaterial, incidental, or irrelevant. "Use of a wholly-owned subsidiary to conduct business in a foreign jurisdiction does not necessarily subject the parent corporation to suit in the district in which the subsidiary transacts business. This is true even where the separation is merely formal, as long as the separation is real."[80]

*Cascade Steel Rolling Mills, Inc. v. C. Itoh & Co. (America)*[81] appears to be one of the few Ninth Circuit cases involving antitrust in which

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[76]O.S.C. v. Toshiba, 491 F.2d 1064, 1066 (9th Cir. 1974) (antitrust action brought by two California plaintiffs against Japanese parent corporation and its two New York subsidiaries, who sold calculators throughout the U.S., including California).

[77]491 F.2d 1064.

[78]432 F. Supp. 376 (1977) (antitrust action by California resident against Japanese parent of two U.S. subsidiaries, who sold calculators in the forum).

[79]*Toshiba*, 491 F.2d at 1069.

[80]*Williams*, 432 F.Supp. at 379. The court in *Taubler*, 655 F.2d 991, found jurisdiction over both the breach of contract and the antitrust claim. These claims, however, were not discussed separately for purposes of jurisdiction. Furthermore, the court focused mainly on the contract claim.

[81]499 F. Supp. 829 (D. Or. 1980) (antitrust action against Japanese steel manufacturers, Japanese trading companies, and, in some instances, their American subsidiaries).

jurisdiction was found over a foreign defendant.[82] In this case, the court relied on both the "stream of commerce" theory[83] and the fact that a federal statute was involved.[84]

The *Cascade* court distinguished this case from *O.S.C. Corp. v. Toshiba*[85] and others[86] by finding that those cases had "largely ignored the liberalizing effect of the 'transacts business' language in Section 12."[87] The court claimed that a broader view of "found" and "doing business" must be followed in antitrust cases because ". . . otherwise, the remedial purpose behind Section 12 of the Clayton Act would be frustrated."[88] The court then turned its focus to the "stream of commerce" theory, finding it important ". . . to determine whether the defendant specially manufactured the products for shipment to the forum."[89]

Only in *Cascade* did a Ninth Circuit district court turn to a federal statute in support of a broader application of jurisdiction in the antitrust context. Indeed, the court even went so far as to cite a products liability case[90] to strengthen its argument, while it must have been aware that products liability cases in the Ninth Circuit are generally treated with the most expansive findings of personal jurisdiction. However, a district court that did turn to a federal statute in *U.S. v. Toyota*,[91] a tax case, did not look to the Sherman Act when deciding *Williams v. Cannon*.[92]

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[82]Jurisdiction was found to exist over the trading companies, since it shared employees and presented a common image to the world with its subsidiaries. Jurisdiction was found lacking over the steel manufacturers, since they could exercise no control over the trading companies, were separate entities, and dealings with them were at arm's length.

[83]"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 the consumers in the forum state." *Cascade*, 499 F.Supp. at 835 (quoting *World-Wide Volkswagen*, 444 U.S. 286).

[84]The court pointed to a Fifth Circuit case, Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980), in which jurisdiction was upheld over a Japanese manufacturer, although *Oswalt* was a product liabilities case. Noting that, "[u]nder section 12 of the Clayton Act, 15 U.S.C. § 22, an antitrust action may be brought in any district in which a corporate defendant is an inhabitant, is found, or transacts business." *Cascade*, 499 F.Supp. at 833.

[85]491 F.2d 1064.

[86]*Williams*, 432 F.Supp. 376, and San Antonio Telephone Co., Inc. v. American Telephone & Telegraph Company, 499 F.2d 349 (5th Cir. 1974).

[87]*Cascade*, 499 F.Supp. at 836.

[88]*Id.* at 837 (finding that the Clayton Act provisions were designed to remove obstacles in finding venue, and hence jurisdiction, the stricter standard should not be applied here).

[89]*Cascade*, 499 F.Supp. at 842.

[90]Oswalt, 616 F.2d 191.

[91]561 F.Supp. 354.

[92]432 F.Supp. 376.

This may foreshadow a trend allowing courts to rely on federal statutes to find personal jurisdiction in areas in which they had not usually done so.

### *Commercial Paper*

In the field of commercial paper the Ninth Circuit results have been far from consistent. Two recent cases have denied jurisdiction, declining to follow the lead of an earlier case finding jurisdiction.

In *Wyle v. Bank Melli of Tehran, Iran*,[93] the court held that one foreign defendant was "present" within the forum since it maintained an agency there. A second defendant had refused discovery and the court proposed issuing a preclusion order. The court declined to "pierce the corporate veil" and did not find jurisdiction over the Islamic Republic of Iran.

The Court of Appeals specifically declined to follow *Wyle* in *Paccar International, Inc. v. Commercial Bank of Kuwait*,[94] although the fact patterns in both cases were nearly identical. The reasons given were: (1) the mere existence of a contract is insufficient to confer personal jurisdiction,[95] (2) it is not necessary to rely on a particular forum to enforce a letter of credit,[96] and (3) the analysis in *Wyle* does not apply to the facts of this case.[97]

The court then noted that even if the defendant's actions in drawing on the letter of credit were fraudulent, the victim of that fraud was not the California bank but the plaintiff, a Delaware corporation. Consequently, the effect of the conduct was in Delaware and did not establish specific jurisdiction over the defendant in California. Further, since there was no injury in California, California had little or no

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[93]577 F.Supp. 1148 (shipping company's trustee in bankruptcy brought action alleging conspiracy between the Islamic Republic of Iran, an Iranian bank, an Iranian port and shipping organization, and a California bank to make fraudulent demand on a letter of credit). In this case, the court first undertook a long analysis of the case under the FSIA.

[94]757 F.2d 1058 (9th Cir. 1985) (Delaware corporation, which sold trucks in Kuwait, sought to prevent a Kuwaiti bank from drawing on a letter of credit issued by a California bank).

[95]*See Gonzalez*, 614 F.2d 1247.

[96]"The fact that a contract is governed by the law of a particular state does not establish that the parties have purposefully availed themselves of the privileges of conducting business in that state . . . . Such provisions are irrelevant to analysis under the first two *Data Disc* requirements. To the extent the choice of law is relevant, it is considered only in assessing jurisdiction, which falls under the third *Data Disc* requirement." *Paccar*, 757 F.2d at 1063, note 6.

[97]Since the defendant Kuwaiti bank did not select the California bank, there was no purposeful availment of the privilege of conducting business in the forum. The defendant bank simply became a beneficiary of the letter of credit.

interest in adjudication so that the exercise of jurisdiction over the defendant there would be unreasonable.

Ten days after deciding *Paccar*, the Court of Appeals again refused to exercise jurisdiction over foreign defendants in *Pacific Atlantic Trading Co., Inc v. The M/V Main Express.*[98] The court found that the defendants had neither purposely availed themselves of the benefits and protections of forum law nor engaged in minimal activities in the forum. The court reasoned that "[T]he mere causing of an 'effect' in [the forum] is not necessarily sufficient to afford a constitutional basis for jurisdiction if it is 'unreasonable' in the absence of sufficient contacts with the forum."[99] Finding only the possibility of limited jurisdiction and noting that the claim at issue did not arise from any of the defendant's limited forum contacts, jurisdiction over the defendant was denied.

## CONCLUSION

The Ninth Circuit has a clear and well-defined test to determine whether to exercise personal jurisdiction over a foreign defendant. The first prong of the test is to determine whether there is a state statute that will potentially confer jurisdiction. The next step is to determine whether the state statute accords with constitutional due process requirements. If general jurisdiction cannot be found, the courts turn to the three prong *Data Disc*[100] test. The third-prong of that test — reasonableness — is further broken down into a minimum of seven factors to be considered in deciding whether jurisdiction is to be found. These steps are often quoted and are always discussed in cases involving personal jurisdiction over foreign defendants. The Ninth Circuit courts are always careful to state that a foreign defendant presents a greater barrier to jurisdiction than does a defendant from a sister state.

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[98]758 F.2d 1325 (California corporation shipped cargo to Malaysian defendant via West German carrier; plaintiff never endorsed bills of lading to defendant; action for conversion against defendant).

[99]*Pacific Atlantic*, 758 F.2d at 1328.

[100]557 F.2d 1280.