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Thomas H. Sponsler

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JURISDICTION OVER THE CORPORATE AGENT: THE FIDUCIARY SHIELD

THOMAS H. SPONSLER*

In the decades since the Supreme Court decision in *International Shoe Company v. Washington*,¹ the authority of courts to exercise jurisdiction over nonresident defendants served outside the state of the forum has grown steadily. Legislatures, through the enactment of broadly reaching long-arm statutes,² and courts, through the liberal interpretation of those statutes³ and the expansive application of the due process standards set

* Visiting Professor of Law, Washington and Lee University, Professor of Law, Loyola University, New Orleans.

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¹ 326 U.S. 310 (1945). Abandoning much of its former thinking on the subject, the Supreme Court specified as the due process test for the assertion of personal jurisdiction over a nonresident an analysis as to whether the defendant has adequate minimum contacts with the territory of the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316. The Court's exposition of the appropriate factors of analysis indicates that the quantity of the relevant contacts need not be great when the cause of action sued upon arises out of those contacts. In *Hansen v. Denckla*, 357 U.S. 235 (1958), the Court further refined the doctrine of *International Shoe* by indicating that the contacts between the nonresident defendant and the state of the forum must be voluntary: "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* at 253. The *International Shoe-Hansen* approach has been most recently reaffirmed by the Supreme Court in *Shaffer v. Heitner*, 97 S. Ct. 2569 (1977).

² Since the assertion of jurisdiction over a nonresident depends upon both compatibility with the due process test of *International Shoe* and authorization by an appropriate long arm statute, most state legislatures have enacted such statutes with a mind to availing plaintiffs of the benefits of *International Shoe*. Such statutes have normally listed categories of activities which, if demonstrated, permit the assertion of jurisdiction over the nonresident. See, e.g., N.Y. CIV. PRAC. LAW (McKinney) art. 3, § 302(a) n.16 (1972); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03. A more recent development is the legislative equation of the long arm statute with the due process test, thereby making only one analysis necessary and assuring that no untapped reserve of power compatible with due process exists. See, e.g., R.I. GEN. LAWS § 9-5-33 (1956).

³ For examples of courts' going to heroic lengths to provide broad applications of long arm statutes, see *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal.

forth in *International Shoe* have afforded plaintiffs a greater choice of forums by increasing defendants' amenability to suit in states other than those of their domicile. While some legislatures and courts have demonstrated a greater reluctance than others to test the limits of due process,⁴ the expanding nature of state court⁵ jurisdiction over parties is unmistakable. It is therefore noteworthy when a doctrine appears which runs contrary to this current in the law and restricts the jurisdiction of courts over non-resident defendants. Such a doctrine has developed over the last twelve years with little notice and with no critical examination.

The question involved is the amenability of a corporate agent to the personal jurisdiction of a court within a state in regard to which the agent has conducted some kind of activity considered relevant under the terms of the forum state's long arm statute. Although such activities may be sufficient to subject the corporate principal to the court's jurisdiction, the doctrine considered here provides a different outcome in regard to the corporate agent himself. As the theory is most frequently explained: "[J]urisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual."⁶

The analyses by the courts in the cases in which this "fiduciary shield"⁷ theory has been discussed have been generally deficient in treating alike greatly divergent fact patterns which the cases have presented and in failing to differentiate between the issue of substantive liability and the issue of jurisdiction. In regard to fact patterns, two principal ones have emerged: the first occurs when a corporate agent commits an act outside of the forum state which gives rise to the suit and the agent has no contact with the forum state except his position within a corporation which does maintain sufficient contacts with the forum state to permit assertion of personal jurisdiction over the corporation. In such a case the issue is whether the relationship between the corporation and the forum state is

Rptr. 113 (1969); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

⁴ For examples of courts' providing rather conservative readings of the due process clause, see *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502 (4th Cir. 1956); *Safari Outfitters, Inc. v. Superior Court*, 167 Colo. 456, 448 P.2d 783 (1968).

⁵ Under FED. R. Civ. P. 4(e) federal courts may, in accordance with a statute or rule of court of the state in which the district court is located, obtain jurisdiction over parties not inhabitants of or found within the state. References to state court jurisdiction would therefore normally apply to federal courts as well in absence of a special federal statute authorizing broader personal jurisdiction.

⁶ *Lehigh Valley Indus., Inc. v. Birenbaum*, 389 F. Supp. 798, 803-04 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975).

⁷ The term "fiduciary shield" appears in *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1282 (10th Cir. 1969); *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966). While no other court seems to have engaged in a sufficiently lengthy discussion of the doctrine to require the use of a shorthand name, the term employed by these two courts is being used here for convenience.

sufficient or even relevant in determining the jurisdiction over the corporate agent. The second occurs when the corporate agent actually enters the state of the forum and conducts activities sufficient to meet the requirements of the state long-arm statute but all of the activities are in his capacity as corporate agent and none are on his own behalf. The courts have tended to assume that the danger of unfairness in asserting jurisdiction over the corporate officer in the first case is similarly present in the second.

The distinction between substantive liability and personal jurisdiction is significant because in many of the cases in which the fiduciary shield doctrine has figured, plaintiffs have charged defendants with breaches of contracts signed by the individual defendants on behalf of their corporate principals. As a matter of substantive law, it is settled that an agent will not be personally bound by a contract signed by him on behalf of his principal unless there is clear evidence that the agent intended to be bound.⁸ Indeed, it has been held that the agent must sign twice in such cases, once on behalf of the corporation and once in his personal capacity.⁹ In cases of tortious acts, however, the result is different. The corporate agent who acts improperly is liable along with his principal; the liability of the principal in no way relieves the liability of the agent.¹⁰

The substantive liability of the agent for torts committed by him on behalf of the corporation was crucial in the earliest case located by this writer in which the fiduciary shield argument was considered. In *Maternity Trousseau, Inc. v. Maternity Mart*,¹¹ the individual defendant challenged the jurisdiction of the court over her on the grounds that the activities conducted by her in the forum state of Maryland were not performed in her individual capacity but were on behalf of the corporation. The court rejected the argument, holding specifically that the Maryland long-arm statute included such activity by the individual defendant within its definition of "doing business or performing work or services" within the state.¹²

⁸ *E.g.*, *Savoy Record Co. v. Cardinal Export Corp.* 15 N.Y.2d 1, 203 N.E.2d 206, 254 N.Y.S.2d 521, (1964); *RESTATEMENT (SECOND) OF AGENCY* § 320 *et seq.* (1957).

⁹ *See, e.g.*, *Saltzman Sign Co. v. Beck*, 10 N.Y.2d 63, 176 N.E.2d 74, 217 N.Y.S. 2d 55 (1961).

¹⁰ *E.g.*, *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728 (W.D.Ky. 1941), *aff'd*, 136 F.2d 12 (6th Cir. 1943); *CIC Leasing Corp. v. Dade Linen & Furniture Co.*, 279 So. 2d 73 (Fla. Dist. Ct. App. 1973); *RESTATEMENT (SECOND) OF AGENCY* § 343 (1957).

¹¹ 196 F. Supp. 456 (D. Md. 1961).

¹² *Id.* at 457; *MD. ANN. CODE* art. 75, § 78 (1956) (current version at *MD. CTS. & JUD. PROC. CODE ANN.* § 6-103 (1974):

Any nonresident, person, firm, partnership, general or limited, not qualified under the laws of this State as to doing business herein, who shall do any business or perform any character of work or service in this State, shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the secretary of state to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business, or the performing of such work, or services, or as an incident thereto by any such nonresident, or his, its or their agent, servant or employee.

The court also noted that in this case, a tort case, the fact that the defendant was acting as an agent "would not relieve her from liability if such illegal acts on her part are proved."¹³

The first case generally cited for the establishment of the fiduciary shield theory is *Boas & Associates v. Vernier*.¹⁴ In *Boas* the plaintiff sought to recover commissions earned "under a written agreement or under a subsequent oral agreement."¹⁵ The court's opinion provides few facts upon which to make an independent analysis but does conclude that there was no showing that the oral agreement between plaintiff and defendant was negotiated or concluded by defendant within the forum state of New York. From this the court decided that the cause of action, to the extent that it was based upon the oral agreement, could not be said to have arisen from an act of the defendant in the transaction of business within the state in accordance with the appropriate provision of New York's long-arm statute.¹⁶ In regard to the written contract which had been concluded prior to the alleged oral contract, the court pointed out that the terms of the contract did not relate to the plaintiff's cause of action in this case because the actions charged against defendant were not inconsistent with the terms of the contract.¹⁷ In this regard the court concluded that the "written contract is inapplicable to plaintiff's claims, and its negotiation and execution by defendant in New York proves no basis for personal jurisdiction."¹⁸

The following sentence of the opinion is probably the source of the fiduciary shield theory: "The writing, moreover, was executed by defen-

¹³ 196 F. Supp. at 458.

¹⁴ 22 App. Div. 2d 561, 257 N.Y.S.2d 487 (1965).

¹⁵ 22 App. Div. at 562, 257 N.Y.S.2d at 489.

¹⁶ N.Y.CIV.PRACT. LAW (McKinney) art. 3, § 302(a) (1972).

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to the cause of action for defamation of character arising from the act; or
3. commits a tortious act within the state causing injury to a person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) 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 the state, or
 - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

¹⁷ The written agreement required the defendant to pay the plaintiff a commission based upon amounts received in the transfer of a minority interest of a company to "a person or business having a base, branch or affiliate in the United States." Plaintiff's suit sought a commission for arranging such a transfer between the defendant and two French nationals. 22 App. Div.2d at 563, 257 N.Y.S.2d at 490.

¹⁸ 22 App. Div.2d at 563, 257 N.Y.S.2d at 490.

dant solely in his capacity as general manager of the corporation and not in his individual capacity."¹⁹ Since personal jurisdiction is the subject of the immediately preceding sentence, this statement has apparently been construed to mean that the action of the agent in signing the contract in New York as an agent did not make him subject to the New York court's jurisdiction. However, the court went on in the very next sentence to cite two cases, *Salzman Sign Co. v. Beck*,²⁰ and *Savoy Record Co. v. Cardinal Export Co.*,²¹ for the proposition that "[A] person who signs solely as a corporate officer is not personally obligated on the contract even though the text of the writing states that the officer is to be liable personally."²² Since the *Salzman* and *Savoy* cases involve issues of substantive liability it is clear that the court's language was directed to the issue of the lack of substantive liability of the defendant on the written contract which he had signed as an agent only. The court neither considered nor disposed of the case on the basis that the defendant's actions within the state, otherwise relevant to the cause of action asserted by the plaintiff, could not be considered in determining personal jurisdiction over the defendant under the state's long-arm statute.

Despite this fact the *Boas* decision has been cited by subsequent courts as authority for the fiduciary shield theory.²³ Indeed, the very next year the United States Court of Appeals for the Second Circuit cited *Boas* as authority for this proposition²⁴ although the majority concluded that the doctrine did not apply to the facts of that case. A dissenter, however, concluded that such was clearly the law in New York and that it did apply to the facts at hand:

[I]t is clear that the activities of Klein as a corporate officer on behalf of the corporations do not constitute the transaction of busi-

¹⁹ *Id.* In the defendant-respondent's brief the following summary of a portion of the argument appears: "A corporate officer acting solely in such capacity does not subject his person to the jurisdiction of New York courts merely by executing a corporate agreement in New York." Brief for Respondent at 14. This statement appears at the outset of a portion of the brief in which it is argued that the respondent cannot be bound on a contract executed on behalf of his principal. The thrust of the entire argument is the absence of substantive liability. Respondent concluded this portion of his argument as follows: "The corporate transaction was clearly intended to bind only the disclosed corporate principal and cannot properly be imputed to the corporate officer to subject the latter to New York jurisdiction under section 302(a)(1) C.P.L.R." Brief for Respondent at 18. To the extent that the respondent argued and the court accepted the argument that the agent could not be subjected to the jurisdiction of the New York courts because of his status as an agent, such a conclusion was based upon the fact that he was not liable as a matter of substantive law.

²⁰ 10 N.Y.2d 63, 176 N.E.2d 74, 217 N.Y.S.2d 55 (1961).

²¹ 15 N.Y.2d 1, 203 N.E.2d 206, 254 N.Y.S.2d 521 (1964).

²² 22 App.Div.2d at 563, 257 N.Y.S.2d at 490.

²³ *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969); *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir. 1966); *Alosio v. Iranian Shipping Lines, S.A.*, 307 F.Supp. 1117, 1118 (S.D.N.Y. 1970); *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523, 528 (S.D.N.Y. 1967).

²⁴ *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir. 1966).

ness by Klein individually. 235 F. Supp. 345, 348. This holding by the district court is squarely in accord with well settled New York law, including a recent decision that jurisdiction under C.P.L.K. Sec. 302(a)(1) may not be obtained over an individual who acts in New York "solely in his capacity as general manager of the corporation, and not in his individual capacity." *Boas & Associates v. Vernier*, 22 A.D.2d 1, 561, 563, 257 N.Y.S.2d 487, 490 (1st Dept. 1965). See *Savoy Record Co. v. Cardinal Export Corp.*, 15 N.Y.2d 1, 254 N.Y.S.2d 521, 203 N.E.2d 206 (1964); *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 217 N.Y.S.2d 55, 176 N.E.2d 74 (1961); *Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177, 179 (1953); *Hall v. Lauderdale*, 46 N.Y. 70, 74 (1871).²⁵

The dissenter's cited cases all relate to the substantive liability of an agent who signs the contract on behalf of his principal. None of them, including *Boas*, concern the proposition for which they were cited.

Another early case cited as supporting the fiduciary shield theory is *Unicon Management Corp. v. Koppers Company*.²⁶ In that case the plaintiff brought suit against various individual corporate officers of the defendant corporation charging them with conspiracy to precipitate a termination of a contract between plaintiff and the corporate defendant, thereby wrongfully interfering with the contractual relationship. Plaintiff alleged that the individual defendants, in furtherance of this conspiracy, appointed coordinators and administrators²⁷ to enter the state of New York to impede and hinder plaintiff in the performance of its agreement with defendant and thus bring about the eventual breach of contract. Plaintiff asserted that the coordinators and administrators were actually the agents of the individual defendants and not merely agents of the corporation. The court mentioned no visits by the individual defendants to New York in regard to the facts giving rise to the cause of action.

The disputed facts upon which the jurisdictional issues turned were the same as those which determined the substantive issues in the case; if the corporate employees who did enter the state were personal agents of the individual defendant, plaintiff had a cause of action against the individual defendants and personal jurisdiction over them since they had acted in the state through agents.²⁸ If the corporate employees who entered New York were not acting for the individual defendants but for the corporation only, there would be no substantive claim against the individual defendants and no jurisdiction over them since they had not personally entered the state or acted therein by or through agents. The issue of the agency of the

²⁵ *Id.* at 252.

²⁶ 250 F. Supp. 850 (S.D.N.Y. 1966).

²⁷ The "coordinators" and "administrators" were allegedly sent into New York to interfere with the plaintiff's management of a third corporation and to prevent plaintiff from exercising rights under its agreement with the defendant corporation. *Id.* at 851.

²⁸ See N.Y.CIV.PRAC.LAW (McKinney) art. 3, § 302(a) (1972) (permits the assertion of jurisdiction over a nondomiciliary who acts in person or through an agent).

coordinators and administrators was thus the crucial factual issue upon which both the jurisdictional issue and the substantive issue turned. The court examined the affidavits submitted on the issue and concluded that the plaintiffs had offered:

absolutely no indication of the factual support for jurisdictional allegations (1) that a conspiracy existed, (2) that the individual defendants were acting in furtherance of their own interests rather than what they conceived, in good faith, to be Koppers' interest, or (3) that the employees sent to New York in furtherance of the alleged conspiracy were acting as the agents of the individual defendants rather than of Koppers.²⁹

The court did not conclude that the corporate employees performing the acts which would meet the terms of the long-arm statute would not be subject to the court's jurisdiction, but that the coordinators and administrators sent into New York, the only contact between New York and the individual defendants, had not been demonstrated to be the actual agents of the individual defendants. The court held that the affidavits had presented insufficient indication of such an agency relationship to merit a hearing on the issue.³⁰

The plaintiff in *Unicon* attempted to transform a breach of contract suit against a corporation into a tort suit against the corporation's officers whose actions in management of the corporation led to the alleged breach. The court appeared willing to embrace such a theory if the plaintiff could offer some evidence to substantiate the allegation that the coordinators and administrators sent into New York acted on behalf of the individual defendants personally. The absence of such a showing resulted in dismissal of the suit. *Unicon*, like *Boas*, involved no fiduciary shield theory.

The third case bringing the fiduciary shield theory to existence was *Schenin v. Micro Copper Corp.*,³¹ a case presenting almost the same facts as *Unicon*. As in *Unicon* the plaintiff essentially had a breach of contract claim which he tried to transform into a tort suit against the officers of the contracting corporation. The court was presented with several alternate theories of jurisdiction one of which was that the individual defendants had transacted business in the state of New York, thereby coming within the scope of the long-arm statute. The parties and the court misread *Boas* and *Unicon*³² to provide for a fiduciary shield doctrine and went on to inquire whether the defendant was present in the state to transact business on his own behalf as well as on behalf of the corporation. The argument

²⁹ 250 F. Supp. at 852.

³⁰ *Id.* at 853.

³¹ 272 F. Supp. 523 (S.D.N.Y.1967).

³² "Plaintiff concedes that, if Swift and Cook had entered New York solely for the purpose of transacting business on behalf of Vanura, the Court would lack jurisdiction over their persons. *Boas & Associates v. Vernier*, 22 A.D.2d 561, 257 N.Y.S.2d 487 (1st Dep't 1965); *Unicon Management Corp. v. Koppers Co.*, 250 F. Supp. 850 (S.D.N.Y.1966)." *Id.* at 528.

employed by plaintiff was that the defendants had bound themselves personally when signing the contract on behalf of the corporation; the court concluded that the appropriate high standard for binding the agent to the contract of the principal had not been met. Notably, in another part of the opinion, discussing the assertion that the defendants had committed tortious acts within New York, the court concluded that any such acts had occurred outside of the state.³³ Although this would have been a logical point at which to discuss specifically the fiduciary shield theory the court made no mention of it.

In each of these first three cases generally cited for the fiduciary shield theory, the courts were not compelled by the facts to apply such doctrine. The court in *Boas* apparently neither intended nor did in fact announce such a doctrine; the court in *Schenin*, although it assumed the existence of such a doctrine, was, like the *Unicon* court, really concerned with substantive law, dealing as it did with the liability of a corporate officer under a contract signed on behalf of the corporation. Nevertheless, the language employed by the courts in the latter two cases superficially indicates a recognition of a fiduciary shield theory.

It was not until the fourth case, *Willner v. Thompson*,³⁴ that a fiduciary shield theory may have had actual effect. *Willner* was a contract action in a New York court against a California corporation and an individual defendant. It is not clear from the court's recitation of the facts whether the individual defendant was joined because he was actually a party to the contract on merely as the signator for the corporation. The court concluded that the corporation was subject to the New York long-arm statute but that the individual defendant was not. Here the plaintiff admitted that the individual defendant conducted no business in New York in his own right. The court concluded without explanation that he could not be served in California under the terms of the New York long-arm statute since he had not transacted any business in New York.³⁵ The court offered no explanation of what activities, if any, the individual defendant engaged in within New York nor any citation of authority for its conclusion. It is impossible therefore to know if the fiduciary shield theory was actually applied. The court's language was sufficiently broad, however, to convince subsequent courts that such a theory was applied.³⁶

³³ *Id.* at 529.

³⁴ 285 F. Supp. 394 (E.D.N.Y. 1968).

³⁵ *Id.* at 397. See N.Y.CIV.PRAC.LAW (McKinney) art. 3, § 302(a) (1972).

³⁶ 285 F. Supp. at 397. The *Willner* court stated:

A different question is presented concerning the individual defendant. Plaintiffs admit that this defendant conducted no business in New York in his own right and they made no showing that the activities of the corporation may be attributed to him as the corporation's alter ego. Plaintiffs do not allege that the corporate entity is a mere facade or sham to protect the individual defendant. Since the corporate defendant is not the agent of the individual defendant, its acts cannot possibly be attributed to him. It follows that the individual defendant did not transact any

The fiduciary shield theory, heretofore strictly a creature of New York courts, gained added legitimacy in *Wilshire Oil Co. v. Riffe*,³⁷ a decision by the Tenth Circuit Court of Appeals. *Wilshire* was a tort suit by a corporation against former officers whose actions made the corporation liable, criminally and civilly, for antitrust violations. The activities of the individual defendants were performed in various capacities as officers of the plaintiff corporation and of other corporations which the individual defendants themselves controlled. The opinion at times invites the conclusion that the activities of the defendants within the foreign state, Kansas, were insufficiently related to the cause of action asserted against them to invoke the Kansas long-arm statute, and at times supports the fiduciary shield theory. It is clear that the district court³⁸ and the court of appeals recognized the efficacy of the fiduciary shield doctrine although the court of appeals did not totally rely upon this as a basis for its decision.³⁹

The court of appeals in *Wilshire* treated the fiduciary shield theory tentatively, indicating by way of footnote that "it has been held that" such was the case.⁴⁰ By 1970, the court in *Path Instruments International Corp. v. Ashi Optical Co.*⁴¹ held that it was "settled" that the corporate shield

business in New York and could not be validly served in California pursuant to Section 302, CPLR.

Id. at 397.

Despite the ambiguity of this language, courts in *Whilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969), and *Path Instruments Int'l Corp. v. Asahi Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970), have cited *Willner* while holding that they lacked jurisdiction over corporate officers who actually entered the forum state to perform activities connected with the cause of action.

³⁷ 409 F. 2d 1277 (9th Cir. 1969).

³⁸ The foregoing activities were, for the most part, conducted by Homer Riffe and L.E. Riffe in their capacity as agents and employees of *Wilshire*. This led the district court to conclude that these agents, in performing these acts for their corporate principal, did not thereby render themselves personally amenable to service of process under the Kansas statute, i.e., they were not individually transacting business in Kansas in the sense specified in the statute.

Id. at 1280-81.

³⁹ Thus, our previous discussion of the fiduciary shield precluding an exercise of personal jurisdiction over a corporate agent applies with equal force here. Nonetheless we do not deem it necessary to decide the matter solely on that basis. The interaction of the inherent weakness of the contacts and the strained causal connection with the underlying cause of action, operate in conjunction with the fact of the agency relationship to require, in conformity with notions of fair play and substantial justice, that this court refrain from compelling a corporate officer to answer in courts located in a state foreign to both the agent and his corporation.

Id. at 1282-83.

⁴⁰ It has been held that while a foreign corporation is amenable to service when it transacts business through agents operating in the forum state, unless the agents transact business on their own account and not on behalf of the corporation, the agents are not engaged in business so as to sustain an application of the long-arm statute to them as individuals.

Id. at 1281 n.8.

⁴¹ 312 F. Supp. 805 (S.D.N.Y. 1970). "It is settled that jurisdiction over individual

theory was applicable. *Path*, like *Wilshire*, was a tort case but this time the court conceded that the individual defendants had entered the forum state, New York, for business purposes connected with the subject matter of the action. Yet, citing *Wilshire*, *Schenin*, *Unicon* and *Willner*, the court found no personal jurisdiction over the individual defendants. By 1975 in *Lehigh Valley Industries, Inc. v. Birenbaum*,⁴² "settled" gave way to "axiomatic" and the fiduciary shield theory had become an accepted jurisdictional doctrine without a single full dress analysis by court or commentator.⁴³

The most extensive analysis of the doctrine to date appears in *Idaho Potato Commission v. Washington Potato Commission*.⁴⁴ In that case suit was brought by an Idaho state agency against a Washington state agency and its individual directors for approving an advertising plan which was disseminated in Idaho and which allegedly infringed the plaintiff's trademark. The members of the Washington Commission were never shown to be present in Idaho. In considering the jurisdictional issue, the court discussed the instance of a truck driver who enters a state and commits a tortious act; it reasoned that both he and his employer would be subject to the personal jurisdiction of the state's courts.⁴⁵ In the case under consideration, although the defendant commission, like the more common corporate defendant, had sufficient contacts with the state to permit assertion of personal jurisdiction over it for actions taken outside the state, the court was unwilling to assert personal jurisdiction over the commission members who acted in their official capacities but outside of the state. The court emphasized the fact that the commission members would have no reasonable expectation of being sued in another state for their official activities.⁴⁶ While the court's discussion of the truck driver points to a different conclusion had the commission members entered the state of Idaho there is other language in the opinion that points to the opposite result.⁴⁷ Other courts

officers and employees of a corporation may not be predicated merely upon jurisdiction over the corporation itself." *Id.* at 810.

⁴² 389 F. Supp. 798 (S.D.N.Y.), *aff'd*, 527 F.2d 87 (2d Cir. 1975). "It is axiomatic that jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation. That is to say, an individual's transaction of business within the state solely as an officer of a corporation does not create personal jurisdiction over that individual." *Id.* at 803-04.

⁴³ The subject is briefly treated in C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1069 (Supp. 1976), but no analysis is offered.

⁴⁴ 410 F. Supp. 171 (D. Idaho 1976).

⁴⁵ *Id.* at 182. *Cf. Eisman v. Martin*, 174 Kan. 726, 258 P.2d 296 (1953) (state implied consent statute held to apply to the agent driver of an automobile as well as to the owner).

⁴⁶ 410 F. Supp. at 182.

The members of any such commission, including employees of such board, shall not be held responsible individually in any way whatsoever to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as principal, agent, person or employee, except for their own individual acts of dishonesty or crime.

WASH. REV. CODE ANN. § 15.66.230 (West 1971), *cited at* 410 F. Supp. at 182, n.4.

⁴⁷ The same substantive distinction applies in cases where tortious activity is alleged to confer personal jurisdiction under a state's long arm statute, such that

have applied the doctrine to corporate officers who have in fact entered the forum states and committed tortious acts there with no consideration being given to the inconsistency between such a result and that which would apply in a case such as that of the hypothetical truck driver.⁴⁸

The parameters of the fiduciary shield doctrine in the jurisdictions in which it has been accepted include possible exceptions. Courts otherwise willing to recognize and apply the theory have expressed a willingness to disregard the corporate form and reach the corporate officer, usually on the theory that the individual defendant is the alter ego of the corporation. Thus, if the corporation is owned and controlled entirely by the individual defendant,⁴⁹ if the individual's actions partake of fraud or are otherwise criminal,⁵⁰ or if they serve his personal interests as distinct from those of

unless there is evidence that the act by the corporate officer was other than as an agent for the corporation, then personal jurisdiction over the corporate officer will not lie. *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836, 842 (E.D.N.Y. 1971).

410 F. Supp. at 181.

The situation here is much like activity by a corporate employee who, by performing corporate business, causes the corporation to purposefully avail itself of the law of another state. Absent a ruse to conceal an employee's personal activity behind the corporate shield, it is most difficult to conclude that the employee purposefully availed himself of a distant forum's laws.

410 F. Supp. at 183. Despite the court's apparent willingness to decline jurisdiction even over a corporate officer who enters the state to transact business on behalf of his principal, the court did distinguish the facts at hand from its hypothetical involving a truck driver by noting that the individual defendants were never physically present in Idaho but acted only in Washington with the effect being felt in Idaho. This distinction followed the court's observation that "conceptually, it is difficult to distinguish the facts in this case from" the hypothetical situation involving the truck driver. 410 F. Supp. at 182.

⁴⁸ The imprecision with which the relevant facts are explained hinders analysis in most cases, but several courts, although willing to concede that the individual defendants did enter the state in regard to the subject matter of the lawsuit, still declined to exercise jurisdiction over them: *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969) (individual defendant entered the forum state and allegedly made misrepresentations in the course of contract negotiations on behalf of the principal); *Lehigh Valley Industries, Inc. v. Birenbarum*, 389 F. Supp. 798 (S.D.N.Y. 1975) (individual defendant made visits to the forum state which may have been unrelated to the cause of action); *Fashion Two Twenty, Inc. v. Steinberg*, 339 F. Supp. 836 (E.D.N.Y. 1971) (court indicates that individual defendants may have transacted business within the forum state, but if so, only as agents of the corporation); *Path Instruments Int'l Corp. v. Asahi Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970) (court concedes that all of the individual defendants have entered the state of the forum for business purposes); *Yardis Corp. v. Cirami*, 76 Misc.2d 793, 351 N.Y.S.2d 586 (N.Y. Sup. Ct. 1974) (court refuses to enforce a default judgment rendered in another state on the ground that anything done in the other state by the individual defendant was done as an officer and employee of a foreign corporation).

⁴⁹ *Dudley v. Smith*, 504 F.2d 979 (5th Cir. 1974). In this case the court upheld the assertion of jurisdiction under the terms of the Alabama long-arm statute over a corporate officer who acted in Alabama on behalf of the corporation of which he was president, chairman of the board, de facto sole stockholder and which he dominated completely. The court made no mention of the fiduciary shield line of cases.

⁵⁰ *United States v. Montreal Trust Co.*, 358 F.2d 239 (2d Cir. 1966). The court upheld jurisdiction over the estate of a corporate officer whose acts amounted to a breach of fiduciary

the corporation,⁵¹ the court may be willing to disregard the fiduciary shield.

In a few cases the courts have gone further and asserted jurisdiction over a corporate officer while admitting that the individual defendant did not have sufficient contacts with the state of the forum apart from contacts through the corporation. These courts come to a result directly opposed to the fiduciary shield theory; attributing to the individual the contacts which exist between the corporate employer and the state. The opinion in the leading such case, *Odell v. Singer*,⁵² provides the clearest explanation for such a result.

This presents a rather unique situation. The corporation has performed sufficient acts to constitute it as doing business, but the individuals through whom the corporation must act have not performed sufficient acts to constitute them as doing business. May the corporate acts be imputed to the individuals for the purpose of obtaining jurisdiction over them? In this instance we think so Further, in this case, the acts of the corporation are chargeable to the individuals for purposes of determining the existence of jurisdiction. The reason being that the individual officers, as agents of the corporation would be personally liable to any third person they injured by virtue of their tortious activity even if such acts were performed within the scope of their employment as corporate officers. On this basis, appellees could not escape liability because of their non-residence, when the corporation which they represent was doing business in the state. If the tortious corporate activity is attributable to them personally, then the acts of that corporation which constitute it as doing business in this state are similarly attributable to the individuals for purposes of determining jurisdiction.⁵³

obligation to the corporation and a wrongful diversion of funds to himself from the corporation. Plaintiff was successful in alleging that the corporate agents acting within the forum state were personal agents of the absent defendant, the argument unsuccessfully asserted in *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974); *Alosio v. Iranian Shipping Lines, S.A.*, 307 F. Supp. 1117 (S.D.N.Y. 1970); *Unicon Mgt. Corp. v. Koppers Co.*, 250 F. Supp. 850 (S.D.N.Y. 1966). The court upheld assertion of jurisdiction over individual defendants who used an underfinanced corporation to defraud those they dealt with and used illegal bank accounts to siphon money out of the corporation for personal use. This case is also notable for the dissatisfaction expressed by the court with the fiduciary shield theory: "However debatable it may be in the light of reasons underlying the minimum contacts theory . . . to differentiate between a corporate act and an individual act, this remains a distinction of legal significance." *Id.* at 1118.

⁵¹ *Krause v. Hauser*, 272 F. Supp. 549 (E.D.N.Y. 1967) (court asserts jurisdiction over a partner acting in New York since he was acting in violation of his fiduciary duties by improperly furthering his own interests). See also *United States v. Montreal Trust Co.* 358 F.2d 239 (2d Cir. 1966).

⁵² 169 So.2d 851 (Dist. Ct. App. Fla. 1964), writ discharged, 176 So.2d 94 (Sup. Ct. Fla. 1965).

⁵³ *Id.* at 853-54.

Several other courts have adopted similar reasoning, usually on the grounds that the corporate form was not adequately maintained,⁵⁴ that the individual owners of the corporation were using the corporation as their agent for the transaction of business in the forum state,⁵⁵ or that the interests of the individual defendant and the corporation were identical.⁵⁶ Finally, a few courts, while not going so far as to attribute to a nonresident individual the jurisdiction producing contacts of a corporation, have declined to adopt the fiduciary shield doctrine to the extent that it would immunize the corporate agent for actions taken by him in the forum state.⁵⁷

This development of the fiduciary shield doctrine in those jurisdictions that have accepted it appears to be based on the failure of courts to distinguish disparate factual situations and upon unthinking reliance upon prior cases and language which were not relevant to the situations before them. Starting with the early New York cases⁵⁸ which turned on matters of sub-

⁵⁴ *Country Maid, Inc. v. Haseotes*, 299 F. Supp. 633, 637 (E.D.Pa. 1969). This was suit against thirteen sibling corporations with identical owners, directors and executive boards. The court concluded that the individual corporations together constituted but one business operation. *Id.* at 638.

⁵⁵ *Fisher v. Premiere Realty Co.*, 298 So.2d 447, 449 (Dist. Ct. App. Fla. 1974). (three sole nonresident shareholders of a corporation held subject to the court's jurisdiction after they personally guaranteed a lease entered into by the corporation); *Harris v. Arlen Properties, Inc.*, 256 Md. 185, 198-200, 260 A.2d 22, 29-30 (Ct. App. Md. 1969) (jurisdiction over a parent corporation found through the activities of the subsidiary whose sole purpose was to hold title to real estate for the parent).

⁵⁶ In *Holfield v. Power Chemical Co.*, 382 F. Supp., 388 (D. Md. 1974), the court upheld jurisdiction over the president-owner of a corporation stating:

Where, as in this case, there is an unmistakable identity of interest between the defendant and the corporation through which he acts, where that corporation has acted in a manner that brings it within a long-arm statute, and where significant forum state interests are involved in the cause of action, then disregarding the corporation entity to reach the defendant for the purpose of asserting the personal jurisdiction of the state courts over the defendant does not offend the due process requirements of the Constitution.

Id. at 394. In *Lawson v. Baltimore Paint & Chem. Corp.*, 298 F. Supp. 373 (D. Md. 1969), the court, emphasizing the difficulty plaintiff would have in obtaining jurisdiction over the nonresident defendants in any other single forum, asserted jurisdiction over them stating:

The allegations of the amended complaint go beyond the mere fact that the individual defendants acted as directors or officers of a corporation incorporated in Maryland or a corporation having its principal place of business in Maryland. In this case the corporation was incorporated in Maryland and has its principal office and place of business in Maryland, and each of the individual defendants has derived substantial revenue from his services as a director or officer or both, which services we have seen, were used in Maryland within the meaning of section 96(a)(4). It is further alleged that defendants' acts caused tortious injury to [the] [c]orporation in Maryland.

Id. at 379.

⁵⁷ *Costin v. Olen*, 449 F.2d 129 (5th Cir. 1971); *Topik v. Catalyst Research Corp.*, 339 F. Supp. 1102 (D. Md. 1972), *aff'd*, 473 F.2d 907 (4th Cir.), *cert. denied*, 414 U.S. 910 (1973); *Maternity Trousseau Inc. v. Maternity Mart*, 196 F. Supp. 456 (D. Md. 1961); *Simmons v. Travelers Ins. Co.*, 295 So.2d 550 (Ct. App. La.), *writ denied, result found to be correct*, 299 So.2d 795 (1974).

⁵⁸ See notes 14-34 *supra*.

stantive law or in which the facts would not allow assertion of jurisdiction even without resort to a theory of corporate insulation of employees, the language employed took on a life of its own apart from the contexts in which it was used. This disturbing process established a theory which closer analysis and application of existing doctrine refutes.

Initially a distinction must be drawn between the situation in which a corporate employee enters the jurisdiction and one in which he does not. If the employee has no direct contacts with the state of the forum it may be unreasonable, given only his relationship to the corporation that may have such contacts, to conclude that he would be subject to the personal jurisdiction of the court. To the extent that the statement "jurisdiction over an individual cannot be predicated upon jurisdiction over a corporation"⁵⁹ carries this meaning, it is appropriate. A contrary conclusion would make every officer, employee, or director of a corporation subject to the personal jurisdiction of courts in every state where the corporation is doing business, certainly a result unfair to the individual employee.

Such would certainly be true in the case of a large corporation whose operations cross state lines; an employee of such a corporation is in no sense the alter ego of the corporation. Most corporations are far more modest, however, and the corporate structure may be a vehicle for the conduct of business by an individual or a set of individuals whose control over the corporation and its day to day operations is total. In such cases the actions taken by individual defendants outside the state of the forum for which the substantive law would impose liability and which, through the vehicle of the corporation, have produced adverse effects within the state of the forum, should reasonably subject the absent individuals to personal jurisdiction in the forum state providing control of the corporate activities can be fairly attributed to them.

While comparatively few cases exist in which such an analysis has resulted in the assertion of personal jurisdiction over a nonresident individual, the problem arises fairly frequently in the context of parent corporations being reached through the activities of their wholly owned and controlled subsidiaries in the forum state. A rich store of precedent exists for analysis in such cases,⁶⁰ with two major approaches evident. One line of cases emphasizes the care with which the corporate identities of the parent and subsidiary are maintained.⁶¹ These cases emphasize the following fac-

⁵⁹ *Lehigh Valley Industries, Inc. v. Birenbaum*, 389 F. Supp. 798 (S.D.N.Y. 1975).

⁶⁰ See, e.g. *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838 (S.D. Fla. 1975); *Flank Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357 (D. Col. 1967); *Mathes v. P.T. Nat'l Util. Helicopters, Ltd.*, 68 Cal. App. 3d 182, 137 Cal. Rptr. 104 (1977); *Copeland v. Gordon Jewelry Corp.*, 288 So.2d 404 (Ct. App. La.), writ denied, result found to be correct, 290 So.2d 911 (1974); *Public Adm'r of New York, Co. v. Royal Bank*, 19 N.Y.2d 127, 224 N.E.2d 877, 278 N.Y.S.2d 378 (1967).

⁶¹ See, e.g., *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925); *Berkman v. Ann Lewis Shops, Inc.*, 246 F. 2d 44 (2d Cir. 1957); *Smeltzer v. Deere Co.*, 252 F. Supp. 552 (W. D. Pa. 1966); *Fisher Baking Co. v. Continental Baking Corp.* 238 F. Supp. 322 (D. Utah 1965).

tors: are separate records kept for each firm including records of transactions between them?; are there separate by-laws, charters and accounts?; are there separate boards of directors and do they meet separately?; a second line of cases disregards the formal separation of the two corporations and concentrates on the day to day control of the subsidiary by the parent.⁶² These cases focus on the following questions: did the parent create the subsidiary as an investment or does the parent in fact do business through the subsidiary by controlling its every activity?; do the officers of the two corporations act separately?; who chooses the officers of the subsidiary?; and, perhaps most crucially, who controls the actions of the subsidiary in regard to the activity giving rise to the lawsuit?

Comparable considerations should be relevant in ascribing the jurisdiction producing contacts of the corporation to the defendant individuals. If the individual defendant's interests are identical to those of the corporation, and he alone with others controls the day to day activities of the corporation including the activities giving rise to the suit and the existence of the corporate form does not immunize him from substantive liability, it would violate no notion of fundamental fairness to conclude that the individual was conducting business in the forum state through the corporation. In the few cases in which courts have reached the individual defendants through the corporation such factors have been present and considered relevant.⁶³ Such cases remain isolated and no significant body of precedent has yet evolved to refute the more frequently voiced and broader conclusion that the individual cannot be reached through the corporation.

When the individual defendant actually enters the territory of the forum state for purposes relevant to the suit or engages in other activities which would subject him to the terms of the forum's long-arm statute without attributing to him contacts of the corporation, the application of the fiduciary shield theory is less defensible. Although the early cases did not involve the actual presence of the corporate agent in the forum state; it was the broad language of these cases which later courts took to have stated the "settled" law. Thus, with little or no analysis of their own, these later courts declined to exercise jurisdiction over corporate agents who actually entered the forum's territory.⁶⁴

One possible line of reasoning could sustain such a result. A corporate agent who enters a state to act on behalf of his principal may not be "doing business" in the state as that term is used in a particular long-arm statute.⁶⁵ "Doing business" has traditionally carried with it a connotation of

⁶² See, e.g., *United States v. Scophony Corp.*, 333 U.S. 795 (1948); *Frito-Lay, Inc. v. Proctor & Gamble Co.*, 364 F. Supp. 243 (N. D. Tex. 1973); *Handlos v. Litton Indus., Inc.*, 304 F. Supp. 347 (E.D. Wis. 1969).

⁶³ See notes 54-56 *supra*.

⁶⁴ See note 48 *supra*.

⁶⁵ Many of the cases predating *International Shoe* were concerned with the question of whether the defendant corporation was "doing business" within the forum state. The tests for "doing business" became incredibly complex and confused. For a good discussion of the

more persistent activity than "transacts business".⁶⁶ However, most long-arm statutes, including that of New York⁶⁷ where the doctrine is most frequently applied, employ the term "transacts business", and the presence of a corporate agent who negotiates, makes representations or otherwise enters into business transactions on behalf of his corporate principal fits the normal understanding of that term. No case so far has made this distinction; the existing decisions, usually reached in regard to statutes employing the "transacts business" wording, are based on the conclusion that the corporate agent who transacts business on behalf of his corporate employer is not transacting business as the statute employs the term and is consequently not subject to service. Such a conclusion is at odds with the kind of analysis that has been applied since *International Shoe*. That analysis has emphasized the logical relationship between the nonresident defendant, the cause of action sued upon, and the state of the forum. If the cause of action sued upon arises from some activity purposefully conducted in the forum state by the nonresident defendant, jurisdiction is consistent with due process even though the defendant's relationship to the state of the forum may be limited to the very contacts giving rise to the lawsuit.⁶⁸ If the defendant has entered the forum state and there transacted business, it is not unfair to make him answer for his actions in the same state. When a corporate agent enters the forum state, even under orders from the corporation, he is acting in his own interest by carrying out the responsibilities of his employment. Despite the fact that he may have acted under orders, his presence in the forum state still amounts to his entry into the state's legitimate sphere of concern.

Making the corporate agent amenable to the court's jurisdiction would seldom involve any hardship to the agent greater than that implicit in being sued in any state. Any corporate agent whose actions raise a legitimate question of substantive liability will certainly be sufficiently involved in the facts of the dispute to require his presence as a witness at any trial involving his corporate employer. Failure to assert jurisdiction over him would merely result in his presence as a witness and not as a party. When the corporation is financially strong enough to be responsible for any adverse judgment obtained by plaintiff it will normally assume the liability

doctrine prior to *International Shoe*, see Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

⁶⁶ The UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, § 1.03(4) provides for personal jurisdiction over the nonresident defendant in regard to a cause of action arising from his "causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct." This concept of doing business is in accord with the usual notion of doing business as extending beyond isolated transactions.

⁶⁷ See note 16 *supra*.

⁶⁸ *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221-22 (1957). In *McGee*, jurisdiction was permitted over a Texas insurer in California despite the fact that the policy sued upon was apparently the only policy issued by the defendant in California and the defendant had not solicited or done business in the state. *Id.* at 222.

of the employee or at least provide for his defense, usually as part of the corporation's own defense.⁶⁹ If the corporate defendant is less able than its agent to sustain an adverse judgment, it is more likely that the corporation may be a shell to protect the activities of the agent. In such a case the need to obtain jurisdiction over the individual agent is even greater for plaintiff.

The corporate officer/agent like the employee truck driver should have his activities examined separately from that of the corporation. The conclusion that the court has jurisdiction over the corporation should not mean that it has jurisdiction over the individual defendant; however, the fact that the individual defendant's actions otherwise meet the terms of the long-arm statute should not be affected by the fact that he has acted in a corporate capacity.

Applying such an analysis to the cases which have involved the fiduciary shield doctrine results in few changes. In those cases in which the individual defendants did not enter the state of the forum or where their contacts with the state were otherwise insubstantial, no jurisdiction would result. However, in cases like *Path Instruments*⁷⁰ and *Wilshire Oil*⁷¹ where the defendants did enter the forum or otherwise met the terms of the long-arm statute, jurisdiction over the individual defendants would obtain.

Ignoring any notion that acting in a corporate capacity somehow provides the defendant with a jurisdictional shield eliminates unfairness to the plaintiff and permits a systematic application of jurisdictional principles as they are applied in other contexts.⁷² The doctrine of the fiduciary shield, having come into existence through misunderstanding and having thrived on lack of articulation and analysis, should be allowed to fade away in the course of more reasoned application of established principles.

⁶⁹ See generally M. SHAEFFLER, *THE LIABILITIES OF OFFICERS: INDEMNIFICATION AND INSURANCE OF CORPORATE OFFICERS AND DIRECTORS* (1976).

⁷⁰ See note 41 *supra*.

⁷¹ See note 37 *supra*.

⁷² The application of differing analyses depending upon the substantive issues involved in particular suits is not unknown although it is not often discussed thoroughly. For an interesting treatment of some of the issues see Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967).

