Corporate Officials Beware: Calder v. Jones May Pierce Your Fiduciary Shield

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CORPORATE OFFICIALS BEWARE: Calder v. Jones
MAY PIERCE YOUR FIDUCIARY SHIELD

I. INTRODUCTION

The "fiduciary shield" doctrine1 "shields" corporate officials from the assertion of personal jurisdiction by state and federal courts when such assertions are based solely on activities conducted by those officials in their corporate capacities.2 The doctrine rests on the premise that activities taken by corporate officials in their corporate capacities constitute acts by the corporations with which those officials are affiliated, and are not acts of the individual officials themselves.3 In that sense, the term "corporate official" has been defined to include not only officers4 and directors,5 but also the shareholders,6 agents7 and employees8 of corporations.

The fiduciary shield doctrine does not bar suit against corporate officials in their individual capacities under all circumstances.9 For instance, officials may be subject to personal jurisdiction in states in which they are domiciled10 and in other states with which they have sufficient minimum contacts11 in their individual capacities.12 Likewise, although the doctrine provides corporate officials with a defense to the exercise of personal jurisdiction, it does not supply a similar defense to an action for personal liability.13

5. Id.
10. "Domicile" is "[t]hat place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning." Black's Law Dictionary 435 (5th ed. 1979).
11. "Minimum contacts" was the test established by the United States Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), to determine whether a court's assertion of personal jurisdiction over a non-resident defendant comports with constitutional due process. See infra notes 20-68 and accompanying text for a discussion of personal jurisdiction.
12. Axelrad, No. 84 Civ. 8936, LEXIS at n.5.
13. Marine Midland Bank, 384 U.S. at 902. Indeed, many courts have been troubled by the fact that an individual could be personally liable for his activities within a state, but could
The fiduciary shield doctrine has been the subject of great debate in state and federal courts for many years. The United States Supreme Court first considered the application of the doctrine, without referring to it by name, in 1984, in *Calder v. Jones*. Unfortunately, the Supreme Court's decision only added to the confusion, and the debate continues today. There are two issues with which courts have struggled following the *Calder* decision: (1) whether the fiduciary shield doctrine survived *Calder*; and (2) if it did survive, whether the doctrine is an element of the constitutional jurisdictional analysis or whether it is an element of the statutory jurisdictional analysis. Until these issues are resolved, corporate officials cannot be certain whether the actions they take on behalf of the corporations they represent will subject them to personal jurisdiction in states other than those in which they have sufficient contacts in their individual capacities. As a result of this uncertainty, the liberty interests of non-resident corporate officials, afforded by the due process clause of the United States Constitution, are being violated.

This Comment begins with a discussion of the issues courts need to consider in establishing personal jurisdiction over non-resident defendants. Next, it examines the history of the fiduciary shield doctrine, the policy reasons underlying its creation, and the legal basis of the doctrine. Specifically, it analyzes the United States Supreme Court's decision in *Calder*. This Comment then examines the effects that *Calder* has had on the fiduciary shield doctrine in the large "corporate states" of California and New York, and concludes with a survey of *Calder*’s effects on the doctrine in other states that have recognized it.

17. Id.
19. Although Delaware is generally looked to as the center of corporate law development, its courts have had little occasion to address the fiduciary shield doctrine. Only one recent Delaware case addresses the fiduciary shield issue, and this case does not mention *Calder*. See Plummer & Co. Realtors v. Crisaﬁ, 533 A.2d 1242 (Del. 1986). In *Plummer*, the Delaware Supreme Court stated that, because the Delaware long-arm statute, DEL. CODE ANN. tit. 10, § 3104(q) (1974 & Supp. 1988), is based on the Illinois long-arm statute, ILL. ANN. STAT. ch. 110, para. 2-209 (Smith-Hurd 1983), the Delaware courts look to the legislative and decisional law of Illinois in interpreting their own statute. *Plummer*, 533 A.2d at 1246. Because Illinois had adopted the fiduciary shield doctrine, Delaware also adopted the doctrine. *Id.* The *Plummer* court applied the doctrine as a limitation on Delaware's long-arm statute, and not as a consideration of due process. *Id.* at 1246-48. The court also recognized an exception to the
II. ESTABLISHING PERSONAL JURISDICTION OVER NON-RESIDENT DEFENDANTS

Courts automatically have personal jurisdiction, assuming proper subject matter, to hear cases involving defendants who reside within their boundaries. Personal jurisdiction over non-resident defendants, however, is not automatic. The scope of a court's jurisdiction over persons who do not reside within the borders of the state in which the court sits is determined by two considerations: (1) the state long-arm statute, which places state-created limitations on the authority of the state; and (2) the due process requirements of the United States Constitution, which place constitutional limitations on the authority of the states. Consequently, a court must satisfy two independent inquiries in order to extend personal jurisdiction over a non-resident. The first step is to determine whether the state long-arm statute allows the exercise of jurisdiction based on the facts of the case. If the first inquiry is satisfied, the court then determines whether the exercise of jurisdiction would comport with the due process requirements of the United States Constitution.

Historically, the consent or the presence of a non-resident defendant within a state's boundaries provided the basis upon which a state could exercise personal jurisdiction. Modern law recognizes a more flexible approach, the "minimum contacts" analysis, which allows the assertion of personal jurisdiction over a non-resident based on the party's contacts with the forum state. In evaluating minimum contacts, a court focuses on the relationship among the defendant,
the forum state, and the litigation. 28

The requirements for asserting personal jurisdiction under long-arm statutes vary among the states. Some long-arm statutes, such as New York's, 29 provide stricter limitations on the exercise of jurisdiction than those imposed under the United States Constitution. 30 Other long-arm statutes, such as California's, 31 allow for the assertion of jurisdiction to the extent permitted by the United States Constitution. 32 Generally, a state long-arm statute may authorize the exercise of jurisdiction to the outermost limits of due process, as permitted by the United States Constitution, but it may not extend jurisdiction beyond that point. 33

States have asserted jurisdiction over non-residents based upon a wide variety of contacts, including "the transaction of business in the state, the commission of any one of a series of enumerated acts within the state, such as the commission of a tort, ownership of property, or entry into a contract, or, in some cases, the commission of a particular act outside the forum that has consequences within it." 34

The United States Supreme Court articulated the constitutional requirements for the exercise of personal jurisdiction over non-resident defendants in the case of International Shoe Co. v. Washington. 35 In International Shoe, the Court held:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." 36

Consequently, the underlying concern in the constitutional analysis is that before a court can exercise jurisdiction over a non-resident, that party must have engaged in activities sufficient to satisfy the demands of due process. 37 The Supreme Court has stated that due process concerns are satisfied when: (1) the

34. J. FRIEDENTHAL, M. KANE & A. MILLER, supra note 20, § 3.12, at 139-40.
35. 326 U.S. 310, 316 (1945).
36. Id. (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).
defendant has established sufficient minimum contacts with the forum state;\textsuperscript{38} and (2) the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice."\textsuperscript{39} Consequently, the due process clause is concerned with the ability of non-residents to structure their conduct with minimum assurance as to where that conduct will or will not subject them to suit.\textsuperscript{40}

The determination of whether a non-resident's contacts satisfy due process depends upon the quality and nature of the defendant's activity within the forum state.\textsuperscript{41} The Supreme Court has stated that due process is satisfied when a non-resident's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."\textsuperscript{42} Accordingly, the due process clause protects against a state's assertion of personal jurisdiction over a non-resident defendant with whom the state has no meaningful "contacts, ties, or relations."\textsuperscript{43}

In \textit{International Shoe}, the Supreme Court provided four guidelines for determining whether the contacts of a non-resident are sufficient to warrant the exercise of personal jurisdiction over him or her: (1) a non-resident defendant is amenable to personal jurisdiction when the activities of that defendant have been continuous and systematic, and those activities gave rise to the cause of action sued upon;\textsuperscript{44} (2) a non-resident defendant is not subject to personal jurisdiction when his or her single or isolated act, or sporadic or casual activities, in the forum are unrelated to the cause of action;\textsuperscript{45} (3) a non-resident defendant may be amenable to personal jurisdiction when the continuous activities of that defendant are substantial, and of such a nature so as to justify the suit against that party, even if the cause of action is unrelated to those activities;\textsuperscript{46} and (4) a

\textsuperscript{38} Id. at 316.

\textsuperscript{39} Id.; see also J. FRIEDENTHAL, M. KANE & A. MILLER, \textit{supra} note 20, § 3.10, at 125.

The authors state that:

The language of the \textit{International Shoe} opinion sets out the "fair play and substantial justice" formulation as the standard against which the sufficiency of the minimum contacts is to be measured, thus tying the two standards together. Many later decisions appear to sever the standard into a two-pronged test. These decisions neither explicitly admit that the test has been altered nor attempt to base the bifurcation upon the text of \textit{International Shoe} itself. Other cases applying the \textit{International Shoe} standard retain the unified approach more or less as it appears in [Chief Justice] Stone's opinion. The Supreme Court, in \textit{World-Wide Volkswagen v. Woodson}, explicitly adopted the two-pronged approach, characterizing the minimum contacts inquiry as a threshold question. Only when minimum contacts are found to exist among the parties and the forum do fair play and substantial justice become relevant considerations.

\textit{Id.} § 3.10, at 125 n.9 (citation omitted).

\textsuperscript{40} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

\textsuperscript{41} \textit{International Shoe}, 326 U.S. at 319.

\textsuperscript{42} \textit{World-Wide Volkswagen}, 444 U.S. at 297.

\textsuperscript{43} \textit{International Shoe}, 326 U.S. at 319.

\textsuperscript{44} \textit{Id.} at 317, 320.

\textsuperscript{45} \textit{Id.}; Hanson v. Denckla, 357 U.S. 235, 251 (1958).

non-resident may be subjected to the assertion of personal jurisdiction by a state for claims arising out of single, or sporadic acts, under certain circumstances.\textsuperscript{47}

The Supreme Court has stated that the due process concerns are met when a non-resident has sufficient minimum contacts with the forum state. The Court reasoned that by exercising the privilege of conducting activities within a forum state, thereby enjoying the benefits and the protections of the laws of that state,\textsuperscript{48} the non-resident has obligated himself or herself to respond to a suit in that state.\textsuperscript{49} Consequently, in \textit{Hanson v. Denckla},\textsuperscript{50} the Supreme Court added that, in every case it is essential that there be some act by which the defendant “purposefully avail[s himself or herself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\textsuperscript{51} The Court has continuously affirmed this principle that the non-resident’s expectations are an integral aspect of the due process analysis.\textsuperscript{52} In \textit{World-Wide Volkswagen Corp. v. Woodson},\textsuperscript{53} the Court stated:

\begin{quote}
When a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.\textsuperscript{54}
\end{quote}

The Supreme Court, in \textit{World-Wide Volkswagen}, concluded that a non-resident must have purposefully availed himself or herself of the benefits and protections of the forum state's laws either by direct acts inside the forum or by acts outside the forum, in such a way that the defendant should have reasonably foreseen that he or she could be required to defend a suit in that state.\textsuperscript{55} This notion of foreseeability does not include the “mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”\textsuperscript{56} This requirement of purposeful availment protects a non-resident defendant's individual liberty interests under the due process clause by giving that party some certainty as to where that individual's

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\textsuperscript{48} \textit{International Shoe}, 326 U.S. at 319.
\textsuperscript{49} \textit{Id}.
\textsuperscript{50} 357 U.S. 235 (1958).
\textsuperscript{51} \textit{Id} at 253.
\textsuperscript{53} 444 U.S. 286 (1980).
\textsuperscript{54} \textit{Id} at 297.
\textsuperscript{55} \textit{Id} at 297-98.
\textsuperscript{56} \textit{Id} at 297.
\end{flushleft}
FIDUCIARY SHIELD DOCTRINE

conduct will or will not subject him or her to suit.\textsuperscript{57}

Therefore, if a non-resident has sufficient minimum contacts with the forum state, and that individual purposefully availed himself or herself of the benefits and protections of that state’s laws, the assertion of personal jurisdiction over that non-resident will be proper so long as the exercise of jurisdiction comports with “traditional notions of fair play and substantial justice.”\textsuperscript{58}

It has long been recognized that courts should determine whether the assertion of personal jurisdiction comports with “fair play and substantial justice” by balancing the burden placed on the defendant to defend a suit outside the state of his or her residence\textsuperscript{59} against: (1) the forum state’s interest in adjudicating the dispute;\textsuperscript{60} (2) the plaintiff’s interest in obtaining convenient and effective relief;\textsuperscript{61} (3) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies;\textsuperscript{62} and (4) the shared interest of the several states in furthering fundamental substantive social policies.\textsuperscript{63} As a result, the Supreme Court has concluded that “[c]ompelling a non-resident defendant to submit to suit in an inconvenient forum may be unduly burdensome, and therefore inconsistent with the demands of due process, even though the defendant has some contacts with the forum state.”\textsuperscript{64} Jurisdiction over a non-resident will be improper only if the burden on him or her is so great that it will defeat these compelling interests.\textsuperscript{65}

Therefore, if the non-resident’s contacts with the forum state meet the requirements of that state’s long-arm statute and the exercise of personal jurisdiction over the defendant comports with the due process requirements of the United States Constitution, jurisdiction over the non-resident will be proper.

The fiduciary shield doctrine enters into this jurisdictional analysis as a limitation on a court’s exercise of personal jurisdiction over non-resident corporate officials.\textsuperscript{66} The doctrine recognizes the fundamental unfairness of subjecting corporate officials to suit in their individual capacities for acts that were taken solely in their corporate capacities.\textsuperscript{67}

When corporate officials conduct activities with the forum state solely in their corporate capacities, it is the corporation that purposefully avails itself of the benefits and privileges of the forum state’s laws, not the individuals. It is

\begin{itemize}
\item \textsuperscript{57} Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982).
\item \textsuperscript{58} International Shoe, 326 U.S. at 316.
\item \textsuperscript{59} World-Wide Volkswagen, 444 U.S. at 292.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} J. Friedenthal, M. Kane & A. Miller, supra note 20, § 3.10, at 128.
\item \textsuperscript{65} See Asahi Metal Indus., 480 U.S. at 114-16 (heavy burden on non-resident defendant to defend suit in foreign country outweighed slight interests of plaintiff and forum state).
\item \textsuperscript{66} United States v. Montreal Trust, 358 F.2d 239, 243 (2d Cir.), cert. denied, 384 U.S. 919 (1966).
\item \textsuperscript{67} Marine Midland Bank v. Miller, 664 F.2d 899, 902 (2d Cir. 1981).
\end{itemize}
clear that constitutional due process requires that jurisdiction be asserted over non-resident defendants only if they purposefully availed themselves of these benefits and protections.68 Personal jurisdiction, therefore, should not be exercised over corporate officials who did not have contacts with the forum state in their individual capacities, because such an exercise would be against "traditional notions of fair play and substantial justice." Consequently, the fiduciary shield doctrine should be considered in the constitutional due process analysis in cases involving corporate officials who are sued in their personal capacities.

However, there is an exception to this general rule. The fiduciary shield doctrine should not be considered in the jurisdictional analysis when corporate officials allegedly commit intentional torts directed at residents of forum states.69 In this situation, fundamental fairness mandates that forum states have the power to exercise jurisdiction over these corporate officials. These concerns for fairness outweigh any unfairness that may result by exercising jurisdiction over corporate officials who have not purposefully availed themselves of the forum states’ laws in their individual capacities.

III. HISTORICAL BACKGROUND OF THE FIDUCIARY SHIELD DOCTRINE

A. The Origin of the Fiduciary Shield Doctrine

The fiduciary shield doctrine evolved from a series of New York state and federal cases decided in the late 1960s.70 The opinion usually identified as creating the fiduciary shield doctrine is Boas & Associates v. Vernier.71 In Boas, Boas & Associates brought an action against Vernier, a non-resident of New York, to recover commissions that Boas & Associates had earned as a broker and consult-
ant under both an oral and a written agreement. The New York Appellate Court found that the New York long-arm statute did not authorize the court to exercise personal jurisdiction over Vernier because the cause of action did not arise from an act of Vernier in the transaction of business within New York. After the court had seemingly dismissed the jurisdictional issue, it provided another reason why jurisdiction over Vernier would be improper: "The writing... was executed by defendant solely in his capacity as general manager of the corporation, and not in his individual capacity." This dictum formed the basis for what is known today as the fiduciary shield doctrine.

Several courts have recognized Boas as having created the fiduciary shield doctrine. The first case to identify the doctrine in the federal courts was United States v. Montreal Trust Co. In Montreal Trust, the Court of Appeals for the Second Circuit, citing Boas, stated that "when one engages in activity within New York in a fiduciary capacity, jurisdiction cannot be obtained over him in his individual capacity." Subsequently, the Court of Appeals for the Tenth Circuit, in Wilshire Oil Co. v. Riffe, also cited Boas, stating:

[While] a foreign corporation is amenable to service when it transacts business through agents operating in the forum state, unless the agents

72. Boas & Assocs., 22 A.D.2d at 562, 257 N.Y.S.2d at 489. The written contract provided that Vernier would pay a commission to Boas & Associates for the arrangement of business between Vernier and a party having "a base, branch or affiliate in the United States." Id. at 563, 257 N.Y.S.2d at 489-90. Because Boas & Associates sought compensation for business it had arranged between Vernier and two French individuals, not American individuals, the written contract did not apply to Boas & Associate's claims. Id. at 563, 257 N.Y.S.2d at 490. As a result, the court reasoned that the negotiation and the execution of the written contract in New York did not provide a basis for the exercise of personal jurisdiction over Vernier. Id. The court also found that the oral agreement did not allow New York to exercise personal jurisdiction over Vernier since the oral agreement was not negotiated or concluded in New York, and Vernier did not engage in any activities in New York with respect to that agreement. Id. at 563, 257 N.Y.S.2d at 489.


75. Id. at 563, 257 N.Y.S.2d at 490.

76. Wilshire Oil, 409 F.2d at 1281 n.8; Schenin, 272 F. Supp. at 528. But see Sponsler, Jurisdiction Over the Corporate Agent: The Fiduciary Shield, 35 WASH. & LEE L. REV. 349, 353 (1978) (author suggests that the Boas court did not intend to create the fiduciary shield doctrine, but was merely attempting to show the defendant's lack of substantive liability on the written contract).

77. See Wilshire Oil, 409 F.2d at 1281 n.8; Montreal Trust, 358 F.2d at 243; Alosio v. Iranian Shipping Lines, 307 F. Supp. 1117, 1118 (S.D.N.Y. 1970); Schenin, 272 F. Supp. at 528-29.


79. Id. at 243. The court held, however, that the fiduciary shield doctrine would not insulate the defendant from jurisdiction because the defendant "could not have been acting in his role as a corporate officer when he allegedly directed a course of payments to his relatives and friends." Id.

80. 409 F.2d 1277 (10th Cir. 1969).
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.81

B. The Rationale Behind the Fiduciary Shield Doctrine

Courts have given several reasons for restricting the assertion of personal jurisdiction over corporate officials. One reason is based on fairness.82 Courts have recognized that it is unfair to force individuals to defend suits in states in which the individuals’ only relevant contacts with those states are acts taken on behalf of the corporations they represent.83 Because contacts undertaken by officials in their corporate capacities further only the corporations’ interests, some courts have recognized that individuals acting in their corporate capacities have not made a voluntary choice to avail themselves of the laws of the forum state.84 Consequently, when corporate officials conduct activities solely in their corporate capacities, it would be unfair to extend jurisdiction over them in their individual capacities.85 The fact that such individuals could be shielded from personal jurisdiction is not fundamentally unfair because the corporation could still be subjected to suit in the forum, providing it has sufficient contacts with the forum, and the corporate officials could still be called or deposed as witnesses.

Courts are also concerned that, without any limitation upon the exercise of personal jurisdiction over corporate officials, these representatives will constantly be in court defending suits directed against the acts of the corporation.86 In Weller v. Cromwell Oil Co.,87 the Court of Appeals for the Sixth Circuit noted that if courts were allowed to exercise jurisdiction over corporate officials on the basis of their corporate acts, officers and directors would be forced to defend suits “in every state of the union whenever they make telephone calls or

81. Id. at 1281 n.8.
   The fiduciary shield doctrine protects an individual who acts in the forum state solely as the representative of the corporation from suit in that state because he does not personally avail himself of the laws and protection of the forum state in any meaningful way. He is there exclusively in furtherance of the interests of his employer.

Id.

85. See infra notes 104-25 and accompanying text.
   If the employee has no direct contacts with the foreign state 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. Otherwise every employee of a corporation would be subject to the personal jurisdiction of the courts in every state where the corporation is doing business.

Id.

87. 504 F.2d 927 (6th Cir. 1974).
write letters . . . ."\(^{88}\)

A final reason to shield corporate officials from assertions of personal jurisdiction is out of respect for the nature of the corporate form. Although a corporation can only act through its representatives, it is well established that the rights and duties of the corporate organization are separate and distinct from the rights and duties of its representatives. \(^{89}\) Courts have continuously respected and enforced these separate rights and duties. \(^{90}\) In *Sun-Herald Corp. v. Duggan*, \(^{91}\) Judge Learned Hand warned:

The law of corporations allows the fabrication of such elaborately involuted jural persons . . . and out of them authentic rights and duties will emerge. Although there are occasions when courts will brush them aside, and decide controversies as though only the human actors had been concerned, when there is no such occasion, the rights and duties that result must be respected and enforced like any others. \(^{92}\)

**C. The Legal Basis of the Fiduciary Shield Doctrine**

Courts and scholars have disagreed on the issue whether the fiduciary shield doctrine is a component of a state's long-arm statute, or whether it is an element of constitutional due process. \(^{93}\) The New York Appellate Court, in *Boas & Associates v. Vernier*, \(^{94}\) did not articulate whether the fiduciary shield doctrine was based on statutory or constitutional law. \(^{95}\) The court merely

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88. *Id.* at 931.


90. See, e.g., Forsythe v. Overmyer, 576 F.2d 779, 783 (9th Cir. 1978) ("courts generally respect corporate boundaries in jurisdictional contexts"); *Montreal Trust*, 358 F.2d at 253 ("This Court has never lightly brushed aside corporate identities which are carefully preserved, but traditionally has respected and enforced the rights and duties resulting from corporate organization"); Kula v. J.K. Schofield & Co., 668 F. Supp. 1126, 1129 (N.D. Ill. 1987) (corporate officers, directors and shareholders are "separate and distinct" from the corporation); Opal Mercantile v. Tamblyn, 616 P.2d 776, 778 (Wyo. 1980) ("Ordinarily, a corporation is a separate entity distinct from that of individuals comprising it.").

91. 160 F.2d 475 (2d Cir. 1947).

92. *Id.* at 478.


95. See *id.* at 563, 257 N.Y.S.2d at 490. Some courts have held that the *Boas* court applied the fiduciary shield doctrine as a statutory principle because the doctrine was invoked when the court analyzed the construction of New York's long-arm statute. See, e.g., *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 n.3 (2d Cir. 1981); United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966). In reaching this conclusion, the *Montreal Trust* court explained that the issue of whether jurisdiction could be asserted over an individual defendant, based on acts taken in his corporate capacity, did not involve the broad
announced the concept and did not provide any critical discussion of the doctrine. Since Boas was decided, courts have disagreed as to the legal basis of the doctrine. The United States Supreme Court had an opportunity to rule on this issue in Calder v. Jones, but the Court’s treatment of the doctrine was very confusing, and, as a result, subsequent courts have continued to have difficulty in determining the legal basis of the doctrine.

Many courts have concluded, without offering any analysis, that the fiduciary shield doctrine is an element of the statutory analysis. However, there are no United States Supreme Court decisions that support this result, nor are there any plausible reasons for concluding as such. On the other hand, many courts have concluded that the fiduciary shield doctrine is a component of constitutional due process. This is logical in light of the principles established by the Supreme Court for determining whether the assertion of jurisdiction over a non-resident comports with the due process clause of the United States Constitution. The following analysis describes the reasons why consideration of the fiduciary shield doctrine is essential in satisfying the requirements of due process.

As noted previously, the due process clause has as its underpinnings a desire to achieve “fair play and substantial justice” in the exercise of personal jurisdiction over non-residents. Additionally, due process requires that non-residents have “fair warning that a particular activity may subject [them] to the question of constitutional interpretation—whether personal jurisdiction over the defendant would be appropriate under the due process clause of the United States Constitution. Rather, the issue concerned the narrow question of statutory interpretation—whether the defendant, within the meaning of New York’s long-arm statute, transacted business in New York. Montreal Trust, 358 F.2d at 242.

If the doctrine is found to be grounded in statutory law, and not grounded in due process, the doctrine could not be applied in an action brought under a state long-arm statute that extends jurisdiction to the outermost limits of due process. Columbia Briargate, 713 F.2d at 1057. However, the doctrine could be applied in an action brought under a state long-arm statute that does not extend jurisdiction to the outermost limits of due process. Byer v. Gordos Ark., Inc., 712 F. Supp. 149, 155 (W.D. Ark. 1989); Chicago Blower Corp. v. Air Sys. Assocs., 623 F. Supp. 798, 804 (E.D. Mich. 1985); Nordic Bank PLC v. Trend Group, 619 F. Supp. 542, 569 n.30 (S.D.N.Y. 1985).

101. Columbia Briargate Co., 713 F.2d at 1058.


103. See supra notes 35-65 and accompanying text.

jurisdiction of a foreign sovereign.’”105

In order for a court to assert jurisdiction over non-residents, those individuals must have sufficient minimum contacts with the forum state,106 and they must have purposefully availed themselves of the benefits and protections of the laws of that state.107 In addition, the assertion of jurisdiction must comport with “traditional notions of fair play and substantial justice.”108

When non-resident corporate officials act solely in their corporate capacities, it cannot be credibly maintained that they purposefully availed themselves of the benefits and protections of the forum states’ laws.109 It is the corporations, not the individuals, that have purposefully availed themselves. The United States Supreme Court has established that it would violate due process to extend personal jurisdiction over parties who have not purposefully availed themselves of the laws of the forum states.110 Indeed, in World-Wide Volkswagen Corp. v. Woodson,111 the Supreme Court stated that one of the purposes in requiring purposeful availment is to give “clear notice” to non-residents that they could be subjected to suit in those states.112 Without purposeful availment, the Court added, individuals cannot act to “alleviate the risk of burdensome litigation.”113 Under these circumstances, it would be against “traditional notions of fair play and substantial justice” to extend personal jurisdiction over individuals when the constitutional requirement of purposeful availment is lacking.

Some may argue that even if there is no purposeful availment, the fact that corporate officials could foresee the injurious results of their actions is enough to extend personal jurisdiction over them. The United States Supreme Court, however, has held that merely foreseeing that activities would cause injuries in other states is not a sufficient basis upon which to justify the assertion of personal

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107. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In Burger King, the Supreme Court stated:

A State generally has a “manifest interest” in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Moreover, where individuals “purposefully derive benefit” from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed. And because “modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,” it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity.

Burger King, 471 U.S. at 473-74 (citations omitted).


110. Hanson, 357 U.S. at 253.

111. 444 U.S. 286 (1980).

112. Id. at 297.

113. Id.
jurisdiction. Rather, "the foreseeability that is critical to due process analysis ... is that the defendant[s'] conduct and connection with the forum State are such that [they] should reasonably anticipate being haled into court there." When corporate officials conduct activities in a state on behalf of the corporations that employ them, the corporations would reasonably anticipate that they would be called to respond to suits there. On the other hand, the individual corporate officials would not reasonably anticipate that they would be subjected to that state's jurisdiction since all of their activities were taken for the benefit of the corporation.

This line of reasoning was advanced by the court in *Idaho Potato Commission v. Washington Potato Commission.* In that case, members of the Washington Potato Commission approved an advertising plan that was distributed in the state of Idaho. Plaintiff, Idaho Potato Commission, alleged that the plan infringed its trademark. The court granted the Washington Potato Commission members' motion to dismiss on the basis that exercising jurisdiction over the members would be against due process. In reaching its conclusion, the court reasoned that the members did not purposefully avail themselves of the benefits and privileges of Idaho's laws. The court explained:

[A] corporate employee . . . by performing corporate business, causes the corporation to purposefully avail itself of the laws 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.

Under these circumstances, the court stated that it was doubtful that the

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117. *Id.* at 182. The court stated that the members' positions on the Commission was "closely analogous to the relationship of officers and directors of a corporation," and therefore the issue of jurisdiction over the members was determined as though the members were officers and directors of a corporation. *Id.* at 180.
118. *Id.* at 182.
119. *Id.* at 183.
120. *Id.* at 182-83. The court also found that the nexus between the Washington Potato Commission members and the forum state of Idaho is "tenuous." *Id.* at 182. Although the activity of the members had an alleged effect in Idaho, the members were never physically present in Idaho. *Id.* The court stated that the facts of this case were different from the facts of the following hypothetical where the nexus between the defendant and the forum is not tenuous:

If Corporation A from State X sends Employee B into State Y to deliver certain products, and B crashes his delivery truck, injuring Resident C in State Y, then jurisdiction over both A and B exists in State Y. The result flows from the commission of a tortious act within the purview of State Y's long-arm statute. *Id.* The court stated that it is one thing to hold that a corporation that conducts activities outside the forum that have effects inside the forum is subject to the personal jurisdiction of the forum, but it is quite different to hold that an individual working for that corporation, who has never been physically present in the forum, is subject to the jurisdiction of the forum. *Id.*
121. *Id.* at 182-83 (emphasis added) (footnotes omitted).
individual members would have reasonably anticipated that their activities
would subject them to personal jurisdiction in Idaho.\footnote{122}

The court concluded by noting that the Idaho Potato Commission’s inter-
est of exercising jurisdiction over the members, and the state of Idaho’s inter-
est extending its jurisdiction to the fullest extent permitted by the due process
clause, would not be seriously harmed since the court had jurisdiction over the
corporation that committed the acts within the state.\footnote{123} Consequently, the
court held that exercising personal jurisdiction over the members of the Wash-
ington Potato Commission “would be against ‘fair play’ and ‘substantial justice’
and is therefore unconstitutional.”\footnote{124}

Since corporate officials who conduct activities solely in their corporate ca-
pacities do not purposefully avail themselves of the benefits and privileges of the
forum state’s laws, these individuals should not be subjected to personal jurisdic-
tion in their individual capacities according to the jurisdictional principles of the
United States Constitution. It would be against “fair play and substantial jus-
tice” to hold that these non-residents are amenable to the jurisdiction of forum
courts when these individuals did not purposefully establish minimum contacts
with those states.\footnote{125} Since the fiduciary shield doctrine promotes the principles
underlying the constitutional jurisdictional analysis, the doctrine is properly
characterized as an element of constitutional due process.

IV. Calder v. Jones

A. The Facts

In Calder v. Jones,\footnote{126} actress Shirley Jones and her husband, Marty Engels,
brought an action in California Superior Court, for libel against the National
Enquirer, a national weekly newspaper publication.\footnote{127} In the same action, the
couple also named as defendants the newspaper’s local distributing company, its
editor, Iain Calder, and reporter, John South.\footnote{128} The action arose out of an
article written by South that alleged that Jones drank so heavily that it pre-
vented her from fulfilling her professional obligations as an entertainer.\footnote{129} Jones
claimed that, as a result of the article, she suffered emotional distress and injury
to her professional reputation in California.\footnote{130}

The National Enquirer is a Florida corporation that transacts business in

\footnotesize{\begin{itemize}
    \item 122. Id. at 182.
    \item 123. Id. at 183.
    \item 124. Id.
    \item 125. Burger King, 471 U.S. at 476; see also Bulova Watch, 508 F. Supp. at 1348 (“Where
    the corporate agent engages in corporate business for the sole benefit of the corporation, it is
    difficult to see how the exercise of jurisdiction over one who has conducted no activities on his
    own behalf ‘comports with fair play and substantial justice.’”).
    \item 127. Id. at 784-85.
    \item 128. Id.
    \item 129. Id. at 788 n.9.
    \item 130. Id. at 788-89.
\end{itemize}}
California, and distributes over five million copies nationwide on a weekly basis. At the time suit was brought, the individual non-resident defendants, Calder and South, resided in Florida. They moved to quash the service of the summons on the ground that the court lacked personal jurisdiction over them since they did not have sufficient "contacts" with the state of California.

Calder was president and editor of the National Enquirer and he supervised nearly every function of the publication. He travelled to California, however, on only two occasions; once for pleasure, and once to testify at a trial in an unrelated matter. His involvement with the allegedly "libelous" article consisted of reviewing and approving the subject of the article, and editing the final version.

South was the author of the article. He made frequent visits to California for business purposes. He also made numerous telephone calls to California in conjunction with the Jones article, including one call to plaintiff Engels to obtain his comments on the article before publication and several calls to a source in California who provided him with information. South did most of his research in Florida, but relied on the source in California for additional information.

The California Superior Court granted the motion by Calder and South to quash the service of the summons for lack of personal jurisdiction, and the California Court of Appeal reversed on the basis that Calder's and South's
actions were intended to cause, and did cause tortious injury to Jones and Engels in California.\textsuperscript{143}

B. The United States Supreme Court's Decision

The United States Supreme Court affirmed the decision of the California Court of Appeal and held that jurisdiction was proper under the United States Constitution,\textsuperscript{144} and therefore, under the California long-arm statute as well.\textsuperscript{145} Calder and South claimed they should not be subjected to California's jurisdiction since their employer was solely responsible for the circulation of the article in California.\textsuperscript{146} They argued that they had no control over the circulation nor the marketing activities of the corporation, and as a reporter and editor, they had no direct economic stake in the corporation's sales.\textsuperscript{147} They reasoned that merely foreseeing that the article could have an effect in California was not a sufficient basis upon which the Court could assert personal jurisdiction.\textsuperscript{148}

Calder and South analogized themselves to a welder, employed in Florida, who worked on a boiler that subsequently exploded in California.\textsuperscript{149} While jurisdiction would be proper over the manufacturing corporation under these circumstances, Calder and South reasoned that jurisdiction would not be proper if exercised over the welder, since he had no control over, nor derived any economic benefit from the corporation's sales in California.\textsuperscript{150} Calder and South argued that they, like the hypothetical welder, had no control over the corporation's activities.\textsuperscript{151} Therefore, they asserted that California did not have jurisdiction over them.\textsuperscript{152}

The Supreme Court responded by stating that the "analogy doesn't wash," because the actions of Calder and South were significantly different from the hypothetical welder's actions.\textsuperscript{153} While the welder would have been charged

\textsuperscript{143} Jones, 138 Cal. App. 3d at 137, 187 Cal. Rptr. at 832. The California Court of Appeal held that California could exercise personal jurisdiction over Calder and South. \textit{Id.} The court of appeal held that the assertion of personal jurisdiction over them was proper because their actions, although conducted in Florida, were intended to cause and did cause tortious injury to Jones and Engels in California. \textit{Id.} at 135, 187 Cal. Rptr. at 830. The court of appeal rejected the superior court's theory that first amendment considerations could operate to immunize reporters and editors from jurisdiction in defamation actions. \textit{Id.} at 132, 187 Cal. Rptr. at 828.

\textsuperscript{144} U.S. CONST. amend. XIV, § 1.


\textsuperscript{146} Calder, 465 U.S. at 789.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.} at 789-90.
with "mere untargeted negligence," Calder and South were charged with "intentional, and allegedly tortious" actions expressly aimed at a resident of California. Furthermore, Calder and South knew that the article South wrote and Calder edited could potentially have a devastating impact upon Jones, and the brunt of any harm would be felt by her in California. As a result, the Supreme Court held that jurisdiction over Calder and South was proper since they could have "reasonably anticipate[d] being haled" into California to respond to the allegations made by Jones.

The Court rejected the argument by Calder and South that they should be immunized from jurisdiction since their actions were taken solely on behalf of the corporation. The Court stated Calder and South were correct in arguing that their contacts with California should not be analyzed according to the activities of their employer. The Court noted, however, that "their status as employees [did] not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually." The Court found that jurisdiction over Calder and South was proper based on their allegedly intentional wrongdoing, the harm of which was felt in the state of California. The Court concluded that Calder and South were not entitled to immunity from jurisdiction based upon the fiduciary shield doctrine because they were "primary participants in an alleged wrongdoing intentionally directed at a California resident . . . ."

V. RECONCILING THE AFTERMATH OF CALDER V. JONES

A. The Analysis of the United States Supreme Court's Decision in Calder v. Jones

The United States Supreme Court acknowledged the fiduciary shield doctrine in Calder v. Jones, without addressing it by name, when it stated "petitioners are correct that their contacts with California are not to be judged according to their employer's activities there." Likewise, in a subsequent
discussion of Calder, in Keeton v. Hustler Magazine, the Court stated that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him . . . ."  

Nevertheless, the Court rejected the argument by Calder and South that they should be shielded from jurisdiction because they had acted solely in their corporate capacities. The Court reasoned that since Calder and South were "primary participants" in "intentional, and allegedly tortious" actions directed at a resident of the forum state, they should not be shielded from jurisdiction. The Court stated "their status as employees [did] not somehow insulate them from jurisdiction."  

The Court also suggested, however, that if Calder and South had been charged with "mere untargeted negligence," such as the hypothetical welder who resides outside the forum and works on a boiler that explodes inside the forum, they would not have been subjected to the exercise of personal jurisdiction. The Court, therefore, indicated that corporate officials who commit intentional torts should be treated differently than corporate officials who commit negligent acts. As a result, Calder should be interpreted as holding that the fiduciary shield doctrine cannot be applied to shield corporate officials from jurisdiction when those officials are charged with committing intentional torts, but it can be applied when those officials are charged with committing mere negligence.

This interpretation of Calder is consistent with the position described above, that the fiduciary shield doctrine is an element of constitutional due

166. Id. at 781 n.13. In Keeton, the plaintiff brought an action for libel against Hustler Magazine, Inc. and other individual defendants. Id. at 772. The Court of Appeals for the First Circuit concluded that since jurisdiction could not be exercised over the corporation, it would not inquire into the propriety of jurisdiction over the individual defendants. Id. at 781 n.13. The Supreme Court reversed the decision by the court of appeals and concluded that jurisdiction was proper over the corporation. Id. at 781. As a result, the Supreme Court found that the issue of jurisdiction over the individual defendants would be open upon remand. Id. at 781 n.13.

Although the Supreme Court did not consider the issue of whether jurisdiction over the individual defendants would be proper, it did set out the relevant issues in a footnote. Id. at 782 n.13. The court stated that:

It does not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants. In Calder v. Jones, we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him . . . . Each defendant's contacts with the forum State must be assessed individually . . . .

Id. (citations omitted).
168. Id.
169. Id. at 790.
170. Id. at 789.
process. As an element of due process, the doctrine seeks to achieve fairness in the assertion of personal jurisdiction over corporate officials. The fiduciary shield doctrine recognizes that, as a general rule, corporate officials should not be subjected to personal jurisdiction for acts they had conducted solely in their corporate capacities because these individuals had not purposefully availed themselves of the forum state's laws in their individual capacities.

For reasons of fairness, however, this doctrine should not be applied when corporate officials commit intentional torts. The overall concerns for fairness that are identified in constitutional due process mandate that courts have the authority to exercise jurisdiction over corporate officials who commit intentional torts. Although this argument was not discussed in Calder, it is reasonable to conclude that the overall concerns for fairness in the jurisdictional analysis outweigh any unfairness that may result by exercising jurisdiction over corporate officials who lack the requisite purposeful availment in their individual capacities. It is, therefore, consistent with "traditional notions of fair play and substantial justice" to exercise personal jurisdiction over corporate officials who commit intentional torts. On the other hand, the doctrine should be applied to shield corporate officials from jurisdiction when they are charged with acts other than intentional torts, since the unfairness associated with exercising jurisdiction over officials who lack purposeful availment is not outweighed by this overall concern for fairness.

The fiduciary shield doctrine, therefore, has survived the Supreme Court's decision in Calder. Calder should be interpreted as holding that the doctrine can be invoked by courts to shield corporate officials from the exercise of jurisdiction when those officials engage in acts other than intentional torts in their corporate capacities, but it should not be applied when those officials engage in intentional torts. Since the doctrine seeks to ensure fundamental fairness in the exercise of jurisdiction over corporate officials, it should be considered as an element of constitutional due process.

B. The Effect of Calder v. Jones on the Fiduciary Shield Doctrine

The United States Supreme Court's discussion of the fiduciary shield doctrine in Calder v. Jones has caused considerable confusion among the lower courts. It is interesting to look at the lower court cases to see how the states have treated the doctrine since the Supreme Court decided Calder. The following is a survey of the states that have ruled on the fiduciary shield doctrine since Calder. This section begins with an examination of the law in California and

171. See supra notes 93-125 and accompanying text.
172. Id.
New York, and ends with a discussion of the law in other states that have considered the doctrine.

1. The effect of Calder v. Jones on California law

a. California’s long-arm statute

The California long-arm statute, section 410.10 of the California Civil Procedure Code,176 extends jurisdiction over non-resident defendants to the outermost limits of the due process clause of the United States Constitution.177 Section 410.10 states, “A court of this state may exercise jurisdiction on any ‘basis not inconsistent with the Constitution of this state or of the United States.”178

b. the law in California prior to Calder v. Jones

Prior to Calder, California courts adopted the fiduciary shield doctrine as a restriction on the exercise of personal jurisdiction over non-resident corporate officials.179 In Arnesen v. Raymond Lee Organization,180 the California Court of Appeal rejected the assertion of jurisdiction over corporate officials who allegedly engaged in intentionally tortious conduct.181 Unfortunately, none of these courts provided a detailed analysis of the legal basis of the doctrine.

176. CAL. CIV. PROC. CODE § 410.10 (West 1973 & Supp. 1990). Section 410.10 reads: “Basis. A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” Id.

177. Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1286 (9th Cir. 1977).

178. CAL. CIV. PROC. CODE § 410.10.

179. See, e.g., Ruger v. Superior Court, 118 Cal. App. 3d 427, 431, 173 Cal. Rptr. 302, 304-05 (1981); Shearer v. Superior Court, 70 Cal. App. 3d 424, 430, 138 Cal. Rptr. 824, 828 (1977); Arnesen v. Raymond Lee Org., 31 Cal. App. 3d 991, 995-96, 107 Cal. Rptr. 744, 747 (1973); see also Forsythe v. Overmeyer, 576 F.2d 779, 783-84 (9th Cir.), cert. denied, 439 U.S. 864 (1978) (applying California law, court did not shield the defendant from jurisdiction, but stated “a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum”).


181. Id. at 996-97, 107 Cal. Rptr. at 747-48. In Arnesen, the plaintiff alleged that the contracts he had entered into with the defendant corporation were illegal and were predicated on the misrepresentations of the individual defendants, who were officers and employees of the corporation. Id. at 993, 107 Cal. Rptr. at 745. The California Court of Appeal found that “[t]he regular, continuous, and substantial conduct by a foreign corporation of business within a state subjects that corporation to the personal jurisdiction of the state's courts,” but it does not subject corporate officials to jurisdiction when they act solely within their corporate capacity. Id. at 995, 107 Cal. Rptr. at 747 (emphasis added). The court concluded that because none of the corporate officials had business of their own in the forum state, California could not exercise personal jurisdiction over them on the basis that they were “doing business” within the state. Id. at 996, 107 Cal. Rptr. at 747. Consequently, the court shielded the corporate officials from jurisdiction even though they were charged with committing intentional misrepresentations in the forum state. Id. at 998, 107 Cal. Rptr. at 748.
c. the law in California after Calder v. Jones

Approximately one year after the *Calder* decision, the California Court of Appeal reaffirmed the fiduciary shield doctrine in *Mihlon v. Superior Court.* The court considered the question of whether counsel for corporations are entitled to a fiduciary shield. The court found that, unlike corporate officers and directors, corporate counsel are not entitled to an "official capacity" shield from personal jurisdiction.

Corporate officers and directors, the court reasoned, are shielded from jurisdiction in states where they do not reside or have minimum contacts because corporations, by their very nature, are "separate legal entities that cannot speak or act without their designated officers and directors." As a result, the *Mihlon* court found that acts performed by corporate officials in their official capacities may not be attributed to them as individual acts in establishing personal jurisdiction. On the other hand, corporate counsel do not "speak for" or "act for" corporations in the same way, since an attorney representing a corporation merely provides legal counsel and services. Consequently, the *Mihlon* court concluded that the rationale behind providing corporate officials with a shield to personal jurisdiction did not extend to corporate counsel. Without any reference to *Calder*, the *Mihlon* court stated, in dictum, that "it is well established by California case law that for jurisdictional purposes the acts of corporate officers and directors, in their official capacities, are acts exclusively of . . . the corporation, and are thus not material for purposes of establishing minimum contacts as to individuals."

Several years later, in *Taylor-Rush v. Multitech Corp.*, the California Court of Appeal criticized *Mihlon* for failing to address the United States Supreme Court's discussions, in *Calder* and *Keeton v. Hustler Magazine*, of the fiduciary shield doctrine. In *Taylor-Rush*, the court held that the fiduciary shield doctrine did not immunize defendants, Messinger and Carow, corporate officers and directors, from personal jurisdiction since they perpetrated a fraud aimed at a resident of California.

Messinger and Carow "allegedly knowingly and intentionally misrepresented facts" that induced the plaintiff, Taylor-Rush, to execute agreements and

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183. Id. at 712-13, 215 Cal. Rptr. at 447.
184. Id. at 715, 215 Cal. Rptr. at 449.
185. Id. at 713, 215 Cal. Rptr. at 447.
186. Id.
187. Id. at 715-16, 215 Cal. Rptr. at 449.
188. Id.
189. Id.
190. Id. at 713, 215 Cal. Rptr. at 447.
194. Id. at 118, 265 Cal. Rptr. at 680.
transfer securities in California. The court stated that "[t]he essence of Calder is that intentional tortfeasors should be prepared to defend themselves in any jurisdiction where they direct their alleged tortious activity. Like the defendants in Calder, Messinger and Carow 'are primary participants in an alleged wrong-doing intentionally directed at a California resident . . . ." Moreover, the Taylor-Rush court noted that an anomalous situation would result if corporate officers, acting in their corporate capacity, could be shielded from jurisdiction for the commission of a tort for which they would be personally liable, when they could not use the same shield as a defense to substantive liability. The court stated, "Whatever the purpose and function of the fiduciary shield doctrine, California's long-arm statute expresses no intent to barricade transient tortfeasors from liability for their fraudulent conduct, and jurisdiction must be determined on the individual facts." Therefore, the California Court of Appeal, in accordance with Calder, rejected the idea that an intentional tortfeasor could be immunized from personal jurisdiction based on the fiduciary shield doctrine.

In Seagate Technology v. A.J. Kogyo Co., the California Court of Appeal held that when a corporate official commits an act for which he or she could be personally liable, the act may be imputed to the individual for purposes of establishing personal jurisdiction, and the fiduciary shield doctrine could not be applied to defeat that exercise of jurisdiction. In Seagate Technology, defendant Nakata, the president and major shareholder of the corporation, was charged with tortiously misrepresenting that the corporation would make good on a guarantee to the plaintiff, Seagate. Nakata personally caused the corporation to issue the guarantee. The court found that the actions by Nakata could subject him to personal liability since it was settled under California law that

195. Id. at 117, 265 Cal. Rptr. at 680.
196. Id. at 118, 265 Cal. Rptr. at 680 (quoting Calder v. Jones, 465 U.S. 783, 790 (1984)).
197. Id.
198. Id. at 117, 265 Cal. Rptr. at 680 (citation omitted).
199. Id. at 117-18, 265 Cal. Rptr. at 680.
201. Id. at 703, 268 Cal. Rptr. at 590. In Seagate Technology, the court stated:
Our conclusion that the fiduciary shield doctrine should not be applied to defeat jurisdiction is supported by the recent decision in Taylor-Rush v. Multitech Corp.. There the court noted that the fiduciary shield doctrine is inconsistent with the legislative intent behind California's long-arm statute which is designed to provide personal jurisdiction to the fullest extent constitutionally permissible.

Id. (citation omitted). It does not appear, however, that the Seagate Technology court intended to completely reject the fiduciary shield doctrine in California by this language. Rather, the court only rejected the application of the doctrine when a corporate official engages in an activity for which he or she could be personally liable. Id. at 703-04, 268 Cal. Rptr. at 590.
202. Id. at 705 n.2, 268 Cal. Rptr. at 591 n.2.
203. Id. at 702, 268 Cal. Rptr. at 589.
204. Id. at 704-05, 268 Cal. Rptr. at 591.
corporate officers and directors were liable for their own tortious conduct. 205

The court also held that the acts taken by Nakata in his corporate capacity would be considered to be acts of his own for purposes of jurisdiction on the theory that "if a corporate officer may be held personally responsible for causing the corporation to act, that act may be imputed to the officer for purposes of establishing personal jurisdiction over him." 206 Thus, the court stated that if a corporate official conducts an act for which the official would be personally liable, and if the act creates "contact between the officer and the forum state," then the act may be considered in determining whether the state has jurisdiction over the individual. 207 Under these circumstances, the court held that the fiduciary shield doctrine could not be applied to defeat jurisdiction over the corporate official. 208 As a result, jurisdiction over Nakata was proper since he committed an intentional act for which he could be personally liable and that act caused a tortious "effect" in California. 209

The Seagate Technology court effectively precluded the application of the fiduciary shield doctrine to defeat jurisdiction over corporate officials when those officials engage in activities for which they could be personally liable. 210 Under California law, corporate officers and directors can be personally liable for the torts they commit, whether they were committed in their individual or corporate capacities. 211 Although this issue was not before the Seagate Technology court, the court's holding logically leads to the conclusion that if corporate officers commit any kind of torts, whether they be intentional or negligent, the acts will be imputed to them as individuals for purposes of establishing personal jurisdiction. This result goes beyond the holdings of Taylor-Rush and Calder, which appeared to limit their holdings to situations where corporate officials commit only intentional torts.

It is clear that Calder has had a significant effect on the fiduciary shield doctrine in California. The doctrine appears to still exist in California, but California has recognized several exceptions to the doctrine. First, the doctrine is inapplicable to intentional tortfeasors who direct their acts at California residents. 212 Second, the doctrine is not available when corporate officials commit intentional acts for which they could be personally liable. 213

The California courts have not given any indication as to whether the

205. Id. at 701, 268 Cal. Rptr. at 589.
206. Id. at 703, 268 Cal. Rptr. at 590.
207. Id. at 703-04, 268 Cal. Rptr. at 590. ("For example, no personal contact would result from doing nothing more than ratifying an act taken by the corporation or by another corporate officer.").
208. Id. at 703, 268 Cal. Rptr. at 590.
209. Id. at 704, 268 Cal. Rptr. at 591.
210. Id. at 703, 268 Cal. Rptr. at 590.
211. Id. at 701, 268 Cal. Rptr. at 589.
212. Id. at 703, 268 Cal. Rptr. at 590; Taylor-Rush, 217 Cal. App. 3d at 117, 265 Cal. Rptr. at 680.
213. Seagate Technology, 219 Cal. App. 3d at 703, 268 Cal. Rptr. at 590.
doctrine is characterized as an element of constitutional due process or as a component of statutory analysis. It appears, however, that the doctrine is regarded as an element of constitutional due process, since California has recognized the doctrine, and California’s long-arm statute is coextensive with due process.


a. New York’s long-arm statute

The New York long-arm statute is narrower in scope than the due process clause of the United States Constitution. Section 302(a) of New York Civil Practice Law and Rules allows the assertion of personal jurisdiction over a non-resident if the party: (1) transacts any business within the state or contracts anywhere to supply goods or services in New York; (2) commits a tortious act within New York, except defamation; (3) commits a tortious act outside of the state causing injury to a person or property in New York, except defamation.

214. But see Davis v. Metro Prods., 885 F.2d 515, 521 (9th Cir. 1989), where the Court of Appeals for the Ninth Circuit, deciding this case under Arizona law, stated that the United States Supreme Court in Calder “signalled” that the fiduciary shield doctrine is not a constitutional issue. Id. The Davis court concluded that the doctrine is a “state-created corporate form” designed to create a “due process limit on jurisdiction.” Id. Thus, the court found that the fiduciary shield doctrine was inapplicable in Arizona since Arizona had not adopted the shield, and because the Arizona long-arm statute, like California’s, is coextensive with constitutional due process. Id. at 522.

215. Data Disc, 557 F.2d at 1286.


217. N.Y. CIV. PRAC. L. & R. § 302(a) (McKinney 1990). Section 302(a) reads:

Personal Jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. commits a tortious act without the state causing injury to 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.

Id.

218. Id. § 302(a)1.

219. Id. § 302(a)2.
tion or (4) owns, uses or possesses any real property situated within New York.

b. the law in New York prior to Calder v. Jones

The fiduciary shield doctrine originated in New York through a series of decisions by the New York state and federal courts. Until Calder, New York courts consistently upheld the doctrine. A district court in New York stated, "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." While in Bulova Watch Co. v. K. Hattori & Co., the district court held that the fiduciary shield doctrine is an element of constitutional due process. In reaching this conclusion, the Bulova Watch court stated, "The constitutional principle underlying the exercise of long-arm jurisdiction is that there is '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.' The court found, however, "Where the corporate agent engages in corporate business for the sole benefit of the corporation, it is difficult to see how the exercise of jurisdiction

220. Id. § 302(a)3.
221. Id. § 302(a)4.
222. See supra notes 70-81 and accompanying text.
225. 664 F.2d 899 (2d Cir. 1981).
226. Id. at 902 n.3.
228. Id. at 1347-48.
229. Id. at 1347 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
over one who has conducted no activities on his own behalf ‘comports with fair
play and substantial justice.’”

c. the law in New York after Calder v. Jones

Since the United States Supreme Court decided Calder, the New York law
regarding the fiduciary shield doctrine could be categorized as inconsistent at
best. For example, in Guccione v. Flynt, one New York district court
declared that Calder rejected the fiduciary shield doctrine altogether, stating
that: “The Supreme Court . . . has recently rejected the proposition that
employees who act in their official capacity are shielded from suit in their individual
capacity.” The court failed to supply any rationale for this interpretation of
Calder.

In contrast, many New York courts, just after Calder was decided, continued
to apply the doctrine without any reference to Calder. In Soltex Polymer
Corp. v. Fortex Industries, for instance, another district court stated that
the fiduciary shield doctrine precluded the exercise of jurisdiction over corporate
officials under every provision of the New York long-arm statute. Additionally,
many of these courts concluded that the doctrine could be applied to shield
officials from jurisdiction even when the individuals committed tortious acts.

Still other New York courts, considering Calder, stated that the Calder
decision did not even address the fiduciary shield doctrine. In Axelrad v. Carl

230. Id. at 1348.
232. Id. at 18,947.
233. See, e.g., Shopping Mall Investors v. E.G. Frances & Co., No. 84 Civ 1469, at *2-*3
(S.D.N.Y. Jan. 29, 1987) (LEXIS, Genfed library, Dist file); Totalplan Corp. v. Lure Camera,
440, 441-42 (E.D.N.Y. 1984); Conniff v. Dodd, Mead & Co., 593 F. Supp. 266, 268 (S.D.N.Y.
1984); Soltex Polymer Corp. v. Fortex Indus., 590 F. Supp. 1453, 1457-58 (E.D.N.Y. 1984);
library, Dist file) (mem.); Photo Promotions Assocs. v. Household Int'l, 584 F. Supp. 1238,
1240 (S.D.N.Y. 1984); Sheldon v. Kimberly-Clark Corp., 105 A.D.2d 273, 275-76, 482
N.Y.S.2d 867, 869 (1984); Laufer v. Ostrow, 55 N.Y.2d 305, 313, 449 N.Y.S.2d 456, 460
(1982).
235. Id. at 1458.
236. Shopping Mall Investors, No. 84 Civ. 1469, LEXIS at *2-3 (applied fiduciary shield
doctrine despite allegations of fraud and breach of fiduciary duty); Totalplan, 613 F. Supp.
at 457-58 (fiduciary shield doctrine ‘confers jurisdictional immunity upon corporate officials,
even though their conduct be tortious, as long as the actions taken were in the interests of
the corporation and not purely personal, and the corporation is not merely a shell for the
individual, and does not lack sufficient assets to respond’); Picower, No. 83 Civ. 4717, LEXIS
(applied fiduciary shield doctrine to defeat jurisdiction over defendant who allegedly committed
fraud in conversations with the plaintiff in New York); Sheldon, 105 A.D.2d at 275, 482
N.Y.S.2d at 869 (‘‘As a general rule, this doctrine protects an out-of-state corporate officer
from being subject to the jurisdiction of the courts of New York for tortious acts committed
without the State, unless that officer was acting in his own personal interest rather than on
behalf of the corporation.’’).
Byoir & Associates, the district court held that Calder had absolutely no influence on the doctrine, and the doctrine is "still very much alive." The Axelrad court stated that although the Supreme Court in Calder and Keeton discussed the issue of personal jurisdiction, it never reached "the issue of the fiduciary shield doctrine." Consequently, the Axelrad court concluded that the Supreme Court allowed the assertion of jurisdiction over Calder and South, "not because the fiduciary shield doctrine is dead, but because jurisdiction over petitioners in California [was] proper because of their intentional conduct in Florida calculated to cause injury to respondent in California."

Another line of authority in New York has held that the Calder Court merely eliminated the fiduciary shield doctrine as an element of constitutional due process, but preserved it as a state-created limitation on a state's long-arm statute. As a result, these courts have held that the doctrine is still available in New York, since the New York courts have adopted the fiduciary shield doctrine as a limitation on the reach of their long-arm statute.

For example, in Thomson McKinnon Securities v. Hamiltonian Industries, the district court stated that: "Although Calder eliminate[d] the fiduciary shield doctrine as a consideration of due process, it [did] not compel New York to abandon it as an equitable doctrine in the construction of its own statute." The district court explained that the Supreme Court in Calder rejected the fiduciary shield doctrine when it held that jurisdiction over Calder and South was proper in California despite the fact that their actions were taken on behalf of their employer. But the Thomson McKinnon Securities court stated that Calder only eliminated the doctrine as an element of constitutional due process, because the Supreme Court had analyzed the case under the California long-arm statute, which is coextensive with the due process clause. Since there was no separate statutory inquiry to consider in Calder, the Supreme Court was only concerned with the constitutional inquiry—"whether the Due Process Clause required the fiduciary shield doctrine to be incorporated into the 'minimum contacts' test of World-Wide Volkswagen Corp. v. Woodson."

Consequently, the Thomson McKinnon Securities court concluded that, although Calder rejected the fiduciary shield doctrine as an element of

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237. No. 84 Civ. 8936 (S.D.N.Y. July 15, 1985) (LEXIS, Genfed library, Dist file) (mem.).
238. Id.
239. Id. at n.3.
244. Id. at 7.
245. Id.
246. Id.
247. Id. (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)).
constitutional due process, it did not reject the doctrine as a component of the statutory analysis.\textsuperscript{248} Therefore, the \textit{Thomson McKinnon Securities} court held that the doctrine was still available in states like New York, where the long-arm statute is more restrictive than the United States Constitution.\textsuperscript{249}

The most recent trend by the courts in New York has been to reject the fiduciary shield doctrine, both as an element of the constitutional analysis and as an element of the New York statutory analysis.\textsuperscript{250} The case that is most often cited for this position is \textit{Kreutter v. McFadden Oil Corp.}\textsuperscript{251} In \textit{Kreutter}, the New York Court of Appeals, without offering any explanation, stated that the United States Supreme Court, in \textit{Calder} and \textit{Keeton}, held that the fiduciary shield doctrine was not a constitutional requirement.\textsuperscript{252} The \textit{Kreutter} court also held that, although several New York federal courts and some of the departments of the New York Appellate Division had accepted the doctrine,\textsuperscript{253} the New York Court of Appeals, the highest court in New York, had not adopted the doctrine in the past, and it would not adopt it at that point.\textsuperscript{254}

The \textit{Kreutter} court gave several reasons why it would not adopt the doctrine in New York. First, there is nothing in the language or the legislative history of New York's long-arm statute indicating that fiduciaries should be shielded from jurisdiction when their actions are taken in their corporate capacities.\textsuperscript{255} Second, the doctrine is not necessary as a matter of fairness because "[t]he equitable concerns which motivated development of the doctrine are amply protected by constitutional due process requisites which guarantee that jurisdiction over a nonresident will be sustained only when the demand for his presence is reasonable and consistent with notions of 'fair play and substantial

\begin{itemize}
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Id.
\item \textsuperscript{251} 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988).
\item \textsuperscript{252} Id. at 470-71, 522 N.E.2d at 46, 527 N.Y.S.2d at 201 (citing Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, 465 U.S. 770 (1984)).
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id. at 469-72, 522 N.E.2d at 45-47, 527 N.Y.S.2d at 200-02.
\item \textsuperscript{255} Id. at 470, 522 N.E.2d at 46, 527 N.Y.S.2d at 201.
\end{itemize}
The court added that the New York long-arm statute itself takes into account equitable concerns by not authorizing the exercise of personal jurisdiction in every case where it would be constitutionally permissible. Finally, the court stated that the fiduciary shield doctrine is not desirable as a matter of public policy because it “unfairly prejudice[s] plaintiffs who seek relief against defendants conducting affairs in this State.”

The New York Court of Appeal’s decision in Kreutter has been followed by several district courts and the Court of Appeals for the Second Circuit, and has gained general acceptance as the current law regarding the fiduciary shield doctrine in New York. Thus, as one court put it, “New York’s highest court sound[ed] the death knell to the fiduciary shield doctrine.”

3. The effect of Calder v. Jones on Other States

a. the legal basis of the fiduciary shield doctrine

Like California and New York, there has been considerable disagreement in other states on the issue of the proper legal basis of the fiduciary shield doctrine. Since the United States Supreme Court was not clear in its analysis regarding the doctrine in Calder, some courts have held that the doctrine is an element of constitutional due process, while other courts have concluded that the doctrine is an element of statutory analysis.

256. Id. (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
257. Id. at 471, 522 N.E.2d at 46, 527 N.Y.S.2d at 201. The court commented that the case before it provided a good example of why the doctrine is not necessary to prevent inequitable results. Id. Since the plaintiff had obtained jurisdiction over the corporation, the corporate official would probably be its principal witness and would have to travel to New York to serve in this capacity anyway. Id. The court explained:

[T]he inconvenience the corporate official faces if made a party to the suit individually is minimal and, as a result, notions of fairness do not require us to shield him from the reach of the long-arm statute. Inasmuch as the constitutional and statutory safeguards sufficiently alleviate the equitable concerns posed by long-arm jurisdiction, there is “no convincing reason why the mere fact of corporate employment should alter the jurisdictional calculus.”

Id. (quoting Koenig, Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield, 38 STAN. L. REV. 813, 830 (1986)).

258. Id.
260. Retail Software, 854 F.2d at 22.
261. Maier-Schule GMC, 1981 Trade Cas. (CCH) at 60,255.
262. See infra notes 264-81 and accompanying text.
263. See infra notes 282-304 and accompanying text.
(i) states finding that the fiduciary shield doctrine is an element of constitutional due process

Several courts, both before and after *Calder* was decided, have stated that the fiduciary shield doctrine was an element of constitutional due process. Courts in the states of Idaho, Iowa, Illinois, Ohio, and New Jersey reached this conclusion before *Calder* was decided.

One of these courts, an Idaho district court, in *Idaho Potato Commission v. Washington Potato Commission* found that the doctrine was an element of the constitutional analysis, since it would be against "fair play and substantial justice" and, therefore, unconstitutional to extend jurisdiction over corporate officials based on acts taken in their corporate capacities. The court reasoned that it would be difficult to conclude that these corporate officials personally availed themselves of the "'privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" The *Idaho Potato Commission* court also stated that it would be difficult to find that these corporate officials reasonably anticipated being haled into a forum state for activities conducted on behalf of the corporation, when those same activities would not subject them to personal liability.

After the Supreme Court decided *Calder*, a number of courts in the states

267. *See Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974) (deciding case under Ohio law, court stated that "even if the statute were construed to permit suit in Ohio we would still be faced with grave questions as to its constitutionality. We have serious doubt whether the activities of the corporate officers in behalf of the corporations...are sufficient so as to make it reasonable and just, consistent with traditional notions of fair play, and in conformity with due process requirements of the Fourteenth Amendment that the individuals be subjected to suit in Ohio to enforce personal liability arising out of such activities.").
270. *Id.* at 183.
271. *Id.* at 183 n.6 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).
272. *Id.* at 182.
of Illinois,\textsuperscript{273} New Hampshire,\textsuperscript{274} Oklahoma,\textsuperscript{275} Pennsylvania,\textsuperscript{276} and Texas\textsuperscript{277} also concluded that the fiduciary shield doctrine was an element of constitutional due process. For example, an Oklahoma district court, in \textit{McClelland v. Watling Ladder Co.},\textsuperscript{278} reasoned that the fiduciary shield doctrine was a component of constitutional due process on the basis that both the doctrine and the due process clause are \textquote{animated by a similar concern for fairness.}\textsuperscript{279} In addition, a Pennsylvania district court, in \textit{Moran v. Metropolitan District Council},\textsuperscript{280} concluded that: \textquote{Disregarding activity undertaken on behalf of a corporation regardless of the circumstances would be inconsistent with the flexibility inherent in the jurisprudence of personal jurisdiction since the Supreme Court decided International Shoe.}\textsuperscript{281}

These courts are correct that the fairness considerations that underlie the constitutional jurisdictional analysis mandate the application of the fiduciary shield doctrine. Accordingly, the doctrine should be considered as being grounded in principles of constitutional due process.

(ii) states finding that the fiduciary shield doctrine is an element of statutory analysis

Numerous courts, on the other hand, have found that the fiduciary shield

\begin{footnotes}
\item \textsuperscript{273} See Rog v. Professional Window & House Cleaning, No. 84 C 4198 (N.D. Ill. Aug. 1, 1986) (LEXIS, Genfed library, Dist file) (mem.); Rollins v. Ellwood, Nos. 69697, 69698, at *47-*51 (Ill. Nov. 30, 1990) (LEXIS, States library, III file). \textit{But see In re Mahurkar Double Lumen Hemodialysis Catheter Patent Lit.}, 750 F. Supp. 330, 335 (N.D. Ill. 1990) (stated that \textit{Calder} established that the United States Constitution does not require states to adopt the fiduciary shield doctrine); Hyatt Corp. v. Club Regency Int‘l, No. 85 C 7540 (N.D. Ill. July 11, 1986) (LEXIS, Genfed library, Dist file) (mem.) (\textquote{In \textit{Calder}, the Supreme Court noted that nothing in the United States Constitution insulates employee defendants from jurisdiction merely because of their employee status.}).
\item \textsuperscript{274} See Estabrook v. Wetmore, 529 A.2d 956, 958-59 (N.H. 1987).
\item \textsuperscript{275} See \textit{McClelland v. Watling Ladder Co.}, 729 F. Supp. 1316, 1321 (W.D. Okl. 1990).
\item \textsuperscript{277} See Saktides v. Cooper, 742 F. Supp. 382, 385 (W.D. Tex. 1990) (court considers the doctrine as a \textquote{sub-issue of due process}). \textit{But see Donovan v. Grim Hotel Co.}, 747 F.2d 966, 973-74 (5th Cir. 1984), \textit{cert. denied}, 471 U.S. 1124 (1985) (citing \textit{Calder}, court held due process is not offended when a non-resident corporate agent or employee is made subject to personal jurisdiction in Texas for acts performed in his or her corporate capacity).
\item \textsuperscript{278} 729 F. Supp. 1316 (W.D. Okla. 1990).
\item \textsuperscript{279} \textit{Id.} at 1321.
\item \textsuperscript{280} 640 F. Supp. 430 (E.D. Pa. 1986).
\item \textsuperscript{281} \textit{Id.} at 434.
\end{footnotes}
doctrine is not an element of constitutional analysis, rather, it is a component of
the statutory analysis. Unfortunately, none of these courts has provided any
analysis for reaching this conclusion. Yet, without any justification, courts have
held, both before and after *Calder*, that the fiduciary shield doctrine was a com-
ponent of the statutory analysis. Courts in Maryland\(^2\) and South Carolina\(^3\)
reached this conclusion prior to *Calder*.

In addition, several courts since *Calder* was decided, have found that the
fiduciary shield doctrine was a statutory principle. Some of these courts reached
this conclusion as a result of their interpretation of *Calder*, while other courts
reached this conclusion independent of *Calder*.

Courts in the states of Arkansas,\(^4\) Michigan,\(^5\) Minnesota,\(^6\) and Ne-
braska\(^7\) based their holdings on the *Calder* decision. Unfortunately, none of
these courts explained the rationale behind its conclusions. For example, in
*Byer v. Gordos Arkansas, Inc.*,\(^8\) an Arkansas district court stated that as a
result of *Calder* and *Keeton*, "a constitutional due process analysis properly dis-
regards the fiduciary shield doctrine entirely, and if such shield continues to
exist at all, it must do so by virtue of state substantive tort law or state-imposed
limitations of extra-territorial judicial jurisdiction short of the fullest extent al-
lowed by due process."\(^9\)

Conversely, courts in the states of Connecticut,\(^0\) Delaware,\(^1\) Kansas,\(^2\)

\(^3\) See Columbia Briargate Co. v. First Nat'l Bank, 713 F.2d 1052, 1064 (4th Cir. 1983),
South Carolina law).
1985) ("Michigan courts have not adopted the fiduciary shield doctrine, and due process
does not command this court to apply it in the absence of state law requirements.").
\(^6\) See Garber v. Jack's Corn Crib, No. 4-86-740, at *25-*26 (D. Minn. July 18, 1988)
(LEXIS, Genfed library, Dist file).
\(^7\) See McGowan Grain, Inc. v. Sanburg, 225 Neb. 129, 145-46, 403 N.W.2d 340, 351
(1987) (court held *Calder* eliminated the fiduciary shield doctrine as a constitutional principle,
but did not adopt the doctrine as a limitation on its long-arm statute).
\(^9\) Id. at 155.
(LEXIS, Genfed library, Dist file) (mem.); Drez v. E.R. Squibb & Sons, No. 86-2176-S (D.
Kan. Oct. 15, 1986) (LEXIS, Genfed library, Dist file) (mem.). But see Wilshire Oil Co. of
Tex. v. Riffe, 409 F.2d 1277, 1282 (10th Cir. 1969) (fiduciary shield doctrine was found to be a
constitutional principle under Kansas law); Traffas v. Bridge Capital Corp., No 90-1304-C, at
*13 (D. Kan. Nov. 30, 1990) (LEXIS, Genfed library, Dist file) (mem.) ("This court believes
the fiduciary shield doctrine is best handled as an important element in the due process
considerations.").
Maryland, Massachusetts, and the District of Columbia have concluded that the fiduciary shield doctrine was an element of statutory analysis without any reference to *Calder*. Likewise, these courts failed to provide any explanation for this result.

Several of the courts that found the doctrine to be a statutory principle also stated that it was not available in states where the long-arm statute extends to the outermost limits of due process. These courts reason that since the doctrine is not a component of constitutional due process, the doctrine does not apply in a state where the long-arm statute is coextensive with due process. Consequently, the doctrine has been found to be unavailable in Michigan, Minnesota, West Virginia, and possibly in Maryland. Nevertheless, a court in Kansas held that the doctrine


294. See Yankee Group v. Yamashita, 678 F. Supp. 20, 22 (D. Mass. 1988) (mem.) (“Massachusetts courts have never recognized the fiduciary shield doctrine as a limitation on the reach of the long-arm statute . . . [and] it is unlikely that Massachusetts would adopt such a limitation in view of the fact that the long-arm statute is intended to reach the limits of the United States Constitution.”); Johnson Creative Arts v. Wool Masters, Inc., 573 F. Supp. 1106, 1111 (D. Mass. 1983), aff’d on other grounds, 743 F.2d 947 (1st Cir. 1984) (Massachusetts long-arm statute is not limited by fiduciary shield doctrine).


296. See Chase v. Pan-Pacific Broadcasting, 617 F. Supp. 1414, 1423 (D. D.C. 1985) (District of Columbia has not applied the fiduciary shield doctrine to its long-arm statute in the past, and the court did not do so in this case).

297. See Western Contracting, 885 F.2d at 1200 (applying Maryland law); Pittsburgh Terminal, 831 F.2d at 525 (applying Maryland law); Birrane, 738 F. Supp. at 169 n.1; Zeman, 717 F. Supp. at 376; Byer, 712 F. Supp. at 155; Garber, No. 4-86-740, LEXIS at *25-*26; Chicago Blower Corp., 623 F. Supp. at 803; Chase, 617 F. Supp. at 1423.


299. Id.

300. See Chicago Blower, 623 F. Supp. at 803. The court added that: “The *Calder* decision has been interpreted by almost all courts as holding that where the state long-arm statute extends to the limit of due process, the exercise of jurisdiction over corporate officers who individually have had minimum contacts with the forum is permissible, even if those contacts were made in their capacity as corporate officers.” Id. at 804.

301. See Garber, No. 4-86-740, LEXIS at *25-*26. The court stated: “Most courts interpreting the *Calder* decision have held that where the State long-arm statute extends to the limit of due process, the exercise of jurisdiction over corporate officers who individually have had minimum contacts with the forum is permissible, even if those contacts were made in their capacity as corporate officers.” Id. (quoting Chicago Blower Corp. v. Air Sys. Assocs., 623 F. Supp. 798, 804 (E.D. Mich. 1985)).

302. See Pittsburgh Terminal, 831 F.2d at 525 (fiduciary shield doctrine is not available in West Virginia because the West Virginia long-arm statute is coextensive with the full reach of due process).

303. See Western Contracting, 885 F.2d at 1200 (as a statutory principle, fiduciary shield
was available as a statutory limitation, even though the Kansas long-arm statute is coextensive with due process. 304

States have interpreted the fiduciary shield doctrine and the Calder decision in many different ways. Part of the reason for this confusion is the vague treatment of the fiduciary shield doctrine in Calder. The debate whether the fiduciary shield doctrine is an element of constitutional due process or an element of statutory law continues today.

b. the limitations of the fiduciary shield doctrine

Courts have also been inconsistent in the types of limitations they have imposed upon the application of the fiduciary shield doctrine. Some of these limitations are the result of the courts' interpretation of Calder and some are the result of the courts' own refinement of the doctrine.

The most significant limitation upon the fiduciary shield doctrine, imposed by some states, is that the doctrine does not apply when corporate officials commit certain torts. As discussed above, Calder should be interpreted to hold that the doctrine is not available to shield corporate officials from personal jurisdiction when those officials commit intentional torts directed at residents of forum states. 305 Courts in Alabama, 306 Illinois, 307 Kansas, 308 and Vermont 309 have agreed with this interpretation of Calder.

One of these courts, the Alabama Supreme Court, in Duke v. Young, 310 declined to invoke the fiduciary shield doctrine to immunize six non-resident

doctrine may not be recognized under Maryland law since the Maryland long-arm statute has been interpreted by the Maryland Court of Appeals as exercising jurisdiction to the limits of due process; Birrane, 738 F. Supp. at 169 n.1 (as a statutory principle, fiduciary shield doctrine may not be recognized under Maryland law since the Maryland long-arm statute has been interpreted by the Maryland Court of Appeals as exercising jurisdiction to the limits of due process). But see Zeman, 717 F. Supp. at 376 (fiduciary shield doctrine can only be applied to those provisions of the Maryland long-arm statute which do not extend jurisdiction to the peripheral limits of due process).

304. See Drez, No. 86-2176-S, LEXIS.

305. See supra notes 163-74 and accompanying text.

306. See Duke v. Young, 496 So. 2d 37, 40 (Ala. 1986) (fiduciary shield doctrine only applies to defeat personal jurisdiction over corporate officials who are charged with "mere untargeted negligence," the doctrine is inapplicable when the official is charged with and "intentional, and allegedly tortious actions" expressly aimed at the forum); Brooks v. Inlow, 453 So. 2d 349, 355 (Ala. 1984).

307. See Rollins, Nos. 69697, 69698, LEXIS at *40; see also Ben Kozloff, Inc. v. Seamark Corp., No. 85 C 4634 (N.D. Ill. June 4, 1986) (LEXIS, Genfed library, Dist file) (mem.) (fiduciary shield doctrine does not bar jurisdiction when non-resident allegedly engages in fraudulent activity for his or her own benefit rather than for the benefit of the corporation). But see Veal Assoc., Inc. v. ICI Ams., No. 86 C 7138 (E.D. Ill. Nov. 17, 1986) (LEXIS, Genfed library, Dist file) (mem.) (court applied fiduciary shield doctrine despite allegations of tortious interference with business relationship and fraud).


310. 496 So. 2d 37 (Ala. 1986).
directors from personal jurisdiction because they were charged with fraudulently concealing material facts.\textsuperscript{311} The court stated that \textit{Calder} made it clear that corporate officials charged with "intentional, and allegedly tortious, actions" that are expressly aimed at residents of the forum, will be subjected to personal jurisdiction.\textsuperscript{312} However, the court also recognized that had the corporate officials been charged with "mere untargeted negligence," the fiduciary shield doctrine could have been applied to defeat jurisdiction.\textsuperscript{313}

In addition, the Iowa Supreme Court, in \textit{State ex rel. Miller v. Internal Energy Management},\textsuperscript{314} concluded that the doctrine should not be applied to defeat jurisdiction when a corporate official allegedly perpetrates a fraud upon the plaintiff, because "[t]o hold otherwise would mean that an individual contemplating the commission of fraud in other jurisdictions could escape jurisdiction there by simply committing the fraud through a corporation."\textsuperscript{315}

In Maryland, courts have held that the doctrine is inapplicable in situations where corporate officials commit personal or business torts.\textsuperscript{316} Courts in Kansas\textsuperscript{317} and New Hampshire\textsuperscript{318} have gone even further so as to preclude the application of the doctrine when corporate officials commit any tortious acts within the forum.\textsuperscript{319}

Another limitation upon the fiduciary shield doctrine, imposed by courts in

\begin{itemize}
  \item 311. \textit{Id.} at 40.
  \item 312. \textit{Id.}
  \item 313. \textit{Id.; see also Brooks, 453 So. 2d at 354 (since corporate officials were charged with "mere untargeted negligence," the assertion of personal jurisdiction over them would offend traditional notions of fair play and substantial justice).}
  \item 314. 324 N.W.2d 707 (Iowa 1982).
  \item 315. \textit{Id.} at 716.
  \item 317. \textit{See Ceva Laboratories, No. 88-2609-S, LEXIS at *5 (negligent misrepresentation and fraud).}
  \item 318. \textit{See Estabrook, 529 A.2d at 959 (breach of duty of reasonable care by performing certain acts negligently and failing to perform certain other acts).}
  \item 319. \textit{See also Columbia Briargate, 713 F.2d at 1064-65, where the Court of Appeals for the Tenth Circuit, deciding a case under South Carolina law, held: [W]hen a non-resident corporate agent is sued for a tort committed by him in his corporate capacity in the forum state in which service is made upon him without the forum under the applicable state long-arm statute as authorized by Rule 4(e), he is properly subject to the jurisdiction of the forum court, provided the long-arm statute of the forum state is coextensive with the full reach of due process. On the other hand, if the claim against the corporate agent rests on nothing more than that he is an officer or employee of the non-resident corporation and if any connection he had with the commission of the tort occurred without the forum state, we agree that, under sound due process principles, the nexus between the corporate agent and the forum state is too tenuous to support jurisdiction over the agent personally by reason of service under the long-arm statute of the forum state.}
  \item \textit{Id.}
\end{itemize}
Georgia,\textsuperscript{320} Pennsylvania,\textsuperscript{321} and Wisconsin,\textsuperscript{322} is that the doctrine cannot be applied to defeat jurisdiction if a corporate official could be personally liable for his or her acts. A Pennsylvania district court, in \textit{Donner v. Trans-Witmark Music Library},\textsuperscript{323} stated that: “It would be anomalous, and would defeat the purposes of the law creating substantive liability, to permit a corporate officer to shield himself from jurisdiction by means of the corporate entity, when he could not interpose the same shield as a defense against substantive liability.”\textsuperscript{324} In contrast, courts in Illinois\textsuperscript{325} and New Jersey\textsuperscript{326} have expressly rejected the notion that the personal liability of corporate officials is tied to the exercise of personal jurisdiction over those officials.

One restriction that has been recognized by many states, including

\begin{itemize}
    \item \textsuperscript{320} See Delong Equip. Co. v. Washington Mills Abrasive, 840 F.2d 843, 851-52 (11th Cir. 1988) (applying Georgia law).
    \item \textsuperscript{321} See Moran, 640 F. Supp. at 434;\ Donner v. Trans-Witmark Music Library, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979). \textit{But see Simkins}, 601 F. Supp. at 1345 (“a plaintiff seeking to establish personal jurisdiction over an individual corporate officer or director on the basis of tortious conduct committed in the exercise of his corporate duties must prove, by a preponderance of the evidence, that the non-resident officer or director independently has sufficient forum-related contacts”).
    \item \textsuperscript{322} See Oxmans’ Erwin Meat Co. v. Blacketer, 273 N.W.2d 285, 289 (Wis. 1979).
    \item \textsuperscript{323} 480 F. Supp. 1229 (E.D. Pa. 1979).
    \item \textsuperscript{324} \textit{Id.} at 1234. \textit{But see FSC Professional Servs. Group}, 555 F. Supp. at 791 (“It is essential to understand that \textit{Donner} does not hold that Pennsylvania may assert jurisdiction over corporate officers simply by virtue of their participation in tortious activity on behalf of a corporation which itself is subject to jurisdiction in this state.”).
    \item \textsuperscript{325} See West Coast Video Enters. v. Ponce de Leon, No. 90 C 1236, at *30-*31 (N.D. Ill. Feb. 1, 1991) (LEXIS, Genfed library, Dist file) (mem.); Riga Int’l Corp. v. Alpern, No. 87 C 3422, at *5 (N.D. Ill. Dec. 17, 1987) (LEXIS, Genfed library, Dist file) (mem.); Olinski v. Duce, 155 Ill. App. 3d 441, 444, 508 N.E.2d 398, 400 (1987); Burnhope v. National Mortgage Equity Corp., No. 1-90-0143, at *23-*24 (Ill. App. Dec. 27, 1990) (LEXIS, States library, Ill file). \textit{But see} McHugh v. Blumenfeld, No. 85 C 4177 (N.D. Ill. Sept. 27, 1985) (LEXIS, Genfed library, Ill file) (mem.) (“Where a defendant engages in acts on his own behalf in such a way as to impose personal liability, the fiduciary shield doctrine is not a defense to the assertion of personal jurisdiction.”); \textit{Club Assistance Program v. Zukerman}, 594 F. Supp. 341, 345 (N.D. Ill. 1984) (where a corporate official engages in acts for which he or she is personally liable, the official can not invoke the fiduciary shield because his or her actions were not taken only on the corporation’s behalf); \textit{see also In re Mahurkar}, 750 F. Supp. at 336 (Illinois district court doubts that Illinois state courts would hold that the fiduciary shield doctrine could shield an official from jurisdiction even when that individual could be personally liable for his or her actions, because to do so “would block litigation everywhere.”).
    \item \textsuperscript{326} See Educational Testing Serv. v. Katzman, 631 F. Supp. 550, 559 (D.N.J. 1986) (“corporate officers are liable for torts committed in their corporate capacities and . . . the issues of liability and jurisdiction should be analyzed separately.”).
\end{itemize}
Delaware, Illinois, Kansas, Oklahoma, Tennessee, Texas, Utah, Wisconsin and Wyoming is that the doctrine should not be used to shield an individual from jurisdiction when the corporation is the alter-ego or "shell" of the individual, or where the corporation lacks sufficient assets to respond to the suit. In Torco Oil Co. v. Innovative Thermal Corp., an Illinois district court stated that when the alter-ego exception applies, the corporation's contacts are attributed to the individual, because "while it appears on the face that the individual is acting in a representative capacity, he is in fact pursuing self-interest, and thus it 'will not advance notions of fairness to allow the owner of the corporation to invoke the protections of the fiduciary shield doctrine.'"

Several courts have recognized another limitation to the fiduciary shield doctrine. As an equitable doctrine, these courts state that the fiduciary shield should not be applied mechanically, as a per se rule. Instead, they hold that the doctrine should be applied flexibly, according to the facts of each case. States

327. See Plummer, 533 A.2d at 1246-47.
329. See Saetz v. Langan, No. 90-2217-V, at *7-*12 (D. Kan. Jan. 4, 1991) (LEXIS, Genfed library, Dist file) ("If the corporation is merely a shell, it is equitable, even if the shell may not have been used to perpetrate a fraud, to subject its owner personally to the court's jurisdiction to defend the acts he has done on behalf of his shell.").
330. See Home-Stake Prod. v. Talon Petroleum, C.A., 907 F.2d 1012, 1017 (10th Cir. 1990) (court could not find any Oklahoma cases discussing the fiduciary shield doctrine, but noted that even if the courts adopted the doctrine, they would not apply it if the corporation is merely an alter ego of the individual); McClelland, 729 F. Supp. at 1319.
332. See Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985) (applying Texas law); Saktides, 742 F. Supp. at 386.
337. Id. at 135-36 (quoting Marine Midland Bank v. Miller, 664 F.2d 899, 903 (2d Cir. 1981)).
that have reached this conclusion include Illinois, Indiana, Maryland, Minnesota, New Mexico, Pennsylvania and the District of Columbia. In Torco Oil, the Illinois district court stated that the doctrine should not be applied automatically, but instead, a court should "analyze the particular facts in light of the ultimate consideration of fairness before deciding whether the doctrine should bar jurisdiction."

In addition, the district court of Pennsylvania, in Rittenhouse & Lee v.


Dollars & Sense,\textsuperscript{346} concluded that taking a flexible approach with regard to the fiduciary shield doctrine was consistent with "recent Supreme Court pronouncements."\textsuperscript{347} The court stated:

In Keeton, for example, the Court noted that jurisdiction over an employee does not automatically follow from jurisdiction over his corporate employer. At the same time, however, the Court rejected "the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity." Thus, the court appears to have rejected any per se rule with respect to the corporate jurisdictional shield.\textsuperscript{348}

The Rittenhouse & Lee court provided a list of several factors that should be considered by courts in determining whether the fiduciary shield doctrine should be applied. These include: "the extent and nature of a corporate officer's personal participation in the tortious conduct; the nature and quality of the officer's forum contacts; and the officer's role in the corporate structure."\textsuperscript{349}

Another restriction imposed by courts in Alabama,\textsuperscript{350} New Jersey\textsuperscript{351} and Pennsylvania\textsuperscript{352} is that the determination of whether to apply the doctrine depends upon whether the actions taken by the corporate officials were within or without the forum state. In Educational Testing Service v. Katzman,\textsuperscript{353} the New Jersey district court stated that:

[A]ctions taken within the forum state by a corporate official in his official capacity may be considered for purposes of establishing jurisdiction over him in his individual capacity. However, actions taken by an individual in his corporate capacity outside the forum state are not necessarily enough to establish jurisdiction over the individual.\textsuperscript{354}

Finally, courts in Tennessee\textsuperscript{355} and North Carolina\textsuperscript{356} have limited the


\textsuperscript{347} Id. at *14-15.

\textsuperscript{348} Id. (citations omitted) (quoting Keeton v. Hustler Magazine, 465 U.S. 770, 781 n. 13 (1984)).

\textsuperscript{349} Id. at *13 n.6.

\textsuperscript{350} See Brooks, 453 So. 2d 349, 354-55 (Ala. 1984) (fiduciary shield doctrine applies only to nonresident corporate officials who have never been in Alabama and who had never "personally 'performed any act or omitted to perform any act in Alabama which resulted in tortious injury in Alabama.'" (quoting Thames v. Gunter-Dunn, Inc., 373 So. 2d 640, 642 (Ala. 1979) (emphasis added))).

\textsuperscript{351} See Educational Testing Serv., 631 F. Supp. at 559.

\textsuperscript{352} See Rittenhouse & Lee, No. 83-5996, LEXIS at *13-14 ("[I]t may be proper to consider an officer's corporate acts when the activity was taken within the forum. If, however, the officer's acts were performed outside the forum, corporate activity should not be part of a jurisdictional inquiry.").


\textsuperscript{354} Id. at 559 (emphasis added).

\textsuperscript{355} See Warren, 483 F. Supp. at 793.

\textsuperscript{356} See North Carolina v. Alexander & Alexander Servs., 685 F. Supp. 114, 116 (E.D. N.C. 1988) ("fiduciary shield doctrine does not protect a person when that person has direct personal involvement in the activities that give rise to the cause of action").
application of the fiduciary shield doctrine to situations where the corporate officials have had no direct contacts with the forum state. These courts have reasoned that, if an official has no direct contacts with the forum state, "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. Otherwise every [official] of a corporation would be subject to the personal jurisdiction of the courts in every state where the corporation is doing business."\(^2\)

Courts across the country have imposed several different types of limitations upon the fiduciary shield doctrine. The one limitation that appears to be consistent with the Supreme Court's holding in *Calder*, is that the doctrine should not be applied to shield corporate officials from the exercise of personal jurisdiction when they commit intentional torts directed at residents of forum states.

VI. CONCLUSION

The United States Supreme Court has established that the due process clause of the United States Constitution requires that the exercise of personal jurisdiction over non-residents comport with "'traditional notions of fair play and substantial justice.'"\(^3\) In addition to requiring that non-residents have "minimum contacts" with the forum states, the Supreme Court has stated that non-residents must have purposefully availed themselves of the benefits and privileges of the forum states' laws.\(^4\)

When corporate officials conduct activities with forum states solely on behalf of the corporations that employ them, it is the corporations, not the individual corporate officials, that purposefully avail themselves of the forum states' laws. As a result, the exercise of personal jurisdiction over the corporate officials is improper since the essential component of purposeful availment is lacking. This is the situation which is addressed by the fiduciary shield doctrine.

The fiduciary shield doctrine recognizes the fundamental unfairness in asserting personal jurisdiction over corporate officials who have not purposefully availed themselves of the benefits and privileges of the forum states' laws. The doctrine shields corporate officials from jurisdiction, when jurisdiction is based on acts that were taken solely in their corporate capacities.

The doctrine should not, however, be applied in all cases. The United

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357. *Warren*, 483 F. Supp. at 793 ("On the other hand, if the corporate structure is being used as a vehicle for the conduct of business by an individual who has total control over corporate activities, including the activities giving rise to the suit, then the existence of the corporate form should not immunize him from the jurisdictional contacts of the corporation."); accord *Alexander & Alexander Servs.*, 685 F. Supp. at 116.


States Supreme Court’s opinion in *Calder v. Jones* should be interpreted as holding that the fiduciary shield doctrine cannot be applied to shield corporate officials from personal jurisdiction when they engage in intentional torts. It would be fundamentally unfair to apply the doctrine to shield corporate officials from personal jurisdiction when those officials allegedly commit intentional torts. These overall concerns for fairness outweigh any unfairness that may result by exercising jurisdiction over corporate officials who lack the requisite purposeful availment in their individual capacities. On the other hand, the doctrine should be applied to shield corporate officials from jurisdiction when they are charged with acts other than intentional torts, since the unfairness associated with exercising jurisdiction over officials who lack purposeful availment is not outweighed by this overall concern for fairness.

Consequently, the fiduciary shield doctrine should be considered as a component of the constitutional due process analysis and should be used by courts to achieve a fair result in the exercise of personal jurisdiction over corporate officials. Since the law regarding the fiduciary shield doctrine has been very uncertain after the *Calder* decision, corporate officials cannot structure their conduct with minimum assurance as to where that conduct will or will not subject them to suit. As a result, the due process rights of corporate officials are being violated. These rights will continue to be violated until the United States Supreme Court clarifies the law regarding this doctrine. Only then will corporate officials be certain as to whether the actions they take on behalf of their corporations subject them to personal jurisdiction.

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