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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

1. The "fiduciary shield" doctrine was first coined by *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966).

2. *Marine Midland Bank v. Miller*, 664 F.2d 899, 902-03 (2d Cir. 1981).

3. *Mihlon v. Superior Court*, 169 Cal. App. 3d 703, 713, 215 Cal. Rptr. 442, 447 (1985).

4. *See, e.g., Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1349 (E.D.N.Y. 1981).

5. *Id.*

6. *See, e.g., PSC Professional Servs. Group v. American Digital Sys.*, 555 F. Supp. 788, 794 (E.D. Pa. 1983).

7. *See, e.g., Videotronics, Inc. v. Bend Elecs.*, 564 F. Supp. 1471, 1475 (D. Nev. 1983).

8. *See, e.g., Ruger v. Superior Court*, 118 Cal. App. 3d 427, 433-34, 173 Cal. Rptr. 302, 305-06 (1981).

9. *See Axelrad v. Carl Byoir & Assocs.*, No. 84 Civ. 8936, at n.5 (S.D.N.Y. July 15, 1985) (LEXIS, Genfed library, Dist file) (mem.).

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.¹⁴ The United States Supreme Court first considered the application of the doctrine, without referring to it by name, in 1984, in *Calder v. Jones*.¹⁵ 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*;¹⁶ 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.¹⁷ 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.¹⁸

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,¹⁹ and concludes with a survey of *Calder*'s effects on the doctrine in other states that have recognized it.

not be made amenable to suit within that state. *See, e.g.,* Columbia Briargate Co. v. First Nat'l Bank, 713 F.2d 1052, 1059 (4th Cir.), *cert. denied sub nom. Pearson v. Columbia Briargate Co.*, 465 U.S. 1007 (1984) (There would be an "'anomalous' result which would 'defeat the purposes of the law creating substantive liability,' if the courts were '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'. . . ." (quoting *Donner v. Tams-Witmark Music Library*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979))).

14. *Taylor-Rush v. Multitech Corp.*, 217 Cal. App. 3d 103, 115-17, 265 Cal. Rptr. 672, 678-80 (1990).

15. 465 U.S. 783, 789-90 (1984).

16. *See, e.g., Thomson McKinnon Sec. v. Hamiltonian Indus.*, 610 F. Supp. 5, 7 (S.D.N.Y. 1985).

17. *Id.*

18. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

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(c) (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.²⁰ 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,²¹ 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.²² Consequently, a court must satisfy two independent inquiries in order to extend personal jurisdiction over a non-resident.²³ The first step is to determine whether the state long-arm statute allows the exercise of jurisdiction based on the facts of the case.²⁴ 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.²⁵

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.²⁶ 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.²⁷ In evaluating minimum contacts, a court focuses on the relationship among the defendant,

doctrine, stating that the doctrine will not be applied when the corporation is a mere shell for the corporate official. *Id.* at 1246-47.

20. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 3.6, at 110 (1985) ("availability of defendant's domicile as a proper forum assures that there is one place in which defendant always may be sued").

21. The state statute defining jurisdictional limitations is typically referred to as a "long-arm" statute. A long-arm statute allows a state to exercise jurisdiction over defendants not found within its borders to the extent permitted under the due process clause. *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971).

22. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 20, § 3.1, at 96-97.

23. *Davis v. Metro Prods.*, 885 F.2d 515, 519 (9th Cir. 1989); *Wines v. Lake Havasu Boat Mfg.*, 846 F.2d 40, 42 (8th Cir. 1988); *Haisten v. Grass Valley Medical Reimbursement Fund*, 784 F.2d 1392, 1396 (9th Cir. 1986); *Garber v. Jack's Corn Crib*, No. 4-86-740, at *12 (D. Minn. July 18, 1988) (LEXIS, Genfed library, Dist file).

24. *Davis*, 885 F.2d at 519; *Wines*, 846 F.2d at 42; *Haisten*, 784 F.2d at 1396; *Garber*, No. 4-86-740, LEXIS at *12.

25. *Davis*, 885 F.2d at 519; *Wines*, 846 F.2d at 42; *Haisten*, 784 F.2d at 1396; *Garber*, No. 4-86-740, LEXIS at *12; U.S. CONST. amend. XIV.

26. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

27. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *Contra Burnham v. Superior Court*, 110 S. Ct. 2105 (1990) (plurality upheld assertion of personal jurisdiction over a non-resident defendant based solely upon service of process within the forum state's territory); Note, *International Shoe Gets the Boot: Burnham v. Superior Court Resurrects the Physical Power Theory*, 24 Loy. L.A.L. Rev. 849 (1991) (discusses plurality opinion in *Burnham*).

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

28. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

29. N.Y. CIV. PRAC. L. & R. § 302(a) (McKinney 1990). See *infra* note 217 for the text of this statute.

30. See *Bulk Oil (USA) v. Sun Oil Trading Co.*, 584 F. Supp. 36, 42 (S.D.N.Y. 1983).

31. CAL. CIV. PROC. CODE § 410.10 (West 1990). See *infra* note 176 for the text of this statute.

32. See *Cornelison v. Chaney*, 16 Cal. 3d 143, 147, 545 P.2d 264, 266, 127 Cal. Rptr. 352, 354 (1976). In states where the long-arm statute is coextensive with due process, the two inquiries merge, and the only inquiry is whether jurisdiction would be permissible under the due process clause of the United States Constitution. *Columbia Briar-gate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1057 (4th Cir. 1983), *cert. denied sub nom. Pearson v. Columbia Briar-gate Co.*, 456 U.S. 1007 (1984).

33. J. LANDERS & J. MARTIN, *CIVIL PROCEDURE*, 100-01 (1981).

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)).

37. *International Shoe*, 326 U.S. at 319.

defendant has established sufficient minimum contacts with the forum state;³⁸ and (2) the assertion of jurisdiction comports with "traditional notions of fair play and substantial justice."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.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.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."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."⁴³

In *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;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;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;⁴⁶ and (4) a

38. *Id.* at 316.

39. *Id.*; see also J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 20, § 3.10, at 125.

The authors state that:

The language of the *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 *International Shoe* itself. Other cases applying the *International Shoe* standard retain the unified approach more or less as it appears in [Chief Justice] Stone's opinion. The Supreme Court, in *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.

Id. § 3.10, at 125 n.9 (citation omitted).

40. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

41. *International Shoe*, 326 U.S. at 319.

42. *World-Wide Volkswagen*, 444 U.S. at 297.

43. *International Shoe*, 326 U.S. at 319.

44. *Id.* at 317, 320.

45. *Id.*; *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

46. *International Shoe*, 326 U.S. at 318; *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446-49 (1952).

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.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,⁴⁸ the non-resident has obligated himself or herself to respond to a suit in that state.⁴⁹ Consequently, in *Hanson v. Denckla*,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."⁵¹ The Court has continuously affirmed this principle that the non-resident's expectations are an integral aspect of the due process analysis.⁵² In *World-Wide Volkswagen Corp. v. Woodson*,⁵³ the Court stated:

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.⁵⁴

The Supreme Court, in *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.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."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

47. *International Shoe*, 326 U.S. at 318; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

48. *International Shoe*, 326 U.S. at 319.

49. *Id.*

50. 357 U.S. 235 (1958).

51. *Id.* at 253.

52. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985); *World-Wide Volkswagen*, 444 U.S. at 297; *Kulko v. Superior Court*, 436 U.S. 84, 97 (1978).

53. 444 U.S. 286 (1980).

54. *Id.* at 297.

55. *Id.* at 297-98.

56. *Id.* at 297.

conduct will or will not subject him or her to suit.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."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 residence⁵⁹ against: (1) the forum state's interest in adjudicating the dispute;⁶⁰ (2) the plaintiff's interest in obtaining convenient and effective relief;⁶¹ (3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies;⁶² and (4) the shared interest of the several states in furthering fundamental substantive social policies.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."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.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.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.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

57. *Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

58. *International Shoe*, 326 U.S. at 316.

59. *World-Wide Volkswagen*, 444 U.S. at 292.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 20, § 3.10, at 128.

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).

66. *United States v. Montreal Trust*, 358 F.2d 239, 243 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966).

67. *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981).

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-

68. *Hanson*, 357 U.S. at 253; see *supra* notes 48-58 and accompanying text.

69. See *infra* notes 163-74 and accompanying text.

70. See *Wilshire Oil Co. of Texas v. Riffe*, 409 F.2d 1277, 1281 n.8 (10th Cir. 1969); *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); *Willner v. Thompson*, 285 F. Supp. 394, 397 (E.D.N.Y. 1968); *Schenin v. Micro Copper Corp.*, 272 F. Supp. 523, 528-29 (S.D.N.Y. 1967); *Unicon Mgmt. v. Koppers Co.*, 250 F. Supp. 850, 853 (S.D.N.Y. 1966); *Boas & Assocs. v. Vernier*, 22 A.D.2d 561, 563, 257 N.Y.S.2d 487, 490 (1965).

71. 22 A.D.2d 561, 257 N.Y.S.2d 487 (1965). *But see* *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 468, 522 N.E.2d 40, 44, 527 N.Y.S.2d 195, 199-200 (1988) (court concluded that the *Boas* court did not create the fiduciary shield doctrine). The *Kreutter* court stated:

In *Boas*, however, plaintiff was suing on a contract and the Appellate Division merely found that, as a matter of substantive law, no claim could be asserted against an individual nonresident defendant whose only contact with New York was his execution of a contract here on behalf of his corporate employer. That was so, the *Boas* court noted, because one who executes a contract on behalf of a corporation without also signing it in his individual capacity is not personally obligated under the agreement. The *Boas* court did not address whether the defendant was amenable to jurisdiction in the New York courts and thus it provides no basis for development of the jurisdictional doctrine the Second Circuit attributed to it.

Id. (citations omitted).

ant under both an oral and a written agreement.⁷² The New York Appellate Court found that the New York long-arm statute⁷³ 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.⁷⁴ 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."⁷⁵ This dictum formed the basis for what is known today as the fiduciary shield doctrine.⁷⁶

Several courts have recognized *Boas* as having created the fiduciary shield doctrine.⁷⁷ The first case to identify the doctrine in the federal courts was *United States v. Montreal Trust Co.*⁷⁸ 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."⁷⁹ Subsequently, the Court of Appeals for the Tenth Circuit, in *Wilshire Oil Co. v. Riffe*,⁸⁰ also cited *Boas*, stating:

[W]hile 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.

73. N.Y. CIV. PRAC. L. & R. § 302(a)(1) (McKinney 1990). See *infra* note 217 for the language of this statute.

74. *Boas & Assocs.*, 22 A.D.2d 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.

78. 358 F.2d 239 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966).

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.

82. *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981).

83. *Id.*; *Grove Press v. CIA*, 483 F. Supp. 132, 135-36 (S.D.N.Y. 1980); *Merkel Assocs. v. Bellofram Corp.*, 437 F. Supp. 612, 618 (W.D.N.Y. 1977).

84. *See, e.g., Zeman v. Lotus Heart, Inc.*, 717 F. Supp. 373, 375 (D. Md. 1989). The *Zeman* court stated:

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.

86. *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974); *Warren v. Dynamics Health Equip. Mfg.*, 483 F. Supp. 788, 793 (M.D. Tenn. 1980). The *Warren* court noted:

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 involved 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

88. *Id.* at 931.

89. *United States v. Montreal Trust Co.*, 358 F.2d 239, 253-54 (2d Cir.) (Timbers, J., concurring in part and dissenting in part), *cert. denied*, 384 U.S. 919 (1966); *Rashap v. Brownell*, 229 F.2d 193, 195 (2d Cir. 1956); *Sun-Herald Corp. v. Duggan*, 160 F.2d 475, 478 (2d Cir. 1947).

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.

93. *See, e.g.*, *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1059 (4th Cir.), *cert. denied sub nom. Pearson v. Columbia Briargate Co.*, 465 U.S. 1007 (1984); Note, *The Fiduciary Shield Doctrine: A Rule of Statutory Construction or a Constitutional Principle?*, 1984 J. CORP. L. 901, 909-12.

94. 22 A.D.2d 561, 257 N.Y.S.2d 487 (1965).

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.⁹⁶ Since *Boas* was decided, courts have disagreed as to the legal basis of the doctrine.⁹⁷ The United States Supreme Court had an opportunity to rule on this issue in *Calder v. Jones*,⁹⁸ but the Court's treatment of the doctrine was very confusing,⁹⁹ 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.¹⁰⁰ However, there are no United States Supreme Court decisions that support this result, nor are there any plausible reasons for concluding as such.¹⁰¹ On the other hand, many courts have concluded that the fiduciary shield doctrine is a component of constitutional due process.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.

96. *Boas & Assocs.*, 22 A.D.2d at 563, 257 N.Y.S.2d at 490.

97. See *supra* notes 100-03 and accompanying text.

98. 465 U.S. 783 (1984).

99. See *infra* notes 144-74 and accompanying text.

100. *Marine Midland Bank*, 664 F.2d at 902 n.3; *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.

102. See *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 929 (6th Cir. 1974); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347-48 (E.D.N.Y. 1981); *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F. Supp. 171, 182-83 (D. Idaho 1976); *State ex rel. Miller v. Internal Energy Mgmt.*, 324 N.W.2d 707, 711 (Iowa 1982).

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

104. *International Shoe Co. v. Woodson*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

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

105. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)).

106. *International Shoe*, 326 U.S. at 316.

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).

108. *International Shoe*, 310 U.S. at 316.

109. *Idaho Potato Comm'n*, 410 F. Supp. at 182-83.

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

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

112. *Id.* at 297.

113. *Id.*

jurisdiction.¹¹⁴ 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."¹¹⁵ 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*.¹¹⁶ In that case, members of the Washington Potato Commission approved an advertising plan that was distributed in the state of Idaho.¹¹⁷ Plaintiff, Idaho Potato Commission, alleged that the plan infringed its trademark.¹¹⁸ 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.¹¹⁹ In reaching its conclusion, the court reasoned that the members did not purposefully avail themselves of the benefits and privileges of Idaho's laws.¹²⁰ 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.¹²¹

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

114. *Burger King*, 471 U.S. at 474.

115. *World-Wide Volkswagen*, 444 U.S. at 297.

116. 410 F. Supp. 171 (D. Idaho 1975).

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.¹²²

The court concluded by noting that the Idaho Potato Commission's interests of exercising jurisdiction over the members, and the state of Idaho's interests 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.¹²³ Consequently, the court held that exercising personal jurisdiction over the members of the Washington Potato Commission "would be against 'fair play' and 'substantial justice' and is therefore unconstitutional."¹²⁴

Since corporate officials who conduct activities solely in their corporate capacities do not purposefully avail themselves of the benefits and privileges of the forum state's laws, these individuals should not be subjected to personal jurisdiction in their individual capacities according to the jurisdictional principles of the United States Constitution. It would be against "fair play and substantial justice" 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.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*,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.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.¹²⁸ The action arose out of an article written by South that alleged that Jones drank so heavily that it prevented her from fulfilling her professional obligations as an entertainer.¹²⁹ Jones claimed that, as a result of the article, she suffered emotional distress and injury to her professional reputation in California.¹³⁰

The *National Enquirer* is a Florida corporation that transacts business in

122. *Id.* at 182.

123. *Id.* at 183.

124. *Id.*

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.'").

126. 465 U.S. 783 (1984).

127. *Id.* at 784-85.

128. *Id.*

129. *Id.* at 788 n.9.

130. *Id.* at 788-89.

California, and distributes over five million copies nationwide on a weekly basis.¹³¹ California receives more newspapers than any other state.¹³²

At the time suit was brought, the individual non-resident defendants, Calder and South, resided in Florida.¹³³ 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.¹³⁴

Calder was president and editor of the *National Enquirer* and he supervised nearly every function of the publication.¹³⁵ He travelled to California, however, on only two occasions; once for pleasure, and once to testify at a trial in an unrelated matter.¹³⁶ His involvement with the allegedly "libelous" article consisted of reviewing and approving the subject of the article, and editing the final version.¹³⁷

South was the author of the article.¹³⁸ He made frequent visits to California for business purposes.¹³⁹ 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.¹⁴⁰ South did most of his research in Florida, but relied on the source in California for additional information.¹⁴¹

The California Superior Court granted the motion by Calder and South to quash the service of the summons for lack of personal jurisdiction,¹⁴² and the California Court of Appeal reversed on the basis that Calder's and South's

131. *Id.* at 785.

132. *Id.*

133. *Jones v. Calder*, 138 Cal. App. 3d 128, 130, 187 Cal. Rptr. 825, 827 (1982), *aff'd*, 465 U.S. 783 (1984).

134. *Id.* The defendant, *National Enquirer*, did not contest the court's exercise of jurisdiction over it. *Id.* at 130 n.3, 187 Cal. Rptr. at 827 n.3.

135. *Calder*, 465 U.S. at 786.

136. *Id.*

137. *Id.*

138. *Id.* at 785.

139. *Id.*

140. *Id.* at 785-86.

141. *Id.*

142. *Jones*, 138 Cal. App. 3d at 131, 187 Cal. Rptr. at 827. The California Superior Court stated that the actions of Calder and South were sufficient to assert personal jurisdiction under California's long-arm statute because their actions in Florida caused injury to the plaintiffs in California. *Calder*, 465 U.S. at 786 & n.5. The superior court, however, declined to exercise jurisdiction over them for constitutional policy reasons. *Id.* at 786.

The superior court stated that Calder and South were entitled to "special solicitude . . . because of the potential 'chilling effect' on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked." *Calder*, 465 U.S. at 786. The superior court claimed that in defamation actions, where freedom of the press is involved, "First Amendment considerations should be weighed in the balance of fundamental fairness in resolving whether a state can compel a nonresident defendant to appear and defend an action." *Jones*, 138 Cal. App. 3d at 131, 187 Cal. Rptr. at 827. The superior court justified this immunization from personal jurisdiction on

actions were intended to cause, and did cause tortious injury to Jones and Engels in California.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,¹⁴⁴ and therefore, under the California long-arm statute as well.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.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.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.¹⁴⁸

Calder and South analogized themselves to a welder, employed in Florida, who worked on a boiler that subsequently exploded in California.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.¹⁵⁰ Calder and South argued that they, like the hypothetical welder, had no control over the corporation's activities.¹⁵¹ Therefore, they asserted that California did not have jurisdiction over them.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.¹⁵³ While the welder would have been charged

the ground that Jones' and Engels' rights could be "fully satisfied" in their suit against the corporation without requiring Calder and South to appear as parties. *Calder*, 465 U.S. at 786.

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. *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. *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. *Id.* at 132, 187 Cal. Rptr. at 828.

144. U.S. CONST. amend. XIV, § 1.

145. *Calder v. Jones*, 465 U.S. 783, 791 (1984); see CAL. CIV. PROC. CODE § 410.10 (West 1973 & Supp. 1990). See *infra* note 176 for the text of this statute.

146. *Calder*, 465 U.S. at 789.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 789-90.

with "mere untargeted negligence,"¹⁵⁴ Calder and South were charged with "intentional, and allegedly tortious" actions expressly aimed at a resident of California.¹⁵⁵ 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.¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ 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.¹⁵⁹ 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."¹⁶⁰ 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.¹⁶¹ 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"¹⁶²

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*,¹⁶³ without addressing it by name, when it stated "[p]etitioners are correct that their contacts with California are not to be judged according to their employer's activities there."¹⁶⁴ Likewise, in a subsequent

154. *Id.* at 789.

155. *Id.*

156. *Id.* at 789-90.

157. *Id.* at 790. The Supreme Court rejected the claims by Calder and South that they should be protected from jurisdiction on the basis of first amendment concerns. *Id.* at 790-91. In dismissing this theory, the Supreme Court reasoned that the potential "chilling effect" on reporters and editors is considered in the substantive law governing libel and defamation actions and therefore, there is no need to add special procedural protections. *Id.*

158. *See id.*

159. *Id.*

160. *Id.* (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction.")).

161. *Id.*

162. *Id.*

163. 465 U.S. 783 (1984).

164. *Id.* at 790.

discussion of *Calder*, in *Keeton v. Hustler Magazine*,¹⁶⁵ the Court stated that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him" ¹⁶⁶

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.¹⁶⁷ 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.¹⁶⁸ The Court stated "their status as employees [did] not somehow insulate them from jurisdiction."¹⁶⁹

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.¹⁷⁰ 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

165. 465 U.S. 770 (1984).

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).

167. *Calder*, 465 U.S. at 789-90.

168. *Id.*

169. *Id.* at 790.

170. *Id.* at 789.

process.¹⁷¹ As an element of due process, the doctrine seeks to achieve fairness in the assertion of personal jurisdiction over corporate officials.¹⁷² 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.¹⁷³

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' " ¹⁷⁴ 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*¹⁷⁵ 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.*

173. *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F. Supp. 171, 182-83 (D. Idaho 1976).

174. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

175. 465 U.S. 783, 790 (1984).

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").

180. 31 Cal. App. 3d 991, 107 Cal. Rptr. 744 (1973).

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*.¹⁸² In *Mihlon*, the court considered the question of whether counsel for corporations are entitled to a fiduciary shield.¹⁸³ The court found that, unlike corporate officers and directors, corporate counsel are not entitled to an "official capacity" shield from personal jurisdiction.¹⁸⁴

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."¹⁸⁵ 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.¹⁸⁶ On the other hand, corporate counsel do not "speak for" or "act for" corporations in the same way,¹⁸⁷ since an attorney representing a corporation merely provides legal counsel and services.¹⁸⁸ Consequently, the *Mihlon* court concluded that the rationale behind providing corporate officials with a shield to personal jurisdiction did not extend to corporate counsel.¹⁸⁹ 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."¹⁹⁰

Several years later, in *Taylor-Rush v. Multitech Corp.*,¹⁹¹ 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*,¹⁹² of the fiduciary shield doctrine.¹⁹³ 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.¹⁹⁴

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

182. 169 Cal. App. 3d 703, 713, 215 Cal. Rptr. 442, 447 (1985).

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.

191. 217 Cal. App. 3d 103, 265 Cal. Rptr. 672 (1990).

192. 465 U.S. 770 (1984).

193. *Taylor-Rush*, 217 Cal. App. 3d at 117, 265 Cal. Rptr. at 680.

194. *Id.* at 118, 265 Cal. Rptr. at 680.

transfer securities in California.¹⁹⁵ 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 wrongdoing intentionally directed at a California resident’ ”¹⁹⁶ 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.¹⁹⁷ 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.”¹⁹⁸ 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.¹⁹⁹

In *Seagate Technology v. A.J. Kogyo Co.*,²⁰⁰ 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.²⁰¹ 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.²⁰² Nakata personally caused the corporation to issue the guarantee.²⁰³ The court found that the actions by Nakata could subject him to personal liability²⁰⁴ 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.

200. 219 Cal. App. 3d 696, 268 Cal. Rptr. 586 (1990).

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,²¹⁴ since California has recognized the doctrine, and California's long-arm statute is coextensive with due process.²¹⁵

2. The effect of *Calder v. Jones* on New York law

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.²¹⁶ Section 302(a) of New York Civil Practice Law and Rules²¹⁷ 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;²¹⁸ (2) commits a tortious act within New York, except defamation;²¹⁹ (3) commits a tortious act outside of the state causing injury to a person or property in New York, except defama-

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.

216. *Bulk Oil (USA) v. Sun Oil Trading Co.*, 584 F. Supp. 36, 42 (S.D.N.Y. 1983); see N.Y. CIV. PRAC. L. & R. § 302(a) (McKinney 1990).

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;²²⁰ or (4) owns, uses or possesses any real property situated within New York.²²¹

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.²²² Until *Calder*, New York courts consistently upheld the doctrine.²²³ 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."²²⁴

Although the fiduciary shield doctrine was established law in New York prior to *Calder*, the courts could not agree upon the proper legal basis of the doctrine. In *Marine Midland Bank v. Miller*,²²⁵ the Court of Appeals for the Second Circuit, deciding a case under New York law, held that the doctrine is a statutory principle, stating that: "The fiduciary shield doctrine is not a constitutional principle, but is rather a doctrine based on judicial inference as to the intended scope of the long-arm statute."²²⁶ While in *Bulova Watch Co. v. K. Hattori & Co.*,²²⁷ the district court held that the fiduciary shield doctrine is an element of constitutional due process.²²⁸ 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.'"²²⁹ 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.

223. See, e.g., *Marine Midland Bank v. Miller*, 664 F.2d 899, 902 (2d Cir. 1981); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *United States v. Montreal Trust Co.*, 358 F.2d 239, 243 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); *Bulk Oil*, 584 F. Supp. at 40; *Goshen Litho, Inc. v. Kohls*, 582 F. Supp. 1561, 1565 (S.D.N.Y. 1983); *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1347-48 (E.D.N.Y. 1981); *Grove Press, Inc. v. CIA*, 483 F. Supp. 132, 135 (S.D.N.Y. 1980), *rev'd on other grounds sub nom. Grove Press, Inc. v. Angleton*, 649 F.2d 121 (2d Cir. 1981); *Merkel Assocs. v. Bellofram Corp.*, 437 F. Supp. 612, 618 (W.D.N.Y. 1977); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853, 465 N.Y.S.2d 779, 780 (1983). But see *Hasbro Bradley, Inc. v. Coopers & Lybrand*, 121 A.D.2d 870, 871, 503 N.Y.S.2d 792, 794 (1986) (no New York court had adopted the fiduciary shield doctrine to bar jurisdiction under section 302(a)).

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

225. 664 F.2d 899 (2d Cir. 1981).

226. *Id.* at 902 n.3.

227. 508 F. Supp. 1322 (E.D.N.Y. 1981).

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.' ”²³⁰

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*,²³¹ 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.”²³² 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*.²³³ In *Soltex Polymer Corp. v. Fortex Industries*,²³⁴ 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.²³⁵ Additionally, many of these courts concluded that the doctrine could be applied to shield officials from jurisdiction even when the individuals committed tortious acts.²³⁶

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.

231. 1984 Copyright L. Rep. (CCH) ¶ 25,654 (S.D.N.Y. Apr. 30, 1984).

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*, 613 F. Supp. 451, 457-58 (W.D.N.Y. 1985); *Lancer Prods. v. Rally Accessories*, 597 F. Supp. 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); *Picower v. Lynn Wilson Assocs.*, No. 83 Civ. 4717 (S.D.N.Y. May 23, 1984) (LEXIS, Genfed 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).

234. 590 F. Supp. 1453 (E.D.N.Y. 1984).

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,²³⁷ the district court held that *Calder* had absolutely no influence on the doctrine, and the doctrine is "still very much alive."²³⁸ 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."²³⁹ 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.'"²⁴⁰

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.²⁴¹ 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.²⁴²

For example, in *Thomson McKinnon Securities v. Hamiltonian Industries*,²⁴³ 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."²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ 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*."²⁴⁷

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

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.

240. *Id.* (quoting *Calder v. Jones*, 465 U.S. 783, 791 (1984)).

241. See *Cutco Indus. v. Naughton*, 806 F.2d 361, 367 (2d Cir. 1986) (applying New York law); *Rolls-Royce Motors v. Charles Schmitt & Co.*, 657 F. Supp. 1040, 1059 (S.D.N.Y. 1987); *Nordic Bank PLC v. Trend Group*, 619 F. Supp. 542, 569 (S.D.N.Y. 1985); *Thomson McKinnon Sec. v. Hamiltonian Indus.*, 610 F. Supp. 5, 7 (S.D.N.Y. 1985).

242. See, e.g., *Thomson McKinnon Sec.*, 610 F. Supp. at 7.

243. 610 F. Supp. 5 (S.D.N.Y. 1985).

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.²⁴⁸ Therefore, the *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.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.²⁵⁰ The case that is most often cited for this position is *Kreutter v. McFadden Oil Corp.*²⁵¹ In *Kreutter*, the New York Court of Appeals, without offering any explanation, stated that the United States Supreme Court, in *Calder and Keeton*, held that the fiduciary shield doctrine was not a constitutional requirement.²⁵² The *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,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.²⁵⁴

The *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.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

248. *Id.*

249. *Id.*

250. See *Retail Software Servs. v. Lashlee*, 854 F.2d 18, 22 (2d Cir. 1988) (applying New York law); *Facit, Inc. v. Krueger, Inc.*, 732 F. Supp. 1267, 1269 (S.D.N.Y. 1990); *Schieffelin & Co v. Jack Co. of Boca*, 725 F. Supp. 1314, 1318 (S.D.N.Y. 1989); *Besicorp Group v. Crown Life Ins.*, No. 88-CV-114, at *16 (N.D.N.Y. May 17, 1989) (LEXIS, Genfed library, Dist file) (mem.); *Ross v. Hamilton Beach, Inc.*, No. 89 Civ. 0079, at *2 (S.D.N.Y. Apr. 4, 1989) (LEXIS, Genfed library, Dist file); *Maier-Schule GMC v. General Motors Corp.*, 1989-1 Trade Cas. (CCH) ¶ 68,409, at 60,255 (W.D.N.Y. Nov. 30, 1988); *Davidson v. Vohann of Cal., Inc.*, No. 87 Civ. 3842, at *5 (S.D.N.Y. Aug. 22, 1988) (LEXIS, Genfed library, Dist file); *American Sav. Bank v. Cheshire Mgmt.*, 693 F. Supp. 42, 45 (S.D.N.Y. 1988); *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 470-72, 522 N.E.2d 40, 46-47, 527 N.Y.S.2d 195, 201-02, (1988); cf. *Deutsch v. Integrated Barter Int'l*, 700 F. Supp. 194, 202 (S.D.N.Y. 1988) ("the fiduciary shield doctrine is of questionable validity in New York"); *CPC Int'l v. McKesson Corp.*, 70 N.Y.2d 268, 287, 514 N.E.2d 116, 125-26, 519 N.Y.S.2d 804, 814 (1987) (court stated that the New York Court of Appeal had never adopted fiduciary shield doctrine).

251. 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988).

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)).

253. *Id.*

254. *Id.* at 469-72, 522 N.E.2d at 45-47, 527 N.Y.S.2d at 200-02.

255. *Id.* at 470, 522 N.E.2d at 46, 527 N.Y.S.2d at 201.

justice.’”²⁵⁶ 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.²⁵⁷ Finally, the court stated that the fiduciary shield doctrine is not desirable as a matter of public policy because it “unfairly prejudic[es] plaintiffs who seek relief against defendants conducting affairs in this State.”²⁵⁸

The New York Court of Appeal’s decision in *Kreutter* has been followed by several district courts²⁵⁹ and the Court of Appeals for the Second Circuit,²⁶⁰ 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.”²⁶¹

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,²⁶² while other courts have concluded that the doctrine is an element of statutory analysis.²⁶³

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.*

259. *Madison Nat’l Bank v. NMM Realty Dev. Bank*, No. 86 Civ. 5115, at *2 (S.D.N.Y. Sept. 18, 1990) (LEXIS, Genfed library, Dist file) (mem.); *Department of Economic Dev. v. Arthur Andersen & Co.*, No. 85 Civ. 1292, at *9 (S.D.N.Y. Jan. 8, 1990) (LEXIS, Genfed library, Dist file) (mem.); *Facit, Inc.*, 732 F. Supp. at 1269; *Schieffelin & Co.*, 725 F. Supp. at 1318; *Besicorp Group*, No. 88-CV-114, LEXIS at *16; *Ross*, No. 89 Civ. 0079, LEXIS at *2; *Maier-Schule GMC*, 1989-1 Trade Cas. (CCH) at 60,255; *Davidson*, No. 87 Civ. 3842, LEXIS at *5; *American Sav. Bank*, 693 F. Supp. at 45.

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,²⁶⁴ Iowa,²⁶⁵ Illinois,²⁶⁶ Ohio,²⁶⁷ and New Jersey²⁶⁸ reached this conclusion before *Calder* was decided.

One of these courts, an Idaho district court, in *Idaho Potato Commission v. Washington Potato Commission*,²⁶⁹ 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.²⁷⁰ 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.'"²⁷¹ 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.²⁷²

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

264. See *Idaho Potato Comm'n v. Washington Potato Comm'n*, 410 F. Supp. 171, 183 (D. Idaho 1975).

265. See *Martin v. Ju-Li Corp.*, 332 N.W.2d 871, 874 (Iowa 1983); *State ex rel. Miller v. Internal Energy Mgmt.*, 324 N.W.2d 707, 711 (Iowa 1982).

266. See *State Sec. Ins. v. Frank B. Hall & Co.*, 530 F. Supp. 94, 98 (N.D. Ill. 1981).

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.").

268. See *Sharp Elecs. Corp. v. Hayman Cash Register Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,803, at 71,957-58 (D.N.J. May 20, 1982).

269. 410 F. Supp. 171 (D. Idaho 1975).

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,²⁷³ New Hampshire,²⁷⁴ Oklahoma,²⁷⁵ Pennsylvania,²⁷⁶ and Texas²⁷⁷ also concluded that the fiduciary shield doctrine was an element of constitutional due process. For example, an Oklahoma district court, in *McClelland v. Watling Ladder Co.*,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 "animated by a similar concern for fairness."²⁷⁹ In addition, a Pennsylvania district court, in *Moran v. Metropolitan District Council*,²⁸⁰ concluded that: "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*."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

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, Ill file). But see *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Lit.*, 750 F. Supp. 330, 335 (N.D. Ill. 1990) (stated that *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.) ("In *Calder*, the Supreme Court noted that nothing in the [United States] Constitution insulates employee defendants from jurisdiction merely because of their employee status.").

274. See *Estabrook v. Wetmore*, 529 A.2d 956, 958-59 (N.H. 1987).

275. See *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1321 (W.D. Okla. 1990).

276. See *Bowers v. NETI Technologies*, 690 F. Supp. 349, 359 (E.D. Pa. 1988); *Rittenhouse & Lee v. Dollars & Sense*, No. 83-5996, at *13 (E.D. Pa. Apr. 15, 1987) (LEXIS, Genfed library, Dist file) (mem.); *Moran v. Metropolitan Dist. Council*, 640 F. Supp. 430, 432, 434 (E.D. Pa. 1986); *Simpkins Corp. v. Gourmet Resources Int'l*, 601 F. Supp. 1336, 1345 (E.D. Pa. 1985); *PSC Professional Servs. Group v. American Digital Sys.*, 555 F. Supp. 788, 792-94 (E.D. Pa. 1983). But see *Steele v. Walker*, No. 84-3325 (E.D. Pa. Dec. 5, 1985) (LEXIS, Genfed library, Dist file) (mem.) ("This contention, that employees and directors who act in their corporate capacity are somehow shielded from personal jurisdiction for their wrongdoings, was rejected by the Supreme Court in *Calder v. Jones*.").

277. See *Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990) (court considers the doctrine as a "sub-issue of due process"). But see *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 973-74 (5th Cir. 1984), cert. denied, 471 U.S. 1124 (1985) (citing *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).

278. 729 F. Supp. 1316 (W.D. Okla. 1990).

279. *Id.* at 1321.

280. 640 F. Supp. 430 (E.D. Pa. 1986).

281. *Id.* at 434.

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 component of the statutory analysis. Courts in Maryland²⁸² and South Carolina²⁸³ 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,²⁸⁴ Michigan,²⁸⁵ Minnesota,²⁸⁶ and Nebraska²⁸⁷ 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.*,²⁸⁸ an Arkansas district court stated that as a result of *Calder* and *Keeton*, "a constitutional due process analysis properly disregards 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 allowed by due process."²⁸⁹

Conversely, courts in the states of Connecticut,²⁹⁰ Delaware,²⁹¹ Kansas,²⁹²

282. See *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 329 (D. Md. 1983).

283. See *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1064 (4th Cir. 1983), cert. denied sub nom. *Pearson v. Columbia Briargate Co.*, 465 U.S. 1007 (1984) (applying South Carolina law).

284. See *Byer v. Gordos Ark., Inc.*, 712 F. Supp. 149, 155 (W.D. Ark. 1989).

285. See *Chicago Blower Corp. v. Air Sys. Assocs.*, 623 F. Supp. 798, 804 (E.D. Mich. 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.").

286. See *Garber v. Jack's Corn Crib*, No. 4-86-740, at *25-*26 (D. Minn. July 18, 1988) (LEXIS, Genfed library, Dist file).

287. 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).

288. 712 F. Supp. 149 (W.D. Ark. 1989).

289. *Id.* at 155.

290. See *Mozes v. Welch*, 638 F. Supp. 215, 223-24 (D. Conn. 1986).

291. See *Plummer & Co. Realtors v. Crisafi*, 533 A.2d 1242, 1246-48 (Del. 1987).

292. See *Ceva Laboratories v. Wilson*, No. 88-2609-S, at *5 (D. Kan. Aug. 21, 1989) (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,²⁹³ Massachusetts,²⁹⁴ West Virginia,²⁹⁵ and the District of Columbia²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ As a component of the statutory analysis, these courts state that the doctrine can only be applied in states where the long-arm statute is more limited than what is permitted by the due process clause.²⁹⁹ Consequently, the doctrine has been found to be unavailable in Michigan,³⁰⁰ Minnesota,³⁰¹ West Virginia,³⁰² and possibly in Maryland.³⁰³ Nevertheless, a court in Kansas held that the doctrine

293. See *Western Contracting Corp. v. Bechtel Corp.*, 885 F.2d 1196, 1200 (4th Cir. 1989); *Birrane v. Master Collectors*, 738 F. Supp. 167, 169 n.1 (D. Md. 1990); *Zeman v. Lotus Heart, Inc.*, 717 F. Supp. 373, 376 (D. Md. 1989).

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 [Massachusetts] long-arm statute . . . [and] it is unlikely that Massachusetts would adopt such a limitation in view of the fact that its 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).

295. See *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 525 (4th Cir. 1987) (applying West Virginia law).

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.

298. See, e.g., *Birrane*, 738 F. Supp. at 169.

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 Vermont³⁰⁹ 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 Assocs. 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).

308. *See Traffas*, No. 90-1304-C, LEXIS at *11-*28.

309. *See Stuart v. Federal Energy Sys.*, 596 F. Supp. 458, 462 (D. Vt. 1984).

310. 496 So. 2d 37 (Ala. 1986).

directors from personal jurisdiction because they were charged with fraudulently concealing material facts.³¹¹ The court stated that *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.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.³¹³

In addition, the Iowa Supreme Court, in *State ex rel. Miller v. Internal Energy Management*,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."³¹⁵

In Maryland, courts have held that the doctrine is inapplicable in situations where corporate officials commit personal or business torts.³¹⁶ Courts in Kansas³¹⁷ and New Hampshire³¹⁸ have gone even further so as to preclude the application of the doctrine when corporate officials commit any tortious acts within the forum.³¹⁹

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

311. *Id.* at 40.

312. *Id.*

313. *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).

314. 324 N.W.2d 707 (Iowa 1982).

315. *Id.* at 716.

316. See *Power Conversion, Inc. v. Saft Am., Inc.*, 672 F. Supp. 224, 229 n.6 (D. Md. 1987) (price-fixing conspiracy); *In re Mid Atlantic Toyota Antitrust Lit.*, 525 F. Supp. 1265, 1270-71 (D. Md. 1981) (price-fixing conspiracy). But see *Cawley v. Bloch*, 544 F. Supp. 133, 135-36 (D. Md. 1982) (fiduciary shield doctrine applies despite allegations of tortious conduct by corporate officer).

317. See *Ceva Laboratories*, No. 88-2609-S, LEXIS at *5 (negligent misrepresentation and fraud).

318. 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).

319. 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.

Id.

Georgia,³²⁰ Pennsylvania³²¹ and Wisconsin,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 *Donner v. Trans-Witmark Music Library*,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."³²⁴ In contrast, courts in Illinois³²⁵ and New Jersey³²⁶ 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

320. See *Delong Equip. Co. v. Washington Mills Abrasive*, 840 F.2d 843, 851-52 (11th Cir. 1988) (applying Georgia law).

321. See *Moran*, 640 F. Supp. at 434; *Donner v. Trans-Witmark Music Library*, 480 F. Supp. 1229, 1234 (E.D. Pa. 1979). 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").

322. See *Oxmans' Erwin Meat Co. v. Blacketer*, 273 N.W.2d 285, 289 (Wis. 1979).

323. 480 F. Supp. 1229 (E.D. Pa. 1979).

324. *Id.* at 1234. But see *PSC Professional Servs. Group*, 555 F. Supp. at 791 ("It is essential to understand that *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.").

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). 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."); *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); 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.").

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.").

Delaware,³²⁷ Illinois,³²⁸ Kansas,³²⁹ Oklahoma,³³⁰ Tennessee,³³¹ Texas,³³² Utah,³³³ Wisconsin,³³⁴ and Wyoming,³³⁵ 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.*,³³⁶ 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.'"³³⁷

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.

328. See *West Coast Video Enters.*, No. 90 C 1236, LEXIS at *31-*32; *FBN Food Servs. v. Sizzler Restaurants, Int'l*, No. 90 C 1001, at *6 (N.D. Ill. May 1, 1990) (LEXIS, Genfed library, Dist file); *Torco Oil Co. v. Innovative Thermal Corp.*, 730 F. Supp. 126, 135-36 (N.D. Ill. 1989); *Continental Ill. Nat'l Bank v. Premier Sys.*, No. 88 C 7703, at *7 (N.D. Ill. Mar. 14, 1989) (LEXIS, Genfed library, Dist file) (mem.); *Kula v. J.K. Schofield & Co.*, 668 F. Supp. 1126, 1129 (N.D. Ill. 1987); *Hyatt Corp.*, No. 85 C 7540, LEXIS; *Brainerd & Bridges v. Weingeroff Enters.*, No. 85 C 493 (N.D. Ill. Sept. 13, 1985) (LEXIS, Genfed library, Dist file) (mem.); *State Sec. Ins.*, 530 F. Supp. at 98; *Burnhope*, No 1-90-0143, LEXIS at *24; *Washburn v. Becker*, 186 Ill. App. 3d 629, 633, 542 N.E.2d 764, 767 (1989).

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.

331. See *Warren v. Dynamics Health Equip. Mfg.*, 483 F. Supp. 788, 792 (M.D. Tenn. 1980).

332. See *Stuart v. Spademan*, 772 F.2d 1185, 1197 (5th Cir. 1985) (applying Texas law); *Saktides*, 742 F. Supp. at 386.

333. See *Segil v. Gloria Marshall Mgmt.*, 568 F. Supp. 915, 919 (C.D. Utah 1983).

334. See *Miller Brewing Co. v. Landau*, 616 F. Supp. 1285, 1289-90 (E.D. Wis. 1985).

335. See *Ten Mile Indus. Park v. Western Plains Serv.*, 810 F.2d 1518, 1527 (10th Cir. 1987) (applying Wyoming law).

336. 730 F. Supp. 126 (N.D. Ill. 1989).

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,³³⁸ Indiana,³³⁹ Maryland,³⁴⁰ Minnesota,³⁴¹ New Mexico,³⁴² Pennsylvania,³⁴³ and the District of Columbia.³⁴⁴ 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."³⁴⁵

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

338. See *West Coast Video Enters.*, No. 90 C 1236, LEXIS at *29; *Young v. Connecticut Dual Life Ins.*, No. 90 C 254, at *6-*7 (N.D. Ill. Aug. 14, 1990) (LEXIS, Genfed library, Dist file) (mem.); *FBN Food Servs.*, No. 90 C 1001, LEXIS at *6; *In re Mahurkar*, 750 F. Supp. at 335; *Torco Oil*, 730 F. Supp. at 135; *Continental Ill. Nat'l Bank*, No. 88 C 7703, LEXIS at *7; *Veal Assocs.*, No. 86 C 7138, LEXIS; *Hyatt Int'l Corp. v. Inversiones Los Jabillos*, 558 F. Supp. 932, 936 (N.D. Ill. 1982); *Washburn*, 186 Ill. App. 3d at 633, 542 N.E.2d at 766-67.

339. See *Ryan v. Chayes Va., Inc.*, 553 N.E.2d 1237, 1240 (Ind. Ct. App. 1990).

340. See *Zeman*, 717 F. Supp. at 376-77. An individual's contacts with state should not be considered the individual's for jurisdictional purposes when: (1) he "has pursued conduct in a state solely at the direction of the corporation in furtherance of the corporation's interest; (2) he has not pursued a personal interest in the state that was direct and substantial; and (3) he has not diverted significantly from the corporate purpose and policies while in the state . . ." *Id.* However, a court should consider the individual's contacts as the individual's own when: (1) the individual has "derived a direct and substantial financial benefit from the business he conducts in the state," or (2) the individual "diverted, even unintentionally, from the purpose or policies of his employer to the extent that it can be said that his conduct was independent." *Id.* at 377.

341. See *Garber*, No. 4-86-740, LEXIS at *22.

342. See *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 384 (D. N.M. 1984).

343. See *United States v. Geri-Care, Inc.*, No. 89-5720, at *8-*9 (E.D. Pa. Mar. 29, 1990) (LEXIS, Genfed library, Dist file) (mem.); *Kane Communications v. Norman Klombers*, No. 87-6594, at *7-*10 (E.D. Pa. Mar. 9, 1988) (LEXIS, Genfed library, Dist file) (mem.); *Minigraph, Inc. v. Qualitech Computer Centers*, No. 86-5869, at *17 (E.D. Pa. June 30, 1987) (LEXIS, Genfed library, Dist file); *Rittenhouse & Lee*, No. 83-5996, LEXIS at *13-*15 & n.6 (there is no "hard and fast" rule regarding the application of the fiduciary shield doctrine); *Moran*, 640 F. Supp. at 434. In *Moran*, the court concluded that:

[A] hard and fast rule mandating that such activity should not be considered is appropriate in the determination required under the due process clause. The court must determine whether the exercise of personal jurisdiction is reasonable under all of the underlying circumstances. In some situations it may be appropriate to consider activity that an individual undertakes on behalf of a corporation. Where the corporate officer personally engages in egregious activity that would subject him or her to individual liability, the corporate cloak should not necessarily provide a defense to personal jurisdiction when it provides no defense to liability. On the other hand, the fact that the activity was undertaken on behalf of a corporation should be considered in assessing the significance of the activity as it bears on whether the individual purposely established minimum contacts in the forum state. . . . 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*."

Id. (citations omitted).

344. See *American Directory Serv. Agency v. Amy Beam*, 131 F.R.D. 635, 641 (D.D.C. 1990).

345. *Torco Oil*, 730 F. Supp. at 135.

Dollars & Sense,³⁴⁶ concluded that taking a flexible approach with regard to the fiduciary shield doctrine was consistent with "recent Supreme Court pronouncements."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.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."³⁴⁹

Another restriction imposed by courts in Alabama,³⁵⁰ New Jersey³⁵¹ and Pennsylvania³⁵² 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*,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.³⁵⁴

Finally, courts in Tennessee³⁵⁵ and North Carolina³⁵⁶ have limited the

346. No. 83-5996 (E.D. Pa. Apr. 15, 1987) (LEXIS, Genfed library, Dist file) (mem.).

347. *Id.* at *14-*15.

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

349. *Id.* at *13 n.6.

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))).

351. See *Educational Testing Serv.*, 631 F. Supp. at 559.

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.").

353. 631 F. Supp. 550 (D.N.J. 1986).

354. *Id.* at 559 (emphasis added).

355. See *Warren*, 483 F. Supp. at 793.

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."³⁵⁷

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."³⁵⁸ 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.³⁵⁹

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

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.

358. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

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

States Supreme Court's opinion in *Calder v. Jones*³⁶⁰ 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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360. 465 U.S. 783 (1984).

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