THE USE OF CONSPIRACY THEORY TO ESTABLISH IN PERSONAM JURISDICTION: A DUE PROCESS ANALYSIS

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INTRODUCTION

PHYSICAL presence in a state has long been abandoned as a prerequisite to personal jurisdiction.[1] Under state long-arm statutes, isolated acts and effects may form the basis for a court's assertion of power over non-residents.[2] It thus becomes possible to use concepts derived from substantive law to argue that the acts of one person can be attributed to another to meet the requirements of these statutes. For example, agency concepts have been used to enlarge long-arm jurisdiction.[3] If a non-resident defendant has directed another person to act for his benefit and under his control in the forum state, the other party's act may supply the minimum contact needed to support jurisdiction over the non-resident in an action arising out of the act.[4]

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1. *See* Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 Cornell L. Rev. 411, 414-16 (1981); Jay, *"Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal*, 59 N.C.L. Rev. 429, 432-33 (1981); Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 Ga. L. Rev. 19, 29-36 (1980); Comment, World-Wide Volkswagen Corp. v. Woodson: *A Limit to the Expansion of Long-Arm Jurisdiction*, 69 Calif. L. Rev. 611, 613-17 (1981); *see, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957); International Shoe Co. v. Washington, 326 U.S. 310, 315-320 (1945).

2. *See, e.g.*, Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137, 1144 (7th Cir. 1975) (patent infringement); *In re* Mid-Atlantic Toyota Antitrust Litigation, 525 F. Supp. 1265, 1270-71 (D. Md. 1981) (antitrust violation), *aff'd sub nom.* Pennsylvania v. Mid-Atlantic Toyota Distrib., 704 F.2d 125 (4th Cir. 1983); Parks v. Slaughter, 270 F. Supp. 524, 525 (W.D. Okla. 1967) (negligent operation of an automobile); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 438-43, 176 N.E.2d 761, 764-66 (1961) (negligence in one state causing injury in another).

3. *E.g.*, Clark v. United States, 481 F. Supp. 1086, 1096-97 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980); Arcata Graphics Corp. v. Murrays Jewelers & Distribs., Inc., 384 F. Supp. 469, 472 (W.D.N.Y. 1974); Sparrow v. Goodman, 376 F. Supp. 1268, 1271-72 (W.D.N.C. 1974).

4. *See, e.g.*, Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981) (requiring that alleged agent have acted in the forum state "for the benefit of, with the knowledge and consent of, and under some control by, the nonresident principal"); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 419-20 (9th Cir. 1977) (requiring that alleged in-state actor have acted at the behest of and under the control of the non-resident defendant; expressly applying principles of common law

This agency theory is embedded in the law of personal jurisdiction,[5] and indeed, many long-arm statutes explicitly grant jurisdiction based on acts performed through an agent.[6]

As a matter of substantive law, a conspirator who performs an act in furtherance of the conspiracy does so as an agent for his co-conspirators.[7] Plaintiffs have begun to argue that because co-conspirators are each other's agents for purposes of liability and the act of an agent in the forum state may establish jurisdiction, they need only allege contacts sufficient for one defendant to obtain jurisdiction over all co-conspirators.[8]

Courts facing this proposed wedding of liability and jurisdiction law have responded in a variety of ways, ranging from unexamined

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agency); Lott v. Burning Tree Club, Inc., 516 F. Supp. 913, 917 (D.D.C. 1980) (requiring "manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*") (emphasis added by court) (quoting Restatement (Second) of Agency § 1(1) (1957)); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 514 (D. Kan. 1978) (requiring that non-resident directed or purposefully sought benefit from active relationship with entity that acted in forum state).

5. While this Article will deal exclusively with problems arising out of the use of conspiracy theory to attribute jurisdictional contacts and will frequently distinguish uses of conspiracy theory from uses of conventional agency theory, similar problems arise from the use of the latter and some of the solutions proposed herein may also be applicable in agency cases.

6. *E.g.*, Ill. Ann. Stat. ch. 110, § 2-209 (Smith-Hurd 1983); Kan. Stat. Ann. § 60-308(b) (Supp. 1982); N.Y. Civ. Prac. Law § 302(a) (McKinney 1972 & West Supp. 1982-1983).

7. Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267, 1274 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (1975); *see* Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1074 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); Hoffman v. Halden, 268 F.2d 280, 295-96 (9th Cir. 1959); International Union v. Cardwell Mfg. Co., 416 F. Supp. 1267, 1290 (D. Kan. 1976); Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U.L. Rev. 921, 929 (1979).

8. *E.g.*, Professional Investors Life Ins. Co. v. Roussel, 445 F. Supp. 687, 695-96 (D. Kan. 1978); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 151 (D.D.C. 1976); Mandelkorn v. Patrick, 359 F. Supp. 692, 695-96 (D.D.C. 1973).

Agency analysis has also been used to establish jurisdiction over non-resident members of a partnership based on the actions of another partner. Intercontinental Leasing, Inc. v. Anderson, 410 F.2d 303, 305 (10th Cir. 1969); Felicia, Ltd. v. Gulf American Barge, Ltd., 555 F. Supp. 801, 805-06 (N.D. Ill. 1983); Vespe Contracting Co. v. Anvan Corp., 433 F. Supp. 1226, 1233-34 & n.11 (E.D. Pa. 1977). Additionally, concepts of agency have been used to justify the admission of a co-conspirator's hearsay statements made in the furtherance of the conspiracy. Anderson v. United States, 417 U.S. 211, 218 & n.6 (1974). The co-conspirator exception in the Federal Rules of Evidence, however, was not based on agency concepts. *See* Fed. R. Evid. 801(d)(2) advisory committee note (agency analogy termed a "fiction"). It has been suggested that a more likely justification for the co-conspirator exception is the practical necessity of admitting the evidence to obtain a conviction. *See* Levie, *Hearsay and Conspiracy—A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1163-65 (1954).

acceptance[9] to complete rejection.[10] Most have assumed that a conspiracy theory of jurisdiction is available in appropriate cases and have concentrated on identifying the elements that a plaintiff must demonstrate.[11] At the same time, these courts have attempted to set standards for resolving jurisdictional motions presenting issues inextricably tied to the merits of the case.[12] Often courts have tailored their solutions to the facts of a particular case and thus have provided little guidance for future litigants. Moreover, because trial courts exercise discretion in ordering discovery and deferring jurisdictional findings until trial, appellate courts have had little opportunity to clarify the requirements for attributing jurisdictional contacts or to control the potential unfairness involved in deferring consideration of the jurisdictional issue until after discovery or even until trial on the merits.

This Article examines the problem of attributing forum contacts by means of conspiracy theory. It finds that the case law provides neither a coherent framework for the theory's application nor adequate protection against its abuse. The Article then considers whether the theory satisfies constitutional principles of due process and concludes that conspiracy concepts have a place in the law of jurisdiction only to the extent that they help to describe the true relationship between the non-resident defendant and the forum state. Finally, the Article proposes a two-step process of analyzing whether attribution of contacts is appropriate in an individual case and suggests a way for courts to preserve the defendant's due process rights from the outset of a litigation.

I. The Case Law

A. *The Rise of the Conspiracy Theory of Jurisdiction*

An isolated exercise of jurisdiction based on the actions of a co-conspirator in the forum state occurred in the 1940's. In *Giusti v. Pyrotechnic Industries*,[13] the Ninth Circuit permitted service on a non-resident defendant under sections of the California Civil Code dealing with service of process on corporations that have withdrawn

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9. Cherokee Laboratories, Inc. v. Rotary Drilling Servs., 383 F.2d 97, 103 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); Professional Investors Life Ins. Co. v. Roussel, 445 F. Supp. 687, 696 (D. Kan. 1978); Mandelkorn v. Patrick, 359 F. Supp. 692, 696-97 (D.D.C. 1973); Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467, 468-69 (N.D. Cal. 1971). See *infra* notes 46-53 and accompanying text.

10. Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976). See *infra* notes 43-45 and accompanying text.

11. See *infra* notes 54-57 and accompanying text.

12. See *infra* pt. II(B).

13. 156 F.2d 351 (9th Cir.), *cert. denied*, 329 U.S. 787 (1946).

from transacting business in the state.[14] The non-resident contended that the statute did not permit service because the complaint cited only business transacted by alleged co-conspirators, the corporation itself having done "nothing in California."[15] The court flatly stated that "[t]he California members of the conspiracy were agents of [the non-resident corporation] in the conspiracy's attempt to destroy appellant's business."[16] It equated co-conspirators with agents employed to act in the state and, without more, reversed the district court's opinion ordering that service be quashed.[17]

It was not until the 1970's that other courts examined the use of conspiracy concepts to establish personal jurisdiction.[18] In *Leasco*

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14. *Id.* at 353. Section 411(2) of the California Civil Code required a corporation that had previously qualified to transact business to designate the Secretary of State as its agent for service of process in cases based on a "liability or obligation incurred within [the] State prior to" the withdrawal. *Id.* Section 406a, enacted later, permitted service upon a foreign corporation that had transacted business in the state in an action "arising out of such business," regardless of whether the corporation had ever complied with the statutory prerequisites to doing business. *Id.*

15. *Id.* The plaintiff had charged defendants with a conspiracy to destroy its business through a monopolization of the fireworks industry. *Id.* The out-of-state defendant also argued that service was improper under the statute because the alleged actions were illegal and thus not transactions of business within the meaning of the long-arm statute. *Id.* The court found that combinations to destroy a competitor were usual business transactions prior to the enactment of the antitrust laws and that legislation forbidding such combinations does not alter their character as business transactions. *Id.* at 354.

16. *Id.*

17. *Id.* at 354-55.

18. The first cases following *Giusti* espoused a conspiracy theory of venue under federal antitrust law. Plaintiffs used the Clayton Act's provisions for venue where the defendant "transacts business," 15 U.S.C. § 22 (1982), or "has an agent," 15 U.S.C. § 15 (1982), to consolidate litigation against many antitrust co-conspirators in a single district. *See, e.g.*, Riss & Co. v. Association of Western Rys., 159 F. Supp. 288, 295-96 (D.D.C. 1958); Bertha Bldg. Corp. v. National Theatres Corp., 140 F. Supp. 909, 913 (E.D.N.Y. 1956), *rev'd*, 248 F.2d 833 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); Ross-Bart Port Theatre, Inc. v. Eagle Lion Films, Inc., 140 F. Supp. 401, 402-03 (E.D. Va. 1954); Steiner v. Twentieth Century-Fox Film Corp., 140 F. Supp. 906, 907-08 (S.D. Cal. 1953). Finding legislative intent to distinguish venue in private antitrust cases from venue in cases brought by the government by giving a wider range of choice to the government, the Supreme Court in dictum termed the venue theory "frivolous albeit ingenious." Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953). Later cases rejected the venue theory and recognized the initial mistake of using *Giusti* as authority for it. *E.g.*, Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 492 (9th Cir. 1979); Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958); West Virginia v. Morton Int'l, Inc., 264 F. Supp. 689, 692-97 (D. Minn. 1967); Independent Prods. Corp. v. Loew's, Inc., 148 F. Supp. 460, 463-65 (S.D.N.Y. 1957); *see* Byrnes, *Bringing the Co-Conspirator Theory of Venue Up-To-Date and into Proper Perspective*, 11 Antitrust Bull. 889, 893-96 (1966).

Data Processing Equipment Corp. v. Maxwell,[19] the Court of Appeals for the Second Circuit noted that "the mere presence of one conspirator . . . does not confer personal jurisdiction over another alleged conspirator."[20] But in a brief statement it accorded significance to the contention that one of the alleged conspirators who had acted in the forum state might have done so under the direction and authority of the one over whom jurisdiction was sought.[21] The court remanded the case for a determination of whether the facts indicated an agency relationship.[22] No fanfare announcing the adoption of a potentially far-reaching doctrine appears here. Indeed, the court's language indicates that it had simply found in the conspiracy the earmarks of an ordinary agency relationship between the non-resident defendant and the in-state actor.[23]

Subsequent cases have viewed *Leasco* as opening the door to a conspiracy theory of jurisdiction quite distinct from conventional agency. But since *Leasco* itself neither sets forth a usable legal standard governing the conspiracy theory nor examines its constitutionality, cases using the theory in reliance on *Leasco* omit important considerations.

The first case to interpret *Leasco*'s discussion of conspiracy was *Turner v. Baxley*.[24] Relying on *Leasco*, the *Turner* court stated that an act in furtherance of a conspiracy is alone insufficient to establish

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Once venue is established under the Clayton Act, service of process is permitted "wherever [the defendant] may be found." Clayton Act § 12, 15 U.S.C. § 22 (1982). This consequence does not, however, represent use of a conspiracy theory to impute jurisdictional contacts for the purposes of a long-arm statute, as was the case in *Giusti*. *See* California Clippers, Inc. v. United States Soccer Football Ass'n, 314 F. Supp. 1057, 1065-67 (N.D. Cal. 1970).

19. 468 F.2d 1326 (2d Cir. 1972). Prior to *Leasco*, the District Court for the Northern District of California conceded in dictum that a conspiracy theory of jurisdiction is valid provided the acts allegedly committed in furtherance of the conspiracy fall within one of the categories of acts the relevant statute enumerates as bases for jurisdiction. California Clippers, Inc. v. United States Soccer Football Ass'n, 314 F. Supp. 1057, 1067 (N.D. Cal. 1970).

20. 468 F.2d at 1343 (citing Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833, 836 (2d Cir. 1957), *cert. denied*, 356 U.S. 936 (1958), and H.L. Moore Drug Exch., Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97, 98 (2d Cir. 1967) (per curiam)).

21. 468 F.2d at 1343.

22. Faced with a question of fact as to the relationship between the two alleged co-conspirators, the court held it an abuse of the trial court's discretion to dismiss the action for lack of personal jurisdiction without permitting the plaintiffs to obtain answers to interrogatories they had submitted. On remand, after the plaintiff had received answers to its interrogatories, the district court granted the motion to dismiss. 68 F.R.D. 178, 182-84 (S.D.N.Y. 1974). The court found that the plaintiff was unable to make the required factual showing.

23. *See* 468 F.2d at 1343. See *supra* note 4 (standards of agency theory).

24. 354 F. Supp. 963 (D. Vt. 1972).

personal jurisdiction over an out-of-state co-conspirator.[25] The court then referred to a discussion of jurisdiction in *Leasco* that dealt not with the act of another attributed to the defendant, but with the effect in the forum state of an act that the defendant had directly committed.[26] The *Leasco* court had cautioned that this effects-based jurisdiction requires careful scrutiny of the defendant's knowledge or reason to know that the conduct outside the state would have an effect in the forum state.[27] Without explaining why, the *Turner* court applied this standard to the asserted conspiracy-based theory of jurisdiction by analyzing whether the alleged conspiratorial conduct, which occurred outside the state, entailed actual or constructive knowledge of the effect—the tortious act of the co-conspirator—in the state.[28] This synthesis of two distinct discussions in *Leasco* gave the conspiracy theory of jurisdiction the appearance of an accepted doctrine governed by recognized standards.[29]

In *Socialist Workers Party v. Attorney General*,[30] the plaintiffs sought to base jurisdiction on one act, committed in the forum and attributed to the defendants only through the allegation of conspiracy.[31] The court declared that "under certain circumstances" New York law recognizes a conspiracy theory of jurisdiction.[32] It noted, however, that the plaintiff bears the burden of going forward with the

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25. *Id.* at 977.

26. *Id.* at 976-77 (citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972) (analyzing Restatement (Second) of Conflict of Laws § 37 (1971))).

27. 468 F.2d at 1341.

28. 354 F. Supp. at 977.

29. In *Leasco*, on remand, 68 F.R.D. 178, 182-84 (S.D.N.Y. 1974), another district court combined the two portions of the Second Circuit opinion discussing conspiracy and effects jurisdiction.

30. 375 F. Supp. 318 (S.D:N.Y. 1974).

31. *Id.* at 320-21. Jurisdiction was asserted under the New York long-arm statute, which permits service on a person who has committed a tortious act within the state. N.Y. Civ. Prac. L. §302(a)(2) (McKinney 1973). Under Fed. R. Civ. P. 4(e), state law applies when there is no federal statutory provision for service of process. The *Leasco* court had relied on the service provision in § 27 of the 1934 Securities Exchange Act and thus did not refer to state law. 468 F.2d at 1339.

32. 375 F. Supp. at 321-22. The court cited Neilson v. Sal Martorano, Inc., 36 A.D.2d 625, 319 N.Y.S.2d 480 (1971), and American Broadcasting Cos. v. Hernreich, 40 A.D.2d 800, 338 N.Y.S.2d 146 (1972) (per curiam), for this proposition. 375 F. Supp. at 321-22. It is interesting to note, however, how narrow the "circumstances" were in these two cases. In *Neilson*, the plaintiff sued a corporation and its sole stockholder for fraudulently conveying one parcel of land and delivering mortgages on another parcel of land and on a crane to the sole stockholder's sister during the pendency of the plaintiff's wrongful death suit against the corporation. 36 A.D.2d at 626, 319 N.Y.S.2d at 481. The sister, also a defendant, contested the court's jurisdiction on the ground that she had not acted in New York. *Id.*, 319 N.Y.S.2d at 482. The court's legal analysis consisted of a single sentence:

evidence[33] and concluded that the facts alleged did not adequately "connect" the defendants with the forum state.[34] Although the plaintiffs came forward with allegations of evidentiary facts tending to show the existence of a plan, they could not show that the plan was aimed at them or even that the plan resulted in the particular act that occurred in the forum state.[35] Because the attempt to connect the defendants to the act in the state "was based on nothing but speculation,"[36] the court found it unfair to subject them to the burdens of discovery and other pretrial proceedings and denied the plaintiffs' request to defer the motion pending discovery.[37]

Socialist Workers Party strictly analyzed the evidentiary facts and kept a rein on discovery,[38] but it also spurred the growth of the conspiracy theory in two significant ways. First, it created the impression that the theory existed in state law,[39] obscuring the fact that it is a creature of the federal courts.[40] Second, it stated the principle that allegations of conspiracy, if they are sufficiently definite and if they "connect" the defendant to an act occurring in the forum state, can form the basis for the assertion of jurisdiction over non-resident de-

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> A trier of the facts could find that the defendant Perez conspired with her brother to effect fraudulent conveyances, *that he acted as her agent* in preparing and recording the mortgages and in the payment to her in satisfaction of the mortgages, and that those acts therefore constituted tortious acts in New York.

Id. (emphasis added). The word "conspired" appears, but analytically serves only to describe a relationship between two parties and to support a conclusion of agency.

In *Hernreich*, the non-resident defendant had bribed a New York employee of the plaintiff corporation, thereby inducing that employee to carry out certain illegal acts in New York for the non-resident's benefit. 40 A.D.2d at 800, 338 N.Y.S.2d at 148. In a one-page per curiam opinion, the court characterized the agreement between the non-resident and the employee as an "illegal conspiracy," concluded that the employee had acted as the non-resident's agent, and imputed the New York acts to the non-resident defendant for jurisdictional purposes. *Id.* at 801, 338 N.Y.S.2d at 148. These two state cases track agency principles so closely that they do not support the conclusion that New York courts had adopted a "conspiracy theory" of jurisdiction.

33. 375 F. Supp. at 322. See *infra* pt. II(B).

34. 375 F. Supp. at 322.

35. *Id.*

36. *Id.* at 325.

37. *Id.*

38. The court's refusal to grant discovery contrasts sharply with the *Leasco* court's willingness to allow discovery on the jurisdictional issue when a question of fact is presented. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343-44 (2d Cir. 1972).

39. *Id.* at 321. See *supra* note 32 and accompanying text.

40. *See* Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 222-25 (Del. 1982) (examining the growth of the theory in federal courts and incorporating it for the first time into Delaware state law); Green v. Advance Ross Elecs. Corp., 86 Ill. 2d 431, 440-41, 427 N.E.2d 1203, 1208 (1981) (dictum indicating that some courts find the theory questionable).

fendants.[41] Indeed, this case and this principle are frequently cited in later cases that neither fully articulate the theory nor justify its adoption.[42]

B. *Judicial Response to the Conspiracy Theory*

Judicial response to the conspiracy theory has varied widely. One court found the theory incapable of meeting the "strict constitutional standards" of due process.[43] The court expressed its "belie[f] that personal jurisdiction over any non-resident individual must be premised upon forum-related acts personally committed by the individual."[44] In its rejection of any "imputed conduct" as "too tenuous" a basis for jurisdiction, however, this court apparently would not accept even a conventional agency theory.[45]

Other courts have accepted a broad and almost automatic use of the theory[46] as a result of their failure to differentiate between the standards governing liability and those governing jurisdiction.[47] Consequently, they have assumed that co-conspirators ought to be deemed each other's agents in both contexts, regardless of the level of proof and the constitutional considerations of fairness that govern personal jurisdiction. Under this analysis, jurisdiction is based solely upon the allegation that the out-of-state defendant conspired with a person who acted in the forum state provided the act in the state falls within the

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41. *See* 375 F. Supp. at 321-22.

42. *See, e.g.*, Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980); Dixon v. Mack, 507 F. Supp. 345, 348 (S.D.N.Y. 1980); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 312 (S.D.N.Y. 1975).

43. Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976). The court, harkening back to the ill-fated line of antitrust venue cases which fell under the weight of the Supreme Court's "frivolous albeit ingenious" dictum, see *supra* note 18, found the application of the theory in the jurisdictional context "much more frivolous." 422 F. Supp. at 873 n.14.

44. Kipperman v. McCone, 422 F. Supp. 860, 873 n.14 (N.D. Cal. 1976).

45. *See id.*

46. *See, e.g.*, Cherokee Laboratories v. Rotary Drilling Servs., 383 F.2d 97, 103 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); National Van Lines, Inc. v. Atlas Van Lines, Inc., 406 F. Supp. 1087, 1089-90 (N.D. Ill. 1975); Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467, 469 (N.D. Cal. 1971).

47. The most sweeping endorsements of the conspiracy theory are misleading because they appear in cases in which the defendant had not even denied the allegations of conspiracy. *See, e.g.*, National Van Lines, Inc. v. Atlas Van Lines, Inc., 406 F. Supp. 1087, 1089-90 (N.D. Ill. 1975) (jurisdiction sufficient if allegations of conspiracy not controverted by defendant); Mandelkorn v. Patrick, 359 F. Supp. 692, 696-97 (D.D.C. 1973) (jurisdiction based on conclusory allegations of conspiracy sufficient, but the "situation would be quite different on this point, if the allegations of the complaint were controverted or if the facts should develop otherwise than as alleged").

state's long-arm statute.[48] For example, in *Mandelkorn v. Patrick*,[49] the District Court for the District of Columbia asserted jurisdiction based only on the plaintiff's allegation that the defendants conspired to forcibly remove the plaintiff from a religious sect.[50] The court rejected *Leasco*'s requirement of a factual showing of an agency relationship to establish jurisdiction over co-conspirators, finding instead that allegations of conspiracy, even when made in a conclusory fashion, justify an assertion of jurisdiction over a non-resident co-conspirator.[51] The court found that the difficulties of proving a conspiracy at the pleading stage require a more lenient standard for establishing jurisdiction in a conspiracy case than in a business agency case.[52] It should be noted, however, that *Mandelkorn*'s acceptance of the theory was based largely on the fact that the defendant failed to controvert the conspiracy allegations.[53]

Most courts have parroted *Leasco* in stating that the mere presence of a co-conspirator in the forum state does not confer jurisdiction, but like the court in *Socialist Workers Party*, have assumed that the conspiracy theory is available in appropriate cases.[54] Courts have concentrated on determining whether the particular case facing them is an "appropriate" one. As a result of both the basic assumption that the theory exists and its case-by-case application, the standards gov-

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48. Cherokee Laboratories v. Rotary Drilling Servs., 383 F.2d 97, 103 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); Professional Investors Life Ins. Co. v. Roussel, 445 F. Supp. 687, 696 (D. Kan. 1978); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 151 (D.D.C. 1976); National Van Lines, Inc. v. Atlas Van Lines, Inc., 406 F. Supp. 1087, 1089 (N.D. Ill. 1975); Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973); Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467, 469 (N.D. Cal. 1971); Reeves v. Phillips, 54 A.D.2d 854, 855, 388 N.Y.S.2d 294, 296 (1976). Some of these cases, despite the acceptance of attribution of contacts based on the mere existence of conspiracy, do require more than a bare allegation of conspiracy to support jurisdiction. For a discussion of the burden of proof imposed on the party asserting jurisdiction, see *infra* pt. II(B).

49. 359 F. Supp. 692 (D.D.C. 1973).

50. *Id.* at 696.

51. *Id.* The court's decision is criticized in McLaughlin v. Copeland, 435 F. Supp. 513, 532 (D. Md. 1977).

52. 359 F. Supp. at 696.

53. *See id.* at 695-96.

54. Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 321-22 (S.D.N.Y. 1974); *see* Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1132 (D. Mass 1982); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1347 (E.D.N.Y. 1981); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 313 (N.D. Ga. 1980); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 391-92 (S.D.N.Y. 1978); Merkel Assocs. v. Bellofram Corp., 437 F. Supp. 612, 617 (W.D.N.Y. 1977); McLaughlin v. Copeland, 435 F. Supp. 513, 530 (D. Md. 1977); Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1379 (S.D.N.Y. 1975); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 309-12 (S.D.N.Y. 1975).

erning it have been built up by accretion. Reviewing all of these cases, one could compile a formidable list of required "elements" of the theory, but because courts have tended to isolate the single point that is dispositive of the case before them[55] or to overlook certain requirements when they are clearly present in the case at bar,[56] no single case states a definitive test.[57] The next section presents a distillation of these cases and sets forth the range of requirements that courts have applied.

II. Application of the Conspiracy Theory

A. *Elements of the Factual Showing Required for the Attribution of Jurisdictional Contacts*

At a minimum, most courts require a plaintiff to allege facts which, if proven, show: 1) that a conspiracy existed;[58] 2) that the defendant over whom jurisdiction is sought became a member of the conspiracy;[59] and 3) that a co-conspirator committed an act—or a "substantial act"—in furtherance of the conspiracy in the forum state.[60] Some

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55. *See* Grove Press, Inc. v. Angleton, 649 F.2d 121, 123 (2d Cir. 1981) (membership in the alleged conspiracy); Mandaglio v. United Brotherhood of Carpenters, 528 F. Supp. 468, 471 (E.D.N.Y. 1981) (whether conspiracy actually existed); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1348 (E.D.N.Y. 1981) (need to connect defendant to transactions in forum state); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 391-92 (S.D.N.Y. 1978) (membership and whether act by alleged co-conspirator falls within enumerated acts in long-arm statute); McLaughlin v. Copeland, 435 F. Supp. 513, 532 (D. Md. 1977) (whether defendant knew or should have known that alleged conspiracy would have effect in forum state).

56. *See, e.g.*, Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944-45 (D. Vt. 1981) (omitting discussion of membership requirement); Dixon v. Mack, 507 F. Supp. 345, 348 (S.D.N.Y. 1980) (omitting discussion of act in furtherance of conspiracy).

57. *See* National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 313 (N.D. Ga. 1980) (noting "considerable confusion" in the case law); Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 222-25 (Del. 1982) (discussing various showings required).

58. *E.g.*, Gilday v. Quinn, 547 F. Supp. 803, 805 (D. Mass. 1982); Dixon v. Mack, 507 F. Supp. 345, 348 (S.D.N.Y. 1980); Merkel Assocs. v. Bellofram Corp., 437 F. Supp. 612, 617 (W.D.N.Y. 1977); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 313 (S.D.N.Y. 1975); Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982).

59. *E.g.*, Gilday v. Quinn, 547 F. Supp. 803, 805 (D. Mass. 1982); Dixon v. Mack, 507 F. Supp. 345, 348 (S.D.N.Y. 1980); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 391-92 (S.D.N.Y. 1978); Merkel Assocs. v. Bellofram Corp., 437 F. Supp. 612, 617 (W.D.N.Y. 1977); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 313 (S.D.N.Y. 1975); Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 225 (Del. 1982).

60. *E.g.*, Gilday v. Quinn, 547 F. Supp. 803, 805 (D. Mass. 1982); Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 (D. Vt. 1981) ("crucial act");

courts condense this tripartite test into the requirement that the defendant have some "connection"—or "substantial connection"—to the alleged contact with the forum state.[61] A fourth requirement, often left unexpressed, is that the act attributed to the defendant through the conspiracy theory must provide a basis for extraterritorial service of process under the relevant statutory law.[62]

Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979) ("substantial acts"); Merkel Assocs. v. Bellofram Corp., 437 F. Supp. 612, 616-17 (W.D.N.Y. 1977) ("specific act"); Hitt v. Nissan Motor Co., 399 F. Supp. 838, 847-49 (S.D. Fla. 1975) ("tortious act"); Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A. 2d 210, 225, 227 (Del. 1982) ("substantial act," "essential step"); *see also* Maricopa County v. American Petrofina, Inc., 322 F. Supp. 467, 469 (N.D. Cal. 1971) (allowing jurisdiction over co-conspirators in case in which injury occurred within the state but acts creating injury occurred outside the forum).

61. *E.g.*, Glaros v. Perse, 628 F.2d 679, 682 n.4 (1st Cir. 1980) ("connection between the out-of-state defendants and specific acts" within the forum); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1132 (D. Mass. 1982) (same); Dixon v. Mack, 507 F. Supp. 345, 348-49 (S.D.N.Y. 1980) (facts connecting defendant to the conspiracy); Clark v. United States, 481 F. Supp. 1086, 1096-97 (S.D.N.Y. 1979) (facts alleged connecting defendant to the conspiracy), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980); Chromium Indus. v Mirror Polishing & Plating Co., 448 F. Supp. 544, 553 (N.D. Ill. 1978) ("factual connection"); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 313 (S.D.N.Y. 1975) ("sufficient nexus"); Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 322 (S.D.N.Y. 1974) ("evidentiary facts to connect the defendant with transactions"); Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972) ("substantial connection"). This analysis is particularly common among courts that ultimately find the factual allegations too weak to support jurisdiction. The "substantial connection" test can also be seen as including an analysis of the foreseeability of defendant's being required to defend in the forum. See *infra* notes 66-74 and accompanying text.

62. Cawley v. Bloch, 544 F. Supp. 133, 134-35 (D. Md. 1982); Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 223 n.15 (Del. 1982); *see, e.g.*, Dixon v. Mack, 507 F. Supp. 345, 348-52 (S.D.N.Y. 1980) (tortious acts); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 344 (E.D. Mich. 1977) (transacting business); Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 321-22 (S.D.N.Y. 1974) (tortious acts committed within the state); Turner v. Baxley, 354 F. Supp. 963, 975 (D. Vt. 1972) (activity sufficient to support personal judgment). The conspiracy itself may not be recognized as a tort under state liability law and hence may not alone form a basis for jurisdiction under a long-arm statute that permits service of process based upon a tort committed in the forum state. The act in furtherance of the conspiracy, therefore, must actually be tortious to support jurisdiction. *See* Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 392 (S.D.N.Y. 1978); McLaughlin v. Copeland, 435 F. Supp. 513, 525 (D. Md. 1977); *see also* Rutkin v. Reinfeld, 229 F.2d 244, 252 (2d Cir. 1956) ("The charge of conspiracy in a civil action is merely the string whereby the plaintiff seeks to tie together those who, acting in concert, may be held responsible in damages for any overt act or acts."). When the long-arm statute in question extends jurisdiction to the full reach of constitutional due process, analysis of this fourth requirement will merge with the constitutional considerations. *See, e.g.*, Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 943 (D. Vt. 1981); Speckine v. Stanwick Int'l., Inc., 503 F. Supp. 1055, 1057 (W.D. Mich. 1980); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559, 563-64 (M.D.N.C. 1979).

Among those courts that make a more detailed analysis, two other major areas of inquiry emerge. The first is whether the conventional attributes of agency are present. Although a showing of "formal agency" is not always considered necessary,[63] some courts impose requirements tracking those of business agency.[64] They examine whether the non-resident defendant consented to or directed the act in the forum state and whether the act was done on his behalf or for his benefit.[65] The second area of inquiry is foreseeability, which may or may not explicitly advert to constitutional standards of due process.[66] Either because most of the cases dealing with this issue predate *World-Wide Volkswagen v. Woodson*'s[67] shift from foreseeability to purposeful availment as the test of due process,[68] or because they are applying *Leasco* as the *Turner* court did,[69] courts ask whether the non-resident defendant should reasonably have foreseen that the conspiracy would have an effect in the forum state.[70] These courts frequently assert that the level of foreseeability necessary to justify an

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63. *E.g.*, Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 90 n.3 (2d Cir. 1975); Dixon v. Mack, 507 F. Supp. 345, 349 (S.D.N.Y. 1980); Clark v. United States, 481 F. Supp. 1086, 1100 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980). This is true even when applying conventional agency principles of jurisdiction. Galgay v. Bulletin Co., 504 F.2d 1062, 1065 (2d Cir. 1974).

64. *E.g.*, Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981); Dixon v. Mack, 507 F. Supp. 345, 350 (S.D.N.Y. 1980); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 343 (E.D. Mich. 1977).

65. *E.g.*, Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981); Dixon v. Mack, 507 F. Supp. 345, 350 (S.D.N.Y. 1980); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 343-44 (E.D. Mich. 1977).

66. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296-98 (1980) (rejecting due process analysis based only on the foreseeability of effects within the forum, in favor of an analysis which examines whether defendant "purposefully avails" himself of the benefits of a state's law).

67. 444 U.S. 286 (1980).

68. *Id.* at 295-98. *World-Wide Volkswagen* held that foreseeability alone does not make an assertion of jurisdiction constitutional. The expectation that a defendant would be subject to jurisdiction must flow from its having "purposefully avail[ed] itself of the privilege of conducting activities within the forum State." *Id.* at 297 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958)); *see* Note, *Retracting the Long Arm*: World-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 22 B.C.L. Rev. 385, 398 (1981) [hereinafter cited as *Retracting the Long Arm*]; Bauxites' *"Individual Liberty Interest" and the Right to Control Amenability to Suit in Personal Jurisdiction Analysis*, 51 Fordham L. Rev. 1278, 1284-85 (1983) [hereinafter cited as *Individual Liberty Interest*].

69. See *supra* notes 24-29 and accompanying text.

70. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972) (foreseeability required), *on remand*, 68 F.R.D. 178, 183-84 (S.D.N.Y. 1974) (looking for "purposeful availment" under Hanson v. Denckla, 357 U.S. 235 (1958)); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979) ("co-conspirator knew or should have known that acts would be performed in the forum state"); Ammon v. Kaplow, 468 F. Supp. 1304, 1312 (D. Kan. 1979) ("foreseeable consequences"); Professional Investors Life Ins. Co. v.

exercise of jurisdiction exceeds "the rather low floor of foreseeability necessary to support a finding of tort liability."[71] They also require allegations showing that each defendant knew or should have known that his actions outside the forum state would have an effect in the forum state.[72] Stating this requirement more succinctly, a court may consider whether the alleged conspiracy was "directed toward" or "calculated to have an effect in" the forum state.[73] Under this analysis, due process will not permit the plaintiff to use insignificant acts in the forum to assert jurisdiction over all co-conspirators.[74]

Roussel, 445 F. Supp. 687, 694-96 (D. Kan. 1978) (foreseeability); McLaughlin v. Copeland, 435 F. Supp. 513, 531-32 (D. Md. 1977) (whether defendant "knew or should have known" that his activity would have effects in the forum); Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972) (same).

Two cases decided after *World-Wide Volkswagen* that mention constitutional considerations in connection with the conspiracy theory are Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 (D. Vt. 1981) (acknowledgement of due process limit on jurisdiction, with citation to Turner v. Baxley, 354 F. Supp. 963 (D. Vt. 1972)) and Istituto Bancario Italiano v. Hunter Eng'g Co., 449 A.2d 210, 219-22, 225 (Del. 1982) (finding a strict conspiracy jurisdiction test consistent with due process, in that a defendant who "voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws"). *See also* Vest v. Waring, 565 F. Supp. 674, 694 (N.D. Ga. 1983) (applying purposeful availment test in basing conspiracy jurisdiction on alleged act of entering into the conspiracy in the forum state; attribution of contacts not involved).

Some courts have confused the question of the foreseeability of the effect that the conspiracy would have in the forum state with the foreseeability of the effect of an act *directly* committed by the out-of-state defendant, when the act is also in furtherance of a conspiracy. *See* National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 313-14 (N.D. Ga. 1980) (noting confusion among courts); *see, e.g.*, Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 344-45 (E.D. Mich. 1977); Gypsy Pipeline v. Ivanhoe Petroleum, 256 F. Supp. 567, 568 (D. Colo. 1966). See *supra* notes 24-29 and accompanying text. Both questions require careful analysis of constitutional due process, but only the former involves the use of the conspiracy theory for the purpose of attributing to one defendant the acts of another. The latter is no different from cases involving any tortious act outside the state that causes injury in the state. Those cases and other "effects jurisdiction" cases do, however, provide useful insight into how a court should analyze the fairness of the attribution process. See *infra* text accompanying notes 124-26.

71. Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 & n.11 (2d Cir. 1972). On remand and after discovery, the district court examined whether the non-resident defendant had committed some act outside the forum state that he knew or should have known would "directly contribute" to the act in furtherance of the conspiracy that did take place in the forum state. 68 F.R.D. 178, 182 (S.D.N.Y. 1974).

72. *E.g.*, Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 (D. Vt. 1981); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559, 564 (M.D.N.C. 1979); Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972). See *infra* note 136.

73. Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972).

74. *See id.*

Courts have assumed that a conspiracy theory of jurisdiction exists and have concentrated on whether it applies to the particular facts presented, and thus the identification of the elements of the showing that must be made has been overshadowed by the problem of establishing the level of proof the party asserting jurisdiction must meet.[75] The problem of proof has troubled courts because prior to discovery the plaintiff usually lacks personal knowledge of the inner workings of the alleged conspiracy.[76] Further difficulties arise because the attribution process upon which jurisdiction depends is viewed as inextricably tied to the substantive merits of the case.[77]

B. *The Problem of Proof on Motion to Dismiss: the Inextricable Merits of a Case*

Although the party asserting jurisdiction ultimately bears the burden of proof by a preponderance of the evidence,[78] that party may survive a motion to dismiss for lack of personal jurisdiction simply by alleging facts that if proved would support a prima facie finding of jurisdiction.[79] The court then will view itself as possessing "threshold jurisdiction," permitting it to retain the case through the discovery and motion stages.[80] As long as the court makes no conclusive finding of personal jurisdiction, the defendant may, upon further develop-

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75. *See, e.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir. 1980) (insufficient allegations to support conspiracy claim), *cert. denied*, 454 U.S. 893 (1981); Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980) (same); Bennett Waites Corp. v. Piedmont Aviation, Inc., 563 F. Supp. 810, 812 (D. Colo. 1983) (same); National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 314 (N.D. Ga. 1980) (finding jurisdiction based on allegations showing foreseeability); Gemini Enters. v. WFMY Television Corp., 470 F. Supp. 559, 564-65 (M.D.N.C. 1979) (finding jurisdiction based on uncontroverted allegations); Chemical Bank v. World Hockey Ass'n, 403 F. Supp 1374, 1379 (S.D.N.Y 1975) (mere allegations of conspiracy insufficient to support jurisdiction); Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 321-26 (S.D.N.Y. 1974) (same).

76. Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973).

77. *See* R. Casad, Jurisdiction in Civil Actions ¶ 4.03[1][b], at 4-65 (1983).

78. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182, 189 (1936).

79. *E.g.*, United States v. Montreal Trust Co., 358 F.2d 239, 242 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 (D. Vt. 1981); McLaughlin v. Copeland, 435 F. Supp. 513, 530 (D. Md. 1977); Ghazoul v. International Mgmt Servs., 398 F. Supp. 307, 309-10 (S.D.N.Y. 1975); *see* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1068, at 250 (1969 & Supp. 1983).

80. Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 (D. Vt. 1981); McLaughlin v. Copeland, 435 F. Supp. 513, 530 (D. Md. 1977); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 309 (S.D.N.Y. 1975); *see* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982); Note, *The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery*, 50 Fordham L. Rev. 814, 839-40 (1982).

ment of the record, renew its motion to dismiss.[81] If the party asserting jurisdiction raises a question of fact as to whether jurisdiction exists, the court may defer the motion pending discovery on the jurisdiction issue alone, and afterwards, determine whether it may properly exercise jurisdiction.[82] To some extent, this approach takes into account the interests of both parties. If the plaintiff has demonstrated some likelihood that he can eventually prove jurisdiction, the court will provide him with the opportunity to discover the facts needed to carry his burden. The defendant, on the other hand, may avoid the burdens of discovery by convincing the court that the jurisdictional allegations are inadequate.

Tailoring these concepts to the conspiracy theory raises special problems. It is difficult before discovery for a plaintiff to come forward with detailed allegations about something as inherently hidden as conspiracy.[83] Conversely, it is all too easy for a plaintiff to append a bald allegation of conspiracy to the allegation that one of several co-defendants has acted in the forum state. Before courts will exercise threshold jurisdiction, therefore, they will generally require that the plaintiff allege definite facts that, if proved, would establish the elements of conspiracy jurisdiction.[84] Allegations "based on nothing but speculation and conjecture" are not considered enough to impose the burdens of discovery on the defendant.[85] This solution often provides

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81. *See, e.g.*, Vermont Castings, Inc. v. Evans Prods., 510 F. Supp. 940, 944 n.2 (D. Vt. 1981); Dixon v. Mack, 507 F. Supp. 345, 352 (S.D.N.Y. 1980); Ghazoul v. International Mgmt Servs., Inc., 398 F. Supp. 307, 309-10 (S.D.N.Y. 1975).

82. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343-44 (2d Cir. 1972); Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 66, 71-72 (S.D.N.Y. 1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 151 (D.D.C. 1976).

83. Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973).

84. *E.g.*, Textor v. Board of Regents, 711 F.2d 1387, 1392-93 (7th Cir. 1983); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1236-37 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975); Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1132-33 (D. Mass. 1982); Clark v. United States, 481 F. Supp. 1086, 1096 (S.D.N.Y. 1979), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980); Merkel Assocs. v. Bellofram Corp., 437 F. Supp. 612, 616 (W.D.N.Y. 1977); Kenyatta v. Kelley, 430 F. Supp. 1328, 1331 (E.D. Pa. 1977); Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1379 (S.D.N.Y. 1975); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 312 (S.D.N.Y. 1975); Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 322 (S.D.N.Y 1974); Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972). *But see* Mandelkorn v. Patrick, 359 F. Supp. 692, 696 (D.D.C. 1973) (allegations of overt acts and conclusory allegations of conspiracy are sufficient when the conclusory allegations are not controverted).

85. Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1133 (D. Mass. 1982); *see, e.g.*, Chemical Bank v. World Hockey Ass'n, 403 F. Supp. 1374, 1379 (S.D.N.Y. 1975); Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 325 (S.D.N.Y. 1974).

an escape from the problem of proof. If the court can isolate some element of the required showing that the plaintiff has failed to support with allegations of definite facts, it can grant the motion to dismiss.[86] But if the defendant has not controverted the plaintiff's definite factual allegations, the court can either deny the motion subject to renewal after discovery[87] or defer decision on the motion until after the plaintiff has conducted discovery on the issue of jurisdiction.[88]

This method of dealing with the jurisdictional motion breaks down when the plaintiff's allegations are complete and the defendant submits affidavits—typically his own sworn denials—refuting those allegations. This situation will become increasingly common as litigants acquire familiarity with the conspiracy theory. Plaintiffs will focus on pleading appropriate facts for each element of the showing and will emphasize their need for discovery. Defendants will learn not to rely on the contention that they simply never "set foot" in the forum state.[89] Courts faced with defendants' affidavits have permitted discovery on the jurisdiction issue because the plaintiff usually lacks access to any witness with direct knowledge of the conspiracy itself and thus cannot meet the defendant's sworn denial with affidavits of his own.[90] Appellate courts have deferred to the trial courts' discretion in ordering discovery.[91] Thus, they have delineated no guidelines

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86. *E.g.*, Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981); Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975); Chromium Indus. v. Mirror Polishing & Plating Co., 448 F. Supp. 544, 553 (N.D. Ill. 1978); McLaughlin v. Copeland, 435 F. Supp. 513, 532-33 (D. Md. 1977).

87. *E.g.*, Professional Investors Life Ins. Co. v. Roussel, 445 F. Supp. 687, 697 (D. Kan. 1978); Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 313-14 (S.D.N.Y. 1975); *see* Mandelkorn v. Patrick, 359 F. Supp. 692, 696-97 & n.8a (D.D.C. 1973).

88. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343-44 (2d Cir. 1972); Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 66, 71-72 (S.D.N.Y. 1979); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 151 (D.D.C. 1976).

89. *Cf.* Ghazoul v. International Mgmt. Servs., 398 F. Supp. 307, 313 (S.D.N.Y. 1975) (motion to dismiss denied upon defendant's failure to controvert allegations relating to conspiracy theory, relying instead on allegation that he never physically entered forum state).

90. *See, e.g.*, Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343-44 (2d Cir. 1972) (improper to grant motion to dismiss prior to discovery on jurisdiction issue in face of conflicting affidavits); Clark v. United States, 481 F. Supp. 1086, 1097 (S.D.N.Y. 1979) (defendant denied nonconclusory allegations, court found decision inextricable from merits and therefore denied motion), *appeal dismissed*, 624 F.2d 3 (2d Cir. 1980). *But see* American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij N.V., 710 F. 2d 1449, 1454 (10th Cir. 1983) (dismissal affirmed where plaintiff failed to adequately controvert defendant's denial of allegations); Gilday v. Quinn, 547 F. Supp. 803, 806-07 (D. Mass. 1982) (same).

91. *See* Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977); Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977); Swanner v.

controlling this process, except to the extent that they may find the trial court's decision an abuse of discretion.[92]

Discovery on jurisdiction ordinarily involves inquiry into a circumscribed sphere of facts[93] about which there is little or no controversy, such as the nature of the defendant's business or the relationship between a parent corporation and its subsidiary. When conspiracy theory underlies the jurisdiction issue, however, that discovery may be coextensive with the discovery on the merits and may involve hotly contested issues central to the plaintiff's cause of action. Proceeding even to the discovery stage on the jurisdiction issue represents "an assertion of jurisdiction to some extent"[94] that may be extremely burdensome in conspiracy cases. This burden seems particularly offensive when it is not based on a finding of threshold jurisdiction but merely on an impasse created by the court's recognition of the plaintiff's inability to counter factual proof submitted by the defendant.

In concentrating on the problems of discovery and proof, courts have failed to address the question whether the conspiracy theory of jurisdiction satisfies due process requirements or even to delineate clear and predictable standards governing its use. The practice of

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United States, 406 F.2d 716, 719 (5th Cir. 1969); Surety Ass'n of Am. v. Republic Ins. Co., 388 F.2d 412, 414 (2d Cir. 1967).

92. *E.g.*, Textor v. Board of Regents, 711 F.2d 1387, 1393 (7th Cir. 1983); McLaughlin v. McPhail, 707 F.2d 800, 807 (4th Cir. 1983); Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 93-94 (2d Cir. 1975); *see* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1343-44 (2d Cir. 1972). In *Leasco*, the district court faced conflicting affidavits, but found that only a "very strained reading" of plaintiff's affidavit could produce a question of fact. 319 F. Supp. 1256, 1260 (S.D.N.Y. 1970). Moreover, plaintiff's allegations were not based on personal knowledge. *Id.* The Second Circuit, on the other hand, perceived "many unresolved questions of fact." 468 F.2d at 1343. Interestingly, that court took into account that the proposed discovery on the jurisdiction issue would neither impose undue burdens nor delay the trial. It is thus difficult to determine whether this court would always require discovery in the face of any conceivable question of fact or whether it would balance the proposed hardship on the defendant against the substantiality of the question of fact. Another kind of balancing was used in Turner v. Baxley, 354 F. Supp. 963 (D. Vt. 1972), in which the court weighed the reasonableness of requiring a non-resident to defend in the forum against the hardship of forcing the plaintiff to pursue its action in many forums. *Id.* at 977. The latter hardship is offset by the consideration that permitting the plaintiff to consolidate litigation may enable him to forum shop and to harass defendants, in contravention of principles of due process. See *infra* pt. III(B)(2) (court's decision should rest on a balancing of factors).

93. 4 J. Moore & J. Lucas, Moore's Federal Practice ¶ 26.56[6], at 26-191 (2d ed. 1983).

94. Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 325 (S.D.N.Y. 1974). Of course, by appearing in the case and contesting jurisdiction, the defendant consents to follow the court's discovery orders. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982). See *infra* note 130 and accompanying text. Nevertheless, the court's proper exercise of discretion, even though it may be unreviewable, is the key to providing due process at this stage.

deferring consideration of motions presenting questions of fact until trial on the merits tends to defy appellate review. By the time a defendant is in a position to appeal the use of the conspiracy theory, he will have lost on the merits and the plaintiff's allegations of conspiracy will already be established findings of fact.[95] Of course, if a defendant prevails on the merits, he will have no motive to appeal. In those rare instances when the question is presented on appeal, the appellate court is likely to defer to the trial judge's discretion in matters of discovery.[96] The following section, therefore, offers the groundwork for renewed judicial scrutiny of the conspiracy theory.

III. Analysis

A. *Due Process Analysis of the Conspiracy Theory*

Constitutional due process requires that all assertions of personal jurisdiction rest upon sufficient "minimum contacts" to satisfy "traditional notions of fair play and substantial justice."[97] This fairness analysis has replaced "the patchwork of legal and factual fictions"[98] used to justify various exercises of jurisdiction under the territorial power-based analysis enunciated in *Pennoyer v. Neff*.[99]

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95. *See* Fed. R. Civ. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous . . . ."); 9 C. Wright & A. Miller, *supra* note 79, § 2587 n.30. Similar problems of proof exist in cases dealing with admission of the hearsay statements of a co-conspirator. See *supra* note 8. Once the conspiracy has been factually established at trial, it will be difficult for the defendant to contest the existence of the conspiracy on the issue of the admissability of the evidence. The decision to admit the evidence is solely within the discretion of the judge. Fed. R. Evid. 104(a) (1976); *see* United States v. Petrozziello, 548 F.2d 20, 22-23 (1st Cir. 1977). In order to protect defendants from having evidence improperly admitted, many courts have raised the standard of proof required for the admission of a co-conspirator's hearsay statement. Instead of the traditional test requiring a prima facie showing of conspiracy, evidence will be admitted only if conspiracy is proven by a preponderance of the evidence. United States v. Martorano, 557 F.2d 1, 11 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); United States v Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977).

96. *See* Voegeli v. Lewis, 568 F.2d 89, 96 (8th Cir. 1977); Data Disc, Inc. v. Systems Technology Assocs., 557 F.2d 1280, 1285 n.1 (9th Cir. 1977); Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1969); Surety Ass'n of Am. v. Republic Ins. Co., 388 F.2d 412, 414 (2d Cir. 1967).

97. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see* Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (applying the test of "fair play and substantial justice" to quasi in rem jurisdiction).

98. Shaffer v. Heitner, 433 U.S. 186, 219 (1977) (Brennan, J., concurring in part and dissenting in part).

99. 95 U.S. 714 (1878), *discussed in* Shaffer v. Heitner, 433 U.S. 186, 196-204 (1977); *see* Clermont, *supra* note 1, at 414-16; Kurland, *The Supreme Court, the*

Any theory of jurisdiction derived from a state's statutory or common law must survive the test of fairness based on the defendant's contacts with the forum state.[100] Thus, a court may not simply take the principle of state law that a co-conspirator acts as the agent of the other conspirators, plug it into the state's jurisdiction statute, and exercise whatever purported jurisdiction flows from that combination. The process of combining the two legal premises must itself survive due process scrutiny. Indeed, the attenuation involved in attributing one person's jurisdictional contacts to another should inspire increased vigilance. In *Rush v. Savchuk*,[101] the Supreme Court found "plainly unconstitutional" the state court's attribution of an insurer's contacts to its insured.[102] The Court stated that "the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction."[103]

The legal principle that co-conspirators act as each other's agents when they act in furtherance of a conspiracy should not, by automatic operation of law, permit the attribution of one party's forum contacts to another.[104] Rather, the particular facts of the relationship between the parties must support the conclusion that the non-resident knew or should have known that by entering into the relationship he was exposing himself to the risk that he could be haled into court in the forum state.[105] That conclusion must rest not on a conceptual device but on a finding that the non-resident, through his relationship with another, has "purposefully avail[ed himself of the privilege of conducting activities within the forum State."[106] The relationship may be described in terms of conspiracy, but such a characterization should

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Due Process Clause and the In Personam Jurisdiction of State Courts, From Pennoyer *to* Denckla: *Review*, 25 U. Chi. L. Rev. 569, 574-86 (1958); *Retracting the Long Arm*, *supra* note 68, at 385-86; Comment, *Federalism, Due Process, and Minimum Contacts*: World-Wide Volkswagen Corp. v. Woodson, 80 Colum. L. Rev. 1341, 1341 (1980).

100. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290-92 (1980); F. James & G. Hazard, Civil Procedure § 12.14, at 633 (2d ed. 1977). The statutory and constitutional inquiries will be merged in states that interpret their long-arm statutes as extending jurisdiction to the limits of the due process clause. *See* 444 U.S. at 290; R. Casad, *supra* note 77, ¶ 4.01[1].

101. 444 U.S. 320 (1980).

102. *Id.* at 331-32.

103. *Id.* at 332.

104. *See* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (rejecting "mechanical or quantitative" test of jurisdiction, and instead considering "the quality and nature of the activity in relation to the fair and orderly administration of the laws").

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

106. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

not mask the real facts of the relationship or avoid analysis of the attribution process. The term "conspiracy" is meaningful only to the extent that it helps to elucidate those facts.

The earliest cases discussing the concept of conspiracy in attributing jurisdictional ties properly used the term merely to describe the relationship of the parties.[107] When the facts demonstrated that the out-of-state defendant agreed to a plan whereby another person would act on his behalf in the forum state, courts needed to indulge in little analysis to justify attribution of contacts to the defendant.[108] The term "conspiracy" served to describe the agreement and explain these facts, but did not short-circuit the due process analysis.[109] In later cases, however, courts began to assume that an independent conspiracy theory existed and that it could be used as a device to bridge a gap they could not otherwise close.[110]

Automatic attribution of contacts upon a showing of conspiracy avoids consideration of the individual defendant's contact with the forum state—the very essence of jurisdiction.[111] No finding is made whether each defendant purposefully availed himself of the privilege of conducting activities within the state through the acts of the co-conspirator[112] or whether he had any opportunity, short of avoiding the transaction altogether,[113] to structure his activities to avoid contacts with that state.[114] In some conspiracy cases the co-conspirator's connection with the forum will be clear. However, before it may properly assert jurisdiction, a court must find actual or constructive knowledge on the part of each defendant that the conspiracy could lead to the kind of significant contact with the state that would support jurisdiction. It cannot rely on a conspiracy "theory" to hold every individual defendant to the expectation of a particular forum simply because one of the alleged co-conspirators happened to choose that state as the place to perform an act.[115]

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107. See *supra* note 32.

108. *See id.*

109. *See id.*

110. See *supra* note 54 and accompanying text.

111. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

112. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

113. It is important not to conclude prematurely that a defendant has no right to conduct conspiratorial transactions regardless of how he "structures" them. The transactions underlying a claim based on conspiracy may be the conduct of legitimate business or of law enforcement that will ultimately be vindicated at trial.

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

115. If a non-resident defendant is clearly responsible for the particular act, but has willfully chosen to remain ignorant of the places where the act might be committed, a court could find that he should have expected the effect in the forum state. A

In this necessary constitutional analysis, the question whether to recognize a conspiracy theory of personal jurisdiction evaporates. Insofar as conspiracy theory becomes a device to bypass due process analysis, it is plainly unconstitutional. Nevertheless, the idea of conspiracy, deprived of its talismanic properties, can help to describe a relationship among defendants and can thus contribute to the analysis of a defendant's jurisdictional contacts. In order to promote predictability of jurisdictional consequences and guide the structuring of a potential defendant's activities,[116] a framework is needed for analyzing when attribution may constitutionally flow from allegations involving conspiracy.

B. *A Framework for the Jurisdictional Analysis of Conspiracy Allegations*

1. Elements of the Jurisdictional Analysis

Assume a court is presented with a complaint joining numerous defendants on the theory that all conspired to harm the plaintiff and that one defendant in fact injured the plaintiff in the forum state. The plaintiff asserts that there is jurisdiction over all defendants based upon that single act; no other forum contact is alleged. How should a court, consistent with due process, approach the jurisdictional issue?

First, the court should determine whether the act in the forum state suffices as a basis for jurisdiction over the person who actually committed it. In a state whose long-arm statute enumerates acts that may form the basis for service of process, the act must be one of the enumerated acts.[117] In addition, and in a state authorizing jurisdiction to the full reach of the Constitution,[118] the act must represent a purposeful availment of the privilege of conducting activities in the state that reasonably gives rise to the expectation that the actor may be required to defend a lawsuit in that forum based on that act.[119] For

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person setting a conspiracy in motion might also be analogized to a manufacturer defending a negligence action who has delivered products into the stream of commerce. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961), *discussed in* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980).

116. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); *see Individual Liberty Interest*, *supra* note 68, at 1290.

117. *E.g.*, Ill. Ann. Stat. ch. 110, § 2-209 (Smith-Hurd 1983); Kan. Stat. Ann. § 60-308(b) (Supp. 1982); N.Y. Civ. Prac. Law § 302(a) (McKinney 1972 & West Supp. 1982-1983).

118. *E.g.*, Cal. Civ. Proc. Code § 410.10 (West 1973); R.I. Gen. Laws § 9-5-33 (1969); Wyo. Stat. § 5-1-107(a) (1977).

119. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98 (1980); Hanson v. Denckla, 357 U.S. 235, 253 (1958).

example, if the act allegedly committed in furtherance of the conspiracy is a tort, it will probably fall within the terms of most long-arm statutes and comport with constitutional standards of due process.[120] If the co-conspirator actor merely performs some preparatory act that in itself causes no injury to the plaintiff, jurisdiction should fail. If the contact with the forum state cannot support jurisdiction over the direct actor, the court need not reach the question whether it may attribute the contact to the alleged co-conspirators.

If the act supports jurisdiction over the actor, an analysis of the attribution process must follow. Here, the court must find some purposeful act on the part of each defendant that justifies the inference that he knew or should have known that that act entailed the risk of consequences in the forum state[121] substantial enough to require him to defend a lawsuit in that state.[122] The touchstone of this analysis is the non-acting defendant's responsibility for the forum contact which arises from the relationship between him and the direct actor. That responsibility may flow from actual control of the actor and benefit from the act,[123] or it may flow from involvement in planning and encouraging the co-conspirator to perform the act. On the other hand, responsibility may not exist when one of the co-conspirators has at some remote time and place performed an act in furtherance of the conspiracy that the out-of-state defendant would not have anticipated.

Any analysis must ultimately answer the constitutional inquiry whether each defendant, through his own actions, purposefully availed himself of the privilege of conducting activities in the forum state.[124] The purposefulness of the in-state actor's conduct is not enough. Each defendant's own purposeful act in joining the conspiracy and planning the transaction must import knowledge of the risk of significant contact with the forum. Because co-conspirators, unlike those who directly act in the forum, do not necessarily know where the act is committed, the court here must more carefully consider a non-acting defendant's relation to the forum state. In this respect, the non-actor is analogous to a non-resident defendant over whom jurisdiction is sought based on an act committed outside the state that

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120. R. Casad, *supra* note 77, ¶¶ 7.02[1][a], 7.02[2][a]; F. James & G. Hazard, *supra* note 100, at 632-33.

121. See *supra* notes 97-103 and accompanying text.

122. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Kulko v. California Superior Court, 436 U.S. 84, 97-98 (1978).

123. *See* Grove Press, Inc. v. Angleton, 649 F.2d 121, 122 (2d Cir. 1981); Dixon v. Mack, 507 F. Supp. 345, 350 (S.D.N.Y. 1980); Weinstein v. Norman M. Morris Corp., 432 F. Supp. 337, 343 (E.D. Mich. 1977); Neilson v. Sal Martorano, Inc., 36 A.D.2d 625, 626, 319 N.Y.S.2d 480, 482 (1971).

124. See *supra* notes 97-103 and accompanying text.

had an effect in the forum state.[125] In both cases the effect in the forum state must be a reasonably foreseeable consequence of the defendant's purposeful act before a court may constitutionally exercise jurisdiction.[126]

2. A Proposed Method of Proof

The essential problem of basing jurisdiction on conspiracy is the presentation of factual issues inextricable from the substantive merits of the plaintiff's claim. If the defendant's due process rights were served only by rendering unenforceable a judgment procured without personal jurisdiction,[127] proof of jurisdiction could be completely merged with proof on the merits. Modern jurisdictional analysis, however, is concerned with the fairness of subjecting a defendant to the burden of litigating in a particular forum.[128] Complete merger of

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125. It is conceivable that a court could attribute an out-of-state act having an effect in the forum state to a non-actor whom it deems responsible for the act. However, the likelihood that those contacts will suffice is decreased.

126. In Turner v. Baxley, 354 F. Supp. 963, 976-78 (D. Vt. 1972), the court combined two discussions of different issues of jurisdiction from Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972). See *supra* notes 24-29 and accompanying text. In a due process analysis, the analogy of conspiracy-based jurisdiction to effects-based jurisdiction is apt, and the heightened sensitivity to foreseeability is appropriate to both. See *supra* notes 67-73 and accompanying text.

This proposed standard may be high, but it is flexible. To the extent that one may derive a test from the present case law, that test is a rather hidebound list of requirements that may distract the court from the true issues of responsibility and expectation and may defeat jurisdiction through a technical failure to allege facts relating to a particular link. Admittedly, the proposed standard will sometimes protect a defendant who would ultimately have been held liable for a co-conspirator's act. This will happen because the place where an act occurs means little for the purpose of liability but is central to the issue of jurisdiction. Preventing a plaintiff from consolidating his litigation against all conspirators in a single forum will in some cases appear harsh, but similar splitting of litigation often results from application of jurisdictional standards. Splitting will naturally occur more frequently when the theory of jurisdiction depends on the attribution of one person's acts to another, because the knowledge and responsibility inherent in directly committing the act is lacking. The added frequency of defeating consolidation must be expected as a consequence of the increased attenuation of the attribution process and the function of attribution in increasing the number of defendants. The interest of consolidating litigation may enter into the balancing of the equities, see *infra* notes 134-37 and accompanying text, but it should not motivate courts to omit constitutional scrutiny of the attribution process. Given a system of jurisdiction that requires scrutiny of purposeful direct contact with the forum state, it would be irrational to allow this theory of attribution to operate to evade similar scrutiny.

127. *Cf.* Pennoyer v. Neff, 95 U.S. 714, 732-33 (1878) (judgment unenforceable in sister state because of lack of personal jurisdiction cannot be enforced in rendering state).

128. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

the jurisdictional issue with the trial on the merits imposes this burden on the defendant regardless of whether there is jurisdiction, and therefore is unacceptable under a modern analysis.

Yet merger is precisely what will result if courts continue to rely on the standards that govern motions for summary judgment when they face jurisdiction questions tied to the substantive merits. These standards have the effect of delaying the jurisdiction decision until factual questions may be conclusively resolved.[129] A summary judgment motion has the purpose of providing a shortened route to final judgment on the merits when a trial is not necessary. When questions of fact preclude granting the motion, because those questions require trial, no interest served by the motion is compromised. Applying the same standards to the jurisdictional motion, however, vitiates the very interests jurisdiction is meant to serve.

Once the defendant has elected to enter the proceedings for the purpose of establishing jurisdiction, he is entitled to the due process inherent in the court's proper exercise of discretion.[130] Had he chosen to default, he could have resisted any exercise of judicial power over him, but he would also have forfeited all but the jurisdictional defense in a collateral attack on the default judgment.[131] If submission of the conspiracy-jurisdiction question to the court results in its merger with the trial on the merits and no serious threshold scrutiny, the defendant's due process rights are relegated to the scant protection available in the default process. Some finding of threshold jurisdiction therefore must come at the outset of the case in order to preserve due process. The necessity of dealing with the issues of fact central to the case on the merits does not make this task impossible, however, because a jurisdiction motion does not depend on a conclusive determination of what the facts are. Rather, it poses the question whether, under the circumstances, compelling the defendant to litigate in the forum is fair. Answering this question does not yield conclusive findings of fact.

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129. See *supra* notes 83-88.

130. *Cf.* Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1981) (court is authorized to order discovery to determine jurisdictional facts and may impose Rule 37(b) sanctions on a defendant who fails to comply with the discovery order). *Bauxites* authorizes discovery sanctions when the court, in its discretion, finds such a sanction justified. While it is clear that a defendant, by objecting to jurisdiction, subjects himself to the court's power to authorize the means necessary to determine if jurisdiction exists, the court must exercise discretion in determining whether to order discovery. The court has the "inherent power" to employ the judicial mechanisms necessary to the exercise of its other powers. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980). However, "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Id.*

131. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1981).

The problem of inextricability of the merits may thus be seen as in reality a practical problem, and not a problem of prejudging the merits.[132] But the interests of due process, at stake from the outset, remove the option of combining the jurisdiction issue with liability simply in order to save time and avoid duplication. Finding a way to deal with the merits in a preliminary fashion is crucial if a conspiracy theory, which almost invariably raises central issues of fact, is to be of any use in establishing personal jurisdiction.

An appropriate model for early decision-making may be found in motions for preliminary injunctions. There courts must act at the outset of a case to avoid irreparable injury to the plaintiff. They find the needed basis for their action in the likelihood of success on the merits balanced against other relevant interests.[133]

Similarly, a court presented with a motion to dismiss for lack of personal jurisdiction faces a need to justify compelling the defendant to undergo the rigors of discovery, pretrial practice and trial. It should also approach this motion in the framework of likelihood of success. The likelihood that plaintiff will ultimately meet his burden of proving the existence of jurisdiction by a preponderance of the evidence should be balanced against the equities presented[134]—such as the burden of litigation to be placed on the defendant, the prospect of forcing the plaintiff to split his litigation, the problem of forum shopping,[135] and the need to include the additional defendants in order to obtain full relief. In making its determination, the court should look at the entire evidentiary picture presented at the outset, including the allegations in the complaint, as well as allegations in the plaintiff's affidavits, the defendant's affidavits, and any documentary proof.[136]

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132. *See* Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1232 (5th Cir. 1973).

133. *E.g.*, Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 112 (8th Cir. 1981); Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980); United States v. Siemens Corp., 621 F.2d 499, 505 (2d Cir. 1980).

134. *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (analysis of due process may include factors other than the defendant's contacts, such as "the plaintiff's interest in obtaining convenient and effective relief"); *accord* Keeton v. Hustler Magazine, Inc., 682 F.2d 33, 34 (1st Cir. 1982), *cert. granted*, 103 S. Ct. 813 (1983).

135. *See* Turner v. Baxley, 354 F. Supp. 963, 977 (D. Vt. 1972) (weighing the hardship of requiring plaintiff to pursue multiple litigation against the problem of enabling him to forum shop).

136. Insistence that the plaintiff's allegations relating to personal jurisdiction appear in the complaint is widespread. *See, e.g.*, Textor v. Board of Regents, 711 F.2d 1387, 1391-93 (7th Cir. 1983); Glaros v. Perse, 628 F.2d 679, 681 (1st Cir. 1981); 4 C. Wright & A. Miller, *supra* note 79, § 1068, at 250. This requirement appears unjustified under the Federal Rules. *See* Fed. R. Civ. P. 8(a). The plaintiff should be permitted to meet the defendant's challenge to jurisdiction with allegations contained in affidavits. For examples of cases in which the court appeared to be willing to look

Since it is not conclusively finding facts, the court should be permitted at this point to make judgments of credibility and to permit concrete allegations of evidentiary fact to defeat the motion to dismiss even in the face of sworn denials from the defendants who purport to have actual personal knowledge of the facts, particularly when the equities favor the plaintiff.[137]

The court may also apply its discretion at this point to further the interests of fairness by viewing the initial showing solely as the step in litigation that precedes the next opportunity to reevaluate competing interests. Accordingly, it can grant the plaintiff limited discovery commensurate with the strength of the showing made. The plaintiff will then have a strong incentive to fashion a limited request for discovery to support his argument that the burden on defendant is light. Answering limited interrogatories will burden the defendant little more than preparing an affidavit in support of his motion to dismiss for lack of personal jurisdiction. Indeed, this treatment may motivate the defendant to submit a fairly substantial affidavit in support of his argument that the proposed burden is not justified.

The standards that govern fact-finding distort the issue of jurisdiction and result in the antithesis of due process when the theory of jurisdiction is firmly interwoven with the merits of the case. This problem becomes most prominent in the area of conspiracy jurisdiction due to the abstraction involved in linking the non-acting party to any contacts with the forum state. It is therefore important to free the trial judge from the strictures of fact-finding standards and affirm that it is his exercise of discretion that makes the preservation of due process possible.

Conclusion

Concepts originating in the law of substantive liability can be useful tools in the analysis of the minimum contacts that support long-arm

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beyond the complaint, see Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1237 (6th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981); Lehigh Valley Indus. v. Birenbaum, 527 F.2d 87, 92-93 (2d Cir. 1975); Dixon v. Mack, 507 F. Supp. 345, 348-49 (S.D.N.Y. 1980); Merkel Assocs., Inc. v. Bellofram Corp., 437 F. Supp. 612, 616-17 (S.D.N.Y. 1977).

137. Even if dismissal results, the co-conspirator charged with acting in the forum state should remain in the case. If this defendant is not subject to jurisdiction by reason of that act, the other defendants cannot be reached even if the contacts of the first defendant could properly be attributed to them. See *supra* pt. II(B). In cases where the in-state defendant is subject to jurisdiction but jurisdictional standards result in granting the motions to dismiss of the non-resident defendants, the case will proceed through discovery. The plaintiff will still have the opportunity to adduce facts supporting attribution. The court granting the motion may specify that the plaintiff may move to add these defendants if he subsequently becomes able to prove

jurisdiction. They must not, however, serve as devices to avoid genuine due process analysis. The term "conspiracy" properly describes some relationships that support the attribution of jurisdictional contacts to a defendant who has not acted in the forum state. But care must be taken lest litigants use that term to gloss over the analysis of fairness that applies to the attribution process. Due process considerations demand that the court deal with the jurisdiction question at the outset of the litigation, despite the asserted inextricability of the ultimate merits of the case. The courts must focus on the fairness of subjecting the defendant to the burdens of litigation under the circumstances presented, rather than on the appropriateness of conclusively resolving all questions of fact. Accordingly, it is proper for the trial court to use its judgment to balance the likelihood that the plaintiff will ultimately meet its burden of proving jurisdiction against the proposed burden to be placed on the defendant, a true due process approach.

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jurisdiction or to demonstrate a likelihood of proof clearly outweighing the proposed burdens on these defendants. *See* Socialist Workers Party v. Attorney Gen., 375 F. Supp. 318, 326 (S.D.N.Y. 1974).