

ARTICLES

Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction

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Introduction

Plaintiffs frequently file civil claims against defendants who are non-residents of the forum state. Almost as common, defendants attempt to frustrate plaintiffs' choices of forum by filing a motion to dismiss the claim for lack of personal jurisdiction. In order to overcome the motion, plaintiffs must make a *prima facie* showing that state law confers jurisdiction and that the exercise of jurisdiction comports with constitutional due process.¹

Through a series of cases, the United States Supreme Court has established a two-part test for determining the constitutional propriety of asserting jurisdiction over a nonresident defendant. First, the defendant must have “minimum contacts” with the forum state.² Second, the assertion of jurisdiction over the defendant must be reasonable, that is, it must not offend principles of “fair play and substantial justice.”³

Because the Supreme Court has never clearly defined the scope of “fair play and substantial justice,” this Article focuses on federal appellate and trial court opinions for clarification of this standard. The first section of the Article briefly reviews major Supreme Court opinions that

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1. For federal cases, the exercise of personal jurisdiction must satisfy the requirements of fifth amendment due process. State courts may exercise personal jurisdiction over nonresident defendants only if such jurisdiction satisfies the Due Process Clause of the Fourteenth Amendment.

2. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

3. *Id.*

have articulated but seldom applied the component parts of the “fair play” standard. The second section defines and describes the five primary parts of the “fair play” standard and how the lower federal courts have applied them. A working knowledge of these principles can be a powerful weapon for attorneys who litigate motions to dismiss for lack of personal jurisdiction.

I. The Supreme Court Cases and Personal Jurisdiction

*International Shoe Co. v. Washington*⁴ signalled the modern era for concepts of personal jurisdiction by retreating from the mechanical approach previously demanded by *Pennoyer v. Neff*.⁵ *International Shoe* and its progeny have divided the constitutional inquiry into two parts: whether the defendant purposefully established “minimum contacts” with the forum state and, if so, whether the exercise of jurisdiction results in “fair play and substantial justice.”⁶

In *World-Wide Volkswagen Corp. v. Woodson*,⁷ the Supreme Court concluded that due process barred the exercise of personal jurisdiction “over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendant’s only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.”⁸ The Court found insufficient contacts to sustain the exercise of personal jurisdiction over the defendant, but nevertheless proceeded to consider the second part of the due process personal jurisdiction equation.⁹ Although the Court did not apply the “fair play” factors to the facts of the case,¹⁰ its discussion was far more explicit in identifying the component aspects of

4. 326 U.S. 310 (1945).

5. 95 U.S. 714 (1878). In *Pennoyer*, Justice Field’s “two well-established principles of public law” were that (1) “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory,” and (2) “no State can exercise direct jurisdiction over persons or property without its territory.” *Id.* at 722. Personal jurisdiction existed only if the defendant was served with process while in the forum, voluntarily appeared, or consented to jurisdiction. *Id.* at 724-25.

6. *International Shoe*, 326 U.S. at 316; see also footnotes 7-18 and accompanying text.

7. 444 U.S. 286 (1980).

8. *Id.* at 287.

9. *Id.* at 292.

10. In dissent, Justice Brennan applied some of the “fair play” standards to the facts in *World-Wide Volkswagen*. *Id.* at 300-05 (Brennan, J., dissenting). He noted that the majority had accorded “too little weight to the strength of the forum State’s interest in the case and fail[ed] to explore whether there would be any actual inconvenience to the defendant.” *Id.* at 299-300.

the "fair play" or "reasonableness" standard than in prior cases.¹¹

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.¹²

In *Burger King Corp. v. Rudzewicz*,¹³ a Florida corporation sued a Michigan resident in a Florida federal court for breach of a franchise agreement which was entered into as a result of the defendant's initiative. The Supreme Court upheld the district court's exercise of jurisdiction over the defendant. The Court identified the defendant's sufficient minimum contacts with the forum state, and then proceeded to articulate guidelines for utilizing the "fair play" factors:

Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." . . . [A] defendant . . . must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. . . . [M]inimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.¹⁴

The Court quickly disposed of the "fair play" analysis by observing that the defendant failed to point "to other factors that can be said persuasively to . . . establish the *unconstitutionality* of" the forum state's assertion of jurisdiction.¹⁵

*Asahi Metal Industries Co. v. Superior Court*¹⁶ represents the Court's most recent pronouncement on "fair play and substantial justice." The Court unanimously found the exercise of jurisdiction unrea-

11. For example, in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Court, in assessing whether the exercise of personal jurisdiction was constitutional, only alluded to the burden on the defendant and the plaintiff's interest.

12. *World-Wide Volkswagen*, 444 U.S. at 292 (citations omitted).

13. 471 U.S. 462 (1985).

14. *Id.* at 476-78 (citations omitted).

15. *Id.* at 482 (emphasis in the original). The Court did observe that any inconvenience to the defendant could be accommodated through a change of venue. *Id.* at 483-84.

16. 480 U.S. 102 (1987).

sonable after applying the “fair play” factors.¹⁷ For the first time, the Court applied the factors to the facts of the case. In *Asahi*, a Japanese company had sold tire valve stems to an independent Taiwanese firm that used them in manufacturing tire tubes which were then sold to California customers. A California resident who was injured as a result of the stems’ failure sued the Taiwanese firm in a California superior court. The defendant sought indemnification from Asahi as a third-party defendant. The underlying tort suit was settled, leaving only the indemnity action pending between the defendant and Asahi. The *Asahi* Court ruled that given the international context (1) the forum state had a small interest in deciding a dispute between two foreign firms merely arguing over rights of contribution, (2) the burdens of litigating in the forum state created unacceptable hardships for the defendant, and (3) the plaintiff’s interest in litigating the claim in California was slight.¹⁸

The Supreme Court has established a due process standard for evaluating the exercise of personal jurisdiction over nonresident defendants.¹⁹ Clearly, the Court is open to consideration of factors beyond simply whether a defendant has minimum contacts with the forum state.²⁰ The *Asahi* Court’s analysis occurred years after lower federal courts had been developing and refining these concepts. The following section of this Article focuses on the federal appellate and trial courts’ extensive and developing case law that further defines the scope of the “fair play and substantial justice” standard.

II. The “Fair Play and Substantial Justice” Factors

Generally, the judicial approach to constitutional personal jurisdiction issues is to determine first whether a defendant has the necessary

17. The Court was equally divided on the sufficiency of defendant’s contacts with the forum state. *Id.* at 112, 117.

18. *Id.* at 112-16. Recently, in *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990), the Supreme Court unanimously upheld the concept of transient jurisdiction, the exercise of personal jurisdiction over a nonresident defendant who resides elsewhere but happens to be in the jurisdiction at the time of service, but divided on how “fair play and substantial justice” should be applied. Three Justices found that only “traditional notions of fair play and substantial justice” should apply. *Id.* at 2117-19 (plurality opinion). Four concurring Justices believed that “contemporary notions of due process” apply, citing as an example the burden on a transient defendant. *Id.* at 2120-26 (Brennan, J., concurring). Justice Stevens and Justice White, in their respective concurring opinions, thought it unnecessary to become embroiled in this argument in such an “easy case.” *Id.* at 2126 (Stevens, J., concurring); *id.* at 2119-20 (White, J., concurring).

19. See *supra* notes 4-18 and accompanying text.

20. See, e.g., *Asahi*, 480 U.S. at 112-16.

minimum contacts²¹ with the forum state to satisfy due process.²² If a defendant lacks minimum contacts with the state forum, there is no need to examine the reasonableness of asserting jurisdiction.²³ Although some courts regard the minimum contacts prong of the due process standard to be more important than the reasonableness prong,²⁴ the virtual absence of any reasonableness interest the forum has in hearing a case also argues for dismissal for want of personal jurisdiction over the defendant. In most cases,²⁵ therefore, although a finding of minimum contacts establishes a presumption of reasonableness, the constitutional inquiry does not end with a conclusion that there are minimum contacts between the

21. Occasionally, a court may not consider the minimum contacts issue, deciding after an evaluation of the fairness factors that even if there are minimum contacts with the forum, the exercise of jurisdiction would be unreasonable. See *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1442 (9th Cir. 1987); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

Unlike other circuits, the Ninth Circuit incorporates the minimum contacts analysis into its evaluation of the fairness factors. The "extent of the defendant's purposeful interjection into the forum state" is a Ninth Circuit factor deemed pertinent to the reasonableness of personal jurisdiction. *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981).

22. Most of the constitutional discussions occur in cases regarding specific jurisdiction, that is, when the claim relates to or arises out of the defendant's contact with the forum state. When the claim does not arise from the defendant's contacts with the forum state, a court can still exercise jurisdiction over the defendant on the basis of general jurisdiction, that is, when the nonresident defendant's contacts with the forum are not merely minimal but are continuous and systematic. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The courts apply the "fair play and substantial justice" factors to both specific and general jurisdiction cases. See, e.g., *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987).

Because the Court in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), stated that all assertions of jurisdiction are to be evaluated according to the standards set forth in *International Shoe* and its progeny, the constitutional discussion is relevant to assertions of quasi in rem jurisdiction as well as to personal jurisdiction.

23. See *Gitomer v. Rosefelde*, 726 F. Supp. 109, 112 (D.N.J. 1989); *Scott v. ABC Extrusion Co.*, 694 F. Supp. 811, 813 (D. Wyo. 1988); *Smith v. Dainichi Kinzoku Kogyo Co.*, 680 F. Supp. 847, 853 (W.D. Tex. 1988).

A finding of a defendant's insufficient contacts has not prevented some courts from proceeding to rule on the reasonableness factors. See *Bearry*, 818 F.2d at 377; *Stephens v. Coleman*, 712 F. Supp. 1571, 1577 (N.D. Ga. 1989), *aff'd*, *Stephens v. Department of Health and Human Servs.*, 901 F.2d 1571 (11th Cir.), *cert. denied*, 111 S. Ct. 555 (1990); *Garrett v. Beaver Run Ski Enters., Inc.*, 702 F. Supp. 265, 267 (D. Colo. 1988).

24. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Land-O-Nod Co. v. Bassett Furniture Indust.*, 708 F.2d 1338, 1340 (8th Cir. 1983).

25. Some courts still decide the due process issue by examining the defendant's minimum contacts only. See *First City Bank v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1131 (10th Cir. 1987). Based on the Supreme Court cases, it is apparent that an evaluation of the reasonableness factors is unnecessary in every case. *World-Wide Volkswagen*, 444 U.S. at 292. Opinions like *First City Bank*, however, do not allude to that point in finessing their way past the reasonableness idea.

defendant and the state forum.²⁶ To defeat jurisdiction, the defendant must present a compelling case that the presence of some of the "fair play and substantial justice" factors would render jurisdiction unreasonable.²⁷ A finding that jurisdiction over a nonresident defendant is reasonable effectively means that the defendant failed to present a compelling reason to rebut the presumption of reasonableness of asserting jurisdiction.²⁸ The judicial determination of reasonableness is not an abstract exercise but is intended to be flexible by focusing on the circumstances of each case.²⁹ Because this fact-specific approach is lacking in predictability and precision, it is subject to strong criticism from lower courts that are bound to apply it. For example, the court in *LAK, Inc. v. Deer Creek Enterprises*³⁰ remarked that:

If it suggests nothing else, this case may suggest that there is a downside, as well as an upside, to the judicially imposed requirement that each and every question of personal jurisdiction over a non-resident defendant be decided "on its own facts," with counsel and court sifting through each new complex of facts in search of "contacts" demonstrating that the plaintiff's choice of a forum does or does not accord with the notions of "reasonableness" and "fair play" reflected in a vast number of fact-specific judicial opinions. More sharply defined standards might well reduce miscalculations on the part of lawyers who, not surprisingly, normally seek a home court advantage if they think they see some chance of getting it—and it is not inconceivable that clearer standards might lead to more expeditious and efficient resolution of those jurisdictional questions that counsel choose to fight out in court. In this particular case, diligent lawyers have favored us with several hundred case citations; scholarship that comprehensive carries obvious costs, both in time and in money.³¹

26. Despite the clarity of Supreme Court opinions, some courts end their discussion after establishing the defendant's minimum contacts without any reference to the "fair play" portion of the analysis. See, e.g., *Ramsey Prod. Corp. v. Morbark Indus.*, 823 F.2d 798, 802 (4th Cir. 1987); *National Can Corp. v. K Beverage Co.*, 674 F.2d 1134, 1137-38 (6th Cir. 1982).

27. See *supra* note 14 and accompanying text.

28. See, e.g., *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988) (no compelling reasons presented); *Watlow Elec. Mfg. Co. v. Patch Rubber Co.*, 838 F.2d 999, 1003 (8th Cir. 1988) (no reasons presented).

29. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981).

30. 885 F.2d 1293 (6th Cir. 1989) (citation omitted), *cert. denied*, 110 S. Ct. 1525 (1990).

31. *Id.* at 1304 n.7. Commentators also complain about the "fair play" part of the due process test. Besides the concern that the factors offer no guidance to persons seeking to avoid being subject to a state's jurisdiction, the convenience for the defendant, plaintiff, and the judicial system have no constitutional foundation. Comment, *Constitutional Limitations on State Long Arm Jurisdiction*, 49 U. CHI. L. REV. 156, 160-62 (1982). Others have observed that the minimum contacts test is sufficient to ensure that personal jurisdiction is consistent with due process. Note, *Personal Jurisdiction and the Due Process Factors: An Evaluation of the Fairness Factors*, 19 PAC. L.J. 1459, 1485 (1988). The factors are more appropriately in-

A. Burden on the Defendant of Litigating the Claim

The Supreme Court has clearly indicated that the burden on the defendant is always a primary concern in assessing the reasonableness of jurisdiction.³² "If the burdens of trial are too great for a plaintiff, the plaintiff can decide not to sue or, perhaps, to sue elsewhere. A defendant has no such luxury."³³ The burden of defending, however, is not dispositive of the reasonableness issue and should be considered in light of other relevant factors.³⁴ For example, the *Asahi* Court observed that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."³⁵ Thus, unless the inconvenience to the defendant is so substantial as to constitute a deprivation of due process, it is unlikely to overcome clear justification for the court's exercise of jurisdiction.³⁶ As with the evaluation of other factors, some courts simply conclude that the burden of defending in a distant place is great,³⁷ or that the burden on the defendant outweighs³⁸ or is outweighed by other considerations.³⁹ Other courts either note that an element of inconvenience would exist regardless of where the trial is held⁴⁰ or assess the burden on the defendant in light of the burden on the plaintiff to litigate in the defendant's place of residence.⁴¹

voked under the theory of venue. Morton, *Contacts, Fairness and State Interests: Personal Jurisdiction after Asahi Metal Industry Co. v. Superior Court of California*, 9 PACE L. REV. 451, 457 (1989). Finally, the balancing process has been dismissed as a pretext for courts to indulge in promoting their forum's self-interest by denying defendants' motions to dismiss. See Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 431 (1980).

32. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980). For an example of lower federal court application of this factor, see *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1065 (9th Cir. 1985) (Kuwaiti defendant would bear heavy burden if required to defend lawsuit in California).

33. *Marina Salina Cruz*, 649 F.2d at 1272.

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

35. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987).

36. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 484 (1985); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

37. See, e.g., *Lapeire v. Volkswagen AG*, 698 F. Supp. 95, 99 (E.D. Pa. 1988).

38. See, e.g., *Groome v. Feyh*, 651 F. Supp. 249, 256 (S.D. Fla. 1986).

39. See *Johnson v. Goodyear S.A. Colmar Berg*, 716 F. Supp. 531, 535 (D. Kan. 1989); *Gerber Garment Technology, Inc. v. Lectra Sys., Inc.*, 699 F. Supp. 1576, 1581 (N.D. Ga. 1988); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 778 (D. Kan. 1987).

40. See *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 791 (9th Cir. 1987); *Lake v. Lake*, 817 F.2d 1416, 1423 (9th Cir. 1987); *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 611 (M.D. Tenn. 1986).

41. Decisions making this comparison usually find the burden greater for the plaintiff. See *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 850 (11th Cir. 1988), cert. denied, 110 S. Ct. 1813 (1990); *Hedrick v. Daiko Shoji Co., Osaka*, 715 F.2d 1355, 1359

The Supreme Court has noted that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he engages in economic activity."⁴² Courts frequently assess the burden of defending by examining the distance that a nonresident defendant would have to travel in order to contest a lawsuit.

1. *Domestic Defendants*

Many courts have found the defendant's burden minimal when the defendant's state of residence is adjacent to or near the forum state in which the lawsuit is pending.⁴³ When the defendant has to travel to another part of the United States to defend, communication and transportation improvements minimize the burden of litigating in a distant place.⁴⁴

(9th Cir. 1983); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 398 (9th Cir. 1983); *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982); *Lister v. Marangoni Meccanica S.P.A.*, 728 F. Supp. 1524, 1527 (D. Utah 1990). Some courts conclude, however, that the burden on the defendant is greater. *See Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986).

Other courts find the burdens on the respective parties to be equal. *See Shute v. Carnival Cruise Lines*, 897 F.2d 377, 386 (9th Cir.), *cert. granted*, 111 S. Ct. 39 (1990); *Rose v. Franchetti*, 713 F. Supp. 1203, 1213 (N.D. Ill. 1989). The Supreme Court's decision in *Shute*, not rendered at the time this Article was written, could address and possibly modify the "fair play and substantial justice" analysis.

42. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222-23 (1957). Of course, since *McGee*, transportation and communication have improved significantly. *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988).

43. *See, e.g., Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988) (Texas and Louisiana); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987) (West Virginia and Virginia); *Melcher*, 824 F.2d at 791 (Colorado and Arizona); *Wichita Fed. Sav. & Loan Ass'n v. Landmark Group, Inc.*, 674 F. Supp. 321, 325 (D. Kan. 1987) (Kansas and Texas); *Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861, 865 (D.R.I. 1987) (Connecticut and Rhode Island).

However, in *Cabbage v. Merchant*, 744 F.2d 665, 670 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985), the court identified inconvenience for the defendant although the defendant lived the same distance from the relevant courts in Arizona and California.

44. *See, e.g., Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir. 1990) (New Jersey and Florida); *Shute*, 897 F.2d at 386 (Washington and Florida); *Williams Elec. Co., v. Honeywell, Inc.*, 854 F.2d 389, 393 (11th Cir. 1988) (Florida and Texas); *Morris*, 843 F.2d at 495 (New Jersey and Alabama); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 841 (9th Cir. 1986) (Illinois and Montana); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986) (California and Missouri); *Koff v. Brighton Pharmaceutical, Inc.*, 709 F. Supp. 520, 528 (D.N.J. 1988) (New Jersey and Missouri).

A defendant engaged in interstate business is acquainted with and therefore able to bear the burden of out-of-state litigation. *Frontier Fed. Sav. & Loan v. National Hotel Corp.*, 675 F. Supp. 1293, 1299 (D. Utah 1987). Even a small corporation may not be inconvenienced by going to another part of the country to litigate. *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989).

2. Foreign Defendants

The opinions are split, however, when the defendant is from another country. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."⁴⁵ Opinions supporting jurisdiction over foreign defendants observe that the burden for the plaintiff to litigate overseas may be as great as it is for the defendant to litigate in a United States forum.⁴⁶ Moreover, the burden is reduced for a foreign defendant who engages in ongoing activity in the forum state.⁴⁷ The foreign defendant's burden of litigating is greatest when potential defense witnesses are located in the foreign country⁴⁸ or when the defendant's contacts with the forum are minimal.⁴⁹ For these reasons, the inconvenience of litigating in a distant forum can affect the foreign defendant's ability to present his or her case effectively. Although modern transportation may reduce the burden, the longer the distance for witnesses to travel, the more difficult and expensive it is for a foreign defendant to have them testify voluntarily in person.⁵⁰ Similarly, despite communication advances, the foreign

45. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987). Where the defendant has done little to reach out to the forum state, the burden of defending militates against exercising jurisdiction. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987); *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981). See *infra* notes 55-62 and accompanying text.

46. *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 398 (9th Cir. 1983); *Karsten Mfg. Corp. v. United States Golf Ass'n*, 728 F. Supp. 1429, 1435 (D. Ariz. 1990); see *Olsen v. Government of Mex.*, 729 F.2d 641, 650 (9th Cir.) (burden for Mexico to litigate in San Diego, California, "is as small as any foreign defendant may be expected to bear"), *cert. denied*, 469 U.S. 917 (1984).

47. *Poyner v. Erma Werke GMBH*, 618 F.2d 1186, 1192 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980); see *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 315 (2d Cir. 1981) (foreign defendant constantly used services in and frequently visited the United States), *cert. denied*, 454 U.S. 1148 (1982); *Walpex Trading v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383, 392 (S.D.N.Y. 1989) (frequent presence of foreign defendant's employees and officers in United States militates against a finding of impermissible burden); *Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269, 1273 (N.D. Ind. 1987) (foreign defendant's major American subsidiary is located in forum). See also *infra* notes 55-62 and accompanying text.

48. *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985); *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981).

49. See *supra* notes 17-18 & 21 and accompanying text.

50. Compare *Pacific Atl. Trading Co.*, 758 F.2d at 1330 (California forum with Malaysian witnesses is considerable burden for defendant) and *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982) (all witnesses are outside forum) and *Rocke*, 660 F.2d at 399 (many witnesses from Canada where claim arose) and *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981) (no direct transportation service from Mexico to Alaskan forum) and *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1320-21 (D. Del. 1987) (burden is "great" for Maryland or Virginia witness to testify in Delaware) with *Hirsch v. Blue*

defendant's costs of moving tangible evidence may be substantial.⁵¹ Opportunities for efficient and effective litigation of the claim may also reduce the burden on a foreign defendant.

3. *All Nonresident Defendants*

Retention of the same counsel by all defendants reduces the burden,⁵² as does the option of hiring local counsel for substantive representation.⁵³ Litigating in another forum is also less burdensome when the court has already found personal jurisdiction as to some counts, making the extra burden of litigating additional counts minimal.⁵⁴

4. *The Nature of Defendant's Contacts with the Forum*

The defendant's contacts with the forum may also affect the court's evaluation of the burden of litigating there.

When a corporation "purposely 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.⁵⁵

As long as the Court finds that a defendant has satisfied the "purposeful availment requirement,"⁵⁶ the Court may be implicitly stating that any burden on the defendant is reduced as a result of the defendant's election

Cross, *Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986) (modern transportation reduces burden of witnesses going from Missouri to California) and *Olsen*, 729 F.2d at 650 (burden is small for Tijuana, Mexico witness to testify in San Diego, California) and *Horne v. Adolph Coors Co.*, 684 F.2d 255, 260 (3d Cir. 1982) (no burden on defendant when witnesses are not from any particular locality).

51. See *Marina Salina Cruz*, 649 F.2d at 1271-72. In *Hester Int'l Corp. v. Federal Republic of Nig.*, 681 F. Supp. 371, 385-86 (N.D. Miss. 1988), *aff'd*, 879 F.2d 170 (5th Cir. 1989), the court minimized the defendant's burden when much of its proof was documentary rather than witness testimony.

52. *Hanes Co. v. Ronson*, 712 F. Supp. 1223, 1228 (M.D.N.C. 1988); see also *Nixon v. Celotex Corp.*, 693 F. Supp. 547, 552 (W.D. Mich. 1988) (defendant shared counsel with its subsidiary and co-defendant).

53. See *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988); *Marine Charter & Storage Ltd. v. Denison Marine, Inc.*, 701 F. Supp. 930, 936 (D. Mass. 1988); *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 325 (D. Kan. 1987).

54. *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

In *Frontier Fed. Sav. & Loan v. National Hotel Corp.*, 675 F. Supp. 1293, 1299 (D. Utah 1987), the court curiously found that the substantial amount in controversy precluded any real hardship to the nonresident defendant because its size made the possibility of default by the defendant minimal.

55. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

56. *Id.*

to engage in the conduct which led to the filing of the lawsuit.⁵⁷ In *S & S Screw Machine Co. v. Cosa Corp.*,⁵⁸ the court found that the defendant's deliberate exploitation of the American market for at least ten years provided adequate notice that it might be subjected to suit in the forum.⁵⁹ A related approach requires the court to examine whether a nonresident defendant engaged in deliberate conduct which had a foreseeable effect on the plaintiff in the forum. For example, in *Violet v. Picillo*,⁶⁰ the court held that the defendants' failure to structure their conduct in the forum to avoid the possibility of litigation made them subject to suit there.

The interrelationship between the defendant's contacts with the forum and the defendant's burden to litigate there may produce a different conclusion. Instead of looking retrospectively to determine how the defendant could have altered his or her conduct to control the likelihood of litigation, some courts prefer a prospective view. Following the lead of the Supreme Court,⁶¹ the Ninth Circuit "recognizes that once minimum contacts have been established, inconvenience to the defendant is more appropriately handled not as a challenge to jurisdiction but as a factor supporting a change in venue."⁶²

B. The Forum State's Interest in Adjudicating the Dispute

The forum state's interest in adjudicating the dispute is one of the most important factors in the balancing process for determining the reasonableness of jurisdiction over a nonresident defendant. A court's disposition of this factor is generally consistent with the ultimate disposition

57. See, for a lower federal court example of this statement, *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988).

58. 647 F. Supp. 600, 611 (M.D. Tenn. 1986).

59. Compare *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1199 (9th Cir. 1988) (continuing contacts between defendant's American agent and the forum translate into reduced litigation burden for the defendant) and *Microsoft Corp. v. Very Competitive Computer Prods. Corp.*, 671 F. Supp. 1250, 1256 (N.D. Cal. 1987) (foreign defendant's litigation burden carries less weight when the defendant has direct and ongoing business activities in the United States) and *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633, 641-42 (M.D. Ga. 1987) (defendant's extensive sales in forum requires it to answer complaints resulting therefrom) with *Wells Am. Corp. v. Sunshine Elec.*, 717 F. Supp. 1121, 1128-29, n.6 (D.S.C. 1989) (defendant directed no effort toward forum other than to collect money due arising from unsolicited orders).

60. 613 F. Supp. 1563, 1578 (D.R.I. 1985).

61. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

62. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir.), cert. granted, 111 S. Ct. 39 (1990); see also 28 U.S.C. § 1404(a) (1990). For a foreign defendant, a change of venue is not a significant change. See *Lister v. Marangoni Meccanica S.P.A.*, 728 F. Supp. 1524, 1527 (D. Utah 1990).

of the reasonableness equation.⁶³ While judicial decisions may simply conclude without explanation that the forum state has an interest in hearing the case,⁶⁴ most have effectively indicated the importance of the forum's interest factor by identifying a variety of factual bases supporting the reasonableness of personal jurisdiction over nonresidents.⁶⁵ In evaluating the importance of this factor in any case, the issue for consideration is whether the forum state has a legitimate concern with the outcome of the litigation.⁶⁶ The interest often finds expression in the need to protect a forum state's citizen or in the forum state's interest in the application of its own law.

1. *Providing a Forum for Resident Plaintiffs*

The most frequent judicially invoked basis for this interest is that of providing a forum for its own citizens, individual or corporate,⁶⁷ who may have suffered some injury within the state,⁶⁸ especially by nonresident defendants' acts.⁶⁹ Judges easily identify the forum's interest in pro-

63. For a rare example of when the forum state's interest has some impact in favor of approving jurisdiction, but is outweighed by the other factors, see *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981).

64. *Poyner v. Erma Werke GMBH*, 618 F.2d 1186, 1191 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980).

65. See *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986); *Olsen v. Government of Mex.*, 729 F.2d 641, 650 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984); *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 327 (D. Kan. 1987); *Warren v. Honda Motor Co.*, 669 F. Supp. 365, 371 (D. Utah 1987).

66. See *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 791 (9th Cir. 1987).

67. See, e.g., *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389, 393 (11th Cir. 1988) (plaintiff is incorporated in forum); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988) (same); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987) (plaintiff brought shareholder derivative action against domestic corporation); *Petroleum Helicopters, Inc. v. Avco Corp.*, 804 F.2d 1367, 1371 (5th Cir. 1986) (plaintiff had principal place of business in forum); *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1228 (M.D.N.C. 1988) (plaintiff is incorporated in forum); *Koff v. Brighton Pharmaceutical, Inc.*, 709 F. Supp. 520, 528 (D.N.J. 1988) (same); *Marine Charter & Storage Ltd. v. Denison Marine, Inc.*, 701 F. Supp. 930, 936 (D. Mass. 1988) (same).

68. See *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989); *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1085 (5th Cir. 1984); *Lister v. Marangoni Meccanica S.P.A.*, 728 F. Supp. 1524, 1527 (D. Utah 1990); *Mize v. Harvey Shapiro Enters.*, 714 F. Supp. 220, 223 (N.D. Miss. 1989); *Inter-American Ins. Co. v. Ketchum*, 723 F. Supp. 1266, 1272 (N.D. Ill. 1988); *Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.R.I. 1985).

69. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 (1985), the Court noted that the forum state had a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors. Lower courts have followed this view. See *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.*, 710 F.2d 1449, 1453 (10th Cir. 1983); *Marine Charter & Storage*, 701 F. Supp. at 936; *Schartner v. Northwest Int'l Equip. Co.*, 694 F. Supp. 1364, 1371 (E.D. Wis. 1988); *Rhode Island Hosp. Trust Nat'l Bank v. San Gabriel Hydroelectric Partnership*, 667 F. Supp. 66, 72 (D.R.I. 1987); *Dupont*

protecting its injured citizens from defective products.⁷⁰ The courts have also recognized a state's interest in providing a local forum to enforce the contractual obligations of parties contracting with forum residents,⁷¹ especially where insurers refuse payments to resident insureds.⁷²

2. Scope of Forum State's Interest

While courts have expressed that the interest may not weigh as heavily when a lawsuit is brought by a nonresident of the forum,⁷³ in some types of cases the scope of the forum state's interest extends even to

Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc., 659 F. Supp. 861, 865 (D.R.I. 1987).

70. See *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990); *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988); *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660, 668 (7th Cir. 1986), cert. denied, 479 U.S. 1092 (1987); *Hedrick v. Daiko Shoji Co., Osaka*, 715 F.2d 1355, 1359 (9th Cir. 1983); *Riordan v. Babcock & Wilcox Co.*, 705 F. Supp. 279, 281 (W.D. Pa. 1989); *Lapeire v. Volkswagen AG*, 698 F. Supp. 95, 98-99 (E.D. Pa. 1988); *Wessinger v. Vetter Corp.*, 685 F. Supp. 769, 778 (D. Kan. 1987).

The court in *Wells Am. Corp. v. Sunshine Elec.*, 717 F. Supp. 1121 (D.S.C. 1989), however, found the forum state's interest was not implicated when the nonresident defendant "merely manufactured goods according to precise specifications submitted by an industrial buyer—who subsequently accepted such goods without objection on each occasion, and apparently only objected to the quality of the goods after a demand for payment . . . was made by [the defendant]." *Id.* at 1129 (emphasis in original).

71. Compare *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 701 (3d Cir. 1990) (breach of contract) and *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989) (breach of contract and copyright infringement) and *Koff*, 709 F. Supp. at 528 (breach of stock purchase agreement) and *Info-Med, Inc. v. National Healthcare, Inc.*, 669 F. Supp. 793, 798 (W.D. Ky. 1987) (breach of contract) and *A.I.M. Int'l v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633, 641 (M.D. Ga. 1987) (same) and *Dentsply Int'l Inc. v. Pentron Corp.*, 648 F. Supp. 856, 860 (D. Del. 1986) (breach of patent agreement) and *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600 (M.D. Tenn. 1986) (breach of contract) with *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985) (contract neither negotiated nor performed in forum; forum's interest minimal at best) and *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1321 (D. Del. 1987) (same) and *Groome v. Feyh*, 651 F. Supp. 249, 256 (S.D. Fla. 1986) (contract signed outside forum with out-of-state corporation).

A more generalized way of expressing the interest is to protect commerce within the forum state's borders. See *Quikrete Cos. v. Nomix Corp.*, 705 F. Supp. 568, 575 (N.D. Ga. 1989). Another expression of the interest in a commercial setting is the protection of resident businesses as creditors under the applicable laws. See *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988).

72. In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), the Court stated that the forum had a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. Lower courts have followed this view. See, e.g., *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (insurance claim); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986) (same); *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) (same); *Skelton v. Lowen*, 665 F. Supp. 469, 472 (E.D. Va. 1987) (same); *Rigdon v. Bluff City Transfer & Storage Co.*, 649 F. Supp. 263, 269 (D. Nev. 1986) (same).

73. See *Fields*, 796 F.2d at 302-03 (plaintiff was forum resident and a British subject); *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1065 (9th Cir. 1985) (plain-

suits by nonresidents.⁷⁴ Several courts have stretched the interest to include the protection of forum citizens from injuries outside the forum,⁷⁵ the protection of the forum's nonresident businesses,⁷⁶ the impact of the injury being felt in the forum,⁷⁷ and the benefit of a recovery for the forum state.⁷⁸ Similarly, some courts have held personal jurisdiction over nonresident defendants reasonable when the forum has an interest both in injury to land located in the forum and in the recovery of public monies expended to protect such land.⁷⁹

3. *Application of Forum State's Law*

Another justification for the forum state's interest in adjudicating disputes over nonresident defendants is that the case involves the general application of the forum state's law on some or all of the issues.⁸⁰ More specifically, a state may have articulated its interest in protecting its citi-

tiff was not forum corporation and defendant was not chartered under forum's law); *Leney v. Plum Grove Bank*, 670 F.2d 878, 880 (10th Cir. 1982) (plaintiff was nonresident of forum).

74. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (defamation harms both the subject of the falsehood, the plaintiff in the lawsuit, and the readers of the statement living in the forum state); *Frontier Fed. Sav. & Loan v. National Hotel Corp.*, 675 F. Supp. 1293, 1299 (D. Utah 1987) (extending *Keeton* to a case in which the defendant allegedly used property in the forum to perpetrate a fraud connected with the forum).

75. *Compare Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir.) (injury to forum resident outside forum), *cert. granted*, 111 S. Ct. 39 (1990) and *Cubbage v. Merchant*, 744 F.2d 665, 671 (9th Cir. 1984) (same), *cert. denied*, 470 U.S. 1005 (1985) and *Olsen v. Government of Mex.*, 729 F.2d 641, 651 (9th Cir.) (protection of minor residents is important when parents were killed outside forum), *cert. denied*, 469 U.S. 917 (1984) with *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987) (injury outside forum to nonresident of forum "implicates virtually no distinct interest of" the forum state) and *Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986) (alleged fraud and negligence occurred outside forum state; forum interest is "very limited") and *Szakacs v. Anheuser-Busch Cos.*, 644 F. Supp. 1121, 1124 (N.D. Ind. 1986) (injury outside forum state suggests that state of injury has greater interest in case).

76. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981) (forum has interest in protection of its nonresident fishing fleet from negligent foreign repairs). In this case, the court noted that the forum state's interest would have been greater if plaintiff had been a resident of the forum. "Such residence would, presumably, also have increased the convenience preference of" the parties for the forum state. *Id.*

77. *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981) (economic impact of forum plaintiff's disabling injury would be felt in forum).

78. *Entek Corp. v. Southwest Pipe & Supply Co.*, 683 F. Supp. 1092, 1099 (N.D. Tex. 1988) (recovery by forum plaintiffs of damages to their business interests would probably benefit forum state).

79. *Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.R.I. 1985).

80. See *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988); *Slawson v. Hair*, 716 F. Supp. 1373, 1378 (D. Kan. 1989); *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1228 (M.D.N.C. 1988); *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 327 (D. Kan. 1987); *Dentsply Int'l Inc. v. Pentron Corp.*, 648 F. Supp. 856, 860 (D. Del. 1986).

zens by enacting a comprehensive statutory scheme intended to reach nonresidents in furtherance of this interest.⁸¹ By contrast, when the parties have designated a foreign forum in a contract's controlling law provision, the forum state's interest in hearing the dispute may not weigh as heavily.⁸² When a court finds that both the forum state and another state may have legitimate interests in adjudicating the case, it may deny the motion to dismiss and note that any interest the non-forum state may have in the case can be accommodated by application of that state's law.⁸³

C. Plaintiff's Interest in Obtaining Convenient and Effective Relief

The third relevant factor for consideration is "the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum"⁸⁴ Generally, a court's finding on this factor seems to weigh heavily in the balancing suggested by the Supreme Court. Indeed, it is unusual for a judicial finding on this factor to be at variance with the court's conclusions after balancing all the factors.⁸⁵ Judicial decisions often sim-

81. See, e.g., *Retail Software Servs. Inc. v. Lashlee*, 854 F.2d 18, 24 (2d Cir. 1988) (forum state's franchise laws); see also *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982) (forum has no interest in the admission to the bar of another state); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1214-15 (W.D. Ky. 1987) (forum's interest in actions of military personnel based there already expressed by statute); *Rigdon v. Bluff City Transfer & Storage Co.*, 649 F. Supp. 263, 269 (D. Nev. 1986) (forum state's interest in carrying out its workers' compensation laws).

In *Shaffer v. Heitner*, 433 U.S. 186, 213-16 (1977), the plaintiff's argument that the forum state had a strong interest in supervising the management of a forum corporation was undercut by the failure of the forum legislature to enact a statute designed to protect that alleged interest. Whether a jurisdiction's long-arm statute could specifically articulate the forum state's interest is in dispute. See *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 530 (4th Cir. 1987) (although the defendant's activities were not explicitly defined in the long-arm statute, the court found that their activities constituted "transacting any business" in the forum state's long-arm statute); *Willis v. Willis*, 655 F.2d 1333, 1338 (D.C. Cir. 1981) (no jurisdictional statute in place).

The forum state also may lack an interest as a result of the substantive case law. See *Stephens v. Coleman*, 712 F. Supp. 1571, 1577 (N.D. Ga. 1989) (administration of federal personnel system is of national interest; state's interest is insubstantial), *aff'd*, *Stephens v. Department of Health and Human Servs.*, 901 F.2d 1571 (11th Cir.), *cert. denied*, 111 S. Ct. 555 (1990).

82. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987).

83. *Third Nat'l Bank v. Wedge Group Inc.*, 882 F.2d 1087, 1092 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 870 (1990). See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985); see also *infra* text accompanying notes 144-47.

84. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (citations omitted).

85. See *Burstein*, 693 F.2d at 522-23 (plaintiff's interest outweighed by other factors; jurisdiction unreasonable).

ply conclude, without more, that the plaintiff's interest favors maintaining the lawsuit where it was filed.⁸⁶ Occasionally, a court glibly notes that the plaintiff's interest is substantial or "cannot be denied."⁸⁷ Most opinions, however, seem to attempt to articulate the interest with more precision regardless of the conclusion.

1. *Defining the Plaintiff's Interest*

The plaintiff's interest in obtaining an effective resolution of the case takes several forms. For example, if a court finds that the plaintiff's likelihood of recovery in another forum would be so significantly diminished as to justify keeping the case in the current forum, it is reasonable to subject the defendant to personal jurisdiction there.⁸⁸ Courts have expressed a related concern regarding "whether litigating in a particular forum will allow the plaintiff to join all parties in one suit."⁸⁹ In multiparty litigation, a plaintiff may be burdened substantially if forced to proceed in parallel or piecemeal actions, especially when the plaintiff has limited litigation resources.⁹⁰

Another approach to defining the plaintiff's interest has been to compare the plaintiff's substantive claim with the third-party claim in *Asahi*.⁹¹ In one case, *Rhode Island Hospital Trust National Bank v. San Gabriel Hydroelectric Partnership*, the third-party plaintiff's interest was found not substantial because the claim "was primarily one for indemnification, and thus, centered upon resolution of a technical legal issue

86. See, e.g., *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 315 (9th Cir. 1987); *Quikrete Cos. v. Nomix Corp.*, 705 F. Supp. 568, 575 (N.D. Ga. 1989); *Hatzlachh Supply Inc. v. Savannah Bank of Nig.*, 649 F. Supp. 688, 691 (S.D.N.Y. 1986).

87. *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383, 392 (S.D.N.Y. 1989) (plaintiff's interest "cannot be denied").

88. See *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985) (court suggests, but defendant fails to prove, that a significant difference in the interpretation of the applicable law between the forum and a foreign court would constitute the unavailability of effective relief); *Rocke v. Canadian Auto. Sports Club*, 660 F.2d 395, 400 (9th Cir. 1981) (likelihood of recovery not diminished in foreign forum; unreasonable to keep case in forum); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310, 1321 (D. Del. 1987) ("plaintiffs will be able to obtain effective relief" in the courts of another state).

89. *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 326 (D. Kan. 1987).

90. See *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 589 (5th Cir. 1982) (plaintiffs' "interests are not adequately protected by a speculative ability to bring suit against all parties in another forum"; plaintiffs have strong interest in maintaining suit in forum), *overruled on other grounds*, *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (1986), *aff'd*, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.R.I. 1985) (state government as plaintiff).

91. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); see *supra* notes 16-20 and accompanying text.

rather than upon an issue of substantive interest to plaintiff such as vindicating the rights of a severely injured consumer."⁹²

A plaintiff's likelihood of enforcing a judgment against a defendant also bears on the effectiveness of the court as a forum for resolving the dispute. If the plaintiff cannot demonstrate the probability of collecting or enforcing a judgment from the forum or elsewhere, effective relief in the forum is problematic even if the forum is a more convenient place to litigate.⁹³ On the other hand, if the defendant is unable to demonstrate that a judgment against it would be unenforceable, the court will find for the plaintiff on this factor.⁹⁴

2. *Rebutting the Plaintiff's Asserted Interest*

Despite the plaintiff's initial choice of the forum in which to litigate, the defendant has the opportunity to convince a court that the plaintiff's convenience (1) will not be served by that choice, thereby making that choice unreasonable, or (2) may just as easily be promoted elsewhere.⁹⁵ Individual rather than corporate defendants may be less able to seek practical relief in foreign courts. As the Supreme Court indicated in *McGee v. International Life Insurance Co.*,⁹⁶ individual claimants are at a severe disadvantage if they must follow defendants to a distant place in order to hold them legally accountable. A defendant effectively becomes judgment proof when individuals with small claims cannot afford the cost of bringing an action in an inconvenient forum.⁹⁷ When all parties are corporate entities, however, with apparently sufficient resources to defend in the forum or elsewhere, the weight a court accords to the plaintiff's interest is not as significant.⁹⁸

92. Rhode Island Hosp. Trust Nat'l Bank v. San Gabriel Hydroelectric Partnership, 667 F. Supp. 66, 71-72 (D.R.I. 1987). The court here explicitly distinguished the claim in its case from the third-party claim in *Asahi*, 480 U.S. 102.

93. Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1273 (9th Cir. 1981). See *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1066 (9th Cir. 1985) (plaintiff did not prove that it could not receive effective relief in foreign country); *Karsten Mfg. Corp. v. United States Golf Ass'n*, 728 F. Supp. 1429, 1435 (D. Ariz. 1990) (foreign court will not enforce American antitrust laws).

94. *Olsen v. Government of Mex.*, 729 F.2d 641, 651 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). The ability to collect on a judgment also relates to the plaintiff's interest in obtaining convenient relief. For example, in *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987), the court stated that "[i]t would be unfair to require plaintiffs who prevailed [at trial] to sue on their judgments in [another state]."

95. See *infra* notes 109-16 and accompanying text on the Ninth Circuit's analysis of the existence of an alternative forum.

96. 355 U.S. 220, 223 (1957).

97. *Id.*

98. See *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

3. *The Plaintiff's Burden in Establishing the Interest*

Litigating where the plaintiff lives or works at the time the lawsuit was filed or at the time the motion to dismiss was heard,⁹⁹ where the plaintiff suffered injury,¹⁰⁰ or where plaintiff's witnesses reside,¹⁰¹ is persuasive for the convenience of jurisdiction. Courts occasionally decide the sufficiency of the plaintiff's interest in litigating in the forum of choice by comparing the convenience of litigating there with another forum. The effect of this approach places a burden of production on the plaintiff to justify the original forum choice.¹⁰² If the court finds that the plaintiff's interest is not strong, the court may rule either that the plaintiff has shown little added convenience to herself by litigating in the forum,¹⁰³ or that she has not demonstrated that pursuing the claim elsewhere would be less expedient than the forum of choice.¹⁰⁴ The court

99. Compare *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989) (former Canadian "now" lives and works in forum) and *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1200 (9th Cir. 1988) (plaintiff a resident of forum) and *Rossmann v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (plaintiffs are forum residents) and *Mason v. F. LLI Luigi & Franco Dal Maschio*, 832 F.2d 383, 386 (7th Cir. 1987) (plaintiff lives in forum) and *Cabbage v. Merchant*, 744 F.2d 665, 672 (9th Cir. 1984) (same), *cert. denied*, 470 U.S. 1005 (1985) and *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 588 (5th Cir. 1982) (plaintiffs were forum residents at time suit was filed), *overruled on other grounds*, *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (1986), *aff'd*, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987) with *Groome v. Feyh*, 651 F. Supp. 249, 256 (S.D. Fla. 1986) (burden on defendant outweighs convenience to plaintiff of suing in forum of residence). See also *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1170 (6th Cir. 1988) ("plaintiff [an Ohio corporation] has a strong interest in the availability of a convenient forum [Ohio] for resolution of a dispute that had the possibility of affecting its relations with all its shareholders"); *In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1215 (W.D. Ky. 1987) (plaintiffs "legitimately concerned with obtaining convenient and effective relief from limited resources").

100. See, e.g., *Rossmann*, 832 F.2d at 287; *Mason*, 832 F.2d at 386; *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 841 (9th Cir. 1986); *Lister v. Marangoni Meccanica S.P.A.*, 728 F. Supp. 1524, 1527 (D. Utah 1990).

Conversely, the plaintiff's interest is weak when the injury occurred outside the forum state. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987).

101. See, e.g., *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986); *Koff v. Brighton Pharmaceutical, Inc.*, 709 F. Supp. 520, 528 (D.N.J. 1988); *Hayworth v. Beech Aircraft Corp.*, 690 F. Supp. 962, 966 (D. Wyo. 1988).

If the plaintiff cannot point to any witnesses located in the forum state, there is no distinct interest in the lawsuit proceeding in that particular forum. *Bearry*, 818 F.2d at 377.

102. In *Schartner v. Northwest Int'l Equip. Co.*, 694 F. Supp. 1364, 1371 (E.D. Wis. 1988), plaintiff alleged that he had a small business in Wisconsin, and that it would be a great inconvenience and expense to require him and his witnesses to travel to Washington for trial. The court found that this "generalized allegation" had "minimal persuasive value," but found for plaintiff on the motion to dismiss in part because defendant submitted no counter-allegation.

103. See, e.g., *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986).

104. See *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1200 (9th Cir. 1988) (no showing by plaintiff that lawsuit cannot be litigated outside forum); *Froning & Deppe, Inc. v. Conti-*

simply may conclude that the plaintiff could litigate the claim as easily and effectively in another forum.¹⁰⁵

By contrast, a court may conclude that the plaintiff's interest in convenient relief may be promoted in the forum of choice. First, the plaintiff simply may lack the financial and physical ability to bear the cost of litigating outside the forum of choice.¹⁰⁶ Dismissal of the lawsuit could effectively prevent the plaintiff from obtaining relief even when an alternative forum is in fact available.¹⁰⁷ Second, the plaintiff's interest may be served by keeping the suit in the forum of choice because the record does not indicate that the suit could be maintained over the defendant in any other forum.¹⁰⁸

4. *The Ninth Circuit Approach in Identifying Plaintiff's Interest*

The Ninth Circuit separates the plaintiff's interest in convenient and effective relief from the availability of an alternate forum and treats the two as separate factors. Under the analysis, the plaintiff must show that the unavailability of an alternate forum increases the reasonableness of jurisdiction in the forum.¹⁰⁹ Most Ninth Circuit cases consider the prac-

mental Ill. Nat'l Bank & Trust Co., 695 F.2d 289, 294 (7th Cir. 1982) (plaintiff already prosecuting its claim against defendant in another forum).

105. See *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1445 (9th Cir. 1987) (plaintiff already litigating a different dispute in foreign forum); *Bearry*, 818 F.2d at 377 (plaintiff already has lawsuits pending in state where the injury occurred and state of defendant's residence); *Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861, 865 (D.R.I. 1987) (because of proximity, plaintiff could litigate as easily in Connecticut as in Rhode Island); *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 326 (D. Kan. 1987) (plaintiff able to obtain relief in either forum).

106. See *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir.) (Washington personal injury plaintiffs' physical and financial burdens of pursuing lawsuit in Florida), *cert. granted*, 111 S. Ct. 39 (1990); *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1481 (9th Cir. 1986) (costs of litigating outside forum would be significant); *Olsen v. Government of Mex.*, 729 F.2d 641, 651 (9th Cir.) (concern for plaintiffs' personal comfort and convenience argues for forum in United States), *cert. denied*, 469 U.S. 917 (1984); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 399 (9th Cir. 1983) (individual plaintiff unlikely to seek relief in foreign court); *Schartner*, 694 F. Supp. at 1371 (great expense for plaintiff and his witnesses to travel from Wisconsin to Washington).

An allegation of financial inability to bear the costs of litigating in a distant forum, even by an individual, may be dismissed as mere speculation. *Burstein v. State Bar*, 693 F.2d 511, 522 (5th Cir. 1982) (even if not speculation, the plaintiff's interest was outweighed by all other "fair play" considerations "pointing away" from the forum).

107. See *supra* note 106.

108. See, e.g., *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 529 (4th Cir. 1987).

109. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981). Plaintiff's inability to sustain the burden does not guarantee overall success for defendant in establishing the unreasonableness of jurisdiction. See *Olsen*, 729 F.2d at 651.

ticality of an available alternative,¹¹⁰ but some look at the issue only when it is determined that the forum state's interest is unreasonable.¹¹¹ The finding on this factor takes one of several forms. First, the plaintiff fails either to sustain its burden of production¹¹² or to offer any proof.¹¹³ Second, despite the existence of an alternate forum, the difficulties for the plaintiff and the witnesses of litigating in the alternative forum may make that forum practically unavailable.¹¹⁴ Third, an alternate forum may exist, but jurisdiction there would serve no regulatory or policy interests.¹¹⁵ Finally, an alternate forum obviously exists when the plaintiff files a prior action to preserve his or her rights and the defendant has no objection to defending the lawsuit there in the alternative.¹¹⁶

D. Interstate Judicial System's Interest in Obtaining the Most Efficient Resolution of Controversies

Along with the shared interest of the several states in furthering substantive social policies,¹¹⁷ federal courts frequently fail to discuss the interest in efficient resolution of lawsuits—according it lesser importance than the burden on the defendant, the forum's interest, and the plaintiff's interest. Nevertheless, a “court sitting in the district where the injury occurred and where witnesses are located ordinarily will be the most efficient forum. The court most competent to interpret the applicable law

110. See *Hedrick v. Daiko Shoji Co., Osaka*, 715 F.2d 1355, 1359 (9th Cir. 1983).

111. See *Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1201 (9th Cir. 1988); *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 791 (9th Cir. 1987).

112. See, e.g., *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1445 (9th Cir. 1987) (failure to sustain burden that plaintiff would be precluded from suing defendant outside forum); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 841 (9th Cir. 1986) (defendant amenable to suit elsewhere); *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 303 (9th Cir. 1986) (alternative forum available); *Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1331 (9th Cir. 1985) (plaintiff did not meet burden); *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1066 (9th Cir. 1985) (no concrete proof of alternative forum); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333-34 (9th Cir. 1984) (prospect of unfair trial due to political unrest in foreign forum does not sustain plaintiff's burden), *cert. denied*, 471 U.S. 1066 (1985); *Olsen*, 729 F.2d at 651 (allegation of damage cap in foreign forum does not sustain burden).

113. *Marina Salina Cruz*, 649 F.2d at 1273.

114. See, e.g., *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 387 (9th Cir.) (Florida not practical alternative for Washington resident plaintiffs due to physical and financial burdens), *cert. granted*, 111 S. Ct. 39 (1990); *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 399 (9th Cir. 1983) (German court impractical for Oregon resident); see also *Hedrick*, 715 F.2d at 1359 (Japanese court not practical alternative for Oregon resident).

115. See *Brainerd v. Governors of the Univ. of Alberta*, 873 F.2d 1257, 1260 (9th Cir. 1989); *Sinatra*, 854 F.2d at 1201.

116. *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 400 (9th Cir. 1981); see *Fields*, 796 F.2d at 302 (plaintiff conceded the availability of alternate court).

117. See *infra* text accompanying notes 148-67.

should normally try the case."¹¹⁸

The "efficient resolution" interest takes several forms, emphasizing (1) the preference for the forum where the injury occurred and/or where the witnesses reside, (2) the avoidance of piecemeal litigation, and (3) the role of choice of law principles.

1. *Situs of the Inquiry*

When the forum is the place where the claim arose,¹¹⁹ where all or most likely witnesses reside,¹²⁰ or where critical evidence exists,¹²¹ litigating the lawsuit in such a forum seems reasonable. One court observed, however, that giving undue preference to these concerns "improperly ignore[s] the fact that modern transportation reduces the burden of travel for out-of-forum witnesses"¹²² If the place of the injury differs from the actual or alleged locales for potential trial witnesses and evidence, a troublesome balancing is necessary. "No matter in which state the case is ultimately resolved, the system is going to experience some inefficiency in having one side travel to the other's forum state to litigate some phase

118. *Raffaele*, 707 F.2d at 399; see also *Cabbage v. Merchant*, 744 F.2d 665, 671-72 (9th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

119. Compare *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir.) (jurisdiction reasonable where lawsuit filed), *cert. denied*, 110 S. Ct. 83 (1989) with *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 377 (5th Cir. 1987) (forum unreasonable when claim arose in another state) and *Brand v. Menlove Dodge*, 796 F.2d 1070, 1075 (9th Cir. 1986) (same) and *Pacific Atl. Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1331 (9th Cir. 1985) (forum unreasonable when claim arose in Malaysia) and *Rocke*, 660 F.2d at 399-400 (forum unreasonable when claim arose in Quebec).

120. Compare *Brown v. Flowers Indus., Inc.*, 688 F.2d 328, 334 (5th Cir. 1982) (jurisdiction reasonable in forum when all witnesses live there), *cert. denied*, 460 U.S. 1023 (1983) and *Hayworth v. Beech Aircraft Corp.*, 690 F. Supp. 962, 966 (D. Wyo. 1988) (jurisdiction reasonable when important fact witnesses live in forum) with *Willis v. Willis*, 655 F.2d 1333, 1338 (D.C. Cir. 1981) (jurisdiction unreasonable in forum when most parties and witnesses live in Ohio) and *Blue Ball Properties v. McClain*, 658 F. Supp. 1310, 1320-21 (D. Del. 1987) (jurisdiction unreasonable in Delaware when most potential witnesses reside in Maryland or Virginia and plaintiff presented no evidence that its witnesses live in Delaware).

121. Compare *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 315 (9th Cir. 1987) (almost all relevant documents located in forum) and *Olsen v. Government of Mex.*, 729 F.2d 641, 650 (9th Cir.) (forum is richest source of physical evidence and documents), *cert. denied*, 469 U.S. 917 (1984) with *Paccar Int'l, Inc. v. Commercial Bank of Kuwait*, 757 F.2d 1058, 1066 (9th Cir. 1985) (most evidence located in Kuwait) and *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981) (most documents and physical evidence located in Mexico) and *Stephens v. Coleman*, 712 F. Supp. 1571, 1577 (N.D. Ga. 1989) (Georgia forum unreasonable when most records located in Washington), *aff'd*, *Stephens v. Department of Health and Human Servs.*, 901 F.2d 1571 (11th Cir.), *cert. denied*, 111 S. Ct. 555 (1990).

122. *Corporate Inv. Business Brokers v. Melcher*, 824 F.2d 786, 791 (9th Cir. 1987). See *supra* text accompanying notes 42-44 (advances in transportation and communication reduce the burden for a nonresident defendant to litigate).

of the case."¹²³ For example, in *Rigdon v. Bluff City Transfer & Storage Co.*,¹²⁴ a nonresident defendant claimed that jurisdiction in a Nevada court was unreasonable because all of its witnesses lived in Tennessee and Indiana. The federal district court believed instead that the most important witnesses in this breach of contract case were local Nevada doctors, insurance agents, and investigators involved in the case.

In a products liability case, the Eleventh Circuit noted that if the witnesses to and the evidence of a product's design and repair were situated outside the forum, but the witnesses to establish the product's chain of custody following its repair were situated in the forum, other forums could not be deemed "demonstrably better" for the efficient resolution of the case.¹²⁵

The Ninth Circuit took a similar approach in *Decker Coal Co. v. Commonwealth Edison Co.*,¹²⁶ where the circumstances leading to the defendant's decision to invoke a *force majeure* contract provision occurred at its plants in Illinois and Indiana. The plaintiff's injury occurred in the forum, and the reviewing court found that an efficient resolution of the case could be obtained either in the forum or in Illinois.¹²⁷

In another Ninth Circuit case, *Sinatra v. National Enquirer, Inc.*,¹²⁸ witnesses who established that defamatory statements were made resided in Switzerland and throughout the United States.¹²⁹ All witnesses who established the value of the alleged defamatory newspaper article to the defendant and the value of the plaintiff's good name were in the United States.¹³⁰ As between the American forum selected by the plaintiff and a Swiss court, the Ninth Circuit found that efficiency weighed in favor of jurisdiction in a United States court.

Finally, a court is likely to conclude that the just and efficient conduct of a lawsuit will be served because the Judicial Panel on Multidis-

123. *Rhode Island Hosp. Trust Nat'l Bank v. San Gabriel Hydroelectric Partnership*, 667 F. Supp. 66, 72 (D.R.I. 1987); *see Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861, 865 (D.R.I. 1987) ("resolution of this case is hardly likely to be expedited were it to be litigated in the only other conceivable forum . . .").

124. 649 F. Supp. 263, 269 (D. Nev. 1986).

125. *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988); *see Shute v. Carnival Cruise Lines*, 897 F.2d 377, 386-87 (9th Cir.) (forum deemed more efficient than others even though injury and at least one witness lived elsewhere), *cert. granted*, 111 S. Ct. 39 (1990).

126. 805 F.2d 834 (9th Cir. 1986).

127. *Id.* at 841. In *Horne v. Adolph Coors Co.*, 684 F.2d 255, 260 (3d Cir. 1982), the court held that jurisdiction was reasonable after finding that the legal issues did not require "witnesses from any particular locality."

128. 854 F.2d 1191 (9th Cir. 1988).

129. *Id.* at 1200.

130. *Id.*

strict Litigation already has decided that the forum is best able to render the most efficient resolution of the controversy.¹³¹

2. *Avoidance of Piecemeal Litigation*

To avoid piecemeal litigation, a single adjudication of legal issues pertaining to the same series of events generally serves the "efficient resolution" of controversies.¹³² In "litigation involving numerous defendants from diverse geographic locations, it would be onerous and cumbersome to require the plaintiff to proceed separately against each defendant in the defendant's home forum, particularly given the strong federal interest in allowing for efficient conduct of a complex lawsuit."¹³³ Two courts have observed that if a single dispute can be resolved in one proceeding, the court with jurisdiction over some defendants should exercise jurisdiction over all defendants whenever it can.¹³⁴

By the time a trial court rules on a defendant's motion to dismiss for lack of personal jurisdiction or an appellate court reviews a trial court's ruling on the jurisdictional issue, the progress of the case or its relative progress compared to other lawsuits may suggest that the forum is the most efficient place to resolve the dispute.¹³⁵ For example, discovery may be complete and the trial of the case imminent.¹³⁶ The court's familiarity with the underlying transaction¹³⁷ or the prior consolidation of multiple lawsuits¹³⁸ filed in that district may persuade the court of the reasonableness of maintaining jurisdiction. This conclusion implies that judicial economy would not be served by dismissing the lawsuit because

131. *See, e.g., In re Air Crash Disaster at Gander, Newfoundland*, 660 F. Supp. 1202, 1215 (W.D. Ky. 1987); *see also* 28 U.S.C. § 1407 (1988), which sets up a Judicial Panel on Multidistrict Litigation and authorizes it to transfer cases pending in different districts to a single district for coordinated or consolidated pretrial proceedings.

132. *Violet v. Picillo*, 613 F. Supp. 1563, 1579 (D.R.I. 1985) ("matrix" of raised and prospective cross-claims and defenses heavily favors forum).

133. *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 850-51 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 1813 (1990); *see Entek Corp. v. Southwest Pipe & Supply Co.*, 683 F. Supp. 1092, 1099 (N.D. Tex. 1988) (exercising personal jurisdiction over nonresident defendants would avoid piecemeal litigation, with the alternative being separate lawsuits in other states).

134. *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 589 (5th Cir. 1982), *overruled on other grounds*, *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (1986), *aff'd*, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Wichita Fed. Sav. & Loan v. Landmark Group, Inc.*, 674 F. Supp. 321, 327 (D. Kan. 1987).

135. *Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269, 1273 (N.D. Ind. 1987).

136. *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

137. *Hanes Cos. v. Ronson*, 712 F. Supp. 1223, 1228 (M.D.N.C. 1988).

138. *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 387 (5th Cir.), *cert. denied*, 110 S. Ct. 83 (1989).

another court would only duplicate the prior efforts of the forum.¹³⁹ Occasionally, the existence of a parallel suit in another forum actually enables a court to compare the progress of the lawsuits in order to measure the achievement of judicial economy in permitting its case to proceed or to terminate in a dismissal.¹⁴⁰

A court may also define the efficiency of personal jurisdiction by gauging the effect of a dismissal upon the possible disposition of the case. For example, in *Dittman v. Code-A-Phone Corp.*,¹⁴¹ the court found no compelling efficiency argument that favored severing a third-party indemnity claim from the underlying claim.

In *Nixon v. Celotex Corp.*,¹⁴² the court found it expedient to name a parent corporation as a party defendant. Although relief from the wholly-owned subsidiary alone was possible, any damages recovered would affect the parent's financial interests.

In contrast to *Celotex*, a court may rule against jurisdiction because it doubts the plaintiff's ability to enforce a judgment against the foreign defendant. When a foreign country asserts sovereign immunity against a prospective judgment from an American court, for example, "this possibility bears on judicial efficiency conceived in terms of the effective resolution of the dispute."¹⁴³

3. *Role of Choice of Law Principles*

A federal district court applies the choice of law rules of the state in which it sits.¹⁴⁴ If the court determines that the forum state's substantive law applies to the case, then efficiency is served by proceeding in that forum. "The court most competent to interpret the applicable law should normally try the case."¹⁴⁵ It may be efficient, however, to litigate

139. See *Dentsply Int'l Inc. v. Pentron Corp.*, 648 F. Supp. 856, 860 (D. Del. 1986).

140. See *Lapeyrouse v. Texaco, Inc.*, 693 F.2d 581, 589 (5th Cir. 1982), *overruled on other grounds*, *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415 (5th Cir.), *aff'd*, *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

141. 666 F. Supp. 1269, 1273-74 (N.D. Ind. 1987).

142. 693 F. Supp. 547, 552 (W.D. Mich. 1988).

143. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1273 (9th Cir. 1981).

144. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

145. *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 399 (9th Cir. 1983); see *Fields v. Sedwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) (British contract governed by English law); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984) (Arizona forum more efficient than Phillipine court to resolve interpretations of Arizona law), *cert. denied*, 471 U.S. 1066 (1985); *Froning & Deppe, Inc. v. Continental Ill. Nat'l Bank & Trust Co.*, 695 F.2d 289, 294 (7th Cir. 1982) (Iowa court more skilled than Illinois court in interpreting Iowa law); *Advideo, Inc. v. Kimel Broadcast Group, Inc.*, 727 F. Supp. 1337, 1341 (N.D. Cal. 1989) (dispute governed by law of forum).

a case in another forum after a court determines¹⁴⁶ or the parties have agreed¹⁴⁷ that the law of that other forum applies, especially the law of another nation.

E. The Shared Interest of the Several States in Furthering Fundamental Substantive Social Policies

Asahi was the first Supreme Court case to attempt to explain “the shared interest of the several States in furthering fundamental substantive social policies.”¹⁴⁸ On a case-by-case basis, a court is to examine the substantive policies of other states or nations whose interests are affected by the assertion of jurisdiction by the forum state.¹⁴⁹ Few courts attempt to articulate this “fair play” aspect of the due process test for personal jurisdiction, instead omitting any reference to this factor. In turn, few of the courts willing to discuss the factor understand that the “shared interest” factor is a distinct consideration. Judicial discussions of this factor differ on its role depending upon whether the case is against a foreign or domestic defendant.

1. Foreign Defendants

Although the *Asahi* Court cautioned against extending state long-arm statutes against foreign defendants,¹⁵⁰ conflict with the sovereignty of a defendant’s state “is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court.”¹⁵¹ Nevertheless, courts are careful to recognize the “obvious”: “foreign nations present a higher sovereignty barrier than that between two states within [the] union.”¹⁵²

Judicial discussions of this factor do not always produce consistent conclusions. Successful invocations of the “shared interest” factor to

146. *Olsen v. Government of Mex.*, 729 F.2d 641, 650-51 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984); *Marina Salina Cruz*, 649 F.2d at 1273.

147. *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (contractual provision prescribed applicable law); *Willis v. Willis*, 655 F.2d 1333, 1338 (D.C. Cir. 1981) (same).

148. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

149. *Id.* at 115. When a defendant is a resident of a foreign nation, courts often refer to the “shared interest” factor as a “[c]onflict with [f]oreign [s]overeignty [i]nterests.” See *British-American Ins. Co.*, 828 F.2d at 1442, 1444.

150. *Asahi*, 480 U.S. at 115.

151. *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1333 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).

152. *Insurance Co. of N. Am. v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981). The international context also requires an assessment of the “Federal Government’s interest in its foreign relations policies.” *Asahi*, 480 U.S. at 115.

quash jurisdiction over foreign defendants have occurred when the subject of litigation is the conduct of a foreign corporation and by contract foreign law governs the case,¹⁵³ or when the defendant belongs to a foreign sovereign's agency.¹⁵⁴ Most discussions of this "shared interest" factor in the international context, however, support rather than undermine the reasonableness of jurisdiction. First, by default, the exercise of jurisdiction is proper when the foreign nation expresses no sovereign interest in the case and the defendant cites no foreign policy or political consideration to prevent the United States court from exercising jurisdiction.¹⁵⁵ Second, the "shared interests" of the United States may override foreign interests when the plaintiff's claim is based on questions of American federal law.¹⁵⁶ Likewise, the use of international procedural rules enhances the reasonableness of jurisdiction, thereby mitigating or eliminating foreign sovereign interests.¹⁵⁷ Finally, a court may conclude that sovereignty considerations weigh less heavily when the foreign defendant maintains a continuing business relationship through a domestic agent. For example, in *Sinatra v. National Enquirer, Inc.*,¹⁵⁸ the foreign defendant solicited business through advertisements and a toll-free information

153. *British-American Ins. Co.*, 828 F.2d at 1444 (the defendant maintained no officer, affiliate or subsidiary in the United States; the vice-president of a subsidiary happened to accept a check in the forum and thereby consummated the transaction in controversy).

154. *Marina Salina Cruz*, 649 F.2d at 1272. The facts in this case arose before the passage of the Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1988). The court also cited the physical location of the defendant in a foreign country as relevant to the reasonableness of jurisdiction. This suggestion merely restates the obvious—that the constitutional due process analysis is necessary when a plaintiff attempts to bring a nonresident defendant before the court. Similarly, asserting that the foreign residence of the defendants should be dispositive misses the point of the analysis—whether it is reasonable to subject a nonresident to the personal jurisdiction of a United States court. *See* *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981) (Canadian residency of defendants tends to undermine reasonableness of personal jurisdiction).

A foreign defendant may even prefer a forum in the United States instead of asserting a conflict between the American forum and the sovereignty of its home country. For example, in *Shute v. Carnival Cruise Lines*, 863 F.2d 1437, 1446 (9th Cir.), *cert. granted*, 111 S. Ct. 39 (1990), the court noted that despite a corporation's foreign residency, its preferred forum was its principal place of business in Florida.

155. *Raffaele v. Compagnie Generale Maritime*, 707 F.2d 395, 398 (9th Cir. 1983). The court gave no indication about how a nation could express its sovereign interest.

156. *Compare* *Gerber Garment Technology v. Lectra Sys., Inc.*, 699 F. Supp. 1576, 1581 (N.D. Ga. 1988) (patent infringement) *and* *Microsoft Corp. v. Very Competitive Computer Prods.*, 671 F. Supp. 1250, 1256 (N.D. Cal. 1987) (copyright infringement) *with* *Karsten Mfg. Corp. v. United States Golf Ass'n*, 728 F. Supp. 1429, 1436 (D. Ariz. 1990) (claim based on American antitrust law does not override foreign interests in a case concerning a resident of a foreign country).

157. *See* *S & S Screw Mach. Co. v. Cosa Corp.*, 647 F. Supp. 600, 611-12 (M.D. Tenn. 1986) (use of discovery procedures of the Hague Evidence Convention).

158. 854 F.2d 1191 (9th Cir. 1988).

line in the United States, both of which manifested an intent to serve and benefit from the American market. As a result, the court concluded that exercising jurisdiction over the foreign defendant presented no possibility of an interruption of or interference with international commerce.¹⁵⁹

2. *Domestic Defendants*

When the nonresident defendants are all from the United States, the discussion of the "shared interest" factor proceeds without any concern for international sovereignty issues. Some courts have attempted to define the scope of the "shared interest" in the context of specific cases. In *Violet v. Picillo*,¹⁶⁰ the court articulated the nature of the interest strongly favoring the forum in an environmental case:

[T]he several states of this nation surely share an important substantive interest in furthering policies designed to mitigate the widespread effects of improper management and disposal of hazardous chemical wastes. Each state's ability to utilize its own legal tools in this area, as well as those provided by the federal government, depends significantly on each state's ability to reach parties whose disposal activities have harmed its environment and its population. Because state (and local) treasuries have shouldered the greatest financial burden in cleaning up toxic waste sites where no solvent responsible party is locally available, there can be no doubt that this shared substantive interest is a powerful one.¹⁶¹

By contrast, in *Froning & Deppe, Inc. v. Continental Illinois National Bank & Trust Co.*,¹⁶² the federal appellate court sustained the dismissal of a third-party complaint against a nonresident bank that had accepted forged checks. The court held that maintaining personal jurisdiction

would positively *hinder* the underlying policies of the several states which favor the free flow of commerce and of interstate banking transactions in particular. Upholding jurisdiction here on either . . . theory would have the result of subjecting a bank to suit in any state from which a check cashed by one of its customers might originate, and would more broadly potentially subject anyone who did business with a large national corporation to suit in any state in which the corporation did business, irrespective of the individual's contacts with the state. Plainly, such a result would wreak havoc

159. *Id.* at 1200.

160. 613 F. Supp. 1563 (D.R.I. 1985).

161. *Id.* at 1579 (prima facie showing of jurisdiction). See *Buillion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990), in which the court noted society's interest in holding doctors to answer for tortious conduct in states where "they solicit and enlist volunteers for the consumption of experimental drugs."

162. 695 F.2d 289 (7th Cir. 1982).

upon the orderly conduct of interstate business.¹⁶³

Other courts have emphasized the reasonableness of jurisdiction when the shared interest of the several states corresponds with the forum's substantive interests—to ensure that valid contracts are not breached, for example. Because the forum state or one of its corporations has allegedly been damaged as a result of a contractual breach, the courts find that the forum's interests in enforcing the contract are greater than any alternative forum.¹⁶⁴

As interpreted by many courts, the “shared interest” factor repeats the forum state's interest or efficient resolution rationale with no apparent reference to the substantive social policies furthered by the states' shared interest, which are that (1) another state has no greater interest than the forum in resolving disputes involving harm to the forum's residents,¹⁶⁵ (2) there is no serious conflict with another state's sovereignty even though the subject of the dispute is or can be governed by the law of the other state,¹⁶⁶ or (3) the interest of the several states is best served by resolving claims against all defendants in one forum.¹⁶⁷

III. Conclusion

In American jurisprudence, the Supreme Court often announces a constitutional principle and leaves the task of interpretation and application to lower federal and state courts. This Article illustrates how those

163. *Id.* at 294 (emphasis in original). Similarly, in *Wells Am. Corp. v. Sunshine Elec.*, 717 F. Supp. 1121 (D.S.C. 1989), the court found that “unlike the overwhelming practicality and important social policy served by forcing insurers to defend suits in jurisdictions in which they regularly solicit business, . . . social policy would appear best served by allowing suit to proceed in the forum in which all business was solicited, Illinois.” *Id.* at 1129.

164. *Rhode Island Hosp. Trust Nat'l Bank v. San Gabriel Hydroelectric Partnership*, 667 F. Supp. 66, 72 (D.R.I. 1987) (denying motion to dismiss); *Marine Charter & Storage Ltd. v. Denison Marine, Inc.*, 701 F. Supp. 930, 937 (D. Mass 1988) (following *Rhode Island Hosp. Trust* with same result); see also *Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861, 865 (D.R.I. 1987) (only the forum state and one other had an interest in the substantive social policy underlying the dispute).

165. *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 315 (9th Cir. 1987) (reversing dismissal by trial court); *Hayworth v. Beech Aircraft Corp.*, 690 F. Supp. 962, 966 (D. Wyo. 1988) (denying motion to dismiss); see also *Cubbage v. Merchant*, 744 F.2d 665, 671 (9th Cir. 1984) (other forum did not express a stronger sovereignty interest in case), *cert. denied*, 470 U.S. 1005 (1985).

166. *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 285 (5th Cir. 1988) (resolution of conflicting social policies can be accommodated by choice-of-law rules); *Morris v. SSE, Inc.*, 843 F.2d 489, 495 (11th Cir. 1988) (same); *Rigdon v. Bluff City Transfer & Storage Co.*, 649 F. Supp. 263, 269 (D. Nev. 1986) (contract at issue governed by law of another state).

167. *Riordan v. Babcock & Wilcox Co.*, 705 F. Supp. 279, 281 (W.D. Pa. 1989) (denying motion to dismiss); see also *Paolino v. Channel Home Centers*, 668 F.2d 721, 725 (3d Cir. 1982) (reversing dismissal by trial court).

courts have interpreted and defined the Supreme Court's constitutional standard for exercising personal jurisdiction over a nonresident defendant. The Supreme Court's two-part due process standard requires a court to evaluate both the defendant's contacts with the forum and the reasonableness of subjecting the defendant to a binding judgment in that forum. If a plaintiff successfully persuades a court that the defendant has sufficient contacts, the court presumes that jurisdiction is reasonable. To avoid the exercise of jurisdiction by the court, the defendant must then rebut the presumption by using the foregoing discussion of the five "fair play" factors. Frequent judicial reliance upon the "fair play" factors persuasively supports this prong of the two-part constitutional standard, which continues to develop independently from the minimum contacts inquiry.

