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Does a Cartel Aim Expressly? Trusting Calder Personal Jurisdiction when Antitrust Goes Global?

Larry Dougherty

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DOES A CARTEL AIM EXPRESSLY? TRUSTING *CALDER*
PERSONAL JURISDICTION WHEN ANTITRUST
GOES GLOBAL

*Larry Dougherty**

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I. INTRODUCTION

Suppose your law firm represents CrabApple, the large, California-based manufacturer of the BuyPod, a portable digital music player. CrabApple also sells songs from its online music store, BuyTunes, for use on the BuyPod. One morning, a class-action antitrust lawsuit lands on your desk. It accuses CrabApple of illegal tying—because the BuyPod is

* J.D. expected 2009, University of Florida Levin College of Law; A.B. in philosophy, Princeton University. For Taylor and Stella, who sacrificed so much, and who make me a very lucky guy. I would also like to thank Professor William H. Page for his inspiration and assistance.

designed to play only music from BuyTunes, and BuyTunes songs only play on BuyPods.¹ CrabApple customers claim the tying has forced them to make unwanted purchases—BuyPod owners felt compelled to buy their music from BuyTunes, and anyone who wanted to use BuyTunes had to get a BuyPod. These consumers claim that the forced purchases damaged them. You recognize the name of plaintiffs’ law firm at the bottom of the complaint. The firm has a reputation for aggressive, well-funded, and protracted consumer litigation. The plaintiffs seek a treble-damage money judgment. They have filed the lawsuit in a federal district court in the state of West Dakota. You know West Dakota’s economy has long been mired in recession, due to factory and farm jobs going overseas. The judicial division is notorious among defense counsel for rogue juries and large plaintiffs’ verdicts. You fear the jury pool would have little inclination to treat your client fairly.

CrabApple has no connection to West Dakota. It has no stores or offices there, no property or bank account there, and none of its officers lives or works there. True, its products are purchased there, but the market is so small and depressed that you don’t think West Dakota even factors into CrabApple’s marketing plans. Yet despite this lack of contacts, plaintiffs are seeking personal jurisdiction over your client in West Dakota, based on the “effects test”² from *Calder v. Jones*.³ The lawsuit claims CrabApple “expressly aimed” its anticompetitive activity at West Dakota, creating effects that injured consumers there, and justifying the assertion of jurisdiction by the West Dakota court. You have twenty days to respond.

Farfetched? Maybe not. In *Calder*, the Supreme Court held that the tortious effects that a defendant “expressly aimed” at a forum, without ever

1. For a real-life analogue to this hypothetical, see *Slattery v. Apple Computer, Inc.*, No. 5:05-cv-00037-JW (N.D. Cal. filed Jan. 3, 2005). The filings for this case can be found online at Justia News, The Apple iPod iTunes Anti-Trust Litigation, <http://news.justia.com/cases/featured/california/candce/5:2005cv00037/26768/> (last visited July 14, 2008). One of the predecessor cases is *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2006). The lawsuits attack Apple’s failure to license its proprietary digital rights management (DRM) software, FairPlay, to competing online stores and player makers. See, e.g., *Tucker*, 493 F. Supp. at 1094. Licensing of the standard would enable iTunes customers to play the songs they purchase on players other than the iPod and allow iPod owners to play songs purchased from other music stores besides iTunes. *Id.*

2. See, e.g., *Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc.* (*In re Magnetic Audiotape Antitrust Litig.*), 334 F.3d 204, 208 (2d Cir. 2003) (reading *Calder* for authority that a court may exercise effects-test personal jurisdiction over defendant consistent with due process when defendant is a primary participant in a meeting outside the United States to allegedly direct price-fixing in the United States). The effects-test inquiry for personal jurisdiction is distinct from the effects-test inquiry for antitrust subject matter jurisdiction. IB PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 266d2, 272c (3d ed. 2006).

3. 465 U.S. 783 (1984).

setting foot there, could provide the basis for personal jurisdiction in that forum, even in the absence of the usual contacts, such as the presence of an office or employees.⁴ The underlying tort in *Calder* was libel—a *National Enquirer* story written in Florida, impugning actor Shirley Jones in her home state of California.⁵ But in the nearly twenty-five years since the Court announced *Calder*, plaintiffs have analogized and attempted to apply the *Calder* test to other torts, including tortious interference with business relationships,⁶ infringement of publicity,⁷ and antitrust violations.⁸

Calder required that a defendant “expressly aim[.]” its conduct at the forum.⁹ This requirement makes sense for the classic effects-test hypothetical—someone who fires a rifle while standing just inside the Nevada border, aiming at another person standing in California.¹⁰ But with the globalization of business blurring regional and national boundaries,¹¹

4. *Id.* at 789. While the phrase “expressly aimed” may be a logical tautology, no one has questioned its rhetorical punch.

5. *Id.* at 785.

6. *See, e.g.,* *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 256 (3d Cir. 1998) (denying *Calder* jurisdiction for allegations of tortious interference by a defendant based in Germany aimed at a company headquartered in New Jersey).

7. *See, e.g.,* *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 803–07 (9th Cir. 2004) (denying *Calder* jurisdiction for lack of express aiming by affirming the dismissal of Arnold Schwarzenegger’s suit for infringement of publicity against an Ohio car dealer who used pictures of Schwarzenegger’s film character the Terminator in Ohio newspaper ads without Schwarzenegger’s permission). For an article arguing *Schwarzenegger* was wrongly decided, see A. Benjamin Spencer, *Terminating Calder: “Effects” Based Jurisdiction In The Ninth Circuit After Schwarzenegger v. Fred Martin Motor Co.*, 26 WHITTIER L. REV. 197, 216–18 (2004) (claiming that the infringement of the California resident’s right of publicity, rather than the publication of newspaper ads in Ohio, was the tortious act expressly aimed at California).

8. *See, e.g.,* *Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc.* (*In re* Magnetic Audiotape Antitrust Litig.), 334 F.3d 204, 205 (2d Cir. 2003); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 817 (9th Cir. 1988) (denying *Calder* jurisdiction against English corporation since the contract in question, though signed by California plaintiffs, did not mention California and was not “purposefully directed” to instigate any tortious act or effect in California).

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

10. *See, e.g.,* Memorandum of Points and Authorities in Opposition to Motion to Quash Service of Summons for Lack of Jurisdiction at 2, *DVD Copy Control Ass’n v. McLaughlin*, No. CV-786804 (Cal. Super. Ct. Aug. 29, 2000), available at <http://cyber.law.harvard.edu/openlaw/DVD/filings/CA/opp-pavlovich-mot.html> (mentioning the bullet hypothetical).

11. One set of illustrations of the extent of globalization is available from the Swiss think tank KOF, which has aggregated worldwide economic, social, and political trends into bar graphs and animated maps. *See* KOF, INDEX OF GLOBALIZATION, WORLD REGION (2008), <http://globalization.kof.ethz.ch/> (click on “maps” tab; then click on “Display map”). “To suggest that antitrust and competition concepts are becoming more global is akin to suggesting that iPods might be more than a fad.” John M. Majoras, *Harmonizing the Globalization of Antitrust Laws*, METROPOLITAN CORP. COUNS., Oct. 2007, at 6. “Another noteworthy trend has been what some term the ‘Americanization’ of European private enforcement actions. EU Competition

it is harder to show that a business has expressly aimed its anticompetitive activity at a particular forum.¹² Thus, when companies serving national or international markets are antitrust defendants, the due process inquiry can become: When does aiming everywhere mean aiming nowhere? And in terms of the hypothetical at the beginning of this Note, the question is: Has CrabApple expressly aimed its conduct at West Dakota in a way that justifies its being haled into court there? The perverse result, according to some courts, is that the more widely you aim your anticompetitive conduct, the safer you are from *Calder* jurisdiction.¹³ The cynical advice to a cartel might be, “don’t aim too carefully.”

This Note suggests that while *Calder* jurisdiction fits well with some types of antitrust allegations, the *Calder* analogy weakens when charges of broad-based anticompetitive conduct collide with the long-arm statutes of particular states.¹⁴ The risk of forcing the analogy too far, of course, is

Commissioners have been calling for increased private enforcement for some time, and the 2006 green paper addressing the issues makes clear that there is an appetite for greater action.” *Id.*; see also William S. Dodge, *Antitrust and the Draft Hague Judgments Convention*, 32 LAW & POL’Y INT’L BUS. 363 (2001). Professor Dodge wrote:

Because U.S. courts exercise general jurisdiction based on contacts unrelated to a cause of action and because a foreign company is likely to have more contacts with the United States (especially if those contacts are assessed on a nationwide basis) than with a smaller country, U.S. courts will be able to exercise personal jurisdiction over foreign defendants in antitrust cases more often than courts in smaller countries. Similarly, because of the size of the United States, a foreign company is more likely to have assets in the United States against which an antitrust judgment can be enforced than it is to have assets in a smaller country.

Id. at 385.

12. Antitrust complaints now routinely address conduct in a wide variety of national and international markets including magnetic audiotape, see *Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc.* (*In re Magnetic Audiotape Antitrust Litig.*), 334 F.3d 204, 206 (2d Cir. 2003), bulk graphite, see *In re Bulk Extruded Graphite Prods. Antitrust Litig.*, Civ. No. 02-6030 (WHW), 2007 WL 1062979, at *1 (D.N.J. Apr. 4, 2007), and even livestock vitamins, see *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267, 1268 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1092 (2006).

13. See, e.g., *Nw. Aluminum Co. v. Hydro Aluminum Deutschland GmbH*, No. 02-398-JE, 2003 WL 23571744, at *4–5 (D. Or. Sept. 22, 2003) (noting that a strict application of *Calder* would produce the anomalous result that a court “would have jurisdiction over a small scale conspiracy aimed solely at an individual company within the United States market, but would lack jurisdiction to consider claims involving a large scale worldwide conspiracy that included numerous companies within the U.S.”); *Cole v. Tobacco Inst.*, 47 F. Supp. 2d 812, 815 (E.D. Tex. 1999) (rejecting defendant’s argument that “if its intentional wrongdoing was aimed at more than one state” then the *Calder* test was not satisfied and observing that such an outcome “goes against common sense. It implies that a party can avoid liability by multiplying its wrongdoing.”).

14. This Note only addresses specific jurisdiction, which *Calder* discussed.

a violation of due process.¹⁵ Part II of this Note reviews the facts and holding of *Calder*, and some of the key cases that followed it. Part III addresses the question of how the effects test might be different for antitrust complaints. Part IV reviews one type of anticompetitive conduct that seems to place particular strain on the *Calder* analogy—cartel practices whose effects are attacked in a particular state. Part V balances the due process argument for a narrow reading of *Calder* with policy considerations supporting a broader application of *Calder* to antitrust cases.

II. THE *CALDER V. JONES* EFFECTS TEST

The Supreme Court issued a number of landmark cases on personal jurisdiction in the 1980s,¹⁶ and given their influence, it first seemed that *Calder* might have to fight for attention. However, the flexibility of the *Calder* analysis, not to mention the appeal of its tabloid facts, helped increase its currency. This Part reviews the facts and holdings of *Calder*, and then raises five considerations important for a look at *Calder* today. First, it is important not to read *Calder* in isolation; in particular, the reasonableness analyses of *Burger King Corp. v. Rudzewicz*¹⁷ and *Asahi Metal Industries Co. v. Superior Court*¹⁸ play an important role in any question of personal jurisdiction. Second, plaintiffs have applied *Calder* jurisdiction ever more broadly—to other torts, to contract cases, and, in 2006, to a First Amendment case—even as courts continue to wrestle with the question of what *Calder* jurisdiction requires. Third is an initial look at *Calder*'s crucial requirement for “express aiming.” Fourth, *Calder*'s requirements for injury have produced a split in the circuits as to its extent. And lastly, analysis of the role of state long-arm statutes remains a key part of the personal jurisdiction inquiry, even though no long-arm statute was present in *Calder*. The number of these issues and their subtlety demand even more care than usual in the ordinary personal jurisdiction analysis.

15. The Due Process Clause of the Fourteenth Amendment controls a state court's exercise of personal jurisdiction over a defendant. See *Calder v. Jones*, 465 U.S. 783, 788 (1984).

16. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

17. 471 U.S. 462 (1985).

18. 480 U.S. 102 (1987).

A. Facts and Holding of the Case

In *Calder*,¹⁹ the Supreme Court held that a state could exercise personal jurisdiction over a defendant who had no ordinary contacts with the state, but who had directed the tortious effects of his conduct into the state.²⁰ The case concerned libel.²¹ The *National Enquirer* published a story in October 1979 claiming that actor Shirley Jones drank too heavily to fulfill her professional obligations.²² She filed a lawsuit in California Superior Court for libel, invasion of privacy, and intentional infliction of emotional harm.²³ The suit named the Florida-based newspaper and two of its Florida-based journalists as defendants.²⁴ The newspaper conceded jurisdiction,²⁵ but both the journalists moved to quash service of process, and the court ruled for them.²⁶ The state appellate court reversed, finding that the journalists' intentional actions in Florida injured Jones in California, so that jurisdiction was proper.²⁷

In affirming the finding of personal jurisdiction, the U.S. Supreme Court began its analysis with the Due Process Clause of the Fourteenth Amendment.²⁸ Under *International Shoe Co. v. Washington*,²⁹ the Court noted, a state may assert personal jurisdiction over a defendant who has "minimum contacts" with the state, as long as the "suit does not offend 'traditional notions of fair play and substantial justice.'"³⁰ To comport with *Shaffer v. Heitner*,³¹ the minimum contacts analysis must focus on "the

19. 465 U.S. 783 (1984).

20. *Id.* at 789. *Calder*, 465 U.S. at 789.

21. *Id.* at 785.

22. *Id.* at 788 n.9. In their brief to the U.S. Supreme Court, Jones' lawyers included the text of the offending article:

[M]illions of fans of her new TV show, "Shirley," don't realize that the seemingly bubbly star is really crying on the inside. . . . "[Jones' husband] has driven Shirley to drink," charged an inside source "She pours down vodka so fast that at first the crew thought she was drinking water. She starts blurring her lines and by 3 o'clock in the afternoon she's a crying drunk and they have to stop shooting."

Joint Appendix, *Calder*, 465 U.S. 783 (No. 82-1401), 1983 U.S. S. Ct. Briefs LEXIS 214, at *8-9.

23. *Calder*, 465 U.S. at 784-85.

24. *Id.* at 785-86.

25. *Id.* at 785.

26. *Id.* at 786.

27. *Id.* at 786-77.

28. *Id.* at 788.

29. 326 U.S. 310 (1945).

30. *Calder*, 465 U.S. at 788 (quoting *Int'l Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

31. 433 U.S. 186 (1977).

relationship among the defendant, the forum, and the litigation.”³² The Court noted that the plaintiff was the focus of the defendants’ activities that led to the suit.³³

The Court concluded that the forum state of California was the focal point of the challenged conduct.³⁴ The journalists drew on California sources to describe the California activities of a California resident.³⁵ The Court reached this conclusion even though the journalists had worked in Florida. The reporter John South resided in Florida and did most of his work on the article in Florida, calling sources in California for information.³⁶ Before the story ran, he called the actor’s home and read the story to her husband, to get his comments.³⁷ Although South had been to California numerous times, he strongly denied ever visiting California to report the Jones story.³⁸ The editor Iain Calder also lived in Florida.³⁹ He served as editor and president of the *National Enquirer*,⁴⁰ which was a Florida corporation with its principal place of business in Florida.⁴¹ Calder approved the initial story idea and edited its final draft.⁴² At the time of publication, Calder had only ever visited California once, on vacation.⁴³

Besides being the focal point of the challenged conduct, the Court held that California also was the focal point of the harm suffered.⁴⁴ The *National Enquirer* sold 600,000 of its 5-million issues in California—more than in any other state.⁴⁵ Jones lived in California, she experienced emotional distress and damage to her professional reputation in California, and her television career centered in California.⁴⁶

Moreover, the Court emphasized that the journalists knew the brunt of the effects of their work would be felt in California.⁴⁷ In their appeal, the

32. *Calder*, 465 U.S. at 788 (quoting *Shaffer*, 433 U.S. at 204).

33. *Id.* at 788 (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220 (1957)).

34. *Id.* at 789.

35. *Id.* at 788.

36. *Id.* at 785.

37. *Id.* at 785–86.

38. *Calder*, 465 U.S. at 785 nn.3–4.

39. *Id.* at 786. Celebrities fascinated the Scottish-born editor Calder. *See generally* IAIN CALDER, *THE UNTOLD STORY: MY 20 YEARS RUNNING THE NATIONAL ENQUIRER* (2004) (discussing the Gary Hart scandal, a camera hidden in a cummerbund, and the Elvis coffin photo, among other journalistic coups).

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

41. *Id.* at 785.

42. *Id.* at 786.

43. *Id.*

44. *Id.* at 789.

45. *Id.* at 785.

46. *Calder*, 465 U.S. at 788–89.

47. *Id.* at 789–90.

journalists had compared themselves to welders who supposedly worked in Florida on a boiler, which their employer subsequently shipped to California, where the boiler exploded.⁴⁸ The Court rejected this attempt to recast their conduct as “untargeted negligence.”⁴⁹

[T]heir intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote, and petitioner Calder edited, an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works, and in which the *National Enquirer* has its largest circulation.⁵⁰

Through the journalists’ conduct and their connection with California, the Court concluded that they should “reasonably anticipate being haled into court there” to answer for their actions.⁵¹ As a final point, the Court noted that each defendant’s contacts with a forum State must be evaluated separately.⁵² By finding personal jurisdiction over the journalists to be constitutional,⁵³ the Supreme Court found that the effects of the journalists’ work in California effectively served as a “contact” with California, even though the individual reporters’ traditional contacts with the forum were lacking.⁵⁴ Therefore, the effects test supplemented the customary analysis of contacts under *International Shoe*.⁵⁵ In sum, *Calder* premised a finding of personal jurisdiction on (1) an intentional act, (2) expressly aimed at the forum, and (3) causing harm, the brunt of which the defendant knew was likely to be felt in the forum.

B. *The Reasonableness Inquiry*

The *Calder* analysis presents a separate issue, not unique to antitrust—the need for a reasonableness inquiry when weighing personal jurisdiction. The U.S. Supreme Court announced *Calder* in 1984, a year

48. *Id.* at 789.

49. *Id.*

50. *Id.* at 789–90 (emphasis added).

51. *Id.* at 790 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). A month after the Court announced *Calder*, Shirley Jones and her husband settled their libel complaint against the *Enquirer* for an undisclosed sum. Aljean Harmetz, *National Enquirer Agrees To Settle With Shirley Jones in Libel Suit*, N.Y. TIMES, Apr. 27, 1984, at A17. The settlement included a retraction printed by the *Enquirer*, as well as the right for Jones and her husband to reprint the retraction in paid advertisements as they saw fit. *Id.*

52. *Calder*, 465 U.S. at 790.

53. *Id.* at 789–91.

54. *Id.* at 785–86.

55. *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

before *Burger King*⁵⁶ and three years before *Asahi*.⁵⁷ The latter cases crystallized the reasonableness factors necessary for a personal jurisdiction decision to meet the “fair play and substantial justice” test of *International Shoe*.⁵⁸ *International Shoe* required not only minimum contacts, but fair play and substantial justice, for a finding of personal jurisdiction.⁵⁹ The *Calder* court seemed to anticipate this test by noting that “[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.”⁶⁰ The *Burger King* and *Asahi* cases, following shortly after *Calder*, made this reasonableness requirement clearer. Yet courts applying *Calder* to antitrust cases do not always make explicit the reasonableness test.⁶¹ Moreover, *Burger King* stated that the reasonableness analysis operates on an equal footing with minimum contacts, as either a complement or a counterweight, such that a finding of one can supplement or negate a finding of the other.⁶² It is clear, then, that a finding of *Calder* jurisdiction is only the first step of the inquiry. Courts also have to apply the reasonableness analysis refined in *Burger King* and *Asahi*.

C. How Courts Have Applied Calder

In applying *Calder* to claims besides libel, some courts have focused on the nature of the intentional act, and whether the claim sounds in contract, tort, or another doctrine.⁶³ *Calder* itself clearly stated it did not

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

57. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (listing reasonableness factors as “the burden on the defendant, the interests of the forum State, and the plaintiff’s interest in obtaining relief” as well as “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” (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980))).

58. *Int’l Shoe Co.*, 326 U.S. at 316.

59. *Id.*

60. *Calder v. Jones*, 465 U.S. 783, 790 (1984).

61. *See, e.g., Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc. (In re Magnetic Audiotape Antitrust Litig.)*, 334 F.3d 204, 208 (2d Cir. 2003) (ordering additional discovery to see if a *Calder* analysis could justify the assertion of personal jurisdiction, while making no mention of a reasonableness inquiry).

62. *Burger King Corp. v. Rudzewicz*, 471 U.S. 477–78 (1985). (“[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. . . . [J]urisdictional rules may not be employed in such a way as to make litigation ‘so gravely difficult and inconvenient’ that a party unfairly is at a ‘severe disadvantage’ in comparison to his opponent.” (citations omitted)).

63. *See, e.g., County of Stanislaus v. Pac. Gas & Elec. Co.*, No. CV-F-93-5866-OWW, 1995 WL 819149, at *4–5 (E.D. Cal. Dec. 18, 1995) (rejecting defendant’s claim that the Ninth Circuit disapproved the application of *Calder* to antitrust cases, or to any cases “beyond a narrow class of

apply to negligence.⁶⁴ In recent years, *Calder* has been extensively applied to a variety of claims accruing via the Internet.⁶⁵ The Ninth Circuit has read *Calder* broadly, applying it to tort claims of infringement of publicity⁶⁶ and product liability,⁶⁷ as well as contract⁶⁸ claims, and, in 2006, a claim involving the First Amendment.⁶⁹

The federal circuit courts have cast *Calder* in different ways. The Third Circuit, in a 1998 case concerning tortious interference, stated the *Calder* requirements this way:

First, the defendant committed an intentional tort. Second, the forum was the focal point of the harm suffered by the plaintiff as a result of that tort. Third, the forum was the focal point of the tortious activity in the sense that the tort was “expressly aimed” at the forum. Essential was a corollary finding that the defendants knew that the “brunt” of the injury caused by their tortious acts would be felt by the plaintiff in the forum.⁷⁰

In that case, the Third Circuit pointed out that the circuits had split on the issue of locating the injury under *Calder*.⁷¹ When analyzing for *Calder*

tort cases that involve almost exclusively libel and slander claims,” and finding *Calder* jurisdiction over Canadian natural gas reseller who primarily focused on serving California customers); *see also* Bell Helicopter Textron, Inc. v. C & C Helicopter Sales, Inc., No. 3:00-CV-1516-X, 2001 WL 290569, at *4–5 (N.D. Tex. Mar. 21, 2001) (citing *Calder*, Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998), and *Guidry v. U.S. Tobacco Co.*, 188 F.3d 619 (5th Cir. 1999)) (“[T]he dilution of trademark and trademark counterfeiting causes of action are not the sort of ‘aimable’ intentional torts that were present in *Calder* (libel), *Panavision* (trademark extortion), or *Guidry* (fraud and misrepresentation).”).

64. *Calder*, 465 U.S. at 789; *see also* Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 264 (3d Cir. 1998) (“*Calder* clearly was clearly [sic] not concerned with negligence . . .”).

65. *See, e.g.*, TiTi Nguyen, Note, *A Survey of Personal Jurisdiction Based on Internet Activity: A Return to Tradition*, 19 BERKELEY TECH. L.J. 519 (2004) (concluding that many courts have reverted to *Calder* and other “traditional” paradigms when weighing personal jurisdiction in Internet-related litigation).

66. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 799 (9th Cir. 2004).

67. *Pac. Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 n.1 (9th Cir. 1985) (noting that the broader finding of jurisdiction in products liability cases was due to the “strong state interest in protecting its citizens against harmful products”).

68. *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1395 (9th Cir. 1986).

69. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006).

70. *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998) (denying *Calder* jurisdiction for allegations of tortious interference aimed at a company headquartered in New Jersey).

71. *Id.* at 261–65. For more discussion of the various circuit courts’ approaches to the injury issue, *see infra* Part II.e.

jurisdiction, the Ninth Circuit noted, “[t]he substance, not form, of the defendant’s activities is dispositive.”⁷² The Ninth Circuit has also said that *Calder* requires “something more” than mere foreseeability to justify a finding of jurisdiction.⁷³ While *Calder* has clearly been applied to a wide variety of claims, courts must be cautious about a “one size fits all approach.” There are several reasons why antitrust places a particular strain on the *Calder* analogy,⁷⁴ and arguably the most important one involves *Calder*’s requirement for express aiming.

D. Express Aiming, Asahi, and “Without More”

Calder’s requirement for express aiming may be its most distinctive feature, and one that has proved inconsistent in its application. While a fuller discussion of express aiming as applied to antitrust will follow,⁷⁵ it is important to note that *Calder* jurisdiction has at least some overlap with the Court’s stream of commerce analysis in *Asahi*.⁷⁶ While the *Asahi* Court split and its pluralities failed to advance a single theory, the O’Connor plurality found that “[t]he placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State.”⁷⁷ The something “more,” the Court wrote, might be marketing, advertising, service, or design done with the forum in mind.⁷⁸ The Eighth Circuit compared the holdings of *Asahi* and *Calder* when deciding a question of personal jurisdiction in a trademark

72. *Haisten*, 784 F.2d at 1398. Despite the *Haisten* court’s emphasis on substance over form, the Ninth Circuit went on to state in 2004 that “availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract. A purposeful direction analysis, on the other hand, is most often used in suits sounding in tort.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citations omitted). The functional difference of the Ninth Circuit’s distinction between availment and direction, for purposes of *Calder* jurisdiction, is not immediately apparent.

73. *Schwarzenegger*, 374 F.3d at 805 (quoting *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

74. *See infra* Part IV.

75. *See infra* Part III.b.

76. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109–13 (1987).

77. *Id.* at 112 (emphasis added).

78. *Id.* In personal jurisdiction analyses, courts sometimes seem to repeat and modify the “without more” language of *Asahi* with the phrase “something more.” *See, e.g., Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1020–21 (9th Cir. 2002) (finding that local newspaper advertising in the forum state was the “something more” that tipped the scales for assertion of personal jurisdiction over a largely passive Internet site, thereby creating a *Calder*-style effect that satisfied the “purposeful availment” prong of the specific jurisdiction test).

infringement case.⁷⁹ Such reasoning highlights the extent to which the two theories are cousins in the realm of personal jurisdiction theory.

E. Locating the Injury Under Calder

A separate issue in the cases citing *Calder* was whether the brunt of injury had to accrue in the forum. The Supreme Court in *Calder* held that the forum state California was the focus of the harm suffered.⁸⁰ However, lower courts have subsequently varied this requirement. In the 2006 case, *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*,⁸¹ the Ninth Circuit, noting its varying positions in the past on this question, announced that going forward it would *not* require the brunt of *Calder* harm to be suffered in the forum.⁸² A Seventh Circuit opinion also seemed to adopt a more flexible standard for injury, holding in 1997 that “the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor.”⁸³

The Third Circuit, however, has applied *Calder*'s injury requirement more narrowly. In reviewing a claim of tortious interference with business relationships, the Third Circuit held in 1998 in *Imo Industries, Inc. v. Kiekert AG*⁸⁴ that *Calder* required that the brunt of the injury be felt in the forum state of New Jersey, and that the defendant had to know the brunt of the harm would fall there.⁸⁵ The *Imo* court cited decisions from the Tenth,⁸⁶ Fifth,⁸⁷ and Fourth⁸⁸ circuits for the proposition that *Calder* is not satisfied by “the mere allegation that the plaintiff feels the effect of the defendant’s tortious conduct in the forum because the plaintiff is located there.”⁸⁹ Holding otherwise would “carve out a special intentional torts

79. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991) (finding *Calder* analogized more closely than *Asahi* to an allegation of intentional trademark infringement); *see also* *iAccess, Inc. v. WEBcard Techs., Inc.*, 182 F. Supp. 2d 1183, 1186 (D. Utah 2002) (reading *Asahi* and *Calder* together for the requirement that the defendant “expressly aimed” or “intentionally directed” alleged tortious interference with business relations at residents of the forum state).

80. *Calder v. Jones*, 465 U.S. 783, 789 (1984).

81. 433 F.3d 1199 (9th Cir. 2006).

82. *Id.* at 1207. The Ninth Circuit cited as authority for its conclusion the U.S. Supreme Court’s decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), announced the same day as *Calder v. Jones*. In *Keeton*, the Court upheld a finding of personal jurisdiction in New Hampshire even though “[i]t is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire.” *Yahoo!*, 433 F.3d at 1207 (quoting *Keeton*, 465 U.S. at 780).

83. *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997).

84. 155 F.3d 254 (3d Cir. 1998).

85. *Id.* at 265–66.

86. *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1080 (10th Cir. 1995).

87. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772–73 (5th Cir. 1988).

88. *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625–26 (4th Cir. 1997).

89. *Imo*, 155 F.3d at 263.

exception to the traditional specific jurisdiction analysis.”⁹⁰ Such a finding, for example, would confer personal jurisdiction in a forum where a plaintiff corporation incurred lost profits as the result of a business arrangement.⁹¹ The upshot of the Third Circuit’s narrow reading of injury location in *Imo* could be that antitrust plaintiffs there could have a harder time establishing *Calder* jurisdiction over defendants.

F. Interaction with State Long-arm Statutes

The Court in *Calder* ruled solely on the constitutionality of the state court’s assertion of effects-test personal jurisdiction.⁹² Since California law permits courts to find personal jurisdiction to the same extent allowed by the U.S. Constitution, there was no analysis of a state long-arm statute.⁹³ Likewise, many antitrust cases avoid consideration of a long-arm statute, as many antitrust suits, particularly those involving international conspiracies, are brought under § 12 of the Clayton Act,⁹⁴ which provides for worldwide service of process against antitrust defendants.⁹⁵ The process provision effectively serves as a broad grant of personal jurisdiction against antitrust defendants: “The ensuing minimum contacts analysis looks to a corporation’s contacts with the United States as a whole,” in applying the Due Process Clause of the Fifth Amendment.⁹⁶ Therefore, antitrust plaintiffs seeking *Calder* jurisdiction in those cases do not have to contend with a state long-arm statute.

In other antitrust fact patterns, however, the role of a state long-arm statute looms large. Courts have indicated that restrictive language of state long-arm statutes can further limit the reach of *Calder* jurisdiction over antitrust defendants, as in *In re Vitamins Antitrust Litigation*.⁹⁷ This Note discusses the issues implicated by this case in Part IV.

90. *Id.* at 265.

91. *Id.* at 263.

92. *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

93. *Id.* at 786 n.5.

94. 15 U.S.C. § 22 (2000).

95. *Id.* The circuit courts of appeal have split on the question of whether § 12’s venue provision must be satisfied *before* invoking its worldwide service-of-process provision. For an excellent discussion of this issue, see Jordan G. Lee, Note, *Section 12 of the Clayton Act: When Can Worldwide Service of Process Allow Suit in Any District?*, 56 FLA. L. REV. 673 (2004), cited with approval in *Ky. Speedway, LLC v. NASCAR*, 410 F. Supp. 2d 592, 600–01 (E.D. Ky 2006) (“This court agrees with the view expressed in the conclusion of the *Florida Law Review* article . . .”).

96. *Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc.* (*In re Magnetic Audiotape Antitrust Litig.*), 334 F.3d 204, 207 (2d Cir. 2003).

97. *In re Vitamins Antitrust Litig.*, Misc. No. 99-197, 2001 U.S. Dist. LEXIS 25073 (D.D.C. Oct. 30, 2001). For a discussion of the issues implicated by this case, see *infra* Part IV.a.

In summary, it is clear that a proper application of *Calder* requires more than the three-part test from the case law. Reasonableness must be considered, as well as any applicable long-arm statute. For some cases these additional factors can be decisive. But first another question arises: Do the particular features of antitrust subject matter change the *Calder* jurisdiction analysis? Likely they do, for as the *Imo* court wrote, “*Calder*’s holding cannot be severed from its facts.”⁹⁸

III. THE EFFECTS TEST: DIFFERENT FOR ANTITRUST?

Is *Calder* jurisdiction different for antitrust allegations? Or to put the question much more generally, how much does a lawsuit’s subject matter modulate the personal jurisdiction analysis? For *Calder*, the snap answer is that the conduct *is* the contact. As courts have analogized *Calder* to other cases, they have wrestled with the extent to which the subject matter affects personal jurisdiction. Some antitrust plaintiffs have successfully obtained *Calder* jurisdiction over defendants in federal district courts.⁹⁹ Others have not.¹⁰⁰ This Part has three divisions. The first is a brief

98. *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 261 (3d Cir. 1998).

99. *See, e.g., CDI Int’l, Inc. v. Marck*, No. 04-4837, 2005 WL 146890, at *3 (E.D. Pa. Jan. 21, 2005) (finding effects-test personal jurisdiction over Ohio competitor for directing theft of importer’s trade secrets from trash in Pennsylvania, and interfering with supplier relationship, and noting “[t]he *Calder* ‘effects test’ recognizes that the ‘unique relations among the defendant, the forum, the intentional tort, and the plaintiff may under certain circumstances render the defendant’s contacts with the forum—which would otherwise not satisfy the requirements of due process—sufficient’” (quoting *Imo*, 155 F.3d at 265)); *Midland v. F. Hoffman-Laroche, Ltd. (In re Vitamins Antitrust Litig.)*, 270 F. Supp. 2d 15, 32 (D.D.C. 2003) (finding effects-test personal jurisdiction over defendant in Kansas and Illinois for fixing prices of vitamin ingredient, and noting that “the Illinois construction of the ‘effects test’ is among the most broad”); *Gardner v. Clark*, 101 F. Supp. 2d 468, 476 (N.D. Miss. 2000); *Snow v. Am. Morgan Horse Ass’n*, No. 93-463-JD, 1989 WL 508485, at *7 (D.N.H. Sept. 20, 1989) (finding plaintiff horse breeder contesting expulsion by competitors from registry “has adequately alleged that the investigation was an intentional act aimed at the plaintiff’s business” in the forum state); *Velcro Group Corp. v. Billarant*, 692 F. Supp. 1443, 1448 (D.N.H. 1988).

100. *See, e.g., Fleury v. Cartier Int’l*, No. C-05-4525 EMC, 2006 WL 2934089, at *3 (N.D. Cal. Oct. 13, 2006) (denying *Calder* jurisdiction against French company because allegations failed to show it purposefully directed action at the United States to instigate a tying scheme in Cartier watch parts); *Pokermatic Inc. v. Pokertek, Inc.*, No. 06-3258, 2006 WL 2803037, at *6 (E.D. Pa. Sept. 27, 2006) (denying *Calder* jurisdiction in Pennsylvania and noting plaintiff “‘ignores the critical difference between an act which has an effect in the forum and one directed at the forum itself’” (quoting *Surgical Laser Techs., Inc. v. C.R. Bard, Inc.*, 921 F. Supp. 281, 285 (E.D. Pa. 1996))); *Am. Copper & Brass, Inc. v. Mueller Eur., Ltd.*, 452 F. Supp. 2d 821, 829 (W.D. Tenn. 2006) (“Plaintiffs’ collection of irrelevant facts, conclusory statements, and bald allegations falls well short of a showing that Mueller Europe ‘expressly aimed’ its conduct at the forum”); *Nw. Aluminum Co. v. Hydro Aluminum Deutschland GmbH*, No. 02-398-JE, 2003 WL 23571744, at *5 (D. Or. Sept. 22, 2003) (denying *Calder* jurisdiction for plaintiffs’ failure to show they suffered direct harm from subsidiary of German corporation’s alleged fixing of prices for carbon cathode

consideration of how the tort of antitrust fits into the *Calder* framework, with attention to the unique nature of antitrust injury. Second is a review of the interaction of antitrust allegations with *Calder*'s key requirement for express aiming. The last is a discussion of how the distinction between the two most basic types of antitrust violations—cartel conduct and exclusionary conduct—might affect the outcome in *Calder* jurisdiction analyses.

A. *Antitrust and Libel: An Odd Couple of Torts?*

The problems of analogizing the effects test to anticompetitive behavior flow largely from the fact that *Calder* involved the distinct tort of libel. So some comparing and contrasting of these torts helps. Antitrust is also a tort¹⁰¹—a doctrine of civil reparation, with an analogue in the criminal law.¹⁰² Moreover, antitrust and libel both are intentional torts. *Calder* itself and some of the following cases made it clear that *Calder* jurisdiction would not apply to allegations of negligence.¹⁰³

block as required by the Ninth Circuit's effects test); *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1348 (S.D. Fla. 2002) ("Unlike California in *Calder*, there has been no showing that Florida was the focal point of either Altadis, S.A.'s alleged illegal activities or the alleged harm suffered by Plaintiff. . . . The minimum contacts requirement of the Due Process Clause would be worthless if foreign defendants could be brought before a court in Florida merely by alleging 'illegal effects within the United States.' Accordingly, the Court finds that Plaintiff has failed to establish that Altadis, S.A. has purposely availed itself of the privilege of conducting business in Florida."); *Mgmt. Insights, Inc. v. CIC Enters., Inc.*, 194 F. Supp. 2d 520, 526 (N.D. Tex. 2001) (declining to find *Calder* jurisdiction because of lack of express aiming towards Texas, and because plaintiff's presence in forum was "mere fortuity" and finding that "[t]o hold otherwise would be to destroy altogether the limits imposed by due process" (citing *Bell Helicopter Textron, Inc. v. C & C Helicopter Sales, Inc.*, No. 3:00-CV-1516-X, 2001 WL 290569, at *3–4 (N.D. Tex. Mar. 21, 2001))); *Sea-Roy Corp. v. Parts R Parts*, No. 1:94CV00059, 1995 U.S. Dist. LEXIS 21859, at *32–34 (M.D.N.C. Aug. 15, 1995) (failure to show express aiming at forum); *Kane Commc'ns, Inc. v. Klombers*, No. 87-6594, 1988 WL 26462, at *4 (E.D. Pa. Mar. 10, 1988).

101. See, e.g., *Williams Elec. Co. v. Honeywell, Inc.*, 854 F.2d 389, 394 (11th Cir. 1988); *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030 (WHW), 2006 WL 1084093, at *7 (D.N.J. Apr. 24, 2006).

102. The Sherman Act provides both civil and criminal penalties for antitrust violations. 15 U.S.C. § 1 (Supp. IV 2004). Therefore, antitrust superficially resembles other torts like battery, assault, or false imprisonment, all of which have analogues in the criminal law. To this extent, libel may be slightly anomalous. "Many people have argued that criminal libel laws are unconstitutional, but the Supreme Court has never so held." Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1124822280.shtml> (Aug. 23, 2005, 2:38 EST). The Supreme Court's last relevant decision, *Garrison v. Louisiana*, reversed a criminal libel conviction. 379 U.S. 64, 77–79 (1964). However, the case "did not go further and suggest that all criminal libel laws are per se impermissible." Posting of Eugene Volokh, *supra*.

103. *Calder v. Jones*, 465 U.S. 783, 789 (1984); see also *Imo*, 155 F.3d at 264 ("*Calder* clearly was clearly [sic] not concerned with negligence . . .").

As a tort, antitrust encompasses a wide array of behavior. Section 2 of the Sherman Act forbids conduct in support of the illegal acquisition or maintenance of monopoly power¹⁰⁴—presumably because of the effects of monopoly on consumer welfare.¹⁰⁵ But a § 1 violation may be more complicated in its presentation. Section 1 of the Sherman Act forbids unreasonable “contracts, combinations or conspiracies” in restraint of trade.¹⁰⁶ Therefore, the § 1 antitrust offense is an agreement—an agreement to fix prices or divide sales territories, for instance. In other words, the violation is a contract or quasi-contract deemed illegal and unenforceable as a matter of public policy. A § 1 violation might in some cases present itself as a contract, possibly eluding the application of *Calder* when warranted, if a court focuses too much on the form rather than the substance of the conduct.¹⁰⁷

A tort is all about the injury, of course, and by this measure the differences between libel and antitrust violations provide a little contrast. Libel redresses injury to a plaintiff’s reputation. Antitrust, however, remedies injury to competition¹⁰⁸—an even more intangible idea. The

104. 15 U.S.C. § 2 (Supp. IV 2004).

105. Circuit Judge Learned Hand wrote in *Alcoa* that:

[E]ven though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.

United States v. Aluminum Co. of Am., 148 F.2d 416, 427 (2d Cir. 1945).

106. 15 U.S.C. § 1 (Supp. IV 2004).

107. For further discussion of the form/substance distinction, see *supra* notes 63–72 and accompanying text. In *McGlinchy*, the *Calder* analysis focused on the alleged anticompetitive effect of a contract signed by the parties. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 817–18 (9th Cir. 1988). On the other hand, there is perhaps at least one type of *per se* § 1 violation to which *Calder* could never properly be applied—an illegal agreement without effect. *Socony Vacuum*’s famous footnote 59 interpreted § 1 to forbid price-fixing agreements as *per se* illegal, even if the agreeing parties lack the power to put the agreement into effect in the market. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The lack of effect anywhere would preclude the assertion of *Calder* jurisdiction in a foreign forum. As a practical matter, such an agreement would probably never be the subject of civil or criminal prosecution.

108. Antitrust’s specific requirements for injury have generated much commentary. See, e.g., Jeffrey L. Harrison, Essay, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 215 (2007) (“The plaintiff’s interest and the public’s interests (in more competitive markets) must be aligned for the plaintiff to have standing.”); Simon A. Rodell, Comment, *Antitrust Law: The Fall of the Morton Salt Rule in Secondary-Line Price Discrimination Cases*, 58 FLA. L. REV. 967, 974–75 (2006) (describing the Supreme Court’s uncoupling of competitor injury from the injury-to-competition damage analysis for one type of Robinson-Patman

seminal case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*¹⁰⁹ held antitrust law specifically does *not* protect a competitor who suffers financial loss resulting from legal competition.¹¹⁰ A court applying *Calder* to an antitrust complaint needs to make sure that the injurious effect is one covered by the antitrust law. In *Brunswick*, the maker of bowling alley equipment bought a number of financially struggling bowling alleys in New Jersey during a time of decreased popularity of bowling.¹¹¹ A rival bowling alley operator sued, alleging that even though Brunswick controlled only two percent of all U.S. alleys, the mergers and Brunswick's "deep pocket[s]" would lead to unfair competition.¹¹² The Supreme Court vacated a jury verdict against Brunswick, however, ruling that vigorous competition was the goal of antitrust law—even if the competition had the effect of hurting the business of a less-efficient competitor.¹¹³ The Court found that "[t]he antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*.' It is inimical to the purposes of these laws to award damages for the type of injury claimed here."¹¹⁴ These considerations need to be weighed alongside the restrictions of *Calder*.

As *Imo* stated, if the mere fact of lost revenues registering in a corporation's home state sufficed to give the state personal jurisdiction over a defendant, *Calder* would authorize jurisdiction in every district where a corporation incurred a loss.¹¹⁵ "[W]hile it is true that a corporation 'feels' lost sales at its headquarters, permitting *Calder* to be satisfied on this basis would mean that jurisdiction in intentional tort cases would *always* be appropriate in the plaintiff's home state, since the plaintiff always 'feels' the impact of the tort there."¹¹⁶ While acknowledging that its narrow reading of *Calder* might "limit the types of business tort cases" to which it could be applied, the *Imo* court noted that *Calder* did not "carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state."¹¹⁷

Injury is only one aspect of antitrust's unique standing doctrine that plaintiffs must negotiate. Other requirements of antitrust standing—that

Act claim).

109. 429 U.S. 477 (1977).

110. *Id.* at 489.

111. *Id.* at 479–80.

112. *Id.* at 480, 487.

113. *Id.* at 489.

114. *Id.* at 488 (citation omitted) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

115. *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 263 (3d Cir. 1998).

116. *Id.*

117. *Id.* at 265.

only direct purchasers may bring private causes of action,¹¹⁸ for example—do not implicate the personal jurisdiction question. These hurdles probably offer plaintiffs greater challenges these days, in the light of the Supreme Court’s growing skepticism about thinly-pleaded antitrust complaints.¹¹⁹ The narrowness of the antitrust doctrines of injury and standing seem to suggest that *Calder* ought to apply narrowly to antitrust complaints as well.

B. *The Requirement of Express Aiming*

Perhaps the knottiest part of applying effects-test jurisdiction to antitrust allegations is *Calder*’s requirement for express aiming. If a firm directs conduct towards a given market, say to tailor products or advertising specifically for that market, it is reasonable to conclude that it is aiming at that market.¹²⁰ But the mere act of production, *Asahi* seems to suggest, is not by itself aiming.¹²¹ The same analysis should apply to allegations of anticompetitive conduct. But some cases suggest that if a firm aims anticompetitive conduct broadly, it has not aimed anywhere. Such a holding would seem to immunize anticompetitive practices that focus on huge markets, or practices that take pains not to “aim” anywhere.¹²² In 2003, the Second Circuit reviewed the application of *Calder* jurisdiction in *In re Magnetic Audiotape Antitrust Litigation*.¹²³ While the court’s analysis is brief and lacks a discussion of reasonableness, it provides a good example of express aiming in a cartel case, one that withstands a narrow reading of *Calder*.

In *Magnetic Audiotape*, a private antitrust class action was filed against German and Korean makers and distributors of magnetic audiotape, accusing them of a conspiracy to fix the price of magnetic tape in the U.S.¹²⁴ The defendants allegedly had a market share exceeding 90% for

118. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 745–46 (1977). Congress has declined to overturn this finding. More than half the states have overruled *Illinois Brick* for state antitrust matters, thereby allowing indirect purchasers to sue under state competition laws. Kevin J. O’Connor, *Is the Illinois Brick Wall Crumbling?*, ANTITRUST, Summer 2001, at 34–35.

119. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (expressing concern about the high cost of antitrust discovery to defendants, in dismissing an antitrust complaint for failing to sufficiently plead allegations of concerted action).

120. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987).

121. *See supra* notes 76–79 and accompanying text.

122. *See, e.g.*, *Nw. Aluminum Co. v. Hydro Aluminum Deutschland GmbH*, No. 02-398-JE, 2003 WL 23571744, at *4 (D. Or. Sept. 22, 2003) (noting the “anomalous [sic] result that this court would have jurisdiction over a small-scale conspiracy aimed solely at an individual company within the United States market, but would lack jurisdiction to consider claims involving a large scale worldwide conspiracy that included numerous companies within the U.S.”).

123. 334 F.3d 204, 208 (2d Cir. 2003).

124. *Id.* at 206. In addition to using *Calder*’s effects test, plaintiffs in these situations

magnetic audiotape sold in the U.S. in the mid-1990s.¹²⁵ One defendant was SKM Ltd., a Korean corporation with its headquarters in Seoul.¹²⁶ SKM's American subsidiary had a 40% market share in the U.S.¹²⁷ However, SKM itself had no office, bank account, or license to do business in the U.S., nor did any of its employees work or reside in the U.S.¹²⁸ SKM filed a motion to dismiss for lack of personal jurisdiction.¹²⁹ The trial court granted the motion, finding the plaintiffs had failed to allege facts showing SKM participated in price-fixing aimed at the U.S. sufficient to warrant a finding of personal jurisdiction.¹³⁰ The Second Circuit vacated the order and remanded with instructions to allow the plaintiffs limited discovery on the question of personal jurisdiction.¹³¹

The Second Circuit began its analysis by asking the question—did SKM have sufficient minimum contacts with the U.S. to satisfy due process?¹³² It noted that the plaintiff had pleaded allegations about a meeting in Seoul at which price-fixing took place.¹³³ An SKM executive attended that meeting, according to minutes of the meeting that the plaintiffs submitted.¹³⁴

The allegations provided a good basis for a finding of express aiming. Indeed, the minutes contained many persuasive details.¹³⁵ Translated into

sometimes use a conspiracy theory of personal jurisdiction. *See infra* notes 188–89 and accompanying text.

125. Brief for Plaintiffs-Appellants and Plaintiff-Counter-Defendant-Appellant at 24, *Magnetic Audiotape*, 334 F.3d 204 (No. 02-7687), 2002 WL 32872513, at *24.

126. Brief for Defendant-Appellee SKM Ltd. at 6, *Magnetic Audiotape*, 334 F.3d 204 (No. 02-7687), 2002 WL 32872511, at *6.

127. Brief for Plaintiff-Appellants, *supra* note 125, at 27.

128. Brief for Defendant-Appellee, *supra* note 126, at 7.

129. *Id.*

130. *Id.*

131. *Magnetic Audiotape*, 334 F.3d at 209.

132. *Id.* at 207.

133. *Id.* at 208.

134. *Id.*

135. Plaintiffs' reply brief filed with the Second Circuit contained the following passage:

In its responses to interrogatories, [SKM's American affiliate] expressly admitted that Sung-Eiu Song, an SKM executive, attended the April 1995 meeting in Seoul along with Bernard Geisler of BASF, among others. SKM's attempt to relegate the Seoul meeting to footnote status and gloss it over as "a short culturally required courtesy meeting" is at odds with the evidence.

Indeed a document produced by [the affiliate] relating to the April 28, 1995 meeting between BASF and SKM in Korea entitled "BASF Meeting Agenda" contains, *inter alia*, a handwritten English translation of an agenda item: "Price increases in USA market have been preliminarily agreed as follows" with a listing of prices and tape grades. Similarly, another document produced by [the affiliate] detailing the discussions at the April 28, 1995 meeting is entitled "Conference

English, the memorandum bore the heading: “The Market Situation and the Possibility of Mutual Cooperation in Raising Product Prices.”¹³⁶ An entry titled “Agreed details on the price raise in America” stated that ““BASF’s selling price on chrome is 10% lower than SKM. SKM requests BASF [a co-defendant German corporation] to raise the price to 5.80 cents/100 ft. Geisler from BASF agrees.””¹³⁷ As the plaintiff’s attorney said, “such direct evidence of participation in price-fixing is relatively rare in antitrust litigation.”¹³⁸ Typically, antitrust plaintiffs lack direct evidence of agreement, and instead have to marshal evidence from which a fact-finder can infer agreement.¹³⁹

The court read *Calder* as supporting a finding of personal jurisdiction when “defendant is a primary participant in intentional wrongdoing—albeit extraterritorially—expressly directed at forum.”¹⁴⁰ While conceding its executive’s presence at the meeting, the defendant SKM had characterized it as a ““short, culturally required courtesy meeting,”” the court noted.¹⁴¹ SKM denied that price-fixing occurred,¹⁴² but the court held it had no power to resolve questions of fact on a motion to dismiss.¹⁴³ Remand also was appropriate, the court held, in view of the possibility the district court might have overlooked the specific allegation from the minutes of the meeting.¹⁴⁴ The court concluded that these

Memo.” The English translation of that document has a subject heading “*The Market Situation and the Possibility of Mutual Cooperation in Raising Product Prices.*” Under the subheading “*Negotiated Matters on Price Raise*” is an entry setting forth “*Agreed details on the price raise in America,*” which describes the price-fixing agreements reached by the participants: “BASF’s selling price on chrome is 10% lower than SKM. SKM requests BASF to raise the price to 5.80 cents/100 ft. Geisler from BASF agrees.”

This is clear evidence of SKM’s participation in the conspiracy to raise prices of magnetic audiotape sold in the United States. Indeed, such direct evidence of participation in price-fixing is relatively rare in antitrust litigation.

Reply Brief for Plaintiffs-Appellants and Plaintiff-Counter-Defendant-Appellant at 2–3, *Magnetic Audiotape*, 334 F.3d 204 (No. 02-7687), 2002 WL 32872512, at *2–3 (citations and annotations omitted).

136. *Id.* at 2 (emphasis omitted).

137. *Id.* at 2–3 (emphasis omitted).

138. *Id.* at 3.

139. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (granting motion to dismiss antitrust complaint that failed to plead facts sufficient to elevate allegations of concerted action “from conceivable to plausible”).

140. *Magnetic Audiotape*, 334 F.3d at 208.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

allegations by themselves “arguably” satisfied the effects test under *Calder*.¹⁴⁵

Oddly, the Second Circuit included no reasonableness analysis in its personal jurisdiction consideration, despite the fact that both sides briefed the issue. The defendant SKM contended it should not have to shoulder the burden of facing litigation in New York.¹⁴⁶ Plaintiffs, however, argued for the reasonableness of *Calder* jurisdiction in their brief, quoting *Asahi* factors.¹⁴⁷ Besides the strong facts present in the meeting minutes, the plaintiffs’ argument drew strength from the fact they had brought suit under § 12 of the Clayton Act, allowing worldwide service of process.¹⁴⁸ This wrinkle meant that the plaintiffs could aggregate the defendant’s contacts with the U.S. as a whole, rather than for a single state.¹⁴⁹ In conclusion, there is a strong indication of express aiming that justifies the Second Circuit’s approval of *Calder* jurisdiction in *Magnetic Audiotape*.

The strong facts of express aiming in *Magnetic Audiotape* stand in clear contrast to the facts of *McGlinchy v. Shell Chemical Co.*,¹⁵⁰ where the Ninth Circuit found a fatal lack of allegations of express aiming, in an opinion just four years after *Calder* was announced.¹⁵¹ In a California court, plaintiffs argued that a contract they had signed with Shell International Chemical Company (SICC), a British corporation, purposefully directed anti-competitive activity in the sale of polybutylene resin towards California.¹⁵² The Ninth Circuit rejected that argument, noting that the contract neither mentioned California nor purposefully directed any tortious act or effect towards California.¹⁵³ “The contract makes no reference to California, to appellants’ residence in California, or to any reliance on appellants’ facilities in California.”¹⁵⁴ The argument that the contract satisfied the requirements of *Calder* jurisdiction was “specious,” the court found.¹⁵⁵

145. *Id.*

146. Brief for Defendant-Appellee, *supra* note 126, at 20 (“[I]t will be burdensome for SKM, a Korean corporation reorganization in bankruptcy, with no offices in the United States, to litigate this complex matter and effectively defend itself in the United States. All of SKM’s witnesses are located in Korea, speak Korean and would have to travel to New York for trial.” (citation omitted)).

147. Brief for Plaintiffs-Appellants, *supra* note 125, at 37.

148. *Magnetic Audiotape*, 334 F.3d at 206–07.

149. *Id.* at 207.

150. 845 F.2d 802, 817 (9th Cir. 1988) (denying applicability of *Calder* jurisdiction against English corporation since contract in question, though signed by California plaintiffs, did not mention California and was not purposefully directed to instigate any tortious act or effect in California).

151. *Id.*

152. *Id.* at 805, 817.

153. *Id.* at 817.

154. *Id.*

155. *Id.*

The contract does not name the United States. It does name twenty-one other countries. There are no terms in the contract which would indicate that SICC contemplated an effect in California, much less that any such effect should be considered a material term of agreement. The contract was “purposefully directed” at activities in nations other than the United States; appellants concede this when they recite their “willingness and ability” to “travel anywhere, anytime and any place . . . to expand the market for [SICC’s product].”¹⁵⁶

Reading *McGlinchy* and *Magnetic Audiotape* together, one may conclude that a close reading of the complaint will reliably show whether the allegations reveal express aiming. As will be discussed in Part IV, alleging this express aiming becomes more difficult when the target forum is a state rather than the U.S.—when the target is smaller. In those cases, specific allegations of express aiming become even more important.

C. Price-fixing Versus Exclusionary Practices

The application of *Calder* jurisdiction also has varied depending on the theory of the underlying antitrust complaint. Anticompetitive conduct generally falls into one of two broad categories—cartel behavior and exclusionary conduct.¹⁵⁷ Cartel behavior comprises some of the most familiar activities associated with antitrust—agreements about maximum price, agreements about minimum price, and agreements to divide territory. Exclusionary conduct includes concerted refusals to deal, also known as boycotts; exclusive dealing contracts; and tying. Exclusionary conduct can be attacked as an illegal agreement under § 1; or it can be attacked as conduct in support of the acquisition or maintenance of a monopoly, in violation of § 2.¹⁵⁸ The upshot for *Calder* jurisdiction is that some anticompetitive conduct is by its nature aimed specifically—aiming a boycott to harm a rival who is deemed a threat,¹⁵⁹ for example, or in *Magnetic Audiotape*, conspiring to fix prices for a product in the U.S. market.¹⁶⁰ Cases like *Magnetic Audiotape* typify many recent civil antitrust

156. *McGlinchy*, 845 F.2d at 817 (alterations in original).

157. See generally A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 376–78 (2006) (discussing different forms of anticompetitive conduct).

158. See *id.* at 377.

159. Examples of boycotts that were well-aimed at rivals, and that predate *Calder*, include *Fashion Originators’ Guild of America, Inc. v. FTC*, 312 U.S. 457, 461 (1941), and *Eastern States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 611 (1914).

160. *Tex. Int’l Magnetics, Inc. v. Auriga-Aurex, Inc. (In re Magnetic Audiotape Antitrust*

actions that are sometimes called “follow-ons,” private litigation that follows a criminal investigation into allegations of price-fixing.¹⁶¹ The earlier criminal investigations sometimes yield plea agreements¹⁶² and internal documents¹⁶³ that provide excellent prima facie evidence of the specific plotting and aiming of conduct at U.S. markets. This evidence of aiming anticompetitive conduct makes the use of *Calder* jurisdiction suitable.

More problematic, though, are allegations of anticompetitive conduct that lack this fine-point focus. One example was the hypothetical at the beginning of this Note. The imaginary defendant CrabApple just didn't seem to be targeting aggrieved consumers in the forum state, West Dakota. This problem plays out in plenty of actual cases as well, particularly when plaintiffs seeking *Calder* jurisdiction must satisfy not only constitutional mandates, but also the requirements of a state long-arm statute. When evidence of express aiming does not materialize, *Calder* jurisdiction becomes problematic. The next Part explores this difficulty.

IV. CALDER IN ANTITRUST: STRAINING THE ANALOGY

Calder jurisdiction can hit problems when applied to conduct allegedly aimed at a state. The defendant may claim, sometimes convincingly, that the smaller forum never entered its thoughts. No express aiming, of course, means no *Calder* jurisdiction. Such a situation can highlight the due process problems associated with misapplication of *Calder*. This Part has two divisions. The first will examine the 2001 district court opinion in *In re Vitamins Antitrust Litigation*,¹⁶⁴ which highlighted the hurdle that state long-arm statutes can pose to *Calder* jurisdiction. The second revisits the hypothetical posed at the beginning of this Note and applies the analysis developed so far.

A. In re Vitamins Antitrust Litigation

The *Vitamins Antitrust* court declined to find *Calder* jurisdiction in eight states, citing the lack of express aiming required by those states' long-arm statutes.¹⁶⁵ At the same time, the court granted effects-test

Litig.), 334 F.3d 204, 206 (2d Cir. 2003).

161. See Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163, 1166–70 (1986) (discussing the advantages and disadvantages of the follow-on cases compared to independently initiated cases).

162. See, e.g., *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030 (WHW), 2006 WL 1084093, at *1 n.1 (D.N.J. Apr. 24, 2006).

163. See, e.g., *supra* notes 135–38 and accompanying text.

164. Misc. No. 99-197, 2001 U.S. Dist. LEXIS 25073 (D.D.C. Oct. 30, 2001).

165. *Id.* at *64–65.

jurisdiction in California and Illinois, noting that those states have “construed *Calder* and the ‘effects test’ most broadly.”¹⁶⁶ *Vitamins Antitrust* comprised a large volume of civil litigation that followed a U.S. criminal investigation of the livestock-vitamin industry in the mid-1990s.¹⁶⁷ The defendants, which included U.S. and foreign companies, were accused of fixing the price of choline chloride, the B₄ vitamin used in chicken and swine feed, in violation of § 1 of the Sherman Act.¹⁶⁸ As often happens in antitrust cases, guilty pleas in a criminal matter paved the way for subsequent civil litigation on behalf of direct purchasers. In *Vitamins Antitrust*, the civil suits were consolidated in a multi-district litigation proceeding.¹⁶⁹ As is the standard practice in such circumstances, a single district judge decides pretrial issues for similar cases pending in many jurisdictions. Therefore, *Vitamins Antitrust* offered an unusual and useful state-by-state comparison of *Calder*’s application to antitrust allegations pending in a variety of jurisdictions simultaneously.

The *Vitamins Antitrust* court declined to subject a Belgian corporation, UCB, to personal *Calder* jurisdiction in eight states, while granting effects-test jurisdiction against UCB in California and Illinois.¹⁷⁰ Unlike many of the other civil defendants, UCB had not earlier pleaded guilty in a criminal proceeding¹⁷¹—thus denying plaintiffs’ attorneys the typically rich trove of guilty pleas and colloquies that can yield the aiming evidence like that proffered in *Magnetic Audiotape*. The *Vitamins Antitrust* court had to weigh the case for personal jurisdiction in each state—in some cases, evaluating the case that UCB itself, and not its subsidiaries or co-conspirators, aimed anticompetitive conduct specifically at each state.

The court began its analysis by noting that Illinois and California have construed *Calder* and the effects test broadly.¹⁷² A defendant faced jurisdiction in Illinois if he committed a tort against an Illinois business so

166. *Id.* at *58–59.

167. COHEN MILSTEIN HAUSFELD & TOLL PLLC, COHEN MILSTEIN HAUSFELD & TOLL OBTAINS \$150 MILLION VERDICT IN CHOLINE CHLORIDE PRICE-FIXING CLASS ACTION, http://www.cmht.com/cases_cwcholine.php (last visited July 14, 2008).

168. *Id.*

169. *In re Vitamin Antitrust Litig.*, No. 1285, 1999 U.S. Dist. LEXIS 8599, at *3–4 (J.P.M.L. June 7, 1999).

170. *Vitamins Antitrust*, 2001 U.S. Dist. LEXIS 25073, at *64–65.

171. *Id.* at *19. The court noted that in *Execu-Tech Business Systems, Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 585 (Fla. 2000), the Florida Supreme Court upheld *Calder* jurisdiction against a defendant who pleaded guilty to charges of fixing the price of thermal fax paper. *Vitamins Antitrust*, 2001 U.S. Dist. LEXIS 25073, at *57–58. The Florida court held that jurisdictional requirements were met by allegations that conspirators had (1) manufactured the product, (2) pleaded guilty to participating in the conspiracy, and (3) the product had been distributed at the increased price in every state, including Florida. *Id.*

172. *Id.* at *58–59.

that injury was felt in Illinois.¹⁷³ California's analysis was slightly more complicated, and hinged in part on the presence of antitrust allegations. In a ruling predating *Calder*, the California state courts had held that "effects-test" jurisdiction was reasonable if a foreign defendant caused effects "that the State treats as exceptional and subject to special regulation."¹⁷⁴

Plaintiffs' arguments for jurisdiction in eight other states failed, however. The common thread in the denials of jurisdiction was the states' heightened requirements for proving "express aiming."¹⁷⁵ While UCB's subsidiaries or co-conspirators might have aimed specifically at the forum state, UCB itself had not.¹⁷⁶ For example, Virginia law required "purposefully targeted conduct."¹⁷⁷ Georgia required "tortious and intentional acts . . . specifically directed at plaintiff and his work."¹⁷⁸ Indiana called for "deliberate actions . . . expressly aimed at Indiana and calculated to have effect in Indiana."¹⁷⁹

Defendants argued against personal jurisdiction by citing the *Calder* Court's observation that the journalists knew their article would damage Shirley Jones and that she would feel the brunt of her injury in California.¹⁸⁰ The *Vitamins Antitrust* court found this tack persuasive, writing: "Defendant is correct that there must be some limits on the 'effects test'; specifically, courts have held that *Calder* 'cannot stand for

173. *Id.* at *59 (citing *Janmark, Inc. v. Reidy*, 132 F.3d 1200, 1202 (7th Cir. 1997) (citing *Green v. Advance Ross Elecs. Corp.*, 427 N.E.2d 1203, 1206 (Ill. 1981))).

174. *Id.* (quoting *Quattrone v. Superior Court*, 44 Cal. App. 3d 296, 306 (Ct. App. 1975)). Antitrust allegations addressed by the Cartwright Act qualified as charges subject to special regulation. *Id.* n.22.

175. *Id.* at *61; *see also* *Archer Daniels Midland v. F. Hoffman-Laroche, Ltd. (In re Vitamins Antitrust Litig.)*, 270 F. Supp. 2d 15 (D.D.C. 2003). In granting *Calder* jurisdiction against Chinook, another defendant in the same case, the *Vitamins Antitrust* court detailed the heightened demands of the Kansas long-arm statute:

Kansas also recognizes the "effects test," but requires a more particularized inquiry as to whether the defendant purposely directed its tortious actions at Kansas. Following the Tenth Circuit's analysis, courts in that jurisdiction examine "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Courts further examine "the contacts created by the out-of-state defendant in committing the alleged tort."

Vitamins Antitrust, 270 F. Supp. 2d at 32 (citations omitted) (quoting *Wempe v. Sunrise Med. HHG, Inc.*, 61 F. Supp. 2d 1165, 1170 (D. Kan. 1999)).

176. *Vitamins Antitrust*, 2001 U.S. Dist. LEXIS 25073, at *61 n.24.

177. *Id.* at *61 (quoting *Robinson v. Egnor*, 699 F. Supp. 1207, 1214 (E.D. Va. 1988)).

178. *Id.* (citing *Horsley v. Feldt*, 128 F. Supp. 2d 1374, 1379 (N.D. Ga. 2000)).

179. *Id.* (citing *Intermatic, Inc. v. Taymac Corp.*, 815 F. Supp. 290, 297 (S.D. Ind. 1993)).

180. *Id.* at *62 (citing *Calder v. Jones*, 465 U.S. 783, 789–90 (1984)).

the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction.”¹⁸¹

The plaintiffs attempted to save their cases for personal jurisdiction by arguing that aiming at the United States as a whole satisfied the aiming requirement for individual states. They cited *Cole v. Tobacco Institute*,¹⁸² in which a district court found that a British tobacco corporation was subject to *Calder* jurisdiction as a matter of “common sense.”¹⁸³ If a defendant aimed intentional wrongdoing at more than one state, the *Tobacco Institute* court reasoned, then it should satisfy the express aiming requirement of every one of those states.¹⁸⁴ Finding otherwise, the *Tobacco Institute* court wrote, would “imply that a party can avoid liability by multiplying its wrongdoing.”¹⁸⁵ While showing sympathy with the *Tobacco Institute* court’s argument, the *Vitamins Antitrust* court hewed to a narrower reading of *Calder*: “[T]he fact remains that the remaining fora have required defendant’s tortious conduct to be specifically and purposefully directed at those states to satisfy the effects test.”¹⁸⁶

By reaching this conclusion, the *Vitamins Antitrust* court honored the precedent surrounding the individual forum states’ long-arm statutes. This careful reading also seems to square with the requirements of due process, and with the federal courts’ constitutional mandate of limited jurisdiction. There are other concerns, beyond domestic constitutional and statutory ones, that argue for a conservative application of *Calder* jurisdiction, however. Part of the fallout of globalization is that courts everywhere must contend with the implications of their rulings on foreign markets, governments, and persons.¹⁸⁷

181. *Id.* at *62–63 (quoting *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)). This narrower reading of *Calder* seems to fit with the *Imo* court’s narrow reading of *Calder*. See *supra* notes 84–91 and accompanying text.

182. 47 F. Supp. 2d 812 (E.D. Tex. 1999).

183. *Id.* at 815.

184. *Id.* at 815–16.

185. *Id.* at 815.

186. *Vitamins Antitrust*, 2001 U.S. Dist. LEXIS 25073, at *64.

187. One need look no further than the example of Microsoft, which on appeal rebuffed many of the findings of the U.S. government’s monopolization case, only to have a European Union court subsequently force it to share some proprietary secrets with rivals. See Steve Lohr & Kevin J. O’Brien, *Microsoft Is Yielding in European Antitrust Fight*, N.Y. TIMES, Oct. 23, 2007, at C1. Governments’ needs to protect competition and promote efficiency must square with business’ need for uniformity and predictability in regulation. Moreover, U.S. courts hearing cases involving international parties have to confront the issue of comity—the extent to which their judgments will affect the judicial, executive, and legislative acts of other nations. *Black’s Law Dictionary* defines comity as “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts.” BLACK’S LAW DICTIONARY 284 (8th ed. 2004). In *Magnetic Audiotape*, the Second Circuit rejected the defendant’s argument that bankruptcy proceedings in a Korean court barred the plaintiff’s

The plaintiff, of course, shoulders the burden of pleading the prima facie case for *Calder* jurisdiction. *Calder* jurisdiction by its nature focuses on one narrow set of circumstances. Courts have a duty not to extend *Calder* beyond its limits, no matter how sympathetic they may be to the apparent rightness of a cause.¹⁸⁸ If the plaintiff can't meet that burden, there are always other theories of jurisdiction to plead, and other forums to seek. One theory commonly pleaded alongside *Calder* jurisdiction in antitrust cases is the so-called "conspiracy theory of jurisdiction," whereby a proper finding of personal jurisdiction over a defendant in a forum is imputed to the defendant's co-conspirator, who has no requisite contacts with the forum.¹⁸⁹ Thus, a denial of *Calder* jurisdiction does not mean a death knell for antitrust allegations against a particular defendant.

B. *BuyPod* Revisited

The opening hypothetical of this Note posed the question of whether *Calder* jurisdiction could be used to hale CrabApple into court in West Dakota. Reconsidering the question in the light of the analysis developed so far clarifies some of the problems the plaintiffs face in that case.

Reasonableness. While obviously inconvenient and expensive for a corporation to defend a suit in another state, large corporations routinely shoulder such burdens. Indeed, in the Microsoft follow-on litigation, indirect purchasers in numerous state courts pursued actions that Microsoft was compelled to defend in those states.¹⁹⁰ *Burger King* balanced

antitrust claims. *Tex. Int'l Magnetics, Inc. v. Auriga-Aurex, Inc.* (*In re* Magnetic Audiotape Antitrust Litig.), 334 F.3d 204, 208–09 (2d Cir. 2003). The court held that a dearth of evidence precluded a proper finding on the issue. *Id.* at 209. At the same time, however, the court cited Federal Rule of Civil Procedure 44.1 for the proposition that "courts are not precluded from engaging in their own information gathering with regard to issues of foreign law." *Id.* More and more, U.S. courts will have to be mindful of the implications of their rulings when dealing with international business.

188. *See, e.g., Vitamins Antitrust*, 2001 U.S. Dist. Lexis 25073, at *64 (denying *Calder* jurisdiction despite "sympathizing with plaintiffs' argument . . . [and] even though the Court may agree with plaintiffs' position").

189. *See id.* at *56 (finding conspiracy theory jurisdiction over the same defendant in Arkansas, Indiana, Missouri, and Virginia). For a seminal discussion of this issue, not framed for antitrust cases specifically, see Ann Althouse, *The Use of Conspiracy Theory to Establish In Personam Jurisdiction: A Due Process Analysis*, 52 *FORDHAM L. REV.* 234 (1983). Another theory is "alter-ego" jurisdiction, in which a U.S. subsidiary may be so intertwined with its overseas parent corporation that a finding of personal jurisdiction against the former justifies the imputation of personal jurisdiction over the latter. *See, e.g., In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030 (WHW), 2004 U.S. Dist. LEXIS 29586, at *18–19 (D.N.J. Oct. 26, 2004); *Archer Daniels Midland v. F. Hoffman-Laroche, Ltd.* (*In re Vitamins Antitrust Litig.*), 270 F. Supp. 2d 15, 24–27 (D.D.C. 2003). Personal jurisdiction through § 12 of the Clayton Act is another option in antitrust cases.

190. *See, e.g., William H. Page, Class Certification in the Microsoft Indirect Purchaser*

inconvenience to the defendant against the plaintiffs' interest in obtaining relief, and it is doubtful that the obstacles to CrabApple in defending in West Dakota would be "gravely difficult and inconvenient" enough to put it at a "severe disadvantage."¹⁹¹ On the other hand, it is unlikely that granting jurisdiction in West Dakota, and every other forum in which a plaintiff's firm might file a similar complaint, will advance "the interstate judicial system's interest in obtaining the most efficient resolution of controversies."¹⁹² Even the economies obtained through multi-district litigation end at the point of jury selection. On balance, however, reasonableness by itself probably would not bar *Calder* jurisdiction, given the realities of contemporary civil litigation as seen in the Microsoft case.

Brunt of the injury. Plaintiffs face a heavier burden here. The narrow language of *Calder*, emphasized by subsequent opinions like *Imo*, make a strong case that the brunt of CrabApple's alleged harm would never be felt in West Dakota, given the wide reach of its market, and moreover that CrabApple would not expect the brunt of the harm to fall in West Dakota.

Express Aiming. The lack of express aiming poses another high hurdle for *Calder* jurisdiction. There is a strong argument that CrabApple never expressly aimed its anticompetitive conduct at West Dakota, given the state's relatively miniscule market. And, as previously discussed, without extrinsic evidence of express aiming, price-fixing lacks the inherent focus of other, more targeted anticompetitive activity, like boycotts aimed at a rival. Nor do facts like these support inference of any *Asahi*-style factors, such as marketing plans CrabApple directed at West Dakota, or a specially designed version of the BuyPod designed specifically with West Dakota consumers in mind. It clearly would be frustrating for a BuyPod owner in West Dakota, when seeking redress, to lose access to his home forum. But there are always other theories of jurisdiction, other courts, and other defendants that in combination might provide the most just outcome.

West Dakota long-arm statute. While many states have long-arm statutes that extend a state's personal jurisdiction to constitutional limits, the existence of a more demanding long-arm in West Dakota could well be the final blow in the CrabApple plaintiffs' quest for *Calder* jurisdiction. As seen in *Vitamins Antitrust*, states that impose a more stringent interpretation of express aiming frequently are inhospitable to claims of *Calder* jurisdiction.

In conclusion, it is likely that, given these considerations, the CrabApple plaintiffs might soon find themselves on the losing side of a Rule 12(b)(2) order dismissing their case for lack of personal

Litigation, 1 J. COMPETITION L. & ECON. 303, 303-04 (2005).

191. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

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

jurisdiction—notwithstanding their strategic forum shopping.

V. A BROADER TAKE ON *CALDER*: POLICY AND THE LAW

Courts have to apply *Calder* carefully to antitrust cases if they are to observe the limits of due process. Otherwise, courts will fall short of the “fair play and substantial justice”¹⁹³ and reasonableness¹⁹⁴ standards of the personal jurisdiction inquiry.¹⁹⁵ Lurking behind these traditional issues of personal jurisdiction, however, are larger judicial and legislative policies. Despite the due process arguments that seem to favor a narrow use of *Calder*, there are other arguments that suggest applying *Calder* in a slightly broader fashion than previously discussed. While remaining faithful to the principles of personal jurisdiction, courts should be mindful of these other factors when analogizing *Calder* to antitrust cases.

A. Avoiding a Slide into the Merits

The first rationale for applying *Calder* somewhat more forgivingly is that, because of its unusually close focus on the conduct at issue, the *Calder* analysis can ineluctably morph into an evaluation of the merits—an inappropriate analysis on a motion to dismiss, when allegations are sketchiest and before discovery has developed a more complete record.¹⁹⁶ The effects test requires an appraisal, however cursory, of the conduct that is usually at the heart of the case. It is true that plaintiffs bear the reduced burden of pleading a prima facie case for personal jurisdiction in the complaint and in the early stages of litigation.¹⁹⁷ The theoretical check on this more permissive policy is the more intense scrutiny of evidence at the summary judgment phase, where unwarranted claims can be weeded out. While this pattern matches the notice pleading and broad discovery philosophies of the Federal Rules of Civil Procedure, it seems clear that the Supreme Court has become more impatient with subjecting antitrust

193. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

194. *Burger King*, 471 U.S. at 477.

195. Antitrust cases sometimes involve uniquely complex determinations of personal jurisdiction and venue. *See generally* Lee, *supra* note 95.

196. *See, e.g., In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030 (WHW), 2007 WL 2212713, at *9 (D.N.J. July 30, 2007); *see also* *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (reversing the lower court’s grant of summary judgment against plaintiff, and stating that “summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot”).

197. *See, e.g., Tex. Int'l Magnetics, Inc. v. Auriga-Aurex, Inc. (In re Magnetic Audiotape Antitrust Litig.)*, 334 F.3d 204, 206 (2d Cir. 2003) (finding that prima facie showing of personal jurisdiction must include averment of facts).

defendants to expensive discovery on the basis of thinly-pleaded complaints.¹⁹⁸ Courts, then, have to balance their demands for probative detail with the sketchy facts of many *Calder* jurisdiction claims.

B. *No Immunity for a “Shotgun” Approach*

If the *Calder* analogy seems to work best on clearly aimed conduct—a defamatory newspaper story, or a price-fixing conspiracy obviously aimed at another country’s market¹⁹⁹—it seems odd not to seek jurisdiction against anticompetitive firms that do not practice the virtue of precise targeting. Why should a price-fixer who aims to control a worldwide market escape jurisdiction, as opposed to one who targets more narrowly? Clearly, the *Calder* analogy can only be stretched so far before it breaks. And it can scarcely comport with due process to hale a defendant into court solely because its operations are large and its marketing reach is broad. Even more practically, it is unlikely that a firm contemplating illegal conduct will be considering its defenses to evolving theories of personal jurisdiction, should it be brought into court at some point in the future. Still, a firm contemplating anticompetitive conduct might be cynically advised not to make the aiming of its designs too specific. Courts should be mindful of the potential incentives they create if they find personal jurisdiction only against actors who target with specificity.

C. *The Plain Language of the Sherman Act Suggests Aggressive Enforcement*

Another rationale for applying *Calder* jurisdiction more liberally is that the plain words of the Sherman Act, with its severe criminal and civil penalties—up to ten-year prison sentences and fines of up to \$1-million for natural persons and \$100-million for corporations,²⁰⁰ and the provisions for private plaintiff treble damage actions with attorneys’ fees²⁰¹—evince Congress’ strong policy against anticompetitive conduct. The implication is that courts should therefore read procedural requirements more forgivingly. There are whispers of this rationale afoot. In *In re Bulk*

198. See, e.g., *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965–67 (2007) (granting motion to dismiss antitrust complaint for insufficient “factual matter” to support allegations of an agreement and noting the high cost of abusive discovery demands on antitrust defendants).

199. See *Magnetic Audiotape*, 334 F.3d at 208.

200. 15 U.S.C. § 1 (Supp. IV 2004). Congress approved these tougher penalties in spring 2004. One commentator noted that the increased penalties followed the Enron and WorldCom accounting scandals, and years of questions from judges and academics whether criminal antitrust penalties were too lenient. Melanie Sabo, *Congress Poised to Bolster Criminal Antitrust Penalties: An Update on H.R. 1086*, ANTITRUST SOURCE, May 2004, <http://www.abanet.org/antitrust/at-source/04/05/sabo.pdf>.

201. 15 U.S.C. § 15 (2000).

[*Extruded*] *Graphite Products Antitrust Litigation*,²⁰² for example, the district court declined to apply *Imo*'s narrow reading of *Calder* express aiming to an antitrust case, citing, without elaboration, "[t]he special character of an antitrust claim."²⁰³ The tradeoff, of course, is that courts must weigh the costs of haling defendants into court and subjecting them to the risk and expense of demonstrating their lack of antitrust liability against the deadweight losses and monopoly profits that competition law seeks to eliminate. While there is no easy answer, it is clear that the effects of global trade are broad, and its hazards can be felt as broadly as its benefits.

VI. CONCLUSION

Courts should weigh claims of *Calder* jurisdiction carefully in cases alleging anticompetitive conduct aimed at a forum state with a demanding long-arm statute, if they are to stay within the bounds of due process. Moreover, courts must decline to find *Calder* jurisdiction when the allegations fail to demonstrate express aiming. The effects test is a powerful tool, and regardless of the fact that the result in *Calder* itself feels right, the possibility of misapplying *Calder* is great when the conduct is anticompetitive rather than libelous. As the *Imo* court noted, "*Calder*'s holding cannot be severed from its facts."²⁰⁴ The speed and extent of globalization inspire concern as well as awe, and it is tempting to reach for *Calder* jurisdiction if one perceives a far-flung wrong. But as these cases show, *Calder* jurisdiction is not always the answer. Courts must remain mindful that there are usually other theories of jurisdiction—conspiracy theory, for example—and usually other defendants, perhaps domestic subsidiaries or affiliates, who might stand in the place of the unreachable parent corporation. From these alternatives, courts have to fashion what justice they can. A narrow reading of *Calder* can be frustrating for antitrust plaintiffs, but it is necessary if due process is to remain one of this nation's most valuable exports.

202. No. 02-6030 (WHW), 2007 WL 2212713 (D.N.J. July 30, 2007).

203. "The special character of an antitrust claim leads the Court to interpret more liberally the phrase 'expressly aim[. . .] tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.' To be sure, plaintiffs' evidence is thin, but at this stage of the proceedings it is sufficient to defeat a *Rule 12(b)(2)* motion." *Id.* at *9 (quoting *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998)).

204. *Imo*, 155 F.3d at 261.