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Aviation Law

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Given the frequency of international and multistate contacts in an aviation accident, it is not uncommon for a plaintiff suing a foreign airline or manufacturer to worry about whether a basis for in personam jurisdiction over that defendant exists in the forum state when the cause of action occurs outside the forum.

This is true even today when a defendant manufacturer's aircraft or aircraft parts may be distributed, sold and used worldwide, and when a United States' passenger can reach just about any part of the globe through one or more connecting flights operated by foreign airlines that do not fly to or from a United States airport. If the defendant has no office or employees in the forum state, so as to satisfy the traditional "doing business" test, and the cause of action arises outside the forum, an alternative basis for obtaining in personam jurisdiction may exist if the defendant has a wholly owned subsidiary or agent in the forum.

'Anderson v. Dassault Aviation'

The recent U.S. Court of Appeals for the Eighth Circuit case, *Anderson v. Dassault Aviation*,[1] addressed the factors a court should consider in determining whether general personal jurisdiction exists over a foreign aircraft manufacturer through the actions of its wholly owned subsidiary. *Anderson* dealt with Arkansas' "doing business" long-arm statute,[2] which gives courts personal jurisdiction over persons and claims to the maximum extent permitted under the federal Due Process Clause. The Eighth Circuit's analysis shares much in common with the U.S. Court of Appeals for the Second Circuit's interpretation of New York's "doing business" long-arm statute.[3] *Anderson* invites a re-examination of the New York test for establishing personal jurisdiction through the in-state conduct of a foreign defendant's subsidiary or agent.

The case involved a product liability suit in Arkansas federal court, brought by a Michigan plaintiff injured in a Michigan crash, against Dassault Aviation, a French corporation, and the manufacturer of the subject Falcon business jet. Plaintiff argued that personal jurisdiction existed in Arkansas over defendant Dassault Aviation based on the Arkansas conduct of Dassault Falcon Jet, an Arkansas corporation and wholly owned subsidiary of Dassault Aviation.

The facts established that after the jets were manufactured in France and purchased by customers, the jets were sent to Dassault Falcon's Little Rock, Ark., production plant where the jets were completed according to the customer's final specifications and then delivered. The French parent's Web site and marketing materials heavily touted the Little Rock production plant. In fact, the two companies shared a Web site, utilized a common logo, and jointly produced customer service publications. The Arkansas subsidiary was the exclusive Western hemisphere distributor for the French parent.

The District Court, however, granted defendant's motion to dismiss based on lack of personal jurisdiction, concluding that the subsidiary's activities for the parent in Arkansas were relevant for jurisdictional purposes only if plaintiff could "pierce the corporate veil" and show that the Arkansas subsidiary was the mere "alter ego" of the French parent.

The Eighth Circuit reversed, holding that the acts of a subsidiary in the forum may give rise to personal jurisdiction over the parent irrespective of whether plaintiffs can establish an "alter ego" relationship and regardless of whether the foreign defendant has a physical presence in the forum. The court emphasized that determining the propriety of personal jurisdiction was not amenable to any "bright-line" test or set of rigid rules, but it was, however, able to identify important factors to consider.

Key Factors

The factors the Eighth Circuit focused on were: (1) the extent to which the subsidiary played a role in the commercial distribution of the parent's product; (2) the existence or not of a "unified marketing strategy"; and (3) the existence or not of a "closely intertwined business relationship" or "a close, synergistic relationship" between the two that while "not an abuse of the corporate organizational form" was demonstrative of "a clear awareness of and interest in [the] subsidiary's substantial operations in the [forum]."[4]

Under these factors, personal jurisdiction existed over the French parent based on its "close, synergistic relationship" with its Arkansas subsidiary. Aside from the fact that the Arkansas subsidiary was responsible for completing all new Falcon jets and was the exclusive Western hemisphere distributor, and that the companies shared a "unified marketing strategy" as reflected in their Web site and publications, there were indicia of parental control, namely overlapping directors and officers and the fact that the CEO of the Arkansas subsidiary received all of his compensation from the French parent.

While the Eighth Circuit rejected the "alter-ego" principle as a litmus test for invoking jurisdiction over the parent company, New York's "doing business" test for invoking jurisdiction over a foreign parent through its subsidiary is sometimes described as an "alter ego" test. Under New York law, personal jurisdiction exists over a foreign corporation not physically present in New York if it has a wholly owned subsidiary that operates in New York as a "mere department" of the parent or the foreign corporation affiliates itself with an "agent" that renders important services on its behalf that the

foreign corporation would otherwise have to perform if no agent were available.

The seminal "mere department" case is the New York Court of Appeals decision *TACA International Airlines S.A. v. Rolls-Royce of England, Ltd.*,[5] which has been restated into a four-part test by the Second Circuit in *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp*.[6]

The alternative "agency" theory of personal jurisdiction was first adopted by the New York Court of Appeals in *Frummer v. Hilton Hotels International, Inc.*[7] and is discussed extensively in the Second Circuit case *Wiwa v. Royal Dutch Petroleum Co*.[8]

'Mere Department' Test

The "mere department" test for establishing jurisdiction through a wholly owned subsidiary is analogous to the Eighth Circuit's "closely intertwined business relationship" test in *Anderson.* Its adoption by the Court of Appeals in the *TACA* case involved a suit for loss of an aircraft by TACA airlines against Rolls-Royce of England Ltd., the aircraft engine manufacturer. Rolls-Royce of England owned a Canadian corporation, which in turn wholly owned a New York corporation named Rolls-Royce Inc. The New York company sold and serviced Rolls-Royce engines and autos in New York. Rolls-Royce of England hired, assigned and trained the principal personnel in the New York company and there were overlapping directors and key executive personnel. Rolls-Royce of England also determined the policies of the New York company and published the training and sales literature. The Court of Appeals held that the New York company was not an "independent entity," but rather, a "mere department" of Rolls-Royce England, which was "doing extensive business in our state though its local department separately incorporated as Inc."[9]

Many years later, in *Volkswagenwerk,* which involved a product defect claim against Beech Aircraft Corp., a Kansas company, the Second Circuit set forth one "essential" and three "important" factors a court must evaluate to determine if the foreign parent's control of the New York subsidiary extended beyond mere ownership so as to permit assertion of jurisdiction over the parent on the grounds that the subsidiary was "a mere department." The essential factor — although insufficient by itself - is "common ownership" or "at least nearly identical ownership interests."

The three important factors were: (1) financial dependency of the subsidiary on the parent; (2) the degree to which the parent interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities; and (3) the degree of control the parent exercises over the marketing and operational policies of the subsidiary.[10]

These factors dovetail fairly closely the analysis of the Eighth Circuit in *Anderson.* While *Anderson* expressly rejected that the plaintiff's burden of proof on jurisdiction was the equivalent of "piercing the corporate veil" and establishing "alter ego," and while neither *TACA* or *Volkswagenwerk* described the "mere department" test as an "alter ego" test, many New York state and federal cases which apply the "mere department" test interchangeably call it an "alter ego" test.[11] Other cases, however, do properly distinguish the "mere dependent" test as a jurisdictional test that is less onerous than the "alter ego" test, which is applied to determine whether the parent corporation is liable for the misconduct of its subsidiary.[12]

'Agency' Test

The "agency" test for establishing jurisdiction over a foreign company does not require "common ownership" and "looks to the relative importance and extensiveness of the work being done by the local corporation for the foreign corporation."[13] The "agent" need not be wholly owned by the foreign corporation and it need not be involved in the foreign corporation's "core functions." The work performed by the agent in New York need not be work that can only be performed in New York, but the plaintiff does have a burden to show some financial dependency, that the agent's work has "meaningful importance" in helping generate or maintain business for the foreign corporation, and that the foreign corporation benefits from the agent's New York presence.[14] The classic example of "agency" jurisdiction is the local reservation service corporation which makes hotel reservations for and markets the foreign entity.[15]

While the line between the "mere department" and agency tests is hard, if not impossible, to draw, it does appear that by having two alternative methods for invoking in personam "doing business" jurisdiction over a foreign corporation through acts of a local subsidiary, New York law is broader and more flexible than the law set forth by the Eighth Circuit in *Anderson.*

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Endnotes:

1. 361 F3d 449 (8th Cir. 2004).

2. Ark. Code. Ann. §16-4-101.

3. N.Y.C.P.L.R. §301 (McKinney's 2005).

4. 361 F3d at 452-54.

5. 15 NY2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965).

6. 751 F2d 117 (2d Cir. 1984).

7. 19 NY2d 533, 281 N.Y.S.2d 41, 227 N.E.2d 851 (1967).

8. 226 F3d 88 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001).

9. 15 NY2d at 102, 256 N.Y.S.2d at 132, 204 N.E.2d at 331.

10. 751 F2d at 120-22.

11. See, e.g., In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 230 FSupp2d 376 (S.D.N.Y. 2002); Mayatextil, S.A. v. Liztex U.S.A., Inc., 1995 WL 131774 (SDNY March 23, 1995).

12. See Allojet PLC v. Vantgage Assoc., 2005 WL 612848 (SDNY March 15, 2005); Sun First Nat. Bank of Orlando v. Miller, 77 FRD 430 (SDNY 1978).

13. Mayatextil, S.A., supra, n.12, 1995 WL 131774, discussing Frummer v. Hilton Hotels, supra, n.8, 19 N.Y.2d 533.

14. Wiwa, supra at n.9, 226 F.3d at 95-97.

15. Frummer, supra, n.8, 19 N.Y.2d 533.